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The evolution of insurance law in Fiji: The past and present

Pradeep Krishan Tiwari* and Gaurav Shukla†

The legislative history of insurance in Fiji reflects two main objectives — prudential regulation and consumer protection. Consumer protection is essential in the industry not only as a goal in itself but also because the lack of consumer protection ultimately will prevent take-up of insurance and thus destroy the industry. In other words, customer satisfaction is not only the need for the insurance sector to survive it is the most essential factor for providing social security. Thus, it is often consumer protection and community concerns that drive the regulation of the industry, even where prudential regulation is concerned. The article takes up the historical development of insurance legislation during different times to understand the focus of lawmakers and keeping the customer satisfied.

I Pre-independence era (before 10 October 1970)

The colonial expansion in the 19th century in Asia, Africa and the Pacific was for the economic and political advantage of Britain, France, Germany, Japan and other major European powers.¹ In the late 19th century, European settlers began to arrive in Fiji. The first European settlers to Fiji were beachcombers, missionaries, whalers, merchants and those engaged in the then-booming sandalwood and bêche-de-mer (sea cucumber) trade.² On the other hand, the rising price of cotton in the wake of the American Civil War (1861–65), led thousands of planters from Australia and the United States to come to Fiji in search of land and cheap labour to grow cotton.³ To fulfill the demand for labour, people from New Hebrides were brought to Fiji to work on cotton plantations. The demand for cotton receded after the American Civil War

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1 Joeli Baledrokadroka, 'The Fijian Understanding of the Deed of Cession Treaty of 1874' (Research Paper, School of Law, University of Auckland, 30 July 2021) 4 <<https://dli.dlib.indiana.edu/dli/bitstream/handle/10535/1151/Baledrokadroka.pdf?sequence=1>>.

2 Lynda Newland, 'Fiji' in Manfred Ernst (ed), *Globalisation and the Re-Shaping of Christianity in the Pacific Islands* (Pacific Theological College, 2006) 317, 319 <https://www.academia.edu/277071/Fiji_in_Globalization_and_the_Re_shaping_of_Christianity_in_the_Pacific_Islands?sm=b>.

3 Committee to Promote the Representation of the Colony, *The Colony of Fiji 1880* (Pamphlet, December 1880) 6 <<https://nla.gov.au/nla.obj-69241620/view?searchTerm=St+Pinnock+Fiji&partId=nla.obj-69264418>>.

ended in 1865. While this affected the Fijian economy,⁴ it indirectly inspired ‘blackbirding’.⁵ This was the beginning of a new era for Fiji.⁶

Britain, citing the need to abolish ‘blackbirding and save a sinking economy’,⁷ annexed Fiji on 10 October 1874 at Levuka (the old capital of Fiji).⁸ The Fijian system of law was replaced with the British system of law which attracted more trade, ultimately fulfilling the needs of the British Empire.⁹

The push for more trade by the British Empire witnessed the appointment of the first agent of the National Insurance Company of New Zealand¹⁰ at Levuka in 1874.¹¹ On 21 May 1880, the British Government enacted *Life Assurance Ordinance No I of 1880* (Colony of Fiji); and *Life Assurance Ordinance No II of 1880 (Cap 189)* (Colony of Fiji) (*‘Life Assurance Ordinance’*).¹² These ordinances were enacted to ‘encourage and protect life insurances and other like provident arrangements for the benefit of insurers [sic] their wives and families’. Three years later, in 1883, New Zealand Insurance Co Ltd established an agency in Fiji;¹³ and in 1899, Queensland Insurance (Fiji) Ltd appointed an agent in Suva and opened a branch in 1906.¹⁴ In 1974, Queensland Insurance (Fiji) Ltd became a subsidiary of Queensland Bankers’ Equitable Insurance Company Ltd (*‘QBE’*).¹⁵ In 2004, Queensland Insurance (Fiji) Ltd changed its name to QBE Insurance (Fiji) Ltd.

As the insurance companies were touching the shores of Fiji, the British Government of that time enacted *Registration of Business Names Ordinance No 2 of 1923* (Colony of Fiji)¹⁶ to regulate the insurance sector. The

4 ‘History of Fiji’, *Wikipedia* (Web Page, 19 March 2022) <https://en.wikipedia.org/wiki/History_of_Fiji>.

5 ‘Blackbirding’ was the practice of kidnapping Pacific Islanders and using them as forced labour to work on cotton and sugar cane plantations: *Oxford Languages* (online at 29 September 2021) ‘blackbirding’ <<https://www.google.com/search?q=what+is+blackbirding&oq=what+is+blac&aqs=chrome.1.69i57j0i51219.6433j0j7&sourceid=chrome&ie=UTF-8>>.

6 ‘First Fiji Expedition’, *Wikipedia* (Web Page, 2 February 2022) <https://en.wikipedia.org/wiki/First_Fiji_expedition>.

7 Committee to Promote the Representation of the Colony (n 3) 5.

8 Newland (n 2) 319–20.

9 Baledrokadroka (n 1) 4.

10 *Tower Insurance* (Web Page, 2021) <<https://www.towerinsurance.com.fj/>>.

11 Levuka is a town on the eastern coast of the Fijian island of Ovalau, in Lomaiviti Province, in the Eastern Division of Fiji. Levuka is the old capital of Fiji. In June 2013, UNESCO declared Levuka as the World Heritage Site: ‘Levuka’, *Wikipedia* (Web Page, 4 January 2022) <<https://en.wikipedia.org/wiki/Levuka>>.

12 Government of Fiji, *The Ordinances of the Colony of Fiji* (Government Printer, rev ed, 1925) vol 1, 298. (The authors have obtained a certified copy from the National Archives of Fiji on 04 October 2019).

13 Register of Companies, *Name of Insurance Companies Registered and/or Operating in Fiji*, 14. (The authors have obtained a copy from the Registrar of Companies Office, Ministry of Justice, Level 2, Suvavou House, Suva on 02 September 2019).

14 See ‘QBE Insurance (Fiji) Limited – Subsidiary Company’, *QBE* (Web Page) <<https://www.qbe.com/pi/en/about/fiji%3E>>.

15 *Ibid*.

16 On 29 November 1923, *Registration of Business Names Ordinance No 2 of 1923* (Colony of Fiji) was enacted: see Government of Fiji, *The Ordinances of the Colony of Fiji* (Government Printer, rev ed, 1925) vol 2, 1633. (The authors have obtained a certified copy from the National Archives of Fiji on 04 October 2019). The purpose of the *Registration of*

immigration of insurance companies continued and Fiji observed the arrival of two Australian companies, the National Mutual Life Association Ltd and Eagle Star Insurance Co Ltd in 1945 and 1946 respectively.¹⁷ Then in 1948, to regulate motor vehicle insurance, the British Government introduced the *Motor Vehicles (Third Party Insurance) Ordinance No 19* (Colony of Fiji) ('*Motor Vehicles Ordinance*'). On 1 January 1950, the *Assurance Companies Ordinance (Cap 188)* (Colony of Fiji) ('*Assurance Companies Ordinance*') was enacted to regulate the carrying on of assurance or insurance business and for purposes incidental thereto.¹⁸ In 1954, New India Assurance Co Ltd established its first branch in Suva, and 13 years after, in 1967, established its second branch in Lautoka in the Western division of Viti Levu. New India Assurance Co is still performing its insurance services, with an A (Excellent) credit rating given by AM Best¹⁹ credit rating agency of the United States.²⁰

Then in 1956, the Life Insurance Corporation of India arrived in Fiji.²¹ To codify the law relating to marine insurance, the British government introduced the *Marine Insurance Ordinance (Cap 190)* (Colony of Fiji) ('*Marine Insurance Ordinance*') on 26 April 1961.²² As the demand for service providers grew, there was a great boom in the insurance companies in Fiji.²³ Thus, the need for more regulation and scrutiny surfaced.

A The initial hiccups of the insurance sector in Fiji

The growing insurance sector posed many challenges and the first was highlighted on 27 July 1966 by the Hon CA Shah, Honourable Member of Legislative Council. He stated in the Legislative Council the numerous problems faced by policyholders²⁴ and invited the government to look into the operations of insurance companies in Fiji. The first problem the Honourable Member highlighted was the undue delay in settlement of claims.²⁵ He said insurance companies took considerable time to settle a claim.²⁶ This was simply because the insurance companies were not authorised to pay out claims without prior approval from their head office. Since all the insurance

Business Names Ordinance No 2 of 1923 was to 'provide for the registration of firms and persons carrying on business under Business Names and for purposes connected therewith'.

17 Register of Companies (n 13) 14.

18 Government of Fiji (n 12) 2505.

19 AM Best is a US based credit rating agency that specialises in assessing the creditworthiness of insurance companies. AM Best was founded in 1899 in New York City by Alfred M Best after the 1906 San Francisco earthquake. AM Best is designated as a Nationally Recognised Statistical Rating Organisation by the US Securities and Exchange Commission and the National Association of Insurance Commissioners in the United States: 'AM Best', *Wikipedia* (Web Page, 10 October 2021) <https://en.wikipedia.org/wiki/AM_Best>.

20 *Ibid* section 1.

21 *Life Insurance Corporation of India* (Web Page, 2022) <<https://licifiji.com/>>.

22 *The Ordinances of the Colony of Fiji: A New Edition* (Edward John March, 1875–1905) 2511. (The authors have obtained a certified copy from the National Archives of Fiji on 04 October 2019).

23 Government of Fiji, *Legislative Council Debates*, Legislative Council, 27 July 1966, 836 (Justin Lewis). (The authors have obtained the certified copy from the National Archives on 20 September 2019).

24 *Ibid*.

25 *Ibid*.

26 *Ibid*.

companies were foreign-based with their head offices also based abroad, there was delay in claim settlements. The Honourable Member pleaded that ‘the Government must insist that these companies should have the authority to deal with insureds directly and if there is any question of authority from the head office the same should be obtained in advance so that no delay results’.²⁷

The second problem highlighted by the Honourable Member related to the completion of proposal forms.²⁸ Because of the low literacy level of the locals, usually, the agents of the insurer filed the proposal forms on behalf of the prospective insured. If the agent made an error in filling the proposal form, the insurer held the contract void because a contract of insurance requires utmost good faith and that the insured failed to honour this.²⁹ Even if the servant of the insurance company made a mistake in filing the proposal form, the servant was deemed as the agent of the insured, and as a result, the policyholder got nothing.³⁰ The third problem was related to the sum insured.³¹ People were encouraged to over-insure themselves so that they were fully covered. Little did they know that in case of a loss, the insurer would only indemnify the insured for the loss, not pay out the sum insured. For instance, for a motor vehicle insurance claim, the insurer will not pay the policyholder the sum insured, but pay the pre-accident value of the vehicle; despite the insurer accepting premium on the sum insured.

Hence, the insured consequently paid a higher premium when in fact, they were covered for a lesser sum.³² This amounted to fraud — a racket to mislead the insured. Given these abuses, Hon CA Shah asked the government to look into the operations of the insurance business as consumer interests were being jeopardised.³³ He added that:

[S]ome onus could well be placed on the insurance companies in this country, eg third party claims. There is no nominal defendant and the Government should look into this so that hit and run victims wherever the driver is not discovered can recover something.

This was the beginning of consumer protection as a driving force behind the appropriate regulation of the industry.

Consequently, in September 1969, the Bureau of Statistics under the authority of the *Statistics Ordinance No 29 of 1961* (Fiji), carried out *A Report on a Pilot Survey of Insurance Business in Fiji (1966–1968)* (‘*Pilot Survey*’).³⁴ This survey was the first of its kind to be held in Fiji. The information was collected using a questionnaire from each company operating in Fiji. The report was divided into two sections, life and non-life insurance. The

27 Ibid.

28 Ibid.

29 Ibid.

30 Ibid.

31 Ibid.

32 Ibid.

33 Ibid.

34 Fiji Bureau of Statistics, *A Report on A Pilot Survey of Insurance Business in Fiji 1966–1968* (Report, October 1970) 3 (‘*Pilot Survey*’). (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 7 August 2019).

information gathered related to the period 1966–68,³⁵ and only Fiji operations.³⁶ The report noted that all the insurance companies operating in Fiji are foreign-based, except Fiji Insurance Co Ltd.³⁷

At the time of this *Pilot Survey*, 52 insurance companies were operating in Fiji.³⁸ It is perhaps interesting to note that the volume of business in Fiji (with a population of a little over half a million) — supported such a large number of insurance companies. As noted in the pilot report,³⁹ one of the reasons for this was perhaps the relatively high turnover of international trade and the growth in the tourism industry in Fiji.⁴⁰ Another reason suggested by the pilot report was that Fiji is also a regional and international route center and by its strategic geographical position, is ‘the hub of the South Pacific’.⁴¹ Of these 52 insurance companies,⁴² 38 companies were licensed under the *Assurance Companies Ordinance*⁴³ and appeared in the Register of Companies record; while 14 other firms were known to be operating in Fiji, but not on record.⁴⁴

Of these 38 active insurance companies, 20 carried on business individually, while 17 others conducted their business in six groups.⁴⁵ The Insurance Statistics do not state how these 17 companies conducted their business in six groups. Thus, it is presumed that while these 17 companies operated separately because they were separately registered, the reason they submitted their consolidated returns in six groups could be that they shared the administrative/running costs (that is, operated from the same location and shared human resources, etc). Another reason could be, but least likely, the volume of business underwritten may not be significant to warrant separate returns. However, this presumption is negated because the head offices of each of these companies would be interested in the financial statement of the subsidiary company operating in Fiji.

Thus, 26 individual or consolidated returns were lodged of which 20 pertained to general or non-life insurance, and six to the life insurance business.⁴⁶ However, the *Pilot Survey* of 1966–68 revealed certain deficiencies in the questionnaire to insurers.⁴⁷ There were taken note of when designing the

35 Fiji Bureau of Statistics, *Insurance Statistics 1970* (Report, November 1971) 2. (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 21 August 2019) (*‘Insurance Statistics 1970’*).

36 Fiji Bureau of Statistics, *Insurance Statistics 1969*, (Report, October 1970) 2. (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 21 August 2019) (*‘Insurance Statistics 1969’*).

37 *Pilot Survey* (n 34) 6.

38 *Ibid* 3.

39 *Ibid*.

40 *Ibid*.

41 *Ibid*.

42 Fiji Bureau of Statistics, Parliament of Fiji, *Insurance Report and Statistics of Fiji 1977* (Parliamentary Paper, 1977). 36 (*‘Insurance Report 1977’*). This was licensed under the *Assurance Companies Ordinance (Cap 188)* (Colony of Fiji). (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 21 August 2019).

43 *Ibid* 36–7.

44 *Pilot Survey* (n 34) 3.

45 *Insurance Statistics 1969* (n 36) 2.

46 *Ibid*.

47 *Insurance Statistics 1970* (n 35) 2.

1970 questionnaire which became more comprehensive and yielded considerably more detail.⁴⁸ However, consistency with the 1969 Pilot Survey had to be sacrificed due to this redesign and it is primarily for this reason that 1970 does not contain any historical analysis.⁴⁹

II Post-independence era, but before the *Insurance Act 1976* came into force

With the increase in commercial activities after independence,⁵⁰ demand for insurance grew.⁵¹ While the above ordinances continued to regulate the insurance business in Fiji, agents and brokers remained unregulated until 31 December 1972. On 22 November 1972, the Insurance Agents and Brokers Bill 1972 (Fiji)⁵² was presented to the Parliament by the then Minister of Finance, Honorable Charles A Stinson, and came into effect on 1 January 1973.⁵³

The *Insurance Agents and Brokers Act 1972* (Fiji) (*Insurance Agents and Brokers Act*) was enacted to regulate and control the business of insurance agents and brokers.

In 1973, under s 5 of the *Assurance Companies Ordinance*, 36 firms were issued certificates as authorised insurers. Out of these 36 firms, there were 27 non-life insurers, six life insurers, one broker, one firm to protect its own assets (self-insurance) and local marine risks, and one firm authorised to carry on life as well as non-life business.⁵⁴

The ordinances failed to fully meet the needs of the insuring public.⁵⁵ For example, registration under the ordinance was not on an annual basis and therefore, once registered, companies had the right to issue policies and may have done so sporadically as not all of them operated in the Fiji market on a regular, systematic basis.⁵⁶ Some companies had ceased to write business in Fiji, but their names still appeared on the list of insurers.⁵⁷ Since the list of authorised insurers and the list of insurers registered under the *Assurance Companies Ordinance* did not reconcile, this led to a serious problem in the sense that, in the absence of adequate regulation, bogus companies may have been operating in the market.⁵⁸

48 *Insurance Statistics 1969* (n 36) 2.

49 *Ibid.*

50 *Fiji Independence Act 1970* (Fiji) s 1(1).

51 *Ibid.*

52 Fiji, *Parliamentary Debates*, House of Representatives, 22 November 1972, 1704. (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 20 September 2019).

53 *Insurance Agents and Brokers Act 1972* (Fiji).

54 Fiji Bureau of Statistics, *Insurance Statistics 1973* (Report, April 1975) 1. (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 20 September 2019).

55 Parliament of Fiji, *Insurance Bill, 1976* (House of Representatives Paper, 16 November 1976) pt 2, 955 (*Insurance Bill, 1976*). (The author has obtained the certified copy from National Archives on 20 September 2019).

56 *Insurance Report 1977* (n 42) 37.

57 *Ibid.*

58 *Ibid.* 38.

Thus, according to the Minister of Finance, the adequacy of the legislation was at stake.⁵⁹ In 1974, the Commonwealth Secretariat under the Commonwealth Fund for Technical Co-operation Aid Scheme appointed Dr ARB Amerasinghe as Adviser to Fiji Government on Insurance to review the present legislation⁶⁰ to promote and encourage the sound and orderly development of the insurance industry in the country.⁶¹ Thus, Dr ARB Amerasinghe undertook the task to review the insurance legislation in Fiji.⁶² Dr Amerasinghe concluded that the prevailing legislation, namely, the *Assurance Companies Ordinance*, the *Life Assurance Ordinance*, and the *Insurance Agents and Brokers Act* were obsolete, irrelevant, and inadequate to meet the current requirements⁶³ and more comprehensive legislation was needed.

The target was to consolidate various insurance legislation to mobilise insurance funds for the economic development of Fiji and provide for adequate safeguards and controls for companies and the community. No changes were proposed to *Marine Insurance Ordinance* and *Motor Vehicles Ordinance* because the nature and extent of changes required further study and consideration.⁶⁴

According to the Minister of Finance, this assistance was very timely as the insurance industry had prospered to a stage (35 licensed insurers with gross premium income of over FJD14 million) where systematic and continuous surveillance was necessary for the steady development of the industry.⁶⁵ While many insurance companies acted with a due sense of responsibility and rectitude, apparently there were abuses such as encouraging people to over-insure, thus, unnecessarily paying a higher premium. Thus, systematic and continuous surveillance was necessary both in the interests of the policyholders, and the industry as a whole.⁶⁶

Hence, the Insurance Bill 1976 (Fiji) was introduced in the Parliament on 16 November 1976 by the then Minister of Finance, Hon Charles A Stinson. Commenting on the Bill, Hon Subramani Baswaiya, a Member of Opposition said that 'while the Bill before the House is desirable, the only regret is that, there is no mention of motor vehicle third party and marine insurance (despite the complaints on prescribed minimum limits and circumstances in which compensation was payable)'.⁶⁷ The Minister acknowledged the suggestions and said that 'the nature and extent of these changes require further study and consideration before changes could be introduced'.⁶⁸ The *Insurance Act 1976* (Fiji) ('*Insurance Act 1976*') was subsequently enacted and came into force on 1 January 1977.⁶⁹

59 *Insurance Bill, 1976* (n 55) 955.

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid* 956.

67 *Ibid* 960.

68 *Ibid* 955.

69 *Insurance Act 1976* (Fiji) ('*Insurance Act 1976*').

This new legislation repealed and replaced the *Assurance Companies Ordinance*, the *Life Assurance Ordinance*, and the *Insurance Agents and Brokers Act*. This new Act was consolidated legislation regulating general insurance, life insurance, agents, and brokers to streamline it and enable the healthy growth of the insurance industry in Fiji.⁷⁰ The *Insurance Act 1976* also provided some degree of supervision of the activities of insurance companies.⁷¹ Thus, the Office of the Commissioner of Insurance was established who was appointed by the Public Service Commission under s 3 of the Act.⁷² However, no changes were made to motor vehicle third party and marine insurance under the new legislation.

Dr ARB Amerasinghe, former Insurance Advisor to the Government was appointed as the Commissioner of Insurance. The Commissioner was responsible to formulate standards in the conduct of the business of insurance. It was the responsibility of the Commissioner to ensure that every insurance company must always have adequate reinsurance arrangements. Dr Amerasinghe occupied the position until 1981 when the then Governor of the Reserve Bank of Fiji ('RBF'), Mr Savenaca Siwatibau was appointed as the Commissioner. Upon the resignation of Mr Siwatibau in 1988, Mr Clive Amputch, the Deputy Commissioner was appointed as the Commissioner. At the time of its establishment in 1977, the Commissioner's office operated as a unit of the Ministry of Finance. Since 1981, the office came under the administration of the RBF. The move of the Commissioner's office to the Reserve Bank was part of the government's policy to rationalise the supervision of financial institutions in the country.

III Post Insurance Act 1976 era, but before the Insurance Act 1998 came into force

Two years before the commencement of the *Insurance Act 1976*, in 1975 (the *Insurance Act 1976* came into force on 1 January 1977), 25 insurance companies were issued a license to conduct insurance business in Fiji.⁷³ However, the total number of service providers came down to 23 firms in 1976, 13 general or non-life, six life insurers, and four brokers.⁷⁴ After the *Insurance Act 1976* came into force on 1st January 1977, the number of service providers again went down by two, that is, from 23 to 21. Only two general insurance companies, the Commercial Union Assurance Society of Australian Ltd and Hartford Fire Insurance Co Ltd withdrew from the Fiji market as a result of the new legislation, quoting that their operations in Fiji were not viable.⁷⁵

The number of insurance companies in Fiji continued to go down year after year, and in 1978, there were 15 registered companies.⁷⁶ Out of these

⁷⁰ *Insurance Report 1977* (n 42) 34.

⁷¹ *Ibid.*

⁷² *Insurance Act 1976* (n 69) s 3.

⁷³ *Insurance Report 1977* (n 42) 22.

⁷⁴ *Insurance Bill, 1976* (n 55) 955.

⁷⁵ Commercial Union Assurance Society of Australian Ltd and Hartford Fire Insurance Co Ltd.

⁷⁶ Parliament of Fiji, *Insurance Report and Statistics of Fiji 1978* (House of Representatives

15 reporting companies, 11 were registered to transact new business, that is, eight general and three life. Three life insurers were permitted only to service existing contracts, and one registered but did not operate.⁷⁷ In the same year, the Royal Globe transferred its portfolio of life insurance business in Fiji to The Colonial Mutual Life Assurance Ltd; QBE Insurance Ltd transferred its portfolio of non-life insurance business to Queensland Insurance (Fiji) Ltd.⁷⁸ After a thorough discussion between the Fiji government and various interested parties in Fiji and abroad on the prospect of a reinsurance institution,⁷⁹ Fiji Reinsurance Co Ltd was set up and was issued a certificate to commence business from 30 June 1978.⁸⁰

The following year, the National Insurance Co of New Zealand Ltd agreed to purchase the shares of WR Carpenter Holdings Ltd in Southern Pacific Insurance Ltd of Australia.⁸¹ During 1979/1980, there were 11 registered insurers, eight general (non-life), and three life insurers,⁸² three brokers, and 299 agents in Fiji.⁸³ While the following year the number of insurers and brokers remained the same, the number of agents decreased by 13 from 299 to 286.⁸⁴

Conceivably, the most important articulation of the Minister of Finance was when he said: *'Mr. Speaker, Sir, we intend to leave the insurance industry to regulate itself, but we should not be powerless should intervention become necessary.'*⁸⁵ Regrettably, the government took 22 years to realise that many of the provisions of the *Insurance Act 1976* have become outdated as they have not kept pace with the developments in an evolving financial system.⁸⁶ As a result, the *Insurance Act 1976* was reviewed.

IV The present regulation of the insurance industry in Fiji and some issues

Before the *Insurance Act 1998* (Fiji) ('Act') came into force, the insurance industry was regulated by the *Insurance Act 1976*. The *Insurance Act 1976*

Paper No 16, 1980) 2. (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 21 August 2019).

⁷⁷ Ibid 2.

⁷⁸ Ibid 9.

⁷⁹ 'Reinsurance is the insurance of the risk borne by the insurer.': Fundación Mapfre, *An Introduction to Reinsurance* (2013) 1.

⁸⁰ Parliament of Fiji, *Insurance Report and Statistics of Fiji, 1979/1980* (House of Representatives Paper No 17, 1981) 48. (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 21 August 2019).

⁸¹ Ibid 9.

⁸² Ibid 8.

⁸³ Ibid 10.

⁸⁴ Parliament of Fiji, *Insurance Report and Statistics of Fiji, 1980/1981* (House of Representatives Paper No 55, 1982) 9. (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac HG 8738. A4 F52 on 21 August 2019).

⁸⁵ *Insurance Bill, 1976* (n 55) 957 (emphasis added).

⁸⁶ Fiji, *Parliamentary Debates*, House of Representatives, 17 July 1996, 3060 (*Insurance Law Reform Bill 1996*). (The authors have obtained the certified copy from National Archives on 20 September 2019).

which came into force on 1 January 1977, repealed and replaced the *Assurance Companies Ordinance*, the *Life Assurance Ordinance*, and the *Insurance Agents and Brokers Act*.⁸⁷ The *Insurance Act 1976* established the Office of the Commissioner of Insurance⁸⁸ responsible for the ‘formulation of standards in the conduct of the insurance business in Fiji’.⁸⁹

Due to the growing dissatisfaction with *Insurance Act 1976*, and given the developments abroad to address the shortfalls and unethical practices in the insurance market, the Fiji Law Reform Commission addressed the issue of insurance with the present laws governing the insurance market and insurance generally.⁹⁰ While introducing the Insurance Law Reform Bill 1996 (Fiji) in Parliament, the Minister of Finance, Hon B Vunibobo admitted that there have been no significant changes to the *Insurance Act 1976* since it was enacted in 1977⁹¹ and because of the complaints, articulated by the Law Reform Commission, the *Insurance Law Reform Act 1996* (Fiji) (*‘Insurance Law Reform Act’*) was imperative.⁹² The Minister added that Workmen’s Compensation and Motor Vehicle (Third Party Insurance) had also been reviewed and changes recommended.⁹³ For instance, compliance with the requirement to insure for injured passengers and persons hit by unidentified drivers.

Consequently, the *Insurance Law Reform Act* was enacted.⁹⁴ This new legislation constituted a general code of practice to establish fairness between the interests of the insurer, the insured, and all other stakeholders.⁹⁵ No changes were made to the *Insurance Act 1976*⁹⁶ as it was already under review by the RBF.⁹⁷ The need for an efficient and effective insurance sector to supplement socio-economic development and regulation and supervision of insurance entities remained necessary to achieve it.⁹⁸ As part of the review process, extensive discussions with relevant organisations in Fiji and abroad were carried out, and consequently, the *Act*⁹⁹ was enacted which repealed the *Insurance Act 1976*.¹⁰⁰ This new Act abolished the statutory office of the

87 Ibid.

88 *Insurance Act 1976* (n 69) s 3.

89 Ibid s 5.

90 *Insurance Law Reform Bill 1996* (n 86) 3059–60

91 Ibid 3060.

92 Ibid.

93 Ibid.

94 *Insurance Law Reform Act 1996* (Fiji) came into force on 1 January 1997.

95 *Insurance Law Reform Bill 1996* (n 86) 3061.

96 Fiji, *Parliamentary Debates*, House of Representatives, 13 August 1998, 523. (The authors have obtained a copy from Pacific Collections, University of the South Pacific, Suva, Fiji, pac J961. K2 on 21 August 2019).

97 The Central Monetary Authority of Fiji which was established in July 1973 to nurture development, was replaced in 1984 by the Reserve Bank of Fiji (‘RBF’): see Jade Mitchell, ‘Reserve Bank of Fiji’, *Central Banking* (Web Page, 12 August 2015) <<https://www.centralbanking.com/central-banks/2480701/reserve-bank-of-fiji>>.

98 *Insurance Bill, 1998* (n 96) 522.

99 The *Insurance Act 1998* (Fiji) (*‘Insurance Act 1998’*) was enacted on 14 August 1998 and came into force on 1 January 1999.

100 Ibid s 171.

Commissioner of Insurance and formally transferred the administration of the sector to the RBF.¹⁰¹

Under the new legislation, the Commissioner of Insurance Office was abolished and the administrative responsibilities of insurance sector was given to the RBF.¹⁰² The Fijian government believed that by bringing the supervision of the insurance industry with supervision of banks, the RBF will more effectively discharge its duties under the *Act*.¹⁰³

This perception is flawed/illusionary because while insurance and banks are both part of the financial system, their functions are different. Insurance by accepting risks provides security; banks by accepting deposits finances the economy. Insurance is based on indemnity, banks pay interest on deposits. The indemnity is to put the insured back in the same financial position prior to the loss, interest on deposits in banks is an income on investment. There are numerous differences between insurance companies and banks.

On the other hand, the RBF being the central bank is already under immense responsibility (that is, to protect the value of the currency, ensure sustainable economic growth, formulate monetary policy, promote price stability, issue currency and liquidation in the primary market);¹⁰⁴ how could the additional encumbrance on RBF be justified; more so, on insurance. Thus, it's a case of 'a square peg in a round hole'.

In other jurisdictions such as the UK and Australia, the central banks are not responsible for the regulation of the insurance industry. The insurance industry in the UK is regulated by the Prudential Regulation Authority ('PRA') and the Financial Conduct Authority ('FCA').¹⁰⁵ While PRA is part of the Bank of England,¹⁰⁶ insurance industry in UK is not regulated by the Bank of England.¹⁰⁷ The insurance industry in Australia is regulated by the Australian Prudential and Regulatory Authority ('APRA') and the Australian Securities and Investments Commission ('ASIC').¹⁰⁸ The theory of de-establishing the Commissioner of Insurance office under the new legislation for a mere reason of alienation suffocated the industry in Fiji.

The RBF, as the administrator of the *Act*,¹⁰⁹ is assigned specific functions to promote confidence in the insurance industry¹¹⁰ and to ensure that the interests of the policyholders are protected.¹¹¹ In this regard, the *Act* empowers the RBF (by delegated legislative powers) to undertake the regulation and supervision

101 Ibid s 3.

102 Ibid s 3(1).

103 *Insurance Act 1998* (n 99).

104 *Reserve Bank of Fiji* (Web Page) <<https://www.rbf.gov.fj/#>>.

105 'Prudential Regulation', *Bank of England* (Web Page, 2022) <<https://www.bankofengland.co.uk/prudential-regulation>>.

106 Ibid.

107 Financial Conduct Authority, *Annual Report and Accounts 2019/20 (for the year ended 31 March 2020)* (Report, September 2020) 18 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/916806/FCA_Annual_Report_2019_20.pdf>.

108 'About APRA', *APRA* (Web Page) <<https://www.apra.gov.au/about-apra>>.

109 *Insurance Act 1998* (n 99) s 3(1).

110 Ibid s 3(2).

111 RBF, *Insurance Annual Report 2019* (Report, 26 June 2020) 14 ('*Insurance Report 2019*').

of the insurance industry in Fiji.¹¹² The RBF focuses on prudential regulation and it confers self-regulation by the service providers.¹¹³ While prudential regulation is vital for a healthy/safe and progressive industry, equally, if not more, important is consumer protection because, without consumers, the industry will not exist. No changes were made to the *Motor Vehicles Ordinance* (1948) and the *Marine Insurance Ordinance* (1961).¹¹⁴

As part of its regulatory framework, RBF continued to issue Insurance Supervision Policy Statements ('ISPS').¹¹⁵ For instance, in 2019, the RBF reviewed the *Solvency Requirements for Insurers Licensed to Conduct Life Insurance Business*.¹¹⁶ As the name suggests, this policy reviewed the minimum solvency requirements for life insurance companies operating in Fiji. The *Solvency Requirements for Insurers Licensed to Conduct General Insurance Business in Fiji*¹¹⁷ reviewed the minimum solvency requirements for general insurers licensed to conduct general insurance business in Fiji. In formulating these policies, consideration was given to the recommendations of the International Association of Insurance Supervisors, International Monetary Fund ('IMF') Technical Assistant on Insurance Supervision, Fiji Accounting Standards and other industry participants. In addition, the *Fit and Proper Requirements for Licensed Intermediaries and Insurers*¹¹⁸ was reviewed by RBF to safeguard the interests of investors, beneficiaries, and stakeholders by ensuring that licensed intermediaries and issuers undertake capital markets activities are soundly and prudently managed and directed.

The *Disclosure Requirements for Licensed Insurers in Fiji*¹¹⁹ was also reviewed in 2019. This policy outlines publication requirements of financial and prudential information of licensed insurers for use of the general public.

112 Ganesh Chand and Chandra P Dulare, *The Insurance Industry in Fiji: Consumer Protection Issues* (Report, 2008) 27.

113 Ibid 27.

114 *Insurance Bill, 1976* (n 55) 955.

115 *Insurance Report 2019* (n 111) 14.

116 This notice is issued under s 3(2)(a) of the *Insurance Act 1998* (n 99) as part of the RBF's standards governing the conduct of insurance business in the Fiji Islands: see RBF, *Solvency Requirements for Insurers Licensed to Conduct General Insurance Business in Fiji* (Insurance Supervision Policy Statement No 3B, February 2011) <https://www.rbf.gov.fj/wp-content/uploads/2020/02/ISPS3B_Solvency-Requirements-for-General-Insurance.pdf> ('*Solvency Requirements for Insurers Licensed to Conduct General Insurance Business in Fiji*').

117 This notice is issued under s 3(2)(a) of the *Insurance Act 1998* (n 99) as part of the RBF's standards governing the conduct of insurance business in the Fiji Islands. See *Solvency Requirements for Insurers Licensed to Conduct General Insurance Business in Fiji* (n 116) 1–16, 1.

118 This policy complements s 5(r) of the *Capital Markets Decree 2009* (Fiji) which states that the RBF is to take all reasonable measures to safeguard the interest of persons dealing in securities. See RBF, *Fit and Proper Requirements for Licensed Intermediaries and Insurers* (Capital Markets Supervision Policy Guideline No 6, February 2011) 1–9, 2 <https://www.rbf.gov.fj/wp-content/uploads/2020/02/PS-6_Fit-Proper-Requirements-for-Licensed-Intermediaries-and-Issuers.pdf>.

119 This notice is issued under s 3(2)(a) of the *Insurance Act 1998* (n 99) as part of the RBF's standards governing the conduct of insurance business in Fiji. See RBF, *Disclosure Requirements for Licensed Insurers in Fiji* (Insurance Supervision Policy Statement No 11, December 2011) 1–6, 1 <<https://www.rbf.gov.fj/wp-content/uploads/2020/02/ISPS-No.11-Disclosure-Requirements-for-Licensed-Insurers-in-Fiji.pdf>>.

The objective of this policy is to reinforce the transparency of licensed insurers so that the public has confidence in the financial system. Before an ISPS policy is implemented, the RBF is required to inform the Minister of Finance about the proposed ISPS policy.¹²⁰ To embed a strong corporate governance culture within its regulated entities, the RBF implemented its first system-wide prudential supervision policy specifying the *Minimum Requirements for Corporate Governance of Licensed Entities*. The new policy was effective from 1 April 2019 replacing ISPS No 4, and full compliance to the new policy by 1 April 2020.¹²¹

In formulating its insurance supervision policies, the RBF seeks to refer to international best practices.¹²² For instance, Recommendations 10 ‘Customer Due Diligence’ and 11 ‘Record-Keeping’ of the Financial Action Taskforce (‘FATF’) 40 Recommendations of 2021.¹²³ To ensure the relevance of policy requirements to the local business environment, key stakeholders are consulted during the policy implementation and finalisation stages to foster an effective understanding of the policy objectives.¹²⁴ In line with the RBF’s Strategic Plan theme of ‘Strengthening our Central Banking Role’,¹²⁵ the IMF’s Pacific Financial Technical Assistance Centre is providing technical assistance to the RBF for the review of the current Act, to ensure its relevance to the industry, and align to new supervisory approaches and regulatory developments.¹²⁶

A Administration of insurance sector in Fiji

Section 3 of the *Act* states the responsibilities of the RBF in the supervision of the *Act*.¹²⁷ The RBF is responsible for the formulation of standards; regulation of the conduct of agents, brokers, and insurers; assisting the Minister in formulating regulations concerning government policies on insurance; approval of the policy wordings; rates of insurance; and such other functions relating to the supervision as are assigned to it by the Minister.¹²⁸ In addition, subject to the approval of the Minister, the RBF may, in writing, delegate any of its powers, duties, or functions under the *Act*.

However, there is no mention in the *Act* that the RBF being the regulator of the insurance industry will protect the interests of policyholders. If the RBF is not responsible for the protection of insurance consumers and prospective consumers, then who is? In other jurisdictions, such responsibility is set out. For example, in Australia, s 2A(1) of the *Insurance Act 1973* (Cth) states that: ‘[T]he main objects of this Act are: (a) to protect the interests of policyholders and prospective policyholders ... and (b) to promote financial system stability

120 *Insurance Act 1998* (n 99) s 3(2)(c).

121 *Insurance Report 2019* (n 111) 14–15.

122 *Ibid* 15.

123 *Ibid*.

124 *Ibid*.

125 *Ibid*.

126 *Ibid* 14.

127 *Insurance Act 1998* (n 99) s 3.

128 *Ibid* s 3(2).

in Australia'.¹²⁹ The *Insurance Contracts Act 1984* (Cth) ('*Insurance Contracts Act*')¹³⁰ also provides consumer protection. Furthermore, s 4(1) of the *Insurance Act 2005* (Vanuatu) states: '*The object of this Act is to promote the maintenance of efficient, fair, safe and stable insurance markets for the benefit and protection of policyholders.*'¹³¹

Section 3(1) of the *Act* states that the RBF 'must' perform all the functions under the *Act*.¹³² The intention of the legislation is crystal clear that there is no room for discretion. However, s 16 'Reserve Bank may investigate unlicensed person'; s 72 'Reserve Bank may investigate a licensed person'; s 80 'Reserve Bank may issue directions'; s 81 'Reserve Bank may assume control of a licensed person'; s 106 'Reserve Bank may petition court'; and s 121 'Reserve Bank may give notice', all include the term 'may'¹³³ which implies discretion. This is against the interests of insurance consumers and prospective consumers as it gives the regulator discretion either to act or not to act when the *Act* imposes a positive duty on the regulator to act.

On the other hand, ss 3(2)(e), 128 of the *Act* are conflicting. Section 3(2)(e) of the *Act* states that '*the functions assigned to the Reserve Bank by this Act include the approval of standard terms and conditions contained in policies of insurance*'.¹³⁴ The heading for s 128 states: '*Proposal and policy documents not to be misleading*'.¹³⁵ So in a practical sense, all the policy documents and proposals are approved by the RBF before any person can enter into the insurance contract. If the RBF had approved the policies, then the same policies cannot later become misleading? If the proposal and policy are misleading, the RBF will not approve them.

The issue is not whether s 128 of the *Act* is inconsistent or not; the issue is the impact of s 128 on consumers. The first implication of this inconsistency is that this will create doubt or distrust in the minds of consumers whether or not the proposal used and policy used/issued by the underwriter have been sanctioned by the regulator. If not, whether the scope of cover afforded under a policy sanctioned by the regulator is greater than that issued by the underwriter? Secondly, in the event of a claim, whether the underwriter will indemnify or reject the claim based on some technicalities? This uncertainty

129 *Insurance Act 1973* (Cth) s 2A (emphasis added).

130 The long title of the *Insurance Contracts Act 1984* (Cth) ('*Insurance Contracts Act*') states that:

An Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds and other members of the public and so that the provisions included in such contracts, and the practices of insurers concerning such contracts, operate fairly, and for related purposes.

131 The *Insurance Act 2005* (Vanuatu) s 4(1) (emphasis added).

132 *Insurance Act 1998* (n 99) s 3(1).

133 According to the Oxford Learners Dictionary, 'may' is a verb used to say that something is possible. It refers to the possibility of something happening, eg, a house may or may not burn down: see *Oxford Learners Dictionaries* (online at 31 March 2021) 'may' <https://www.oxfordlearnersdictionaries.com/definition/american_english/may_1>. On the other hand, 'must' denotes certainty. For instance, although we don't know when, death is a must. Therefore, if RBF is under a statutory duty to do something, then, why do certain sections give RBF discretion on certain matters, and as such, reinforce discrimination?

134 *Insurance Act 1998* (n 99) s 3(2)(e) (emphasis added).

135 *Ibid* s 128 (emphasis added).

in the minds of the consumers will affect penetration because consumers will lose confidence in the industry.

In *Australian Prudential Regulation Authority (APRA) v Kelaher*,¹³⁶ APRA alleged that two entities within the Independent Order of Odd Fellows Holdings Ltd Group of companies, IIML and Questor, and two of their directors, Mr Kelaher (the Managing Director) and Mr Venardos (the Chairman), contravened ss 52, 52A of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SIS Act*'). APRA sought disqualification orders against the directors and three responsible officers of the entities, Chief Financial Officer David Coulter, Company Secretary Paul Vine, and General Counsel Gary Riordan. The Federal Court of Australia found that none of APRA's claims of contraventions of the *SIS Act* were sustainable and that there were no grounds for disqualification of any of the individual respondents. The *SIS Act* required trustees to exercise the requisite degree of care, skill, and diligence towards the beneficiaries. The court held that trustees must act in the best interests of the beneficiaries and to give priority to the interests of the beneficiaries in the event of a conflict of interest.¹³⁷

A coverage clause in a contract of insurance should be read objectively¹³⁸ in the context of the policy as a whole,¹³⁹ its context, scheme, and the surrounding circumstances.¹⁴⁰ An ambiguous provision in a contract of insurance should be construed against the party that wrote the contract.¹⁴¹ While these Australian and English cases are not binding on the courts in Fiji, they can be highly persuasive. Thus, the RBF bears a heavy responsibility to ensure that language used in a contract of insurance (that is, proposals and policies) are unambiguous as this will avoid unwarranted litigation and delay in settlement.

B Liability for the conduct of agents and employees — Section 4

Generally, insurance companies rely upon their employees and intermediaries (agents and brokers) to promote and distribute their products and services in the market. They bind cover on their behalf and assist in the settlement of claims. Since they represent the employer/principal, s 4 of the *Act* binds the insurer for any conduct of their employees, and agents

on which a person in the circumstances of the insured could be reasonably expected to rely; and on which the insured relied in good faith, whether or not the employee acted within the scope of his/her employment, or the agent acted within the authority granted by the insurer.¹⁴²

136 (2019) 138 ACSR 459.

137 David Jacobson, 'Case Note APRA V IOOF: Duties of Superannuation Fund Trustees and Directors', *Bright Law* (Web Page, 25 September 2019) <<https://www.brightlaw.com.au/case-note-apra-v-ioof-duties-of-superannuation-fund-trustees-and-directors/>>.

138 *AAI Ltd v GEO Group Australia Pty Ltd* [2017] NSWCA 110.

139 *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, 528–9 [15].

140 *Sargent v GRE (UK) Ltd* [1997] EWCA Civ 1414.

141 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, 589 [22].

142 *Insurance Act 1998* (n 99) s 4.

The legislative intent of s 4 is to protect insurance consumers. However, the term ‘good faith’¹⁴³ is neither defined in the *Act* nor any other Act in Fiji. The term ‘good faith’ is also used in ss 149 ‘Effects of a notice on trust’, 166 ‘Protection for official acts’, but not defined. Therefore, does it protect the interests of the consumers?

‘Good faith’ was first coined into English common law in *Carter v Boehm*.¹⁴⁴ The court held that the duty of good faith applies to the insurer and the insured.¹⁴⁵ It has been interpreted to protect insurance companies from dishonest and fraudulent policyholders.¹⁴⁶ ‘Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary.’¹⁴⁷ Since then, the expression ‘good faith’ has been referred to as ‘perfect good faith’;¹⁴⁸ ‘utmost good faith and *uberrimae fidei*’;¹⁴⁹ ‘honesty heart of the good faith principle’;¹⁵⁰ ‘good faith connotes an element of honesty’;¹⁵¹ ‘duty not limited to act honestly but extends to requiring parties to have regard to the legitimate interests of the other’;¹⁵² consistent with commercial standards of decency and fairness¹⁵³ with due regard to the interests of the insured.¹⁵⁴

The New South Wales Supreme Court¹⁵⁵ held that the insurer was able to reduce its liability under the policy to nil because the insured had failed to

143 The principle of utmost good faith, also known as *uberrimae fidei* in Latin, states that the parties to an insurance contract must be honest with each other and must not hide any information relevant to the contract from each other. It is important to the insurer that they have a full and accurate picture of the risk that is proposed for cover: ‘The Duty of Utmost Good Faith’, *Legal Services Commission South Australia* (Web Page, 30 March 2021) <<https://lawhandbook.sa.gov.au/ch25s01s02s01.php>>.

144 (1766) 3 Burr 1905; 97 ER 1162. In this case, the plaintiff, the Governor of Fort Marlborough insured the fort against seizure by foreign enemies. The Governor failed to disclose to the insurer the possibility of an imminent attack on the fort by the French. Due to the non-disclosure, the insurer declined the plaintiff’s claim. The court decided in favour of the insured, stating that the insurer knew the purpose of the cover, ie the possibility of an attack. The insurer should have made further inquiries before issuing cover. Thus, the insurer knew the likely circumstances that might unfold. Lord Mansfield further stated that ‘the governing principle applies to all contracts and dealings, and that a contract was void at the insurer’s option where there was a breach of good faith, which included misrepresentations and non-disclosures’.

145 Gerald Swaby, ‘A Critical Examination of the Disproportionate Rights and Duties of Insurers and Insured vis-à-vis Good Faith, Fraud and the Settlement of Insurance Claims’ (PhD Thesis, University of Huddersfield, 2016) 12 <<http://eprints.hud.ac.uk/id/eprint/30181>>.

146 *Ibid* 14.

147 *Ibid* 13.

148 *Britton v Royal Insurance Co* (1866) 4 F & F 905; 176 ER 843, 909 (Willes J).

149 *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2003] 1 AC 469, [44] (Lord Hobhouse).

150 *Kelly v New Zealand Insurance Co Ltd* [1996] 130 FLR 97, 111 (Owen J).

151 *CIC Insurance Ltd v Barwon Region Water Authority* [1999] 1 VR 683. Note: As mentioned above, while the Australian and English decisions are not binding on the courts in Fiji, it may be extremely persuasive because the Australian and English experience would be valuable guidance for Fiji as Fiji’s experience by far remains modest by comparison with Australia and England.

152 *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1.

153 *Ibid*.

154 *Insurance Contracts Act* (n 130) s 13.

155 *Stealth Enterprises Pty Ltd v Calliden Insurance Ltd* (2015) 300 FLR 81.

disclose material facts.¹⁵⁶ The duty of good faith requires both parties to act honestly at all times not just when the contract is being negotiated or entered into, but to any subsequent dealing in respect of the contractual obligations undertaken. However, if an insured's claim is fraudulent, the insurer is free to reject the claim.¹⁵⁷ The rule exists at common law for contracts concluded before 12 August 2016 and is restated in the *Insurance Act 2015* (UK) ('*Insurance Act 2015*') for later contracts.¹⁵⁸ The Fijian legislation on the other hand, is silent on pre-contractual non-disclosure.

By the *Insurance Act 2015*, a party can no longer avoid an insurance contract if utmost good faith is not observed by another party.¹⁵⁹ It further states that a contract of insurance is a contract based on the utmost good faith that is modified to the extent required by the provisions of this Act and the *Consumer Insurance (Disclosure and Representations) Act 2012* (UK) ('*Consumer Insurance (Disclosure and Representations) Act*').¹⁶⁰ Accordingly, s 17 of the *Marine Insurance Act 1906*, 6 Edw 7, c 41 ('*Marine Insurance Act*') is amended,¹⁶¹ and s 2(5) of the *Consumer Insurance (Disclosure and Representations) Act* has been omitted.¹⁶² In addition, ss 18 (Disclosure by Assured), 19 (Disclosure by Agent Affecting Insurance), 20 (Representations Pending Negotiation of a Contract) of the *Marine Insurance Act* are also omitted.¹⁶³ The *Insurance Act 2015* further states that: '[A]ny rule of law to the same effect as any of those provisions is abolished.'¹⁶⁴

Nevertheless, the insurer must disclose to the insured all the material upon which the insurer intends to rely and give sufficient time to the insured to respond to any adverse material.¹⁶⁵ In extending the principle, the court has relied upon implied term to act in good faith and allowed damages in addition to interest to compensate an insured for late payment.¹⁶⁶ The insurer's duty is not limited to acting honestly but extends to determining a claim for indemnity promptly and without delay.¹⁶⁷ The duty of utmost good faith, in certain situations, acts as a barrier for insurers' to reject an insured's claim.¹⁶⁸ Since

156 A brothel was destroyed in a fire, which the insured tried to claim on its insurance policy. However, the underwriter refused to pay to claim that the insured had failed to disclose firstly, that the director and manager were associated with the Comancheros bikie gang and, secondly, that the brothel was no longer registered under the *Prostitution Act 1992* (ACT) ('*Prostitution Act*') when the policy was renewed. The Supreme Court accepted the evidence that activities of bikie gangs were 'widely known' to result in property damage and personal injury. The Supreme Court also agreed with the insurer that the policy would not have been renewed if it had been disclosed that the business was no longer registered under the *Prostitution Act*. As such, the insurer was able to reduce its liability under the policy to nil.

157 *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45.

158 *Insurance Act 2015* (UK) s 12 ('*Insurance Act 2015*').

159 *Ibid* s 14(1).

160 *Ibid* s 14(2).

161 *Ibid* s (3)(a).

162 *Consumer Insurance (Disclosure Representations) Act 2012* (UK) s 2(5).

163 *Insurance Act 2015* (n 158) s 21(2).

164 *Ibid* s 21(3).

165 *Beverley v Tyndall Life Insurance Co Ltd* (1999) 21 WAR 327.

166 *Moss v Sun Alliance Australia Ltd* (1990) 55 SASR 145.

167 *Sharma v Insurance Australia Ltd* [2017] NSWCA 55.

168 *Onley v Catlin Syndicate Ltd* (2018) 360 ALR 92.

'good faith' is not defined in the *Act*, it increases the burden of proof for the insured that in fact, the insured relied upon in good faith. Therefore, a clear definition of the term 'good faith' in the *Act* would pave the way for the insured just as the definition of good faith in the *Insurance Contracts Act* does.¹⁶⁹

This imposes a huge responsibility on insurance companies to recruit competent employees and agents, and provide regular training, and perhaps encourage employees and agents to undertake a prescribed course of studies in the insurance field, for example, that offered by the Australia and New Zealand Institute of Insurance and Finance. However, these will add to the overall expenditure of the underwriter, and thus, will decrease the bottom-line profit for the underwriter, ultimately passed on to insurance consumers. Under the *Act*, an insurer is responsible for the conduct of his employees,¹⁷⁰ agents,¹⁷¹ and sub-agents¹⁷² regarding insurance, whether or not they acted within the scope of his authority. If a person is the agent of more than one insurer, respective insurers would be liable for the conduct of his agent.¹⁷³ If a person is the agent of more than one insurer and the person engages in any conduct relating to a class of insurance business in which the person is not the agent of any of those insurers, the insurers are jointly and severally liable for that conduct, even if the agent acted outside the scope of the authority granted by any of the insurers.¹⁷⁴ The insurer is also responsible for any loss or damage suffered by the insured under s 4(2), s 4(3), s 4(4), s 4(5) or s 4(6) of the *Act*.¹⁷⁵ Subsections (2)–(7) do not affect any liability of an agent or employee of an insurer to an insured.¹⁷⁶ An agreement, in so far as it purports to alter or restrict the operation of sub-ss (2)–(7), is void.¹⁷⁷ An insurer must not make, or offer to make, an agreement that is, or would be, void by reason of sub-s (9).¹⁷⁸

Section 4(11) states: 'An insurer who contravenes subsection (10) commits an offence and is liable on conviction to a fine of \$10,000.' Given the seriousness of the offence, that is, an insurer who makes, or offers to make, an agreement that purports to alter or restrict the operation of sub-s (2) to (7),¹⁷⁹ a fine of \$10,000 is too lenient. This may not be sufficient to encourage insurers to engage in such activities, but perhaps make them more complacent at the costs of the insured and prospective insured.

Under s 4 of the *Act*, insurers indirectly assume responsibility for the conduct of agents and employees.¹⁸⁰ On the other hand, under the *Insurance Contracts Act*¹⁸¹ the insurer must, before a contract of insurance is entered

169 *Insurance Contracts Act* (n 130) ss 12–14.

170 *Insurance Act 1998* (n 99) s 4(2).

171 *Ibid* s 4(3).

172 *Ibid* s 4(6).

173 *Ibid* s 4(4).

174 *Ibid* s 4(5).

175 *Ibid* s 4(7).

176 *Ibid* s 4(8).

177 *Ibid* s 4(9).

178 *Ibid* s 4(10).

179 This is similar to the *Insurance Contracts Act* (n 130) s 52(1) and the *Insurance Act 2015* (n 158) s 15.

180 *Insurance Act 1998* (n 99) s 4.

181 *Insurance Contracts Act* (n 130) s 22(1).

into, inform the insured in writing of the nature and effect of the insured's duty of disclosure. This is a proactive approach to eliminate or minimise non-disclosure. An insurer who fails to comply with this provision may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent.¹⁸² If the insured made an untrue statement but based on the belief that the statement is correct, the statement will not be a misrepresentation.¹⁸³

In *Australian Securities and Investments Commission v TAL Life Ltd [No 2]*,¹⁸⁴ the insurer declined the insured's claim for non-disclosure of an unrelated prior medical history. TAL contended that the insured had breached her duty of good faith under s 13 of the *Insurance Contracts Act*. In response, ASIC alleged that TAL failed to inform the consumer of a retrospective investigation into her medical history, and without an opportunity to respond to the insurer's concerns, rejected the claim. The Federal Court of Australia held that TAL breached its duty to act with utmost good faith under the *Insurance Contracts Act* when handling a claim. Even if the insurer had known the unrelated prior medical history of the insured, the insurer would have accepted the risk and on the same terms.¹⁸⁵ Therefore, the impact of misrepresentation on the underwriting of the risk is nil.

V Conclusion

The demand for systematic and continuous surveillance of insurers ascends with the growth of the insurance industry. The architect of the *Insurance Act 1976*, Dr ARB Amerasinghe outright labeled the prevailing legislation as obsolete, irrelevant, and inadequate to meet the rapid growth of the insurance industry. Despite the enactment of the *Insurance Act 1976* and the *Insurance Law Reform Act*, the balance was still not struck between the interests of the insurers and the insured. The *Insurance Act 1976* was reviewed to bring the *Act* in line with developments in the insurance industry, increase the level of consumer protection and to enhance the viability of the industry.¹⁸⁶ As a result, the *Act* was enacted. The biggest flaw in this legislation is that it abolished the office of the Commissioner of Insurance and brought the supervisory and administrative responsibility under the ambit of the RBF.

The reality is that banks are institutionally interconnected, and insurers are stand-alone operators. In the UK and Australia, the central bank and the insurance regulator are two separate bodies. To effectively protect consumers, the insurance industry should be regulated by an independent statutory body rather than the central bank.

182 Ibid s 22(3).

183 Ibid s 26.

184 (2021) 389 ALR 128, 134 [19].

185 *Insurance Contracts Act* (n 130) s 28.

186 RBF, *Annual Report 1998* (Report, March 1999) 18.