
From: Insurance Review
To: no-reply@mbie.govt.nz
Subject: RE: Response to Review of insurance contract law comprehensive form

From: no-reply@mbie.govt.nz [mailto:no-reply@mbie.govt.nz]
Sent: Thursday, 27 June 2019 3:29 p.m.
To: Insurance Review
Subject: Response to Review of insurance contract law comprehensive form

Preamble question 1

Do you have any feedback regarding the objectives for the review?

Preamble question 2

Do you have feedback in relation to the options for disclosure by consumers?

Explanatory text for qn2

Preamble qn 3 and 4

Should insurers be required to warn consumers of the duty to disclose? Should insurers be required to warn all insureds of the duty to disclose, including businesses?

Should insurers have to tell consumers what third party information they will access, when they will access it and if they will use it to underwrite the policy?

Preamble q 5

What is your feedback on the options in relation to disclosure by businesses?

Explanatory text for question 5

Preamble q 6

If we have a separate duty of disclosure for businesses, should small businesses have the same duty as consumers? If so, how should small businesses be defined?

If a duty of fair presentation is adopted, should businesses be allowed to contract out of the duty?

What are the pros and cons? If businesses are allowed to contract out the duty of fair presentation, should the duty apply to all businesses?

Preamble question 8

What is your feedback in relation to the disclosure remedy options?

Explanatory text for question 8

Preamble question 9

Is it fair to require insurers to pay claims that are unrelated to a non-disclosure or misrepresentation, even if the insurer would not have entered into the contract had they known the facts?

Should insurers be able to offer reduced cover or ask the insured to cover the difference in order to recoup the amount they would have charged if they had the facts?

Should we clarify that where a contract has been avoided and all claims rejected, the insured is not required to refund claims money if it is not easily returnable and would hard and unfair to the insured? Why or why not?

Do you agree that section 35 of Subpart 3 of the Contract and Commercial Law Act should not apply to insurance contracts? Are there any other sections of the Contract and Commercial Law Act that should not apply to insurance contracts?

Preamble qn 13

Do you agree with the proposed change to the misrepresentation provisions in the Insurance Law Reform Act 1977? Why/why not?

Preamble qn 14

Which of the terms in Table 4 are unfair? In your opinion, are they exempt from the unfair contract terms prohibition?

Preamble qn 15

What is your feedback on the UCT options?

Explanatory text for question 15

Preamble question 16

What is your feedback on the options to help consumers understand and compare contracts?

Explanatory text for qn 16

Preamble qn 17

What is your feedback on the options?

Explanatory text for qn 17

Can the issues with the status quo be overcome with insurers contractually requiring representatives to pass on all material relevant information? What are the benefits of a statutory obligation requiring representatives to pass on information?

Should consumer insureds be treated differently from commercial insureds in relation to these issues?

Preamble qn 20

What is your feedback on the options in relation to section 11 of the Insurance Law Reform Act 1977?

Preamble qn 21

What is your feedback on the option to provide that Section 9 of the Insurance Law Reform Act 1977 does not apply to time limits under claims made policies?

We do not agree that the benefits of the proposed changes outweighs the costs.

Let's make this clear, the proposed change will mean that an Insured is not covered for a valid claim on a claims made policy, when (i) the claim is notified to the Insurer after the expiration of the policy period, and (ii) the delay has not caused the Insurer any prejudice.

Difficulty with Determining a Circumstance

There is a presumption with this issue that an Insured can easily identify when a claim should be notified to the Insurer of a claims made policy. This is not so. A 'claims made' policy also responds to 'circumstances which may give rise to a claim'.

What constitutes a 'Circumstance' that should be notified to insurers is not a defined term in this type of insurance policy. There is no clear definitive guidance in the policy for the Insured as to what constitutes a circumstance.

This is where the difficulty arises and why the law must remain with the Status Quo.

Above the duty to notify is expressed as a 'circumstances which may give rise to a claim'. Some policies however express the duty to notify as a 'circumstances which is likely to give rise to a claim'. These notification thresholds whilst appear similar, actually impose vastly different obligations on the Insured.

Early Notification of Claims

We have raised the issues for the Insured in identifying a circumstance. This can not only lead to a late notification, it can also lead to the Insured notifying matters before they should – i.e. too soon. Insurers will not accept every notification an Insured makes as a valid circumstance under their policy. This also means an Insured can have a claim declined as they initially made the notification of that circumstance too early to their insurer.

Can Insurers Meet the Standard of a Circumstance?

Insurers themselves are not immune to the difficulty with determining a valid circumstance. The difficulty determining a 'circumstance' can by itself be subject to litigation. A good example of the complexity can be found in *Sinclair v O'Malley v National Insurance Company of New Zealand* [1992] 2 NZLR 706 (one of many such cases that deal with this problem). Please contact the writer if MBIE require other examples of cases that illustrate this point.

Summary of Circumstance

What constitutes a circumstance is not easy, if anything it is a complicated legal minefield. With the proposed change, an Insured can be uninsured for claims (i) they notify late, or (ii) they notify early.

Given this complexity, there must be protection available for an Insured who unintentionally does not notify at the appropriate time. In some ways it can be argued that Section 9 of the Insurance Law Reform Act 1977 protects the Insured from vague and abstract contractual terms.

It is the Insurers that have imposed this notification requirement in their policies. It is the insurers therefore that should be made to live with the consequences of it.

Is Section 9 “Problematic” for Insurers of Claims Made policies
We do not believe this is the case.

Neither Insurers nor the Insurance Council have established that the current law makes the operation of claims made policies problematic in New Zealand. It is easy to say that it does, however nothing submitted supports this.

The day to day operation of “claims made” policies in NZ demonstrate that the Status Quo is not problematic. This is evidenced by:

- i. Continuity Clauses – Many insurers provide ‘continuity cover’ extensions. The existence of the clauses demonstrate that (a) insurers are cognisant of the difficulties associated with determining a valid circumstance, and (b) that late notification of a claim is not ‘problematic’.
- ii. Some insurers offer ‘claims made’ coverage that covers a multi-year policy period e.g. 6 years. If late notification of claims on ‘claims made’ policies was a problem, Insurers would never offer a multi-year period policy, let alone one that lasts 6 years.
- iii. Since the early 2000’s the number of ‘claims made insurers’ operating in NZ has increased significantly. New insurers, often global insurers, suggest that the insurers view NZ as an appropriate insurance market for this form of insurance.
- iv. There is no shortage of global reinsurers providing capacity to NZ insurer’s offering claims made Insurers.
- v. For insurers, the incidence of ‘late notification of claims’ is very low, we would estimate at less than 3% (based on our client base).
- vi. Claims made policies are typically liability policies. It is impossible to accurately determine a reserve on liability claim at the time of notification. Due to this, an insurer will use other methods of forecasting their potential claims liability at the conclusion of a policy period. These forecasts will involve sophisticated mathematical forecasting. In effect they use the past to predict the future liability (these calculations determine the reserves the Insurer will consider appropriate at the end of a policy year).
- vii. Following from the previous point, many insurers will chose to base their reserving on a forced loss ratio at early stages. They will set aside claims reserves referred to as IBNR (incurred but not reported).
For example, an insurer will automatically put aside 50% of every \$1 of premium received as a claim reserve against a policy year. At the end of the year, if they have written \$10million in premium, their reserves will simply be \$5million.
- viii. In a given policy year, an insurer will not be able to determine profitability by examining each claim for costs incurred & reserve estimates. For most insurers it will be 4-5 years after that policy year before they can do so.

Points (v), (vi), (vii) & (viii) can be rewritten to – 97% of claims on a policy year, notified correctly in that policy year, have no direct correlation to the ‘portfolio claims reserves held’ by the Insurer at the end of the policy period. Therefore late notification of claims (less than 3%) do not make things “problematic” for the insurer.

The Insurance Council of New Zealand state in their submission "... the Insurer's purpose of knowing where it stands at the end of the period of cover is defeated because of the possibility of future claims that the insurer can resist only if it can establish prejudice".

If this statement was true for an individual insurer, it would suggest that the Insurer's business practices are problematic, not the operation of NZ Insurance Law.

Are there other Impacts not Identified

Due to the difficulty of determining a "circumstance", Insureds will be less inclined to change insurers. Any factor that reduces the likelihood of an Insured changing insurers, will ultimately lead to less competition.

Explanatory text for qn 21

If section 9 were to no longer apply to claims-made policies, should there should be an extended period (e.g. 28 days) for notifying claims or potential claims after the end of a policy term?

If the option is adopted an extended period of 28 days is simply not long enough for the reasons already submission and in this submission. If an extended period is adopted we would recommend that a timeframe consistent with the Limitations Act 2010 be adopted – for example, 6 years from reasonable discovery of a 'circumstance'.

We would recommend that the best option is to remain with the Status Quo.

Preamble qn 23-24

What is your feedback in relation to the options for section 9 of the Law Reform Act?

Explanatory text for qn 23

If the option is adopted, should it apply to insolvency only? Should third parties be required to get leave of the court? Should reinsurance contracts be excluded from the application of the option?

Preamble qn 25

What is your feedback to the options in relation to the duty of utmost good faith?

Explanatory text for qn 25

Preamble qn 26

Do you have any feedback on the proposal to consolidate non-marine insurance statutes into a single statute?

Preamble question 27

Do you have feedback on our proposed approach in relation to the Marine Insurance Act 1908?

Preamble qn 28

Are the above provisions redundant ? Why/why not? Are there other redundant provisions in the legislation covered by this review?

Preamble qn 29

Do you agree with the proposed option in relation to registration of assignments of life insurance policies?

Preamble qn 30

Should the maximum payment amounts for life insurance policies for minors be increased? Why or why not?

Your name

Blair Dyer / Neil Austin

Your organisation

Austinsure Limited

Your email address

In what capacity are you making this submission?

business

Other capacity

Use of personal information - intro

Can we include your name or other personal information in any information about submissions that we may publish?

yes

We intend to upload submissions to our website. Can we include your submission on the website?

yes

You may ask us to keep your submission, or parts of your submission, confidential. If so, you'll need to attach reasons and grounds under the Official Information Act 1982 for consideration.

no

You've indicated that you would like us to keep your submission confidential. Please tell us your reasons and grounds under the OIA that we should consider.