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**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 8:07 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?**

Yes. I refer to the Law Society's submissions on this point dated 16 July 2018. In particular, the objectives which are modelled on the two main purposes of the Financial Markets Act 2013, do not adequately acknowledge the nature of insurance contracts and insurance business. This is particularly important as usually the consumer will have the relevant information which the insurer will want to obtain in particular in relation to medical/health, trauma and life insurance cover and policies. The information and access to information is a key issue from the insured or a customer's point of view and in most cases they rely on third parties such as medical doctors to provide the relevant information to underwrite the policy and risk.

### **Preamble question 2**

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

Yes. Consumers or insured's are not medical experts and disclose information that they subjectively consider is relevant. The only way to ensure full disclosure is for an insured to provide access to full medical records and for an insurer to check. The failure to provide all relevant information can mean that there are serious consequences for an insured in that their claim can be declined and policy/cover can be avoided or cancelled by an insurer making it difficult or impossible for the insured or consumer to obtain cover through another insurer.

### **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 and Yes for 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?**

Yes definitely.

### **Preamble q 5**

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

Option 1- duty to disclose what a reasonable person would know to be relevant is a subjective test. On whose reasonableness is this to be assessed and on what basis? This leaves this wide open to challenge.

Option 2- duty to make fair presentation of risk- is a more fair test based on what the insurer knew or ought to have known.

Option 3- is more a duty on directors of businesses and the issues with this is it is difficult to know everything factual and could result in significant increased costs either upfront costs or in terms of premiums.

As to the best option- Option 2 is preferable.

**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?**

Yes- just disclose all relevant information to the insurer relevant to the underwriting risk.

**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.

**Preamble question 8**

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

Option 3 is the best option to prevent insurance fraud.

**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?**

No. If the burden was actually deflected to the insurer to obtain all the relevant medical information then they should have all the information and this would avoid any non-disclosure/misrepresentation situations. If there then was an actual misrepresentation situation the insurer could then avoid or cancel.

**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?**

Possibly. Although if you place the burden on the insurer to check medical records this should not be an issue.

**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?**

Yes. Usually insured's are in a difficult situation when they make a claim due to health/medical/trauma/death. They are generally not able to refund money to an insurer and it is hard or unfair on the insured.

**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?**

Yes

**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- as long as protections remain in place for insureds so their policies do not get avoided or cancelled.

**Preamble qn 14**

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

1. Travel- requiring pre-approval for urgent medical treatment is sometimes near impossible;
2. Income protections policies- insurer has ability to make decisions that affect the insured ie: whether they can work or what treatment they require;
3. Car insurance- insurer may decline if can't find person at fault-sometimes is not the insured's fault

but a third party's

4. Life cover- someone dies and their spouse/family is not automatically entitled to any benefits for example if a business partner is a named beneficiary

### **Preamble qn 15**

#### **What is your feedback on the UCT options?**

Option 1- the Australian approach is preferable.

### **Explanatory text for question 15**

#### **Preamble question 16**

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

Option 1- Require plain language insurance policies that consumers/insureds can understand. This is the best option to ensure prior understanding and provide a summary (one to two pages) as per Option 3.

Insurers should also disclose key terms/information using plain concise language- Option 5.

All the options outlined would be helpful from an insured/consumer's point of view.

### **Explanatory text for qn 16**

#### **Preamble qn 17**

#### **What is your feedback on the options?**

Option 3- is a good option.

### **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?**

Section 11 is an important section, however it does sometimes unintentionally interfere with the way in which some insurance policies work. Perhaps there could be an exclusion but this is usually limited to motor vehicle cover.

### **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?**

I refer to the submission made by Blair Dyer of Austinsure on this point and repeat their submissions.

In summary, Section 9 affects 'claims made' insurance policies.

A 'claims made' policy only responds to claims notified to the insurer during the policy period. A claim notified outside this period is not covered. Professional Indemnity insurance is a 'claims made' policy (as well as many other policies – e.g. Directors & Officers Liability and Statutory Liability).

An issue that may arise with notification of claims.

It is common for there to be delays in notification of claims and specifically circumstances that may give rise to a claim. Most often this is due to the insured not knowing they had to notify a circumstance. There is a serious lack of clarity in defining a 'notifiable circumstance,' this having been the basis of numerous legal cases.

Example:

The insured is currently with Insurer B, however they have a claim which falls within a prior period with Insurer A. Insurer B declines the claim due to it being a 'known claim or circumstance' and Insurer A declines the claim because the policy has expired, leaving the insured without any coverage for the claim. Currently, Section 9 prevents this from happening by allowing for the insured to be covered by Insurer A as long as the delay has not caused the insurer to 'suffer prejudice.' Therefore, both the insured and the insurer are protected from harm.

Section 9 currently gives protection for late notifications.

Section 9 means an insurer is unable to decline a claim for late notification unless that delay has caused them prejudice.

What would the proposed changes mean?

The Law Commission proposes amending Section 9 so that it does not apply to late notifications made after a policy expires.

Without the protection of Section 9, delays in notification can result in claims being declined by insurers, leaving an insured in a situation where there is no insurance cover.

If the change to Section 9 was to occur, it would also make it more risky for anyone to change insurers. Due to the common occurrence of late notifications, many insureds may consider it safer to stay with the same insurer to avoid the risk of a claim not being covered. This will effectively remove competition from the market.

It has been argued that currently, insurers are disadvantaged by Section 9, as they may have a claim brought years after an event, for example, making it difficult to accurately calculate reserves. We are currently making a further submission to MBIE that responds to this point. Simply stated I do not believe the application of Section 9 is problematic for insurers of 'claims made' policies.

The law as it stands is necessary to retain in order to maintain protection for the insured within reasonable bounds for the insurer and to maintain a competitive market.

#### **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 it were to apply it would be prudent to have an extended period of time for notifying claims or late notification. Although for the reasons outlined Section 9 should not be changed as it does not cause problems with claims made policies. There are numerous circumstances which can result in late notification including not knowing there is an issue until several years later in terms of claims made policies.

#### **Preamble qn 23-24**

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

Requires further consideration as to what any proposed legislation would say.

#### **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?**

This should not be limited to insolvency only. If leave of the court were required this puts parties at a further disadvantage and costs.

#### **Preamble qn 25**

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

The problem with the issue of good faith is that it is effectively a one sided duty from the insured/consumer's point of view. There are various cases and examples where insured's have acted

in good faith and an insurer has declined claims then reversed the declinature yet cancelled/avoided cover. This can hardly be said to be acting in good faith on the part of the insurer and makes life difficult for the insured/consumer in terms of challenging their claim, the costs involved and then trying to get new cover. This is especially applicable to medical/trauma cover.

**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?**

Section 12 of the Insurance Law Reform Act 1977 should remain.

Section 9 of the Insurance Law Reform Act 1977 should remain.

**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?**

**Preamble qn 29**

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

Yes.

**Preamble qn 30**

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

Yes. They should be increased because the limits mean that amounts paid out under life insurance policies for minors may be insufficient to cover funeral costs. A limit of say \$10,000 would be more appropriate.

**Your name**

Kate Sheehan

**Your organisation**

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**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

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