

NATIONAL INSURANCE BROKERS ASSOCIATION OF AUSTRALIA

COMMENTS ON

INSURANCE DUTY OF DISCLOSURE NOTICES - DRAFT REGULATION

NIBA welcomes the opportunity to comment on the draft amendments to the Insurance Contracts Regulations 1985 to prescribe new duty of disclosure notices.

As Treasury is aware, if a client is represented by an insurance broker (by reason of section 71 of the Insurance Contracts Act) the requirement under section 22 to provide the notice will not apply.

However, insurance brokers have their own obligations to clients to ensure they are properly informed of the duty of disclosure and the content of the notice are important in assisting insurance brokers in meeting such obligations.

In addition, insurance brokers when acting as agents for insurers, will need to issue the required notices in order to ensure their insurer principal complies.

NIBA sets out its main comments below for consideration by Treasury.

Regulation 42 - use of existing or amended prescribed wording

Draft regulation 42 states that an insurer may continue to use the current **prescribed** form of wording or the new version for any contract entered into before 28 December 2015.

This allows insurers, who now use the current **prescribed** form of wording, to leave updating their s22 notices until next year, subject to the misleading and deceptive issue noted below.

However, few, if any, insurers use the exact **prescribed** form of wording because they have the option of whether to follow the exact form or not.

Under the Act section 22 provides that:

- ss22(1) The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure and, if section 21A applies to the contract, also clearly inform the insured in writing of the general nature and effect of section 21A.

Note: If the insurer wishes to rely on section 21B during the transition period (within the meaning of section 21B) in relation to the renewal of an eligible contract of insurance, the insurer must also comply with subsection 21B(2) before the contract is renewed.

- ss22(2) If the regulations prescribe a form of writing to be used for informing an insured of the matters referred to in subsection (1), the writing to be used may be in accordance with the form so prescribed.
- ss22(3) An insurer who has not complied with subsection (1) may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent.

The effect of s22(2) is that if an insurer uses the form of wording in the Schedule it complies with its obligation under ss22(1).

The proposed Regulation 42 covers insurers who use the form in the Schedule.

Those who don't must rely on establishing compliance with section 22 (1) above (ie the "general nature and effect obligation").

Most insurers don't use the form and adapt it in various ways.

Because of this, the value of this regulation seems limited in its practical effect. Most insurers adopt a form of wording that meets what they believe are the content requirements of the duty of disclosure notice obligation in section 22, running the risk that if it is not consistent with the prescribed form, a court is likely to hold there has been non compliance.

To limit the risk, most insurers ensure the content at least matches the prescribed content, albeit reworded in various respects to be more accurate or more consumer friendly.

To address this issue, Treasury may want to make a change to the regulation so that insurers can continue to use their non-prescribed form existing duty of disclosure notice up until 28 December 2015 (as intended by this regulation), provided that the notice meets the obligations under section 22 in force prior to 28 December 2015.

If this is not done, there will be an uneven playing field for insurers that used the prescribed form and those who do not.

Misleading and deceptive risk for Eligible contracts

Even assuming the above change is made, there is a misleading and deceptive conduct risk.

An insurer using an old eligible contract notice that talks about the renewal duty as that under section 21 (as most do) when renewal will be from or after 28 December 2015 when section 21B will apply, won't accurately advise the client of the renewal duty by issuing the existing form of notice.

This is because s21B will apply for renewals from 28 December 2015 and whilst the proposed regulation results in compliance with the Insurance Contracts Act, it doesn't appear to remove the risk of a technical breach of the misleading or deceptive provisions of the ASIC Act or Corporations Act. What is Treasury's position on this and will ASIC take no action in such circumstances?

We expect it would not, provided the updated duty is advised prior to the renewal which will take place from or after 28 December 2015.

Clarity on this is crucial.

Assuming insurers adopt at a minimum the prescribed form content in substance, the same risk would not appear to arise for non-eligible section 21 only contracts.

This is because the current form of notice should not be misleading in current form vs new form as the only significant changes relate to:

- telling the customer the duty applies up until entry. Not including this in the notice can reasonably be argued not to be misleading on the basis that the statement that it applies up until the next renewal can be provided prior to that time and nothing requires the duty of disclosure notice information to be in one form. Provided all the information is advised prior to the next renewal there should be no issue.
- the non exclusive factors – which Treasury does not appear to believe need to be included – see comments below on this.

However, it may be worth including any section 21 only notices as well in any amendments or statements in relation to this issue in case there is something we have missed as insurers use a variety of notice forms.

The regulation could be amended to confirm that the issue of a old notice in the prescribed form or otherwise in accordance with s21(1) will comply with s22 and not be misleading or deceptive provided that on the next variation, renewal, reinstatement or extension which occurs on or after 28 December 2015 the insured is advised before or at that time of the new obligations.

Notice content issues

Reasonable person in the circumstances test

The new prescribed forms of wording do not include the two non-exclusive factors to have regard to when determining whether a matter known to the insured is one that a reasonable person in the circumstances could be expected to know to be relevant to the decision of the insurer on whether to accept the risk or not and if so, on what terms.

As noted above, under the Act, if insurers use the prescribed form of wording they are in effect, protected from any argument from a consumer that these factors should have been disclosed in their s22 notice to comply with s22(1) (other than an argument that the regulation is not consistent with the Act itself).

However, if the insurer does not use the exact prescribed form of wording which most don't, this protection is not available and the non inclusion of these factors may be open to challenge. While the risk probably very low given the prescribed form of words don't include them and a court would be likely to take this into account, we would like Treasury to specify in the Explanatory Statement that they do not believe that these matters need to be disclosed in the s22 notice and the reason for this. This will help avoid unnecessary disputes.

Insurer's rights for a breach

An insurers rights for innocent non disclosure are to reduce liability and/or cancel the policy. They can do both if they want ie reduce the specific claim and then cancel the policy. The current notices and proposed notices do not accurately reflect this reality. This should be tidied up now so consumers are not misled.

Situations in which the duty does not apply

The reference to "course of business" should read course of our business as an insurer" to better reflect the words used in the qualifier in the Act. These words are broader than the Act intends.

Applies until the contract is entered into

Consumers may be confused by the reference to "applies until the contract is entered into" where it also applies in relation to renewal and other specified circumstance in the Act.

Whilst technically accurate, it may be more consumer friendly to use a clearer form of words to avoid the need to check the Act for what else constitutes "entry".

The other concepts are in fact dealt with in the Schedule 1 notice after this statement.

It may be better to insert the renewal/variation paragraph first and following this state "applies until the contract is entered into (or renewed, extended, varied or reinstated as applicable) after it.

The concepts of variation, extension and reinstatement are also not covered in some of the notices where they are likely to be relevant.

Reminder notice

We are also concerned that the reminder notice does not clearly explain what an insured needs to do at this point (ie if anything has changed since last disclosure tell the insurer) and by short forming the content of the actual notice (e.g eligible contracts renewal notice) could create confusion. Have the notices been user tested with consumers?

Further contact

If you would like to discuss any aspect of these comments and suggestions, please do not hesitate to contact:

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