ICNZ Insurance Council of New Zealand

Insurance Council of New Zealand
P.O. Box 474 Wellington 6140
Level 2, 139 The Terrace
Tel 64 4 472 5230
email icnz@icnz.org.nz
Fax 64 4 473 3011
www.icnz.org.nz

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Financial Markets Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Emailed to: insurancereview@mbie.govt.nz

ICNZ submission on Options Paper – Insurance Contract Law Review

Thank you for the opportunity to submit on the Options Paper titled Insurance Contract Law Review ('Options Paper'), which was released by the Ministry of Business Innovation and Employment (MBIE) on 27 April 2019.

ICNZ represents general insurers that insure about 95 percent of the New Zealand general insurance market, including about a trillion dollars' worth of New Zealand property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, marine and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

This submission is in two parts:

- Part 1 - Overarching comments and summary
- Part 2 - Responses to questions in the Options Paper

Individual members may take differing views to ICNZ on some issues and may submit to you separately.

Part 1 - Overarching comments and summary

ICNZ welcomes the progression of the Review of Insurance Contract Law and the release of the Options Paper. We support changes to the law for insurance contracts in response to issues that have been identified where they support the sustainable and efficient provision of insurance in New Zealand and facilitate innovation.

This requires a regulatory regime that gives insurers, and the reinsurers that support them, confidence to commit their risk capital to the New Zealand insurance market. The regime should aim to create the right environment for fair competition and continuous innovation, to allow good customer outcomes, achieving a balance between the needs of customers, firms and public policy. It should support the role of insurers as providers of solutions for a broad range of customers and risks. It

should also be noted that over 70% of New Zealand's catastrophe cover is dependent on the international reinsurance sector, who seek clarity and certainty around the terms and conditions they are underwriting in primary insurer policies.

Insurance is a unique type of product in that the contract, and the commitments it includes, are the product. It is a contract whereby the insurer promises to pay benefits to the insured or on their behalf to a third party if certain defined events occur, which are either uncertain as to when they will happen or if they will happen at all. Insurers establish and manage insurance pools for certain types of risks, and they must manage the pools carefully and consistently to ensure their sustainability. The provision of insurance also relies on insureds' upholding their initial and ongoing obligations, for example to accurately describe the risks being insured or to mitigate loss after an event.

This review is taking place in a time of extensive regulatory reform for the insurance and wider financial services sector. A number of these changes impact the provision of insurance, most notably the financial advice reforms, proposed new conduct regulation for financial services[1] and changes to the *Credit Contracts and Consumer Finance Act 2003* (CCCFA). These all have an explicit focus on improving consumer outcomes. As well as appropriately aligning and integrating with the other regulatory reforms it is important that changes to insurance contract law focus on maintaining a sound and efficient insurance market that appropriately balances the interests of insurers and insureds. Also, while we generally support these new regulations, we are mindful that insurers have seen significant growth in compliance costs through additional regulation over the past decade and that this trend looks set to continue.

We support reform of the duty of disclosure for consumers, while recognising the case for change in regard to business insurance contracts is limited. We support the statutory introduction of proportional remedies in regard to breaches of the duty of disclosure/misrepresentation by both consumers and businesses. We note that depending on the duty adopted for consumers there may need to be separate duties for consumer and business contracts of insurance, that this has a range of implications, and if this is the case the practical demarcation is between consumers and businesses.

ICNZ remains of the view the current provisions relating to the regulation of 'unfair contract terms' (UCT) are appropriate and should be retained, though we have identified refinements that could be made. Importantly it should be noted that the current provisions applying to insurance under the *Fair Trading Act 1986* do not permit insurers to issue unfair contracts. The Act requires insurance terms to be fair and specifies a limited number considered to be reasonably necessary to protect the legitimate interests of the insurer. If change was to occur in this area, we support tailoring the generic UCT provisions to insurance in the way outlined in the Options Paper. In either case it would be appropriate if these were provided in insurance-specific legislation.

Insurers compete on price, features and service and ICNZ recognises the importance of well-informed consumers in supporting competition. We already advocate for use of plain language in insurance policies and have financial capability as one of our strategic priorities. Whilst we recognise it can take effort to compare policies, we do not consider that regulatory intervention is justified in this area and may increase the likelihood of consumers purchasing polices based on price rather than choosing appropriate cover. Insurance is not a commodity like electricity.

We generally welcome the proposals for reform in regard to the 'miscellaneous issues' outlined in the Options Paper and we provide detailed commentary on these in Part 2 of this submission. It is important that the responsibilities of intermediaries and insurers are clearly and appropriately

[1] Conduct of Financial Institutions, Options Paper, April 2019.

provided for in a way that is compatible with other legislation, the common law and business practices. In our view further detailed consideration and engagement with the insurance sector is required on this. More than half the insurance sold in New Zealand is intermediated.

As noted above, ICNZ agrees the statutory law for insurance contracts is highly fragmented across six statutes and would benefit from consolidation into a single statute (aside from the *Marine Insurance Act 1908*). We are also mindful of the significant role that is played by the common law. Given the materiality of the changes to insurance contract law being proposed, the need to consolidate five current Acts into one whilst adding new provisions, and the interdependencies with wider financial services law (e.g. financial advice and conduct) it is critical that an exposure draft of the Bill is released for consultation prior to its introduction to Parliament. It will be important for instance to ensure that reinsurance contracts are not inappropriately included within the scope of any proposals.

We would also generally welcome further engagement on development of the preferred proposals. This will be integral to ensuring the reforms are effective and integrated with other legislative regimes in place or being created concurrently.

Part 2 - Responses to questions in the Options Paper

In this section we provide answers to the questions contained in the indicated sections of the Options Paper. We make reference in a number of areas to the content of ICNZ's comprehensive submission[2] on the Issues Paper for the Review of Insurance Contract Law that was released by MBIE in May 2018. That submission also contained commentary on the context relevant to the general insurance sector in New Zealand and insurance contract law.

Objectives of the review

Question 1	*What is your feedback regarding the objectives for the review?*
	While the four objectives outlined for the review are generally sensible, we consider there is a need to include additional objectives to ensure the full suite of relevant matters are provided for. It is also crucial to recognise that for the reforms to be in the wider best interests of consumers, and to ensure they provide for a sustainable and efficient insurance market, it will be important to get the balance between them right. We welcome the addition of Objective 3, which addresses points raised in our submission on the Issues Paper in 2018. It is also important that facilitating innovation in insurance is also provided for within the objectives and we suggest this is provided for through the addition of innovation to Objective 3. We also consider it is necessary to provide another wider objective related to ensuring an ongoing efficient, competitive and sustainable insurance industry in New Zealand. We note that Objective 4 refers to 'consumers' even though some measures apply to or relate to businesses (i.e. non-consumers). While the emphasis overall is clearly on consumers, we suggest it would be logical for Objective 4 to be broadened to some extent to reflect that the scope of the proposals goes beyond consumers in some areas.

[2] Available from ICNZ's website at https://www.icnz.org.nz/industry-leadership/submissions/

Duties to disclose information

Question 2	*What is your feedback in relation to the options for disclosure by consumers? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?*
	As indicated in our submission on the Issues Paper, we recognise the issues that have been identified in regard to the duty of disclosure for consumers and support a reformulation of the duty to address these. We have introduced the concept of reasonableness of response to non-disclosure into the Fair Insurance Code and support a legislative approach for consumers that includes both a revised approach to the duty itself and the statutory provision of proportional remedies. In making individual policy choices in this area it is important to have regard to the consequential implications and wider effects. In commenting on this area we recognise the respective information asymmetries between the insurer and the insured that need to be provided for, namely that insurers are highly familiar with insurance policies and law but that insureds are much more familiar with their personal circumstances. Of the three options for reform of the duty of disclosure for consumers outlined in the Options Paper, ICNZ considers that Option 1 (Duty to take reasonable care not to make a misrepresentation) and Option 2 (Duty to disclose what a reasonable person would know to be relevant) both have merit. They have different pros and cons that are outlined in Table 1 on pages 13-14. Given the legislative introduction of proportional remedies the practical difference between these two options will in many respects relate more to the process steps required prospectively, and at renewal time, than in terms of outcomes for insureds at claims time. Notwithstanding this the choice of Option 1 or 2 has significant flow-on effects to the design of the wider regime because whilst Option 2[3] could reasonably be adopted in regard to businesses also, Option 1[4] would not be appropriate for businesses. This means that should Option 1 be progressed for consumers there will need to be separate duties for consumers and businesses. The implications of this change is discussed further below and in answer to later questions. Whichever option is progressed for consumers, its effectiveness and workability will depend on the detail of its design and the drafting of the legislation. We are mindful that Option 1 is effectively the UK consumer approach outlined in the *Consumer Insurance (Disclosure and Representations) Act 2012* and that Option 2 is essentially the current Australian approach in the *Insurance Contracts Act 1984*. While we don't advocate simply blindly replicating them here, and care needs to be taken to ensure whatever is progressed is suitable for New Zealand circumstances, particular care has to be taken in regard to modifying or omitting any elements of these approaches to avoid upsetting what are carefully constructed frameworks. We would welcome further engagement in the development of the detail of new legislation in this area and as noted elsewhere recommend the release of an exposure draft of the new legislation before it is introduced.

[3] As equivalent to Option 1 for businesses – duty to disclose what a reasonable person would know to be relevant.

[4] As equivalent to Option 3 for businesses – duty to take reasonable care not to make a misrepresentation.

	Option 1 (Duty to take reasonable care not to make a misrepresentation) While there is no consensus amongst our members, the majority of ICNZ's members support the progression of Option 1 for consumers on the basis it is most certain for consumers as it reduces the risks of inadvertent non-disclosure by recognising that insurers are better placed than an insured to identify the categories of information that they consider to be relevant. It also generally aligns with how insurance products are distributed to consumers (i.e. insurers ask questions on matters relevant to underwriting). Should Option 1 be progressed it will be important that insurers can ask relatively general questions of consumers, recognising that where the reasonableness of an insured's response to such a question is assessed, how clear and specific the question was would be taken into account. It is appropriate that a misleadingly incomplete answer to a question should be covered as a misrepresentation. We also note there may be other detailed issues flowing from replacing a duty on the consumer to volunteer information with a duty to not make a misrepresentation, which would need to be addressed. Option 1 places the burden on an insurer to elicit the information that it needs in order to assess whether it will insure a risk and at what price, while not requiring the consumer to surmise what information might be important to an insurer. As noted in the Options Paper this may require more questions to be asked at contract formation and annual renewal, with a resulting burden on consumers. Changes at annual renewal resulting from Option 1 may be most pronounced. If insurers were for instance to provide the answers previously given and ask consumers to let them know if something has changed, this would result in changes to systems and would require insurers to send personal information that is potentially very sensitive information depending on the type of insurance. How to balance the need to verify and/or update relevant information at renewal with maintaining the simplicity of the renewal process for both insurers and insureds is something that would need to be carefully worked through. *Option 2 (Duty to disclose what a reasonable person would know to be relevant)* As noted above we also consider Option 2 has merit and combined with proportional remedies would address many of the issues that have been identified in regard to consumers by replacing a prudent insurer test with a reasonable person test. This would retain a requirement on the consumer to actively identify information that might be important to an insurer, which recognises the reciprocal nature of the relationship between the insurer and the insured. This is the key difference with Option 1 and as identified in the Options Paper this gives insurers more confidence that they can measure and price risk because it is most likely that information will be disclosed to the insurer, but that in turn the consumer is required to identify information that a reasonable person would expect an insurer to consider relevant. Option 2 would generally require less change in insurers systems and processes in regard to both initial distribution and renewal. Significantly, as noted above the adoption of Option 2 in regard to consumers would, if combined with the proposed Option 1 for businesses[5], allow a consistent

[5] Option 1 for disclosure by businesses: Duty to disclose what a reasonable person would know to be relevant, outlined on paragraphs 41 and 42 of the Options Paper.

	duty of disclosure to be implemented across all consumers and business insureds. This alignment would not be possible with the other options proposed as they are tailored to either consumers or businesses. This aspect is discussed further below, in response to Question 6 in particular. *Option 3 (Require life and health insurers to use medical records to underwrite)* Whilst not relevant to general insurers, we consider Option 3 would be impractical and costly for insurers and fails to recognise both the limitations of medical records and the importance of other information to underwriting. Such an approach would be completely impractical in some contexts where the health of the insured is only a partial aspect of the cover provided (e.g. travel insurance).
Question 3	*Should insurers be required to warn consumers of the duty to disclose? Why/why not? Should insurers be required to warn all insureds of the duty to disclose, including businesses?*
	ICNZ supports a regulatory requirement being introduced that requires insurers to warn consumers of the duty to disclose, or the duty to take reasonable care not to make a misrepresentation if consumer Option 1 is adopted. Insurers already advise consumers of the duty to disclose and the consequences of not complying with it. ICNZ's Fair Insurance Code also provides significant material on the duty of disclosure to help insureds understand their obligations. ICNZ notes that a requirement that the duty of disclosure be explained in writing before the contract is entered into should not constrain valid distribution models or innovation. We note also that in relation to the financial advice reforms a flexible approach to disclosure is planned to reflect different ways of engaging with customers (e.g. in person, over the phone, digital etc). Examples to consider include where certain consumers have a need to place insurance in a timely way, for example where a customer has purchased a new vehicle and needs to have insurance in place before leaving the car yard. It is often the practice to explain the duty verbally in such circumstances, so any requirement regarding the explanation of the duty of disclosure must allow flexibility for those scenarios where written explanation of the duty may be impractical.
Question 4	*Should insurers have to tell consumers what third party information they will access, when they will access it and if they will use it to underwrite the policy?*
	It appears from the commentary in paragraphs in 39 and 40 of the Options Paper, that the issues identified are relevant to life and/or health insurance rather than to general insurance. ICNZ notes that a potential statutory obligation of the kind suggested by MBIE would be impractical for general insurance due to the broad and undefined scope of the concept and the varying nature and diversity of, and ongoing change in, potential data sources used for underwriting different kinds of policies and verifying information. We also note that insurers' privacy statements/policies set out how they collect, disclose and handle an insured's personal information in a more general context and consumers are entitled to contact insurers to access and correct their own personal information.

	We do not consider there is a particular problem in this area that needs addressing and do not support this option being progressed.
Question 5	*What is your feedback on the options in relation to disclosure by businesses? In particular: Should businesses have different disclosure obligations to consumers? Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?*
	We maintain the view, as outlined in our submission on the Issues Paper, that the case is limited for moving away from the status-quo in regard to the duty of disclosure for general insurance contracts with businesses, although we support the introduction of proportional remedies in statute for all insurance contracts. We agree that as identified on page 10 of the Options Paper there is little evidence of the current law on disclosure causing issues for business insureds. There are key differences with insurance for businesses, including that most business insureds are advised by brokers and that commercial insurance comes in many forms and can relate to complex business risks and involve bespoke cover (e.g. multiple properties and locations, large workforces etc.), making understanding the specific nature of the risks particularly important. This latter aspect also makes it more difficult to cover all possible issues in a set of standard questions. Of the three options presented in the Options Paper, Option 1 (Duty to disclose what a reasonable person would know to be relevant) and Option 2 (Duty to make fair presentation of risk) both have merit and would be appropriate and workable for insurers and business insureds. In contrast, our view is that Option 3 (duty to take reasonable care not to make a misrepresentation, same as Option 1 for consumers) would not be at all suitable in regard to business insurance contracts. Option 1 for businesses, essentially the Australian approach, would represent a relatively minor change to the status quo, and would be to the benefit of insureds without imposing major costs on insurers. As mentioned above in Question 2 and elsewhere, we note that adoption of business Option 1 in conjunction with consumer Option 2 would allow a consistent duty of disclosure across all insurance contracts as they would both impose a duty to disclose what a reasonable person/business would know to be relevant. Option 2 for businesses, the approach provided in the UK's *Insurance Act 2015*, would represent a completely new formulation, but given the nature of it and the introduction of proportional remedies in any case, the practical differences compared with both the status quo and Option 1 for businesses appear relatively limited. Given the absence of identified issues with the current duty for business insureds, or clear evidence of the advantages of making change in this area, at this stage we favour the retention of the status quo for business insurance should there be two separate duties. As covered above we would not in principle oppose either of Option 1 or 2 being progressed but emphasise the value in considering the overall approach to this area, and its effects, in light of the approach chosen in regard to consumer insureds.

	We consider there is value in retaining a single duty for consumers and businesses if practicable and recognise it is particularly relevant in New Zealand given a significant number of insurers customers' are both consumers and businesses depending on the product and the large numbers of SMEs (i.e. ~97% of businesses have less than 20 FTEs). As noted above, should consumer Option 1 be progressed, and therefore spilt duties become necessary, given the absence of identified issues with the current duty for business there is a case for the status quo duty of disclosure to be retained in regard to businesses (with proportional remedies provided for in legislation). Options 1 and 2 for business insurance contracts are both valid approaches and of these two we would on-balance support Option 1 (Duty to disclose what a reasonable person would know to be relevant). We consider business Option 3 would be inappropriate and we do not support it. Alternatively, should consumer Option 2 be progressed, then given the benefits of maintaining a consistent duty progressing business Option 1 may be most appropriate. Both of these options entail a duty to disclose what a reasonable person would know to be relevant.
Question 6	*If we have a separate duty of disclosure for businesses, should small businesses have the same duty as consumers? Why/why not? If so, how should small businesses be defined?*
	If there are to be separate duties of disclosure for businesses and consumers, ICNZ considers that the only viable option is for all businesses to be treated the same (i.e. small businesses should have the same duty as larger businesses and not the same duty as consumers). Our reasons for this are as follows: • Any distinction that split out small businesses based on size or turnover etc. would be impractical as the same insurance policies are offered to small, medium and in some cases larger firms. Unless the Australian approach incorporating a distinction based on class of policy is adopted, the result could require a policy to include two different disclosure wordings, creating complexity and uncertainty for both insureds and insurers. • Commercial insurance comes in many forms and can relate to complex business risks (e.g. multiple properties and locations, large workforces etc) and involve bespoke cover, making understanding the specific nature of the risks particularly important and making the total reliance on answers to specific questions more problematic. • Most business insureds are advised by brokers as this is how the vast majority of commercial insurance is distributed. We also note that the UK framework for business insurance, which applies separate duties for businesses and consumers, applies to all businesses including unincorporated sole traders (refer to section 1 of the *Consumer Insurance (Disclosure and Representations) Act 2012* and section 1 of the *Insurance Act 2015*). We take this position notwithstanding that it would result in a different approach to that applying to the scope of external dispute resolution schemes (and the Fair Insurance Code), while also noting uncertainty as to the scope of the proposed new conduct regulation.

Option (a), employee count of less than 20 employees, is that applied in regard to the scope of external dispute resolution schemes under the *Financial Service Providers (Registration and Dispute Resolution) Act 2008* and is followed by the Fair Insurance Code. The Code sets general conduct standards and in regard to disclosure requires a proportional approach by providing that insurers will 'respond reasonably in relation to what you did not disclose.' This reflects the general approach of ICNZ members independent of the customer size and we also support the introduction of proportional remedies across the board. While we recognise this threshold is ultimately arbitrary and can be uncertain in its application, this is not a particular issue in the context of the Code as the same reasonable response approach is applied across it and there is currently only one duty of disclosure. However, using the same threshold to draw a distinction between two separate legal duties is not practical for the reasons noted above (principally that the same insurance policies are offered to small, medium and in some cases larger firms and that uncertainty is not tolerable in this situation).

Option (b), business turnover, is not a useful demarcation in an insurance context because this feature is not relevant to insurance products provided, is not something that insurers are in a position to assess or monitor and does not align with other thresholds used already for external dispute resolution schemes/Fair Insurance Code or included in the financial advice reforms. Option (c), whether listed or not, is certain in application but would mean that only the tiny proportion of businesses that are publicly listed would be treated as businesses and would still have the issue that the same sorts of policies are issued to listed and un-listed businesses.

Given this view, we don't consider any of the options (a) – (c) under paragraph 47 would be practical in this context for distinguishing between two different duties of disclosure

Ultimately, should it be necessary, we consider there are only two practical options for distinguishing between consumers and businesses in regard to disclosure/misrepresentation, specifically:

- by adopting a 'consumer' definition along the lines of that in the *Fair Trading Act 1986* and *Consumer Guarantees Act 1993* or perhaps the UK insurance regime[6]; or
- on the basis of the class of policy (approach (d) below paragraph 47), an approach utilised in Australia, as this can be clearly defined and provide certainty by focussing on the types of policies used by consumers.

In determining the appropriate approach and crafting definitions, it would also be necessary to have regard to matter such as the application to potential 'mixed use' policies, where the insurance covers some private and some business use. For example, insurance on a car used mainly as a taxi with only the occasional private trip would generally be considered commercial insurance. However, an individual who insured their home contents, but included a small amount of business equipment would generally be considered a consumer. Options for addressing this include focussing on the main purpose of the insurance or excluding such policies

[6] Refer to the definition of 'consumer insurance contract' in section 1 of the Consumer Insurance (Disclosure and Representations) Act 2012 and the definition of 'non-consumer insurance contract' in section 1 of the Insurance Act 2015.

	from the consumer regime. We note this is an aspect that was given careful consideration in the formation of the current UK insurance regime.
Question 7	*If a duty of fair presentation of risk is adopted, should businesses be allowed to contract out of the duty? What are the costs and benefits of allowing businesses to do so? If businesses are allowed to contract out, should the duty apply to all businesses?*
	ICNZ considers that contracting out of the duty, whether the duty of fair presentation or the current duty of disclosure should not be allowed. Insurance pooling doesn't work well with varying disclosure across insureds. We also note that brokers have significant market power to potentially contract out. Overall, it is unclear what issue this is trying to address or what benefit insureds would gain from it and therefore we do not support it.
Question 8	*What is your feedback in relation the disclosure remedy options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?*
	ICNZ supports a proportional approach to remedies for non-disclosure and/or misrepresentation, as relevant. In practice, most insurers already adopt a proportional approach, as evidenced through the inclusion of 'We will respond reasonably in relation to what you did not disclose' in paragraph 20 of the Fair Insurance Code. Of the three options presented we strongly support Option 1 (Remedies based on intention and materiality), in essence the UK approach. We do not consider either of the other two options (2 & 3) would be appropriate. Overall it is important that the legislative approach to remedies incentivises insureds to disclose or represent material facts accurately and truthfully and provides the insurer with proportionate remedies for when they do not. Option 1 (Remedies based on intention and materiality) provides a balanced and reasonable approach and enables insurers to avoid the contract if they would never have entered into it had the original disclosure/representation been accurate. Option 2 (Remedies based on intention and materiality; no avoidance for non-fraudulent material non-disclosure) would reward carelessness by insureds, is unfair to insurers, and requires an assumption that insurers (i.e. insurance pools) can simply afford to pay and can provide cover. Aside from cost issues it is important to consider that there may be circumstances (e.g. reinsurance or risk appetites) where insurers would not have been able to provide cover had accurate information been provided initially. Option 3 (Disclosure remedies based on materiality only) has the same weaknesses as Option 2 and further increases risks of gaming and fraud by insureds, as is identified in the Options Paper. For these reasons we don't consider that either of these options would be viable or appropriate options and that in attempting to further protect those insureds who misrepresent/make incomplete disclosure they would disadvantage insureds more generally.

Question 9	*Is it fair to require insurers to pay claims that are not connected to a non-disclosure or misrepresentation, even if the insurer would not have entered into the contract had they known the facts?*
	Consistent with our view that a proportional approach to remedies is appropriate, ICNZ considers it would not be fair to require insurers to pay claims that are not connected to a non-disclosure or misrepresentation where the insurer would not have even entered into the contract had they known the facts. If however the insurer would have entered into the policy with the insured knowing the relevant information (even on different terms), the insurer should be required to pay the claim. On a principled basis the parties should be put in the position they would have been had the disclosure been accurate. Accordingly we strongly oppose this option outlined in paragraph 59, noting it would undermine the approach to proportional remedies and the integrity of insurance pools and incentivise misleading or incomplete disclosure by insureds.
Question 10	*Should insurers be able to offer reduced cover or ask the insured to cover the difference in order to recoup the amount they would have charged if they had the facts? Why/why not?*
	Yes, insurers should be able to offer reduced cover or ask the insured to cover the difference in order to recoup the amount they would have charged if they had accurately disclosed/not misrepresented at the time of contact formation. The law should encourage compliance and not condone or reward misbehaviour.
Question 11	*Should we clarify that where a contract has been avoided and all claims rejected, the insured is not required to refund claims money if it is not easily returnable and would be hard and unfair to the insured? Why or why not?*
	No, the insurer should have the right to recover in such situations. We note such situations are fairly rare in practice. It would be unfair on the rest of the insured pool and insurers if an insured cannot be required to refund claims money in situations of deliberate/reckless and material nondisclosure/misrepresentation by the insured in particular. This is consistent with our view that a proportional approach to remedies is appropriate. The law should not condone or reward misbehaviour or fraud, which is currently estimated to cost all policyholders over $600 million per annum. It does not necessarily mean that an insurer will pursue this action, but they should have the right to do so. In situations where they do so, the potential impact of this on the insured is a factor that is considered by insurers. In addition, we note the proposed conduct regulation will amongst other things ensure that insurers only exercise their rights when appropriate and take into account considerations such as whether an insured is a vulnerable consumer or suffering financial hardship (which is something insurers already consider). To be complete this option would logically also apply to 'careless' non-disclosures/misrepresentations as well as to deliberate/reckless ones.

Question 12	*Do you agree that section 35 the Contract and Commercial Law Act should not apply to insurance contracts? Are there any other sections of the Contract and Commercial Law Act that should not apply to insurance contracts?*
	ICNZ's initial view is that it would be logical for section 35 the *Contract and Commercial Law Act 2017* to not apply to insurance contracts. Also, while some of that Act clearly does not apply to insurance or isn't relevant, we are aware that confusion about the interplay between insurance law and this new Act has been identified and we support further consideration being given to this. For instance, two regimes for misrepresentation is problematic but some aspects of the *Contract and Commercial Law Act 2017* are useful/appropriate in regard to insurance contracts (e.g. treatment of technical mistakes).
Question 13	*Do you agree with the proposed change to the misrepresentation provisions in the Insurance Law Reform Act 1977? Why/why not?*
	No comments, not relevant to general insurers.

Unfair contract terms

Question 14	*Which of the terms in Table 4 are unfair? In your opinion, are they exempt from the unfair contract terms prohibition?*
	ICNZ notes MBIE's analysis and commentary in Table 4, including the uncertain conclusions reached when applying the various limbs of the UCT test in the *Fair Trading Act 1986*, in particular whether a term is necessary to protect legitimate interests as well as to whether the insurance specific provisions in section 46L(4) may apply. Whether a particular term in an insurance contract might be determined to be 'unfair' under the UCT legislation will ultimately turn on the drafting of the contract, the relevant context and the application of the law. We are also mindful of the lack of case law generally in relation to UCT, or to insurance contracts in particular, to give guidance on the likely coverage of the current UCT regime.
Question 15	*What is your feedback on the UCT options? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?*
	In our submission on the 2018 Issues Paper we outlined that having advocated in 2015 for the introduction of the current approach to UCT in regard to insurance, we remained of the view it is appropriate. Our rationale for this was outlined in detail on pages 19 to 23 of that submission and we noted that the commonly held view that insurance contracts are not subject to the UCT provisions is incorrect. While we still hold the view that the current approach in section 46L of the *Fair Trading Act* is appropriate, we would support changes to the current provisions so long as the legitimate and reasonably necessary interests of insurers are protected, and thereby the sustainable provision of insurance in New Zealand is supported. We broadly agree with the criteria outlined in paragraph 80, although we consider 'measure' should be replaced with 'assess, manage…'.

	Insurers' risk appetite is determined at a corporate level and maintaining the link between this and the individual insurance contracts issued is critical to ongoing financial stability. It is fundamental that both consumers and insurers can rely on the terms forming the basis of their contracts. If not, then insurers will need to reprice the risks being underwritten and there could also be significant implications for their reinsurance arrangements and the capital they need to hold, which could affect the scope of policy coverage and would likely lead to higher premiums for consumers. The ongoing involvement of international re-insurers is critical to providing insurance capacity in New Zealand. It is also important when considering this issue to have regard to the New Zealand context, for instance the prevalence of 'all risks' policies, which are constructed differently to policies in other jurisdictions where only specific risks are covered. We consider that the status-quo is a valid and appropriate option and this approach of codifying the terms that are reasonably necessary in order to protect the legitimate interests of the insurer remains our preferred approach. There is however potential scope to refine it to reflect other changes being made. For example by revising or removing the current section 46L(4)(g), on the basis that the duty of disclosure/misrepresentation and associated remedies are going to be comprehensively codified, or section 46L(4)(f) should the duty of utmost good faith be codified (noting that we do not consider this is necessary as outlined in our response to Question 25). In terms of the three options outlined on pages 26-28. We consider Option 1 (tailor generic UCT provisions to insurance) has the potential to be workable for both consumers and insurers. Option 2 (rely on generic UCT provisions) would not be workable for insurers for the reasons outlined in our Issues Paper submission. Option 2a (core terms exempt unless not transparent and prominent) would introduce new concepts into the generic regime solely in relation to insurance contracts and we agree that Option 3 (exempt insurance and rely on new conduct regulation) would be an inappropriate approach. We also consider a refined status quo should be considered as an option and as outlined above this is our recommended approach. Of the options presented in the Options Paper, we consider Option 1 (tailor generic UCT provisions to insurance) is the only option other than the status-quo that has the potential to balance the interests of consumers with that of insurance providers. It has the potential if designed appropriately to protect consumers from unfair terms while also protecting the legitimate interests of insurers. Some of the alternative remedies discussed in the final bullet point below paragraph 81 could provide flexibility while addressing some of the concerns raised by insurers in relation to the inadequacy of the generic regime. Defining the 'main subject matter' under Option 1 broadly would be critical to reflect the nature of an insurance contract. There would also be a need to specifically provide for terms related to the basis on which claims may be settled, as these are fundamental to the scope of the risk accepted and to pricing the risk. We also note that in regard to the second to last bullet point below paragraph 81, which refers to disproportionately or unreasonably disadvantaging the insured, this would need to refer to a class of insureds, not the specific insured as it does currently. For reasons noted above and previously, Option 2 (Rely on generic unfair contract terms provisions) would not be workable. It is also important to note that the

	nature and scope of Option 2 (and Option 2a) is inherently uncertain because Government consulted on material changes to the generic unfair contract terms provisions in early 2019, with decisions on which of these will be progressed currently pending. These proposed changes would make the generic regime even less workable in regard to insurance contracts by potentially extending the generic unfair contract terms protections to businesses and by altering the remedies provisions. Proposed Option 2a (core terms are exempt unless not transparent and prominent) appears to provide more recognition of the specific issues associated with insurance contracts and we agree that specific exclusions/excesses etc should be brought to the attention of the insured prior to the inception of the contract. Option 2a would however introduce new legal concepts into the New Zealand law and it is hard to assess the implications of this at this stage in the absence of specific drafting and clarity on the wider reforms to the generic regime. As outlined above we do not consider Option 3 (Completely exempt insurance contracts from UCT provisions and rely on conduct regulation) is either necessary or appropriate as it would reduce the protections available to consumers and the legitimate interests of insurers can be protected through appropriate implementation of other approaches. In summary it is critical that application of the UCT regime to insurance enables insurers to have confidence that they can effectively manage and price risk. ICNZ considers this would be best achieved through the status quo or a refined status quo, or alternatively through a careful and measured implementation of Option 1. Separately and independent of the option progressed, we note that the way these provisions are currently provided in the Act, gives rise to the suggestion that such terms would if not for being listed as being reasonably necessary, by their nature be 'unfair' and we don't consider this to be an accurate reflection of the true nature of insurance contracts. Given this we consider that in recognition of the unique nature of insurance contracts, UCT provisions applying to insurance contracts should be provided for in the new insurance contract law.

Understanding and comparing policies

Question 16	*What is your feedback on the options to help consumers understand and compare contracts? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which options do you prefer and why?*
	ICNZ notes the discussion regarding understanding and comparing policies outlined on pages 30-31 of the Options Paper and that insurers compete on price, features and service to the benefit of policyholders. Well-informed consumers help to support competition in the provision of services such as insurance and it is crucial consumers understand the insurance policies they purchase. We recognise that consumer engagement and understanding of insurance policies is an ongoing challenge but note this is equally a challenge in regard to consumer contracts of all kinds around the world. We agree that upcoming changes to the regulation of financial advice, which will apply to both financial advisers such as brokers and a range of insurers that deal

directly with consumers, will play a role in improving the quality and transparency of advice to consumers. We also agree that adopting measures such as plain English help consumers to better understand and compare insurance policies.

ICNZ recognises the importance of well-informed consumers. That is why we have introduced relevant features into our Fair Insurance Code and contribute to financial capability initiatives. ICNZ's Fair Insurance Code provides in paragraph 9 that insurers will 'give you access to your policy wording, which sets out in plain English what is insured, what is not insured and what your obligations are'. Our members continue to work actively on ensuring that plain English is used in their relevant policies.

Overall and based on the commentary on page 30 of the Options Paper we do not consider there is evidence of a public policy problem requiring regulatory interventions. Information on policies is widely available, with ongoing efforts to make them more easily understood, and prices can be sought online or over the phone.

In terms of the five options briefly presented on pages 31-32 of the Options Paper. Option 1 (require plain language), Option 2 (core wording clearly defined), Option 3 (require a summary statement) and Option 5 (require insurers to disclose key information) all encompass ideas or concepts that ICNZ agrees with. However, we are concerned that as regulatory options they are disproportionate (i.e. Option 1 is provided for in self-regulation already and insurers already make efforts in regard to Option 2) and/or risk introducing unnecessary complexity and/or having adverse outcomes. We are mindful of some efforts in other jurisdictions to make things easier for consumers that have not had the intended outcomes.

In regard to Option 3 (require a summary statement), as an industry we aim to communicate clearly with customers but want to avoid providing additional written materials to customers, particularly when these will not necessarily address the underlying issue and risk oversimplifying elements of the policy. We recognise there is a place for greater education of consumers to enhance their understanding of products and we note intermediaries can play a role in assisting customers to compare policies. We also note that while summaries can be useful for customers, they don't necessarily facilitate making effective comparisons. For example, in the UK, where a template is provided for briefly summarising polices (i.e. 1-3 pages), the information is provided in different ways and so the ability to accurately compare policies effectively is limited.

Elements of Option 4 related to third party comparison platforms would be a disproportionate intervention based on the evidence outlined in the Options Paper. As we noted in our submission on the Issues Paper, comparison websites are something that, if well designed and managed, can have a role in helping consumers to compare insurance providers and their offerings, particularly in regard to simpler products. However, for a range of reasons they need to be considered with care and would need to be subject to appropriate regulation to protect consumers.

For example, there is a need to ensure there is transparency in terms of the information provided on the website (e.g. how much of the market is covered), disclosure of commercial relationships (e.g. commissions or other payments) and that conflicts of interest are appropriate managed (e.g. differing rates of commission in regard to each insurer being compared). Other matters include oversight of the use of algorithms (we are aware of cases of inherent bias with such sites in other jurisdictions) and the problem of keeping up with day-to-day changes

	in rates, terms and conditions (e.g. consumers may identify a price on site and by the time they have applied for the cover may find the price or terms and conditions have changed). Comparison websites can also have the perverse impact of reducing consumer awareness of product features and selection by focusing primarily on price, rather than helping consumers to look for value and the features that most suit their needs and circumstances. The over-simplification of information can also obscure important differences between products and policies.[7] Both of these aspects can also increase the chance of policyholders inadvertently finding they were not properly covered when they come to lodge a claim. A focus on price alone in the absence of prescribed minimum cover also has the potential to encourage a 'race to the bottom' in terms of policy coverage. This would obviously not be in customer's interests. Further, any adoption of this option would need to clearly identify the types of policies to which such an option would apply.

Miscellaneous issues

Question 17	*What is your feedback on the options in relation to intermediaries? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?*
	As we outlined in our submission on the Options Paper on proposed conduct regulation, the nature of the intermediaries themselves and nature of their relationships with the insurer and customer vary widely. There are many different models for distributing insurance to customers and intermediaries of varying kinds play an important role in many of these. In the case of general insurance approximately half of all insurance (by premium paid) is conducted through intermediaries. The vast majority of commercial insurance is put in place through insurance brokers, which vary from individual brokers to large international broking houses. For some intermediaries, insurance contracts are their core business (i.e. insurance brokers, underwriting agencies) whereas for others it is a more peripheral part of their business (e.g. travel agents providing travel insurance or retailers distributing consumer credit insurance). At one end of the spectrum some will be closely tied to the insurer whereas others will be acting in an independent capacity (regardless of the fact of whether they receive a commission from the insurer), working across different insurers to get the best deal for their customer (the insured). There is both a diverse range of arrangements in-between these and the continual development of new distribution models. Some brokers have their own policy wordings that insurers are required to use to place policies with the broker's customers. Banks, and in some cases insurers, can also be intermediaries.[8] In some cases there will be detailed contractual arrangements between insurers and

[7] The comparator website industry in Australia, Australian Competition and Consumer Commission, November 2014.

[8] For example banks distributing home insurance products from general insurers to their mortgage customers or general insurers distributing life insurance products from life insurers or travel insurance products from another specialist insurer.

intermediaries and in others there won't be, noting that not all intermediaries will agree to enter into insurance contracts with insurers.

In certain cases there will be multiple intermediaries in the chain between the customer and the insurer, for example a customer who works through a broker to an underwriting agent that is issuing policies on behalf of an insurer.

From a regulatory perspective a fundamental distinction will be that many intermediaries will in future be Financial Advice Providers (FAPs) and others will not. It is notable that whilst many/most financial services intermediaries, and many insurers, will be subject to the financial advice regime under the FMCA (and be licensed FAPs) not all will be, and that few if any non-financial services intermediaries (e.g. airlines, travel agents, car dealers, retailers) will be.

It is important that the responsibilities of insurers and intermediaries are provided for in law so that insureds are sufficiently and consistently protected and that responsibilities between insurers and intermediaries are workable, appropriate, consistent and integrated. This needs to be reflected across the application of the new regime for financial advice, in the design and application of the new conduct regime for financial services and in the changes being made to insurance contract law through this review.

ICNZ is concerned that the existing section 10 of the *Insurance Law Reform Act 1977* imposes agency on intermediaries by virtue of receiving commission in order to resolve a single issue (the transfer of information disclosure by the insured) and in doing so creates wider issues by deeming a situation that does not reflect the reality of the situation. We consider that this specific information issue could be provided for specifically (e.g. as envisaged in Option 3) and wider issues of agency and responsibility addressed separately.

ICNZ therefore considers change in this area is required and supports the repeal of current section 10 of the *Insurance Law Reform Act 1977*, which we note is a unique provision amongst common law jurisdictions. We support the criteria outlined at paragraph 108 and recognise that the repeal of section 10 would create two issues that would need to be resolved:

a) how to determine who an intermediary is the agent of; and
b) how to appropriately protect insureds from failures by intermediaries?

How to determine who an intermediary is the agent of?

Where the distribution of an insurance contract is being undertaken by a broker who is engaged by the customer to search the market, provide impartial advice and find the insurance product/s on their behalf, ICNZ's view is that they are clearly the insured's agent regardless of the payment of commission by the insurer to the broker. It is inappropriate to hold an insurer liable for the actions of an intermediary when they are acting for the client and the insurer has no control or influence over them. We note the relevant matters extend beyond insurance contracts to regulatory requirements associated with collection of the Fire and Emergency New Zealand (FENZ) Levy and the disclosure of an insurers financial strength rating to customers under the *Insurance (Prudential Supervision) Act 2010*.

In contrast in situations where an intermediary is distributing insurance contracts on behalf of a single insurer on a tied basis they are clearly the insurer's agent. We also recognise that many tied intermediaries (e.g. travel agents, retailers, car

	dealers etc.) will not be licensed financial advice providers in the future although some will be (e.g. banks, brokers operating in a tied capacity). We consider that the proposed Option 2 (Provide for some intermediaries to be agents of the insured) has merit and should be further explored and developed. It will be important that the provisions adopted provide appropriate certainty and be applied in practice. We don't have fixed views at this stage on whether the best approach would be to follow the UK approach outlined in paragraph 111, the Australian approach of relying on the common law or an alternative such as was conceived in the 2008 Cabinet paper.[9] We recognise that addressing these issues at this time is a substantial task but that given the various changes being pursued and it is the appropriate and necessary time to undertake it. Further consideration of the financial advice regime and the proposed conduct regime and further engagement with the insurance sector will be required to explore what would be the most appropriate approach. *How to appropriately protect insureds from failures by intermediaries?* In situations where the intermediary is the agent of the insured, and the insurer is therefore not responsible for their failing for instance to pass on information, there is the issue of how to appropriately protect insureds. As outlined below paragraph 106, intermediaries likely to be the agent of the insured will generally be required to be licensed financial advice providers, will owe conduct and client care duties to the insured, have professional indemnity insurance and many are substantial entities in their own right. They are also required to be members of an external dispute resolution scheme. The introduction of Option 3 (statutory obligation on intermediaries to pass on information to insurers) would be a logical. This would ensure that in all cases intermediaries would be subject to this obligation, whether provided for in contract or not. In the very rare situations where an intermediary acting on behalf of an insured failed in its statutory obligation to pass on relevant information to insurers it is more appropriate for this liability to rest with that intermediary, rather than being transferred to the insurer and the other members of the insurance pool. This would align with the situation for other professions. Where an intermediary acting on behalf of an insurer failed in its statutory obligation to pass on the information to consumers the insurer would remain responsible as the intermediary is their agent.
Question 18	*Can the issues with the status quo be overcome with insurers contractually requiring representatives to pass on all material relevant information? What are the benefits of a statutory obligation requiring representatives to pass on information?*
	We don't consider that issues with the status quo can be overcome with insurers contractually requiring all potential distributors to pass on all material relevant information and that legislative provisions are required. The contractual approach would not work in all situations as not all intermediaries will agree to enter into insurance contracts with insurers (as discussed above in response to Question 17). A contractual approach would also not address the wider problems with deeming agency this way as discussed above.

[9] Cabinet Paper signed by Minister of Commerce (Hon Lianne Dalziel) titled "Insurance: Contracts, Agency and Assignments".

Question 19	*Should consumer insureds be treated differently from commercial insureds in relation to these issues?*
	We do not support treating different kinds of insureds differently in relation to these issues. Intermediaries need to provide appropriate advice and uphold their responsibilities with regard to both non-consumer and consumer insureds and this broadly aligns with the approach being taken to the financial advice reforms. Furthermore, with the different delineations being applied under the financial advice regime, for the scope of external dispute resolution schemes and potentially for the duty of disclosure and under new conduct regulation, having consistent obligations in regard to the treatment of relationships between insureds, their intermediaries and insurers avoids creating yet further complexity.
Question 20	*What is your feedback on the options in relation to section 11 of the Insurance Law Reform Act 1977? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why? Are the options preferable to the status quo?*
	While neither option is a perfect solution to the problems created by the operation of section 11 of the *Insurance Law Reform Act 1977* (namely insurers ending up covering risks they had sought to exclude from cover), ICNZ believes that either would be an improvement on the status quo. In our opinion, both options would satisfy the criteria set out at paragraph 126. Option 1 (remove certain types of exclusions from section 11) would provide a more certain outcome as the exclusions that would not be subject to the operation of section 11 would be clear. However, as the Options Paper points out, it may be difficult to identify a complete list of exclusions, and while this could be partly mitigated by a regulation-making power to add further exclusions, this would still be reactionary and unlikely to provide enough flexibility, and would require ongoing work. Opting for Option 2 (exclusion does not apply if insured can show non-compliance with the exclusion could not possibly have increased the risk) would align New Zealand's law with that of the UK. It also makes sense to adopt an option that relates specifically to the level of risk. The only other downside ICNZ has identified in respect to Option 2 is that it shifts the burden to the insured, in that they must show that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. However, given the context, being non-compliance with the section, ICNZ believes this is reasonable. Any potential burden on the insured could also be mitigated by the creation of a positive duty on the insurer to inform the insured of the implications of section 11, and to guide them through the process of being able to articulate how non-compliance with the exclusion did not materially increase the risk of loss in the specific circumstances. This positive duty on the part of the insurer would ensure that valid claims are not being declined and would reduce the effort and frustration from both the insured and insurer perspective.

Question 21	*What is your feedback on the option to provide that Section 9 of the Insurance Law Reform Act 1977 does not apply to time limits under claims made policies? In particular: Do you agree with the costs and benefits of the option? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Is the option preferable as compared with the status quo?*
	Section 9 of the *Insurance Law Reform Act 1977* has been problematic for insurers. It has created enormous uncertainty, particularly when setting claims reserves (the resources required at any time to meet the costs (for example, indemnity, defence costs and other miscellaneous disbursements) of all claims not finally settled at that time). Section 9 has caused obvious difficulties for insurers in terms of reserving, in that they may incur costs for claims which would otherwise be outside the application of the policy. Certainty around claims reserves is needed for insurers for a number of reasons, but particularly in relation to meeting statutory solvency requirements and ensuring the availability of reinsurance. ICNZ therefore supports the proposal for section 9 to not apply to time limits under claims made policies. ICNZ agrees with the benefits identified by MBIE in the Options Paper – particularly that claims made policies would operate as intended, allowing for certainty of underwriting. ICNZ does however raise a criticism about the language used in criterion (b) of paragraph 137. We do not agree that failing to comply with the terms and conditions set by an insurance policy should be described as "mere" failure. Policy terms are there to limit the scope of cover, or the circumstances in which cover applies – there should be strict compliance by the insured.
Question 22	*If the option is adopted, should there be an extended period (e.g. 28 days) for notifying claims or potential claims after the end of a policy term?*
	Claims-made policies cover the insured for legal claims made against it in the policy period. Claims-made and notified policies cover the insured for legal claims made against it in the policy period, where the insured has also notified the insurer in the policy period. ICNZ tentatively supports an extended period for notifying claims or potential claims after the end of a policy term but will need to see the suggested wording of such a provision in an exposure draft before we can comment definitively. The inclusion of such a provision should be limited to people who have not taken out a further policy (as they would otherwise have the opportunity to notify under their new policy), and should apply where a person did not know, or could not reasonably have known about the claim or potential claim during the actual term of their policy. MBIE should also consider that this proposal has in theory the potential to impact the pricing of claims made policies as it will effectively extend a year-long policy to 13 months.

Question 23	*What is your feedback in relation to the option for section 9 of the Law Reform Act? In particular: Do you agree with the costs and benefits of the option? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option (including the status quo) do you prefer and why?*
	ICNZ supports the option to allow third party claimants to claim from insurers directly. This option would be an improvement on the status quo. It would provide greater certainty for claimants and insurers alike (particularly those operating in jurisdictions other than New Zealand) and would create consistency with what legislators have done in Australia and the UK. Importantly, allowing third party claimants to claim from insurers directly will rectify many of the issues raised by ICNZ in our submission on the Issues Paper (determining priority of claims, issues around defence costs, and particular difficulties around claims-made policies, amongst others). ICNZ is comfortable with either a new provision replacing section 9, or creating stand-alone legislation, as has been done in New South Wales and the UK. We are satisfied that either option would work as well as the other. ICNZ does note that the chosen approach should ensure that an insurer can continue to raise indemnity issues in a claim made directly against them, that they would otherwise have been able to raise had the legislation not been changed. This is so a third party cannot obtain better rights against the insurer than the insured would have had if the insured was still solvent.
Question 24	*If the option is adopted, should it apply to insolvency only? Should third parties be required to get leave of the court? Should reinsurance contracts be excluded from the application of the option?*
	If the option is adopted, ICNZ believes that the following should apply: • It should apply to insolvency only: this would be consistent with the origins of section 9, which was to protect injured workers against their employer's insolvency. • Third parties should be required to get leave of the court: in New South Wales' *Civil Liability (Third Party Claims Against Insurers) Act 2017*, section 4(4) states that leave to proceed must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law[10]. This is consistent with ICNZ's comments made in response to Question 23 above, that the chosen option must enable an insurer to raise indemnity issues. • Reinsurance contracts should be excluded from the application of the option: reinsurance contracts are those contracts of insurance in place between an insurer and reinsurer. The insured does not have a direct relationship with the reinsurer and could not make a claim from them.

[10] Section 4(4), Civil Liability (Third Party Claims Against Insurers) Act 2017.

Question 25	*What is your feedback to the options in relation to the duty of utmost good faith? In particular: Do you agree with the costs and benefits of the options? Do you have any estimates of the size of those costs and benefits? Are there other impacts that are not identified? Are there other options that should be considered? Which option do you prefer and why?*
	The view of ICNZ and the majority of its members is that the duty of utmost good faith, which has developed over many years across a range of jurisdictions, is currently operating as intended and no change is required. The common law already provides for duties of utmost good faith by both the insured and insurer. This duty has been applied in a number of cases and left alone, will continue to be developed by the courts. The Options Paper cites the *Young v Tower* case as the common law position to be reflected in possible codification. This case is not suitable for codification to be based upon (should the proposal be advanced) for two reasons. Firstly, while the judgment briefly states that a duty of utmost good faith is "an obligation that flows both ways"[11], the decision focusses heavily on the obligations of the insurer, and not the insured. Codification would need to be clear that a duty of utmost good faith applies equally to both parties to a contract of insurance, which is not apparent from the *Young v Tower* judgment. Secondly, Justice Gendall himself says that the full scope and limits of the duty he sets out in the judgment "can be left for another day" and what the duty requires in the judgment is only the "bare minimum".[12] It is therefore clear that the test is intended to be developed further by the courts. Codification would curtail the natural development of the duty. ICNZ also notes that the duty in *Young v Tower* for insurers to disclose material information; act reasonably, fairly and transparently; and process claims in a reasonable time are all requirements already covered by the Fair Insurance Code and may also be addressed by legislation arising from the Conduct of Financial Institutions Review. While ICNZ opposes codification of the duty, if it were to occur, we recommend that only a basic duty is incorporated into legislation. The provision should not seek to be overly prescriptive as this will reduce flexibility in the operation and development of the duty. This is the position taken by Australia in their *Insurance Contracts Act 1984*, which includes in section 13 an obligation for each party to the insurance contract "to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith". While the provision is now enshrined in statute law, it has also been left open to further interpretation and development by the courts.

[11] *Young v Tower Insurance Limited* [2016] NZHC 2956 [7 December 2016] at [163].
[12] Ibid.

Question 26	*What is your feedback on the proposal to consolidate non-marine insurance statutes into a single statute?*
	ICNZ supports the proposal to consolidate non-marine insurance statutes into a single statute. We stress however that careful consideration and thorough consultation will be needed on an exposure draft of that statute to ensure that all relevant principles and provisions of each statute have been included, and the intent of those provisions has not been lost or unintentionally diminished.
Question 27	*What is your feedback on our proposed approach in relation to the Marine Insurance Act 1908?*
	ICNZ agrees that the *Marine Insurance Act 1908* should remain separate from any new piece of legislation consolidating the other non-marine pieces of legislation. As stated in our submission on the Issues Paper, this is for two primary reasons. Firstly, incorporating the entire Act into a new piece of legislation would require modernisation of the language used which bring risks. While the Act is based on the equivalent 1906 United Kingdom legislation, the language used goes back to the 18th century. Modernisation may alter the intent of the Act and negate decades worth of legal precedent. Secondly, and importantly, marine insurance is inherently international in its nature. The United Kingdom's 1906 Act and a number of others based on it (in Australia and China for example) are still in use, and New Zealand's legislation must be consistent with that of key players in the international community. We note however, that parts of the *Marine Insurance Act 1908* will likely need to be updated to reflect the proposed consolidation of the non-marine insurance statutes. ICNZ would welcome the opportunity to assist with making any necessary changes.
Question 28	*Are the above provisions redundant? Why/why not? Are there other redundant provisions in the legislation covered by this review?*
	ICNZ notes the following in relation to the specific provisions MBIE proposes to repeal: a. **Section 8 of the Insurance Law Reform Act 1977:** agree that this provision could be repealed as section 11 of the *Arbitration Act 1996* deals with the issues raised under section 8. For completeness, we note that repealing section 8 would also require section 11(6)(b) of the *Arbitration Act 1996* to be repealed. b. **Section 12 of the Insurance Law Reform Act 1977**: agree that this provision should be repealed. Only certain civil proceedings can be tried in the High Court with a jury. Those proceedings are set out in section 16 of the *Senior Courts Act 2016* and are limited to defamation, false imprisonment, and malicious prosecution. Actions brought in relation to a contract of insurance will therefore be tried by judge alone, as section 12 of the *Insurance Law Reform Act 1977* provides. c. **Section 7(3) of the Insurance Law Reform Act 1985:** agree that this provision should be repealed as it relates to another already-repealed subsection. d. **Section 26 of the Marine Insurance Act 1908:** while ICNZ agrees that the general criminal law on fraud, or negligence or some other action can deal

	with the issue in section 26, there may be value in retaining this provision. Retaining and modernising this provision may be useful in order to provide clarity. e. **Section 32 of the Marine Insurance Act 1908:** agree that this provision should be repealed, as it is no longer in use. f. **Sections 34-36 of the Marine Insurance Act 1908:** agree that these provisions should be repealed, as they are of no effect in New Zealand due to section 11 of the *Insurance Law Reform Act 1977*. g. **Sections 37-42 of the Marine Insurance Act 1908:** agree that these provisions should be repealed, as they are rendered largely redundant by measures against warranties. In consolidating the non-marine insurance statutes, it may become apparent that other provisions can be repealed. ICNZ encourages MBIE to seek specialist legal advice to ensure that all necessary provisions are incorporated into any new piece of consolidated legislation, and to ascertain whether any further redundant provisions can be repealed. We would welcome further engagement should further potential changes be identified.
Question 29	*What is your feedback on the proposed option in relation to registration of assignments of life insurance policies?*
	No comments, not relevant to general insurers.
Question 30	*Should the maximum payment amounts for life insurance policies for minors be increased? Why or why not?*
	ICNZ notes that while travel policies may contain payments for accidental death, these policies are considered composite policies under section 85 of the *Insurance (Prudential Supervision) Act 2010* and are to be treated as non-life policies. Travel policies therefore fall outside the operation of the *Life Insurance Act 1908* and are not limited to the current $2,000 limit.

A further matter is the deferral of payments of premiums by intermediaries, which is briefly discussed in paragraph 164 of the Options Paper. ICNZ's view is that there is no principled rationale for the current rules allowing retention of premiums by intermediaries for 50 days given modern payment systems. It is antiquated approach that should be reformed.

There is limited oversight of the use of the funds, delayed payment also increases risks related to conduct and bankruptcy etc. and insurers have to for example pay the FENZ and EQC levies before receiving the relevant premium from the intermediary. All this adds unnecessary cost and risk to the distribution of insurance in New Zealand and given approximately half of premiums are paid through intermediaries this is a significant issue. It has also not proved practical to address this in terms of providing more modern payment terms through contracts. ICNZ's advocates for the current 50 days to be reduced to a much shorter period, such as 5 days following receipt of the money from the insured.

A final matter to be considered in the development of new legislation is that there is material insurance business carried on outside the scope of the *Insurance (Prudential Supervision) Act 2010* ('IPSA') including types of contract that are currently deemed not to be insurance contracts under IPSA – including warranties, guarantees, and waivers and unlicensed (by RBNZ) foreign insurance firms that insure New Zealand policyholders. When reforming insurance contract law there is the opportunity

to address any potential mismatches of definitions under New Zealand law that may for instance allow entities to undertake unregulated insurance services by calling them something else.

Conclusion

Thank you again for the opportunity to submit on the Options Paper. If you have any questions, please contact our Regulatory Affairs Manager on (04) 914 2224 or by emailing andrew@icnz.org.nz.

Yours sincerely,

Tim Grafton
Chief Executive

Andrew Saunders
Regulatory Affairs Manager

Jane Brown
Legal Counsel