

DUTY OF DISCLOSURE EXPLAINED AND THE REASONABLE 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. You must tell the insurer everything that is known, or could reasonably be expected to be known, that will be relevant to the insurer's decision to accept the risk of insurance and on what terms.



The same duty applies when you renew, extend, vary or reinstate a contract of general insurance.

When and how does each Duty apply?

- The Duty of Disclosure applies to wholesale insurance (anything that isn't retail insurance).
- 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.
- 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.
- A misrepresentation is a false answer, an answer that's only partially true, or an answer which doesn't fairly reflect the truth. This duty also applies when extending or making changes to existing insurance and reinstating insurance.
- The Duty of Disclosure applies to the insured.
- The Duty Not to Make a Misrepresentation applies to the responses provided by an insured to questions posed by the insurer.

Things you should always tell the insurer

Although something may not seem important to you, failure to tell the insurer all information 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.

Always remember not to make a misrepresentation to an insurer when it asks for information. 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/occupants as some occupations are considered high risk and may result in a higher premium or excess.

Consequences of not telling the insurer something they should know or making a misrepresentation

If the strata scheme fails to tell the insurer something they honestly thought was irrelevant or that they 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 scheme is required to only disclose what it knows to comply.

If the strata scheme knew something was relevant and deliberately failed to tell the insurer or gave 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 (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 and if it fails to do so, or if there's any dispute about the responses not being provided to the insurer, any subsequent action would be against the broker.

If you have any questions about Duty of Disclosure, please contact your local BCB office.

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