
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 6:33 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?

We support the objectives of the review. Specifically, we consider it important that both insurers and those insured are well informed. Interactions in the insurance market should be fair, efficient, and transparent at all points of an insurance policy's lifecycle. It is crucial that barriers affecting an insurer's participation in the insurance market are minimised. In addition, we believe a further important objective is to ensure that insurance continues to be accessible and affordable for insureds and viable for insurers.

Preamble question 2

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

We consider Option 1 (duty to take reasonable care not to make a misrepresentation) strikes the most appropriate balance between those insured and insurers. If this option is adopted, it is crucial that the term 'misrepresentation' is clearly defined to include an 'omission' – i.e. a failure to disclose a material fact, with that concept in turn clearly defined. Ensuring there are tangible consequences for an insured's failure to disclose material facts, will assist in limiting the number of questions an insurer would need to pose.

Option 2 (duty to disclose what a reasonable person would know to be relevant) would create an unreasonable level of uncertainty for insurers. Option 3 (require life and health insurers to use medical records to underwrite) would come at a significant cost, create complications, and bring with it a range of unintended consequences. We consider Options 2 and 3 not appropriate.

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?

We consider it good practice for insurers to warn consumers of the duty to disclose. In our experience, it is common for insurers to warn consumers of the duty to disclose. Those warnings should also advise the consequences of not disclosing before entering into the insurance contract.

A statutory requirement will assist in ensuring this warning is consistently made across the industry. If a statutory requirement is adopted, the requirement will need to allow for social media and verbal disclosures to cater for the full range of customer interactions that occur in modern society, such as where parties to an insurance contract discuss the insurance contract over the phone.

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?

In our view there should not be a specific insurance law obligation imposed on insurers to tell consumers what third party information they will access. The appropriate approach is to permit the insurer to determine whether or not it decides to tell a consumer what information that insurer will access, when it will access information, and whether or not it will use the information to underwrite

the policy, within the parameters of privacy law constraints. With information becoming increasingly available and accessible, it would be difficult for an insurer to confine what third party information it will access, to assist it in accurately assessing a risk. For example, 15 years ago the idea of social media being an avenue to share and access information on an individual was not ordinary. In our view, the prevailing requirements of privacy legislation are the appropriate place for relevant constraints to reside, without replicating them in insurance law.

Preamble q 5

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

We do not believe it is appropriate to have different sets of disclosure requirements between consumers and businesses. As a consequence, Option 3 (duty to take reasonable care not to make a misrepresentation) is our preferred option. Our comments in question 2 above are equally relevant for this question.

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 believe there should be no difference in the duty of disclosure between businesses and consumers, and no difference between small and large businesses.

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?

In our view, Option 1 (remedies based on intention and materiality) is the most appropriate option. In our experience, most insurers currently provide remedies based on intention and materiality. It is common practice for insurers to apply serious consequences (avoidance) to deliberate non-disclosures and less serious consequences (re-underwrite) to other non-disclosures. We consider this good practice and codifying it will ensure insurers are consistent throughout the industry when addressing claims and remedies. Option 1 is consistent with the Contract and Commercial Law Act 2017. In our view, this consistency should remain. As illustrated in the Options Paper, the benefits of Option 1 outweigh the costs.

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?

We do not believe it is fair to require insurers to pay claims that are unrelated to a non-disclosure or misrepresentation. The objective should be to put the parties in the same position they would be if the appropriate disclosure had been made. In other words, if the non-disclosed matter would have resulted in the insurer not taking on the risk, the insured should not be able to benefit from the non-disclosure or misrepresentation.

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?

We support the ability for insurers and those insured to have further options if there are any disputes when a claim is made. Given the unique nature of insurance contracts, it is important regulations do not restrict the parties of an insurance contract from coming to commercially sensible agreements. This coincides with the duty of utmost good faith whereby rather than the insurer avoiding the contract (even with the right to do so), the insurer offers for the insured to cover the difference. As a last resort, if the parties cannot agree on an outcome, there are dispute resolution processes for the parties to utilise.

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?

We consider that there should be one regime for both misrepresentation and non-disclosure. This would help address with the historic complexity and confusion around an insured's duty to provide accurate and complete information to an insurer when assessing risk.

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 consider Option 2a (core terms are exempt unless not transparent and prominent) as the most appropriate option. We agree that insurance contracts are unique and so the insurance-specific exceptions under the Fair Trading Act 1986 should not be removed. In our view, it is appropriate for insurers to be able to carve out core terms. For example, prices or scope of risk. The emphasis on the transparency and prominence of terms will provide certainty for both insurers and those insured while respecting the unique nature of insurance contracts.

In considering any changes to the unfair contract terms provisions under the Fair Trading Act 1986, terms in existing contracts should not be deemed to be unfair as a result of any change in the law. It is crucial that the nature of those contracts be preserved given they would have been entered into and priced on that basis. Additionally, any adjustment to unfair contract terms provisions should be considered in light of the current conduct & culture reforms.

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?

We support Option 1 (status quo). We believe the changes to the relationship between insurers and intermediaries as a result of the Financial Services Legislation Amendment Act 2019 (FSLAA) should be sufficient to address concerns in this area. If not, that would be a failing of the FSLAA reforms. We believe the issues raised in relation to intermediaries will be addressed by the changes to licensing requirements, disclosure requirements, and the new duty provisions (including the broader scope of the new code of conduct). To avoid the introduction of additional obligations on insurers only and 'double regulation', we oppose the other options in the Options Paper.

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?

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?

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?

We support the consolidation of the five insurance statutes into a single statute. Any process to consolidate statutes should include consultation with stakeholders. We consider the process of consolidating statutes for the Contract and Commercial Law Act 2017 to be an example to follow.

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

David Ireland

Your organisation

Kensington Swan

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.