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Financial Markets Policy
Building, Resources and Markets
Ministry of Business Innovation & Employment
Wellington

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Insurance Contracts Bill - Consultation

I am a barrister practising in Christchurch. One of my specialist fields is insurance law. In particular, I have intimate experience of insurance issues and disputes following a natural disaster, specifically the Canterbury earthquake sequence from the Darfield earthquake of 4 September 2010 and the Port Hills earthquake of 22 February 2011.

My submission addresses sub-part 4 of Part 3 of the Insurance Contracts Bill dealing with third party claims for liability insurance money for which the new provisions are to replace s9 of the Law Reform Act 1936. My focus is one specific issue, the exclusion of reinsurance.

My concern is that the exclusion, and the removal of the statutory charge facility, will deny domestic and commercial policyholders from an important recovery mechanism in the aftermath of a natural disaster where an insurer is in financial and/or administrative difficulty over meeting claims or insolvent. The circumstances were well illustrated in the High Court decision of France J in *Re Western Pacific Insurance Limited (in Liq); Ruscoe v. Canterbury Policyholders* (2011) 9 NZBLC 103,483 [2002] 2 NZLR 438¹.

For the homeowners and building owners insured with Western Pacific, the statutory charge created by s9 of the Law Reform Act 1936 provided an economic realisable means for securing payment under their policies. If that facility had not been available, then it is possible that the reinsurance treaties might not have been triggered, relying on liquidation exclusions in the treaties, or even if payment had been made by the reinsurer(s), then the policyholders would have been competing with other creditors of Western Pacific through the liquidation process, resulting in delay and reduced payouts.

From that experience, which we must expect will be repeated in future natural disaster events, notwithstanding the new Prudential Supervision regime implemented since, the exclusion of reinsurance from Part 3 of the Bill is unfortunate. On my reading, there is no replacement facility for policyholders affected by an insolvent insurer to claim directly against the reinsurer(s). No common law rights of action exist.

Whilst I understand the reasons advanced against using a statutory charge mechanism, the very real benefit, as illustrated by the Western Pacific experience, was that the (existing) s9 charge meant that all reinsurance funds paid stood solely for the benefit of the affected claimant policyholders. The charged funds could not form part of the greater pool of assets subject to the liquidator's fees and claims from general creditors, secured and unsecured of the insolvent insurer.

¹ Note also the decision of Venning J in the High Court Auckland *Re ACS (NZ) Limited* [2012] NZHC 1396 in relation to approval of a scheme of arrangement under Part 15 of the Companies Act 1993

In my submission, reinsurance should not be excluded; specifically consideration should be given to providing a mechanism, if not a statutory charge, for policyholders to claim and recover against reinsurers.

I would be happy to speak further to my submission, including providing copies of the Court decisions referred to, if needed.

Ngā mihi nui

Privacy of natural persons

Richard Johnstone
Barrister

Privacy of natural persons