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**Our Reference:           Duty of disclosure regarding insurance contracts**

The issue of whether or not you have fulfilled your duty to disclose certain information to the insurer. The following material sets out the basis of information an Insurer relies on to issue a contract of Insurance.

**When will an insurer ask questions about an application for insurance?**

An insurer is obliged to ask an applicant (who is normally the insured) to answer a number of specific questions when first arranging a policy of insurance. These questions may be asked:

- orally (by telephone or in person)
- via the internet, or
- in a written proposal.

The applicant is required by law to provide answers for themselves and anyone else to whom the questions apply (eg another listed driver under a comprehensive motor vehicle policy) within their knowledge.

**The obligation imposed on the applicant to answer these questions**

If the applicant wants the insurance policy to cover the risks they are insuring against, then the applicant must fulfil their duty of disclosure. In assessing what an applicant must do to fulfil that duty, we have regard to the requirements of sections 21, 21A, 22, 26 and 28 of the *Insurance Contracts Act 1984* (ICA). In brief, application of section 21 of the ICA requires the applicant to disclose every matter that they know, or could reasonably be expected to know, is relevant to an insurer's decision to enter into a contract of insurance with them.

It is important to note a person's duty of disclosure applies whenever they:

- first arrange
- renew
- extend
- vary, or
- reinstate

a policy of insurance.

In particular, whenever a person renews their insurance policy, they are entering into a new contract of insurance. As such, they are required to comply with their duty of disclosure each time they renew their insurance policy.

**Eligible contract of insurance**

Section 21A of the ICA applies to an "eligible contract of insurance" unless it is entered into by renewal. An eligible contract of insurance is a contract of insurance in the following classes of insurance:

- motor vehicle
- home buildings
- home contents
- sickness and accident
- consumer credit, and
- travel.



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For eligible contracts of insurance, an insurer must ask the applicant specific questions relevant to the insurer's decision to enter into a contract of insurance. The applicant must then answer those questions by disclosing each matter known to the applicant and what a reasonable person in their circumstances could be expected to include in the answer. If the insurer fails to ask specific questions, then it is deemed to have waived the applicant's obligation to comply with their duty of disclosure.

This is a general summary of these sections. The sections can raise complex issues in some cases and how these sections apply to a particular case can vary.

### **The consequences of the applicant not fulfilling the duty of disclosure**

If the applicant fails to fulfil this duty, the insurer may:

- refuse to pay a claim, and/or
- cancel the policy.

Given some claims can be of significant monetary value (e.g. substantial fire damage to a home), it is important for an applicant to comply with their duty of disclosure.

### **Determining if the applicant fulfilled the duty of disclosure**

In response to a claim under a policy, an insurer may say an applicant failed to comply with their duty of disclosure. In these circumstances the insurer is responsible for establishing that, on the balance of probabilities, the applicant failed to comply with their duty of disclosure.

In considering these disputes, :

- Has the insurer clearly informed the applicant of their duty of disclosure?
- Did the applicant's answer(s):
  - misrepresent, or
  - fail to disclose

information provided in response to certain questions asked by the insurer?

- Does the information provided by the insurer establish that the applicant knew a relevant fact that should have been disclosed?
- Can the insurer establish that, had it been aware of the information that was not disclosed, it would:
  - not have entered into a contract of insurance with the applicant, or
  - have entered into a contract of insurance on different terms?

### **Factors relevant to assessing whether or not the applicant fulfilled their duty of disclosure**

- Was the applicant's untrue answer given because the applicant (or a reasonable person in the applicant's circumstances) believed the answer to be true? (Some examples where this may occur are:
  - when an individual was unaware that their vehicle was modified, or
  - if the applicant answered the questions without true knowledge of the facts regarding the driving history of family member who is a listed driver under the policy.
- Should the insurer have known about the factual matters relevant to the non-disclosure? For example, an insurer may be said to have knowledge of certain information if an applicant has disclosed a fact to it in relation to a previous policy or claim.
- Was the insurer's question to the applicant ambiguous?

### **Documents required to assess compliance?**

#### **Insurance contract**

The following information is required to confirm the terms of the contract of insurance in the event of a dispute:



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- a copy of the completed and signed proposal (if the relevant questions were answered in writing)
- a copy of the policy
- a copy of the certificate of insurance
- the date the policy and certificate of insurance were sent to the applicant
- when and how the duty of disclosure was explained
- the questions asked, and
- the answers given by the applicant.

The insurer needs to establish that an applicant has failed to comply with a duty of disclosure,

For instance, if the alleged non-disclosure relates to a failure to disclose the driving history, the insurer should provide a copy of the applicant's driving history showing the discrepancy between the information provided in the driving history and the information provided by the applicant in answer to the insured's questions.

**An insurer would need to show that it would not have accepted the applicant's risk on the same terms or at all**

- not accepted the applicant's risk, or
- accepted the risk on different terms
- A copy of the applicable underwriting guidelines that were in operation at the time the insurance contract was entered into.
- A statutory declaration from a person with the appropriate authority in the insurer's underwriting department identifying:
  - the underwriting guidelines that were in operation at the time the applicant breached their duty of disclosure, and
  - how the insurer would have applied the underwriting guidelines to the applicant's contract of insurance had the correct disclosure been made.
- Where there are no clear underwriting guidelines covering the situation, examples of similar declines of insurance which are:
  - reasonably contemporaneous to when the non-disclosure occurred, and
  - similar in circumstances to the dispute. For example, if the non-disclosure is related to traffic history, the example should be that a policy was refused due to non-disclosure of traffic offences. An example of non-disclosure for modifications would not meet this requirement.

Where the underwriting guidelines require the exercise of an underwriter's discretionary statutory declaration from the person who has (or would have had) the appropriate authority to exercise the relevant discretion explaining how that person would have exercised their discretion to the applicant's proposal together with any available examples to demonstrate the process by which the discretion is exercised.

**Conclusion**

This explanation takes into account the law, good industry practice and fairness.

Yours Faithfully,  
Kelly & Coe Insurance Brokers Pty Ltd