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Sent: Friday, 28 June 2019 11:31 am

To: Insurance Review <insurancereview@mbie.govt.nz>

Subject: Response to Review of insurance contract law comprehensive form

Preamble question 1

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

nib supports the objectives of the review. In addition we wish to emphasise that an important additional objective is to ensure that ‘insurance remains accessible and affordable for consumers and sustainable for insurers’.

It is well documented that New Zealand has an ‘under-insurance’ problem. The proposed reforms need to recognise the unique nature of insurance, the information asymmetry between insurer and consumer and ensure that the proposals do not increase the uncertainty for insurers in assessing risk, raising costs and other barriers for obtaining insurance.

Preamble question 2

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

We prefer Option 1: Duty to take reasonable care not to make a misrepresentation – as it is the option most likely to be understood by consumers. However, it is likely to increase the length of application forms and the extent of information insurers need to collect. This may result in less engagement by consumers to seek insurance – as it becomes a lengthy and involved process. To minimise this risk it will be important that a ‘misrepresentation’ as defined in new legislation includes an omission (to ensure insurers do not have to ask every conceivable question relevant to the risk).

Option 2: Duty to disclose what a reasonable persons would know to be relevant – this is our second preferred option. However, we are concerned about how the reasonable person criteria would be defined and interpreted. We also consider that consumers may not understand the ‘reasonable person’ criteria and this is likely to result in more differences in opinion between the insurer and consumer and potential disputes.

Option 3: Require life and health insurers to use medical records to underwrite – we do not support this option. We acknowledge that obtaining and reviewing all medical records is sometimes useful to mitigate claims leakage and non-disclosure. However, this is our least preferred option because:

- Some practitioners refuse to supply notes
- Notes are often not complete as people may have a number of different practitioners
- It has the potential to contravene the Privacy Act 1993 as most notes received would not be relevant to the offer of insurance terms
- It leaves interpretation as to what to supply – doctors may supply only parts of notes at their discretion (e.g. electronic records only)
- There is often a cost for supplying medical and health records (often around \$200+GST for notes but there can be additional fees). Some providers may choose to pass these onto the consumer either by incorporating the cost into the premium or through direct payment.

- The collection, review and assessment of medical notes is highly time intensive (and often not required for one-off, limited insurance such as travel insurance). Requiring life and health insurers to undertake this assessment will result in a much higher cost of acquisition and a lower conversion of consumers obtaining insurance due to the process involved
- Insurance may ultimately be offered on worse terms due to the detail received in relation to health information records
- As a result of the Christchurch earthquakes – many medical practices are missing large parts of their notes and are unable to provide notes. This information gap may be detrimental to Christchurch consumers
- Some providers may choose to pass the costs of interpreting medical notes on to the consumer either by incorporating the cost into the premium or through direct payment.

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 support Design Option 1: Requirement to inform consumers of the duty to disclose. nib already provides this information to consumers before they enter into a policy with nib. We note that the proposal requires that the warning should be provided ‘in writing’ before a contract is entered into. This requirement needs to be more flexible and allow for verbal disclosure to be given where an insurance contract is taken out by a consumer calling the insurer.

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?

nib does not support Design Option 2: Disclosure of the use of third party information. The circumstances in which an insurer may determine to access third party records, and any impact this might have on the consumers duty of disclosure, will be specific and tailored to individual insurance application. In our view it is not a practical solution to expect insurers to individually consider these requirements and inform each consumer individually.

Preamble q 5

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

nib supports Option 3: Duty to take reasonable care not to make a misrepresentation. The duty of disclosure has been historically complex and caused a number of issues in the insurance industry. In our view it is therefore preferable to introduce one standard that applies to both consumers and businesses. Any difference in consumer and business understanding of the insurance risk can be managed by the application of what is ‘reasonable care’ for a consumer compared to a business.

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?

In our experience providing health insurance to small businesses is very similar to the relationship and interaction with consumers. For that reason we support the proposal

that genuinely small businesses with typical, standardised needs, should be treated as consumers for the purposes of a duty of disclosure. We have submitted at question 5 above, that the duty of disclosure should be the same for consumers and businesses, and that the only differential needs to be made in relation to what is considered 'reasonable care' by the insurance applicant. If this approach is adopted, then the assessment of the 'reasonable care' that a small business would need to take would be similar to that of a consumer.

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?

We do not support the ability for businesses to be allowed to contract out of the duty to disclose (assuming a duty of fair presentation of risk was adopted).

Preamble question 8

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

We support Option 1: Remedies based on intention and materiality. This remedy puts the parties in the position that they would have been in had the information been provided as required – as long as – the customer has not deliberately or recklessly misrepresented the position. We note that it is very rare for nib to seek to avoid an insurance contract with more appropriate and proportionate remedies usually able to be adopted. However, in the case of deliberate or fraudulent behaviour, it is important for the insurer to have the ability to avoid a contract

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?

Question 9: nib does not support a proposal that insurers be required to pay claims not connected to a non-disclosure or misrepresentation even if the insurer would not have entered into the contract had they known the facts. If an insurer, armed with all the information it required and should have been provided, would have legitimately been able to decline a risk it is unfair to expect the insurer to pay a claim for which it should never have been carrying the risk.

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?

Question 10: nib supports the proposal for insurers to be able to offer reduced cover or ask the insured to cover the difference in order to recoup the amount the insurer would have charged if it had all the facts. We consider that this is a proportionate remedy that incentivises appropriate consumer behaviour.

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?

Question 11: nib does not support the proposal that where a contract has been avoided for deliberate/reckless material non-disclosure/misrepresentation and all claims rejected, that the insured is not required to refund claims money if it is not easily

returnable and would be hard and unfair to the insured. nib does not consider that a consumer who has deliberately or recklessly failed to provide material information to an insurer, should have a statutory ability not return claims money paid. Existing law already provides the framework for when a consumer may seek to establish that it would be unjust to return monies (the concept of unjust enrichment). It is not necessary to introduce a new legal test into the insurance contracts review for this purpose.

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?

Question 12: No comment.

Preamble qn 13

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

nib supports the proposal to replace the provisions for misrepresentation in the Insurance Law Reform Act 1977 and bring them into line into any new remedies for an insured's failure to disclose under this insurance law reform. There is often a similar effect between non-disclosure and misrepresentation and often an act of one can amount to both. In our view, it is preferable to have one regime for both misrepresentation and non-disclosure which should assist with the historic complexity and confusion around an insured's duty to provide accurate information to the 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?

No comment.

Preamble qn 15

What is your feedback on the UCT options?

The exceptions to the unfair contract terms in the Fair Trading Act were only introduced for insurance contracts in March 2015. These exclusions were introduced to recognise the unique nature of insurance contracts and to ensure that insurers could adequately assess and price insurance risk. This is a relatively new regime with very little complaint or consideration on the affect of these exclusions for the benefit of insurance contracts. We consider that it is more appropriate to allow the unfair contract terms contained within the Fair Trading Act to continue to operate – given the lack of any enforcement or case law since they were introduced it is conceivable the existing law is actually operating appropriately. It is not necessary to amend or view these provisions as part of the insurance contract review.

To the extent that any of the options identified by MBIE must be followed, nib's preference would be Option 1: Tailor generic unfair contract term provisions to insurance. nib prefers this option as it most closely aligns with the existing insurance exceptions within the Fair Trading Act and aligns with what Australia is currently considering.

Explanatory text for question 15

Preamble question 16

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

nib supports proposals to increase the level of clarity, understanding and comparison of insurance policies. nib considers that the proposals should consider adoption of the Australian model with the introduction of clear standardised definitions as well as easy to understand product tiers.

For example from 1 April 2019, the Australian Government announced significant reforms to the private health insurance (PHI) industry that were designed to improve affordability and value, enhance the visibility of out-of-pocket expenses and make PHI easier to understand for members.

Under the changes the following has occurred:

Easy to understand product tiers

- Consumers are now able to choose and use their health cover with greater ease, with all hospital policies classified into easy to understand product tiers.
- There are four tiers of hospital products – Gold, Silver, Bronze and Basic – with all insurers required to include the tier in the name of any product that has been designed in line with the Product Tier and Clinical Category reform requirements.
- Products that cover services in addition to the minimum requirements of a given tier may be “Plus” products, e.g. Bronze Plus.
- Designed to improve comparability and understanding of products across private health insurers, the reform helps to eliminate features of the current system which consumers have found confusing.

Standardised Clinical Definitions

- To ensure industry-wide consistency of coverage and in turn simplify PHI for consumers, the Department of Health in Australia developed standardised clinical categories.
- It's great news for consumers who can now compare products more easily across funds with each category consistent between insurers.
 - o For instance, if a member is covered for “Eyes (not cataract)” under one health fund's product they will receive cover for the same items if selecting a product with cover for “Eyes (not cataract)” with another health fund.

By creating similar standardised clinical definitions and product tiers in New Zealand, it would help improve the customer experience and premium affordability. These changes also would bring about more choice, certainty and simplicity to the industry.

Explanatory text for qn 16

Preamble qn 17

What is your feedback on the options?

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?

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

Your organisation

nib nz limited

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?

no

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.