



SUBMISSION ON OPTIONS PAPER – IMPROVING INSURANCE CONTRACT LAW


NOTE: Financial Advice New Zealand is the professional body for Lending, Risk, Financial Planning and Investment Advisers. Financial Advice New Zealand represents the interests of over 1,680 AFA and RFA members.

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1 What is your feedback regarding the objectives for the review?

We are of the belief there should be an additional Objective.

Objective 5 - Accessibility of the insurance market is increased for those who have limited access through lack of knowledge, resources and sophistication. Increased access to the intermediated channel allows for tailored personalised advice thereby increasing accessibility of fundamental protection insurances in the marketplace.

2 What is your feedback in relation to the options for disclosure by consumers? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?

We are supportive of Option 1- Duty to take reasonable care not to make a misrepresentation - as it has the best outcomes for consumers. We believe the pros and cons have been well defined in the paper.

As stated in previous submissions, in our experience we believe consumers have a limited knowledge of their duty of disclosure and the implications if disclosure is not complete. The average consumer would be unaware that the possible remedy for non-disclosure is the contract can be avoided even though the non-disclosure has no connection between the facts that were not disclosed, and the claim being made by the policyholder. This situation is also compounded by lack of clarity of what information to disclose in the law.

Where a consumer applies for insurance without the assistance of an adviser the risk of a non-disclosure is higher and perhaps the insurer receiving the application needs to do more to ensure the consumer is fully aware of their duty, and the implications - something an adviser is likely to have done.

If a consumer does not use an adviser there could be an additional onus on the insurance company to contact the consumer seeking insurance to clearly articulate what their duty of disclosure is and what important information should be included.

Disclosure is important so the insurer can understand the risk associated with the insured and price the premium according to the risk. For the insurance market to work effectively insurers need to be financially viable.

Currently, we believe the burden of disclosure is too high for consumers and recommend a duty to take reasonable care not to make misrepresentations is more appropriate and should be considered.

3 Should insured be required to warn consumer of the duty to disclose? Why/why not? Should insurers be required to warn all insureds of the duty to disclose, including business?

All insured regardless of individual or business should be made aware of the duty to disclose.

The issue is the relevancy of disclosure. A reasonable person does not understand what is deemed material by the insurance company. Therefore, there is a gap in disclosure requirements between the insurance company and the insured. This can lead to a reluctance to purchase insurance as disclosure requirements appears complex and time consuming and the uncertainty of whether you have disclosed everything weighs on the mind if the insured then had to make a claim and had accidentally forgotten something which the insurance company then claimed was material which resulted in a lack of payment at claim time.

We know from our experience as advisers even after reading a section titled 'your duty of disclosure' very few consumers fully understand their duty of disclosure.

We know questions need to be specific, explicit and understandable and many advisers have seen clients change their answers after the adviser intervened with an explanation or prior knowledge of the client's circumstances.

As stated in previous submissions we believe having a questionnaire can create a false sense of security for a consumer as they feel they have answered all the necessary questions, therefore all the material areas for the contract.

Real Example: Most applications have a generic question such as "Any other symptoms or signs for which you are currently experiencing, or have experienced at any time ..." Which is often answered "no" - sometimes due to a lack of understanding what is material, and other times due to question fatigue.

The consumer cannot possibly know what is important and what is not unless they seek assistance from a specialist in the field like a financial adviser who deals with these disclosure duties on a daily basis.

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?

There will be better outcomes for consumers if they understand when access to their records occurs.

There needs to be transparency and clarity at the contract formation point as to when 3rd party records are accessed so there are no false expectations there has been fuller disclosure by attaching or allowing access to medical records.

We know our clients feel if they have stated contact the GP for all records that there is less of an onus on them to disclose in more detail on their insurance application form. As intermediated advisers we understand and guide clients to disclose everything regardless of attachments and accessibility of records.

5 What is your feedback on the options in relation to disclosure by business? In particular: Should businesses have different obligations to consumers? Do you agree with the cost and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?

We support Option 1- Duty to disclose what a reasonable person would know to be relevant. The asymmetry problem is exactly the same in the business insurance context.

6 If we have a separate duty of disclosure for businesses, should small businesses have the same duty as consumers? Why/why not? If so, how should small businesses be defined?

If there was to be a separate disclosure for business, we believe small businesses should have the same duties as consumers. Many small businesses have business owners which are financially unsophisticated and to apply the same level of understanding and disclosure of larger scale businesses is unfair.

The risk and exposure associated with small businesses is significantly less than larger businesses. To differentiate between business by size will also increase accessibility of insurance protection for those businesses.

7 If a duty of fair presentation of risk is adopted, should businesses be allowed to contract out of the duty? What are the costs and benefits of allowing businesses to do so? If businesses are allowed to contract out, should the duty apply to all businesses?

No Comment

8 What is your feedback in relation the disclosure remedy options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?

We support Option 2 – Remedies based on intention and materiality; no avoidance for non-fraudulent material non-disclosure - which allows balanced outcomes and appropriate remedies for both the insured and the insurer. We strongly believe where the insurer has not suffered any significant loss or where it would be harsh and unfair the contract should not be voided.

We acknowledge there are numerous examples where the insurer has adjusted a claim to reflect the non-disclosure position. Sometimes this is a reduction in the amount of cover or could be issued with modified terms.

9 Is it fair to require insurers to pay claims that are not connected to a non-disclosure or misrepresentation, even if the insurer would not have entered into the contract had they known the facts?

The insurance market functions on the basis that insurers can decline to offer insurance if the facts indicate it is not prudent to do so. However, the principle needs to be determined whether non-disclosure was intentional, deliberate and material. If the non-disclosure was not intentional and the nondisclosure was not material to the claim, then payment should be made.

10 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? Why/why not?

The insurer should have the ability to make changes on an existing policy which are forward focussed or void the remaining term of the policy if the insured has misrepresented their position intentionally or unintentionally.

- 11 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?**

The insurers typically have ample opportunity to check and consider a wide range of information prior to paying a claim. Unless there has been a fraudulent or reckless claim paid then we don't believe the claims proceeds should be refunded. The insured should have confidence once a claim is paid the funds received are full and final settlement and the funds cannot be reclaimed at a later date.

- 12 Do you agree that section 35 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?**

No Comment

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

No Comment

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

No Comment

- 15 What is your feedback on the UCT options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

We support Option 2a – unfair contract terms: core terms are exempt unless not transparent and prominent.

Insurance as a product can be unique where certain variables such as age and pre-existing conditions can make a significant difference to the insurer determining the risk and costs.

This needs to be balanced with transparency and accuracy in contracts so all parties understand the basis and terms of the contracts.

When comparing New Zealand to other jurisdictions it is important to remember New Zealand's unique risk profile especially in relation to ACC, public health and the different risks associated with our various demographics and their particular needs.

- 16 What is your feedback on the options to help consumers understand and compare contracts? In particular: Do you agree with the costs and benefits of the options? Do you**

have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which options do you prefer and why?

We are fully supportive of Options 1,2,3 – Require plain-language insurance policies; require core policy wording to be clearly defined; require a summary statement to be provided.

If we are to ensure insurance is accessible for most it has to be easy to understand, have clear definitions and a simple summary of the policy.

A complex document which has dozens of pages does not build consumer trust and confidence. Those that do not use a financial adviser are severely disadvantaged as many consumers are uninformed and would not take the time to understand the complex documentation.

It is fundamentally important insurance companies have the ability to deliver multi-faceted insurance products, so consumers remain to have choice in the market. Many insurance products are inherently complex by nature and there has to be a balance between simplifying insurance so consumers can understand the product and allowing the insurance companies the ability to design insurance products which are relevant to the needs of the insured.

As stated in previous submissions, to effectively compare insurance policies you would need to have an understanding of the different elements which each policy covers, the exclusions in each policy, how the policies interface with each other in terms of discounts and premiums just to name a few of the variations.

Real Example: Trauma policies can range from 11 trauma conditions to 40+. Definitions across different 'trauma' policies can vary widely - for example the treatment of 'heart attack' - one insurer requires 'prolonged chest pain', where another does not. Some life policies have special increase options, some don't. Some income policies will 'offset' ACC income, and some don't. Some are agreed value; some you have to prove the 'pre disability income'.

The above differences can be difficult for consumers to see and understand yet can fundamentally affect the price of the cover and their claim outcome.

However financial advisers provide advice based on knowledge and tools such as subscription-based research to consumers. Financial Advice New Zealand has a website which allows consumers to select a financial adviser to obtain advice as to which is the best provider for them.

We do acknowledge there are simple insurance products which would be suitable for a comparison website.

- 17 What is your feedback on the options in relation to intermediaries? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

We agree there needs to be accountability between the insurance provider and the adviser and this should be determined in contractual agreements and not via the blunt tool of legislation. Therefore, we support retaining the status quo and insurers manage any non-disclosure issues with the intermediary including imposing conditions to hold an agency agreement.

- 18 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?**

FSLAA and the new code requires a higher level of compliance and competency for all advisers which did not previously exist. Under the new regime there is greater responsibility and accountability of adviser's actions and we recommend waiting for the new regime to be implemented before developing new legislative requirements.

- 19 Should consumer insureds be treated differently from commercial insureds in relation to these issues?**

This should be principle based and there should be the same obligations for all.

- 20 What is your feedback on the options in relation to section 11 of the Insurance Law Reform Act 1977? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why? Are the options preferable to the status quo?**

No Comment

- 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? In particular: Do you agree with the costs and benefits of the option? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Is the option preferable as compared with the status quo?**

No Comment

- 22 If the option is adopted, should there be an extended period (e.g. 28 days) for notifying claims or potential claims after the end of a policy term?**

No Comment

- 23 What is your feedback in relation to the option for section 9 of the Law Reform Act? In particular: Do you agree with the costs and benefits of the option? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?**

No Comment

25 What is your feedback to the options in relation to the duty of utmost good faith? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?

We are supportive of Option 2 - codify the duty of utmost good faith. We believe this would provide guidance on the scope and limits of the duty but leave courts flexibility to develop the law further.

26 What is your feedback on the proposal to consolidate non-marine insurance statutes into a single statute?

Consolidation of legislation is considered good practice and allows a better understanding and clarity for the consumer.

27 What is your feedback on our proposed approach in relation to the Marine Insurance Act 1908?

It makes sense to update all insurance law at the same time - what would be the sense in having one insurance law which is outside of the review and modernisation. A piece meal approach to reviewing legislation can create gaps and have unintended consequences. This Marine Insurance Act 1908 has not been reviewed for 6 years.

28 Are the above provisions redundant? Why/why not? Are there other redundant provisions in the legislation covered by this review?

No Comment

29 What is your feedback on the proposed option in relation to registration of assignments of life insurance policies?

We agree the registration system for transfers and mortgages of life insurance policies under the Life Insurance Act 1908 is outdated because it is required to be paper-based and suggest the registration system needs to be updated to reflect modern practice of notices.

30 Should the maximum payment amounts for life insurance policies for minors be increased? Why or why not?

An average funeral is approximately \$8,000 therefore the Life Insurance Act 1908 which limits the payment amount for life insurance policies for minors under 10 years old to \$2000 is outdated and needs modernising. We are recommending the amount to be \$10,000 and the Act should allow for CPI increase to the benefit each year so that the benefit amount stays relevant.