

# Submission template

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## Review of insurance contract law

### Instructions

This is the submission template for the discussion document, *Review of insurance contract law*.

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in the discussion document by 5pm on **Friday 13 July 2018**. Please make your submission as follows:

1. Fill out your name and organisation in the table, "Your name and organisation".
2. Fill out your responses to the consultation document questions in the table, "Responses to discussion document questions". Your submission may respond to any or all of the questions in the discussion document. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.
3. We also encourage your input on any other relevant issues in the "Other comments" section below the table.
4. MBIE intends to upload PDF copies of submissions received to MBIE's website at [www.mbie.govt.nz](http://www.mbie.govt.nz). MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.
5. When sending your submission:
  - a. Delete these first two pages of instructions.
  - b. Include your e-mail address and telephone number in the e-mail or cover letter accompanying your submission – we may contact submitters directly if we require clarification of any matters in submissions.
  - c. If your submission contains any confidential information:
    - i. Please state this in the cover letter or e-mail accompanying your submission, and set out clearly which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.
    - ii. Indicate this on the front of your submission (e.g. the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).
    - iii. Please provide a separate version of your submission excluding the relevant information for publication on our website (unless you wish your submission to remain unpublished). If you do not wish your submission to be published, please clearly indicate this in the cover letter or e-mail accompanying your submission.

6. Note that submissions are subject to the Official Information Act 1982.
7. Send your submission:
  - as a Microsoft Word document to [insurancereview@mbie.govt.nz](mailto:insurancereview@mbie.govt.nz) (preferred), or
  - by mailing your submission to:

Financial Markets Policy  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140  
New Zealand

Please direct any questions that you have in relation to the submissions process to  
[insurancereview@mbie.govt.nz](mailto:insurancereview@mbie.govt.nz)

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# Submission on discussion document: Insurance contract law review

## Your name and organisation

<b>Name</b>	Katrina Shanks
<b>Organisation</b>	Financial Advice New Zealand

## Responses to discussion document questions

### Regarding the objectives of the review

1	Are these the right objectives to have in mind?
1	Yes we believe they are the correct Objectives
2	Do you have alternative or additional suggestions?
2	Not at this stage.

### Regarding disclosure obligations and remedies for non-disclosure

3	<p>Are consumers aware of their duty of disclosure?</p> <p>The origins of disclosure are based on entering the insurance contract in 'utmost good faith' and to disclose material information so the insurer can analyse the risk effectively. An average consumer would not understand the knowledge required for the insurer to analyse risk effectively.</p> <p>In our experience we believe consumers have a limited knowledge of their duty of disclosure and the implications if disclosure is not complete. The average consumer would be unaware that the possible remedy for non-disclosure is the contract can be avoided even though the non-disclosure has no connection between the facts that were not disclosed and the claim being made by the policyholder. This situation is also compounded by lack of clarity of what information to disclose in the law.</p>
3	<p>Where a consumer applies for insurance without the assistance of an adviser the risk of a non-disclosure is higher and perhaps the insurer receiving the application needs to do more to ensure the consumer is fully aware of their duty, and the implications - something an adviser is likely to have done. We believe that if a consumer does not use an advisor there could be an onus on the insurance company to contact the consumer seeking insurance to clearly articulate what their duty of disclosure is and what important information should be included.</p> <p>We believe the burden of disclosure is too high for the consumers and recommend a duty to take reasonable care not to make misrepresentations is more appropriate and should be considered.</p>

4

Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?

Very few consumers fully understand the duty of disclosure, even after reading a section titled 'your duty of disclosure'.

Consumers rely on the questions to be specific, explicit and understandable. And even then most competent advisers will report that they have seen clients change their answers after the adviser intervened with an explanation or prior knowledge of the client's circumstances.

4

We believe having a questionnaire can create a false sense of security for a consumer as they feel they have covered all the questions, therefore the material areas for the contract.

Real Example: Most applications have a generic question such as "Any other symptoms or signs for which you are currently experiencing, or have experienced at any time ..." Which is often answered "no" - sometimes due to question fatigue.

The consumer cannot possibly know what is important and what is not unless they seek assistance from a specialist in the field like a financial advisor who deals with these disclosure duties on a daily basis.

5

Can consumers accurately assess what a prudent underwriter considers to be a material risk?

Consumers are at a massive disadvantage. They must play a game where the rules are vague, the lines are imaginary, and the ref only makes a call after the game has finished.

A condition or event commonly regarded as minor when actually disclosed, could be perceived to be regarded in a different case as material.

The definition of material risk is different for every situation and person. What is material to one person may not be material to another. What is material to a policyholder may not be material to an underwriter. Unless you are applying material risk in an insurance environment on a regular basis, as a financial advisor does, you have no base-line to measure this level. To believe a consumer can assess a level of material risk on their own is unrealistic from our experience. There is anecdotal evidence of the consumer not understanding this risk.

5

Real example: A person who is completing an application for disability insurance may consider a mole which was removed years ago is not relevant to disclose due to the time lapse and the insignificance of the procedure. However, the insurer would consider this to be material - in an application form the terminology can be:

"Have you ever had, or been diagnosed with, had symptoms for / of and / or are you currently being treated for or expecting to receive treatment in the future, or have you consulted a doctor for any of the following:"

Therefore, we believe it is unrealistic to believe a consumer knows what is material to disclose. We believe the duty of disclosure is too high for the consumers and recommend a duty to take reasonable care not to make misrepresentations is more appropriate and should be considered.

6

Do consumers understand the potential consequences of breaching their duty of disclosure?

6

Most consumers do not understand the potential consequences of breaching their duty of disclosure.

Contracts have large portions of small print and exclusions. Without a financial advisor to navigate and interpret these they are rarely read in detail or understood by the consumer. The average consumer would be unaware the remedy for non-disclosure is the contract can be avoided even though the non-disclosure has no connection between the facts that were not disclosed and the claim being made by the policyholder.

Real example: Client mentions a sore/clicking hip to doctor a short time prior to taking a policy. Failed to disclose this. 10 years later has heart attack, insurer seeks to avoid claim, retain premiums because of "material non-disclosure".

In some instances, we believe the consequences of breaching their duty of disclosure are too harsh based on the consumer's limited ability to understand what is their duty of disclosure.

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?

The consumer will always know more details about their circumstances and life events than the insurer. However, risk is based on judgement and consumers are not generally able to perceive their circumstances in the eyes of an insurer. The consumer can only draw on their own terms of reference to understand risk unless seeking additional help.

An insurer understands risk and material risk as they deal with this every day.

7 Real Example: A person who had depression after a relative died, was treated and the incident occurred sometime ago. This person who would be categorised as having a mental health history may not see the condition as a material risk however the insurer knows this condition would be considered a material risk in relation to insurance.

Technology will both help and hinder this process. It may help the process by being able to provide explanations greater than a source documentation to explain risk. We know closed ended question result in closed answers whereas a conversation person to person allows a greater richness of information through a free-flowing conversation where areas of concern can be explored further.

We believe personal relationships with financial professionals assisted by technology is the best outcome for consumers.

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.

Breach of the duty of disclosure has led in numerous cases where a claim has been refused which we believe in many cases may have been a disproportionate consequence.

Examples

8 1.A [Fire and General insurance] policy has been renewed and you have to start the disclosure process again and new events may have arisen which may require new disclosure but you do not realise they are material to disclose and any subsequent claim can be avoided.

2. Insured picks up a driving conviction, does not realise this must be disclosed to insurer at renewal. **Subsequent motor claim of any kind can be avoided.**

3. Client does not believe he has had any 'mental health' issues at time of application. Insurer discovers GP notes that client mentioned "he was a little stressed/anxious" in a GP consultation. Bear in mind questions tend to lead people to disclose things they have had, or been diagnosed with, or treated for. Eventual claim for depression was denied.

We believe the duty of disclosure is too high for the consumer, and recommend a duty to take reasonable care not to make misrepresentations is more appropriate and should be considered.

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?

The current regime makes no distinction around intent. However, the intent in behaviour between the two actions is quite different. In both Australia and the UK they have lower thresholds in terms of disclosure being that specific questions are not asked and a duty to take reasonable care not to make misrepresentations.

9

Unintentional non-disclosure would be hard to prove. It would be the default position for most insureds facing a declined claim. A reasonableness test we believe is a better solution.

We believe to prove an action was intentional or unintentional would be difficult therefore a duty to take reasonable care not to make misrepresentations is more appropriate.

10

Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?

10

11

Should non-disclosure be treated differently from misrepresentation?

11

*[Insert response here]*

12

Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?

12

*[Insert response here]*

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?

13

The treatment of non-disclosure is very much case by case. This makes the potential outcome more about luck and circumstance than any foreseeable fate of policy wording. In effect what the insurer is doing is determining themselves whether the non-disclosure was material, and whether it impacts on if they would have accepted the policy at inception or not, and on what terms. This behaviour indicates that contract terms which state a contract may be void for nondisclosure (regardless of whether it relates to the claim at hand) can be too harsh a consequence for the insured.

However as in the finding from the Insurance and Financial Service Ombudsman Case # 129907. The insurer maintained they were entitled to void the insurance contract based on non-disclosure of material information, however they decided to take a "fair and reasonable approach" and added a hip exclusion, reinstated the policy, and paid the heart attack claim.



We also note that ASIC found that, on average, claims declined rates were significantly higher for non-advised policies.

“Declined claim rates were higher for non-advised policies, compared with group and retail policies. The average declined claim rates in the retail and group channels were lower than for non-advised sales (7% and 8% compared to 12%).” ASIC 2016, report 498, par 28.

We believe legislation does not reflect the current operating environment which supports the recommendation that a duty to take reasonable care not to make misrepresentations is more appropriate and should be considered.

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?

1 [Insert response here]

## Regarding conduct and supervision

16 1 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?

Data from APRA and ASIC in November 2017 revealed that of the 103,100 claims finalised in 2016, 95,000 – or 92.1% – were accepted by life insurers. A further 8,100 – or 7.9% claims were declined, according to the data, which was released as an industry-aggregate. In NZ there are no easily accessible statistics but we assume a similar level. Individually insurers in NZ report statistics that support this assumption.

1 “Although the considerable majority of claims are paid, we are concerned that in some cases, claims are being declined on technical or contractual grounds that are not in accordance with the ‘spirit’ or ‘intent’ of the policy. We identified that fairness should be given greater consideration by insurers. Not all insurance claims will be successful, but an issue arises when a policyholder’s reasonable expectations about policy coverage do not align with the technical wording in the policy.” - ASIC 2016, report 498, par 21, 22

We believe the consumer would expect their claims to be treated according to the ‘spirit and intent’ of the policy. Both parties must work in good faith. However, the current legislation doesn’t allow for this.

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

1 There are a number of government reviews currently being performed in this area.

18 Does the lack of oversight over the full insurance policy ‘lifecycle’ pose a significant risk to purchasers of insurance?

1	<i>[Insert response here]</i>
	What has your experience been of the claims handling process? Please comment particularly on:
19	<ul style="list-style-type: none"> <li>● timeliness the information from the claims handler about: <ul style="list-style-type: none"> <li>○ timeframes and updates on timeframes</li> <li>○ reasons for declining the claim (if relevant)</li> <li>○ how you can complain if declined</li> </ul> </li> <li>● The handling of complaints (if relevant)</li> </ul>
18	In general, the majority of claims paid and complaints are performed in a timely manner.
20	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
19	<i>[Insert response here]</i>
21	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
20	N/A
22	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
21	<i>[Insert response here]</i>
23	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
22	We believe this to be out of scope of the Review of Insurance Contract Law and consider this to be more of a conduct issue.
24	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?
23	We consider this to be more of a conduct issue and out of scope of the Review of Insurance Contract Law.
23	Currently, there are varying disclosure requirements between Financial Advisors and Clients.
	The finance sector is in the middle of significant legislative change which will impact on disclosure and professional conduct.

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



25 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.

26 [Insert response here]

26 More generally, are there terms in insurance contracts that you consider to be unfair? If so, why do you consider them to be unfair?

27 Yes. "Unlawful act" exclusions in life policies are unfair and unnecessary.

27 Why are each of the specific exceptions outlined in the Fair Trading Act needed in order to protect the "legitimate interests of the insurer"?

28 [Insert response here]

28 What would the effect be if there were no exceptions? Please support your answer with evidence.

29 [Insert response here]

### Regarding difficulties comparing and changing providers and policies

29 Is it difficult for consumers to find, understand and compare information about insurance policies and premiums? If so, why?

Yes. To find, understand and compare information about insurance policies and premiums is, for the consumer, complex.

To effectively compare insurance policies you would need to have an understanding of the different elements which each policy covers, the exclusions in each policy, how the policies interface with each other in terms of discounts and premiums just to name a few of the variations.

Real Example: Life Policies can range from 11 trauma conditions to 40+ and often the cost is similar. Definitions across different 'trauma' policies can vary widely - for example the treatment of 'heart attack' - one insurer requires 'prolonged chest pain', where another does not. Some life policies have special increase options, some don't. Some income policies will 'offset' ACC income and some don't. Some are agreed value, some you have to prove the 'pre disability income'.

The above differences can be difficult for consumers to see and understand yet can fundamentally affect their claim outcome.

Consumers are not equipped with the knowledge or tools (such as subscription based research) to effectively compare their options. However financial advisors provide this service to consumers. Financial Advice New Zealand has a website which allows consumers to select a financial advisor to obtain advice as to which is the best provider for them.

30 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.

	The level of information varies according to a number of factors – type of insurances, level of cover, how they access information, and the complexity of financial products.
29	In our experience most consumers who access financial advice obtain an outcome which meets their needs in a more tailored manner therefore gets a product which is better suited to them.
31	What barriers exist that make it difficult for consumers to switch between providers?
	Accessing good information about the advantages and disadvantages of obtaining or switching insurance is vital. Most consumers buy insurance rarely, so have little experience, knowledge and skill in deciding what factors to consider, features to look for, and the risks and pitfalls of switching.
30	Switching insurance policies and providers is not as easy as switching power companies. One of the bigger barriers for consumers is events or circumstances which have changed since they obtained their initial insurance policy (which may result in new pre-existing conditions) which could result in new exclusions, and/or higher premiums. A competent financial adviser can guide them through this process.
32	Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
33	Yes.
33	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?
34	Financial Advice New Zealand has the ability to lead the sector as an independent body to allow consumers to access information on insurance policies. The government should be highlighting and investing in the importance of seeking financial advice and empower and enabling New Zealanders to access this advice.

### Regarding third party access to liability insurance monies

34	Do you agree that the operation of section 9 of the Law Reform Act 1936 (LRA) has caused problems in New Zealand?
35	<i>[Insert response here]</i>
35	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
36	<i>[Insert response here]</i>
36	What has been the consequence of the problems with section 9 of the LRA?
37	<i>[Insert response here]</i>

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

38 [Insert response here]

### Regarding failure to notify claims within time limits

38 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?

39 [Insert response here]

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

40 [Insert response here]

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

41 [Insert response here]

### Regarding exclusions that have no causal link to loss

41 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?

42 [Insert response here]

42 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?

43 [Insert response here]

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

44 [Insert response here]

### Regarding registration of assignments of life insurance policies

44 Do you agree that the registration system for assignment of life insurance policies still requires reform?

4	<i>[Insert response here]</i>
45	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?
4	<i>[Insert response here]</i>

### Regarding responsibility for intermediaries' actions

46	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.
4	<i>[Insert response here]</i>
47	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?
4	<i>[Insert response here]</i>
48	If you consider there to be problems, what options should be considered to address them?
4	<i>[Insert response here]</i>

### Regarding insurance intermediaries – Deferral of payments / investment of money

49	Do you agree that the current position in relation to the deferral of payments of premiums by intermediaries has caused problems?
4	<i>[Insert response here]</i>
50	If you agree that there are problems, what options should be considered to address them?
4	<i>[Insert response here]</i>

### Other miscellaneous questions

51	Are there any provisions in the six Acts under consideration that are redundant and should be repealed outright? If so, please explain why.
5	<i>[Insert response here]</i>
52	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?

53	<p>53 [Insert response here]</p> <p>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.</p> <p>53 [Insert response here]</p>
54	<p>54 Is there anything further the government should consider when seeking to consolidate the six Acts into one?</p> <p>54 [Insert response here]</p>

## Other comments

54	<p>54 We welcome any other comments that you may have.</p> <p>We believe the duty of disclosure for consumers is an extremely high bar and The UK's Consumer Insurance (Disclosure and Representations) Act (CIDRA) 2012 model of a duty to take reasonable care not to make a misrepresentation maybe a fairer approach for the consumer.</p> <p>54 We strongly encourage the government to educate New Zealanders to access financial advice thus empowering and enabling New Zealanders to obtain optimum outcomes for their financial wellbeing.</p>
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