

## Guarantees

- A guarantee is a contract between the guarantor and the creditor to secure a debtor's obligation to the creditor, should the debtor fail to meet that obligation.
- Guarantees are usually requested by credit providers when they are concerned that prospective debtor poses a credit risk. For example, where the debtor has a bad credit history or is borrowing a large amount of funds against limited or no assets.

## Guarantee versus indemnity

- *Re Taylor Ex Parte Century 21 Real Estate Corporation (1995)* tells us that a guarantee is a secondary obligation arising only in case of default by the debtor. *Sunbird Plaza Pty Ltd v Maloney (1988)* tells us that an indemnity is a primary obligation by the promisor to keep the promisee harmless against loss. Under an indemnity, a person becomes a surety instead of a creditor.

## Section 55 requirements

- A guarantee under the National Credit Code (located in schedule 1 of the National Consumer Credit Protection Act 2009) must be in the form required by the Code and amongst other things be in writing and signed by the guarantor (Section 55). A guarantee will not be enforceable if it does not comply with Section 55.
- A guarantee can only secure an amount equal to the debtor's liability under the credit contract. A guarantee under the code is void to the extent it exceeds this amount.
- Under the National Credit Code, the prospective guarantor must receive a copy of the credit contract or proposed credit contract (failure to do so will render the guarantee unenforceable), and an information statement including information about what is a guarantee, the amount being borrowed, credit charges, the rights and obligations of a guarantor, and when the guarantee may be exercised (Section 56 of the National Credit Code and Form 9 of the National Consumer Credit Protection Regulations 2010).

## Independent legal advice

- A guarantor must also receive a recommendation to seek independent legal and financial advice, as well as to make their own inquiries about the credit worthiness, financial position and honesty of the debtor (Section 55 of the National Credit Code, Section 81 and Form 8).

## Withdrawing a guarantee

- Section 58 of the Code outlines instances where the guarantor can withdraw from the guarantee. An example of such an instance would be any time before credit is first provided under the contract.

## Obligations on credit providers

- **Section 57 of the Code** tells us that credit providers have obligations to provide certain documents to guarantors within 14 days after the guarantee has been signed, subject to exceptions.
- These documents include a copy of the guarantee signed by the guarantor and a copy of the credit contract.
- The exception is that the credit provider does not need to supply the aforementioned documents if they have previously given the guarantor a copy of the credit contract to keep.

## Penalties if credit provider obligations are breached

- **Section 62 of the Code** outlines the penalties on credit providers for breaching requirements in the aforementioned, discussed sections.

## Unjust guarantees

- **Section 76(2) of the Code** sets out the factors which a court will consider in deciding whether a guarantee is unjust. Such factors include the consequences of compliance or noncompliance with any of the provisions of the contract, the bargaining power of the parties, whether or not at the time of the contract the mortgage or guarantee which was entered into had changed, whether or not it was reasonably practicable for the applicant to negotiate for the alteration of any of the provisions of the contract, mortgage or guarantee, etc.

## Insurance

### Formation

- Insurance is a contract where the insurer agrees to indemnify the insured against a specific loss, in consideration for the payment of the premium by the insured.
- Not all policies of insurance are indemnity policies. Many are agreed value in that the insurer will pay up to an agreed amount in respect of the loss.

### General insurance

- Within general insurance there is commercial and domestic insurance. The general principles between the two are almost exactly the same, with the exception of a couple of minor differences.
- When a contract of insurance is commenced, it results in the issue of a policy, which is then what actually constitutes the contract of insurance itself. The two most common types of policies are event based policies and claims made policies (self-explanatory). Insurance over property is most often event based. Policies of professional indemnity insurance are normally claims based.

### Power to make laws with respect to insurance

- **Section 51 of the Australian Constitution 1900** gives the Federal Government the power to make laws in respect to insurance.

### The Insurance Contracts Act 1984 (Cth)

- This Act is not a complete code, but mostly regulates specific aspects of the law of insurance. The Act will apply to most forms of insurance except the following:
  - Reinsurance
  - Health insurance
  - Insurance entered into by Friendly Societies
  - Marine insurance
  - Workers compensation and motor accident insurance
  - Insurance taken out by State or Territory governments
  - Commercial aircraft

### Insurable interest

- You must have an insurable interest in something to be able to have insurance over it. **Section 16 of the Insurance Contracts Act 1984 (Cth)** tells us that the contract is *not automatically void* just because it was for a non-insurable interest. The reason why is given by **Section 17**.

- **Section 17** of the Act tells us that if an insured has suffered a loss by reason of destruction or damage to the insured property, the insurer is not relieved of liability under the contract just because the insured does not have a legal or equitable interest in the property. Basically, the insurer cannot decline providing the insurance money just for the reason alone of “oh, it should be void because they do not have a legal nor equitable interest in the property”.

### Tenants and insurance

- The case **British Trader’s Insurance Co v Monson (1964)** tells us that a tenant cannot claim insurance over a house they are renting as they do not have a legal interest in the home. The landlord would be the person whom would have to purchase insurance.

### Contract of insurance must be made in the utmost good faith

- **Section 13** tells us that a contract of insurance is one which is based on the utmost good faith of the parties. Reason being, the insurer bears the risk that the insured must act with utmost good faith when making claims.
- **Section 14** requires that the parties to a contract of insurance are not to rely on the contract if to do so would be a breach of the utmost good faith requirement.

### Duty of disclosure of all material facts

- The case **Marene Knitting Mills v Greater Pacific General Insurance (1976)** tells us that all material facts must be disclosed to the insurer. Whether a fact was material is dependent on whether it would reasonably affect the mind of a prudent insurer in deciding whether to accept the risk, and at what premium price.
- **Section 21 of the Insurance Contracts Act 1984 (Cth)** reiterates the common law position – that disclosure must be made of all material facts. **Section 21** also lists factors to be taken into account – therefore setting out an objective test in ascertaining what facts are or are not material.

### Non-disclosure of intent of non-renewal of contract

- The case of **Permanent Trustee Australia v FAI General Insurance Co Ltd (2003)** tells us that the failure by an insured to disclose that it will not be renewing its insurance with the insurer after the present contract has expired is not a breach of the duty to disclose, even though the insurer would not have renewed for commercial reasons had it not been assured of continued business.

### Disclosure of known conduct

The case of **Lindsay v IC Insurance (1989)** tells us that the duty to disclose is in relation to known conduct only. This includes not only the insured’s own knowledge but that of his or her agent (currently this decision has been left open in the **Permanent Trustee’s** case).

This does not apply to conduct that the insured doesn’t know but should know (**Midaz Pty Ltd v Peters McCarthy Insurance Brokers 1999**).

## Special duty of disclosure

- **Section 21A of the Insurance Contracts Act** tells us that a special duty of disclosure is imposed with respect to eligible contracts of insurance. **Section 21A(9)** defines an eligible contract of insurance as that which has been specified by the regulations. Part 2B of the regulations includes the following as eligible contracts of insurance:
  - A contract for new business
  - Motor vehicle insurance
  - Home buildings and contents
  - Sickness and accident
  - Consumer credit
  - Travel insurance
- **Section 22** tells us that an insurer is under a duty to notify the insured of the duty to disclose. The insurer must:
  - Before the contract is entered into
  - Notify the insured of the general nature and effect of the duty
  - If Section 21A applies, notify the insured of the general nature and effect of that section
  - Use the form of writing prescribed by the regulations
- Failure to comply with **Section 22** means that the insurer cannot rely upon any failure by the insured to disclose unless the non-disclosure was fraudulent.

## Misrepresentation

- Misrepresentation comprises the giving of false information concerning a material fact.
- **Section 23** tells us that where a statement is made in answer to an ambiguous question and a reasonable person in the circumstances would have understood the question to have the meaning which the person making the statement understood the question to have, then that is the question's meaning.
- **Section 24** makes any warranty with respect to the existence of a state of affairs into a pre-contractual statement. This negates the effect of a basis clause (a basis clause is a clause that makes the declarations contained in an insurance proposal form the "basis" of any contract of insurance).

## Untrue statements

- **Section 26(1)** tells us that an untrue statement is not a misrepresentation if a.) the insured believed it and b.) a reasonable person would have also believed it to be true.
- The case of **Plasteel Windows v Health Underwriting Agencies (1990)** tells us that the onus of proof is on the person trying to prove a.) and b.) to be true.