



## FINANCIAL SERVICES FEDERATION

28 June 2019

Financial Markets Policy

Building, Resources and Markets

Ministry of Business, Innovation & Employment      By email: [insurancereview@govt.nz](mailto:insurancereview@govt.nz)

### **Introduction:**

The Financial Services Federation (“FSF”) is grateful for the opportunity to submit on the Options Paper: Insurance Contract Law Review. By way of background, the FSF is the industry body representing the responsible and ethical finance, leasing and credit-related insurance providers of New Zealand. We have nearly sixty members and affiliates providing financing, leasing, and credit-related insurance products to more than 1.5 million New Zealand consumers and businesses. Our affiliate members include internationally recognised legal and consulting partners. A list of our members is attached as Appendix A.

### **General Comments:**

Before providing answers to the questions raised in the Options Paper, the FSF has some general comments to make with regard to the Paper itself.

The FSF will be commenting in relation to the Options Paper in terms of the way in which it affects the FSF’s credit-related insurer members only. The FSF does not represent insurers in any sector other than those providing credit-related insurance products.

Officials should note that there is at present a review taking place concurrent to the Insurance Contract Law Review of the Credit Contracts and Consumer Finance Act 2003 (“the CCCFA”) and there is a Bill currently before the House on which submissions have been called by the Finance & Expenditure Select Committee. The CCCFA very specifically deals with the way in which credit-related insurance should be responsibly sold and how providers are expected to achieve this. In support of the requirements in the Act is guidance provided specifically in relation to the responsible sale of credit-related insurance contained as part of the Responsible Lending Code. This Code is to also be reviewed once the Bill before Parliament is enacted.

In addition, an Options Paper: Financial Institutions Conduct has also been disseminated for consultation on a possible conduct regime that could be introduced for financial institutions. The paper does say this regime is aimed predominantly at banks and life insurers but, by its very name, it is likely that proposals contained within it, will have significant implications for all

other financial institutions including credit-related insurance providers. At the very least, FSF expects that, for those financial institutions (which would include credit-related insurance providers) not specifically covered by any legislation that may arise from this consultation, there will be an expectation from the regulators supervising them that they should be applying similar conduct standards on an “if not, why not” basis.

The FSF has serious concerns that all this work being undertaken simultaneously by different groups of officials has the potential to become at best confusing for those within its scope and at worst potentially dangerous in its likelihood of regulatory and regulator overlap.

The FSF believes very strongly that what Minister of Commerce and Consumer Affairs, the Hon Kris Faafoi, says in the first sentence of his foreword to the Options Paper, is absolutely correct. Insurance does play an important role in the lives of New Zealanders, to help us to cope with unforeseen life events and providing businesses with greater certainty. In fact, the FSF would go so far as to say that responsibly sold insurance is absolutely vital to every New Zealand consumer and business in some form or another.

With respect to credit-related insurance in particular, these products exist because consumers need access to a line of credit to be able to purchase assets that are necessary for their lives – for example motor vehicles. A debt is a liability to the individual taking it on and therefore there is a need for protection against the possibility of an unforeseen circumstance that might prevent them from meeting their repayment obligations under the loan contract, or to protect the asset purchased under that contract. Specifically with regard to credit-related insurance (payment protection), this type of policy protects the liability of the customer in the event that they are off work and unable to meet their loan repayments due to events such as death, accident, illness, redundancy, bankruptcy, hospitalisation and strike-related action.

The alternative of not having such protection includes loan arrears or default, a bad credit rating, repossession of the asset and/or bankruptcy. Credit-related insurance products are particularly helpful to consumers who might have more vulnerability due to the nature of their employment or because of the fact that they do not have access to other types of insurance that might provide them with protection under a loan contract.

It should be noted that credit-related insurance products are therefore of a fixed-term nature – having a life that corresponds to the length of the loan contract – as opposed to life insurance for example which is of an ongoing nature.

### **1. What is your feedback regarding the objectives for the review?**

Overall, the FSF is comfortable with the objectives detailed in the Options Paper. The FSF is pleased to see the widened scope of Objective 1 to recognise the fact that an insurance policy is a contract between the insured and the insurer and both parties to the contract have a need to be well-informed and able to transact with confidence.

The FSF supports Objective 2, to ensure that interactions in the insurance market are fair, efficient and transparent but does have some concern that the interpretation of what “fair, efficient and transparent” might look like could be somewhat subjective.

FSF’s consumer credit-related insurance provider members also support the intent of Objective 3 to ensure that New Zealand remains an attractive place in which to provide insurance on the basis that this promotes competition in the market which is healthy both for consumers in providing them with more choice and for insurers in the encouragement it provides for them to remain innovative and competitive. However, the FSF cautions that this objective is unlikely to be able to be achieved if the industry becomes over-burdened with increased costs due to overlapping and sometimes potentially contradictory regulation. Over-regulation would be a definite barrier to attracting new players into the market.

Finally, with respect to Objective 4, the FSF is supportive of the need to ensure that consumers’ interests are recognised and protected when participating in the insurance market, but believes it could be widened in the same way as has been done with Objective 1 to cover both parties to the insurance contract.

**2. What is your feedback in relation to the options for disclosure by consumers? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?**

The FSF believes that the duty is on the insurer who understands the risk they are taking in accepting a policy to ask the right questions to quantify that risk. Certainly, FSF credit-related insurance members do not believe it is reasonable for an insurer to avoid a claim based on medical information not related to the claim and therefore they support some prescription around the questions being asked to obtain information about any pre-existing conditions as an example.

FSF’s credit-related insurance members note that consumers often do not know what is relevant to disclose (particular those consumers who could be described as being more vulnerable in terms of the definition of “vulnerable consumer” contained in the CCCFA) and there is therefore a duty on the people selling the policies at point of sale to ask appropriate questions to understand the risk.

The FSF notes that the Insurance Council’s Fair Insurance Code provides helpful and comprehensive guidance for both insurers and the insured as to what each party needs to disclose to each other and the responsibilities of each party to each other as does the FSF’s Responsible Credit-related Insurance Code. The CCCFA also provides specific requirements of credit-related insurance providers in relation to what must be disclosed concerning the features, benefits and exclusions of the policy.

Of the three options for disclosure by consumers mooted in the Options Paper, the FSF prefers Option 2 for consumers to have a duty to disclose what a reasonable person would know to be relevant with assistance from the insured to help ask the right questions to tease that out. It should be remembered that everyone is impacted if insurers pay claims without having had sufficient information provided to them that they might not otherwise have done.

FSF would certainly not support Option 3, particularly for the provision of credit-related insurance. Gaining access to medical records could take days, weeks or months, when the insured has an immediate need for the insurance when taking on a liability through a credit contract. The unnecessary delay could then become a barrier to consumers taking out insurance which, in the FSF's view, would be a severely retrograde step. It would also add significant cost to the process of accepting an insurance contract which would ultimately be passed to the consumer. The fact also that this information might be passed to someone who is not a medical professional for assessment would not be conducive to good decision-making.

**3. Should insurers be required to warn consumers of the duty to disclose? Why/why not? Should insurers be required to warn all insureds of the duty to disclose, including businesses?**

The FSF believes that the duty for consumers to disclose is a condition that already exists in most insurance policies now. However, regulation could help by being more prescriptive in terms of what exactly should be disclosed and the manner in which disclosure should be made as omissions in disclosure can impact at claims time (if the omissions are relevant to the claim being made).

**4. Should insurers have to tell consumers what third party information they will access, when they will access it and if they will use it to underwrite the policy?**

The FSF submits that any such access to third party information, in whatever form, must be disclosed as a requirement of the Privacy Act 1993 in terms of what third party information is being accessed and what it might be used for. This will be done via a privacy statement in the policy documentation provided to the insured.

**5. What is your feedback on the options in relation to disclosure by businesses? In particular: Should businesses have different disclosure obligations to consumers? Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?**

This is not relevant to the FSF's credit-related insurance provider members who are insuring individuals rather than businesses.

**6. If we have a separate duty of disclosure for businesses, should small businesses have the same duty as consumers? Why/why not? If so, how should small businesses be defined?**

Again, this is not relevant to the FSF's credit-related insurance provider members who are insuring individuals rather than businesses.

**7. If a duty of fair presentation of risk is adopted, should businesses be allowed to contract out of the duty? What are the costs and benefits of allowing businesses to do so? If businesses are allowed to contract out, should the duty apply to all businesses?**

Again, this is not relevant to the FSF's credit-related insurance provider members who are insuring individuals rather than businesses.

**8. What is your feedback in relation to the disclosure remedy options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

Option 1 in relation to disclosure remedy options would be FSF's preferred option because an insurer should be able to avoid a contract on the basis of deliberate or reckless non-disclosure as they may not have taken on the risk had they known all the relevant facts. This would require clarity on what intention and materiality means as the onus under this option would be on the insurer to prove deliberate or reckless non-disclosure which is a high threshold. More prescription in regulation might be required to determine between what is deliberate and reckless non-disclosure versus genuine error in disclosure.

**9. Is it fair to require insurers to pay claims that are not connected to a non-disclosure or misrepresentation, even if the insurer would not have entered into the contract had they known the facts?**

The FSF does not believe it is fair to require insurers to pay claims that are not connected to a non-disclosure or misrepresentation if the insurer would not have entered into the contract had they known the facts but questions how the issue of what is or is not related to be established.

**10. Should insurers be able to offer reduced cover or ask the insured to cover the difference in order to recoup the amount they would have charged if they had the facts? Why/why not?**

The FSF believes that it is entirely reasonable for the insured to be required to cover the difference in premium in order to recoup the amount that would have been charged if the insurer had had all the facts when taking on the risk if the insured wishes the insurer to provide the protection to them should something relating to that fact occur.

**11. Should we clarify that where a contract has been avoided and all claims rejected, the insured is not required to refund claims money if it is not easily returnable and would be hard and unfair to the insured? Why or why not?**

The FSF's credit-related insurance provider members can think of very few, if any, situations where this might become an issue so have no views on the matter.

**12. Do you agree that section 35 of the Contract and Commercial Law Act should not apply to insurance contracts? Are there any other sections of the Contract and Commercial Law Act that should not apply to insurance contracts?**

The FSF is in agreement with the suggestion that section 35 of the Contract and Commercial Law Act 2017 should not apply to insurance contracts on the basis that the legislation resulting from this Options Paper will see new remedies adopted for the duty of fair presentation in insurance. The FSF cannot think of any other sections of the Contract and Commercial Law Act that should not apply to insurance contracts.

**13. Do you agree with the proposed change to the misrepresentation provision in the Insurance Law Reform Act 1977? Why/why not?**

The FSF agrees with the rationale for doing so as provided in paragraph 68 of the Options Paper and therefore supports the proposed change to the misrepresentation provision of the Insurance Law Reform Act 1977.

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

Many of the insurance contract term examples are not relevant to the credit-related insurance provider members of the FSF so the following comment is provided only on those terms listed in Table 4 that are of relevance to these insurers.

The FSF does not agree with the second term in the Table stating that the insurer may make unilateral changes to a contract as this is not fair to the insured as stated in the Table as to whether or not there is an imbalance in rights and obligations.

With respect to the fourth term in the Table which states that the insured must follow the defence recommendations of the insurer's lawyer in third party claims, the FSF believes that this term provides for a potential conflict of interest and should be considered on a case by case basis to ensure the insured is not sacrificing their right to challenge these recommendations.

The FSF agrees that the fifth term in the Table stating that the insurer may decline a car insurance claim for an accident if they cannot contact the person at fault is unfair and the insurer should not be able to decline the claim on this basis.

Finally, with respect to the last term listed in Table 4, allowing for broad exclusions for pre-existing conditions where insurers can decline claims for any symptom, regardless of whether the insured knew it was a symptom, the FSF believes it is fair to exclude pre-existing conditions where the insured knew of the symptom, but certainly not if they did not.

**15. What is your feedback on the UCT options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

The FSF supports Option 1 of the UCT options stated in the Options Paper. The benefits of this Option far outweigh the potential cost. This would allow insurers to retain terms that are reasonable and remove or improve those that are not.

The FSF does not support Option 2 of relying on generic unfair contract terms provisions as insurance does not lend itself to generic provisions because of the complexity and range of the product range. The FSF cannot see where the ability to exclude pre-existing conditions would sit in relation to this option for example.

The FSF is also not in favour of Option 3 to rely on conduct regulation either because it is not yet clear where any such conduct regulation will land in terms of the requirements it might place on insurers and, if this is to be based on the Options Paper that is currently open for consultation about what a potential conduct regime might look like, the FSF has some significant reservations about what is being proposed in this review.

**16. What is your feedback on the options to help consumers understand and compare contracts? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which options do you prefer and why?**

The FSF supports Options 1, 2, 3 and 5 of the options to help consumers understand and compare contracts. With respect to Options 2, 3 and 5, these are already obligations placed on credit-related insurance providers under the CCCFA with which FSF members are already complying.

With respect to Option 1, the use of plain language in insurance policies is industry best practice which FSF insurance members, as responsible providers, already have in place wherever possible. However, the FSF submits that it is not always possible to use plain language when the contract requires the use of a technical term that may not be widely understood by the average consumer. An example of this would be when an insurer provides a mechanical warranty for a motor vehicle and the contract for this product describes vehicle parts and processes.

The FSF is not supportive of Option 4 requiring insurers to work with third party comparison platforms. The range of life events and assets that can be covered by insurance and the ranges of policies available to cover these, is massive and complex. What is covered, how it is covered and what is not covered is driven by so many different elements it makes any reasonable comparison impossible. Insurers are constantly innovating and upgrading their policies and the FSF questions whether any third party would have the capacity to keep up with this to ensure their comparison platform remain timely and relevant to consumers.

To make a comparison between one policy offering and another purely on the basis of price is not helpful (and in fact in some cases could be detrimental) to consumers who are not receiving the full information necessary to determine what features, benefits and exclusions that price is providing to them. It is entirely possible to make the price look attractive but to do so by reducing the cover, reducing the claims limits, increasing excesses etc.

**17. What is your feedback on the options in relation to intermediaries? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

Before answering this question, the FSF notes that those intermediaries who are insurance brokers often have access to a wide range of insurers and insurance products in order to be able to recommend the most appropriate product to meet the needs of their client (the insured). The way in which these advisers do this is subject to the requirements of the recently passed Financial Services Legislation Amendment Act 2019 (“FSLAB”) and the Code for Financial Advisers that is currently being written and to which these advisers will be required to adhere. When this takes effect, they will therefore become even more responsible for their own actions in relation to their treatment of their clients which includes their obligation to pass on all relevant information to the insurer.

In terms of which of the three options the FSF prefers, the FSF submits that credit-related insurance is sold in a different way to that of other insurances. That is that the products are sold in conjunction with the sale of a consumer credit contract as the insurance relates to either the contract itself or the asset being purchased with the funds accessed via that contract. On this basis, the intermediaries who sell credit-related insurance products are already operating under an agency agreement with the insurance provider. If it became obvious to an insurer that an intermediary operating under such an agreement was not passing on information, the insurer has the option of terminating the agency agreement. The insurer still has a liability to the policyholder and is ultimately liable for the actions of the Intermediary.

Option 2 therefore effectively reflects the status quo for credit-related insurers but the provisions of the Insurance Intermediaries Act 1994 make it clear that the insurer is responsible for the actions of the intermediary and that Act also makes clear that it prevails over Section 10 of the Insurance Law Reform Act 1977 (section 20 of the Insurance Intermediaries Act) if an agent failed to pass relevant information onto the insurer.



**18. Can the issues with the status quo be overcome with insurers contractually requiring representatives to pass on all material relevant information? What are the benefits of a statutory obligation requiring representatives to pass on information?**

The FSF's insurance provider members already have such a requirement in their agency agreements with representatives but suggests that a fourth option exists which is that, if material information is not passed on by an agent, thus leaving the insurer exposed, it is for the insured to pursue the matter with the agent if the agent has failed to meet their agency agreement. It remains possible therefore for the insured to terminate the agency agreement thus giving the business control over those agents with whom they will deal. The insurer is still liable for the risk under the policy so this would not affect the policy holder (insured).

**19. Should consumer insureds be treated differently from commercial insureds in relation to these issues?**

As previously stated, FSF's insurance members do not deal with commercial insured so this question is not relevant.

**20. What is your feedback on the options in relation to section 11 of the Insurance Law Reform Act 1977? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why? Are the options preferable to the status quo?**

The FSF does not support Option 1 to remove certain types of exclusions from the operation of section 11 of the Insurance Law Reform Act 1977 for the reason listed under Costs in Table 8 on page 29 of the Options Paper. That is that the FSF agrees that it would be difficult to identify a complete list of exclusions which should not be subject to section 11.

The FSF believes there is a third option with regard to section 11 of the Insurance Law Reform Act 1977 which is to leave the provisions of this section as they are. Section 11 already states that an insurer cannot decline a claim just because an unrelated circumstance subject to a policy exclusion happened to exist when the loss was suffered which seems to the FSF to be entirely reasonable.

However, if the status quo is deemed not to be an option, the FSF prefers Option 2 which, as stated in Table 8 of the Options Paper, allows insurers to more effectively price different risks.

**21. What is your feedback on the option to provide that Section 9 of the Insurance Law Reform Act 1977 does not apply to time limits under claims made policies? In particular: Do you agree with the costs and benefits of the option? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Is the option preferable as compared with the status quo?**

This is not relevant to the FSF's credit-related insurer provider members.

**22. If the option is adopted, should there be an extended period (e.g. 28 days) for notifying claims or potential claims after the end of a policy term?**

This is not relevant to the FSF's credit-related insurer provider members.

**23. What is your feedback in relation to the option for section 9 of the Law Reform Act? In particular: Do you agree with the costs and benefits of the option? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?**

The FSF agrees with the option proposed.

**24. If the option is adopted, should it apply to insolvency only? Should third parties be required to get leave of the court? Should reinsurance contracts be excluded from the application of the option?**

The FSF believes that the allowance for third party claimants to claim from insurers directly should be applied more generally but with the requirement that the wronged third party would be required to get leave of the Court to commence proceedings in order to ensure that such claims are not made spuriously. The FSF would not support reinsurance contracts being included in the application of this option.

**25. What is your feedback to the options in relation to the duty of utmost good faith? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?**

The FSF supports option 1 to leave the courts to interpret the duty of utmost good faith via case law.

**26. What is your feedback on the proposal to consolidate non-marine insurance statutes into a single statute?**

The FSF supports the proposal.

**27. What is your feedback on our proposed approach in relation to the Marine Insurance Act 1908?**

The FSF supports the proposed approach.

**28. Are the above provisions redundant? Why/why not? Are there other redundant provisions in the legislation covered by this review?**

The FSF believes the provisions listed in the Options Paper under paragraph 163 are redundant and therefore supports their repeal. The FSF is not able to provide any further examples of redundant provisions in the legislation covered by this review.

**29. What is your feedback on the proposed option in relation to registration of assignments of life insurance policies?**

This is not relevant to the FSF's credit-related insurer provider members.

**30. Should the maximum payment amounts for life insurance policies for minors be increased? Why or why not?**

This is not relevant to the FSF's credit-related insurer provider members.

Thank you again for the opportunity for the FSF to submit on this Options Paper. Should you require any further information or clarification, please do not hesitate to contact me.



Lyn McMorran  
EXECUTIVE DIRECTOR

**Appendix A**  
**FSF Membership List as at 31 May 2019**

Debenture Issuers - (NBDT) Non-Bank Deposit Takers	Vehicle Lenders	Finance Company Diversified Lenders	Finance Company Diversified Lenders	Insurance	Affiliate Members
<p><u>Rated</u> Asset Finance (B)</p> <p><u>Non-Rated</u> Mutual Credit Finance Gold Band Finance     ➤ Loan Co</p>	<p>BMW Financial Services     ➤ Mini     ➤ Alphera Financial Services</p> <p>Branded Financial Services</p> <p>Community Financial Services</p> <p>European Financial Services</p> <p>Go Car Finance Ltd</p> <p>Honda Financial Services</p> <p>Mercedes-Benz Financial</p> <p>Motor Trade Finance</p> <p>Nissan Financial Services NZ Ltd     ➤ Mitsubishi Motors Financial Services     ➤ Skyline Car Finance</p> <p>Onyx Finance Limited</p> <p>Toyota Finance NZ</p> <p>Yamaha Motor Finance</p> <p><u>Leasing Providers</u> Custom Fleet</p> <p>Fleet Partners NZ Ltd</p> <p>ORIX NZ</p> <p>SG Fleet</p> <p>Lease Plan</p>	<p>L &amp; F Ltd     ➤ Speirs Finance     ➤ YooGo</p> <p>Avanti Finance</p> <p>Caterpillar Financial Services NZ Ltd</p> <p>CentraCorp Finance 2000</p> <p>Finance Now     ➤ The Warehouse Financial Services</p> <p>Flexi Cards</p> <p>Future Finance</p> <p>Geneva Finance</p> <p>Home Direct</p> <p>Instant Finance     ➤ Fair City     ➤ My Finance</p> <p>John Deere Financial</p> <p>Latitude Financial</p> <p>Pioneer Finance</p> <p>South Pacific Loans</p> <p>Thorn Group Financial Services Ltd</p> <p>Turners Automotive Group</p>	<p>Prosopa NZ Ltd</p> <p>Personal Loan Corporation</p> <p><u>Credit Reporting</u></p> <p>Equifax (prev Veda)</p> <p>Centrix</p> <p><u>Debt Collection Agencies</u></p> <p>Baycorp (NZ)</p> <p>Illion (prev Dun &amp; Bradstreet (NZ) Limited</p> <p>Experian</p> <p>Intercoll</p> <p>Receivables Management</p>	<p>Autosure</p> <p>Protecta Insurance</p> <p>Provident Insurance Corporation Ltd</p> <p>Southsure Assurance</p>	<p>AML Solutions</p> <p>Buddle Findlay</p> <p>Chapman Tripp</p> <p>EY</p> <p>Finzsoft</p> <p>KPMG</p> <p>Paul Davies Law Ltd</p> <p>PWC</p> <p>Simpson Western</p> <p>FinTech NZ</p> <p>HPD Software Ltd</p> <p>Total : 60 members</p>