

Submission template

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. 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submission excluding the relevant information for publication on our website (unless you wish your submission to remain unpublished).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.

Note that submissions are subject to the Official Information Act 1982.

6. Send your submission:

- as a Microsoft Word document to 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

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Submission on discussion document: Insurance contract law review

Your name and organisation

Name	Lisa Murray
Organisation	FMG

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>Notwithstanding the fact that the duty of disclosure is clearly outlined in Policy wording and through verbal disclosures, we do not believe that consumers are fully aware of this duty and its implications to their insurance cover.</i>
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	<i>No – see 3. above.</i>
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	<i>No – it is unrealistic to expect that a consumer would have an appreciation of what constitutes a material risk.</i>
6	Do consumers understand the potential consequences of breaching their duty of disclosure?
	<i>Notwithstanding the fact that the potential consequence of breaching said duty is clearly outlined in Policy wording and through verbal disclosures, we do not believe that consumers are fully aware of the implications to their insurance cover.</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?

Whilst consumers know more about their risks than the insurer, they may not have an appreciation as to the implications of said risks from an underwriting perspective.

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.

Yes. For example, House cover. If a client took out House cover on a Nominated Replacement value, but failed to disclose material information that that would prompt an insurer to insure based only on Present Day value, under the current law, the insurer's only option is void the policy ab-initio; as opposed to settling the cover based on PDV. This is a disproportionate response to the client.

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?

Yes. Whilst the distinction in relation to unintentional versus intentional non-disclosure is difficult to prove, unintentional non-disclosure should be treated as an adjustment to terms of cover as opposed to voiding the policy ab-initio. In contrast, where intentional non-disclosure or fraud can be proved, the insurer should retain the ability to void ab-initio.

10

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

Yes – see 9 above.

11

Should non-disclosure be treated differently from misrepresentation?

Yes. Inadvertent non-disclosure is different than a client deliberately misrepresenting their risk situation to gain an advantage on their insurance cover.

12

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

Whilst one would think that businesses /local government should have a better understanding of their legal obligations than consumers, it should be noted that just because a client is a 'business' they may be a small business and be akin to a 'consumer' in terms of their knowledge.

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?

From FMG's perspective, we do not seek to avoid claims, but rather treat non-disclosure on a case-by-case basis; this generally results in a change to their insurance and /or the basis of the settlement of the claim.

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?

If the non-disclosure is inadvertent and there is no suggestion that the client was trying to obtain an advantage on their cover, FMG will modify the terms of their cover and /or change the basis of their claims settlement.

If the non-disclosure was deliberate and material to the loss, FMG may consider voiding the policy ab-initio; noting that this is the very rare exception. Usually, the claim is settled based consideration of the non-disclosed information and FMG may consider exiting the client post settlement if they pose an on-going moral risk. Whilst opting to void the policy ab-initio is rare, the ability to do so should be preserved to deal with deliberate material non-disclosure /fraud.

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?

FMG supports and adheres to the principles set out in ICP 19 and believes that is a fair approach both from the consumer and insurer perspectives.

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

FMG cannot comment on industry as a whole, but, as stated in 15 above, we adhere to these principles.

17 Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?

As a direct insurer, we do not believe there is any significant risk in relation to the foregoing for FMG. Having said that, where brokers are involved, this does pose a risk as there is not one single point of accountability (i.e. this is spread between brokers and the underwriter)

What has your experience been of the claims handling process? Please comment particularly on:

- 18
- 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)

The Fair Insurance Code deals with these matters and FMG adheres to the set out requirements. In addition, our QFE Disclosure Statement, outlines the process for handling of complaints – said document is provided at the inception of a policy and at every renewal.

19 Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.

	N/A
20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
	N/A
21	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
	<p><i>In addition to FMG's General insurance offering, which we underwrite, FMG also provides Personal insurance (life, health, disability) products through life insurers such as Fidelity and Health insurers, such as Southern Cross. In terms of the life insurance products, we have observed that the life insurance industry has an issue with 'churning' of business. This is directly attributable to the fact that there are extremely high up-front commissions with only a requirement that the cover remain in place for two years to avoid any claw-back on the adviser's commission.</i></p> <p><i>Unlike General insurance, the insurability/terms of cover will inevitably become less favourable over time, so replacing or 'churning' business to get another high up-front commission serves, in the vast majority of cases, the interest of the adviser, not the client.</i></p> <p><i>Notwithstanding FMG operates in the Personal insurance space, we do not have issues with the afore-mentioned behaviour as:</i></p> <ol style="list-style-type: none"> <i>1. FMG has a Financial Advisers Code of Conduct that requires that our advisers always act in the best interest of the client.</i> <i>2. FMG does not have any 'minimum' or 'preferred' arrangements in relation to placement of cover and the only direction to our advisers in relation to the placement of cover is that it must be in the best interest of the client.</i> <i>3. Our advisers do not receive a direct commission – FMG receives the commission. Our advisers are salary based with performance incentives that do not directly relate to the placement of insurance with a particular provider.</i> <i>4. We have a strict Replacement Business Policy that stipulates that Personal Insurance cover cannot be replaced unless it puts the client in as good or better position than their current cover.</i>
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
	<i>As per 21 above, this is a reality; however, it can be mitigated through proper internal controls and policies.</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>From FMG's perspective, we believe we are managing any potential conflicts of interest and requiring our advisers to always act in the best interest of the client. Having said that, this</i>

may not be common practice across the wider insurance industry.

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.

We are not aware of any.

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

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"?

These are standard underwriting terms that represent an assessment of material risks associated with the relevant contract of insurance. They are legitimate as the insurer is not trying to gain an 'advantage', but rather clearly the basis on which risk, and the assumption of risk by the insurer, will be either accepted or not, as the case may be.

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

This issue was fully explored when the changes to the Fair Trading Act were contemplated and then implemented. If there were no exceptions, this would open up a myriad of potential complaints unnecessarily.

As set out in 26 above, provided the terms are not designed for the insurer to gain an 'advantage', but rather reflect a clear basis on which the insurer is prepared to assume risk and the basis for settlement of any ensuing claims, this is not detrimental to the customer.

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?

Whilst FMG does not believe this a material issue in relation to General Insurance, it is for Personal Insurance – see response at 21 above.

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.

Yes, see 21 above.

30	What barriers exist that make it difficult for consumers to switch between providers?
	<i>See 21 above</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>See 21 above</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>See 21 above.</i>
	<i>Realistically, this is only a material issue for Personal Insurance; not General Insurance as this is a largely commodity based offering on a one year renewal cycle (generally speaking). There are really no material issues to switching providers and where a client opts to do so, it is largely based either on premium price or, alternatively, a negative client experience either in terms of servicing or claims outcome.</i>
	<i>In terms of the Personal Insurance offerings, whilst FMG proactively manages these issues, it would be in the best interest of the client if there was a mandated approach – i.e. primary requirement to act in the best interest of the client and required process /policy to evidence same by the adviser.</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>Not an issue that FMG has experienced.</i>
34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
	<i>Not an issue that FMG has experienced.</i>
35	What has been the consequence of the problems with section 9 of the LRA?
	<i>Not an issue that FMG has experienced.</i>
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	<i>N/A</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
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	caused problems for “claims made” policies in New Zealand?
	<i>Not an issue that FMG has experienced.</i>
38	What has been the consequence of the problems with section 9 of the ILRA?
	<i>Not an issue that FMG has experienced.</i>
39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	<i>N/A</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?
	The operation of section 11 is fundamentally important to the appropriate resolution of claims. If the exclusion did not materially relate to the cause or contribute to the loss, the exclusion should not be able to be relied upon by insurer to decline the claim. FMG currently operates on this basis in assessing exclusions.
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?
	<i>The principles of section of 11 of the ILRA must be retained. As set out in 40 above, if the exclusion did not materially cause or contribute to the loss, the claim should be paid. Exclusions should be used as a ‘shield, not a sword’ in addressing claims; specifically, exclusions are there to protect the insurer where there is an increased risk associated with certain conditions. They are not intended to provide an ability for the insurer to unilaterally decline legitimate claims where, whilst there may be exclusions in play, they did not materially factor into the cause or contributed to the loss.</i>

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?
	<i>FMG does not have comment in relation to the foregoing.</i>

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?

FMG does not have comment in relation to the foregoing.

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.

Whilst this is not a specific issue for FMG, our position on the current law is that it is fair and reasonable for all parties.

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?

See 45 above

47

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

See 45 above

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?

FMG does not have a comment in relation to the foregoing.

49

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

N/A

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.

Except as specifically stated in the submission, no.

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?

Except as specifically stated in the submission, no.

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.

[Insert response here]

53

Is there anything further the government should consider when seeking to consolidate the six Acts into one?

[Insert response here]

Other comments

We welcome any other comments that you may have.

*In terms of the disclosure obligations and remedies for non-disclosure, FMG **strongly supports** adopting the Australian model; which FMG is currently operating in accordance with. This approach represents an appropriate and fair distribution of risk / responsibilities and appropriate remedies for both the insured and the insurer.*

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