Submissions on Fit for Purpose Financial Services Reform – 17 June 2024

My name is Emma Gabor. I am the Principal of Gabor Law, a boutique law firm specialising in insurance and civil disputes, based in Wellington. I have been an insurance lawyer for 16 years.

Most of my work is to represent policyholders in disputes with insurance companies. That requires interaction with insurance companies and with the dispute resolution schemes. My submissions are limited to the part of the regime that come within the ambit of my work.

1. **Duty of treat customers fairly**

The Financial Markets (Conduct of Institutions) Amendment Act 2022 (the CoFI Act) has been adopted with the specific purpose of ensuring that financial institutions such as insurance companies treat consumers fairly.

In my experience, insurance companies try to treat customers fairly. However, sometimes they fall short.

Insurers should be required to use proper specialists when assessing claims

One area where insurance companies consistently fall short is during the assessment of claims for property damage. Insurers rely on loss adjusters to investigate claims. This is proper for small claims. However, with an increase in natural disaster claims in New Zealand, insurers have started to rely on loss adjusters to make damage assessments to properties that are damaged by natural disasters. Some of these properties suffered impact damage by powerful landslides or have been displaced or undermined by slips. Such a damage assessment is outside the expertise of a loss adjuster. Such damage assessments should be made by structural engineers and/or registered building surveyors.

In addition, insurance companies use loss adjusters to cost the repair work. Loss adjusters are not costing specialists, so they consistently get it wrong and undercost the repairs. I have seen numerous claims where the loss adjuster's costings have fallen short of the real cost.

Insurance companies offer cash settlements based on inadequate damage assessments and inadequate costing reports. Although they know that loss adjusters are not qualified to do damage assessments or prepare costings, they continue to use loss adjusters and make inadequate settlement offers.

Below are 2 examples of my own cases. A property in Auckland was damaged during the January 2023 flood. The house itself was fine, but at the back of the property was a sleepout built on top of a retaining wall. The flood caused the retaining wall to fail, removing two piles from the sleepout which were left hanging above ground. The loss adjuster engaged by the insurer assessed the damage to the sleepout at around $6,000. A few months later, Auckland Council started their own assessment in categorizing properties for flood damage. The Council categorized the sleepout as a 2P property, capable of being repaired. The Council obtained a report from a Geotech engineering company about the remedial options for the sleepout and the likely costs. The costs to repile the sleepout were estimated at between $60,000 to $99,000. The insurer's costings were way off the mark because they did not use a qualified expert.

Another case of a landslip in Wellington, the loss adjuster estimated the cost to repair the property at around $23,000. We engaged a registered building surveyor who identified further damage. We also engaged a qualified quantity surveyor (QS). They estimated the cost at $203,000.

Both these clients waited months and months for the insurer's assessment only to be let down. It is unfair of the insurer to use unqualified people and waste people's time, leading to stress and additional costs to policyholders to challenge the insurer.

The Act should be amended to make it clear that part of the insurer's obligation to treat customers fairly means that they need to engage qualified people to assess property damage and to prepare costings.

Dispute resolution schemes

My second submission relates to the current dispute resolution schemes: IFSO and FSCL (relevant to insurance companies).

It is great that we have such schemes, and they provide a point of difference in a dispute with an insurer. Insurers are always more careful when they deal with a dispute when they know it can end up with IFSO or FSCL. So, the dispute resolution schemes are great.

I have used both schemes.

There are a few things that could be improved in relation to the dispute resolution schemes.

Publication of past decisions

The first would be publishing their decisions.

When I assist a client with a dispute, it is useful to know how previous cases have been decided. That informs me (or a client, if they do it themselves) to know if they have a valid reason for the dispute. It might dispose of a complaint right away. Or might help us give a past decision to an insurer as an example of a case where the ombudsman made a ruling. It would be of massive help.

IFSO used to publish decisions online. They also used to have a search engine based on key words, so it would be easy to search the database of past decisions. IFSO no longer does that, and you can only get copies of the decisions if you are a member (ie if you are an insurance company).

Only insurers have access to the past decisions, consumers do not. This is not of assistance to consumers.

People should be able to search past decisions and see how the ombudsman has dealt with previous cases.

IFSO publishes a handful of representative decisions on specific topics, but they are of limited value.

Publication of actual facts involved in a case

FSCL publish their decisions, but they change the facts to protect the privacy of the people involved. While I agree with changing the names of the parties, I find that changing the facts is not helpful, as

the exact facts are crucial to any application of the policy. Any change in the facts affects the policy response. I had one case with FSCL where FSCL ruled in our favour, but when the published version of the decision came out, the facts were altered so much that it had no resemblance to the fact actual scenario. I was not able to use that precedent to show the insurer that they had no basis for declining a similar claim. The case lost its precedent value.

Dispute resolution schemes are there to assist consumers. One of the major ways they can do that is by providing precedents of past cases which a consumer can use when arguing a case with the insurer. This will avoid having a dispute – if the ombudsman has already ruled on that particular issue, a consumer finds that they have no basis for a case. Or it might be the opposite, in which case, the consumer can take that case and show it to an insurer. That would assist in the resolution of disputes.

Schemes should report metrics

Schemes should report how many claims are found in favour of insurance company, and how many are in favour of policyholders.

At the moment, anecdotally, it appears that IFSO decides 80% of cases in favour of insurers. That cannot be confirmed, because there are no reporting obligations.

As legal advisers, we need to be able to inform a consumer of their chances of success. Without having visibility of past cases, and without knowing the metrics, it is difficult to provide proper advice to a consumer.

Board members and decision-makers to be appointed by the government

Some people working for the dispute resolution schemes come from an insurance background. They think like insurance companies. This is helpful to an extent because they are familiar with insurance policies. However, that might also cause them to have a biased view of how a particular policy should be interpreted, rather than see it how a consumer would see it.

Given that the reason for their existence is to protect consumers, consideration should be given on whether members should be appointed from a consumer-protection background.

Remove the 3-month deadline for bringing a complaint

Currently, a dispute resolution scheme can only hear a complaint if a policyholder makes that complaint within 3 months of the insurer's deadlock letter (final decline). I believe there is no need for such a barrier. In the legal world, people have 6 years to bring proceedings arising out of a breach of contract or in negligence. It is not helpful to cut people's rights after 3 months.

A lot of people take some time to absorb the insurer's decision. Old people in particular find it difficult to make decisions. They take their time.

Consumers should not be cut off from accessing these services after 3 months. The timeframe is extremely short. Such a clause is only of benefit to an insurance company, not to the consumer.

Dispute resolution schemes should be open to businesses as well

At the moment, the dispute resolution schemes are only available to take complaints from consumers and small businesses. It is my submission that the dispute resolution schemes should be open to all policyholders, no matter who they are. There is no reason why an ombudsman could not rule in a policy conflict between an insurer and a large business. It is the same thing as for a small business. It provides a free way of resolving an insurance dispute. As it is now, any business which has more than 20 employees needs to resort to court proceedings in order to have an insurance claim reviewed, even if it is only worth little.

This is unfortunate. There are many cases related to the interpretation of a particular exclusion or clause in a policy where the ombudsman would be the best placed to give a view. But the policyholder has no access to this service because it is a medium or large business.

The dispute resolution schemes should be made available to all policyholders, subject only to the scheme's monetary jurisdiction.

We are fortunate to have the current dispute resolution schemes. They are of great assistance to policyholders. It is always well-received to say to a policyholder that there is a free service where they can take their complaint. It provides hope that someone independent will review the insurer's stance. It keeps the insurer careful in making a final decision. There are a few things I believe could be improved, in removing some barriers to access (time limits, size of business limits), as well as a more pronounced focus on consumers.