

A photograph showing two business professionals in suits sitting at a table. One person is holding a tablet, and the other is holding a pen, suggesting a meeting or discussion. The image is slightly blurred, focusing on the hands and the documents.

AMENDMENTS TO THE AUSTRALIAN INSURANCE CONTRACTS REGULATIONS 1985 – DUTY OF DISCLOSURE

Background – the duty of disclosure

A duty is imposed on insureds to disclose to the insurer, matters that are relevant to the insured's decision to accept the risk and if so on what terms. The duty is imposed up to the time that the contract incepts. If the insured fails to disclose relevant matters to the insurer as required, the insurer then has the opportunity to deny or reduce indemnity or cancel the policy completely, depending on the circumstances of the non-disclosure.

In order to rely on this opportunity, the insurer is required to inform the insured of the duty of disclosure.

What is the Australian government proposing?

The Federal government proposes to prescribe the content of the notice to be given to the insured which informs them of the duty of disclosure. The document is called a Duty of Disclosure Notice. If the proposal proceeds, the amendments would be made to the *Insurance Contracts Regulations (1985)*. The government has released the draft amendments to the regulations for public consultation and has called for submissions to be received by no later than 27 June 2014.

It is worth noting that the amendments do not affect reinsurers or marine insurers because they fall outside the scope of the *Insurance Contracts Act (1984)*.



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Why are the changes necessary?

The purpose of the amendments is to give effect to the changes introduced to the *Insurance Contracts Act (1984)* particularly s21(1)(b), s21A and s21B in 2013.

What is contained in the Duty of Disclosure Notice?

Where the duty of disclosure obligation is in writing -

A new wording for the warning about the duty of disclosure is being prescribed. It will be relevant to three types of policies – general insurance, eligible contracts of insurance and life insurance.

The wording applicable to general and life policies is broadly consistent but the wording applicable to eligible contracts is different.

The wording in relation to general and life insurance policies provides that there is a duty under the relevant Act to disclose every matter that the insured knew or could reasonably be expected to know is relevant to the insurers decision to accept the risk and if so, on what terms. The duty exists before the policy incepts. The warning sets out those matters that are

not required to be disclosed being: (i) that which diminishes the risk, (ii) that which is common knowledge, (iii) that which the insurer in the ordinary course of business knows or should know or (iv) that which has been waived by the insurer.

The new wording in relation to eligible contracts inserts an obligation on the insured if asked a specific question by the insurer. The insured must disclose anything that the insured knows about the risk and anything that a reasonable person in the circumstances would include in the answer.

In all cases, the wording reminds the insured that failure to comply with the duty will entitle the insurer to reduce its liability, cancel the contract or in the case of fraudulent non-disclosure, avoid the contract completely.

The duty applies to new policies, renewal, extensions, variations and reinstatements of both general and life insurance policies and to new eligible contracts and their renewal.

Where the duty of disclosure obligation is stated orally -

In the case of a new eligible contract of insurance, the warning is made orally and the regulations provide for the script of the words that can be used.

When are the amendments to take effect?

Insurers will be permitted to use their existing notices until 28 December 2015. After that time, they will be obliged to use the new Duty of Disclosure Notice.

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