
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: Friday, 28 June 2019 9:30 a.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?

HFANZ supports the objectives of the review, including the addition of the objective 3 – to minimise barriers to insurers participating in the insurance market. One increasingly apparent barrier is the impact of compliance costs in deterring participation from smaller insurers and contributing to industry consolidation and reduced consumer choice. Health insurers have seen significant growth in compliance costs through additional regulation over the past decade and this trend looks likely to continue with this review and the related options paper on financial institutions conduct. Over recent years there has also been a level of consolidation reducing the number of health insurance providers and the level of choice for consumers.

Preamble question 2

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

If there is to be a departure from the status quo, of the options suggested, HFANZ supports the shift in emphasis in option 1 that would impose on consumers a duty not to make a misrepresentation. HFANZ sees this option as the most practicable of the alternatives, with the least ambiguity. This could involve a bit more emphasis from insurers in asking questions at the time of underwriting, although this appears fairly close to the current practice for health insurers at present. The obligation for consumers to answer questions as truthfully and accurately as possible would remain. If this option is selected, HFANZ recommends clarification of misrepresentation, as the term doesn't encompass omissions based on its ordinary meaning.

HFANZ does not support option 2 - applying "a reasonable person" test – as this does not address the lack of consumer understanding about what they are bound to disclose given the need for interpretation of what a "reasonable person" would consider to be relevant. In addition, there is a risk that the application of this test would be unduly onerous for insurers.

HFANZ believes that the option of requiring life and health insurers to use medical records to underwrite is not currently a practical option. Even if the privacy issues could be satisfactorily addressed, there are many instances where medical records are missing, non-existent, fragmented or incomplete. For example, immigrants or New Zealanders returning home after living overseas. This option would likely also mean delays to coverage and increased costs of insurance which are not good outcomes for customers.

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?

HFANZ is comfortable with a requirement for insurers to warn consumers of the duty to disclose.

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?

HFANZ is comfortable with a requirement to provide such detail as necessary to give consumers a general understanding of the nature of the information which might be accessed, from whom it will be accessed, and in what circumstances.

Preamble q 5

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

No comment.

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?

No comment.

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?

No comment.

Preamble question 8

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

HFANZ agrees that in principle, unintentional non-disclosure should be treated differently than intentional non-disclosure (fraud) although notes there are often difficulties in ascertaining intention, and the framework for disclosure remedies needs to have some degree of certainty.

While outright contract avoidance is seldom used by HFANZ members, the ability to use it in cases of fraud or deliberate and material misrepresentation arguably serves as an effective deterrent to fraudulent activity. With health insurance, the current industry practice is to apply retrospective underwriting terms when previously undisclosed information comes to light. This approach delivers fair outcomes for customers in the event of unintentional non-disclosure.

HFANZ members are comfortable with options applying proportionate remedies based on materiality and intention, with a combination of option 1 and option 3 appearing the most workable of the options. Applying a materiality test (i.e. what the insurer would have done had it received the relevant information at policy inception) is likely to produce a fair outcome for insurers and customers as it seeks to put the customer in the position they would have been in had they disclosed the information at the outset. HFANZ suggests that insurers should have the ability to avoid a policy and reject all claims where non-disclosure/misrepresentation is intention based (deliberate, reckless, fraudulent), regardless of the materiality of the misrepresentation/non-disclosure, to dis-incentivise customers from intentional misrepresentation/non-disclosure.

The options need to be viewed in the context of any changes proposed to the disclosure rules, as a substantial lessening of the duties on consumers around disclosure will impact on the need for, appropriateness and effectiveness of any remedies.

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?

With the proposed options likely to reduce the likelihood of contract avoidance significantly, this issue becomes less important. If contract avoidance is invoked due to fraudulent activity or material misrepresentation so significant that an insurer would not have entered into the contract, then it would not appear fair to require insurers to pay claims, even if they are unrelated.

This is very different to a situation where an insurer would have accepted the contract, and say applied a premium loading and/or exclusions from cover. In such instances a fair approach would be for insurers to pay any unrelated claim, apply any premium loading and/or exclusion to the policy, and/or make appropriate adjustment to the amount of claim to reflect this.

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?

No comment.

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?

No comment.

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?

HFANZ supports this measure to remove any ambiguity.

Preamble qn 13

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

No comment.

Preamble qn 14

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

We have comments in regard to some of the specific terms in Table 4.

“Insurer may make unilateral changes to a contract”

Care needs to be applied in assuming that this an UCT in all cases, as the implications for customers may vary, depending on the type of insurance policy held. In the case of health insurance, coverage tends to be reviewed to take account of changes in the way that health services are delivered and funded. This includes addressing new medical technology and treatment. If insurers were constrained from making changes to contract terms then this may impact on the relevance of cover held by policyholders. Even when restrictions to cover do apply, it is likely to moderate premium increases and/or create capacity to fund improved benefits in other areas.

Therefore, it can be argued that making unilateral changes to contract terms in health insurance policies has proven (based upon past experience) to be of benefit to customers. Therefore, the status quo should remain for health insurance policies.

“Broad exclusion for pre-existing conditions”

HFANZ is concerned about constraints in applying legitimate exclusions for pre-existing medical conditions. While restricting insurers may appear to resolve some cases where consumers have been genuinely unaware of their symptoms it also creates an opportunity for some consumers to “game” the system. Some customers may delay purchasing health insurance until they have developed a symptom (knowing that it will be covered) leading to “adverse selection” risk and consequential premium inflation, to the detriment of existing policyholders. Therefore, the status quo should remain for health insurance policies.

Preamble qn 15

What is your feedback on the UCT options?

HFANZ supports the status quo in that it provides a cost-effective way of dealing with a specific set of terms which are unique to insurance contracts and help ensure a well-functioning insurance market.

If there is to be some shift from the present exemption, then option 1 appears the most sensible in that it provides for a degree of certainty in relation to specific terms. A broad definition of ‘main subject matter’ is important for health insurance as policies typically contain cover for a range of treatments together with a number of limitations and exclusions from cover. This is the nature of the product, and is as much about being able to accurately assess and price risk as about being able to offer consumers a range of health insurance cover options which are affordable and meet their needs.

Explanatory text for question 15

Preamble question 16

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

HFANZ maintains there is insufficient evidence of a public policy problem requiring a regulatory solution. In relation to health insurance, it is relatively straightforward for consumers to access information on policies and premiums. Most insurers have online information, some including premium calculators which provide an age-based indication of premium. The HFANZ website contains some useful consumer resources about types of policies, coverage, costs of surgery and other important information.

If any new regulatory requirement is considered, then HFANZ would encourage selection of a simple option with minimal compliance costs. It may also make sense to reconsider whether any action is necessary in the light of the options and proposals around conduct of financial institutions, as much of this is directed at improving customer outcomes.

Explanatory text for qn 16

Preamble qn 17

What is your feedback on the options?

The options appear to be designed to address some of the issues being separately dealt with in the options paper on conduct of financial institutions. As such, any perceived problems arising from the status quo could be expected to diminish. If any change from the status quo is desirable, then option 2 arguably addresses the concern for insurers where intermediaries are acting on behalf of insureds and fail to pass on all client information to the insurer. We note, however, that for this option to be workable the test for when an intermediary is acting for an insurer or an insured would need to be clearly defined and fair to both insurers and customers. Care is needed to ensure preferred options are aligned with those in the options paper on conduct of financial institutions – especially if options in that space contemplate a greater responsibility for insurers over the actions of intermediaries.

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?

Such a requirement may be of assistance although in itself does not guarantee compliance and would not afford the same protection as option 2.

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

No comment.

Preamble qn 20

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

No comment.

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?

No comment.

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?

No comment.

Preamble qn 23-24

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

No comment.

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?

No comment.

Preamble qn 25

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

HFANZ believes the status quo is working satisfactorily, although is comfortable with the proposal to codify aspects of the duty – to provide guidance on the scope and limits of the duty – while leaving courts the flexibility to develop the law further. HFANZ notes that, in the event that the duty of utmost good faith is codified, there may be a conflict with other duties proposed in the Conduct of Financial Institutions paper.

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?

HFANZ supports the consolidation of existing statutes.

Preamble question 27

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

No comment.

Preamble qn 28

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

No comment.

Preamble qn 29

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

No comment.

Preamble qn 30

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

No comment.

Your name

Roger Styles

Your organisation

Health Funds Association of NZ Inc

Your email address

In what capacity are you making this submission?

industry group

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?

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.