Submission on Discussion Document: Insurance Contract Law Review

To the Ministry of Business, Innovation and Employment

13 July 2018

Please find attached the Health Funds Association of New Zealand's submission for the discussion document, *Review of insurance contract law*.

About Health Funds Association of New Zealand

Health Funds Association of New Zealand Inc (HFANZ) is the industry body representing New Zealand's health insurance sector. The association has eight members, who collectively account for over 80% of the 1.4 million New Zealanders with health insurance. The majority of HFANZ members are not-for-profit organisations, dedicated to the funding of healthcare services for their members and policyholders. A list of HFANZ members is attached to this submission.

Health insurers are collectively the largest funder of healthcare services in New Zealand outside of Government. With 28.5% of New Zealanders covered, health insurers fund around $1.2 billion annually in healthcare – mainly for elective surgery.

HFANZ members return on average 88 cents in every dollar of premium to members and policyholders in the form of funded healthcare services – by far the highest percentage of claims/premium of any form of insurance in New Zealand.

HFANZ members abide by an industry code with a strong emphasis on fair treatment of consumers. As a sector, health insurance enjoys very high levels of customer satisfaction and a track record of low volumes requiring formal dispute resolution services.

Note that the responses set out here specifically relate to health insurance, unless otherwise stated.

Some further industry data will be provided separately from this submission.

Thank you for the opportunity to make a submission. I am happy to provide such further comment or clarification as may be required.

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Roger Styles
Chief Executive

Appendix: HFANZ full members

The following insurers are full members of HFANZ:

- Health Service Welfare Society Limited
- AIA International Limited
- Education Benevolent Society Incorporated
- Manchester Unity Friendly Society
- Police Health Plan Limited
- Southern Cross Medical Care Society
- Sovereign Assurance Company Limited
- Union Medical Benefits Society Limited

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Your name and organisation

Name	Roger Styles
Organisation	Health Funds Association of New Zealand

Responses to discussion document questions

Regarding the objectives of the review

1	Are these the right objectives to have in mind?
	HFANZ agrees with the objectives proposed.
2	Do you have alternative or additional suggestions?
	No.

Regarding disclosure obligations and remedies for non-disclosure

3	Are consumers aware of their duty of disclosure?
	See answer to Q6
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	See answer to Q6
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	See answer to Q7
6	Do consumers understand the potential consequences of breaching their duty of disclosure?
	Question 3/4/6: *HFANZ's experience is that generally health insurance consumers have a degree of understanding of the duty of disclosure and the need to provide accurate information. HFANZ and its members have worked on certain initiatives to promote the understanding of this duty up-front, including provision of online resources and ensuring that application forms are clear and easily understood in terms of the required information. Information is also provided on potential consequences of non-disclosure online and in application forms.*

	In addition, HFANZ members generally underwrite consumers at the time of application, by asking medical questions, rather than at the time of claim. This allows the consumer to have a clearer understanding of what they are and are not covered for at the outset of their cover, and provides them with information about whether the policy is appropriate for their needs. (Underwriting may not be necessary where, for example, pre-existing condition coverage is offered.) *However, we are aware some personal lines insurance (income, disability, life insurers, etc.) underwrite at the time of claim, and do not ask medical questions at the outset, despite no pre-existing coverage. This may mean that a consumer may become aware they are not covered for a specific condition only after a significant period of paying premiums, and at a time where there may be fewer opportunities for them to obtain alternative cover that does meet their needs.*
7	Does the consumer always know more about their own risks than the insurer? In what circumstances might they not? How might advances in technology affect this?
	Question 5/7: *It is difficult for consumers to accurately assess what a prudent underwriter considers to be a material risk. Generally, consumers do not know more about their own risks than the insurer. Premiums for health insurance are generally based on claims paid for age cohorts, so age-related claim risk is assessed actuarially. In some cases, consumers may have some knowledge about their own risks – e.g. specific medical history, family history, availability of genetic information on pre-dispositions, etc., but to consumers this information is factual information relating to them (they are unlikely to be scrutinising this information with the same detail or through the same lens as the insurer). It is the insurer that understands the relevance of those facts to the risks insured.* *In addition, technological advances in the areas of virtual health may enable consumers to provide the insurer with more and greater detail about their health, but not necessarily with any greater understanding of materiality and/or effect on risk. While any formulated duty of disclosure relies on a two-way process with appropriate thresholds and outcomes, financial literacy education is also important, i.e. what is it, why it is key?*
8	Are there examples where breach of the duty of disclosure has led to disproportionate consequences for the consumer? Please give specific examples if you are aware of them.
	HFANZ members generally have processes to ensure a fair and proportionate response. Avoidance of contract is seldom used by HFANZ members, and in practice appears to be largely reserved for cases involving suspected fraudulent activity. It would be counterproductive to business for an insurer to develop a reputation for not paying claims as insurers rely on continued and new business. Claims that are declined on the basis on non-disclosure are generally limited to those where the facts not disclosed were relevant to the specific claim under consideration.
9	Should unintentional non-disclosure (i.e. a mistake or ignorance) be treated differently from intentional non-disclosure (i.e. fraud)? If so, how could this practically be done?
	In principle, unintentional non-disclosure should be treated differently than intentional non-disclosure (fraud). However, in practice there are difficulties in ascertaining intention.

	Relevance, scale, and impact are also important factors in determining how to treat non-disclosure. In practice, some HFANZ members may cancel/avoid a policy for fraudulent non-disclosure, whereas in a case of unintentional non-disclosure members would typically instead decline the claim and/or add or an exclusion to the policy for a pre-existing condition (where appropriate). However, given it is difficult to prove intention, we believe it is important to retain a full suite of remedies to be applied as appropriate to the particular circumstances.
10	Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?
	We agree that the remedy available to the insurer should be proportionate to the harm the insurer has suffered, however it should not be overly complex to operationalise and determine. While an ability to cancel or avoid a contract is important to retain as an effective deterrent against fraud, HFANZ members typically apply remedies proportionate to the harm.
11	Should non-disclosure be treated differently from misrepresentation?
	Unintentional non-disclosure should be treated differently than misrepresentation. Intentional non-disclosure is arguably similar to misrepresentation. Again, the degree, relevance and impact are important factors.
12	Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?
	N/A for personal health insurance.
13	In your experience, do insurers typically choose to avoid claims when they discover that an insured has not disclosed something? Or do they treat non-disclosure on a case-by-case basis?
	See answer to Q14
14	What factors does an insurer take into account when responding to instances of non-disclosure? Does this process vary to that taken in response to instances where the insurer discovers the insured has misrepresented information?
	HFANZ members typically respond to issues of non-disclosure in respect of a claim on a case-by-case basis, or in accordance with protocols they have developed over time. Often this results in claims being paid, or ex gratia payments made. Other times a claim will be declined, and a relevant exclusion added to the policy. *Some of the important factors used by HFANZ members in dealing with such cases of non-disclosure are relevance and materiality, the context of other information disclosed, explanations provided by the insured, and the length of the policyholder's custom.* *For example: a claim early into a policy coupled with significant material non-disclosure can be indicative of potential fraudulent behaviour.* *Alternatively, an unintentional non-disclosure where disclosure has generally been thorough and a policy has been in place for a number of years often results in an insurer settling a claim.*

General comment on disclosure:
Ideally, any reform to this area should make it easier for:

- *Consumers to:*

i) understand the importance of disclosure; and

ii) disclose material information, such as medical history or notes.

- *Insurers to:*

i) ask the right questions or seek clarification at the outset; and

ii) assess and price the risk accurately.

Achieving both of these should help minimise the likelihood of problems down the track.

Where issues do arise, the notion of a fair response proportionate to the circumstances is supported.

Regarding conduct and supervision

15	What do you think fair treatment looks like from both an insurer's and consumer's perspective? What behaviours and obligations should each party have during the lifecycle of an insurance contract that would constitute fair treatment?

Regarding conduct and supervision (Q15-23)

HFANZ members have voluntarily adopted an industry code, and the code has governed health insurance in New Zealand for the past three decades. It is subject to regular reviews for relevance, with its last review in September 2017. The code is principles-based and requires member health insurers to comply with a number of obligations, including fair treatment of customers. A copy of the HFANZ Health Insurance Industry Code can be found here: **https://docs.wixstatic.com/ugd/606d2f_116fb42ccb604653a3c3484dedc156ac.pdf**

The Insurance and Financial Services Ombudsman is the principal dispute resolution body to which health insurers in New Zealand belong, and is able to take account of the HFANZ industry code in investigating any disputes before it.

Q15:

Fair treatment encompasses a number of dimensions, including:

- *Prompt assessment and processing of claims. Most health insurers have some form of pre-approvals process which confirms the claim for treatment will be paid. The speed of access to health treatment is part of the value proposition of health insurance, so delays in claim processing are rare*

- *Provision of clear and accurate information to customers and prospective customers*

- *Not engaging in any misleading selling of product – either directly or through*

	intermediaries • *Treating customers' personal and health information with care and in accordance with privacy requirements* • *Ensuring there are adequate internal dispute resolution procedures in the event of a dispute.* *Most health insurers have a range of products and options for cover available which customers are able to migrate to as they age or as circumstances change.* *For example: As premiums increase with age, there are generally options to move to a more affordable product – such as switching from comprehensive to major medical or surgical only cover. Further options to assist with affordability include selection of a higher claims excess in return for lower monthly premium – effectively self-insuring a portion.*
16	To what extent is the gap between ICP 19 and the status quo in New Zealand (as identified by the IMF) a concern?
	Many of the fair conduct requirements in ICP 19 appear to be encapsulated in the current HFANZ industry code. As far as health insurance is concerned, there do not appear to be significant issues arising in relation to HFANZ members. We note that not all health insurers operating in NZ are members of HFANZ, and would support extension of principles for fair conduct to all providers.
17	Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?
	In relation to health insurance, to HFANZ's knowledge there is little evidence that the current regime has led to significant risks to policyholders over the policy lifecycle.

18	What has your experience been of the claims handling process? Please comment particularly on:
	
	• timeliness the information from the claims handler about:
	  ○ timeframes and updates on timeframes
	  ○ reasons for declining the claim (if relevant)
	  ○ how you can complain if declined
	• The handling of complaints (if relevant)

	Around 500,000 people each year have health insurance claims funded, with over a million individual claims paid each year. More than 95% are approved and just a tiny fraction of those declined are disputed. Further industry data on this can be supplied. *HFANZ member experience (including through monitoring customer satisfaction) shows the experience for most health insurance claimants is extremely positive. Over time, processes have improved with innovations enabling online claims, preapprovals, and arrangements with providers to ensure seamless treatments and claims processing by direct funding of providers.* *Against the backdrop of over a million claims paid annually, the incidence of customer*

	dissatisfaction in relation to health insurance is extremely low.
19	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
	N/A
20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
	N/A
21	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
	In line with the health insurance industry code, HFANZ members are careful to ensure that, where intermediaries are used, adverse outcomes for consumers do not arise. As a result of this focus, together with recent and ongoing improvements to the adviser regime, it is considered that there is limited scope for any mis-selling to occur in relation to health insurance today.
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
	In relation to health insurance, particular sales incentives in and of themselves arguably do not cause poor outcomes for purchasers (other than inflating overall premium). However, to the extent that there is any recommendation to change insurance provider which results in an adverse outcome for a consumer (such as loss of cover for pre-existing conditions), then there is arguably some link.
23	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?
	In relation to health insurance, HFANZ members must comply with the industry code, which provides assurance that health insurers will act in good faith and deal fairly with customers. This arguably extends to an insurer's responsibility to ensure intermediaries being remunerated for sales are also acting in the customer's interest. In general, it appears that potential conflicts of interest are being managed, although there is always room for improvement. The current review of the legislation and code for financial advisers is also putting customer interest at the forefront of an adviser's responsibilities, so some improvement in outcomes can be expected.

Regarding exceptions from the Fair Trading Act's unfair contract terms provisions

24	Are you aware of instances where the current exceptions for insurance contracts from the unfair contract terms provisions under the Fair Trading Act are causing problems for consumers? If so, please give examples.
	In relation to health insurance, HFANZ is not aware of any significant issues or problems for consumers arising from the current exceptions for insurance contracts from the unfair contract terms provisions in the Fair Trading Act.

25	More generally, are there terms in insurance contracts that you consider to be unfair? If so, why do you consider them to be unfair?
	No, we consider the contracts reflect the terms reasonably necessary to protect the legitimate interests of insurers.
26	Why are each of the specific exceptions outlined in the Fair Trading Act needed in order to protect the "legitimate interests of the insurer"?
	The specific exceptions in the Fair Trading Act apply to a number of terms that have been deemed to be reasonably necessary to protect the legitimate interests of the insurer. This is a narrower approach than the general exemption applying in Australia to insurance contracts. *Inclusion in this manner is a convenient way of dealing with a set of specific terms which are reasonably necessary – not just to protect the legitimate interests of insurers, but to ensure well-functioning insurance markets.*
27	What would the effect be if there were no exceptions? Please support your answer with evidence.
	If there were no specific exceptions, there might be a number of ways of dealing with the issues, although this may involve considerable effort in terms of both legal cost and time involved on both the part of the insurer and the consumer. Arguably, some of the terms probably cannot be deemed unfair under a separate section of the Fair Trading Act as they relate to the main subject matter of the contract – i.e. the good or service being acquired under the contract. The 'main' subject may include more than one thing, so in relation to an insurance contract may include, for example, the type and extent of cover, the premium, any exclusions, and the term. Matters listed in the current exclusions which could not be said to pertain to the main subject matter would then need to meet the test of being reasonably necessary. *It is noted that the issues paper gives consideration in other places to codifying a number of common law provisions. The proposal to remove the specific exceptions in this part is, in our opinion, contrary to the codifying approach. On balance it is considered the present approach provides a cost-effective way of dealing with a specific set of terms which are quite unique to insurance contracts, and help ensure a well-functioning insurance market.*

Regarding difficulties comparing and changing providers and policies

28	Is it difficult for consumers to find, understand and compare information about insurance policies and premiums? If so, why?
	In relation to health insurance, it is relatively straightforward for consumers to access information on policies and premiums. Most insurers have online information, some including premium calculators which provide an age-based indication of premium. The HFANZ website contains some useful consumer resources about types of policies, coverage, costs of surgery and other important information. *Many advisers will also provide comparative information on different providers. In addition,*

	there are some online comparison tools, although these often only provide a high level comparison, and not on all relevant aspects of policies, and this lack of full analysis can in itself be misleading. In addition, such sites may have a marketing overlay, as they are associated with a specific adviser who may be on differing rates of commission in regard to each insurer being compared.
29	Does the level of information about insurance policies and premiums that consumers are able to access and assess differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	See above comments in relation to health insurance. One other factor with health insurance is in the group health insurance space, the relationship is both an insurance relationship between the insurer and the individual employee, and also a billing relationship between an insurer and the individual's employer. In these circumstances, the employee will often be making a decision about whether or not to accept the particular subsidised insurance being offered by their employer, and comparison with other insurers has less relevance in this context.
30	What barriers exist that make it difficult for consumers to switch between providers?
	In relation to health insurance, the ability to switch between providers is generally easy while still young and without significant pre-existing conditions. As people move into older age groups and develop health conditions, they may experience some difficulties in finding alternative health insurance cover which provides the same level of cover and/or for an equivalent premium, especially in relation to health conditions which they may have developed while a policyholder with their current insurer.
31	Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	See above comment in relation to health insurance. Again, we note that in the specific case of group scheme health insurance subsidised by employers, the question of coverage may be less of an issue, as insurers aren't effectively underwriting the individual and pre-existing conditions will often be covered.
32	What, if anything, should the government do to make it easier for consumers to access information on insurance policies, compare policies, make informed decisions and switch between providers?
	In relation to health insurance, it is not clear that there is any broader role for government in terms of helping consumers access information on policies and providers. This is arguably best left to those providers in the marketplace providing information and marketing and the insurance products people want. *There may however be room for an independent tool that provides an accurate and complete comparison of health insurance policies for consumers, not tied to any specific insurer or their intermediaries.* *In relation to health insurance and the options for government to encourage switching between providers, it is noted that in other parts of the review the focus is on the downsides from too much switching between providers, and any tool provided to enable consumers to compare policies for the purpose of switching would need to make this aspect very clear.*

Regarding third party access to liability insurance monies

33	Do you agree that the operation of section 9 of the Law Reform Act 1936 (LRA) has caused problems in New Zealand?
	[Insert response here]
34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
	[Insert response here]
35	What has been the consequence of the problems with section 9 of the LRA?
	[Insert response here]
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	[Insert response here]

Regarding failure to notify claims within time limits

37	Do you agree that the operation of section 9 of the Insurance Law Reform Act 1977 (ILRA) has caused problems for "claims made" policies in New Zealand?
	[Insert response here]
38	What has been the consequence of the problems with section 9 of the ILRA?
	[Insert response here]
39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	[Insert response here]

Regarding exclusions that have no causal link to loss

40	Do you consider the operation of section 11 of the Insurance Law Reform Act 1977 (ILRA) to be problematic? If so, why and what has been the consequence of this?
	[Insert response here]
41	The Law Commission proposed reform in relation to exclusions relating to the characteristics of the operator of a vehicle, aircraft or chattel; the geographic area in which the loss must occur; and whether a vehicle, aircraft or chattel was used for a commercial purpose. Do you

	agree that these are the areas where the operation of section 11 of the ILRA is problematic? Do you consider it to be problematic in any other areas?
	[Insert response here]
42	If you agree that there are problems with section 11 of the ILRA, what options should be considered to address them?
	[Insert response here]

Regarding registration of assignments of life insurance policies

43	Do you agree that the registration system for assignment of life insurance policies still requires reform?
	[Insert response here]
44	If you agree that there are problems with the registration system for assignment of life insurance policies, what options should be considered to address them?
	[Insert response here]

Regarding responsibility for intermediaries' actions

45	Do you consider there to be problems with the current position in relation to whether an insurer or consumer bears the responsibility for an intermediary's failures? If possible, please give examples of situations where this has caused problems.
	In relation to health insurance, HFANZ is not aware of significant issues of the type described in the issues paper. The main issues in relation to intermediaries are arguably those canvassed earlier in the paper in relation to conduct and supervision – namely around sales incentives and outcomes particularly around switching behaviour.
46	If you consider there to be problems, are they related to who the intermediary is deemed to be an agent of? Or the lack of a requirement for the intermediary to disclose their agency status to the consumer? Or both?
	The above mentioned issues are perhaps more conduct issues and unrelated to particular agency or deemed agency status.
47	If you consider there to be problems, what options should be considered to address them?
	HFANZ is comfortable with the 2008 proposals including deemed agency.

Regarding insurance intermediaries – Deferral of payments / investment of money

48	Do you agree that the current position in relation to the deferral of payments of premiums by

	intermediaries has caused problems?
	[Insert response here]
49	If you agree that there are problems, what options should be considered to address them?
	[Insert response here]

Other miscellaneous questions

50	Are there any provisions in the six Acts under consideration that are redundant and should be repealed outright? If so, please explain why.
	N/A.
51	Are there elements of the common law that would be useful to codify? If so, what are these and what are the pros and cons of codifying them?
	HFANZ hasn't identified other areas or elements of common law which might be useful to codify.
52	Are there other areas of law where the interface with insurance contract law needs to be considered? If so, please outline what these are and what the issues are.
	In relation to health insurance, there are other areas of law where consideration should be given to the interface with insurance contract law, including: • *Insurance (Prudential Supervision) Act 2010: The RBNZ is charged with the prudential regulation and supervision of the insurance sector. While there is generally a good alignment of outcomes in terms of a well-functioning insurance market, there are potentially specific issues of concern or conflict. An example is the unfair contract terms exemptions which were supported from a prudential regulatory perspective* • *Privacy Act & Health Information Privacy Code: In relation to health insurance, the Privacy Act and specific rules around health information have been particularly relevant. In the past, issues such as an insurer's ability to request medical information, such as doctors' records, in assessing claims have sometimes been in the spotlight. If the intention is to move to a regime where there is better disclosure at the outset, then it might be timely to look at improving the ease of access and sharing of medical information on a confidential basis between policyholders (and prospective policyholders) and insurers* • *Human Rights Act: The ability to alter pricing and cover on the basis of age, sex and disability is essential to a risk-rated health insurance system.*
53	Is there anything further the government should consider when seeking to consolidate the six Acts into one?
	[Insert response here]

Other comments

We welcome any other comments that you may have.
[Insert response here]