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## Annual Healthcare Conference

### The Law Commissions' Insurance Contract Law Review

Pre-contract information & Warranties

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## What are we looking at?

- English and Scots law
- Consumer and commercial insurances (including MAT)
- General and long-term business
- Insurance and reinsurance



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## Provisional Timetable

- Scope
  - Scoping Paper – Jan 2006
  - Analysis of Responses and Decisions on Scope – Aug 2006
- Part 1 – Key issues
  - Issues Paper 1 – Misrepresentation and Non-disclosure – Sept 2006
  - Issues Paper 2 – Warranties – Nov 2006
  - Issues Paper 3 – Intermediaries and pre-contract information – Mar 2007
  - Consultation Paper 1 – Summer 2007
- Part 2 – Other issues
  - Issues Papers – 2007
  - Consultation Paper 2 – 2008
- Part 3 – Final Report and draft Bill (2010?)
- Part 4 – Codification?



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## Overall aims

- Increase customer confidence
  - Consumers, confidence in insurance
  - Business, confidence in insurance under English law
- Law should meet reasonable expectations
  - Accord with good practice
  - Departures from norm should be clearly signalled
- Law should be clear and coherent

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## Why may reform be needed?

- Consumers
  - ABI Statements, ICOB Rules, FOS?
    - FOS will not/cannot deal with all cases
    - Regulators unhappy
    - Hard to understand/incoherent
- Business insurance
  - Doesn't match reasonable expectations
  - Europe

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## Pre-contract information from the insured

- Utmost good faith
  - Duty to disclose material facts
  - No misrepresentation of material facts
  - Remedy of avoidance
- Warranties of present or past fact
  - Specific or "basis of contract" clause
  - Strict liability
  - Need not be material
  - If breach, insurer discharged from liability

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### Misrep & Non-Disclosure Criticisms: Consumer

- Residual duty of disclosure poorly understood – particularly by consumers
- Consumer may have no rights though acted honestly and reasonably
- Remedy of avoidance gives “all or nothing” result

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### Misrepresentation & Non-Disclosure The FOS Approach

- No residual duty of disclosure
- Deliberate, reckless, inadvertent, innocent
- No avoidance if innocent
- If inadvertent other remedies considered including proportionality
- Return of premium unless fraud

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### Consumers: 3 principles

- Consumer should not be expected to give information for which not asked
- Consumer who gave inaccurate or incomplete information honestly and reasonably should not lose claim
  - reasonably did not think relevant to insurer
  - had reasonable grounds for statement
- If consumer was honest but careless, should depend on what insurer would have done

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## Consumers: Tentative Proposals 1

- No duty to disclose
- Duty to be honest and use reasonable care in answering questions
  - accurately and completely
    - misleading partial answer
    - no answer at all

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## Consumers: Tentative Proposals 2

- No remedy if consumer honest and careful
  - "materiality" replaced by relevance
  - i.e. no remedy unless either:
    - A reasonable insured in the circumstances would have appreciated that the facts in question would be relevant to the insurer OR
    - Proposer actually knew that they would be relevant
  - Even if knew/should have known material
    - No remedy unless negligent in giving inaccurate/incomplete answer

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## Consumers and misrep: Tentative Proposals 3

- Remedies dependent on state of mind or conduct of insured:
  - Inducement, that if it has known the true facts it would not have entered into the contract at all or on the relevant terms
  - Dishonesty – avoidance
    - Deliberate or reckless whether untrue or material
    - Balance of probabilities
  - Negligence – look at what the insurer would have done:
    - Decline risk – avoidance
    - Exception – rewrite the policy terms or
    - Increase in premium - proportionality

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## Consumers and misrep: Tentative Proposals 4

- No contracting out of rules except to the benefit of the consumer

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## Consumers and misrep: A question

- Life insurance
  - Time limit (e.g. 3-5 years) on avoidance for misrepresentation ?
    - Except where deliberate or reckless misrepresentation

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## Warranties Criticisms

- Specific warranties of fact
  - Need not be material
  - Misstatement may be non-negligent
  - Effect not understood by insured
- All warranties
  - Policy discharged for breach
    - No causal connection with loss
    - Cured before loss

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## Consumers: tentative proposals

- Warranties as to future
  - Set out in schedule
  - Reject claim only if causally connected
- Warranties of specific facts ineffective

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## Exceptions and definitions of risk

- Exclusion of certain conditions
  - Less draconian but may take insured by unfair surprise
- Unfair Terms in Consumer Contracts Regulations 1999
  - Not exempt as "core term" unless
    - In plain, intelligible language
    - Represent how deal presented to customer

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## Intermediaries: problems

- Information disclosed by insured and not passed on:
  - Agent of insured
  - Unless binder/authorised rep.
- Proposal completed by intermediary, signed by insured without spotting mistake or omission:
  - "transferred agency"
  - Signature on form conclusive of knowledge
- MIA s 19(a): agent's duty to disclose

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### Intermediaries: consumer

- Information disclosed by insured and not passed on:
  - "tied"/"multi-tied": agent of insurer
- Proposal completed by intermediary, signed by insured without spotting mistake or omission:
  - No "transferred agency"
  - Signature on form not conclusive of knowledge

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### Businesses and pre-contract info – a problem?

- On average
  - More sophisticated
  - More likely to be advised
- Ways of doing business differ
- Much greater range of risks
- But
  - Many not expert
  - Buy off-the-shelf policies without advice
  - Law contrary to reasonable expectations
  - Fewer business/consumer differences, the better

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### Businesses and Non-Disclosure – Tentative Proposals 1

- Residual duty of disclosure retained

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### Business insurance: 3 principles

- Proposer who gave inaccurate or incomplete information honestly and reasonably should not lose claim
  - Did not think relevant to insurer
  - Had reasonable grounds for statement
- If proposer was honest but careless, should depend on what insurer would have done
- “Default” position, unless agreed otherwise
  - Standard term should not make cover substantially different from reasonable expectations

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### Business and misrep – Tentative Proposals 2

- Honest and careful insured should be paid
- Materiality: insurer must show
  - Either:
    - That proposer appreciated that the facts in question would be relevant to the insurer
  - Or
    - That a reasonable insured in the circumstances would have appreciated that they would be relevant

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### Business and misrep – Tentative Proposals 3

- Should remedies dependent on state of mind or conduct of insured? i.e.
  - Innocence – no remedy
  - Deliberate or reckless – avoidance
  - Negligence -
    - Avoidance? Or
    - Look at what the insurer would have done?
      - Decline risk – avoidance
      - Exception – rewrite the policy terms
      - Increase in premium - proportionality

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### Businesses and fact warranties - Criticisms

- Basis of contract clauses
- Specific warranties of fact
  - Need not be material
  - Misstatement may be non-negligent
  - Effect not understood by insured
  - Policy discharged for breach
    - No causal connection with loss
- Used to define risk
  - Warranty of class

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### Business: Tentative Proposals 4

- Basis of contract clause of no effect
- Permit specific fact warranties
  - If in schedule to policy (or equivalent)
  - Ground of refusing claim only if material, causal link
  - Unless otherwise agreed
    - Standard term should not make cover substantially different from reasonable expectations

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### Business: Tentative Proposals 5

- Warranties as to future
  - Stated in schedule
  - Causal connection
- Exceptions/definitions or risk?
  - NZ: any term that purports to exclude insurer's liability when event thought to increase risk
    - What if wholly outside policy?
      - Not if used in wholly different place or manner
    - Not if standard term, would make cover substantially different from reasonable expectations

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### Effect on contract

- No automatic discharge
- Claim may be refused if connected
- Insurer will have option to terminate immediately
  - Only if serious breach, unless agreed
  - May reserve right to cancel for any reason after notice period
    - Not if standard term, would make cover substantially different from reasonable expectations
- Right may be lost – affirmation/estoppel

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### Intermediaries: business

- No change on agency
- Signed form: as consumer
- MIA 1906 s 19 (Disclosure by agent)
  - s 19(a)
    - Damages against agent
    - Duty to pass information up chain to placing broker?
    - Exclude confidential information
      - Or limit to information obtained in same transaction?
  - s 19(b) – needed?

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