

Submission on discussion document: Insurance contract law review

Your name and organisation

Name	Lawyer 3
Organisation	Part of Community Law Canterbury team contracting services to Residential Advisory Service Canterbury

Responses to discussion document questions

Regarding the objectives of the review

1	Are these the right objectives to have in mind?
	Yes
2	Do you have alternative or additional suggestions?
	No

Regarding disclosure obligations and remedies for non-disclosure

3	Are consumers aware of their duty of disclosure?
	<i>No not at all, from a general insurance point of view, in my experience, the vast majority of property owners believe that there is no responsibility to disclose anything beyond the questions asked by the insurer when the policy is taken out.</i>
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	<i>No, once again, most policy holders rely entirely on the insurer's questioner, the duties and responsibilities set out in s18 and s20 of the Marine Insurance Act 1908 will never occur to them because they will be unaware of the implications of the Act and the Act itself</i>
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	<i>No, The majority of consumers will probably understand the concept of good faith between both parties but are unlikely to understand that their responsibilities under current legislation can go beyond the information they actually hold and extend under the Marine Insurance Act to every circumstance which, in the ordinary course of business, ought to be</i>

	<p><i>known by them. From the point of view of general insurance it is unrealistic to expect that an ordinary consumer, who may be purchasing home insurance, should be required to meet the disclosure standards set in the Marine Insurance Act expressly for very specific business transactions over a century ago.</i></p>
6	<p>Do consumers understand the potential consequences of breaching their duty of disclosure?</p> <p><i>No, consumers at best are forced to rely on the general information contained in their policies regarding the insurer's disclosure requirements, this information is often very brief and can be imprecise and ambiguous.</i></p>
7	<p>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?</p> <p><i>No I don't think they do especially in the general insurance situation, many consumers would find it almost impossible to identify some of the risks insurers will identify as relevant to a policy and will believe that by answering the questions an insurer provides at the inception of the policy or taking their phone advice they are meeting all the insurers requirements. For example, a problem identified early on with claims after the Christchurch earthquakes was the question of actual size or square footage of the house. In many instances the insurer had provided this information themselves to the customer on an average based on the number of rooms the house had, when proper measurements were taken for the rebuild/repair process it was found that some houses were in reality significantly larger than their insurance policy recorded, initially some insurers argued that only the area defined on the policy was insured.</i></p> <p><i>Technology can now provide the insurer with a wealth of information including credit records, social media profiles and shopping habits. Access to large accounting firms could provide "big data" on individual policy holders which would allow an insurer to risk profile the person in question on a far more accurate and complex level than they could ever hope to provide themselves.</i></p>
8	<p>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.</p> <p>NA</p>
9	<p>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> <p><i>Yes it should be treated differently, S26 of the Australian Insurance Contracts Act provides a strong framework to do this, untrue statements made on the basis of a reasonably held belief are not misrepresentation while under s28 (2) if there is a fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation the insurer may avoid the contract or (3) the claim can be reduced to reflect the position the insurer would have been in had the failure or misrepresentation not occurred</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 avoidance should only be available in the case of fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation - following the Australian example there could be an onus on the Insurer to prove it would have rejected the risk entirely had they</i></p>

	<p><i>been aware of the true situation and the remedy available to the insurer should reflect the amount of harm incurred and the initial steps taken by the insurer to avoid the situation i.e. By providing the consumer with specific questions on all areas they required disclosed prior to the policy being provided.</i></p>
11	<p>Should non-disclosure be treated differently from misrepresentation?</p> <p><i>I believe that the English Consumer Insurance (Disclosure and Representations) Act is a good example here, it abolishes the duty of disclosure for general consumers and replaces this with a duty to take reasonable care not to make a misrepresentation. Requiring the insurer to ask the questions in regard to the information it needs to assess the risk is a far fairer option and requiring the insured to answer these specific questions accurately is reasonable and should provide even an inexperienced consumer with a clear guide on the disclosure they need to provide and also clear information about the effects of providing incorrect information.</i></p> <p><i>Following the English legislation, Misrepresentation should be classified and allow the insurer to avoid the claim in the case of fraudulent misrepresentation and provide wider less extreme remedies for other types of misrepresentation.</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>Yes certainly, because they will all have different levels of expertise and understanding of the insurance contract, private consumers usually have to rely on their own understanding of the insurance policy and the disclosure that the insurer provides, while businesses and local government will have access to professional advice i.e. lawyers, property managers and in-house experts. Accordingly disclosure expectations, in terms of general insurance policy holders, should be set at a lower threshold than those expected from business, local government etc.</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 have no personal experience of claims being avoided by the insurer on the basis of non-disclosure myself. I have however had experience of the insurer failing to properly disclose essential information to the policy holder and attempting to avoid the claim on the basis that proper disclosure had taken place.</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>NA</p>

Regarding conduct and supervision

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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?

Throughout the life of the policy there should be a clearly recognised duty of good faith by both insurer and insured, pre policy negotiations should be more closely controlled (ideally by legislation) the insurer should have to follow a prescribed form that provides the insured with clear details about the policy, including correctly describing the type of policy it is. (As an example here we have seen policies which predominantly describe themselves in the policy schedule and in the policy document as Replacement Based on Sum Insured dealt with by the insurer, once a claim is made, as an indemnity one.) Currently the Fair Insurance Code only requires the insurer under Clause 17 " give a clear summary of the key features of your policy "There needs to be legislative back up in this area which sets out the insurers disclosure responsibilities and the available consumer remedies when there is a failure by the insurer to follow these requirements. In terms of general insurance, at the start of the policy the insurer should be required to provide the consumer with a list of questions that constitute the information they need to assess the risk, by answering these questions in good faith the customer will be taken to have completed their disclosure obligations to the insurer.

During the life of the policy the consumer will have the duty to inform the insurer about all changes to their situation which may affect the insurers risk, ideally an outline of these sorts of situations will be clearly set out in the policy document. At each renewal of the policy there needs to be a prescribed exchange of information that will assist in keeping the policy current and relevant.

There should be a clear responsibility on the insurers to explain any changes to the policy that will affect the insureds position during the life of the policy. As a result of the Canterbury earth quakes, many insurers have made changes to their policy wording which although subtle have significantly changed the insureds position. Apart from the obvious change from replacement insurance to replacement sum insured, which was well documented by the insurers and provided a good tool to ensure increased premiums as consumers came to grips with choosing a sum insured amount, I am unaware of any specific information being provided by an insurer to a consumer on the changes that have taken place within existing policies. One insurer made the unilateral decision in 2012 to transfer to a different system: under this new system Present Day Value endorsements were applied to pre 1935 house policies which did not meet requirements, (to date I have been unable to discover any further information about exactly what these requirements are). The change to PDV endorsements effectively means that many people who think they have a Replacement Sum Insured policy actually now, in the insurer's opinion, have an indemnity one and the sum insured amount, which effectively decides the premium paid, may be completely unachievable because of the PDV endorsement.

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To what extent is the gap between ICP 19 and the status quo in New Zealand (as identified by the IMF) a concern?

Yes I believe it should be a significant concern, I am not confident that the ICNZ effectively controls its voluntary members, do not believe the complaint process can be easily accessed by the consumer and think it is unclear what benefit a consumer who actually manages to make a successful complaint under the existing process will receive.

The clients we deal with will have little confidence in an insurance industry controlled internal dispute resolution process and the majority of them may well feel it's not worth

	<i>while pursuing their issue through this service [which may explain the 2016 statistics on the claim/complaint ratio of .3%].</i>
17	Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?
	<i>Yes, we need to catch up with other countries and provide specific legislation which provides a framework for all stages of the lifecycle of all insurance contracts.</i>
18	What has your experience been of the claims handling process? Please comment particularly on: <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>Over the past 5 years the Community Law solicitors through RAS have seen over 4,000 clients, the vast majority of them have experienced all of the above. In many cases contact between the claims handler and the client has broken down or is so sporadic that the client has no idea what their situation is. If time frames are provided, these frequently are not followed by the insurer and no explanation on this is provided to the policy holder. The numbers of clients we see every year and long earthquake court lists provide a clear indication that the insurance industry self-regulation and dispute resolution process is not meeting the needs of a significant number of their policy holders.</i>
19	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
	<i>Yes, a large number of the clients we see have come for advice on this issue. There are numerous examples which we would be happy to discuss and provide specific examples on. There are also examples of clients who, prior to consulting us, have been pressured into accepting the insurers cash settlement offer and required to sign a full and final settlement agreement only to find that once work is underway there is not enough money to complete the repair and because they have signed the settlement agreement there is no recourse to their insurer as this risk has passed to them.</i>
20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
	NA
21	What evidence is there of insurers or insurance intermediaries miss-selling unsuitable insurance products in New Zealand?
	NA
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.

	NA
23	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?
	NA

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
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 believe that most insurance contracts are on the face of it fair, however the operation of the insurance contract during its life cycle can become unfair because of unclear disclosure requirements at the start of the policy and as the insurer introduces unilateral changes to the policy along the way.
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 do not believe they are needed
27	What would the effect be if there were no exceptions? Please support your answer with evidence.
	<i>I believe that, when appropriate, the Fair Trading Act should be able to provide consumers with a viable and more accessible alternative to court proceedings, on that basis it should be available to everyone, I do not believe that Insurers should be exempt from any of its terms. I believe that the Insurers position is a much stronger one than the policy holder, accordingly there is no need for legislative protection.</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?
	NA
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.

	NA
30	What barriers exist that make it difficult for consumers to switch between providers?
	JNA
31	Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	NA
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?
	NA

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?
	NA
34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
	NA
35	What has been the consequence of the problems with section 9 of the LRA?
	NA
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	NA

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?
	NA
38	What has been the consequence of the problems with section 9 of the ILRA?
	NA

39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	NA

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

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?
	NA
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?
	NA

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.
	NA

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

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

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>Yes – In terms of general insurance, the Marine Insurance Act. S 18 and s20</i>
	<i>General insurance consumers should not be expected to meet the disclosure standards set in this Act over a century ago specifically for business transactions between experienced people engaging in trade.</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?
	NA
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.
	NA
53	Is there anything further the government should consider when seeking to consolidate the six Acts into one?
	NA

Other comments

We welcome any other comments that you may have.

One area which has resulted in extreme hardship and stress to a huge number of policy holders during the post EQ claims process is multi-unit buildings (MUBs) in particular the cross lease titles, Insurers too have struggled to provide the assistance which is needed because of the complexity of some situations. Shared ownership of this kind will always be a contentious and difficult situation when there is wide scale damage which needs to be addressed by all owners in a complex with shared elements like party walls, roof and foundations. However if there was legislation in place that would require all owners of buildings which share common elements to have full insurance cover and that each complex has to use the same insurer, a significant amount of issues that need to be addressed would be reduced. These requirements could be built into any new insurance legislation and or the Property Law Act. I believe that both consumers and insurers would benefit as a result of this.

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