

# DUTY OF DISCLOSURE AND THE REASONABLE DUTY NOT TO MAKE A MISREPRESENTATION EXPLAINED

**When applying for insurance, it is crucial to understand your obligations under the Duty of Disclosure and the Duty Not to make a Misrepresentation.**

**These duties apply when you renew, extend, vary or reinstate a contract of general insurance.**



## Duty of Disclosure

The duty of disclosure requires you to inform the insurer of any matter that you know, or could reasonably be expected to know, that's relevant to the insurer's decision to accept the risk of insurance and on what terms.

- **Relevant information:** you must disclose all relevant information, even if the insurer doesn't ask specific questions.
- **Honesty:** provide honest and complete answers to all questions.
- **Changes in circumstances:** tell the insurer about any changes to your circumstances that occur between the time you apply and when the policy starts.

## Duty Not to make a Misrepresentation

Everyone taking out an insurance policy must take care not to make any misrepresentations to the insurer when asked for information. The information you provide must be accurate and not misleading. A misrepresentation is a false answer, an answer that's only partially true, or an answer that doesn't fairly reflect the truth.

- **Accuracy:** ensure all answers and information you provide are correct.
- **No misleading statements:** don't provide false or misleading information.
- **Reasonable care:** take reasonable care to avoid making a misrepresentation.

## When and how does each Duty apply?

The Duty of Disclosure applies to the insured for wholesale insurance (anything that isn't retail insurance).

The obligation of disclosure is ongoing. Therefore, you must continue to provide information and documents as your circumstances change or as more information becomes available or comes into your possession, power or control.

The Duty to take reasonable care not to misrepresent applies to retail or Consumer Insurance Contracts of insurance. This includes home, motor, travel, sickness & accident, consumer credit, and personal and domestic property insurance.

It applies to the responses provided by an insured to questions posed by the insurer.

Strata insurance is generally retail insurance, and the Duty Not to make a Misrepresentation applies unless the Product Disclosure Statement (PDS) states otherwise. If the Duty of Disclosure applies, the PDS will detail the requirements.

## Things you should always tell the insurer

Although something may not seem important to you, failing to disclose all known information to the insurer could mean a strata scheme is uninsured when it comes to making a claim. It's not a risk worth taking, so consider all things that may affect the insurer's ability to provide cover or where cover may be limited.

- Previous claims.
- Any renewals or new applications that have been declined, cancelled or refused, or where an endorsement applied or excesses were imposed.
- Instances of claims declined or indemnity denied.
- Building defects or defective materials used in the property's construction.
- Non-compliance issues, such as fire legislation and Australian Standards.
- Threat or knowledge of any possible legal action against the Insured or an Office Bearer.
- Any injuries sustained at the property, whether in a common area or within a lot.
- Knowledge of a claim that hasn't yet been notified to the insurer.

It's important to provide the insurer with an accurate, complete description of the property, including construction materials, the number of lots, the type and size of machinery, high-risk recreation areas (pools, gymnasiums, tennis courts) and the location of the property (near rivers or dams or a location with a higher than normal risk factor).

For commercial properties, the insurer also needs to know the type of business activity carried out by tenants or occupants, as some occupations are considered high risk and may result in a higher premium or excess.

## Consequences of non-disclosure or making a misrepresentation

If the strata scheme fails to disclose to the insurer something it honestly believed was irrelevant or that it thought the insurer would already know, the insurer can only decline a claim or void the policy if it can prove it would have rejected the application had it been aware of the information. The strata scheme is required only to disclose what it knows to be compliant.

If the strata scheme knew something was relevant and deliberately failed to inform the insurer or provided a knowingly false answer, under Section 27AA of the Insurance Contracts Act 1984, the insurer has the right to treat the policy as though it never existed, thereby voiding the policy. The insurer can also reduce or refuse to pay a claim.

The Insurance Contracts Act 1984 outlines an insurer's options where a person makes a misrepresentation.

## The insurer's responsibility – the Duty Not to Make a Misrepresentation

Under the Duty Not to make a Misrepresentation, if someone fails to answer a question or gives an irrelevant answer, yet the insurer doesn't seek further information or clarity, it cannot later rely on an irrelevant or missing answer to refuse a claim. Instead, the insurer is deemed to have accepted the proposal and waived the person's duty to provide the requested information.

The same applies to a broker. A broker is compelled to pass on any responses received from the insured to the insurer. If it fails to do so, or if there is any dispute about the responses not being provided to the insurer, any subsequent action would be taken against the broker.

**If you have any questions about the Duty of Disclosure or Duty Not to make a Misrepresentation, please contact your local BCB office.**

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### ADELAIDE

Phone 03 8609 2311  
Email [sa@bcb.com.au](mailto:sa@bcb.com.au)

### BRISBANE

Phone 07 5668 7800  
Email [qld@bcb.com.au](mailto:qld@bcb.com.au)

### CAIRNS

Phone 07 5668 7800  
Email [qld@bcb.com.au](mailto:qld@bcb.com.au)

### DARWIN

Phone 07 5668 7801  
Email [nt@bcb.com.au](mailto:nt@bcb.com.au)

### GOLD COAST

Phone 07 5668 7800  
Email [qld@bcb.com.au](mailto:qld@bcb.com.au)

### MELBOURNE

Phone 03 8609 2300  
Email [vic@bcb.com.au](mailto:vic@bcb.com.au)

### PERTH

Phone 08 6245 5300  
Email [wa@bcb.com.au](mailto:wa@bcb.com.au)

### SYDNEY

Phone 02 9024 3850  
Email [nsw@bcb.com.au](mailto:nsw@bcb.com.au)

### QUESTIONS?

Please contact your nearest BCB office for any queries or advice.



[WWW.BCB.COM.AU](http://WWW.BCB.COM.AU)