

# Submission on *Exposure draft Insurance Contracts Bill*

## Your name and organisation

|                              |                            |
|------------------------------|----------------------------|
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## Responses to consultation paper questions

### Part 1: preliminary provisions

1 Do you have any feedback on Part 1 of the Bill?

No

### Part 2: disclosure duties and duty of utmost good faith

2 Do you have any feedback on the Bill's provisions in relation to the duty for consumers to take reasonable care not to make a misrepresentation, including the matters that may be taken into account to determine whether a consumer policyholder has taken reasonable care not to make a misrepresentation?

No

3 Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?

No

4 Do you have any feedback on the Bill's provisions on remedies for breach of the consumer duty in relation to life insurance policies where the misrepresentation was not fraudulent and more than three years ago?

No

5 Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?

No

6 Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?

No

7 Do you have any feedback on the provisions in relation to the insurer's duties to inform policyholders of the disclosure duties, and insurer access to third party information, including how the duties apply for variations of insurance contracts?

No

8 Do you have any feedback on the consequences in the Bill if an insurer breaches duties to inform policyholders of the disclosure duties, and insurer access to third party information?

No

9 Do you have any feedback on how the Bill codifies the duty of utmost good faith?

No

*Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?*

No

*Do you have any other feedback on the drafting of Part 2 of the Bill?*

No

### Part 3: terms of insurance contracts

12

*For claims-made policies, do you consider that 60 days after the end of the policy term is an appropriate period for allowing the policyholder to notify relevant claims or circumstances that might give rise to a claim?*

No, it is not an appropriate period. It is not appropriate to limit the notification period at all. The current law works well and should be preserved.

Section 9 of the Insurance Law Reform Act 1977 is an essential protection for policyholders, while also extending appropriate protection to insurers. Essentially, it means that an insurer can not decline a claim because of late notification, unless the delay in notifying the insurer has caused the insurer prejudice. In other words "no harm no foul". However the bill proposes to remove this protection in relation to claims made policies (such as professional indemnity policies that allow law and accounting firms, amongst many other professional services firms, to serve the public). This would be contrary to the stated purpose of the Bill, being to protect consumers, in that it is likely to:

- (1) reduce competition in the professional indemnify insurance market; and
- (2) result in higher costs to policyholders through increased premiums and uninsured claims, which costs will be passed on to consumers or could even, in the worst instance, ruin otherwise good firms.

Although claims are generally easy to identify (and hence notify), circumstances giving rise to a claim are very frequently not. They are open to interpretation and the situation frequently evolves over time. For instance, a client may express some dissatisfaction with work that was done, without indicating that they will take the matter further, then some weeks, months or even years later lodge a claim. Or a client may become more implacable over time, steadily escalating the amount of time and expense required to placate them. Some clients want us to "just make the problem go away", then complain when we do not, despite the clear unreasonableness of their demand and every appropriate action being taken by the advisor. Some clients have a short fuse and will send an angry email to their advisor, which is most likely just them 'blowing off steam' but which might in a few instances result in a claim being made. In all of these scenarios (and many others) it is only clear in hindsight that there was a possibility of an actual claim (or alternatively considerable expense required to resolve a complaint). This is particularly the case where the advisor has done nothing wrong, yet a client refuses to accept that. It is very often difficult to tell, in the early stages of a complaint, whether there are circumstances giving rise to a claim. But of course an insurer, acting in their own self interest, could take a different view in order to claim that notification was made late and a claim is not covered.

The current law recognises this difficulty, by ensuring that policyholders are not penalised for late notification of circumstances giving rise to a claim – but only on the basis that the

insurer is not prejudiced by the late notification. So both parties are appropriately protected.

Most professional indemnity policies will include cover for earlier unnotified circumstances where the policyholder remains with the insurer (although there is nothing requiring them to do so). So this issue arises primarily where different insurers are involved. If we change insurer and then receive a surprise claim that relates to the period covered by our previous insurer, our new insurer will not provide cover. Under the current law, we would be covered by our previous policy (provided the delay has not caused the previous insurer prejudice). However under the proposed Bill, the previous insurer would not be required to provide cover and we would have no cover at all – simply because we did not appreciate that there had been a circumstance giving rise to a claim (or perhaps there was, perhaps there wasn't, but the insurer takes the view there was and it is uneconomic for us to sue them). There is therefore a real risk in changing insurers.

So one impact of this proposed law change is that many policyholders will be uninsured for what would otherwise be a valid claim.

Another impact is that the risk of changing insurers and losing cover will make policyholders reluctant to move, thereby allowing insurers to increase their pricing and restrict their cover, based not on risk profile but on market power.

It could be argued that the answer is just to notify everything that might have any passing resemblance to an actual risk (claim, complaint) to the business. This is unrealistic. Some claims arise from very innocuous looking circumstances. Furthermore, our own experience has been that adopting a very conservative approach to notifications (notifying everything, not matter how small) gives insurers an excuse to charge higher premiums. It didn't matter that virtually of the notified circumstances never resulted in any claim or insurer involvement. The mere fact that the list of notifications was long was enough for insurers to charge higher premiums. Irrespective of the fact that the notifications were not actually costing them anything. Such is the state of the market and aggressive insurer behaviour.

We understand insurers have claimed this amendment is necessary to allow them to estimate risks with greater accuracy so they know at the end of the policy term what risks they are exposed to. With respect, there appears to be little basis to assert this. Insurers are already offering claim made policies that run for 6 years. They would never do this if they really were concerned about 'estimating risks with greater accuracy'.

The current law a set out in section 9 of the Insurance Law Reform Act 1977 must remain.

13

*Do you consider that insurers should be required to notify policyholders in writing no later than 14 days after the end of the policy term of the effect of failing to notify a claim or circumstances that might give rise to a claim before the end of the 60 day period?*

Yes. If the proposal referred to in 12 above proceeds (which we consider it should not), then it would certainly be appropriate to require insurers to give such a warning to policyholders. Insurance is a specialised and poorly-understood area of law – even for many principals of law firms. And principals of professional services firms are usually extremely busy with core business activity. So it is very likely that, without such a warning, many policyholders would overlook or fail to appreciate the significance of the deadline to notify circumstances giving rise to a claim – resulting in them inadvertently missing out on insurance coverage they assumed they had (and should have).

14 Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?

No

15 Do you have any feedback on the exclusions listed in clause 71(3), which are not subject to the rule for increased risk exclusions in clause 71(1)?

No

16 Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?

No

17 Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?

No

18 Do you have any comments on not carrying over section 10(1) of the ILRA 1977?

No

19 Do you have any other feedback on the drafting in Part 3 of the Bill?

No

#### Part 4: payment of monies to insurance intermediaries

20 Do you consider that changes should be made to requirements for how insurance brokers must hold premium money such as restrictions on brokers' ability to invest or more stringent requirements in line with the client money and property rules in the FMC Act?

I have not considered this issue so do not comment upon it.

21 Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?

No

22 Is it necessary to retain clause 102 (broker to notify insurer within 7 days if a premium has not been received by the broker), and if so, what should be the consequence for breach of clause 102?

I have not considered this issue so do not comment upon it.

23 Do you have any other feedback on Part 4 of the Bill?

No

#### Part 5: contracts of life insurance

24 *If you consider that change needs to be made regarding interest payable from 91<sup>st</sup> day after date of death, please provide any further reasons and provide feedback on whether interest should only begin accruing after 90 days if the insurer has been notified of the death claim and (where relevant) letters of administration or probate have been obtained.*

I have not considered this issue so do not comment upon it.

25 *Do you have any feedback on the proposal that any mortgaging of life insurance policies under new policies be dealt with under the Personal Property and Securities Act 2009?*

No

26 *Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?*

No

27 *Are section 75A of the LIA (relating to a policy entered into by a person for the benefit of the person's spouse, partner or children) or section 2(1) of the Life Insurance Amendment Act 1920 (relating to the reversion or vesting of life policy assigned to a spouse or partner) still necessary?*

I have not considered this issue so do not comment upon it.

28 *Do you have any other feedback on Part 5 of the Bill?*

No

#### **Part 6: regulation-making powers and miscellaneous provisions**

29 *Do you have any feedback on Part 6 of the Bill?*

No

#### **Part 7: unfair contract terms and presentation of consumer policies**

30 *Do you see any unintended consequences from removing sections 18-20, 34-39 and 42 from the MIA?*

I have not considered this issue so do not comment upon it.

31 *In relation to unfair contract terms: which option do you prefer and why?*

I have not considered this issue so do not comment upon it.

32 *Do you have any feedback on the drafting of either of the options?*

No

33 *Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?*

No

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|---|---|
| 34  | <i>Do you have any comments on the regulation-making powers in clause 184?</i>  |
|   | No  |
| 35  | <i>Do you think regulations specifying form and presentation requirements for consumer, life and health insurance contracts (eg a statement on the front page that refers to where policy exclusions can be found) would be helpful? If so, please explain.</i> |
|   | I have not considered this issue so do not comment upon it.   |
| 36  | <i>Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.</i>  |
|   | I have not considered this issue so do not comment upon it.   |
| <b>Timing and transitional arrangements</b> |   |
| 37  | <i>Do you have any initial feedback on when the Bill's provisions should come into effect?</i>  |
|   | No  |
| 38  | <i>Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?</i>  |
|   | No  |
| <b>Schedule 5: amendments to other Acts</b> |   |
| 39  | <i>Do you have any feedback on Schedule 5 of the Bill?</i>  |
|   | No  |

## Other comments

I have been advised by a knowledgeable contact in the professional indemnity insurance industry that expert insurance lawyers are aware of this issue and concerned about it, but will not submit because they do not want to get off side with their (lucrative) insurer clients. Please do not interpret any lack of response to the issues mentioned above as an indication that they are not of concern.