

Submission on discussion document: Insurance contract law review

10/7/18

Your name and organisation

Name	THOMAS EVERITT
Organisation	Barrister

Responses to discussion document questions

Regarding the objectives of the review

	Are these the right objectives to have in mind?
	[Insert response here] Yes (See attached Paper dated 15/12/16 .
2	Do you have alternative or additional suggestions?
	[Insert response here] Yes (See Attached Paper dated 15/12/16.

Regarding disclosure obligations and remedies for non-disclosure

3	Are consumers aware of their duty of disclosure?
	[Insert response here]
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	[Insert response here]
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	[Insert response here]
6	Do consumers understand the potential consequences of breaching their duty of disclosure?
	[Insert response here]
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?
	[Insert response here]

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>[Insert response here]</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>[Insert response here]</i>
10	Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?
	<i>[Insert response here]</i>
11	Should non-disclosure be treated differently from misrepresentation?
	<i>[Insert response here]</i>
12	Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?
	<i>[Insert response here]</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>[Insert response here]</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>[Insert response here]</i>

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?
	<i>[Insert response here] See Attached Paper 15/12/16</i>
16	To what extent is the gap between ICP 19 and the status quo in New Zealand (as identified by the IMF) a concern?
	<i>[Insert response here]</i>
17	Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to

	[Insert response here]
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?
	[Insert response here]
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.
	[Insert response here]

The attached paper written during latter part of 2016 and due 15th Decemr 2016, was prepared and written prior to release of the decision in Young v Tower [2016] NZHC 2956.

The submissions in the enclosed paper, still hold good.

IF Good Faith formed the basis of insurance as a positive duty many of the problems and issues raised in the present "issues paper" would most likely be resolved.

s 9(2)(a)

The Law of Insurance Contracts

A paper submitted as part of the Auckland LLM Degree

15 December 2016

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ID 5170439

The Insurer's duty of good faith in consumer insurance Contracts in New Zealand, codification and reform.

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Introduction

This paper looks at utmost good faith, what is its content and how it is applied, and how it ought to be applied, in the context of consumer insurance, with emphasis on the duty of insurers. It will examine various approaches in New Zealand, Australia and England suggesting there is a need for reform and codification of the good faith obligations of the parties. The current position, after the Canterbury earthquakes, does not meet the expectations of consumers.

Insurance Law Reforms

New Zealand insurance law is a mixture of common Law and statute, a medley¹, ill-suited in the modern era to easy access and comprehension by consumers and businesses alike. This situation has come about by initial legislative inertia², reaction to the Global Financial Crisis which hit New Zealand in 2009 and latterly the ramifications of the Canterbury earthquakes in 2010 and 2011.³ These factors exposed the failure of the law to keep up to date with best practices, and illustrated the tendency to respond to events rather than develop in a planned manner, but presented New Zealand Courts with an unprecedented opportunity to be in the vanguard of reform of insurance principles. There is now recognition that some reforms are overdue, and the Legislation Act 2012 introduced a mechanism for systematic review of statutes, to render them more accessible. The Contract and Commercial Law Bill presently under Parliamentary consideration, reviews and consolidates 11 contract and commercial statutes; it does not, unfortunately include review of insurance statutes. New Zealand in the 1970's was responsible for some important innovations with the introduction of the Illegal Contracts Act 1970, the Accident Compensation Act 1972 and the Insurance Law Reform Act 1977. Reform of insurance law has not kept pace with the technical and economic forces changing the face of New Zealand society and has been fragmentary, requiring the interdependence of several statutes, each providing for different aspects of insurance law, a most unsatisfactory state of affairs. The law of insurance in New Zealand is largely a regulated market and generally follows the common law where applicable, in areas not covered by a statutory provision. The relevant statutory provisions which impact on insurance law are numerous⁴.

The answer to this situation is deceptively simple, namely a consolidating statute in the form of an Insurance Contracts Act. Such an Act is long overdue⁵ and this leaves New Zealand falling behind Australia and England. Reform may have to wait until the Courts have completed the task of unravelling the law relating to claims arising from the Canterbury earthquakes.

The insurance market in New Zealand is relatively small in comparison to the United Kingdom and Australia, and is dominated by general insurance, there being little marine insurance business and virtually no local reinsurance business, consequently reform should be easier to 'sell', especially regarding consumer insurance.

¹ A Dog's Breakfast, some would say.

² The light touch.

³ See Rob Merkin "The Christchurch Earthquakes Insurance and Reinsurance Issues" (2012) 18 Canterbury L R 119, 1 A, The Scenario, for a vivid description of the events and effects experienced.

⁴ Marine Insurance Act 1908, Frustrated Contracts Act 1944, Illegal Contracts Act 1970, Insurance Law Reform Act 1977, Insurance (prudential Supervision) Act 2010, Contractual Mistakes Act 1977, Contractual Remedies Act 1979, Insurance Law Reform Act 1985, Fair Trading Act 1986. Privacy Act 1993, Insurance Intermediaries Act 1994, Financial Advisors Act 2008, Financial Service Providers (Registration and Disputes Resolution) Act 2008, Anti-Money Laundering and Countering Financing of Terrorism Act 2009, Consumer Guarantees Act 1993, Insurance (Prudential Supervision Act 2010, Limitation Act 2010, Fair trading Act 2012, Financial Markets Authority Act 2011, Fair Trading Amendment Act 2013, Financial Markets (Repeals and Amendments) Act 2013, Financial Markets Conduct Act 2013.

⁵ The New Zealand Law Commission did recommend an Insurance Contracts Act be enacted; Report 87 appendix C, (Wellington 2004).

1 A Brief History of Utmost Good Faith

Any discussion of the doctrine of utmost good faith must pay homage to the obiter dictum of Lord Mansfield in the celebrated case of *Carter v Boehm*⁶. It is remarkable that the doctrine of utmost good faith is the foundation stone of the relationship between insurer and assured in New Zealand, when there is no statutory enactment of the doctrine⁷, but good faith is a limited defence in section 20 (5) of the Marine Insurance Act 1908, relating to a representation as to a matter of expectation or belief. The duty has been codified in England since 1906, by section 17 of the Marine Insurance Act 1906⁸. Unlike section 13 of the Insurance Contracts Act 1984 in Australia, section 17 does not provide a remedy other than avoidance, and does not state that there is implied in the contract, a provision requiring each party to it to act with the utmost good faith, and that failure to comply is a breach of the Act, and what remedies are prescribed.

Lord Mansfield did not use the expression 'utmost good faith', but merely applied an equitable principle to the facts, based on a Latin quotation from Cicero⁹. The moral or ethical base for His Lordship's endorsement of the doctrine would have been influenced by the contemporary evangelical Christian preaching of John Wesley¹⁰, the growing concern that raw contractual autonomy needed to be controlled, and the verdict delivered by the jury of merchants. With commendable brevity, he confirmed the rule obliging parties to disclose to prevent fraud, and encourage good faith.

His Lordship stated:

"The question therefore must always be 'whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment; fraudulent if designed; or though not designed, varying materially the object of the policy, and changing the risque understood to be run'¹¹.

Application of the rule had severe consequences in that *concealment* made the contract void. The requirement of good faith applied to both parties and to all contracts and dealings. The remedy, of avoidance was of no real use to an assured who normally would wish the contract cover to continue.

The common law courts applied the rule to post-contract situations, a classic illustration from 1866 is a fraudulent partial claim for fire damage in *Britton v Royal Fire Insurance Company*¹², where Wiles J reiterated that:

⁶ (1776) 3 Burr 1905. (A 250th anniversary Conference was held on 1 October 2016 in Bengkulu, Sumatra, the site of the fort the subject of the policy).

⁷ There can be little doubt that at common law the doctrine of utmost good faith applies in marine and non-marine insurance. *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995]1 AC 501.

⁸ Section 17 provided (until amended by the consumer Insurance Act 2012 and the Insurance Act 2015), Insurance is *Uberimae Fidei* "A contract of insurance is a contract based on the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party".

⁹ *Aliud est celare; aliud, tacere; neque enim id est celare quicquid reticeas; sed cun quod tuscias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire.* (It is one thing to conceal, another thing to be silent; for mere silence does not always amount to concealment, but only when it is coupled with a desire that those whose interest it is to know a fact known to yourself, should remain ignorant of it, with a view to your own advantage). Joseph Story *Commentaries on Equity. Jurisprudence: as Administered in England and America, volume 1* (2nd ed, C C Little and J Brown, Cambridge, Massachusetts, 1835).

¹⁰ John Wesley 1703 to 1791.

¹¹ Above n 6, at 1165.

¹² (1886) 4 F&F 905, 909.

The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained.

Wiles J appears to equate lack of good faith with fraud as a matter of policy, yet lack of good faith can be present in the absence of fraud, for example when an insurer unjustifiably declines a claim for 'technical' reasons unrelated to the merits. It has been held that making a fraudulent claim is a separate matter and is outside the scope of utmost good faith¹³. In England, the scope of the rule has been limited; in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd*, Lord Clyde¹⁴ suggested adopting a flexible construction of the concept of utmost good faith, and that post-contract the relationship between the parties should be coloured by considerations of good faith which in the context of insurance contracts reflects the degrees of openness required of the parties in various stages of their relationship. His Lordship suggested post-contract good faith was a lesser standard than pre-contract utmost good faith. There is insufficient justification for this distinction, the consequences for an assured of an insurer's misconduct in handling a claim may be financially and emotionally ruinous. The suggestion of a watered-down standard does not fit well with the concept of utmost good faith. Importantly, Lord Hobhouse¹⁵ described the doctrine as a principle of fair dealing, not confined to sections 18 to 21 of the Marine Insurance Act 1906.

In Australia, the Insurance Contracts Act 1984, separates the post-contractual duty of utmost good faith from non-disclosure and avoidance of misrepresentation, which are pre-contractual obligations; this paper adopts that distinction. In New Zealand, the Insurance Law Reform Act 1977 makes separate provision for pre-contractual misstatements and misstatements on variation or renewal, but leaves disclosure to be governed by common law. In England, the Consumer Insurance (Disclosure and Representations) Act 2012, now makes provision in consumer contracts, for disclosure and representations, and sets out insurer's remedies in schedule 1 to the Act. Notwithstanding this paper concentrates reform proposals on the insurer's duty of utmost good faith, it is suggested that reform of disclosure should follow the reforms in Australia and England, where it has for most purposes, been abolished in *consumer* contracts. Reform and consolidation of the law relating to disclosure and representations is urgent; there is uncertainty as to whether sections 18 and 19 of the Marine Insurance Act 1908 have been repealed by section 7 of the Contractual Remedies Act 1979, because the saving provisions of section 15 of the latter Act would seem to preserve sections 18 and 19 of the 1908 Act. Reform by statute would still enable a degree of self-regulation by insurers as it is the practice of insurers to issue guide books as to how the provisions will be applied in a pragmatic way. It is appropriate that New Zealand adopts the Australian reforms, as most insurers operating in New Zealand are Australian based companies, and both countries through CER seek to harmonise their commercial laws¹⁶. In addition, English insurance laws presently must take cognisance of European Union directives, which may not be suitable for antipodean conditions¹⁷.

¹³ Lord Mance, in *Agapitos v Agnew* [2002] Vol 2 Lloyd's LR 42, at page.53, [45 d].

¹⁴ [2001] 2 WLR 170 (HL) at 5 and 6.

¹⁵ Above n 14.

¹⁶ NZ-Australia Closer Economic Relations(CER). Since 1983, the two countries have committed to a seamless trans-Tasman single economic market, (SEM).

¹⁷ An example relating to ADR is:- DIRECTIVE 3013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013.(Official Journal of the European Union, 18.6.2013 L165/63).

Good Faith means more than honest dealing¹⁸; it must encompass commercial conduct which would be acceptable to reasonable people under the Golden Rule -do unto others as you would be done by¹⁹. It is suggested that wilful conduct in breach of the Golden Rule, would be a breach of utmost good faith. As discussed later, there are many approaches to utmost good faith; the personal approach-would you invite this person into your home? The cynical approach-the consumer is a fraudster. The naïve approach-the insurer is trusted implicitly to look after the interests of the consumer. The commercial approach-all is fair in love and war, and the fiduciary approach-putting the interest of the consumer first.

The rule as originally laid down was a blunt instrument, a product of the times when there was no means of verifying the movements and whereabouts of ships, and insurers had to rely on the information disclosed by the assured. The economic and social rationale for the rule is no longer relevant; the insurer now has the means of knowledge, currently an assured is asked to answer specific questions in a proposal which assists the insurer to frustrate concealment. Most insurers do not operate a shop-front office where consumers can access advice when completing a proposal form²⁰, consequently the quality of disclosure is compromised. Insurers employ professional services to assist, such as information technologists, medical practitioners, surveyors and actuaries.²¹ It is no longer true that insurers view proposals through a mirror dimly²².

The main deficiencies arising from the rule are, the harsh and disproportionate avoidance provision, (which is applicable regardless of the degree of concealment), and the lack of an alternative efficacious and proportionate remedy for breach of the duty of disclosure. Avoidance seems to have been based on the perceived need to denounce, deter and punish the fraudster. The early decisions did not extend the duty of utmost good faith beyond the requirements of honesty and of disclosure in all contracts and dealings. New Zealand applied the common law exposition of the rule, in *State Insurance General Manager v McHale*, Hardie Boys J stated²³:

“The various policy conditions mentioned are no more than expressions of the fundamental principle that the contract of insurance is one of the utmost good faith on both sides”.

In stating the application of the principle, the Court was concerned with the issue of whether insufficient disclosure was a breach of the rule.

The Utility of the Doctrine of Utmost Good Faith.

¹⁸ *Re Zurich Australian Insurance Ltd* [1998] QSC 209.

¹⁹ Holy Bible, Matthew 7:12.

²⁰ These are now completed on-line or by telephone, when the conversation is recorded.

²¹ *MacGillivray on Insurance Law* (11th ed, (gen ed) Leigh-Jones, Sweet & Maxwell, Thomson Reuter, London, 2008) at [488].

²² Holy Bible 1 Cor.13:12. This metaphor, alludes to the difficulty in seeing a reflexion in a polished metal mirror.

²³ [1992] 2 NZLR 399 at 407.

It is suggested that utmost good faith is the source of pre-and post-contract duties in addition to the assured's duty of disclosure²⁴, for example the post-contract duty of an insurer to justify to the assured the method of calculating loss in a property claim and thus the amount for which it is prepared to settle²⁵. The rule does not apply in all contracts and dealings in the modern context, and is now generally confined to insurance contracts and other special relationships such as partnership and family agreements. In England, and Australia the rule has been modified by statute, in New Zealand there is a reliance on a mix of common law and statute. The learned authors of *Law of Contract in New Zealand*, when referring to the application of the doctrine of good faith to contracts in general, state:

“Like many broadly phrased aphorisms, it is susceptible to different applications in the hands of different people in different contexts”²⁶.

It is not within the scope of this paper to propose a more general application of the doctrine to all contracts, however voices calling for such application are gaining support from academics and Judges from common law jurisdictions; an excellent summary of opinions can be found in the Judgment of Leggatt J, in *Yam Seng Pte Limited v International Trade Corporation Limited*²⁷. Justice Leggatt's comments were made before release of the Judgment of the Supreme Court of Canada in *Bhasin v Hrynew*,²⁸ where Cromwell J referred to good faith as an organising principle, which,

“... manifests itself through the existing doctrines about the types of situation and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should recognise that the list is not closed.”²⁹

The call for recognition of an implied duty, in all contracts, for the parties to deal with each other in good faith, lends strong support for the retention of the duty of utmost good faith in insurance contracts.

Cogent arguments can be advanced that the rule ought to be confined to pre-contractual disclosure. Neil Campbell writing in *Insurance Law Practice, Policy and Principles*³⁰, suggests section 17 of the Marine Insurance Act 1906 has been misapplied, in that the requirement of good faith only applies at the pre-contract stage. He sees nothing in insurance law that distinguishes it from the general law of contracts, where there is no rule the parties are required to act in good faith. Any post formation problems can be dealt with by existing rules under contract law and an award of compensatory damages, and with few exceptions, case law does not support a post-contract duty of good faith. Campbell does not discuss Codes of Practice in the administration of insurance contracts, which do support post contract duties of good faith. Campbell does however recognise that abusive conduct by an insurer, breaching the assured's civil rights and causing mental distress, could give rise to

²⁴ The Law Reform Commission report 20 Insurance Contracts, at para [151].

²⁵ *Southern Response Earthquake Services Limited v Avonside Holdings Limited* [2015] NZSC 110.

²⁶ Burrows Finn and Todd (5th ed) (LexisNexis NZ Limited, Wellington, 2016) at 20.

²⁷ [2013] EWHC 111 (QB) at paras 119 to 153.

²⁸ [2014] 3 SCR 495.

²⁹ *Ibid* at [66]. and n above at 202.

³⁰ Neil Campbell “A Sceptical View of Good Faith in Insurance Law” at 205, in Duncan Webb and David Rowe (eds) *Insurance Law Practice, Policy and Principles* (The Centre for Commercial and Corporate Law Inc., Christchurch, 2004).

recognition of a “separate wrong”. Campbell also acknowledges that there may be room for development of a tortious remedy. To the purist, relational contracts are not seen as a separate class of contract, because all or virtually all contracts are relational, and problems arising can be dealt with by formulation of general principles that apply to all contracts³¹.

Campbell does not regard an insurance contract as having special features which could distinguish it from a general contract, sufficient to require the parties to act in good faith. Not all contracts have elements of dependency, trust, vulnerability and duration. He overlooks the relational aspects of consumer contracts, which should not be dismissed as an arm’s length contract. In many consumer contracts, for example house insurance, the assured is in a vulnerable position and relies on the insurer to “do the right thing” with personalised service, tailoring the terms to the individual needs of the assured. With most property contracts, there is an expectation of annual renewal, which introduces an element of duration to the contract³², with on-going dependence and trust. The assured relies on the expertise, financial strength and prudence of the insurer. Setting the value of cover too low could have disastrous consequences in a total loss situation. A contract of this kind requires the insurer to act professionally in a fair and open manner, it is not merely a transactional relationship.

The public are, by insurer’s advertising campaigns in the media, invited to deal with the insurer directly, either by telephone or on-line. Most insurance companies have deceptively simple catch phrases, some examples are:

VERO “...put things right for our policyholders”, TOWER “...Tower is always looking for better ways to give you confidence that you are protected”, NZI “...Our dedication to the community”, AA INSURANCE “...Keep it simple, don’t get caught short”, LANTERN “...great customer service”, YOUI “... **We get you**”, FMG “... We’re here for the good of the country”, TRADE ME INSURANCE “...Good news for sufferers of painful processes”, AIG “...Tackle the future with confidence”, QEB “...Business confidence made possible. Insuring the hard stuff”.

This form of puffery is disingenuous, if insurers operate on the unexpressed premise that consumers are out to defraud them. If this is even partly true, suspicion of fraud must not be elevated to belief³³, when good faith is a mutual obligation. It should be noted at this point that YOUI has recently been charged in the District Court with 15 charges relating to deceptive conduct, and has been ordered to pay a penalty of \$100,000.00 by The Insurance Council of New Zealand.³⁴

There is no consensus as to the continuing duty of utmost good faith of the insurer post-contract or what ought to be the content of the duty, leading Professor Rob Merkin to comment in a succinct illustration of the problem:

...the obligations to which the insurer’s continuing duty of utmost good faith are applicable have yet to be fully articulated...³⁵

³¹ For a classical contract approach, see Melvin a. Eisenberg “Why There Is No Law of Relational Contracts”, 94 Nw. U. L. Rev.805 (1999) at 805, 821.

³² A modified “business relationship” from S 5 Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

³³ *Stuart v Guardian Royal Exchange no 2*(1988) 5 ANZ Ins Cases 60-844 at 75,279.

³⁴ See below n 60.

³⁵ Reforming Insurance Law: is There a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform. (2006) Para 3.5, 12.

This comment is true for New Zealand, where there is no consensus on policy. The duty appears also to have no known content³⁶, and in practical terms is said to, impose no specific duties on the insurer. An assured has a limited continuing duty of utmost good faith which surprisingly does not extend to fraudulent conduct of the assured, surprisingly because fraud is the antithesis of utmost good faith. The reason for this distinction is likely to be the reluctance to extend the duty of good faith beyond the duty to disclose and the duty not to misrepresent.

Generally, Courts and Parliament are reluctant to burden insurers with onerous obligations under the duty of utmost good faith. The Government's response to the Law Commission Report 87, illustrates that it wished to avoid reforms which could be contentious, for example modification of the insurer's right to avoid for failure of an assured to disclose; it also wished to avoid 'United States style' claims for breach of good faith by insurers.

Conservative jurisprudential analysis of the contractual obligation to pay a valid claim, leads to the conclusion that the promise is to save the assured from loss, such a promise is a promise to pay damages, the right of recovery usually accrues on the happening of the loss unless the contract provides for a different outcome. Consequently, if the insurer is in breach of that promise, by an unjustified failure to pay or unnecessary delay in payment, the assured cannot claim damages for such failure or delay, because damages are not claimable for failure to pay damages³⁷. To the average 'mum and dad' consumer, such niceties are of no solace³⁸, and it is not clear that the rule is accepted in New Zealand³⁹. Such fine distinctions have led the Courts to develop remedies based on implied terms and for mishandling of claims, to look at awarding punitive damages⁴⁰. It is the area of statutory intervention that a remedy will be found, by a provision that procrastination and other forms of spurious denial amount to a breach of contract with damages as a remedy.

There is a large volume of academic writing questioning the continuing role of Good faith obligations, post-contract.⁴¹ Justice William Young is sceptical of the utility of seeking to impose post-contract obligations on insurers⁴². His honour analyses two areas where good faith could be required: handling claims by third party insurers, and not meeting a valid claim. Justice Young is not convinced that a free-standing claim against an insurer, based on breach of good faith, is sustainable, and in England, breach of the duty of utmost good faith by an Insurer does not give rise to a claim for damages⁴³. In New Zealand, the possibility has been left open⁴⁴.

³⁶ Paul Michalek & Christopher Boys, *Insurance Claims in New Zealand* (LexisNexis, Wellington, 2015) at page 7.

³⁷ *Sprung v Royal Insurance* [1999] 1 Lloyd's Rep 1 R 111. There is no implied term in an insurance contract which obliges an insurer to investigate and pay valid claims within a reasonable time. *Insurance Corporation of the Channel Islands Ltd v McHugh* [1997] L.R.L.R. 94 at [136].

³⁸ "The idea that insurers are primarily there to prevent loss is a fiction...a fiction which contravenes common sense and the normal understanding of the parties". The Law Commission, The Scottish Law Commission Joint Review of Insurance Contract Law: Issues Paper 6, Conclusion [2.75-2.77]. See also Rob Merkin "The Christchurch Earthquakes Insurance and Reinsurance Issues" *Canterbury Law Review* [Vol 18, 2012] 119.

³⁹ *Pegasus Group Ltd v QBE Insurance (International) Ltd*

⁴⁰ *Whiten v Pilot Insurance Co* [2002] 1 SCR 595.

⁴¹ Useful summaries and discussion of some relevant papers are referred to in "Remedies for an insurer's breach of good faith from a New Zealand perspective", a paper delivered by the Hon Justice William Young KNZM, to the 2010 conference of New Zealand Insurance Law Association. For non-sceptical and sceptical commentaries, see *NZ Business Law Quarterly* 11 (4) Nov 2005 at 391, and 479. Also New Zealand Law Society, *Law Talk*, 18 June 2015, *Claims for Breach of Good Faith Unjustified*.

⁴² Above n 35 at [42].

⁴³ *Banque Keyser S.A. v Skandia (uk)* 1 Q.B.665 at 771-781, approved by the House of Lords on appeal, [1991] 2 A.C. 249, Lord Templeman at page 280.

⁴⁴ *State Insurance v Cedenco* unreported CA 216/97.

His Honour does note there may be room for cases where an assured has expectations of the insurer which are not met, His Honour, it is suggested, under-values the relational nature of the contract, which gives a greater justification for imposition of good faith obligations on an insurer both pre-and post-contract.

Utmost Good Faith and the Insurer

The proposition advanced in this paper is that the insurer is required to act, in a consumer contract, with utmost good faith, a concept based soundly in common law, and the relational nature of the insurance contract. For the avoidance of any lingering doubts, the duty ought to be enshrined in an amending Insurance Act. It has been said earlier in this paper that the duty has no known content and in practical terms imposes no specific duties on the insurer. In short, a mere platitude. This paper attempts to articulate the duties of an insurer and proposes statutory recognition of those duties in an enforceable, remedial form.

Pre-contract Duties which apply to a new contract, variations and renewals thereof.

The Insurer must

Allow the assured a reasonable opportunity to present a proposal in a form which is in plain language, avoiding legalese, and where no public office is available, facilitate completion either on-line or by telephone.

Supply a list of pre-formulated questions to the assured to assist with meeting the duty of disclosure and representation, and explain the requirement to make full disclosure of all material facts⁴⁵.

Ensure that the needs of the assured are fully understood by asking appropriate questions to understand the assured's circumstances. Where necessary follow up with requests for further information, and clarify exactly what the cover was for, and ensure there is no underinsurance.

Disclose in reasonable detail what cover the assured is getting for the premium paid.

Provide appropriate cover by carrying out a fair and reasonable assessment of the risk, and disclose to the assured, facts material to the risk and material to recoverability of a claim⁴⁶.

Conduct the assessment and investigation of the claim in a timely and transparent manner, to reduce the risk of exaggerated or fraudulent claims and collateral lies⁴⁷.

Post-contract Duties.

When dealing with a claim the insurer must:

assist the assured to present the required supporting information and documentation, including requesting further disclosure if it appears relevant.

disclose the method of assessing and calculating the loss in a transparent manner⁴⁸, by making readily available all reports obtained from assessors, quantity surveyors, builders, architects, engineers etc.

exercise within a reasonable time, its right of election to settle a claim for damage, by reinstatement or payment⁴⁹.

⁴⁵ *Bolton v NZI Co Ltd* [1995] 1 NZLR 244.

⁴⁶ Above n 41.

⁴⁷ *Versloot Dredging BV v HDI Gerling* [2016] UHSC45.

⁴⁸ *Southern Response Earthquake Services NZ Ltd v Avonside*, above n 24.

⁴⁹ *Dominico Trustees Ltd v Tower Insurance Ltd* [2015] NZHC 981.

when a claim involves EQC, the insurer must pay the assured the amount of EQC cover and recover such directly from EQC⁵⁰.

keep the assured informed as to progress of the claim.

not wilfully engage in any form of conduct designed to frustrate the claim.

not cause unreasonable delay in payment of a claim, it must settle quickly and fairly⁵¹.

not assert fraud on the part of the assured without probative evidence of fraud⁵².

explain in written form the consequences of fraud and the existence of a the ICNZ register of fraudulent claims.

not attempt to rely on technicalities which have no material relevance to the claim, such as notice and form.

not use *immaterial* non-disclosure or irrelevant lies to avoid the contract, ⁵³.

not procrastinate for the purpose of resort to the limitation period⁵⁴.

notify the assured that an unresolved dispute may be referred by the assured to a dispute resolution service.

Once settlement terms have been agreed, complete promptly.

Utmost Good Faith and the Canterbury Earthquakes

The Canterbury earthquakes gave the insurance consumer a novel experience of the operation of the insurance market in New Zealand; shaken by the earthquakes, consumers were similarly shaken by the begrudging response of insurers to the thousands of claims for the consequent losses. The reaction of policyholders was to call in question the good faith and integrity of their insurers, who appeared unwilling to settle the claims, allegedly resorting to prevarication, procrastination, gamesmanship and in the background, was the unexpressed belief that policyholders are fraudulent, and make false claims and exaggerate losses.

Allegations of insurers mishandling claims of home owners in the Canterbury region surfaced in concrete form when a representative Action was launched in the High Court by approximately 40 policyholders⁵⁵. This action is funded by an overseas litigation funder⁵⁶ and it is likely that on a win basis each policy holder will pay on a shared basis, 20% of the damages recovered to cover the costs and fees of the lawyer and the litigation funder. The basic allegation in this Action is that Southern Response Earthquake Services Limited (Southern) intentionally failed to disclose to the policyholder the estimates of the costs to settle the claim, only disclosing a much lower estimate, in some cases approximately \$100,000.00 less than Southern's assessors estimate.

⁵⁰ This proposition would require a significant law change, but in Canterbury could have eliminate delays caused by arguments between insurers and EQC.

⁵¹ Section 13A Insurance Act 2015 (UK) (inserted by section 28 of the Enterprise Act 2016, specifies a reasonable time and sets out rules for the application of the implied term. In consumer contracts contracting out is of no effect. Section 30 of the Enterprise Act makes provision for an additional time limit for actions for damages for late payment of claims.

⁵² *Stuart v Guardian Royal Exchange no 2*, above n 32.

⁵³ *Wise Underwriting Agency v Grupo Nacional Provincial SA* [2004] Lloyd's Rep IR 962, also *La Bank Financier de la Cite v Westgate Insurance Co* [1990] 2 ALL ER 947. S Insurance Contracts Act 1984; S Insurance Contracts Act 2015.

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⁵⁵ *Southern Response Unresolved Claims group suing by its representative Cameron James Preston v Southern Response Earthquake Services Limited* [2016] NZHC 245.

⁵⁶ There are seven litigation funding services operating in New Zealand. James Greenland *Seven Litigation Funding services in NZ*, (Law Talk, 5 May 2016, New Zealand Law Society).

Southern assumed the liabilities under thousands of homeowner policies when AMI Insurance Limited failed. It is claimed that 3000 or more claims have been settled by Southern when the policyholders were intentionally not given full disclosure of the costs estimated by the insurer's own assessors. It is alleged that this failure to disclose is a breach of utmost good faith and is a wilful tactic in a strategy to pay out as little as possible. The policyholders' legal team suggest there is evidence of a tactic of failing to disclose; in the case of *Southern Response Earthquake Services Limited v Avonside Holdings Limited*⁵⁷, it was apparent that Southern had disclosed a much lower estimate than their own assessor had calculated. Southern *did not explain* the basis for the calculation of the lower estimate.

Southern strongly disputed these allegations stating that they are a fiction, claiming to have settled 6200 over-cap claims and 1826 since the class action was filed. Southern suggest that the class action will further delay the resolution of claims, and policyholders will be worse off having to pay legal costs and the costs of the litigation funder. Southern say that the policyholders should use mediation services such as Breakthrough Services or the Insurance & Financial Services Ombudsman.⁵⁸

It is a breach of utmost good faith for an insurer to engage in tactics which frustrate or unjustifiably deny a claim⁵⁹. The use of such a strategy has been described by Sarah Miles in her book *The Christchurch Fiasco: the insurance aftershock and the implications for New Zealand and beyond*.⁶⁰ Using anecdotal examples, she suggests claimants were cynically exploited by the insurance industry, referring to what can only be described as a litany of bad faith. The main allegation is that insurers ignored the obligation under the Fair Insurance Code to settle valid claims "quickly and fairly". Insurers were said to adopt overly aggressive claims-handling practices and bullied naïve policyholders. Staff were encouraged to systematically reject valid claims and engage in intentional delay, so the "float" could be invested on term deposit, there being no incentive to break the term. Insurers realised policyholders were ill-equipped for the "battle", and the power imbalance meant most lacked the means to litigate.

In furtherance of this strategy, it is claimed engineering reports were ignored or altered, and more and more unnecessary reports were called for to deflect claims. Adjusters were instructed to slow down claim progress or lie. Claimants were given low-pitched offers to settle, lowering their expectations, and often on a take it or leave it basis. Case files were not made available to policyholders and were often incomplete. Files were delayed for months and vital documents went missing. Insurers resorted to claiming legal privilege for quantity surveyor reports, loss adjuster reports and engineering reports. Captive professionals were used by insurers; policyholders were discouraged from bringing their own professional advisors to meetings.

Policyholders were told they had to pre-fund their loss, (resorting to unreasonable interpretations of policy terms) or surprise conditions were added such as "betterment". Consumers were faced with the blatant use of out-dated price lists for materials and biased computer software set to under-price. The list of tactics seemed to policyholders to be endless, demands to use the insurers project manager and preferred contractors, with

⁵⁷ Above n 24.

⁵⁸ Radio report, John Campbell, *Checkpoint*, Radio New Zealand, National, 18 October 2016.

⁵⁹ The practice is said to be common in the United States of America; see www.injuryclaimcoach.com

⁶⁰ Chapter "policyholder protection".

exclusion of insurance company liability, allegations of noncompliance with building codes, compartmentalisation of insurance offices to obfuscate information.

Assuming the insurers' conduct described above did take place, it cannot be excused or condoned on the basis that there were several earthquakes in a short period, and of such magnitude that damage was heaped on damage; that there was a chronic shortage of skilled assessors, builders, engineers and associated professionals.

The remedies available to dissatisfied policyholders are in most cases illusory. The Insurance and Savings Ombudsman (now renamed the Insurance & Financial Services Ombudsman) did not meet claimant's expectations⁶¹. Sarah Miles relying on data from 2010, where out of 1985 inquiries to the Ombudsman, 334 could not be heard being outside of the jurisdiction. Only 284 complaints were investigated, taking on average 96 days to settlement. As at 17 November 2011 there had been 350 inquiries related to the Canterbury earthquakes, of those 14 had gone through as formal complaints.

Miles comments that people using the Ombudsman's service found the process to be slow and stressful. In addition, the claimant was required to show the insurer was operating outside the policy wording- proof being an elusive target. Equally unattractive as a remedy, litigation is expensive slow and unpredictable. Miles does not see relief in the possibility of class actions where litigation costs can be shared, because it is not always possible to say the questions to be tried are common to each claimant. In insurance litigation, often personal proof of losses is required. This view accords with the opinion of Professor Rob Merkin expressed in *Insurance Business*⁶², under the banner, proposed utmost good faith class action 'misleading'.

Professor Merkin stated:

"...unresolved claims in Christchurch arise from a series of different sources. Policy wordings vary as between policyholders, delays may be the result of different events, eg disputes with the EQC or inability of the parties' experts to agree on the extent of damage".

Justice Mander declined the Preston application, under rule 4.24 of the High Court Rules, for leave to bring the representative action, stating⁶³:

"Presently the group has not sufficiently addressed itself directly to the identification and articulation of the common issues of policy, interpretation and application which arise on each policyholder's claim which would provide definition to the membership of the group".

Leave was granted to bring a further application when the Court's concerns had been addressed⁶⁴. A representative or class action in the case of a group of claims may provide a remedy if the claim can be fitted within the parameters laid down by the Courts. The situation is uncertain in the absence of legislation. A Class Actions Bill was drafted in 2008 but has languished probably because of the Courts' willingness to use and define further the

⁶¹ The Insurance Council of New Zealand issued an updated Fair Insurance Code 2016, which included clauses specifically to remedy these shortcomings, see clauses 37 & 38.

⁶² www.insurancebusinessonline.co.nz 29 April 2015, article by Maryvonne Gray.

⁶³ Above n 20 at [86].

⁶⁴ Amended application filed 27 May 2016, for hearing 19 October 2016.

requirements of Rule 4.24⁶⁵, thus reform of Class Action procedure is not required at the present time. The Preston representative Action is indicative of a willingness on the part of claimants to incorporate allegations of breach of utmost good faith in proceedings arising from mishandling of insurance claims. The next step will be a claim for exemplary damages. The Financial Markets Act Conduct Act 2013 could be amended to include a provision similar to section 55A of the Insurance Contracts Act 1984 to permit the FMA to run Representative Actions on behalf of insurance claimants.

From 1st March 2017, the monetary limit of the civil jurisdiction of the District Court will be increased from \$200,000, to \$350,000, which may make it more attractive to consumers to bring their insurance claims in the District Court.

Utmost Good Faith: to regulate or not to regulate?

Self-regulation

It would seem fanciful that behaviour, such as good or bad faith could be regulated, but in the sense of being defined for pragmatic purposes, it is a viable proposition. Self-regulation by insurers, suggests that they act in the best interest long term, to avoid heavy-handed regulation by the State in response to perceived shortcomings in the sector. Self-regulation insulates the law from more appropriate reforms. A less cynical view suggests other reasons; the wish to lift standards of conduct, be seen to exceed minimum levels to gain market share, support consumer trust, deal with rogues and use self-regulation as a marketing tool. In addition, enhancing information boosts consumer confidence⁶⁶. The conduct of insurers is largely self-regulated in New Zealand and Australia; the alternative is statutory regulation, as in England. Before analysing the benefits and drawbacks of a self-regulated system, it is necessary to outline in some detail how self-regulation operates in New Zealand and Australia, and the statutory scheme in England.

New Zealand

In New Zealand, Insurance companies are required to be licensed⁶⁷, and pass prudential examination by the Reserve Bank. Most insurers, but not all, are members of the Insurance Council of New Zealand incorporated (ICNZ), a voluntary membership organisation, which publishes the Fair Insurance Code (the Code) governing the conduct of its members⁶⁸ who must meet minimum standards, and responsibilities. Members of the ICNZ underwrite 90% of the general insurance market, the most recent version of the Code came into effect on 1 January 2016, and introduced important changes because of the Canterbury earthquake experiences, and looked to improve communication, response times and imposed higher

⁶⁵ *Saunders v Houghton* [2010] 3 NZLR 331, and the authorities cited by Mander J in the *Preston* case above n 20.

⁶⁶ Australian Government, Treasury, Report by the Taskforce on Industry Self-Regulation, chapter 3, *Types of Self-Regulation in Consumer Markets*, August 2000.

⁶⁷ Sections 15, 17-20, The Insurance (Prudential Supervision) Act 2010.

⁶⁸ Lloyd's underwriters must only comply with the code for business placed through a cover holder domiciled in New Zealand.

standards⁶⁹. Whether membership for all licensed insurers should be voluntary or compulsory, is a moot point discussed later in this paper.

This paper concentrates on the ICNZ scheme, which promotes the Insurance & Financial Services Ombudsman, originally established by the insurance industry, for its customers as its approved independent dispute resolution service

The Fair Insurance Code applies only to consumers and small to medium-sized enterprises (SMEs), namely those with 19 or fewer employees, larger businesses were excluded because of the timeframes in settling long-tail claims, larger businesses had deeper pockets and consumers and SMEs were seen to require priority. The Code incorporates in clauses 9 and 13, the principle of mutual utmost good faith and gives some detail in associated clauses of the content of the mutual obligation of utmost good faith.

The ICNZ does not see the need for reform of Insurance practice by legislation, suggesting legislation cannot make people good insurers. Leaving non-members aside, it is the opinion of ICNZ, a self-regulatory code of conduct administered by independent dispute resolution schemes is just as effective as legislation⁷⁰. The ICNZ is a watchdog for the insurance industry ensuring that its members' views are made known on any proposed legislation which could damage their perceived interests. This position runs contrary to the best interest underpinning self-regulation, if it results in a loss of independence when dealing in-house with consumer complaints.

There are two notable features of the Code, relating to self-regulation; the availability of a dispute resolution scheme⁷¹, and an associated Code Compliance Committee⁷² which is tasked with monitoring breaches of the Code, by reporting data of the number of breaches of the Code to the ICNZ Board, investigation of unresolved significant breaches and making recommendations to the Board on those breaches⁷³.

Under the Code a dissatisfied assured has access to an internal dispute resolution process and if that fails to resolve the complaint, the assured is referred to the Insurance & Financial Services Ombudsman (IFSO). All persons carrying on insurance business in New Zealand must be registered and be a member of an approved dispute resolution scheme for retail clients⁷⁴. The IFSO is such an approved dispute resolution service. The IFSO is governed by a Commission⁷⁵ which, inter alia, appoints the Ombudsman and reviews performance and has power to amend the Terms of Reference. A complainant using the IFSO has access to negotiation, conciliation and mediation processes and decision under the decision-making process; the scheme is free to a complainant and the outcome is not binding on the

⁶⁹ ICNZ in a press release dated 01/11/2016 announced that private insurers had paid out nearly \$19 billion to settle commercial and residential claims since the Canterbury earthquakes in 2010 and 2011, of which nearly \$9 billion was for domestic claims. The release gives settlement statistics and details of progress on claims.

⁷⁰ ICNZ, *Fair Insurance Code 2016 Questions and Answers*, (Wellington, 2016).

⁷¹ There are three dispute resolution services handling consumer complaints about their members; the Insurance & Financial services Ombudsman, Financial Dispute Resolution Service (owned by Fairway Resolution Limited) and Financial Services Complaints Ltd.

⁷² High calibre members appointed were Sir Anand Satyanand, former Governor-General, Judge, Ombudsman and lawyer; Former Cabinet Minister Hon David Caygill; Dr McGee former Clerk of the House and Ombudsman.

⁷³ ICNZ, *New Insurance Industry Oversight Council Formed*, Press Release, (www.icnz.org.nz/category/press-release/) 19/08/2015.

⁷⁴ Sections 5(1) (m), 9, 11 and 48 of The Financial Service Providers (Registration and Disputes Resolution) Act 2008.

⁷⁵ Celebrity members appointed, included the well-known Paula Rebstock CNZM and Sir John Hansen (Chair of the Canterbury Earthquake Authority (CERA) Review Panel).

complainant who is still able to pursue court action if desired. The IFSO Scheme has over 4000 Participants from across the financial services sector covering insurance, investments, loans and credit, superannuation, financial advice and foreign exchange⁷⁶. IFSO issues 'information sheets' for consumers on many common issues, such as the sum insured and gradual damage. The IFSO scheme is accessible to dissatisfied assureds, but the jurisdictional limit of \$200,000.00 would not cover for example, a complaint related to total loss of a house in a fire. After the Canterbury earthquakes, the IFSO set up a Canterbury earthquakes response team which dealt with many hundreds of complaints regarding the scope of rebuilds and repairs, policy disputes, declined claims and accommodation costs. Southern Response agreed to waive the jurisdictional limit of \$200,000.00 for residential claims.

Exclusions from jurisdiction under section 6 of the Terms of Reference, can be confusing to the lay consumer. The time frame for referring a complaint is a basic 3 months from deadlock and associated advice with some discretionary flexibility. The scheme will have reference to what is considered "fair and reasonable in all the circumstances". In deciding what is fair and reasonable the scheme may consider several criteria set out in section 12(1) of the terms of reference, such as the manner the complainant has dealt with the (insurer), which is intended to relate to the duty of good faith. Unsurprisingly the scheme is not bound by the legal rules of evidence or by its previous decisions, but it is required to have regard to any applicable rule of law, the rules of natural justice and industry practice where relevant and any applicable Codes, (eg The Fair Insurance Code). The outcomes of complaints are confidential and the decisions made have no precedent value, it can only receive evidence as it does not follow an inquisitorial process⁷⁷.

ICNZ recently brought disciplinary proceedings under its rules, against one of its members, Youi NZ Pty Ltd⁷⁸ (YOUI). It was ordered to pay a penalty of \$100,000.00 for breaching the rules of membership, in that it did not conduct its business in accordance with the Fair Insurance Code. Alternatively, YOUI could have had its membership of ICNZ terminated or it could have been reprimanded. Rule 21.1 (a) of The Rules of ICNZ as incorporated⁷⁹, effective from 13 March 2016, provides inter alia, that:

"every member shall...conduct its business in accordance with the Code of Ethics, presently called the "Fair Insurance Code", promulgated by the Council from time to time and otherwise in a legal, honourable and proper manner:"

In carrying out a determination under Rule 21, the ICNZ Board may decide the procedure it follows, but must abide by the rules of natural justice, in particular, give notice that the Board is to meet, what process it will follow, give a reasonable opportunity for the member to be heard, and ensure that voting members of the Board have no conflicts of interest.

In addition to the ICNZ Decision, YOUI entered guilty pleas to 15 representative charges laid by the Commerce Commission⁸⁰ under the Fair Trading Act 1986 alleging YOUI employed misleading sales techniques when attempting to sell policies to consumers who were only seeking a quote, such as making misleading statements during telephone calls, demanding payment or debiting consumers' bank or credit cards without permission and sending

⁷⁶ Media release, IFSO Ombudsman Karen Stevens, www.iombudsman.org.nz/news-and-publications/media-releases.

⁷⁷ Similar principles apply under the Disputes Tribunal Act 1986.

⁷⁸ YOUI is controlled by Rand Merchant Insurance Holdings Group, registered in South Africa.

⁷⁹ Companies Office, Section 21 Incorporated Societies Act 1908, society number 218390.

⁸⁰ Media Release, 11 August 2016, www.comcom.govt.nz/the-commission/media-centre/media-releases.

invoices for unsolicited policies. The Fair Trading Act 1986 prohibits engaging in conduct which is misleading or deceptive or likely to mislead or deceive, with a specific provision applying to services. The outcome of the prosecutions in the District Court are unknown at this time, in the interim YOUI has issued an apology in a fact sheet, seeking to restore public confidence in its future conduct.⁸¹

ICNZ does not issue a formal decision available to the public, but relies on press releases to publicise its decision and the reasons for its decision⁸². It cannot be expected to be a court of record, but public confidence in its processes would be enhanced by the release of its decisions in a formal document. The informal approach does not enhance transparency and accountability, essential contributions to the legitimacy and credibility of the process. Furthermore, dispute resolution outcomes do not produce new or useful legal precedents.

There is the likelihood of a member being placed in jeopardy of two monetary penalties for the same misconduct, one imposed by ICNZ, and one imposed by a Court in a prosecution arising out of the same circumstances. While this is not strictly a double jeopardy, it seems to breach the principle behind the rule. As in the case of YOUI, where YOUI, is facing prosecution by the Commerce Commission, it would be preferable for ICNZ to wait for the outcome of the prosecution, before imposing its own penalty. The maximum amount for penalties available to ICNZ should be proportionate to the circumstances of the complainant, considering the cost of the premium paid, and the value of the damage or loss suffered. Penalties should be compensatory rather than punitive. Punitive aspects can be accommodated by release of adverse publicity and censure.

Australia

In Australia, consumer and retail general insurance is self-regulated in a very similar way to New Zealand. Section 1101A of the Corporations Act 2001 (Cth), provides for the Australian Securities and Investments Commission (ASIC) to approve codes of conduct that relate to the activities of Australian financial services licensees, their representatives or issuers of financial products⁸³. The Insurance Council of Australia (ICA) introduced the General Insurance Code of Practice, approved by ASIC, in 1994. Membership of ICA is voluntary, but all members of ICA must subscribe to the General Insurance Code of Practice; the current version took effect on 1 July 2014. Other similar codes are, the Code of Banking Practice, the Customer Owned Banking Code of Practice and the Insurance Brokers Code of Practice. There are almost 50 members of the ICA covered by the Code, several of whom operate insurance business in New Zealand. Compliance is monitored by a Code Governance Committee, which has power to impose sanctions, no financial penalty is available in addition to the costs of rectification.

In addition to such an internal disputes resolution scheme, financial service providers are required to belong to an approved external disputes resolution scheme (EDR); FOS is an ASIC⁸⁴ approved independent EDR scheme, which is free to consumers. FOS is an incorporated entity, the Financial Ombudsman Service Limited. FOS monitors compliance with the four codes named above. The EDR scheme is governed by Terms of Reference that forms a contract with the members. FOS currently has more than 16,000 members including banks, general and life insurance companies, brokers and many more assorted financial

⁸¹ www.youifacts.com.

⁸² *Insurance Council of NZ disciplines Youi*, Press Release, 4th October 2016.

⁸³ ASIC, Regulatory Guide 183, *Approval of financial sector codes of conduct*, March 2013.

⁸⁴ ASIC Regulatory Guide 139 governs the standards required, of independence, accessibility, fairness, jurisdiction and reporting.

services providers, and provides dispute resolution services between its members and consumers and SMEs. FOS publishes Operational Guidelines to the Terms of Reference, to assist users of the scheme⁸⁵.

The Terms of Reference current at 1 January 2015, provide for, inter alia, jurisdiction, dispute resolution processes, time limits, rules relating to evidence and procedure, resolution criteria, determination, remedies and compensation. The sanctions for a determination against a member are significant, including a comprehensive variety of financial penalties and compensation.

England

In England, Parliament provided for regulation of financial services, including Insurance, by the Financial Services and Markets Act 2000, (FSMA), which came into force on 1st December 2001. The FSMA set up the Financial Services Authority, (FSA) to administer the Act and consequently the Financial Ombudsman Service, (FOS) set up under part xvi and schedule 17, of the Act, and overseen by FSA. All former financial complaints schemes were superseded by FOS.

FOS is a public body, carrying out its functions on a non-commercial, not-for-profit basis. FSA appoints the directors who in turn appoint the Ombudsmen. FOS has two forms of jurisdiction, a compulsory jurisdiction, and a voluntary jurisdiction which deals with complaints not otherwise covered by the compulsory jurisdiction. Insurance companies come under the compulsory jurisdiction, covering the provision of defined policies for general, accident, sickness, credit, liability and so on. FSA publishes a Handbook setting out how FOS and businesses should handle complaints. The Handbook is a comprehensive manual divided into numerous sections dealing with different forms of market activity. Insurance is covered by a part named, The Insurance: Conduct of Business Sourcebook (ICOBS), which is divided into sections, such as claims handling, and dispute resolution. FOS also utilises, as a guide, the Association of British Insurers (ABI) Code of Practice.

FOS determines complaints against an insurance company, by reference to what is, in the opinion of the Ombudsman, 'fair and reasonable in all the circumstances'⁸⁶. If a determination is accepted by a complainant, it is binding on the respondent insurer, and is final; if not accepted by a complainant, the determination is not binding on either party, and the complainant is free to pursue other remedies such as Court Action. The Ombudsman has wide powers to award compensation to be paid by the insurer to the successful complainant, for loss of money, interest, and non-financial loss, for trouble and upset. The Ombudsman can direct the insurer to make an apology and can order payments up to 150,000 Pounds, (approximately \$300,000 in New Zealand terms). Where a respondent is insolvent and is unable to pay the award, the complainant is referred to the Financial Services Compensation Scheme. FOS does not discipline insurers by exemplary punishments but can report businesses who refuse to pay, to FSA which does have power to discipline defaulters.

FOS is overwhelmingly bureaucratic; there are Rules, Guides and Directives for just about everything imaginable arising from financial markets. Insurance is regulated as part of this bureaucracy, which operates in a culturally and ethnically diverse society, under the 'imprimatur' of European Union regulators. With its emphasis on the ideals of trust,

⁸⁵ FOS *Operational Guidelines to Terms of Reference* 1 January 2015, Introduction, at 4.

⁸⁶ Section 228(2), FSMA.

fairness, reasonableness, informality, inclusiveness, equality, listening, respect, efficiency and doing the right thing, FOS has strong social welfare objectives which are reminiscent of subjective justice. Utmost Good Faith does not get a mention, or if it does it is hidden among the hundreds of pages of FOS's bumph.

The attractive elements of the English approach are, the statutory structure setting up FSA and FOS, with the supervisory, and compulsory jurisdiction, backed up by a comprehensive portfolio of remedies.

Conclusion

Kipling may have thought of New Zealand in terms of "Last, loneliest, loveliest, exquisite, apart...", a comforting romantic description, but inappropriate today in a globalised economy, but apt as a description of the state our insurance law.

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