



Law Council
OF AUSTRALIA

Legal Practice Section

28 February 2020

Senior Adviser
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: FSRCconsultations@treasury.gov.au

Dear Sir/Madam

DUTY TO TAKE REASONABLE CARE NOT TO MAKE A MISREPRESENTATION TO AN INSURER

1. The Australian Consumer Law Committee (**the Committee**) of the Law Council of Australia's Legal Practice Section¹ welcomes the opportunity to make a submission to the Treasury in relation to the consultation regarding the proposed implementation of a duty to take reasonable care not to make a misrepresentation to an insurer in accordance with recommendation 4.5 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Financial Services Royal Commission**).
2. The Committee strongly supports the broad scope proposed. It also supports:
 - the presumption that the contract is a consumer insurance contract at section proposed new section 11AB(3) *Insurance Contracts Act 1984* (Cth) (**Insurance Contracts Act**);² and
 - the amendment of the duty of utmost good faith under Part II of the Insurance Contracts Act so that the duty is limited to the new duty to take reasonable care not to make a misrepresentation.³

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

² Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures) Bill 2020 (Exposure Draft- FSRC rec 4.5 (duty of disclosure to 7 insurer)) cl 2.

³ Ibid cl 3.

3. The Committee supports the introduction of section 20B to the Insurance Contracts Act as drafted where the effect of the provision is to place the onus upon the insurer to ask questions in respect of any consumer insurance contract.⁴
4. It is appropriate that proposed subsection 20B(2) ensures that regard must be had to all the relevant circumstances of a particular case when determining whether the insured has fulfilled the new duty to take reasonable care not to make a misrepresentation to the insurer.⁵ This introduces an important consumer protection. The specific examples provided under proposed subsection 20B(3) provide greater certainty. The Committee notes that the examples mirror section 3(2) of the *Consumer Insurance (Disclosure and Representations) Act 2012 (UK)* with minor amendments which fulfils the purpose of the recommendation.
5. Ultimately, the list of factors works in the favour of the insured. It places the onus on the insurer, and not the insured, to ensure it exercised reasonable care to 'induce' the consumer's compliance with their duty to take reasonable care not to misrepresent. Therefore, the insurer needs to act professionally, potentially have regard to current thinking in respect of behavioural economics to the benefit of the consumer, and not to the insured's detriment.
6. Disclosure questions can be confronting, confusing and can lead to a consumer inadvertently and incorrectly advising the insurer. For example, using unusual or outdated terminology can cause problems in terms of consumer comprehension.
7. Insurers must be required to provide better records in respect of how they informed consumers of their duty of disclosure and the answers to any questions.
8. Proposed subsection 20B(4) requires particular characteristics or circumstances of the insured individual known or the insurer ought to have known, must be taken into account is supported.⁶
9. The Committee strongly supports subsection 20B(5) that the insured is not to be taken to make a misrepresentation in respect of the new duty merely because they failed to answer a question or gave an obviously incomplete or irrelevant answer to a question.⁷ This reflects current law and places the onus on the insurer to follow up.
10. It is the Committee's understanding that the formulation in the UK imposes different remedies depending on the consumer's state of mind and whether it was careless or deliberate or reckless. Implicit in this current recommendation is that the same outcomes are achieved through application of sections 28 and 29 of the Insurance Contracts Act without amendment.
11. 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 (and to make any necessary consequential amendments to the remedial provisions contained in Division 3).

⁴ Ibid cl 4.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

12. The Law Council would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Chair of the Committee, Ben Slade on BSlade@mauriceblackburn.com.au

Yours sincerely

Margery Nicoll.

Margery Nicoll
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