

EXPOSURE DRAFT

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Inserts for
**Financial Sector Reform (Hayne Royal
Commission Response—Protecting
Consumers (2020 Measures)) Bill 2020:
FSRC rec 4.5 (duty of disclosure to
insurer)**

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule [4.5]	1 July 2020.	1 July 2020
2.		
3.		

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Schedule [4.5]—Duty of disclosure to insurer

Insurance Contracts Act 1984

1 Subsection 11(1)

Insert:

consumer insurance contract has the meaning given by section 11AB.

duty to take reasonable care not to make a misrepresentation means the duty referred to in section 20B.

relevant failure, in relation to a contract of insurance, has the meaning given by section 27AA.

2 At the end of Part I

Add:

11AB Consumer insurance contracts

- (1) For the purposes of this Act, a contract of insurance is a *consumer insurance contract* if the insurance is obtained wholly or predominantly for the personal, domestic or household purposes of the insured.
- (2) A contract of insurance is also a *consumer insurance contract* if:
 - (a) it is for new business; and
 - (b) the insurer, before the contract is entered into, gives the insured a written notice stating that the contract is a consumer insurance contract.
- (3) If it is alleged in a proceeding in relation to a contract of insurance that the contract is a consumer insurance contract, it is presumed that the contract is a consumer insurance contract unless the contrary is established.

3 Section 12

Omit all the words after “a duty other”, substitute:

than:

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- 1 (a) in relation to a consumer insurance contract or proposed
2 consumer insurance contract—the duty to take reasonable
3 care not to make a misrepresentation; or
4 (b) in relation to any other contract of insurance or proposed
5 contract of insurance—the duty of disclosure.

6 **4 Before Division 1 of Part IV**

7 Insert:

8 **Division 1A—Consumer insurance contracts: insured’s** 9 **duty to take reasonable care not to make a** 10 **misrepresentation**

11 **20A Application of this Division**

12 This Division applies in relation to:

- 13 (a) consumer insurance contracts; and
14 (b) proposed contracts of insurance that, if entered into, would be
15 consumer insurance contracts.

16 **20B The insured’s duty to take reasonable care not to make a** 17 **misrepresentation**

- 18 (1) Subject to this Act, an insured has a duty to take reasonable care
19 not to make a misrepresentation to the insurer before the relevant
20 contract of insurance is entered into.
- 21 (2) Whether or not an insured has taken reasonable care not to make a
22 misrepresentation is to be determined with regard to all the relevant
23 circumstances.
- 24 (3) Without limiting subsection (2), the following matters may be
25 taken into account in determining whether an insured has taken
26 reasonable care not to make a misrepresentation:
- 27 (a) the type of consumer insurance contract in question, and its
28 target market;
- 29 (b) explanatory material or publicity produced or authorised by
30 the insurer;
- 31 (c) how clear, and how specific, any questions asked by the
32 insurer were;

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- 1 (d) how clearly the insurer communicated the importance of
2 answering those questions and the possible consequences of
3 failing to do so;
4 (e) whether or not an agent was acting for the insured.
- 5 (4) Any particular characteristics or circumstances of the insured of
6 which the insurer was aware, or ought reasonably to have been
7 aware, are to be taken into account in determining whether an
8 insured has taken reasonable care not to make a misrepresentation.
- 9 (5) The insured is not to be taken to have made a misrepresentation
10 merely because the insured:
11 (a) failed to answer a question; or
12 (b) gave an obviously incomplete or irrelevant answer to a
13 question.
- 14 (6) A misrepresentation made fraudulently is taken to have been made
15 in breach of the duty to take reasonable care not to make a
16 misrepresentation.

17 **20C Warranties of existing facts to be representations**

- 18 A statement with respect to the existence of a state of affairs that
19 is:
20 (a) made in or in connection with a contract of insurance; and
21 (b) made by or attributable to the insured;
22 does not have effect as a warranty but has effect as though it were a
23 statement made to the insurer by the insured during the
24 negotiations for the contract but before it was entered into.

25 **5 Division 1 of Part IV (heading)**

26 Repeal the heading, substitute:

27 **Division 1—Other contracts: insured’s duty of disclosure**

28 **6 Before section 21**

29 Insert:

30 **20E Application of this Division**

31 This Division applies in relation to:

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- 1 (a) contracts of insurance that are not consumer insurance
2 contracts; and
3 (b) proposed contracts of insurance that, if entered into, would
4 not be consumer insurance contracts.

5 **7 Sections 21A and 21B**

6 Repeal the sections.

7 **8 Paragraph 22(1)(b)**

8 Repeal the paragraph.

9 **9 Paragraph 22(1)(c)**

10 Omit “section 31A”, substitute “subsection 27AA(2)”.

11 **10 Division 2 of Part IV (heading)**

12 Repeal the heading, substitute:

13 **Division 2—Other contracts: misrepresentations by** 14 **insured**

15 **11 Before section 23**

16 Insert:

17 **23A Application of this Division**

18 This Division applies in relation to:

- 19 (a) contracts of insurance that are not consumer insurance
20 contracts; and
21 (b) proposed contracts of insurance that, if entered into, would
22 not be consumer insurance contracts.

23 **12 Division 3 of Part IV (heading)**

24 Repeal the heading, substitute:

25 **Division 3—Remedies for relevant failures**

26 **13 Before section 27A**

27 Insert:

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27AA Meaning of *relevant failure*

- 1
2 (1) In this Act, a *relevant failure* in relation to a contract of insurance
3 is:
4 (a) if the contract is, or would be, a consumer insurance
5 contract—a misrepresentation made by the insured in breach
6 of the duty to take reasonable care not to make a
7 misrepresentation; or
8 (b) otherwise:
9 (i) a failure by the insured to comply with the duty of
10 disclosure; or
11 (ii) a misrepresentation made by the insured to the insurer
12 before the contract was entered into.
- 13 (2) Without limiting subsection (1), if, in relation to a contract of life
14 insurance under which a person other than the insured would
15 become a life insured:
16 (a) the life insured made a misrepresentation during the
17 negotiations for the contract but before it was entered into;
18 and
19 (b) the misrepresentation would have been a breach of the duty
20 to take reasonable care not to make a misrepresentation if
21 that duty had applied to the life insured in relation to the
22 contract;
23 then the misrepresentation is a *relevant failure* in relation to the
24 contract (whether or not the contract is a consumer insurance
25 contract).

14 Subsection 28(1)

26 Repeal the subsection, substitute:

- 27
28 (1) This section applies if a relevant failure occurs in relation to a
29 contract of general insurance, but does not apply if the insurer
30 would have entered into the contract, for the same premium and on
31 the same terms and conditions, even if the failure had not occurred.

15 Subsection 28(2)

32 Omit “the failure was fraudulent or the misrepresentation was made
33 fraudulently”, substitute “the relevant failure was fraudulent”.
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16 Subsection 28(3)

Omit “the failure had not occurred or the misrepresentation had not been made”, substitute “the relevant failure had not occurred”.

17 Subsection 29(1)

Repeal the subsection (not including the note), substitute:

Scope

(1) This section applies if a relevant failure occurs in relation to a contract of life insurance, but does not apply if:

(a) the insurer would have entered into the contract even if the failure had not occurred; or

(b) the failure was in respect of the date of birth of one or more of the life insureds.

18 Subsection 29(2)

Omit “the failure was fraudulent or the misrepresentation was made fraudulently”, substitute “the relevant failure was fraudulent”.

19 Subsection 29(3)

Omit “the failure was not fraudulent or the misrepresentation was not made fraudulently”, substitute “the relevant failure was not fraudulent”.

20 Subsection 29(4) (definition of Q)

Omit “the duty of disclosure had been complied with or the misrepresentation had not been made”, substitute “the relevant failure had not occurred”.

21 Subsection 29(6)

Omit “the duty of disclosure had been complied with or the misrepresentation had not been made”, substitute “the relevant failure had not occurred”.

22 Paragraph 29(7)(b)

Omit “no failure to comply with the duty of disclosure, and no misrepresentation, by the insureds under the similar contracts before they were entered into”, substitute “no relevant failure in relation to the similar contracts”.

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1 **23 Subsection 31(1)**

2 Omit “failure to comply with the duty of disclosure or fraudulent
3 misrepresentation”, substitute “relevant failure”.

4 **24 Subsection 31(2)**

5 Omit “failure or misrepresentation”, substitute “relevant failure”.

6 **25 Section 31A**

7 Repeal the section.

8 **26 Section 32 (heading)**

9 Omit “**Non-disclosure or misrepresentation**”, substitute “**Relevant**
10 **failure**”.

11 **27 Subsection 32(1)**

12 Omit “failure to comply with the duty of disclosure, or a
13 misrepresentation was made to the insurer,”, substitute “relevant
14 failure”.

15 **28 Subsection 32(2)**

16 Omit “failure to comply with the duty of disclosure, or the
17 misrepresentation,”, substitute “relevant failure”.

18 **29 Subsection 32(2)**

19 Omit “or misrepresentation”.

20 **30 Section 32A (heading)**

21 Omit “**Non-disclosure or misrepresentation**”, substitute “**Relevant**
22 **failure**”.

23 **31 Section 32A**

24 Omit “failure to comply with the duty of disclosure, or a
25 misrepresentation was made to the insurer,”, substitute “relevant
26 failure”.

27 **32 At the end of paragraph 60(1)(a)**

28 Add “or”.

29 **33 Paragraphs 60(1)(b) and (c)**

30 Repeal the paragraphs, substitute:

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- 1 (b) if the contract is a consumer insurance contract—the person
2 who was the insured at the time when the contract was
3 entered into made a misrepresentation in breach of the duty
4 to take reasonable care not to make a misrepresentation; or
5 (c) if the contract is not a consumer insurance contract—the
6 person who was the insured at the time when the contract was
7 entered into:
8 (i) failed to comply with the duty of disclosure; or
9 (ii) made a misrepresentation to the insurer during the
10 negotiations for the contract but before it was entered
11 into; or

34 Application of amendments

- 12 (1) The amendments made by this Schedule apply to contracts of insurance,
13 other than contracts of life insurance, that are entered into on or after 5
14 April 2021.
15
16 (2) Subject to subitem (3), the amendments made by this Schedule apply to
17 contracts of life insurance that are entered into on or after 5 April 2021
18 (disregarding the effect of subsection 11(9) of the *Insurance Contracts*
19 *Act 1984*).
20 (3) If:
21 (a) a contract of life insurance that was entered into before 5
22 April 2021 (disregarding the effect of subsection 11(9) of the
23 *Insurance Contracts Act 1984*) is varied after that day to:
24 (i) increase a sum insured under the contract in respect of
25 one or more of the life insureds; or
26 (ii) provide one or more additional kinds of insurance
27 cover; and
28 (b) the variation was not an automatic variation but was required
29 to be expressly agreed between the insurer and the insured
30 before the contract was varied;
31 then:
32 (c) the contract is treated, to the extent of the variation, as if it
33 had been entered into on or after 5 April 2021; and
34 (d) the amendments made by this Schedule apply to the contract
35 to the extent of the variation.
36