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The changes to the Duty of Disclosure effective on or after the 28th December 2015

There have been a number of substantive changes surrounding the duty of disclosure. The changes are extensive, so this is just a brief summary:

- Section 21(b) has slightly amended the duty of disclosure by introducing two non-exhaustive factors associated with the objective aspect of the mixed subjective/objective test.
- Section 21A, which modifies the duty of disclosure with respect to “eligible contracts of insurance”, has been amended to exclude any ability of an insurer to ask a catch-all question (ie section 21A(4)(b)).
- Section 21B has been introduced which requires insurers that renew “eligible contracts of insurance” to either ask specific questions or seek clarification that information sought previously is correct or needs updating (insurers can use a combination of the two if they choose).
- The duty of disclosure is extended to include a person covered by life insurance who is not a policyholder (new section 31A). With respect to notifying an insured of their duty of disclosure (section 22), this has been amended to include:
- The explanation must include the fact that the duty applies until the proposed contract is entered into.
- The insurer must explain the general nature and effect of the modified duty associated with “eligible contracts of insurance”.
- The required information of the duty of disclosure to be given to any person who will be covered under a life insurance policy, whether or not they are the policyholder.
- If the insurer accepts an application for insurance, or responds with a counter-offer, two months after the insured’s most recent disclosure, then a reminder notice of the duty must be given.

What does this mean for you?

According to the Government, the intention of this reform is to ‘...permit insurers to continue to rely on the accuracy, as at the time of inception or the previous renewal, of matters disclosed on inception and previous renewals’. The duty of disclosure will differ slightly depending on the type of insurance you apply for. For ‘eligible’ contracts of insurance the insurer is required to ask specific questions of the insured which are relevant to underwriting the risk. Policies renewed or varied by the insurer on or after 28 December 2015 are also subject to the ‘specific questions’ requirement or the insurer must supply a copy of the answers to questions originally supplied to them by the insured and ask the insured to disclose any changes.

‘Eligible’ contracts of insurance are the following classes of insurance, but only when they are provided to an individual:

- ***motor vehicle and motorcycle***
- ***home building and contents***
- ***residential strata***
- ***travel***
- ***personal accident and sickness***
- ***consumer credit products***

When taking out a new policy considered an ‘Eligible’ contract of insurance: Answer the specific questions on the application form truthfully and accurately. You must tell the insurer all information that’s known to you and that a reasonable person would be expected to provide in answer to the questions. You don’t need to provide information that isn’t relevant to the questions in the form.

When renewing a policy considered an ‘Eligible’ contract of insurance: Answer the specific questions asked by the insurer or review the information you previously provided (the insurer will provide a copy of this). Tell the insurer about any changes (or tell your broker, so they can tell the insurer). If nothing has changed, simply tell the insurer that. There’s no need to provide any other information.

For all other policies, an insured has a duty to disclose matters the insured knows to be relevant to the insurer’s decision to accept the risk or that a reasonable person could be expected to know to be relevant to the insurer bearing in mind the nature and extent of the insurance cover to be provided under the relevant insurance policy and the types of people who ordinarily apply for this type of insurance. It doesn’t extend to matters:

- ***That diminish the risk;***
- ***That are of common knowledge;***
- ***That the insurer knows or in the ordinary course of the insurer’s business ought to know;***
- ***As to which compliance with the duty of disclosure is waived by the insurer.***



The duty is also ongoing between the date of application for insurance and the commencement of the policy. The insurer must notify the insured of the nature and effect of the duty of disclosure in the application for insurance, the renewal terms and the policy wording. On after 28 December 2015, if that period is greater than 2 months, the insurer must give a reminder notice to the insured of the ongoing duty.

*When renewing or taking out a new policy – all other policies: (i.e. not considered an ‘eligible contract’.)
You must tell the insurer:*

- all information that is known to you which is relevant to the insurer’s decision whether to insure you (and the terms on which to insure you); and*
- everything that a reasonable person could be expected to know is relevant to the insurer’s decision, having regard to the nature and extent of the insurance cover to be provided and the class of people who ordinarily apply for the insurance.*

Most insurance products are underwritten by the insurer before accepting the application for insurance. The insurer considers and, in some cases, makes enquiries into the subject of the insurance. This is usually done in the proposal or application for insurance but also occurs at renewal or when an endorsement or variation to the contract of insurance is given.

If the non-disclosure is fraudulent, the insurer can cancel the policy and refuse to pay any claim. If it is “innocent” then the insurer may reduce the amount of any claim to the amount that would have been paid had the disclosure been made.