
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 12:09 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?

Changes have been made to the objectives since MBIE's May 2018 issues paper, to acknowledge the unique nature of insurance contracts and insurance business. The Law Society supports the amended objectives of the review as set out in the options paper.

Preamble question 2

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

Option 1 would abolish the duty of disclosure for consumer insureds and replace it with a duty to take reasonable care not to make a misrepresentation.

The Law Society considers Option 1 is likely to produce the fairest outcome for consumers and insurers. Option 1 would enable New Zealand to maintain equivalent provisions to other common law jurisdictions:

- it is equivalent to the UK Consumer Insurance (Disclosure and Representations) Act 2012, and
- the final report of the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended that "Part IV of the Insurance Contracts Act should be amended, for consumer insurance contracts, to replace the duty of disclosure with a duty to take reasonable care not to make a misrepresentation to an insurer ...".

[Footnote: <https://financialservices.royalcommission.gov.au/Pages/reports.aspx#final>, at Recommendation 4.5, Volume 1, page 302]

Option 2 would take New Zealand's law in a different direction from that of other common law jurisdictions, leading to potential uncertainty and the need for the courts to intervene to provide guidance on the meaning of the terms.

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?

Q3: Yes, insurers should be required to warn consumers of the duty to disclose. Consumers are often not aware of their duty of disclosure, as evidenced by the number of disputes between insurers and their customers relating to the duty of disclosure (examples of such disputes can be found in the case studies on the Insurance & Financial Services Ombudsman (IFSO) website). Many small businesses may also not be aware of the duty to disclose.

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?

Preamble q 5

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

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?

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?

The Law Society considers there would be significant advantages to adopting the proportionate remedies that were introduced by the UK's Consumer Insurance (Disclosure and Representations) Act 2012 for careless misrepresentation.

Unintentional non-disclosure should be treated differently from intentional non-disclosure to discourage poor conduct. For this reason, Option 1 and Option 2 should be considered ahead of Option 3.

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?

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?

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?

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?

In the Law Society's view, neither sections 34 nor 35 of the Contract and Commercial Law Act 2017 should 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?

Preamble qn 14

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

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?

As identified in the options paper, codification could limit the flexibility of the courts to develop the duty of utmost good faith through case law. Further, conduct regulation of insurers has been proposed in the recent Conduct of Financial Institutions: options paper. Including a codified duty of utmost good faith in separate legislation could lead to unintended consequences.

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?

The Law Society supports 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?

The Law Society agrees with the proposal that the legislative provisions governing marine-specific insurance should remain separate from the provisions governing other insurance.

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

Your organisation

New Zealand Law Society

Your email address

In what capacity are you making this submission?

other

Other capacity

NGO (Law Society)

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.