Introductory comments

A great deal of evidence arose through the insurance fallout after the Canterbury earthquakes that insurers and their policies had imposed an unreasonable and very unrealistic high level of technical knowledge and legal responsibility upon private customers. There was no sign that the approach of insurers was other than self-serving, seeking opportunities to minimise or avoid claims. No effective changes in the industry have occurred since then and legislation is essential for protection of both consumers and the industry.

At the customer level everything in an insurance policy should be clear, easily understood, and not subject to variation or interpretation at some later date. Nothing in an insurance policy should need further explanation to the insured.

Policies must stand by themselves, and contain explanations or definitions of all concepts or expressions that an insurer may rely upon in the future when assessing either a claim or renewal. Silence from a customer does not necessarily mean consent, it may be an indication of either a person out of their depth and not knowing how to deal with that (there can be comprehension or cultural issues involved), or someone feeling they do understand but are incorrect in thinking this.

Dispute resolution schemes are inadequate for the purpose consumers expect them to serve. The dispute resolution process is time consuming, strictly controlled by the insurer[1], and not transparent. Internal insurance review processes have a lengthy time frame (in the the context of claimants who may be experiencing hardship on a weekly or daily basis), involve huge imbalances of knowledge and power. External review processes involve hurdles. The Fair Insurance Code does nothing to provide practical assistance to claimants.

A final stumbling block is the Insurance and Financial Services Ombudsman. There is no certainty of face to face contact with the IFSO, who may not look into conflicts of evidence or other discrepancies, making decisions on the papers supplied to them. This puts claimants at risk as they may not have to ability or support that will allow them to put their position in a thorough and reasoned way. As a consequence the process is skewed in favour of insurers. New Zealand would be better served by a more robust agency.

In solving problems and issues it is essential that the solutions are embodied in statute and not left to insurers to develop voluntary best practices. The insurance industry has not shown itself to be a fair and transparent player so needs to be controlled in an enforceable way[2].

1 e.g. only an insurer can specify that "deadlock" has been reached.

2 On the 24th of June 2019 the Insurance Council of New Zealand issued a media release making the case that general insurers in New Zealand are indeed fair. The evidence provided is not compelling and seems ill-informed. Media release is here: https://www.icnz.org.nz/media-resources/ Accessed 27 June 2019.

1 Review Objectives

Objective 1 of MBIE’s review is stated as: “ *Participants in the insurance market are well informed and able to transact with confidence at all points in the lifecycle of an insurance policy*”. Clarity will be required as to the separate needs of participants (consumer and commercial) and prioritising of needs where conflicts of interest may arise.

Amongst participants the lowest common denominator is the person with limited knowledge of insurance and perhaps having a modest ability with written English either as a first or subsequent language[3]. While insurers would be reluctant to produce comprehensible plain English documents for this group, failure to do so would render reforms meaningless.

2 Duties to disclose information

This seems to be considered a one-way process where those seeking insurance are under a critical obligation to disclose everything the insurer might need to know. There is little evidence of insurers operating under the same obligation (see also the closing comments).

A What is required to be disclosed

At present insurers place an impossible burden on the vast majority of customers because the information specifically sought for policies is not clearly and exhaustively set out. This may not be accidental, as insurers may feel there is a risk to them in not specifying something that later becomes material to a policy or claim[4]. Only insurers have the specialist knowledge, therefore the onus should be upon them to ensure they have all the information they need.

Similarly, there needs to be an obligation on insurers to make clear the customer’s duty to fully disclose all information needed to assess the risk and price the policy. Failure to do so on the part of the insurer could be a form of entrapment. Insurers may hold the view their staff do raise this, however such staff at times work off a script (especially in telephone transaction) and have insufficient understanding to be able to communicate the information in a way that is comprehensible to the customer.

The idea that getting insurance would take longer if there were questions to answer is a dangerous diversion. Considering the importance of insurance, the time cost of applying is nowhere as significant as the financial and personal cost of not fully anticipating an insurers undisclosed information needs.

Recent UK legislation (The Consumer Insurance (Disclosure and Representations) Act 2012) has made a significant distinction between the disclosure obligations of consumer and commercial customers. The essence of the relevant part of the Act is that it “... abolishes the consumer's duty to volunteer information ... Instead, the insurer must ask appropriate questions and the consumer must answer them honestly and carefully. (the Act) imposes on the consumer a duty

3 I have no figures on this but would suggest that perhaps half of all New Zealand citizens and permanent residents over 18 could be disadvantaged in this way.

4 Insurers may express the view that they do everything they can to ensure customers are well informed as the reputation of their business is at stake. This argument has little substance as, like banks, customer churn tends to even out over time.

to take reasonable care not to make a misrepresentation.[5]" this approach would work well in New Zealand.

The bottom line:

- insurers must be required by law to ensure that the products they offer, and especially the conditions, obligations, and exclusions they contain, are easy to understand for all of the client groups they are offered to, and
- if insurers claim it is too difficult for them to disclose their needs in plain language then they must not be permitted to place the obligation to know what is required on customers.

B How much is to be disclosed

Some information requested may seem to an ordinary customer as having no direct relevance to the policy being sought (or renewed).

At a time when privacy issues are prominent, insurers need to explain fully why information is required, how it relates to the policies involved, how long it will be kept, with what other agencies it will or may be shared and under what circumstances. This seems reasonable in terms of the privacy principles 1, 3, 4, 9, and 10 of the Privacy Act 1993.

A compulsory requirement for insurers to include this information in all policy documents would go some way to creating an understanding of what is needed, and how it is important to the insurance contract.

C Problems with legal remedies for non-disclosure

A significant problem with legal remedies is the financial and human cost to claimants. Insurers have the time and resources to devote to claims they wish to challenge, something not available to claimants. In addition, the review and appeal processes available within the insurance industry take time and, being internal, lack transparency and accountability. The Insurance and Financial Services Ombudsman process, while impartial, is not transparent and to all intents works in secrecy – the complainant is not fully involved in the process.

As currently operated claims processing gives the appearance of an insurer looking for reasons to deny a claim[6], non-disclosure being a frequent reason to delay, reduce, or deny a claim. In some instances the consequences of an insurer's decision is way out of proportion to the alleged wrong doing on the part of the insured.

While insurers may claim to use discretion when assessing claims where non-disclosure occurs, this can be subject to pressures other than reasonableness or goodwill, pressures not available to all (e.g. access to legal intervention). How non-disclosure is handled has to be transparent, consistent, proportionate, and enforceable.

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5 https://uk.practicallaw.thomsonreuters.com/6-615-6445?transitionType=Default&contextData=%28sc.Default%29&firstPage=true&bhcp=1#co_anchor_a974480 accessed 27 June 2019.

6 It is not clear whether there are rewards for insurance staff or contractors who identify undisclosed information that could be used to reduce or deny a claim. It would be useful to know whether this is the case.

Where non-disclosure becomes an issue there should be a defined process to determine first, whether what was not disclosed was directly material to the claim and, whether it was clear beyond reasonable doubt to the claimant that the information was required by the insurer.

None of the proposed options address the problems satisfactorily. Recent reforms to UK insurance law provide a well researched and highly relevant path for New Zealand to follow[7]. The UK approach is set out in the *The Consumer Insurance (Disclosure and Representations) Act 2012.* Here non-disclosure is categorised as being one of the following:

- Reasonable
- Careless
- Deliberate or reckless.

Where non-disclosure is reasonable, and having had knowledge of the information would not have caused the insurer to refuse a policy, the insurer cannot decline the claim but has options to either refund all policy monies, or use a statutory formula to reduce the claim (depending on the specific circumstances).[8]

In this way the relative rights and obligations of insurer and insured are set. Rather than try to invent a new system for New Zealand it would be better to follow the UK model.

3 Duty of utmost good faith

The duty of good faith concept has not been a success in New Zealand.

In the past utmost good faith should have been operating equally between the two parties, and has not. The burden placed upon some insureds has been beyond their ability to understand and comply. Insurers, as with banking and insurance in Australia , have acted only in the best interests of their re-insurers and shareholders.

A duty to take reasonable care not to make a misrepresentation, as contained in UK insurance law, would be better suited to insurance consumers in New Zealand. This way the burden is shared by both parties to an insurance policy.

4 Closing observations

Despite high policy fees, and commensurate profits, the insurance industry in New Zealand makes no effort to engage with and inform policy holders at a personal level. Direct communication often involves no more than annual renewal notices.

By comparison a member of the Automobile Association can pay an annual subscription of $89 (Auckland) and receive a whole range of benefits including a member's magazine with up to date product information, law changes, and hints and tips of safety etc. This subscription represents between one and two weeks of fees for an annual comprehensive insurance policy

7 The UK insurance market has a similar legal underpinning as New Zealand's. Unlike New Zealand's industry it is very big (the largest in Europe) and very experienced.

8 Schedule 1, Part 1, (UK) Insurance Act 2015. A description of the UK legislation can be found here: https://uk.practicallaw.thomsonreuters.com/6-615-6445?transitionType=Default&contextData=%28sc.Default%29&firstPage=true&bhcp=1#co_anchor_a974480

for which the insured receives little if any communication from their insurer, and no material on developments in insurance law and how policy holders may be affected, no updates on policy issues arising from claims, disputes and determinations, nor even friendly reminders about things to look out for or to be doing.

While better communication practices cannot be legislated for, the absence of regular personal communication with policy holders underlines the industry's lack of interest in the well-being of its customers.