



## Non-disclosure by an insured does not always mean the insurer can avoid liability for a claim

Author: Nikhil Narayan

A potential insured has a responsibility to disclose all information that is needed for an accurate risk assessment by an insurer, at the time of entering into a policy. Failure to disclose relevant information may entitle the insurer to avoid liability for a claim. However, what happens if the insurer initially agrees to honour a policy despite non-disclosure, but then tries to rely on that same non-disclosure to avoid liability? This question was considered by the Federal Court in *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)* [2020] FCA 588, where the Court found that the insurer must honour the policy.

### Key Background Facts

Delor Vue Apartments (**Delor Vue**) is a body corporate of an apartment complex in Queensland. In March 2017 Delor Vue took out an insurance policy over the apartment complex with Allianz. Five days later the building was damaged during Tropical Cyclone Debbie.

Delor Vue made a claim for the cyclone damage, but it became apparent that Delor Vue had failed to disclose to Allianz several existing defects in the building prior to taking out the policy. After the claim was made, Allianz inspected the property and reviewed the history of the defects. Allianz then elected to honour the policy but stated it would not cover any pre-existing damage. This was communicated in a letter sent to Delor Vue in May 2017 (**Policy Letter**).

Over the next year there were disagreements regarding what damage was pre-existing, and additional undisclosed defects were identified. Ultimately Allianz made a final offer to resolve the claim on a 'take it or leave it' basis. If Delor Vue rejected the offer, Allianz would deny responsibility for the claim under the policy, due to the non-disclosure of pre-existing defects.

Delor Vue commenced proceedings in the Federal Court seeking an order that Allianz was required to honour the policy.

### The Issue

During the proceedings, Allianz argued that it was not required to make a payment under the policy, due to the protections contained in the *Insurance Contracts Act 1984* (Cth) s 28(3). That provision allows an insurer to reduce its liability under a policy where the insured party has failed to disclose material facts. Allianz argued that Delor Vue had a duty to disclose the defects when it was initially considering whether to enter into the policy, and by reason of this non-disclosure, it could reduce its liability under the policy to nil.

Delor Vue argued that despite failing to provide disclosure of the defects, Allianz could not reduce its liability under the policy. This was due to the promise made to honour the policy in May 2017, as set out in the Policy Letter.

### Decision

The Court found that it would be unfair for Allianz to change its position. When Allianz made the decision to honour the policy, Delor Vue started making decisions on the assumption that it was insured. If Allianz were allowed to change its position, it would leave Delor Vue in an unprepared and financially detrimental position. Additionally, by communicating that the policy would continue despite non-disclosure, Allianz had waived its right to reduce its liability under the ICA. Finally, the Court found that the duty of good faith contained in the ICA required Allianz to continue the policy. The Policy Letter stated that it would honour the policy, and the Court saw this as a promise on the part of the Allianz to do so.

### The implications of this decision

This decision demonstrates the importance of a potential insured complying with the duty of disclosure. Failure to do so may entitle the insurer to avoid liability for a claim under the policy. However, as demonstrated by this case, despite non-disclosure by the insured, the insurer was still bound by the policy because of its behaviour and promises. It is important to carefully scrutinise a decision made by an insurer to avoid liability under a policy. An insurer may have certain entitlements in responding to non-disclosure, but it can also relinquish those entitlements through its subsequent conduct and representations, such as failing to enforce those protections or making promises not to do so.

Finally it is important to note the anticipated reforms following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. If enacted, the *Insurance Contracts Act 1984* (Cth) will include a "duty to take reasonable care not to make a misrepresentation to an insurer for consumer insurance contracts".

If you require further information on this decision, or would like assistance in your insurance dispute, please contact [Chris Kintis](#) on 02 8235 1251.