Submission on discussion document: Insurance contract law review

Your name and organisation

Name	Blair Dyer / Neil Austin
Organisation	Austinsure Limited

Responses to discussion document questions

Regarding the objectives of the review

1	Are these the right objectives to have in mind?
	[no response]
2	Do you have alternative or additional suggestions?
	[no response]

Regarding disclosure obligations and remedies for non-disclosure

3	Are consumers aware of their duty of disclosure?
	[no response]
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	[no response]
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	[no response]
6	Do consumers understand the potential consequences of breaching their duty of disclosure?
	[no response]
7	Does the consumer always know more about their own risks than the insurer? In what circumstances might they not? How might advances in technology affect this?
	[no response]
8	Are there examples where breach of the duty of disclosure has led to disproportionate

	consequences for the consumer? Please give specific examples if you are aware of them.
	[no response]
9	Should unintentional non-disclosure (i.e. a mistake or ignorance) be treated differently from intentional non-disclosure (i.e. fraud)? If so, how could this practically be done?
	[no response]
10	Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?
	[no response]
11	Should non-disclosure be treated differently from misrepresentation?
	[no response]
12	Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?
	[no response]
13	In your experience, do insurers typically choose to avoid claims when they discover that an insured has not disclosed something? Or do they treat non-disclosure on a case-by-case basis?
	[no response]
14	What factors does an insurer take into account when responding to instances of non-disclosure? Does this process vary to that taken in response to instances where the insurer discovers the insured has misrepresented information?
	[no response]

Regarding conduct and supervision

15	What do you think fair treatment looks like from both an insurer's and consumer's perspective? What behaviours and obligations should each party have during the lifecycle of an insurance contract that would constitute fair treatment?
	[no response]
16	To what extent is the gap between ICP 19 and the status quo in New Zealand (as identified by the IMF) a concern?
	[no response]
17	Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?

	[no response]

18	What has your experience been of the claims handling process? Please comment particularly on:
	• timeliness the information from the claims handler about:
	  ○ timeframes and updates on timeframes
	  ○ reasons for declining the claim (if relevant)
	  ○ how you can complain if declined
	• The handling of complaints (if relevant)

	[no response]
19	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
	[no response]
20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
	[no response]
21	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
	[no response]
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
	[no response]
23	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?
	[no response]

Regarding exceptions from the Fair Trading Act's unfair contract terms provisions

24	Are you aware of instances where the current exceptions for insurance contracts from the unfair contract terms provisions under the Fair Trading Act are causing problems for consumers? If so, please give examples.
	[no response]
25	More generally, are there terms in insurance contracts that you consider to be unfair? If so, why do you consider them to be unfair?

	[no response]
26	Why are each of the specific exceptions outlined in the Fair Trading Act needed in order to protect the "legitimate interests of the insurer"?
	[no response]
27	What would the effect be if there were no exceptions? Please support your answer with evidence.
	[no response]

Regarding difficulties comparing and changing providers and policies

28	Is it difficult for consumers to find, understand and compare information about insurance policies and premiums? If so, why?
	[no response]
29	Does the level of information about insurance policies and premiums that consumers are able to access and assess differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	[no response]
30	What barriers exist that make it difficult for consumers to switch between providers?
	[no response]
31	Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	[no response]
32	What, if anything, should the government do to make it easier for consumers to access information on insurance policies, compare policies, make informed decisions and switch between providers?
	[no response]

Regarding third party access to liability insurance monies

33	Do you agree that the operation of section 9 of the Law Reform Act 1936 (LRA) has caused problems in New Zealand?
	[no response]
34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?

	[no response]
35	What has been the consequence of the problems with section 9 of the LRA?
	[no response]
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	[no response]

Regarding failure to notify claims within time limits

37	Do you agree that the operation of section 9 of the Insurance Law Reform Act 1977 (ILRA) has caused problems for "claims made" policies in New Zealand?
	Section 9 of the Insurance Law Reform Act does not cause problems for "claims made" policies *The key issue with clams made policies, is not when a "claim" should be notified to an insurer, but rather when a* ***"circumstance"*** *should be notified.* *The current insurance law protects an insured where there is a delay in notifying a claim/circumstance under these policies. Most often the reason for these delays is that insureds fail to realise they should have notified the circumstance earlier. This is a direct result of the lack of clarity around what constitutes a circumstance.* *There are legal cases that consider what constitutes a circumstance under a 'claims made' policy. We can provide some examples of such cases if required, however they would only reinforce the point that understanding what constitutes a circumstance can very complex, even for insurance professionals.* *Without Section 9 an Insured would be required to make a crucial assessment on a technical, and subjective matter (that has been proven in court difficult for insurance experts determine).* *The delay in notification will result in the claim being declined by their insurer.* ***How Section 9 Protects an Insured – Current Practice*** *Section 9 provides the insured protection where, (a) there is a delay in notification, and (b) there has been a change in insurers. For example, they are currently with insurer B, however the claim falls with a prior insurer A. Insurer B declines the claim due to the claim being a 'known claim or circumstance'. Insurer A declines the claim as policy A has expired.* *Section 9 protects the insured where the delay in notification has not prejudiced the Insurer. In this case, Insurer A can not decline the claim unless they have suffered prejudice.* *As an insurance broker, dealing with claims made policies, we would deal with a number of instances each year where the notification is late to the insurer. Section 9 provides us with a clear framework to deal with this notification. We need to establish (1) the correct policy period for the claim to be notified under, and (2) that the Insurer has not suffered any*

prejudice. In our experience it has been an aspect of insurance law that has worked very well for all parties – insurers and insureds.

How "Claims Made" polices define notifiable circumstances

Some examples of circumstances provisions from Professional Indemnity Insurance policies, a form of claims made policies, in the NZ Market:

i. *Any circumstance that the insured becomes aware of, and the insured or a reasonable insured should consider may give rise to…*

ii. *If the insured becomes aware of any circumstance that may give rise to …*

iii. *Any circumstance which the Insured or reasonable Insured should have considered may give rise to…*

*These polices **do not** define what a circumstance is. Therefore, an insured will have no guidance from the policy (nor their insurer) on what constitutes a notification.*

Consequences of Notifying Early

An overlooked issue with the operation of 'Claims Made' policies. The opposite of notifying late, is notifying early. The issue is compounded further when there has been a change in Insurers during the relevant period.

For example, the current Insurer A will not accept the matter as a notification under their policy. At a future renewal of the policy, due to the process of obtaining cover with Insurer B, Insurer B may actually exclude any claims arising from the matter (this is often referred to as a 'specific matters exclusion' or a 'proposal form exclusion').

Without Section 9, we could see the absurd situation where insureds have their claims declined because (1) it was notified early, or (2) notified late. Despite the complexity with what constitutes a circumstance, they must notify at exactly the right time.

Claims Made vs Occurrence Policies

If Section 9 was changed to exempt 'Claims Made' policies, we would be in a farcical position where an insured retains this protection for an 'Occurrence Wording'. Generally, claims under occurrence wordings can be easir to identify – car crash, house fire. Therefore, we retain protection for delays with easily identifiable claims, and have no protection for the more complicated circumstances under a "claims made" policy.

Contrary View of Insurers

There is a school of thought that Section 9 makes it difficult for insurers of "claims made" policies to operate their business. We disagree with this view because of the following reasons:

i. *Section 9 allows for prejudice the Insurer could suffer with the late notification. This is a key point, if the delay in notifying the claim is prejudicial to the insurer, then they can allow for that in their response to the claim.*

ii. *The instance of late notification in a policy period would be relatively minor, e.g. less than 1% of the claims. It is not a common issue.*

iii. *Insurers offer their existing clients a 'continuity clause'. This protects an Insured from a late notification where they have been continually insured with that insurer. In some situations, an insurer will also back date this protection further to when the insured was with a previous insurer. The existence of these 'continuity clauses' proves that late notifications of claims are not prejudicial to an insurer. If it was, these clauses would not be offered.*

iv. *A 'claims made' insurer will write policies during an annual policy period – this would generally follow their treaty insurance programme. For example, 1 July 2018 to 30 June 2019. A policy written on 30 June 2019 will expire on 30 June 2020. In some cases an insurer will also have an extended reporting period option that can extend the policy notification period for an additional year.*

Claims on these types of policies, do not fall nicely within a 12 month policy. An insurer can be open to accepting claims on a 12 month policy year for a 3 year period.

The assessment of profitability on the book of business is further compounded by development. Most insurers will find that their book fully develops (from a claims perspective) 3-5 years after the policy period ends.

What this means is with the example above is that approximately on 30 June 2024 an insurer will have a fair idea whether they made profit during the 2018/19 year. During that 5-year period they will encounter many material changes to the claims incurred on that book of business, a late notification is simply one of these changes.

v. *The previous point is compounded further by the policies issue for more than 12 months. Many insurers are now able to issue "claims made policies" that can stretch as far out as 72months, in some cases 84 months. This could mean that 10 years after the policy is issued an insurer is still accepting valid claims into the policy period in which the policy was issued. Clearly a policy issued for 84 months demonstrates that claims notified well after the issuance of that policy do not cause problems for "claims made" insurers.*

vi. *The process of obtaining reinsurance for the following insurance period, can start as early as 6 months before the end of the current policy period (i.e. well before the claim result for that year is actually known). Therefore, the late notification of a claim has no meaningful bearing on reinsurance process.*

The occasional late notification is therefore not a key factor in how that book develops, its profitability nor the ability of an insurer to obtain reinsurance. It also has little imapct on the day to day operational activity of that insurer.

Facilitating a Competitive Insurance Market

Without the protection afforded by Section 9, it would be risky for any Insured to change insurers. Many insurance professions, (brokers, insurers, lawyers) will advocate not changing insurers on 'claims made' policies – despite obvious benefits for doing so. The reason for this reluctance is concern around the consequences of late notification.

In our view Section 9 helps foster a competitive "claims made" insurance market amongst

	participants.
38	What has been the consequence of the problems with section 9 of the ILRA?
	We do not believe that Section 9 poses any adverse consequences. .
39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	Not applicable

Regarding exclusions that have no causal link to loss

40	Do you consider the operation of section 11 of the Insurance Law Reform Act 1977 (ILRA) to be problematic? If so, why and what has been the consequence of this?
	[no response]
41	The Law Commission proposed reform in relation to exclusions relating to the characteristics of the operator of a vehicle, aircraft or chattel; the geographic area in which the loss must occur; and whether a vehicle, aircraft or chattel was used for a commercial purpose. Do you agree that these are the areas where the operation of section 11 of the ILRA is problematic? Do you consider it to be problematic in any other areas?
	[no response]
42	If you agree that there are problems with section 11 of the ILRA, what options should be considered to address them?
	[no response]

Regarding registration of assignments of life insurance policies

43	Do you agree that the registration system for assignment of life insurance policies still requires reform?
	[no response]
44	If you agree that there are problems with the registration system for assignment of life insurance policies, what options should be considered to address them?
	[no response]

Regarding responsibility for intermediaries' actions

45	Do you consider there to be problems with the current position in relation to whether an insurer or consumer bears the responsibility for an intermediary's failures? If possible, please

	give examples of situations where this has caused problems.
	[no response]
46	If you consider there to be problems, are they related to who the intermediary is deemed to be an agent of? Or the lack of a requirement for the intermediary to disclose their agency status to the consumer? Or both?
	[no response]
47	If you consider there to be problems, what options should be considered to address them?
	[no response]

Regarding insurance intermediaries – Deferral of payments / investment of money

48	Do you agree that the current position in relation to the deferral of payments of premiums by intermediaries has caused problems?
	[no response]
49	If you agree that there are problems, what options should be considered to address them?
	[no response]

Other miscellaneous questions

50	Are there any provisions in the six Acts under consideration that are redundant and should be repealed outright? If so, please explain why.
	[no response]
51	Are there elements of the common law that would be useful to codify? If so, what are these and what are the pros and cons of codifying them?
	[no response]
52	Are there other areas of law where the interface with insurance contract law needs to be considered? If so, please outline what these are and what the issues are.
	[no response]
53	Is there anything further the government should consider when seeking to consolidate the six Acts into one?
	[no response]

Other comments

We welcome any other comments that you may have.	
[no response]	