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: Monday, 17 June 2019 4:50 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?

No

Preamble question 2
Do you have feedback in relation to the options for disclosure by consumers?

Yes, we agree with the costs and benefits.

We favour Option 1. The main practical difficulty with this option is what occurs at annual renewals? Perhaps there needs to be a statutory assumption that nothing has changed at renewal unless the insured says otherwise. Insurers should be compelled to remind insureds of this assumption at each renewal and be given the means to easily advise of any changes.

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?

Yes

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

Preamble q 5
What is your feedback on the options in relation to disclosure by businesses?

Yes, businesses should have different obligations because business insurance is considerably more complex than consumer insurance. Consumer policies are relatively similar. Business policies are much more varied and complicated. The range of potential material facts is much greater and harder for even a seasoned insurer to pick.

We prefer Option 2 based on the English reforms. While a reasonable insured test sounds attractive, how does a judge find one way or the other than making the call himself or herself? No one can give evidence as to what a reasonable insured ought to understand has to be disclosed. The English reforms soften the insured's obligations to include facts that put the insured on notice and provide greater certainty as to who in an organisation holds knowledge that potentially has relevance. This all leads to greater certainty in appying the duty.

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?

Business policies are much more complicated than consumer policies and this doesn't change based on whether the business is small or large.

The separate duty for businesses should apply regardless of size because of this.

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?

This is a complexity in the English reforms that we don't believe NZ should adopt. The abiltiy to contract out simply creates greater complexity when the aim is to reduce it and create certainty.

Preamble question 8
What is your feedback in relation to the disclosure remedy options?

The test for avoidance should be a deliberate or reckless breach only. This is the English appraoch. In our view, their is little difference between a deliberate breach and a fraudulent breach. Knowingly giving false information must be both deliberate and fraudulent.

Apart from deliberate/reckless, the remedies should be proportionate as proposed.

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?

No it is not fair to the insurer if that is what it would have done. The insurer should have the remedy as avoidance for deliberate/reckless breach.

The difference is that once an insurer proves a deliberate/reckless breach, the avoidance is an automatic remedy. However, if the breach is innocent (through ignorance) the insurer will have to prove (perhaps based on previous situations) that it would never have insured the risk in the first place. This will not be an automatic remedy and if a court is not satisfied about that, a lesser remedy can be ordered.

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?

Yes.

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?

In our experience, insurers rarely go down this path even if they are legally entitled to. They are content with avoidance stopping payment of the claim under consideration.

However, if it clear there has been a breach and the evidence is clear that the insurer would never have written the risk, we don't see why the insurer should not be entltled to be put back in the position it would have been in if there was no breach.

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?

Yes, it should not apply. We suspect that regime was never intended to appy to insurance contacts, which have always had their own peculiar law arising from the duty of disclosure being unique to them.

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

Yes.

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

Example
Travel Insurance -Potentially unfair. We do not think s46L (4) (d) saves it, as this is a prerequisite to making a claim, not the basis upon which the claim is settled.
Unilateral changes - Potentially unfair. We do not think s46L (4) (a) saves it, as this is not identifying a peril insured.
Income Protection - Potentially unfair. We do not think s46L (4) (d) saves it, as this defines the entitlement to claim not the basis upon which the claim is settled.
Third Party Claims - We think s46L (4) (d) does apply (correctly) as this term states the basis upon which the liability claim is settled. All liability insurance has this provision as the liability insurer's money is at risk and so it is entitled to control the defence accordingly.
Car Insurance - We think s46L (4) (c) does apply (correctly). The fact that this makes the cover narrower does not, of itself, make it unfair. It may just make it uncompetitive.
Travel – Mental Health - We think s46L (4) (c) does apply (correctly). Insurers must be free to decide how narrow or wide their cover is. The Human Rights Act addresses the issue of insurance and disabilities.
Life – Unlawful Act - We think s46L (4) (c) does apply (correctly). Insurers must be free to decide how narrow or wide their cover is and price it accordingly
Pre-existing Conditions - We think s46L (4) (c) does apply (correctly). Insurers must be free to decide how narrow or wide their cover is and price it accordingly.

Preamble qn 15
What is your feedback on the UCT options?

We favour Option 2a.

Explanatory text for question 15
Preamble question 16
What is your feedback on the options to help consumers understand and compare contracts?

We have extensive experience in drafting policy wordings. It is very difficult to compare them in areas other than price because they tend to vary around the 'edges'. Even the way similar exclusions are drafted can make a difference to the application of them.

In our view, it is a brave person who can accurately compare them in detail without being worried about breaching the Fair Trading Act.

Explanatory text for qn 16
Preamble qn 17
What is your feedback on the options?

Brokers are the agents of the insured based on agency law because they accept a retainer to act for them. It goes against this law to artificially deem the other party to the transaction to know what the agent of the first party knows.

The agent (the broker) should answer to his or her principal (the insured) in the usual way for negligently failing to pass on information to the insurer. The answer to agent insolvency is compulsory PI insurance.

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?

You could do this but it goes against agency law and no other intermediaries in other industries are subject to this kind of law e.g. real estate agents. Why single out insurance brokers?

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

No, it is fundamental to the law of agency. The insured's remedy ought to lie with the negligent agent. As we say, agent insolvency is the issue and this can be addressed by compulsory PI insurance.

Preamble qn 20

What is your feedback on the options in relation to section 11 of the Insurance Law Reform Act 1977?

Section 11 has been interpreted too widely by the courts and this has led to problems. For example, some insurers want to offer a cheaper car policy on the basis that no-one under 25 drives it. If, in breach, a person under 25 does drive it, but his or her age had no relevance to the accident, section 11 saves the claim. This cuts across the bargain freely struck between the parties - If anyone under 25 is driving there will never be a claim.

We support the specific exclusions in the troublesome areas.

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?

In our view, section 9 was never intended to apply to claims-made policies and this should be made clear. Section 9 effectively ruins the claims-made mechanism for cover, which is there for a good reason (to avoid the long tail of liability claims).

A short period should be built in (say 30 days) for notification to be made after the policy period expires. Most claims-made policies in NZ already address this contractually in the insuring clause.

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?

Yes.

Preamble qn 23-24

What is your feedback in relation to the options for section 9 of the Law Reform Act?

With respect, I am not sure your proposed reform of removing the statutory charge that decends on the policy funds works. This is an insolvency provision, ringfencing the funds for the claimant, instead of dividing it amongst the unsecured creditors. If you remove the charge and just let the claimant sue the insurer as though the claimant was a party to the policy, doesn't the claimant risk losing its priority over the funds to other creditors?

The Steigrad issue (which only arises from the claimant's claim exceeding the sum insured) has been largely addressed by liability insurers dividing the sum insured between liability cover and defence costs.

Any statutory reform should follow the NSW and English examples.

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?

Yes, it is an insolvency provision effectively.

Preamble qn 25
What is your feedback to the options in relation to the duty of utmost good faith?

We recommend Option 1. Leave it to the courts to consider.

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?

Good idea. Create an Insurance Contracts Act.

Preamble question 27
Do you have feedback on our proposed approach in relation to the Marine Insurance Act 1908?

Keep it separate, but we recommend the English approach, which reformed parts of their Marine Insurance Act in relation to breaches of warranties. Those reforms are just as deservedly needed here and warranties are mainly used in marine insurance.

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

Yes they are redundant and should be repealed.

Preamble qn 29
Do you agree with the proposed option in relation to registration of assignments of life insurance policies?

Yes.

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

The figure of $2,000 was presumably set in 1908 and it is now too low. The main reason you would want to insure the life of a minor under 10 would be to provide a fund for funeral costs in the event of death. With this in mind, we suggest a figure of at least $10,000 is more appropriate.

Your name

Crossley Gates

Your organisation

Keegan Alexander

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?

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.