

# The Insider

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## A bikie walks into a gentleman's club and an insurer leaves blushing: a tale of non-disclosure

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At first blush, it would appear obvious that a business-owner's association with a bikie gang would need to be disclosed to an insurer given the reputation of gangs and the increased risk of harm to the business. But is this the case where the business is that of a gentleman's club?

The decision of the Supreme Court of New South Wales in *Stealth Enterprises Pty Ltd t/as The Gentleman's Club v Calliden Insurance Limited* [2017] NSWCA 71 is a careful reminder to leave your prejudices at the door and consider, objectively, all of the circumstances relevant to disclosure.

### The blush

On 5 April 2017, the Court of Appeal was asked to consider whether an insured's relationship with the Comancheros bikie gang was an association that was required to be disclosed under section 21 of the *Insurance Contracts Act 1984* (Cth) (the Act).

The appellant, Stealth, owned and operated a gentleman's club under the name 'The Gentlemen's Club'. The business was insured under a contract of insurance providing cover against property damage (including fire) and public and product liability. On 1 January 2012, the premises were damaged by fire.

The respondent insurer, Calliden, denied liability on the basis that Stealth had failed to comply with its duty of disclosure under section 21 of the Act in two respects:

1. Stealth did not disclose that its sole director, Mr Baris Tukel and his brother, Mr Fidel Tukel, the manager of the gentleman's club, were members of the Comancheros bikie gang.
2. Stealth did not disclose that the club's registration under the *Prostitution Act 1992* (ACT) had lapsed.

The primary judge held that Stealth had failed to comply with its duty of disclosure in relation to both matters and that Calliden would not have renewed the policy had either matter been disclosed at the time for renewal. Her Honour reduced Calliden's liability to nil under section 28(3) of the Act.

### The heat

On appeal, the Court of Appeal was unanimous in its decision to uphold Stealth's appeal.

The Court applied the objective test of disclosure required by section 21: could a hypothetical reasonable person in the circumstances of Stealth be expected to know that Stealth's association with the Comancheros was relevant to Calliden's decision to accept the risk?

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Some of the circumstances that were relevant to the question posed by section 21 were that:

- The insurance was for property and liability risks associated with the conduct and operation of a gentleman's club.
- The insurance was offered through a broker and insurer who specialised in insuring businesses engaged in the Adult Industry.
- From an insurer's perspective, the operation of the business as a gentleman's club was an occupation which one would expect to attract questionable characters and associations and increase the risk of property damage and liability claims.
- The insurance proposal specifically asked questions concerning the criminal history of the insured and its directors but did not address any associations of those persons.

It was in that context that the Court of Appeal determined that Stealth could not be expected to know that an association with the Comancheros was relevant to Calliden's decision to accept the risk. That association was the sort of association that an insurer would expect and take into account as part of the general risk of insuring a gentleman's club.

In relation to the second matter, the Court found that had Stealth informed Calliden that its registration had lapsed, Calliden would have simply asked it to renew its registration and then upon that renewal extended insurance.

The Court awarded judgment of \$500,000 to Stealth.

## Leaving red-faced

So to avoid leaving a gentleman's club red-faced, insurers are reminded to consider the following:

- What am I insuring? If it's a gentleman's club, criminal activity may be involved and the threat of property damage to the business increases by association.
- How have I received this request for insurance and is this an industry of specialisation? If the request has come through a broker specialising in the Adult Industry, and you are an insurer of the Adult Industry, consider what you really can expect an insured to disclose in those circumstances and what you would be expected to know to be a risk.
- What disclosure is required by our forms? Is the standard criminal history check enough?

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