

# Submission on discussion document: Insurance contract law review

## Your name and organisation

<b>Name</b>	Lawyer 2 – submissions on questions 51, 52 and other comments only.
<b>Organisation</b>	Part of Community Law Canterbury team that contracts services to the Residential Advisory Service, Christchurch

## Responses to discussion document questions

### Regarding the objectives of the review

1	Are these the right objectives to have in mind? <i>[Insert response here]</i>
2	Do you have alternative or additional suggestions? <i>[Insert response here]</i>

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

3	Are consumers aware of their duty of disclosure? <i>[Insert response here]</i>
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask? <i>[Insert response here]</i>
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk? <i>[Insert response here]</i>
6	Do consumers understand the potential consequences of breaching their duty of disclosure? <i>[Insert response here]</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>[Insert response here]</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>[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]</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 purchasers of insurance?
	<i>[Insert response here]</i>
18	<p>What has your experience been of the claims handling process? Please comment particularly on:</p> <ul style="list-style-type: none"> <li>• timeliness the information from the claims handler about: <ul style="list-style-type: none"> <li>○ timeframes and updates on timeframes</li> <li>○ reasons for declining the claim (if relevant)</li> <li>○ how you can complain if declined</li> </ul> </li> <li>• The handling of complaints (if relevant)</li> </ul>
	<i>[Insert response here]</i>
19	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
	<i>[Insert response here]</i>
20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
	<i>[Insert response here]</i>
21	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
	<i>[Insert response here]</i>
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
	<i>[Insert response here]</i>
23	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?
	<i>[Insert response here]</i>

## 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.
	<i>[Insert response here]</i>

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?

*[Insert response here]*

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”?

*[Insert response here]*

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

*[Insert response here]*

## 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?

*[Insert response here]*

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.

*[Insert response here]*

30 What barriers exist that make it difficult for consumers to switch between providers?

*[Insert response here]*

31 Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.

*[Insert response here]*

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?

*[Insert response here]*

## 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?

*[Insert response here]*

34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?
	<i>[Insert response here]</i>
35	What has been the consequence of the problems with section 9 of the LRA?
	<i>[Insert response here]</i>
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	<i>[Insert response here]</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>[Insert response here]</i>
38	What has been the consequence of the problems with section 9 of the ILRA?
	<i>[Insert response 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>[Insert response here]</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>[Insert response here]</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>[Insert response here]</i>
42	If you agree that there are problems with section 11 of the ILRA, what options should be considered to address them?
	<i>[Insert response here]</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>[Insert response here]</i>
44	If you agree that there are problems with the registration system for assignment of life insurance policies, what options should be considered to address them?
	<i>[Insert response here]</i>

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

## 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?
	<i>[Insert response here]</i>
49	If you agree that there are problems, what options should be considered to address them?
	<i>[Insert response here]</i>

## 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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	<i>[Insert response here]</i>
51	<p>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?</p> <p><i>Following the Christchurch earthquakes there was a lack of clarity about the insurers' liability but which has now been the subject of much litigation, including:</i></p> <ul style="list-style-type: none"> <li><i>• The test for what constitutes earthquake damage and how to treat pre existing damage where there is also earthquake damage;</i></li> <li><i>• What an event by event policy is and the apportionment of damage between events;</i></li> <li><i>• Insurer's liability to an assignee of an insurance claim;</i></li> <li><i>• When an insurer is deemed to have made a binding election (to repair/to rebuild/to cash settle);</i></li> </ul> <p><i>There would be a lot more clarity if the case law was tidied up by codification as some of the issues have been determined in the commercial context and other issues are spread over numerous cases and are sometimes difficult to apply.</i></p>
52	<p>Are there other areas of law where the interface with insurance contract law needs to be considered? If so, please outline what these are and what the issues are.</p> <ol style="list-style-type: none"> <li><i>1. The exercise of local authority discretion under section 112 of the Building Act 2004 to enable building elements damaged in an event to be repaired in accordance with Building Code standards applying prior to the event rather than current standards. See discussion of Court of Appeal on this in MAS v East [2015] NZCA 250. The exercise of the discretion needs to be regulated within the insurance context rather than leaving it to the local authority to decide the extent of the insurer's liability.</i></li> <li><i>2. Clarification as to whether the act or omission referred to in the Limitation Act 2010, and the action accrued referred to in the Limitation Act 1950, is the event that causes the loss, or is the date the claim is settled or refused.</i></li> <li><i>3. The liability of an insurer for defective work where the insurance contract confers only an obligation on the insurer to pay remedial costs, with no right of repair, but the insurer instigates its own repair programme and exerts a great deal of control over the remediation process, including the choice of builder, but refuses liability for the work of that builder.</i></li> <li><i>4. The liability of the Earthquake Commission where incorrect or insufficient repairs have been undertaken which necessitates further funds being expended by the insurer than would have been necessary had the repair been correctly undertaken originally, bearing in mind EQC cap liability (currently \$100,000 plus GST).</i></li> </ol>
53	<p>Is there anything further the government should consider when seeking to consolidate the six Acts into one?</p> <p><i>[Insert response here]</i></p>

## Other comments

It would have been very useful in the Christchurch earthquake sequence, and continues to be both in Christchurch and in relation to the North Canterbury earthquake events, if the engineers had

been working to a common brief. While we had the MBIE Guidance in Christchurch to assist the engineers, there was, and often still is, a difference of opinion between the engineers as to the extent of damage and the remediation solution.

If the engineers had had a common brief, that was continuing evolving to take account of case law, I believe a lot of the court proceedings issued in the High Court could have been avoided.

In addition, we have seen many homeowners at RAS with issues either around failed repairs due to defective work, or a blow out of the time spent by the contractor on completing the work and which has often led to the homeowner exhausting their accommodation entitlement under their policy and suffering the loss of accommodation expenses as a consequence . The project managers engaged to manage repairs have often failed to adequately control the quality of work as well as the time for completion.

It would also be a preventative measure to ensure there is a central point for the collection of information about each property so that buyers can access all relevant information related to a property. The Council LIM file would be the obvious collection point. Without this, wise purchasers will need to engage structural and potentially geotech engineers to report on the condition of the property and which will be an expensive exercise, particularly if they don't end up purchasing the property.

We also see a need to retain such a unit as the Residential Advisory Service to be immediately available to assist policyholders to navigate their way through the insurance process, as and when further disasters arise across New Zealand. It can be a very overwhelming time in any event and the insurance process is rarely straight forward.

We welcome any other comments that you may have.

*[Insert response here]*

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