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Financial Markets Policy  
Building, Resources and Markets  
Ministry of Business, Innovation and Employment  
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## **Submission on Options Paper – Insurance Contract Law Review**

Kiwi Insurance Limited welcomes the opportunity to submit on the Options Paper – Insurance Contract Law Review. We appreciate the Ministry extending the deadline for submissions until 8 July.

Kiwi Insurance is a licensed insurer under the Insurance (Prudential Supervision) Act 2010. It is a subsidiary of Kiwi Group Holdings Limited, along with Kiwibank Limited. It provides life risk products which are distributed solely by Kiwibank to its customers.

Insurance plays a fundamental role in society by providing security, and therefore reducing uncertainty, to consumers and others for unforeseen events. It does this by spreading risk, from the insured to the insurer with risks and returns shared across policy holders. Insurance is by its nature a more complex product than many other financial products, for example, bank accounts and term deposits. In the case of life insurance, it is a lifetime contract that the insurer must manage and price over the lifetime of the insured, in changing environments, but cannot terminate unilaterally except in limited circumstances (fraud or non-payment of premiums).

We agree that insurance contract law is overdue for reform to ensure that the legislation remains fit for purpose. Any reform needs to ensure that it strikes an appropriate balance between protecting consumers and providing insurers with the certainty they need to manage and price risk appropriately. A failure to do this runs the risk of pushing up premium costs and/or reducing the availability of insurance to consumers who may need protection the most and who can least afford for it to be more expensive. Solutions which may provide individual benefits in isolated cases need to be balanced against the benefits to consumers and the costs and risks to the industry more broadly.

The significance of the changes that are being recommended should not be underestimated. The Government needs to allow sufficient time to be taken to ensure that the impacts are fully understood before changes are recommended and the impact of any changes that will result from its reform of conduct of financial institutions can be taken into account. We would welcome further engagement with the Ministry on the detail of the reforms and on an exposure draft of the legislation.

## Submissions

In the attached appendix we set out our responses to some of the questions posed in the Options Paper. Our responses are only in respect of consumers and address three key areas: disclosure, remedies and unfair contract terms.

While other issues raised in the Options Paper are important we have focused our efforts on the issues that are most of concern due to our competing priorities. The key one of these was our response to the Financial Markets Authority and Reserve Bank of New Zealand's feedback on their conduct and culture review of life insurers. That response was due with the regulators at the end of June and required input from the same people who were involved in this submission.

Our key submissions are as follows:

- *Objectives* - We support the objectives of the review but consider they should be expanded to include facilitating easy consumer access to insurance. We have some doubt that Objective 3, which seeks to minimise barriers to insurers participating the market, will likely be achieved. This may depend on the options that are ultimately adopted. The cumulative impact of some of the options, along with other regulatory changes afoot, could increase the risk and uncertainty for insurers and re-insurers, making New Zealand an unattractive place in which to do business.
- *Disclosure* - If the status quo is not retained, we consider that consumers should be required to disclose information that a reasonable person would know to be relevant, taking into account the type of insurance product and the target market for the insurance. We also consider that insurers should be required to inform consumers about their duty to disclose so that they appreciate the significance of the information being provided. We consider that requiring insurers to *always* use medical records to underwrite consumers' policies (Option 3) would be unworkable.
- *Remedies* – We agree that the materiality of any non-disclosure should be a factor in determining the remedy that should apply. Kiwi Insurance's current practice is generally to apply proportionate remedies to cases of unintentional non-disclosure. We think that the insured's intention in not disclosing material information needs to be a relevant factor in assessing remedies in order to ensure that the appropriate behaviour is being incentivised.
- *Unfair Contract Terms* – The current law is relatively new so has not really been tested. Any reform in this area needs to be done cautiously and continue to recognise the unique nature of insurance products, especially life insurance. It must continue to ensure that life insurers can effectively measure and price risk across the lifetime of a policy (as they cannot simply terminate) by providing certainty about terms that both define risk and price.

*Transitional period* – Careful consideration needs to be given to the transitional period for these reforms. Insurers will need to make system changes, revise their documentation and application processes and may need to reprice their products with their reinsurers, all of which can take a significant amount of time. An inadequate timeframe in which to do this could require manual workarounds and other compromises that could lead to errors which will disadvantage both the consumer and the insurer.

Some of the information we have provided in this submission is confidential and commercially sensitive. We request that it not be made public and have provided a redacted version of our submission for this purpose. If any request is made for the redacted information under the Official Information Act 1982

(OIA) we would be grateful for early engagement to ensure our views on the OIA's application to our information is considered.

We would be happy to meet with you to discuss our submissions. Please contact Loretta DeSourdy, Head of Regulatory Affairs on [REDACTED], or email [REDACTED] in the first instance.

Yours sincerely



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Acting CEO, Kiwi Insurance Limited



Melissa Clark- Reynolds  
Director, Kiwi Insurance Limited

## Appendix – Responses to MBIE Template Questions

### Q1 Do you have any feedback regarding the objectives for the review?

1. Kiwi Insurance agrees with the objectives of the review. However, as mentioned in our general comments, depending on the options that are ultimately selected we have some doubt that the overall effect of the reforms will minimise barriers to insurers participating in the market, which is Objective 3. This is because the reforms are likely to increase uncertainty and therefore risk for insurers and re-insurers, making it more difficult to price appropriately. The consequences of any change therefore need to be carefully assessed and the response will need to be measured and proportionate if we want the continued participation of a wide number of insurers in the New Zealand market.
2. In addition, we consider that facilitating easy consumer access to insurance would also be a worthy objective of the review. We note one of the objectives of the April 2019 MBIE Conduct of Financial Institutions review was to:
  - “Retain access to financial products and services that promote good customer outcomes.”
3. We believe a similar consumer access objective should apply to an insurance law review. Thus, it should be assessed if the proposed options may inhibit or enable consumer access to insurance products that promote good customer outcomes. For example, some options may introduce or increase costs, time or complexity to the process and/or the product, and thereby reduce access to good insurance products.

### Q2 Do you have feedback in relation to the options for disclosure by consumers?

4. The Options Paper has three options for disclosure duties:
  - (a) Option 1: Duty to take reasonable care not to make a misrepresentation;
  - (b) Option 2: Duty to disclose what a reasonable person would know to be relevant; or
  - (c) Option 3: Require life and health insurers to use medical records to underwrite.

Our preference is the status quo in relation to disclosure by consumers. That is, when entering into an insurance contract an insured must disclose information that would influence the judgment of a prudent underwriter in setting the premium or deciding whether to take on the risk of providing insurance. We consider this is fair as the insured holds the relevant information about themselves and/or the subject matter of the insurance they are seeking. However, as we state in our response to Question 3 below, we agree that insurers should be required to warn consumers of the duty to disclose. Kiwi Insurance does this currently. Customers should understand the significance of the information they are providing in (or omitting from) their applications. A warning pointing this out is sensible and assists all parties.

5. We consider the status quo deals most effectively with the issue of information asymmetry that exists between the consumer and the insured when it comes to the consumer’s personal circumstances. That information is crucial for the underwriting process and the pricing of risk.
6. We acknowledge that the consequences for non-disclosure can be harsh if insurers choose to strictly apply the disclosure duty. Kiwi Insurance generally does not adopt that strict disclosure approach and expects that across the industry the number of insurers who do so would be small. The Options Paper notes that the number of disputes about non-disclosure is evidence

that non-disclosures are not always dealt with reasonably. However, the cases that result in disputes would represent only a fraction of the claims that are settled by industry, many of which are settled and paid by insurers despite the customer's non-disclosure.

7. If the status quo is not regarded as a viable option, our preference is for Option 2, which would require that the consumer disclose information that a reasonable person would know to be relevant, taking into account the type of insurance product and the target market for the insurance. While we agree that this may still give rise to some uncertainty about what needs to be disclosed, it deals more effectively than Option 1, with the information asymmetry issue.
8. Option 1, which would abolish the duty of disclosure for consumer insureds and replace it with a duty to take reasonable care not to make a misrepresentation, is a less desirable alternative. Insurers would need to identify through questions the information they need to underwrite the risk and consumers must answer truthfully and as accurately as possible. Kiwi Insurance already uses a relatively high number of questions to obtain the information it requires from consumers for its life insurance. When the broader insurance conversation is factored in, this process can take nearly an hour to complete. We understand that this timeframe deters some customers from seeking insurance with us, compared with shorter seemingly 'simpler' processes offered by others.
9. Under Option 1 Kiwi Insurance would need to significantly increase the questions to ensure that it has all relevant information to assess its risk. This will add further to the time taken in the application process, potentially deterring more consumers. We expect that despite more lengthy application forms, insurers would still want to include a "catch all" question to cover anything not listed as it is not possible or practical to list every circumstance that may be relevant. A longer application form will increase the application time for the customer and the consideration time for the insurer. This will negatively impact on consumer take up and the cost of insurance will also increase, further reducing consumer access to insurance. Fully underwritten products (which require these questions) may provide more certainty and value for customers over other types of cover. Making that process more onerous could dissuade insurers from offering fully underwritten products, thereby reducing insurance options and protection for the customers.
10. Kiwi Insurance is most concerned about Option 3 which would require life and health insurers to use medical records to underwrite cover. In addition to being the costliest of the options proposed, there would be several practical issues if it were to be adopted. Consequently, we do not consider it to be a viable option to address the disclosure issues that this reform is trying to address.
11. The cost of insurance would increase significantly as a result of having to obtain medical information for each application and to consider that information once received. Based on current data, we estimate that Kiwi Insurance seeks medical information for approximately [REDACTED] of the applications we receive, even after a lengthy application form. The approximate cost of obtaining this information varies from between [REDACTED] for each application, depending on whether it covers a period less than 3 year or longer.
12. As a number of consumers will not proceed with their insurance application following the underwriting process, the cost of obtaining their information will be reflected in the insurer's overall costs. While this issue exists now, the cost will increase exponentially if medical information is required for each application. Insurers could require that applicants pay these costs as part of the application process, but the expectation is that this would result in a

significant decline in the number of people obtaining life insurance which would be detrimental for both customers and the industry.

13. Option 3 will also result in a delay in processing applications. In our experience on average it takes about [REDACTED] to obtain medical information, but this does vary. The time required to process the information if we had to source medical information for each applicant and if this was to be the only source of information, would also increase substantially. We would likely need to increase staffing levels in order to do this.
14. Apart from the extra cost, time, and inconvenience to customers that would result from both, there are practical considerations that make this option unworkable. Not all consumers have a doctor and of those that do, not all would see their doctor on a regular basis. Their medical information would therefore either be unavailable or incomplete. In the absence of other information, it would not be possible for insurers to price the risk appropriately. This could result in insurers either increasing premiums to deal with this uncertainty or declining to accept the risk.
15. Conversely, some consumers may have several doctors and their records may have to be obtained from multiple sources. Consumers may also use alternative health care providers or may have some of their medical records overseas, especially immigrants. The time and effort required to obtain a complete picture of a person's medical history could increase significantly in these cases.
16. Finally, we note that medical record keeping practices are not consistent so even if medical records can be obtained, they may not provide all the required information. Some doctors are also reluctant to provide all of their notes.
17. While these issues are ones that insurers face now when obtaining medical information, insurers have the benefit of firstly obtaining information from the customer. This allows insurers to determine the extent of any other information they require. It would not be practical to have a regime based solely on medical information so that insurers would be faced with the challenges noted above for each application. As this option would not, as noted in the Options Paper, address disclosure for general insurance, it is also difficult to see how it could be a real option for addressing disclosure more generally.

**Question 3: Should insurers be required to warn consumers of the duty to disclose?**

18. It is reasonable that insurers warn consumers about their duty to disclose. Kiwi Insurance does this currently and we believe that is the case more generally in the industry. It is important that consumers are aware of their disclosure duty, so they understand the significance of the information they are providing (or omitting) and respond appropriately to the information requested.
19. Any requirement to disclose this information must be sufficiently flexible so that it can be fulfilled in a manner that suits the various channels by which insurance can be obtained.

**Question 4: 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?**

20. We consider it is reasonable to say what *types* of third party information we *might* access and who will underwrite the policy. It is not reasonable to say *when* we might access the

information as we will not always know when, given a policy can last a life time and different events can happen over that period.

**Question 8: What is your feedback in relation to the disclosure remedy options?**

21. The Options Paper proposes three disclosure remedy options:
- a. Option 1: Remedies based on intention and materiality;
  - b. Option 2: Remedies based on intention and materiality; no avoidance for non-fraudulent material non-disclosure; or
  - c. Option 3: Disclosure remedies based on materiality only.

We agree that the materiality of any non-disclosure should be a factor in determining the remedy that should apply. However, we would be concerned if the insured's intention was not also taken into account. Otherwise we think this would not incentivise the appropriate behaviour. Option 1 is therefore our preferred option. It would allow for proportionate remedies where the non-disclosure or misrepresentation was not deliberate or reckless but was both careless and induced the insurer to enter into the contract on those terms. It would allow insurers to re-underwrite the contract on learning of the new information by doing what they would have done had they known of the information at the time of the contract formation.

22. Kiwi Insurance's current practice is generally to apply proportionate remedies to cases of unintentional non-disclosure. Of course, this must be considered on a case by case basis in conjunction with our reinsurers and the facts available to us. We consider this is the right approach in order to do the right thing for our customers. We also think this would be the practice adopted by the industry more broadly.

23. If, following a claim, we become aware of information that was not disclosed by the insured at the time the policy was underwritten, we will consider the nature of the omission, the facts available and consult with the reinsurers.

[REDACTED]

24. Because Kiwi Insurance already adopts the approach set out above, we do not consider that Option 1 is likely to have a significant impact on our costs. It provides a better balance as remedies will be dependent on both the insured's intention and the materiality of the non-disclosure. Under Option 1, Insurers could avoid contracts for deliberate or reckless non-disclosure or misrepresentations that are material. A non-disclosure or misrepresentation would allow for avoidance of the contract if the non-disclosure was objectively material and if it induced the insurer to enter into the contract on those terms.

25. We do not support Option 2, which would allow a court or dispute resolution scheme to disallow avoidance or require the insurer to pay an amount in respect of a claim where the insured's non-disclosure or misrepresentation was fraudulent. Even though the insurer may not have suffered any significant loss in those circumstance, we consider this would be detrimental to both the industry and honest consumers. Our concern is that this would create uncertainty for insurers and reinsurers which could result in pricing increases to accommodate the risk. It would also be rewarding dishonest behaviour.

26. Option 3 is also not supported. It proposes that insurers would have to apply remedies regardless of the insured's intent behind the non-disclosure or misrepresentation. Again, our

concern is that this would be rewarding bad behaviour and as noted in the Options Paper, it would not provide a strong incentive against intentional non-disclosure or misrepresentation. Consumers must disclose all material facts accurately in order to ensure risk is properly assessed and priced appropriately. Options 2 or 3 do not provide a strong incentive for them to do so.

**Question 15: What is your feedback on the UCT options?**

27. The Options Paper proposes three options in terms of reforms to deal with unfair contract terms (UCT):
- a. Option 1: tailor generic unfair contract terms provisions to insurance;
  - b. Option 2: rely on generic unfair contract terms provisions; or
  - c. Option 3: completely exempt insurance contract from UCT provisions and rely on conduct regulation.

MBIE has noted in the Options Paper that the last option is not considered to be a viable one.

28. New Zealand's UCT regime is relatively new, having only been in force since 2015. The legislation does not exclude insurance contracts from the regime but does provide insurance specific exemptions in addition to the generic exceptions. The insurance specific exemptions recognised the unique nature of insurance contracts where the product is essentially the contract itself. Further, life insurance is a lifetime contract that the insurer must manage and price over the lifetime but cannot unilaterally terminate (except in exceptional circumstances). It therefore requires a degree of flexibility to ensure the contract remains sustainable for the insurers, can adapt to changing environmental and medical factors and it can meet future claims. The Options Paper notes that there has been no formal enforcement action on UCTs in insurance contracts. Consequently, it is not clear how significant the problem with the current legislation is, nor how the conduct reforms that the Government is proposing to introduce into Parliament by the end of this year may improve the situation for consumers.
29. The current exemptions provide insurers and re-insurers with certainty about the risks they are underwriting so that they can be priced accordingly. Any changes to them must take this into account. This is particularly relevant if the Government's objective of minimising barriers to insurers participating in the insurance market is to be achieved.
30. Our preferred option is the status quo, but between Options 1 and 2 our preference is for Option 1: tailor generic UCT to insurance. Option 1 would best meet the criteria identified in the Options Paper of protecting consumers from contracts terms that disadvantage them and are not necessary to protect an insurer's legitimate interests and provide insurers with the confidence that they can effectively measure and price risk across the lifetime of a policy they cannot terminate. In order to achieve the latter insurers must have certainty about the terms that define both risk and price otherwise the fundamental basis of the contract will be uncertain.
31. Any reform of the UCT regime's application to insurance contracts would need to ensure that existing contracts would continue to be exempt from the insurance specific exemptions given those contracts were drafted, formed and priced on that basis.