

Submission on discussion document: Insurance contract law review

Your name and organisation

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Responses to discussion document questions

Regarding the objectives of the review

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

Regarding disclosure obligations and remedies for non-disclosure

3	Are consumers aware of their duty of disclosure?
	<i>Some are, but many are not.</i>
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	<i>Generally, no.</i>
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	<i>No, the test is impractical.</i>
6	Do consumers understand the potential consequences of breaching their duty of disclosure?
	<i>Generally, no.</i>
7	Does the consumer always know more about their own risks than the insurer? In what circumstances might they not? How might advances in technology affect this?
	<i>The consumer generally always knows more in relation to the moral hazard (the insured's own character and risk profile), but may know less in relation to the physical hazard (the inherent risks surrounding the item to be insured). We don't see technology ever eliminating this.</i>

8	Are there examples where breach of the duty of disclosure has led to disproportionate consequences for the consumer? Please give specific examples if you are aware of them.
	<i>If a consumer has suffered a previous avoidance of a policy for non-disclosure, this is a material fact that must be disclosed on all future proposals for insurance. It is often a question in the proposal. An affirmative answer will usually result in a refusal to insure and the consumer can become an 'insurance leper'. If the consumer has a mortgage over his or her property, the inability to insure the property entitles the mortgagee to call the loan up for repayment. These consequences can be serious and maybe disproportionate to the original oversight.</i>
9	Should unintentional non-disclosure (i.e. a mistake or ignorance) be treated differently from intentional non-disclosure (i.e. fraud)? If so, how could this practically be done?
	<i>Yes, by restricting avoidance of the policy retrospectively to fraudulent non-disclosure.</i>
10	Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?
	<i>Yes.</i>
11	Should non-disclosure be treated differently from misrepresentation?
	<i>No, there doesn't seem to be any principled reason for doing so.</i>
12	Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?
	<i>Yes, consumers should be treated differently from businesses because consumers have less access to insurance brokers (often insuring direct on-line) and the insurance products are more commoditised. Restricting the disclosure obligation to the questions asked is a reasonable compromise. Business risks are more varied and complicated and a large number of insurance brokers are available to utilise.</i>
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?
	<i>They will usually choose to avoid.</i>
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?
	<i>If the fact not disclosed is material at law, they will usually take the point. Some set a higher threshold than others do before they will take the point. The threshold doesn't usually vary between non-disclosure and material misrepresentation.</i>

Regarding conduct and supervision

15	<p>What do you think fair treatment looks like from both an insurer's and consumer's perspective? What behaviours and obligations should each party have during the lifecycle of an insurance contract that would constitute fair treatment?</p> <p><i>For consumers the duty of disclosure should be limited to the questions asked. The consequences of not answering truthfully should be stated clearly.</i></p>
16	<p>To what extent is the gap between ICP 19 and the status quo in New Zealand (as identified by the IMF) a concern?</p> <p><i>Not of great concern. The Financial Advisers Legislation Amendment Bill should deal with most gaps.</i></p>
17	<p>Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?</p> <p><i>No, not of itself. Otherwise, the regulatory burden may become too great.</i></p>
18	<p>What has your experience been of the claims handling process? Please comment particularly on:</p> <ul style="list-style-type: none"> • timeliness the information from the claims handler about: <ul style="list-style-type: none"> ○ timeframes and updates on timeframes ○ reasons for declining the claim (if relevant) ○ how you can complain if declined • The handling of complaints (if relevant) <p><i>Satisfactory to date</i></p>
19	<p>Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.</p> <p><i>No</i></p>
20	<p>When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?</p> <p><i>No</i></p>
21	<p>What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?</p> <p><i>We have seen no direct evidence of this.</i></p>
22	<p>Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.</p> <p><i>Yes</i></p>
23	<p>Does the insurance industry appropriately manage the conflicts of interest and possible flow</p>

on consequences that can be associated with sales incentives?

No. Insurers tend to enter into business relationships with intermediaries that ignore the law of agency (e.g. an insurance broker is the agent of the insured) creating conflicts. Generally, intermediaries do not see and understand the mischief created by these conflicts of interest.

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. The exceptions are necessary, as insurance is by definition a discriminatory product. Not everything is insurable. The decision about when to insure and when not to, and on what terms, is an unscientific value judgement; fairness is not a relevant factor. Insurance has to work this way as a product. The current exceptions correctly consider this.

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. The present unfair contract terms provisions have already resulted in some potentially unfair terms being modified in favour of the consumer. For example, the previous right of the insurer to cancel cover on 14 days' notice for any reason has been watered down.

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"?

For the reasons given in the answer to 24 above. An insurer must be free to rate the risk as he or she sees fit. Decisions about whether to insure and on what terms are not capable of being proven right or wrong.

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

The availability of insurance would reduce considerably, driving the cost up. Insurance is a balancing act between premiums received and claims paid. Getting the ratio right is critical otherwise insolvency follows. It is not possible to legislate this decision-making in a way that addresses every risk under the sun.

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?

Most consumer policies are available on-line now and consumers are free to read them and compare them if they have the inclination. We draft policies for insurers – they are complicated products because not all risks in relation to a car, house or boat (for example) are insurable. It is difficult to draft a policy that achieves the underwriting intention and that

	<i>addresses adequately all the scenarios under the sun.</i>
	<i>It is more difficult to compare premiums short of obtaining an estimate from each insurer separately.</i>
29	Does the level of information about insurance policies and premiums that consumers are able to access and assess differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	<i>Not really, but they all suffer from the difficulties set out for 28 above.</i>
30	What barriers exist that make it difficult for consumers to switch between providers?
	<i>None for general insurance. Pre-existing health conditions are a barrier for health and life insurance.</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>Yes</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>Probably little can practically be done.</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>Yes</i>
34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
	<i>Defeating the cover for legal defence costs under a liability policy by exhausting the liability cover if the potential liability faced exceeds the sum insured, even though no judgment has been entered yet.</i>
35	What has been the consequence of the problems with section 9 of the LRA?
	<i>No cover for defence costs left.</i>
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	<i>Enact similar reforms to those that were done in England and Wales in the Third Parties (Rights against Insurers) Act 2010.</i>

Regarding failure to notify claims within time limits

37	Do you agree that the operation of section 9 of the Insurance Law Reform Act 1977 (ILRA) has caused problems for “claims made” policies in New Zealand?
	<i>Yes, it effectively defeats how the cover is meant to operate.</i>
38	What has been the consequence of the problems with section 9 of the ILRA?
	<i>Insurers have faced a longer ‘tail’ of exposure after a policy year has ended than would otherwise be the case. This creates reserving issues for insurers. See an article on our website about this problem here.</i>
39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	<i>Exempt section 9 from claims-made policies</i>

Regarding exclusions that have no causal link to loss

40	Do you consider the operation of section 11 of the Insurance Law Reform Act 1977 (ILRA) to be problematic? If so, why and what has been the consequence of this?
	<i>It interferes unintentionally with the way some insurance products are intended to work. For example, some insurers wish to offer a cheaper car policy on the basis that no one under 25 years of age drives it. This is achieved by an exclusion. However, if an under 25 year old drives it and doesn't cause or contribute towards the accident, section 11 allows the claim contrary to the common intention of the parties.</i>
41	The Law Commission proposed reform in relation to exclusions relating to the characteristics of the operator of a vehicle, aircraft or chattel; the geographic area in which the loss must occur; and whether a vehicle, aircraft or chattel was used for a commercial purpose. Do you agree that these are the areas where the operation of section 11 of the ILRA is problematic? Do you consider it to be problematic in any other areas?
	<i>They are the main ones. It is difficult to come up with an exhaustive list.</i>
42	If you agree that there are problems with section 11 of the ILRA, what options should be considered to address them?
	<i>It may be possible to redraft section 11 in a more formulaic way to achieve the same outcome without listing specific situations as was proposed by the Law Commission.</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>Not able to comment</i>

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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?

Not able to comment.

Regarding responsibility for intermediaries' actions

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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.

Yes.

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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?

It is both. The common-law says an insurance broker is the agent of the insured and this is consistent with the facts – usually the consumer instructs the insurance broker to arrange cover. However, the deeming provision deems the opposite in order to protect the consumer from the broker's default. This tension is undesirable.

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

The consumer can be protected from broker default in other ways e.g. compulsory PI insurance.

Regarding insurance intermediaries – Deferral of payments / investment of money

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Do you agree that the current position in relation to the deferral of payments of premiums by intermediaries has caused problems?

Not that we are aware of.

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

Not applicable

Other miscellaneous questions

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Are there any provisions in the six Acts under consideration that are redundant and should be repealed outright? If so, please explain why.

No

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Are there elements of the common law that would be useful to codify? If so, what are these

	and what are the pros and cons of codifying them?
	<i>It would be useful to codify the agency common-law that applies to insurance intermediaries in an Act. Many intermediaries don't seem to appreciate that they are acting as an agent and not a principal. This would make their duties as an agent more accessible and transparent in the same way that directors' duties are now spelt out in the Companies Act 1993.</i>
52	Are there other areas of law where the interface with insurance contract law needs to be considered? If so, please outline what these are and what the issues are.
	<i>Yes, the interrelationship between the law relating to material misrepresentations in an insurance policy and sections 35 to 42 of the Contracts and Commercial Law Act 2017 is unclear and should be clarified. For example, if fraudulent misrepresentation continues to result in the entitlement to avoid the contract retrospectively, this is inconsistent with section 42.</i>
53	Is there anything further the government should consider when seeking to consolidate the six Acts into one?
	<i>No</i>

Other comments

	We welcome any other comments that you may have.
	<i>We have decades of specialisation in insurance law at our fingertips; we are happy to assist further.</i>

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