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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:** Thursday, 27 June 2019 7:27 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?**

### **Preamble question 2**

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

I firmly support Option 1. In support of this option I believe that an insurer should also be required to undertake a reasonable inquiry as to the condition/circumstances of the insured at policy inception. For health and life policies this may require them to review medical records where the same are readily available.

I think that it is entirely reasonable that insurers should be responsible for verifying the medical records of insureds. They are the sole party with the expertise and knowledge to determine which factors in the individual's medical records are relevant to the risk they are choosing to insure.

Indeed, the status quo is that insurers do review this material. Indeed this frequently appears to occur when insurers review a claim. As part of the claim process, an insured can be required to provide access to their medical records. If the insurer can, at claim stage, identify potential health indicators and issues of non-disclosure then they clearly have the expertise to review this material at policy inception.

The simple answer is that the insurer is not sufficiently incentivised to undertake a full underwriting of the medical status of the insured.

A further issue for an insured in adequately undertaking full disclosure is the nature of the questions in the application/medical questionnaire. These questions are not able to be answered adequately by the everyday consumer.

For instance, a questionnaire may ask the insured if they have had "any signs or symptoms of" any yet undiagnosed medical conditions that they could potentially have. These signs or symptoms run from the most mundane to the most serious. For instance, has the insured ever experienced dry mouth or fatigue? Alternatively, have you had any signs or symptoms of cardiomyopathy, liver damage or phimosis? How can a lay person discern or understand which symptoms are significant and which are not? In short, how can an insured have the knowledge to be able to self-diagnose these various conditions?

The bottom line is that medical underwriting questionnaires require an insured to make a judgement call. When an insured makes a judgement call, they tend to recall the major illnesses and accidentally omit more minor or mundane issues. They will recall a diagnosis of heart disease. However, an insured may not recall they had tests for the same heart disease. Commonly this is because all tests were eventually negative, and the doctor then provided them with a "clean bill of health".

I completely reject the costs argument. The insurer should be obligated to know what risk they are

taking on. Why do insurance companies demand this unique special protection?

The converse is why should an insurer be able to collect premiums for a piece of insurance that can never be claimed upon because there is an innocent non-disclosure issue? The insured may never claim on that policy and just stop paying. However, the insured has no knowledge that they were paying for cover that would never have been claimed upon.

Lastly, one of the unintended consequences of disclosure is the risk that it will suppress consumers from speaking frankly with their health professionals. If a customer mentions an issue to their GP will an insurance company use that information to decline insurance in the future? Does discussing possible mental health issues with a GP limit that person apply for insurance in the future?

### **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?**

Consumers do not understand the duty of disclosure. The current means of outlining the obligations of disclosure does not overcome this issue. Put simply an insured has no knowledge that they have to disclose their medical history to the degree of detail required to fully mitigate the chance of innocent non-disclosure. Secondly, an insured is very unlikely to retain the information needed to make the required disclosure. Lastly, the insured does not have the required expertise to be able to adequately respond to the very detailed information required by the health questionnaire.

**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 be required to outline the process by which they will review an individual's private information as part of any underwriting procedure. I would encourage insurers to adopt a process of reviewing all third-party material that is available through a 'reasonable inquiry'.

#### **Preamble q 5**

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

The issue of non-disclosure and disclosure by businesses are outside my expertise.

However, the following general comments apply:

1. A business will routinely engage an intermediary broker to assist with the process of application for insurance.
2. A more fulsome underwriting procedure is commonly undertaken when a business rather than an individual applies for insurance.

It appears to be commercially sensible for an organisation to undertake a fulsome underwriting disclosure procedure to ensure itself that it has valid insurance and it will have no issues when it makes any relevant claims on the policy.

### **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?**

I believe that small businesses should have a similar level of protection offered to the consumer. However, that the option to having differing levels of disclosure depending on product type or class of policy, maybe the easiest methodology for the industry to adopt.

**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?**

Clearly an insurer should not be bound where an insured has engaged in deliberate conduct in an attempt to mislead. However, an insurer should not be able to avoid a policy where an insured has made a non-disclosure which is both immaterial and innocent.

The current remedies available do not protect consumers. The current state of the law does not recognise the disparity in power between the two contracting parties.

The complexity of the policy inception phase and the disclosure requirements placed on insureds creates circumstances where an insurer can retrospectively avoid a policy. This does not create certainty for consumers.

The incentive must be for insureds to adequately disclose all material facts known to them without fear that an unrelated non-disclosure has innocently occurred.

**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?**

The threshold for where an insurer would not have entered into a contract is not clear.

**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?**

No, the insurer should have undertaken full underwriting of the risk at inception.

**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 be hard and unfair to the insured? Why or why not?**

In reality an insurer does try to recoup monies paid in error under these circumstances.

**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?**

I agree that should the new remedies for innocent non-disclosure contain similar restrictions on the insureds' right to avoid then those sections of the Insurance Law Reform Act 1977 may be similarly amended. However, I would discourage any undermining of the current right.

**Preamble qn 14**

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

When it comes to the issue of income protection policies, the insurer has absolute discretion to decide whether an insured is unable to work. On that basis, the insured does not have to make a correct determination that is procedurally correct. Instead, the discretion to pay should be based on competing expert evidence. Applying a discretionary right to avoid payment where expert opinion is clear and presents a clear and obvious imbalance in favour of the insurer.

In relation to mental health, any exclusion for mental health should be justified by the insurer. The existing new solutions in life and health-related policies would severely undermine the utility or benefit of these policies. As demonstrated by the Australian research many of these blanket exclusions applied by insurers have no reflection on the real risk posed to insurers, rather an aversion to mental health-related claims. Instead in those applicants that have demonstrated reliance on mental health services, they may indeed present with a lower risk of further mental health-related claims due to a demonstrated history of help-seeking behaviour. To commit this undergoing discrimination against mental health sufferers is clearly unjust. It undermines the efforts to tackle the stigma associated with mental health and isolates mental health as separate to any other health issue. Insurers should be required to rely on statistical data rather than their opinions and a deep misunderstanding of the true nature of mental health conditions.

**Preamble qn 15**

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

**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?**

**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?**

The courts have failed to enforce the mutual obligations of good faith on insurers. The reality is that the Christchurch earthquakes demonstrated that insurers will do anything to avoid paying a claim. The insurer's primary obligation should be for the timely payment of claims. It is simply a farce that coming up to 10 years after an event an insurer can still be equivocal on coverage. An insurer should be required to engage with its insured customers on a good faith basis. It should be required to disclose the basis on which it prepares expert evidence or instructs expert advisors. The insurer should not be able to utilise its commercial advantage to force an insured to accept less than they are contractually entitled to.

**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**

Tim Gunn

**Your organisation**

**Your email address**

**In what capacity are you making this submission?**

individual consumer

**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.**