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 11:00 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?

IBANZ as the industry body representing insurance brokers arranging insurance for their policyholder clients, we fully support the objectives of an efficient insurance market; efficient, accessible and low cost dispute resolution regimes; fair and proportionate remedies for insurers and insureds should disputes arise.

The New Zealand insurance market relies on support from the international insurance and reinsurance markets either through investment in New Zealand licenced insurers or through underwriting insurance directly. Without this, there would be no robust and competitive insurance market and New Zealand.

It is important therefore that the objectives of the review consider this support. It does not mean change cannot be made. Compared to markets similar to NZ such as the UK and Australia our local market has fallen behind in consumer protection and addressing aspects of insurance law, which have been seen as problematic.

While New Zealand is currently experiencing a hard market (higher premiums and coverage restrictions) in certain regions, particularly in the case of natural disaster insurance, any reforms should be considered against the background that the law should be set for a fair long-term balance rather than affected by current concerns. The New Zealand insurance market is far bigger than just for Natural Disaster cover.

Preamble question 2
Do you have feedback in relation to the options for disclosure by consumers?

The current duty makes it difficult for consumers to understand what is expected of them. The consequences of failing to meet the duty can have significant and disproportionate consequences for consumers. We agree that the problem is more aligned with consumers who purchase personal insurance products rather than businesses purchasing commercial insurance. It is also more pronounced where insurance is purchased direct from a provider, compared to arranging it through an insurance intermediary.

Even if they are aware of and understood their disclosure obligations, we agree that consumers will not know, or will have to guess at what would influence a prudent underwriter. This is especially difficult in the case of medical/travel insurance where they are asked to guess at medical as well as insurance issues. Even in their specialist field, businesses may not see something as being material and requiring disclosure, but an insurer faced with a major claim may later choose to say it was.

In terms of the options for disclosure by consumers, we support Option 1 – Duty to take reasonable care not to make a misrepresentation- (the option selected in the UK). If implemented, this option should not be subverted by an insurer asking an open ended question such as “is there anything else we would have to be told about?” to which the insured is directed to answer yes or no.

The involvement of an adviser should not affect the issue of reasonableness. Certainly not if the insured did not consult the adviser as to how a particular question should be answered.

A disadvantage of Option 1 is the potential for greater complexity with more detailed questions in insurance proposals, increasing the cost in time and resources for insurer, insured and intermediary. However, the alternative of Option 2 - Duty to disclose what a reasonable person would know to be relevant - leaves the consumer less certain as to what should be disclosed to meet the "prudent insured" test.

Concerning Option 3, which is targeted specifically at life and health insurance, we agree the current situation allows the insurer to underwrite the risk retrospectively at the time of a claim rather than at the time of underwriting the risk.

There will always be a suspicion that risks that would have been accepted if disclosure had been made are declined with the knowledge that a claim has arisen. We have seen travel claims for hospital expenses declined for non-disclosure despite a doctor expressly clearing the insured for travel.

These are unacceptable outcomes; insurers should be deemed to know the information contained in medical records where these are voluntarily supplied to them (whether read by them or not). We expect insurers will protest the burden of reviewing records, but it is they who are making the underwriting decisions and can decide what is material or not to them. Given the resourcing required for an insurer to review records they should be allowed a reasonable timeframe to do so before final acceptance of the risk.

This option would not however address the wider non – disclosure problems that apply to other forms of insurance.

We believe it is a step too far to make it compulsory for insurers to obtain a prospective insured's medical records on every occasion. Insurers should be content to ask the right questions in the proposal. If that sparks their desire to see the medical records, that is over to them.

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?

Yes, we agree that insurers should be required to warn consumers and businesses that they have a duty to disclose. This will be helpful as long as it is made clear what the duty means, and the consequences if it is not met.

Insurers should take every opportunity to inform insureds of their obligations, and should do so before acceptance or renewal of cover – not just in the insurance documentation issued after coverage is bound.

That said we do not expect that the message will necessarily be received and understood; information about the duty of disclosure is not a panacea. There must be proportionate safeguards for insureds who have reasonable expectations of coverage.

In addition, we would also suggest a cooling off period to allow the policyholder to cancel.

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?

Yes insurers should have an obligation to inform consumers what third party information they will access and for what purpose. If it is for underwriting there should be a time limit for this to be finalised.

Insurers often have access to information that would be useful for underwriting but choose not to use it when considering cover. For example, natural hazards information is typically available from Local Council GIS map viewers and general insurance claims history may be available in the industry claims database (Insurance Claims Register). Where insurers choose not to access this information it should not then be permissible to decline cover for non-disclosure unless the non-disclosure was fraudulent.

A concern here is that for general insurance, unlike life insurance products, the policy is renewed annually. Disclosure requirements therefore need to be concise so as not to overload the renewal process every year. Constant, complex repetition will see consumers ignoring disclosure documents.

Preamble q 5
What is your feedback on the options in relation to disclosure by businesses?

We agree it is appropriate to have different disclosure obligations for business as compared to consumers. However, these obligations need to reflect the level of sophistication of the business. In a very small business, the understanding of disclosure is unlikely to be better than that of consumers. With increasing size of the business, it is reasonable to expect a higher level of knowledge, resourcing and use of insurance brokers to provide advice and assist compliance with disclosure obligations

To achieve an appropriate outcome we prefer the following:

• For SME's, Option 3 - duty to take reasonable care not to make a misrepresentation, this will align their duty to those of consumers. The great majority of businesses in New Zealand are SMEs and their understanding of insurance and disclosure requirements is often limited. In many cases, they will purchase insurance directly from the insurer without the assistance of an intermediary.

• For larger businesses, Option 2 standard – duty to make a fair presentation of risk (the UK approach) would seem to provide the flexibility to achieve appropriate disclosure. This will limit the cost for insurers as they can assume businesses, in conjunction with their broker, will be better at providing the relevant information required by this standard of disclosure.

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?

We recommend the definition of a small business should be aligned with section 63 (1) (c) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008, which treats a small business as a business with no more than 19 FTE employees. This is preferable to a definition based on business turnover or type of insurance product.

We note that some businesses e.g. wineries can fluctuate either side of the threshold depending on the time of year.

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?

Assuming a duty of fair presentation is adopted, we submit it should be insurers that have the option to allow a business to opt out of the duty of fair presentation of the risk. It is the insurer that is potentially disadvantaged if the risk is not fairly presented.

However, insurers should not be permitted to impose a more onerous disclosure regime. If given the option, we expect that they will take it, and the terms that supposedly are contracted to, are effectively imposed in insurer's standard wordings, and quite likely in the small print.

In contrast, some policies (notably D&O policies) lessen the duty of disclosure, or alter the insurer's remedies in the insureds' favour (eg it allows the insurer to charge additional premiums to cover undisclosed risks). This welcome modification of the law should be permitted to continue.

Preamble question 8
What is your feedback in relation to the disclosure remedy options?

The remedy should be proportionate to the relevance of non-disclosure or misrepresentation. Option 2 – remedies based on intention and materiality; no avoidance for non-fraudulent material disclosure - is the fairest approach. It provides a reasonable balance between insurer and insured.

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?

Yes, a claim unrelated to the non-disclosure/misrepresentation should be paid. Insurers can subsequently cancel or amend the policy going forward based on the new information and allows for proportionate remedies.

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?

Yes if the non-disclosure was relevant the insurer should be able to either seek a reasonable additional premium to recoup the amount they would have charged or reduce the cover.
The amount of any additional premium should be reviewable by an independent third party.

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?

The consequences of deliberate/reckless and material non-disclosure/misrepresentation must be made clear to insureds. Where this occurs any claims money, which may have been paid, should be able to be recovered by the insurer if when the insurer paid out they were unaware of a relevant and deliberate non-disclosure.

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?

We agree section 35 of the Contract and Commercial Law Act should not apply to non – disclosure remedies of insurers in any contracts of insurance but leave the rights for insureds for misrepresentation intact. It would provide greater clarity if insurance duty of disclosure related remedies were encapsulated within Insurance Law Reform Act legislation.

Preamble qn 13
Do you agree with the proposed change to the misrepresentation provisions in the Insurance Law Reform Act 1977? Why/why not?

Yes, we agree with the proposed changes to the Insurance Law Reform Act 1977 so that the remedies for misrepresentation are amalgamated into a single common approach.

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?

We support Option 2a – unfair contract terms: core terms are exempt from being declared unfair unless not transparent and prominent.

Because of the nature of insurance contracts to be fair to insurers there needs to be some exemptions to the Fair Trading Act. However, we agree there is a need for some reform, option 2a offers the best balance between certainty and removing issues with broadly worded exclusions.

It should be noted that under the current legislation only the Commerce Act can take action. This severely limits the ability for consumers and businesses to challenge potentially unfair terms in their insurance policy. It would make sense that the Insurance Ombudsman and courts could consider these matters.

Explanatory text for question 15

Preamble question 16

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

Comparing or even summarising coverage under policies is not a straightforward exercise. Beyond essential terms such as periods of insurance or sums insured, there is a great deal of detail and at a secondary level of importance, but still essential to a proper understanding of coverage. So where does one stop?

Product disclosure statements such as seen in Australia and the UK, end up being very lengthy and ultimately no better or in fact worse than the policy wording itself. There are several documents to read (assuming they are read) and a risk of errors or misinterpretation.

Comparisons are difficult too - a policy is a bundle of promises – a number of apparently good features, which appear better in one policy that another can be undone or outweighed by another, less obvious, disadvantage.

The issue is primarily focused on consumers making decisions without receiving any financial advice. The solution therefore should be focussed on situations such as where insurance is purchased direct from an insurer without advice, rather than through an advice model.

What we want to avoid are product statements that end up being very lengthy and ultimately no better or in fact worse than the policy wording itself. Where insurance is purchased direct without advice we see options 1, 2 and 5 in Table 6 as adding value for consumers.

Explanatory text for qn 16

Preamble qn 17

What is your feedback on the options?

We support Option 1 - status quo- and extend section 10 to apply whether or not the intermediary receives a commission from the insurer.

The issue of the application of this provision to insurance brokers as agents for the insured has been considered a number of times by the Courts and is generally applied for the benefit and protection of policyholders. In a recent High Court Decision (T&G Processed Foods Limited v Hawk Packaging Limited), Justice Ellis commented that the mischief which s.10 was designed to overcome was the avoidance of contracts by insurers where the insured has made full and accurate disclosure to a person negotiating the contract and receiving commission or some other form of valuable consideration, from the insurer but who is, at law, the agent only of the insured. If the broker met the test under s.10 then the issue became one of determining the materiality of the information. We consider that the protection for policyholders is important.

The insurer is in the best position to determine the quality of an intermediary they deal with. Insurers

can agree contractual terms with those intermediaries they wish to deal with and the obligations of the parties.

Generally, insurance brokers (intermediaries) consider themselves as the agent of the policyholder and would usually obtain some form of authority from the client to act on their behalf.

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?

The insurer should determine what they require from representatives in the way of information. It is clearly in the insurer's interest to set the terms of what is required.

The failure of the representative to pass on information should not penalise the consumer/business

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

There is no reason to treat consumer insureds any different to that of commercial insureds.

Preamble qn 20
What is your feedback on the options in relation to section 11 of the Insurance Law Reform Act 1977?

We do not believe there are significant issues with section 11, although it is perhaps a little hard to understand at first, and there can be some uncertainly or debate as to what is an exclusion as opposed to what is a term defining the scope of coverage.

The Law Commission acknowledged that while there may be an issue of unfairness for insurers with section 11, other jurisdictions had found difficulty in taking into account the statistical likelihood factor.

While section 11 often comes up as an issue, despite having been NZ law for over 40 years, it has made no apparent difference to the working of an efficient and fair insurance market.

It seems therefore that any attempted reform by removing certain types of exclusions might be too difficult to achieve in a way that does not introduce uncertainty, increased litigation or wipe out the original reform. We therefore do not support either of the options.

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?

As we have previously submitted, section 9 works well in practice, in fact from a policyholder's perspective s.9 provides some relief to situations where insurers are not prejudiced (and they seldom are) as a result of a failure to comply with a strict time limit (or other requirement) to notify claims.

While that may result in some claims being brought after the expiry of the policy, Section 9 provides appropriate protection for insureds that were aware of the claim or circumstance but failed to notify within the time limits for the policy. If the insurer suffered little or no prejudice because of that, then to deny an insured cover due to breach of a policy condition is obviously inequitable.

The issue is actually complicated not in relation to actual claims but in respect to circumstances that can give rise to a claim. Most claims made liability polices also require the insureds to notify any circumstance that could give rise to a claim within the policy period. What constitutes a "circumstance" may only become clear after the expiry of a policy

In the event an insured changes insurers, if they failed to notify a circumstance within the policy period, they will be without cover given cover as the new insurer usually excludes "known

circumstances" which can leave an insured in an invidious position. Again, as above, if the insurer has suffered no prejudice, a policyholder should not be denied cover but for the failure to have advised the circumstance before the expiry of the policy period.

The status quo should remain; there are no significant problems with the current approach.

However, an improvement would be for legislation to make it clear that where a policy has renewed with the same insurer, then insurers cannot rely on S9 of the ILRA 1977 to decline liability. In cases where the insured has ceased insurance cover or taken out alternative cover elsewhere, then S9 should apply as it is currently enacted.

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?

In our opinion, if there is an extended period it should be 365 days.

Preamble qn 23-24
What is your feedback in relation to the options for section 9 of the Law Reform Act?

We do not see a need to change the current statutory charge regime. The market place overcame the Steigrad issue by splitting the sum insured between liability cover and defence costs cover. We doubt that removing the statutory charge on the policy will achieve the aim of the section. It will remove the ring-fence around the policy entitlement in favour of the claimant (as against it being divided amongst the other unsecured creditors). It will make it a race to getting judgment first.

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?

We do not recommend that it be adopted.

Preamble qn 25
What is your feedback to the options in relation to the duty of utmost good faith?

Option 1 – retain the status quo - should remain leaving the courts to continue to interpret the duty of utmost good faith. We favour this flexible approach.

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?

Life and general insurance are very different and should have separate legislation.

Preamble question 27
Do you have feedback on our proposed approach in relation to the Marine Insurance Act 1908?

We agree the Marine Insurance Act 1908 should remain separate. However, we recommend the English reform in the Insurance Act 2015 removing the existing common law regarding breaches of warranties (mainly found in marine policies). A breach should suspend cover during the breach only, not remove cover permanently.

Preamble qn 28
Are the above provisions redundant ? Why/why not? Are there other redundant provisions in the legislation covered by this review?

Agreed, redundant provisions such as those identified should be repealed.

Preamble qn 29
Do you agree with the proposed option in relation to registration of assignments of life insurance policies?

This issue is not relevant to our members and we make no comment.

Preamble qn 30
Should the maximum payment amounts for life insurance policies for minors be increased? Why or why not?

The figure of $2,000 was presumably set in 1908 and it is now too low. The main reason you would want to insure the life of a minor under 10 would be to provide a fund for funeral costs in the event of death. With this in mind, we suggest a figure of at least $10,000 is more appropriate.

Your name

Gary Young

Your organisation

Insurance Brokers Association of New Zealand Inc. (IBANZ)

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?

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.