IBANZ
INSURANCE BROKERS
ASSOCIATION OF NEW ZEALAND INC

Submission

to

Ministry of Business, Innovation & Employment

on

Issues Paper:

Review of Insurance Contract Law

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Your name and organisation

Name	Gary Young
Organisation	Insurance Brokers Association of New Zealand Inc. (IBANZ)

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?
	We would add that for the insured to have certainty on how the insurer will respond in the event of a loss it is vital the insured has appropriate expectations for what insurance can deliver.

Regarding disclosure obligations and remedies for non-disclosure

3	Are consumers aware of their duty of disclosure?
	In general consumers, particularly personal but also commercial, have a very limited understanding of the duty of disclosure and would generally rely on responding to the specific underwriting questions of the insurer in applying for insurance.
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	A consumer's expectation is most likely to be that an insurer will ask for any information they need to underwrite the risk and would generally consider that responding to the specific underwriting questions in an application or proposal would fulfil their disclosure obligations. In general consumers would not understand the wider duty that applies regardless of the questions asked.
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	They can guess at what might be relevant however with no knowledge of the underwriting process, which itself varies between underwriters and risks, it is unreasonable to expect a consumer to accurately assess what is material. Usually that is a matter which is judged in hindsight by the insurer. Consumers are not sophisticated in insurance to understand assessment or underwriting of risk and would expect that if it was important the insurer would have asked a specific question if it was considered to be material in underwriting or assessing the risk.

6	Do consumers understand the potential consequences of breaching their duty of disclosure?
	They will understand that withholding or misrepresenting information is not right but whether they understand the extent of the potential consequences is questionable. While there may be a reasonable expectation that their claim may not be met in whole or in part, they are unlikely to understand the harsh consequences of the policy being avoided or cancelled and that they may have an obligation to disclose that fact in any subsequent applications for insurance.
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?
	In general the insured knows more about their own risk. However the insurer also has significant data on risks that provide them with an understanding of the level of risk being presented and how it compares to other risks. E.g. an insurer can use historical data to determine the likelihood of any loss occurring in relation to a particular type of risk. *Technology is providing greater insight into risks. Telemetry is increasingly used to determine risk in motor vehicle insurance. DNA testing is a proposed controversial method of determining an insured's health risk.*
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.
	The common example is where the non-disclosed information has no relevance to the loss (or little practical effect) but is the reason for the claim or the policy to be avoided. The all-or-nothing nature of avoidance and the low threshold of what can be (or be said to be) material always creates a major risk of disproportionality. The additional fact that insurers are almost always far bigger than their policyholders makes for a doubly-concerning power imbalance.
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 there is a difference between those who simply fail to disclose because they weren't aware that the information was material and situations where the insured knew of certain information and was either reckless or deliberate in failing to disclose that to the insurer. The issue is who has the burden of proof to show this or to better define the scope of the obligation on insureds. The general obligation currently resting with insureds is too broad and consequences can be disproportionate to the harm caused. One cannot rely on insurers to exercise their rights fairly or proportionately – they should be subject to oversight and correction by courts, arbitrators, and dispute resolution schemes.
10	Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?
	The remedy should be proportionate to the scope of the non – disclosure (or mis-representation) so that any claim is reduced by what it would have charged or terms imposed if the disclosure had been made. In the case of fraudulent or deliberate non – disclosure the insurer should be able to continue to avoid the insurance contract.
11	Should non-disclosure be treated differently from misrepresentation?
	No. We consider that it would be preferable to have a standard and consistent approach to the duty of disclosure of material facts and misrepresentation across all forms of insurance.

12	Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?
	It is to be expected that a consumer may well have less understanding of insurance contract law than a business. The legislation around non-disclosure in the UK has recognised this. In Australia there is currently a debate about differentiating personal lines and business when considering non-disclosure. *Certainly the issues relating to non – disclosure are more prevalent for consumers and associated with personal lines and life and health insurances. For commercial lines, these usually involved intermediaries and as a result obligations associated with disclosure of information and collection of underwriting information are better understood.*
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?
	Insurers have become more flexible recently in their response to non-disclosure as consumer protection has become more prominent. The Insurance Council Fair Insurance Code is a response to this pressure although it does not have clear legal power.
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?
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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?
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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?
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17	Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?
	No there is sufficient involvement by regulators in the various parts of the life cycle.

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)

	Internal complaints within insurance companies seem seldom if ever to result in a different conclusion. Complaint handling should be subject to regulatory oversight.
19	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
	Yes, we have seen insurers offer sub-par settlement offers on earthquake claims, and threaten "strict" policy application if the offer is not accepted.
20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
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21	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
	Our experience is that there aren't any issues associated with mis – selling unsuitable fire and general insurance products by intermediaries. Brokers will want to ensure that their clients are offered appropriate insurance to meet their business needs. Generally fire and general insurance is designed to meet specific risks (e.g. property, liability, and marine) that businesses may face and it is the intermediaries' role to design and place an insurance programme to respond to those needs.
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
	Not that we have witnessed.
23	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?
	Generally, the fire and general insurance market is not strongly influenced by a sales incentive environment.

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?
	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"?
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27	What would the effect be if there were no exceptions? Please support your answer with evidence.
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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?
	It is difficult for a consumer because of the complexity of insurance products unless they engage an adviser.
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.
	Different policy types have different issues. E.g. disclosure of material facts for health policies often creates issues in knowing what material is, or when something ceases being material. Is a health or credibility concern disclosable after 2 years? 5 years? 10 years?

30	What barriers exist that make it difficult for consumers to switch between providers?
	For fire and general insurance, given the annual nature of the policies, there are usually not a lot of barriers to switching insurers. Claims-made and circumstances-notified liability insurance problems can raise issues with "prior known fact" exclusions, making switching insurers unpalatable. See the answer to question 37 below. *In relation to life and health insurance, issues such as cover for pre – existing health conditions can create barriers to changing insurers.* *While price may be, or more often is, the driving factor in a person's desire to switch providers, it is difficult for consumers to make informed decisions due to lack of knowledge about how the price is being determined by the insurer, or they lack the knowledge to compare product terms and conditions.*
31	Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	See comments above.
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?
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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?
	Yes initially very much so. The situation is better understood and policies have altered to provide defence-costs only policies created. But it should still be possible for policies to have a single limit for costs and compensation, as elsewhere in the world.
34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
	*That the charge operates **before** liability is established.*
35	What has been the consequence of the problems with section 9 of the LRA?
	Costs-only policies have to be arranged at greater expense and with less flexibility.
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	The solution proposed in NSW is well worth considering.

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?
	No it works well in practice, in fact from a policyholder's perspective s.9 provides some relief to situations where insurers are not prejudiced (and they seldom are) as a result of a failure to comply with a strict time limit (or other requirement) to notify claims. While that may result in some claims being brought after the expiry of the policy, Section 9 provides appropriate protection for insureds that were aware of the claim but failed to notify. If the insurer suffered little or no prejudice because of that, then to deny an insured cover due to breach of a policy condition is obviously inequitable. *The issue is actually complicated not in relation to actual claims but in respect to circumstances that can give rise to a claim. Most claims made and claims made and reported liability polices require the insured to notify any circumstance that could give rise to a claim. What constitutes a "circumstance" may only become clear after the expiry of a policy. In the event an insured changes insurers if they are unable to notify a circumstance late, they will be without cover given cover with the new insurer excludes "known circumstances". Again, as above, if the insurer has suffered no prejudice, a policyholder should not be denied cover but for the failure to have advised the circumstance before the expiry of the policy period.*
38	What has been the consequence of the problems with section 9 of the ILRA?
	We do not believe that Section 9 of the IRLA poses any problems for an insurer or an insured; instead we see this section as providing positive outcomes. It is ***pro-competition*** *in that it promotes an insured's ability to switch insurers on claims-made and circumstances-notified policies.*
39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	From a policyholder perspective, we consider that the recognition the Courts have applied to claims made policies should continue.

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?
	It can be difficult to draw a clear distinction between provisions in the nature of exclusions, or policy provisions defining coverage (which are said not to be caught by s11). Apart from that, section 11 operates fairly and well, and causes few if any problems.

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?
	The Law Commission acknowledged that while there may be an issue of unfairness for insurers with section 11, other jurisdictions had found difficulty in taking into account the statistical likelihood factor. It seems therefore that any attempted reform by removing certain types of exclusions might be too difficult to achieve in a way that does not introduce uncertainty, increased litigation or wipe out the original reform. *An example might be damage on a social yacht race of more than 10 miles off shore. If the weather and seas were favourable, and the damage would have happened anyway, why should a geographical restriction be relevant?*
42	If you agree that there are problems with section 11 of the ILRA, what options should be considered to address them?
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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?
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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?
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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.
	Insurers will often have an agency agreement with an intermediary that allows it to recover losses incurred because of an intermediary error.

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?
	Generally, insurance brokers (intermediaries) would consider themselves as the agent of the policyholder and would usually obtain some form of authority from the client to act on their behalf in relation to their insurance programme. Agency should be determined by the basis of written authorisation by the insurer or the insured.
47	If you consider there to be problems, what options should be considered to address them?
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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?
	This is not a problem and nothing material has changed since the review in 2008. The provisions of the Insurance Intermediaries Act provide valuable protection for insureds. It requires intermediaries to operate a separate broking account for client funds and provides protection to policyholders in the event of a default by the intermediary. *Insurers have the ability to determine who they deal with and the credit terms of that relationship. Given they also carry the credit risk for payment of premium by policyholders, insurers usually have appropriate credit control processes to follow up agreed payment terms with the intermediary and take action of those credit terms are not complied with.* *Likewise intermediaries also need to ensure the collection of premium from clients to meet those credit term obligations and ensure polices remain in force. The obligations insurers and intermediaries have in relation to payment of fire service levies and GST are irrespective of the credit terms the insurer may have with an intermediary or the credit risk associated with payment of the premium.* *It is noted under new FENZ legislation the timeframe for paying the FENZ levy has been extended by 30 days.* *We also note that many changes are made around the time of the policy renewal date and 50 days or less does not allow sufficient time for these changes to be fully processed, paid and reconciled. Reducing the timeframe would only cause added expense and administration to insurers increasing costs to the consumer.*
49	If you agree that there are problems, what options should be considered to address them?
	As above we do not agree there is a problem.

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

	We welcome any other comments that you may have.
	The various policyholder protections in the Insurance Law Reform Acts were far-sighted reforms that have given New Zealand a far more balanced insurance law regime than some other places (e.g., England), without creating any major problems for insurers. IBANZ would be very loathe to see those protections be removed or watered down. *Section 9 of the Law Reform Act has been interpreted in an unfortunate way by the Supreme Court, and we would prefer to see the return of liability policies capable of safely funding defence costs as well as compensation.*