

Submission on discussion document: Insurance contract law review

Your name and organisation

Name	Lawyer 1 - questions 4 to 13 responded to.
Organisation	Part of Community Law Canterbury team contracting services to the Residential Advisory Service, Christchurch

Responses to discussion document questions

Regarding the objectives of the review

1	Are these the right objectives to have in mind? [Insert response here]
2	Do you have alternative or additional suggestions? [Insert response here]

Regarding disclosure obligations and remedies for non-disclosure

3	<p>Are consumers aware of their duty of disclosure?</p> <p><i>For policies coming into effect as a result of the 2010-2012 CES event, generally Insured's seemed to show little awareness of the extent of the duty on them to disclose all material information that a prudent insurer might want to know in deciding to assess the risk, . Some Insured's did not know that they were the only ones who knew the true circumstance of the property and should be passing on this exclusive knowledge, they seemed to think the insurer should know about some aspects of their property.</i></p> <p><i>Some thought the insurer should have been able to work out the correct square meter coverage for all improvements or work out if a garage had to itemised separately rather than within the definition of home. This lead to underinsurance, which may have been avoided if the Insurer was clearer about exact details they need rather than quickly getting cover on knowing the consumer may not have been that confident in the accuracy of their responses.</i></p> <p><i>Currently I would think there exists a limited understanding of the duty and my recommendation would be for the duty to be discussed with an insured at formation.</i></p>
4	<p>Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?</p>

	<i>Generally little understanding of this.</i>
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk? <i>Those with experience in insurance claims may have s a greater understanding but generally this would be too much to comprehend</i>
6	Do consumers understand the potential consequences of breaching their duty of disclosure? <i>Probably not, our experience is that the potential consequence could be triggered not so much where a claim is being handled but during legal proceedings. Insurer's don't seem to have asked questions about reports obtained by the consumer pre insurance, but insurer does have process in place for identifying pre-existing damage when a claim is made. It is in legal proceedings then when disclosure is made that is the time other pre insurance reports relating to the previous condition of the building are exchanged and may trigger Insurer to think there has been a breach.</i>
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? <i>I don't think the average consumer knows that much about the risks of their home, this is because at purchase typically they transfer their risk onto the legal advisor and building survey or engineers in obtaining a report on the condition of the building and any remedial work/defects. It is difficult to know if post purchase the consumer undertakes any of the recommended remedial work.</i> <i>I would think some would and would also inform the insurer of the report's findings and subsequent improvement work but there would be a fair few who do not ever get around to doing the required maintenance and also either gloss over the reports findings to the insurer or do not disclose it</i> <i>I don't know if the insurer would request copies of any building reports leading up to purchase to assess the risk or if they rely on the insured to understand the professionals advice and communicate any items of risk to the insurer;i.e such as cladding that needs repair work to be weathertight.</i>
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. <i>Obviously there will be examples where the policy can be avoided at the insurer's option for instance if the pre purchase condition of the above cladding was not disclosed, and if there is substantial other damages on site in addition to further damage to the cladding then the policy may not respond. A fairer outcome would be for the risk item that was not disclosed in certain circumstances to be removed from cover but allow the other damaged parts of the claim to proceed as long as it is not fraud or intentional non disclosure or misrepresentation.</i>
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?

	<p><i>Yes, the consequence for mistake or ignorance should not be as harsh but because it is such an unknown duty, there needs to be a process in place mandatory for insurers to have a discussion with the consumer at formation about the duty of disclosure and recommend they discuss with a broker or legal advisor before placing cover, arrange for a follow up phone call to secure cover after the advice is sought, that way if the insured chooses to ignore the advice they proceed at their own risk, and should also understand consequence, i.e part or all of the policy can be avoided.</i></p> <p><i>fraud and intentional non –disclosure is different.</i></p>
10	<p>Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?</p> <p><i>Yes as discussed above, partial avoidance of the policy in some circumstances.</i></p>
11	<p>Should non-disclosure be treated differently from misrepresentation?</p> <p><i>This will come down to whether it is an intentional misrepresentation or an ignorant/mistaken one.</i></p>
12	<p>Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?</p> <p><i>They will be, , however all classes of insured's should acknowledge receipt that they have been informed of the duty of disclosure given situations it can extent to and potential consequence then decide whether to take independent advice or proceed without.</i></p>
13	<p>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?</p> <p><i>No experience – probably depends at what stage the claim is at, if in legal proceedings, I would think they may decide to avoid the rest of the policy if it is a valid defence</i></p>
14	<p>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?</p> <p><i>[Insert response here]no experience</i></p>

Regarding conduct and supervision

15	<p>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?</p> <p><i>[Insert response here]</i></p>
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16	To what extent is the gap between ICP 19 and the status quo in New Zealand (as identified by the IMF) a concern?
	<i>[Insert response here]</i>
17	Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?
	<i>[Insert response here]</i>
18	<p>What has your experience been of the claims handling process? Please comment particularly on:</p> <ul style="list-style-type: none"> • timeliness the information from the claims handler about: <ul style="list-style-type: none"> ○ timeframes and updates on timeframes ○ reasons for declining the claim (if relevant) ○ how you can complain if declined • The handling of complaints (if relevant)
	<i>[Insert response here]</i>
19	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
	<i>[Insert response here]</i>
20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
	<i>[Insert response here]</i>
21	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
	<i>[Insert response here]</i>
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
	<i>[Insert response here]</i>
23	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?
	<i>[Insert response here]</i>

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.
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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”?
	<i>[Insert response here]</i>
27	What would the effect be if there were no exceptions? Please support your answer with evidence.
	<i>[Insert response here]</i>

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?
	<i>[Insert response here]</i>
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.
	<i>[Insert response here]</i>
30	What barriers exist that make it difficult for consumers to switch between providers?
	<i>[Insert response here]</i>
31	Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>

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?
	<i>[Insert response here]</i>
34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
	<i>[Insert response here]</i>
35	What has been the consequence of the problems with section 9 of the LRA?
	<i>[Insert response here]</i>
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	<i>[Insert response here]</i>

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?
	<i>[Insert response here]</i>
38	What has been the consequence of the problems with section 9 of the ILRA?
	<i>[Insert response here]</i>
39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	<i>[Insert response here]</i>

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?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>

42

If you agree that there are problems with section 11 of the ILRA, what options should be considered to address them?

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

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.

[Insert response here]

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?

[Insert response here]

47

If you consider there to be problems, what options should be considered to address them?

[Insert response here]

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?

[Insert response here]

49

If you agree that there are problems, what options should be considered to address them?

[Insert response here]

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.
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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.
	<i>[Insert response here]</i>
53	Is there anything further the government should consider when seeking to consolidate the six Acts into one?
	<i>[Insert response here]</i>

Other comments

	We welcome any other comments that you may have.
	<i>[Insert response here]</i>

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