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ICNZ submission on Review of Insurance Contract Law - Issues Paper

Thank you for the opportunity to submit on the Issues Paper "Review of Insurance Contract Law" (**Issues Paper**), which was released by the Ministry of Business, Innovation and Employment (**MBIE**) in May 2018. ICNZ welcomes the Review of Insurance Contract Law and looks forward to engaging thoroughly in this process as it progresses over the next few years.

ICNZ represents general insurers that insure about 95 percent of the New Zealand general insurance[1] market, including over half a trillion dollars' worth of New Zealand property and liabilities. We do not represent life or health insurers.[2]

Please contact Andrew Saunders (andrew@icnz.org.nz or 04 914 2224) if you have any questions on our submission or require further information.

This submission is in two sections:

- Overarching Comments
- Responses to Sections and Questions in the Issues Paper

Overarching Comments

General insurance in New Zealand

The central role of insurance in an economy is the mitigation of insurable risk. Through the acceptance and pooling of such risks, general insurance improves economic welfare by reducing the cost of self-insurance and freeing resources for more productive uses. Individuals and businesses in New Zealand

[1] General insurance includes various types of personal and commercial insurance such as property (e.g. car, home and contents, marine), liability insurance and travel insurance etc.
[2] ICNZ has members that provide life and/or health insurance as well as forms of general insurance. ICNZ represents these members in regard to their provision of general insurance products only.

can pursue economic activities secure in the knowledge that risk has been transferred to their insurer. A reliable and innovative general insurance industry is an essential component of a modern economy.

The general insurance industry plays a critical role in protecting the financial well-being of individuals, households and communities by restoring their standard of living and helping communities recover following natural catastrophes. General insurers received 1.2 million claims and paid out approximately $2.7 billion to New Zealand households and businesses in 2017. The industry also supports initiatives to build New Zealand's resilience to emerging risks, such as those associated with climate change and cyber security.

General insurance is different in nature from life and health insurance in some key ways. Most notably that general insurance involves a contract that is renewed (generally annually) whereas the others are in effect an ongoing contract.

Insurance is more complex than many other financial services, both in terms of the various types of insurance and the inherent complexity associated with underwriting risks (i.e. the level and nature of cover). Consumers (and businesses) demand a range of features and benefits from insurance, which the competitive insurance market provides. Insurers therefore compete on both prices and features, to the benefit of policyholders.

Insurance is a global industry but every insurance market including New Zealand's has a range of features (some unique) based on size, geography, culture, legal regime etc. Two notable aspects include:

- Playing a critical role in managing national risks given our ongoing exposure to catastrophic natural events is high (earthquakes in particular). Whilst we have one of the highest expected insured losses in the world as a proportion of GDP (behind only Bangladesh and Chile and much higher than the United Kingdom for instance)[3] we still have all perils cover thanks to regulatory features such as EQC and the ability of insurers to arrange reinsurance to offer such cover in New Zealand.
- The small size of population and market and the already high level of insurance coverage (New Zealand has one of the highest penetration rates in the world) mean opportunities for growth in New Zealand for insurers are limited.

Given the above factors it is particularly important the regulatory environment remains workable and attractive to insurers to ensure an active and dynamic insurance market is maintained. New Zealand's relative vulnerability means it is also critically dependent on offshore capital to provide reinsurance coverage.

The provision of general insurance involves not only general insurers but also intermediaries (e.g. brokers and underwriting agents). Where intermediaries are involved they often have the direct relationship with the insured (consumer or business etc.). For brokers this is always the case. Commercial insurance is primarily sold and managed through brokers.

[3] From "Lloyd's Global Underinsurance Report October 2012", available at:
https://www.lloyds.com/~/media/Files/News-and-Insight/360-Risk-Insight/Global_Underinsurance_Report_311012.pdf

There are different business models for distributing insurance. Combined with different technologies this leads to a number of routes to establishing an insurance contract, the process might be:

- Conducted at the insurer's office and be mostly on paper.
- Conducted by telephone - the communication of information is verbal. The insurer takes notes and the notes form a part of the insurer's records and the insurer will send the insured a summary of the important information.
- Conducted online - the insured applies for insurance through the insurer's website and there is an electronic record of the communication.
- Conducted through other parties - the insured through an insurance broker or other commercial partner such as a bank, and the insurer though its underwriting agent.
- Automatic: for example, a credit card purchase might bring with it automatically insurance to cover the purchase (or travel undertaken) without the proponent doing anything specific to buy or take out the insurance. The insurance facility would be a benefit of the credit card and would be made available by an arrangement between the credit card provider and the insurer.

In considering potential changes to insurance contract law it is important to bear in mind these sorts of processes, variations of them, as well potential evolution and/or the introduction of entirely new processes.

New Zealand has experienced major natural disasters in the last decade. ICNZ and its members are only too aware that the time taken to resolve Canterbury claims has impacted people and adversely affected perceptions of the sector. The Canterbury earthquake sequence of 2010-11 was exceptional by global standards in terms of the scale and complexity giving rise to a range of issues, some of which were beyond general insurers' control.

Many lessons have been learned from Canterbury and when applied to the Kaikōura earthquake of 2016, New Zealand's second largest ever insured loss event, the insurer led claims process has proven itself in the speed of settlements for customers and we consider this is the appropriate model for managing natural disaster claims in the future. It is important this Review reflects this context rather than seek to address issues that arose in the rarest and most exceptional circumstances as the norm.

Weather events have been significant in recent years. 2017 was NZ's most expensive year on record for severe weather events with $243 million in insured losses and weather-related losses for 2018 are already estimated at $204 million for the six months to the end of June. New Zealand has approximately 15,000 km of coastline (9th longest in the world) and so has a substantial exposure to ongoing climate change risks.

Current regulatory environment for insurance

ICNZ agrees the statutory law for insurance contracts is highly fragmented across six statutes and all participants would benefit from a consolidation. It is crucial though to remember the significant role that is also played by the common law.

As noted in the Issues Paper, it is important to remember that general insurers are subject to other regulatory regimes including:

- Sales and advice: *Financial Markets Conduct Act 2013* (**FMCA**), *Financial Advisers Act 2008* and the *Contract and Commercial Law Act 2017*.
- Market conduct and consumer protection: FMCA and the Financial Markets Authority's (**FMA**) Good Conduct Guide.

- Dispute resolution: *Financial Service Providers (Registration and Dispute Resolution) Act 2008*. Financial Advisers such as brokers and financial service providers such as insurers are required to be a member of an approved external disputes resolution scheme. This provides consumers with an independent forum to hear complaints that a customer cannot resolve with an entity.
- Prudential regime: *Insurance (Prudential Supervision) Act 2010*.
- Privacy: *Privacy Act 1993*, which is to be replaced by a *Privacy Bill* currently before Parliament.

It is also important to recognise (as noted in the Issues Paper) that changes are being made through the *Financial Services Legislation Amendment Bill* (**FSLAB**) and its supporting disclosure regulations and Code of Conduct that are material to regulation of conduct for parts of the insurance contract lifecycle. These will impose stronger and wider duties related to financial advice (including the duty to give priority to the client's interests) and this will cover interactions between consumers and insurers and insurance intermediaries (e.g. brokers) that provide financial advice in relation to the sale and ongoing application of insurance.

The FMA (conduct) and the RBNZ (prudential) are the primary regulators of the general insurance industry in NZ. This is sometimes referred to as the "twin peaks" model, although the Commerce Commission also has functions under the *Fair Trading Act 1986*. This is already a complex situation and so avoiding introducing further complexity is desirable.

As identified in the Issues Paper, general insurers that are members of ICNZ are subject to the Fair Insurance Code issued by ICNZ. The Fair Insurance Code is written in plain English and covers matters such as remedies for non-disclosure, claims handling timeframes and provides examples of the sorts of facts that may affect an insurer's decision to insure customers and on what terms. The Fair Insurance Code was first developed and then introduced by ICNZ in 2011 and was significantly upgraded in 2016. It is currently being reviewed with a revised version likely to come into effect in 2019. ICNZ intends for the revised version to raise the bar higher on conduct.

ICNZ's comments on overarching themes in the Review

ICNZ generally supports the consolidation and modernisation of the existing statutes, with the exception of the *Marine Insurance Act 1908* (refer to our response to Question 53 for further discussion of this issue). Re-insurance contracts should remain outside the scope of insurance contracts law. Any codification of common law needs to be considered very carefully as it could interrupt the development of the common law and introduce new uncertainties.

ICNZ welcomes reform of non-disclosure and the addressing of the "Technical Issues" identified in Section 6 of the Issues Paper. We also welcome consideration being given to the regulation of conduct and how to help consumers to better understand and compare insurance.

ICNZ considers the current provisions relating to the regulation of "unfair contract terms" (**UCT**) are appropriate and should be retained. It would however be appropriate if these were moved into insurance-specific legislation.

We note the Issues Paper is very focussed on consumer issues. Consumer trust and confidence in insurance is paramount to us, so we welcome change that appropriately supports this. However, we are aware that some well-intentioned interventions in other jurisdictions have brought about unintended consumer detriment (e.g. PDS's introduced in Australia to help customers understand policies more easily but ended up creating very long and unwieldy policy documents). We therefore caution against uncritical adoption from other countries.

New technologies and innovations in product development will continue to change the way consumers interact with insurance and these also need to be considered in the reform of insurance contract law. It is also important to work through the practical implications of any changes or interventions before introduction.

Having regard to the issues outlined in the Issues Paper, most of which are consumer related, and international approaches, ICNZ considers it may be appropriate to take a two-track (i.e. consumer/commercial) approach to the regulation of a number of aspects of insurance contracts (e.g. disclosure and conduct). We note a consumer/commercial split is already provided for in a range of relevant domestic and international regimes and we have outlined some relevant ones in the following table for reference.

Framework	**Commercial**	**Consumer**
Financial advice regime (as per FSLAB) Both definitions being inserted into new Schedule 5 of FMCA	A person is a **wholesale client**, in relation to a financial advice service or a client money or property service (unless the person has opted out from being a wholesale client under clause 5) if— (a) the person is an investment business under clause 37 of Schedule 1; or (b) the person meets the investment activity criteria specified in clause 38 of Schedule 1; (e*.g. owns or has owned, a portfolio of specified financial products of at least $1 million or has carried out 1 or more transactions to acquire specified financial worth at least $1 million*).or (c) the person is large under clause 39 of Schedule 1 (*e.g. net assets exceeded $5 million or exceeded $5 million*); or (d) the person is a government agency under clause 40 of Schedule 1; or (e) the person is in the business of being a product provider and receives the financial advice service or client money or property service in the course of that business; or (f) the person is an eligible investor in relation to the service under clause 5 of Schedule 1.	A **retail client**, in respect of a financial advice service or a client money or property service, is a client of a provider of that service who is not a wholesale client.
Dispute resolution schemes[4]	Individual customers and organisations with **19 or fewer full-time equivalent employees**.	**Individual customers** and organisations with 19 or fewer full-time equivalent employees.
Fair Insurance Code	Code applies to individuals and entities with **19 or fewer employees**.	Code applies to **individuals** and entities with 19 or fewer employees.
Fair Trading Act 1986 Unfair contract terms provisions and other matters	Not a "consumer".	**consumer** means a person who— (a) acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and (b) does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of— (i) resupplying them in trade; or (ii) consuming them in the course of a process of production or manufacture; or (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land

[4] *Financial Service Providers (Registration and Dispute Resolution) Act 2008*, Section 48.

Australia Corporations Act, section 761G(5) Insurance Contracts Act 1984	Not a retail client.	The following criteria must be met before an intending policyowner is classified as a '**retail client**' in relation to general insurance contracts: (a) the policyowner is either an individual, or the insurance is for use in connection with a small business, defined to mean one employing fewer than 100 people in the case of a manufacturer of goods, or one with fewer than 20 people in other cases; and (b) the contract of insurance is one or other of 7 specified types, 6 of which correspond to the description of prescribed contracts in the Insurance Contracts Act 1984 (IC Act) and its regulations, namely, motor vehicle, home building, home contents, sickness and accident, consumer credit, travel and medical indemnity insurance. There is provision for further kinds of contract to be prescribed by regulation.[5]
United Kingdom Consumer Insurance (Disclosure and Representations) Act 2012	"**non-consumer insurance contract**" means a contract of insurance that is not a consumer insurance contract;	"**consumer insurance contract**" means a contract of insurance between— (a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and (b) a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000)"

The above table shows the distinctions that already exist and so whilst a tailored approach to consumer and commercial issues may be appropriate in regard to insurance contract law it would need to be compatible with existing regimes and workable for industry. It adds significant complexity to have individual/entities being classified in different ways for different regimes, particularly when a single one might fall on different sides of the various consumer/commercial splits and/or move between them over time.

ICNZ's comments on the process for the Review

The existing law for insurance contracts is well established and a substantial role is played by the common law. The scale of the task of reviewing it should not be underestimated – in the United Kingdom for instance it took many years and we understand it proved particularly complex to resolve the approach to aspects of commercial insurance contracts.

We consider the Review should work from identified issues and problems in New Zealand and on the basis of clear evidence rather than seeking to simply follow developments in selected jurisdictions. Overseas frameworks also need to be viewed in the context of the types of insurance written there and the risk profiles applying. Specified perils cover that is offered in Australia and the United Kingdom is for instance fundamentally different from the all perils cover offered in New Zealand.

Important and interconnected issues (e.g. disclosure and remedies) are being considered in the Review and there is a need for further exploration and discussion of how they fit together. There is a

[5] From Background Paper 14 titled "General Insurance" to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, June 2018. Available from https://financialservices.royalcommission.gov.au/publications/Pages/default.aspx.

need to consider relevant changes that are happening in parallel (e.g. FSLAB and updates to the Fair Insurance Code).

Given the above factors we consider there will be a need for multiple rounds of further consultation and more engagement before an options paper and/or further detailed consultation would need to follow a high-level options paper.

Looking towards the end of the Review, a transition period will be required between the changes to legislation and the application of these to insurance contracts. This transition period may need to be significant and will need to cover both the renewal of existing insurance contracts and the establishment of new contracts.

Responses to Sections and Questions in the Issues Paper

In this section we provide specific responses to the questions in the Issues Paper and for some sections we provide thematic commentary.

Objectives of the review

1	Are these the right objectives to have in mind?
	We consider the phrasing of Objectives 1 and 2 succinctly cover relevant matters although we have an additional suggestion below.
2	Do you have alternative or additional suggestions?
	There would be value in recognising more explicitly the importance of promoting the participation of insurers in the insurance market, along the lines of purpose of the Financial Markets Conduct Act 2013 noted in paragraph 18(a), as this is fundamental to maintaining a dynamic market for insurance in New Zealand.

Disclosure obligations and remedies for non-disclosure

The duty of disclosure dates back to the origins of insurance. It is related to the duty of utmost good faith owed by each party (insurer and insured) and recognises inherent information asymmetries between the parties. It puts an obligation on the insured to disclose information that enables the insurer to sensibly assess and price the risk (generally those facts that have been statistically proven to alter the risk), both at contract formation and over the life of the contract. Insurers ask direct questions that help consumers understand what information insurers need to know.

The duty exists to address the imbalance in knowledge of facts about the risk being insured against and the person being insured. Statute, through section 18 of the *Marine Insurance Act 1908*, provides that where the insured fails to meet the duty of disclosure, and the non-disclosure would have been material to a prudent underwriter, the insurer can avoid the contract. There is no statutory inducement principle, but the common law here has followed the United Kingdom in requiring the insurer to prove inducement (i.e. that it was actually induced by the insured's misleading presentation of the risk to enter into the contract on the terms agreed). This is something that is to the benefit of consumers and we note it is not specifically covered in the Issues Paper.

ICNZ's Fair Insurance Code provides that general insurers that are ICNZ members will respond reasonably in cases where consumers fail to disclose something. Industry practice is for general

insurers to provide a proportionate response to non-disclosure by effectively re-underwriting the insurance contract and if necessary adjusting the situation to what would have been the case had the disclosure been made. It is important to note that for consumers not satisfied with the way their insurer has responded to non-disclosure, the independent dispute resolution scheme can determine what is a reasonable response to non-disclosure and the scheme's decision is binding on the insurer.

Available data indicates that insurance contracts are avoided on the grounds of non-disclosure[6] but this is not common in regard to general insurance and we note this distinction in relation to the comments in paragraph 46 of the Issues Paper. Amongst general insurance it appears anecdotally to most commonly relate to travel insurance.

ICNZ considers the principles underlying the duty of disclosure are generally sound but recognises the following issues need to be addressed:

- what would be material to a prudent underwriter is not something all consumers can be expected to understand, however, it is not an unreasonable expectation with regard to situations such as commercial entities working through brokers; and
- breaching the duty may have disproportionately harsh consequences for an insured as the remedy for non-disclosure provided in statute is simply avoidance of the contract.

Some reformulation of the duty of non-disclosure is needed to address the issues identified but the duty of disclosure should not be simply discarded. Making it more straightforward for consumers to understand what the duty entails would be appropriate. This may mean different approaches to consumers vis a vis businesses/brokers are appropriate.

ICNZ agrees taking a proportionate response to remedies for non-disclosure and misrepresentation is appropriate. The detail of this needs to be carefully considered and the solution needs to factor in fairness and avoid incentives and opportunities for insureds to fail to disclose or misrepresent. Applying a proportional regime involves a degree of re-underwriting based on what the insurer would have done had the disclosure been accurate to start with. This requires clear evidence in terms of underwriting guidelines but is already done regularly in New Zealand and overseas. A proportional approach can still potentially lead to avoidance of the contract in cases where the insurer would never have accepted the risk had disclosure been accurate at the time of contract formation.

We note international approaches to disclosure and remedies for non-disclosure and/or misrepresentation vary in terms of detail and there are lessons to be learned from those jurisdictions with similar legal frameworks to New Zealand. The increasing development and utilisation of new electronic platforms for distribution also needs to be factored in to any legal development in this area.

Given the established nature of the current law and potential complexity of any solutions we consider more work and engagement on the detail of changes to disclosure obligations and remedies will be required. Whatever the duty and the suite of remedies adjoining the duty, the law should permit and incentivise insureds to disclose or represent material facts accurately and truthfully, and provide the insurer with proportionate remedies for when they do not.

[6] IFSO indicated in 2017 about 11 per cent of the 272 complaints it investigated in the last financial year included non-disclosure as a problem (across all classes of insurance).

3	Are consumers aware of their duty of disclosure?
	Insurers consider it is important that consumers understand their responsibilities and we make efforts to inform consumers generally and about the duty of disclosure in particular. The duty will typically be communicated to consumers in one of two ways: • *verbally, where the consumer is purchasing insurance direct from the insurer over the phone or an insurance intermediary (e.g. broker) is assisting the consumer in completing their insurance application; or* • *written disclosure, where the consumer is purchasing insurance online or is completing a hard copy insurance proposal.* *The duty of disclosure is then further disclosed in the policy documentation made available to the consumer confirming the details of the insurance contract once it is issued.* *We recognise that it is important to remind insureds of the continuing nature of the duty of disclosure as there is the potential for this to be overlooked over time. It is therefore also communicated whenever a change is made to a policy or a renewal offer is sent to a consumer.* *The Fair Insurance Code includes a plain English explanation of the duty (refer clauses 16, 19 and 20).*
4	Do consumers understand that their duty of disclosure goes beyond the questions that an insurer may ask?
	Insurers make consumers aware that their duty extends beyond the direct questions asked. Clause 19 of the Fair Insurance Code refers specifically to this and provides "You must tell us any facts that may affect our decision to insure you and on what terms, whether we ask a specific question or not."
5	Can consumers accurately assess what a prudent underwriter considers to be a material risk?
	We agree it can be challenging for consumers to identify what information would be material to a prudent underwriter. However, in practice consumers are assisted in this as insurers generally ask direct questions that help consumers understand what information insurers need to know. In doing this it is necessary to recognise there can be a tension between making the underwriting process accurate (i.e. the insurer fully understanding the risk being presented) and making it less onerous for the consumer (i.e. simpler and quicker). *Notwithstanding the above we recognise it may be appropriate to reformulate the duty to address the issues that have been identified and make it more straightforward for consumers to understand what the duty entails. We note the same issues do not however apply in relation to business conducted through brokers, particularly relating to commercial insurance.*
6	Do consumers understand the potential consequences of breaching their duty of disclosure?
	Insurers clearly outline the consequences of breaching their duty of disclosure in policy wording and other materials. ICNZ and its members make efforts to educate consumers on the need to be fair and transparent in their dealings with their insurer, and the consequences of non-disclosure, through the Fair Insurance Code (clause 20) and other activities. *Regardless of whether consumers understand the potential consequences of breaching their duty of disclosure, in relation to general insurance, we understand from insurers and dispute*

	schemes that non-disclosure is infrequently used as grounds for not paying a claim or voiding a contract. Proportional remedies are commonly applied where relevant. *It is important to recognise there is a (likely very small) proportion of the population who know that if they disclose certain matters they will not get insurance or it will be more costly and these people choose to withhold information or make a deliberate misstatement and hope they do not get caught out.*
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?
	Consumers generally know more than the insurer about their own risks and definitely know more about themselves than the insurer. The insurer requires the material facts about the risk and the customer in order to determine whether or not it will issue a policy, what specific exclusions it may require, and what premium it will charge. At the time of the application, the essential facts are usually known very well by the applicant but may be difficult for the insurer to ascertain. Insurers for instance have no knowledge of a consumer's (and their family's) driving convictions, and other moral risk factors such as criminal history. *The ongoing nature of the insurance relationship also needs to be remembered – a consumer's position will likely evolve after contract formation and to enable an insurer to sensibly underwrite the risk they need to receive further information from the consumer at the time of annual renewal or otherwise. Clause 19 of the Fair Insurance Code refers specifically to this and provides:* *"You must tell us any facts that may affect our decision to insure you and on what terms, whether we ask a specific question or not. You must do this:* • *when you buy insurance from us* • *during the term of your insurance with us, and* • *when you renew your insurance with us."* *We recognise there could be situations and times where insurers better understand the risks facing a consumer's assets at a local level (e.g. natural hazard risks such as coastal inundation or flood risks). Where this is the case this is generally reflected in wording and pricing at a portfolio level.* *Technology may in future allow insurers to access more information about consumers and their property, but whether an insurer can, or will, access such information will be depend on the accuracy/reliability of the information, legal requirements (e.g. privacy law) as well as the costs of sourcing and maintaining it.*
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.
	ICNZ notes that a significant proportion of such cases that have been identified in the media or otherwise have related to life/health insurance rather than general insurance. As noted above, we understand non-disclosure is infrequently used as grounds for not paying a claim or voiding a contract of general insurance. *It is important to consider that while avoidance could be harsh in some situations, in others it is appropriate. For example, where a consumer does not honestly represent the risk they want to insure, and the insurer would not have accepted the risk had it known the correct facts.*

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?
	As outlined elsewhere in this submission we support proportional remedies in regard to innocent non-disclosure. However, it is fundamental that people should be honest and deliberate dishonesty whether related to non-disclosure or misrepresentation should be subject to severe consequences. *We note the United Kingdom regime for both consumers and non-consumers provides a range of responses that recognise whether a non-disclosure or misrepresentation (as relevant) is deliberate/reckless or careless, which is a more suitably nuanced approach than simply considering intentional vs unintentional. This approach also recognises that proving intention can be practically difficult.*
10	Should the remedy available to the insurer be more proportionate to the harm suffered by the insurer?
	Yes, we consider a proportional approach to remedies is appropriate for the reasons outlined elsewhere in this submission.
11	Should non-disclosure be treated differently from misrepresentation?
	The obligation to disclose information not asked by the insurer (the duty of disclosure) and the obligation to answer the insurer's questions accurately (misrepresentation) are related. Both misrepresentation and non-disclosure impact on an insurer's ability to correctly assess and price the risk and the consumer being presented to them. The two concepts have similarities and can overlap (i.e. omitting a piece of information could be both non-disclosure and misrepresentation if provided in the context of an answer to a question). *As noted in the Issues Paper and above, the United Kingdom legislation provides specific rules related to whether the misrepresentation was deliberate/reckless or careless (there is no duty of disclosure for consumers there). We also note that section 4 of the Insurance Law Reform Act 1977 provides specific limitations in relation to misstatement by insureds associated with contracts of life insurance.* *We recognise there are important and subtle issues to be considered in any changes in this area and these will need to be worked through carefully in making changes to the duty of disclosure in particular. ICNZ in any case considers proportional remedies should be applied in relation to both non-disclosure and misrepresentation, which would limit the most severe remedies to cases of intentional non-disclosure and deliberate or reckless misrepresentation.*
12	Should different classes of insureds (e.g. businesses, consumers, local government etc.) be treated differently? Why or why not?
	As outlined above ICNZ is of the view that consideration should be given to applying a different regime to different types of insureds in relation to disclosure, and potentially to other matters. This would enable the regime to recognise the fundamentally different contexts and levels of insurance expertise applying to different situations (e.g. individual getting home insurance directly from an insurer over the phone or online vs. corporation putting in place liability insurance through a broker).

	We note 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. *A split (i.e. commercial/consumer) approach would align with the approach that has been taken in the United Kingdom and applies already in New Zealand in relation to other financial services matter such as "financial advice", dispute resolution schemes and under the Fair Insurance Code. Some of these are outlined in the table in Part 1 of this submission.* *We realise that if this approach was pursued care would need to be taken as to how to demarcate the different categories and there are various options for this based on the nature of the person (e.g. individual, corporate entity etc.), and/or the purpose of the insurance contract (related to a trade or profession or not), and/or the type of insurance contract (e.g. personal lines such as home and contents, motor vs. commercial lines such as liability, stock, commercial property etc). How to provide for very small businesses would be an important matter to consider, recognising these are currently covered by the Fair Insurance Code and external dispute resolution schemes.*
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?
	No, general insurers treat non-disclosure on a case-by-case basis and as outlined above are required to respond reasonably by the Fair Insurance Code. Insurers will generally make an assessment and offer terms to customers that would put them in the same position they would have been in had they disclosed information accurately in the first place (see response to Question 14 below). This may still result in not paying claims in situations such as where the insurer would never have entered the contract had the insured appropriately disclosed the information originally. *In the commercial segment there are often clauses in insurance contracts that modify the remedies for non-disclosure and misrepresentation not to apply in situations where the non-disclosure, misdescription or misrepresentation were inadvertent. This threshold also requires a case by case approach in assessing the criteria and the circumstances.*
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?
	The initial step is to take a natural justice approach (e.g. seek explanation from insured). Following this factors that are taken into account in relation to non-disclosure include: • *Whether the non-disclosure was innocent or deliberate.* • *Where non-disclosure is discovered in the context of a claim (which is common) the extent to which the non-disclosure was relevant to the claim (e.g. non-disclosed driving convictions would be relevant to a motor claim but not to a house or contents claim).* • *Whether the insurer would have offered the insurance on different terms (e.g. different premium, excess, exclusions etc) or not all if the true facts had been disclosed.* *Common practice is to then effectively re-underwrite the situation and in relation to claims this can result in various responses proportional to the facts of the situation including the following non-exhaustive list of potential outcomes:*

- *paying the claim in full because the insurer would not have done anything different with the additional information;*
- *paying the claim but adjusting the result to reflect different terms that would have been in effect (e.g. different premium, excess, exclusions etc); and*
- *not paying the claim, avoiding the contract and returning premium.*

As noted above in relation to Question 11, misrepresentation and non-disclosure, have similar elements and can overlap. However, where misrepresentation is deliberate it is naturally treated differently.

Conduct and supervision

Current conduct regulation of the insurance sector, the common law and the Fair Insurance Code

ICNZ considers good conduct by insurers and intermediaries is fundamental to good consumer outcomes. This is why we put in place the Fair Insurance Code and continue to update it. Building consumer trust relies on being truly customer focused and addressing poor customer outcomes in a timely and effective manner when issues arise. An efficient functioning insurance system also relies on insureds engaging honestly with their insurer and making reasonable efforts to understand the insurance policies they choose to purchase.

As noted in the Issues Paper (and above) as well as the insurance law statues, insurers are also subject to other regulatory regimes including the *FMCA*, *Financial Advisers Act 2008*, *Financial Service Providers (Registration and Dispute Resolution) Act 2008*, FMA's Good Conduct Guide 2017[7], *Contract and Commercial Law Act 2017*, *Fair Trading Act 1986* and the *Insurance (Prudential Supervision) Act 2010*. Some aspects apply to multiple parties (e.g. insurance intermediaries such as brokers are subject to the wider financial advice and conduct regime). The extent to which particular insurers are subject to the various duties depends on the products they offer and the nature of their business model (e.g. consumer/commercial or commercial only, direct sales or intermediated, provide financial advice or not etc.).

General insurers that are members of ICNZ are also subject to the Fair Insurance Code, which has provisions addressing various aspects of conduct. As outlined above the Code is being reviewed currently to ensure it reflects best practice.

Independent dispute schemes, which are free to insureds, play a role in relation to disputes involving customers or smaller businesses (up to 19 FTEs). Decisions by dispute schemes are binding on the insurer but not the complainant. The level of complaints that make it to an independent dispute scheme are a small proportion. During 2017, insurers received 1.2 million claims. Of those, 0.3% (3,446) of complaints were managed by insurers' internal dispute resolution processes and of these 243 complaints were then lodged with external dispute resolution schemes (0.02% of total claims). Of these 19 were upheld, some others will have been settled.

The common law also plays an important role in relation to conduct through the evolution and application of concepts such as the duty of "utmost good faith".

The current regulatory environment is subject to evolution in terms of legislation, regulation and the approach of regulators. The evolving regime for "financial advice" provides significant coverage of the

[7] The FMA publication "A guide to the FMA's view of conduct" outlines a range of expectations in regard to the capabilities of entities, how products and services provide fair value, governance and culture, systems and controls, and misconduct.

front end of the insurance policy lifecycle in relation to insurers and intermediaries that provide financial advice. The introduction of enhanced duties and new disclosure requirements in coming years, combined with strong regulatory oversight by the FMA, is intended to have a meaningful impact on improving conduct, transparency and customer outcomes across the financial services sector.

There is a current focus in New Zealand and Australia on the role of incentives and commissions in potentially causing poor outcomes for consumers in regard to financial services (including insurance). Various policy/regulatory processes are underway on both sides of the Tasman and we note in particular recent investigations by the FMA into concerns about conflicted remuneration in the life and health insurance industry and commentary made by the FMA on churn by intermediaries in the life insurance sector. For some time ICNZ has strongly supported the planned introduction of increased disclosure in regard to commissions and incentives for financial advice and would welcome the opportunity to work with government on other approaches to increase transparency, efficiency and customer outcomes.

Claims handling is the key part of insurance for customers and where disputes generally arise. It is important to emphasise that insurers want to settle their customers claims swiftly and reasonably. Insurers don't want to unduly delay the settlement of claims because it can be bad for their reputation and can have commercial costs due to regulated solvency standards and commercial practices (i.e. insurers need to hold capital for unpaid claims and are potentially liable for interest on late payments).

It must also be recognised that claims processing is highly reliant on third parties acting for insurers, insureds, or both. The availability and performance of these third parties can delay and affect settlement processes. It is appropriate for insurers to be responsible where they outsource functions to third parties (e.g. claims handing) and where the third parties are working for the insurer. Where there is a reliance on third party experts (e.g. engineers) a pragmatic view needs to be taken.

The existence of disputes does not of itself mean poor conduct is occurring and we note conduct regulation is about controlling and improving conduct at a systemic level than resolving complex individual situations. We note that to some extent disputes are inevitable given the sheer number of claims (over 1 million per annum) and the nature and complexity of some claims (e.g. full replacement polices for historic homes).

We note the specific issues with claims handling identified in the Issues Paper appear to relate generally with experiences in Canterbury. The Canterbury earthquakes of 2010-11 were by far New Zealand's biggest natural disaster and insurance event (168,710 claims and $20.7 billion paid out by ICNZ members to this point) and remain one of the most significant global insurance events of all time.

The insurance industry and Government have learned many lessons from the Canterbury and Kaikōura (2016) earthquake sequences. The industry has responded with refined policies (e.g. sum insured rather than replacement), new processes (insurers leading claims management for Kaikōura on behalf of EQC) and significant revisions to the Fair Insurance Code.

Following the Kaikōura earthquake event in November 2016, ICNZ and EQC came to an arrangement whereby insurers would act as agents for EQC in respect of the lodgement, assessment, management and settlement of EQC-related claims. This new approach has worked extremely well, helping to avoid duplication and unnecessary delays in the settlement of claims. As a result, 87% of all Kaikōura earthquake claims had been either fully or partially settled by the end of 2017. In contrast, due to the complexity of the process, seven years later insurers are still receiving over-cap claims from EQC in respect of the Canterbury earthquake series (793 new Canterbury earthquake claims were passed from EQC to insurers during 2017).

The Canterbury earthquakes were a significant event in New Zealand's history with ongoing effects for the region and its people. As noted many lessons have been learned from this but extreme events of this scale should not be the basis for insurance conduct law applying to business as usual situations. It is also important to recognise that process expectations that might be appropriate in a business as usual mode would likely have to be suspended in the event of another major disaster approaching that scale.

The existing insurance law, various conduct law as modified by existing proposals (e.g. FSLAB) and the Fair Insurance Code results in a regime that is complex and intertwined with the regulation of financial services more generally. Overall it provides coverage of most aspects of the insurance lifecycle and in our view is largely appropriate for general insurance. ICNZ recommends taking an evolutionary rather than revolutionary approach to conduct regulation for the insurance sector, which recognises the role of existing regulation, self-regulation and the role and expertise of existing regulators.

Before considering any changes to the conduct regulation applying to the insurance sector government needs to take account of:

- The extent to which changes to other aspects of insurance contracts law (e.g. remedies for non-disclosure) address issues identified in relation to consumers.
- How any conduct regulation considered for insurance contracts aligns and interacts with other financial services regulation that insurers are, or will be, subject to (e.g. regimes for financial services and financial advice) and whether introducing any new conduct regulation would trigger the need to exempt entities from other existing regulation to avoid duplications/overlaps or undue complexity, compliance costs etc.
- The extent to which any conduct regulation might apply (if at all) beyond consumers to include commercial insurance contracts/interactions and if so how the distinction between consumer and commercial is made and how that relates to similar distinctions in other financial services regulation.
- The role of intermediaries and outsourcing, bearing in mind that is appropriate for insurers to be responsible for outsourcing but that some intermediaries (e.g. brokers) have independent regulatory responsibilities and duties.
- The role and value of self-regulation and the potential to enhance the framework around this (e.g. FMA approval of industry codes and/or making them binding in dispute tribunals).
- Any codification of common law related to conduct (e.g. the duty of utmost good faith) needs to be considered very carefully.
- Care needs to be taken with introducing arbitrary timeframes as the application to varying situations such as claims settlement can be problematic and can risk adverse outcomes for consumers in some situations.

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?
	ICNZ considers, as outlined at a high level in the Fair Insurance Code, that "insurers should act honestly, fairly, transparently and with utmost good faith towards consumers and should manage claims quickly, fairly and transparently." Specific things that insurers should do include: • *accurately and fairly represent their products,* • *answer any questions about their products accurately and in a timely manner, ensure insureds understand their obligations,* • *provide a customer with sufficient notice as to whether renewal of the contract will be offered so that they can make alternative arrangements if the current insurer does not wish to offer renewal,* • *pay all legitimate claims in accordance with the policy terms and without any unnecessary delay, and* • *deal with any complaints fairly and in a timely fashion.* *Consumers need to engage honestly and openly with insurers, ensuring they take responsibility for understanding the contract they are entering into (asking questions when they don't), understanding when they need to provide updated information to the insurer and then doing so, and paying all premiums when they are due.*
16	To what extent is the gap between ICP 19 and the status quo in New Zealand (as identified by the IMF) a concern?
	ICNZ considers its members do their utmost to ensure good outcomes for consumers, and act in accordance with the principles of ICP 19. ICNZ also considers that as identified in the Issues Paper, those matters which were identified by the IMF as a gap between ICP 19 and the status quo in New Zealand, are or will be generally covered by other regulatory regimes (e.g. financial services or advice) or by self-regulation in relation to general insurance. *The Fair Insurance Code covers a lot of what is in ICP 19 but we recognise it does not directly deal with arrangements between insurers and intermediaries, which are addressed below in relation to Questions 45-47 below.*
17	Does the lack of oversight over the full insurance policy 'lifecycle' pose a significant risk to purchasers of insurance?
	As noted above a number of areas are already or will in coming years be covered by regulation, however, as identified in the Issues Paper these are spread across a number of regimes. These are mainly within the purview of the FMA but some are covered by the Commerce Commission or other parties (e.g. dispute resolution schemes). *The data on complaints noted above suggests the current regime is working well for the vast majority of consumers the bulk of the time and we note regulation is best suited to addressing or improving systemic issues. Internal dispute processes, external independent dispute schemes and if necessary courts exist and are the appropriate places for resolving individual disputes.*

	ICNZ considers that the regulatory and self-regulatory controls that are/will be in place provide coverage of key aspects of the insurance conduct lifecycle and that "the lack of oversight over the full insurance policy 'lifecycle'" does not pose a significant risk to purchasers of insurance.

18	What has your experience been of the claims handling process? Please comment particularly on:
	• timeliness the information from the claims handler about:
	  ○ timeframes and updates on timeframes
	  ○ reasons for declining the claim (if relevant)
	  ○ how you can complain if declined
	• The handling of complaints (if relevant)

	The insurance industry considers most claims are resolved positively (over 90% of claims are paid) and in a timely way. It is in insurers' best interests to settle all legitimate claims as quickly as possible. As outlined above the industry does however recognise the time and ongoing challenges associated with resolving Canterbury earthquake claims. *The Fair Insurance Code provides specific expectations in regard to claims management, "insurers will:* • *acknowledge receipt within 5 business days of receiving your claim, and* • *determine whether or not to accept your claim within 10 business days of the date we have all the information we need to determine your claim (if this is not possible due to the complexity of a claim or due to a need to get information from third parties then insurers will: explain why, tell you how long we expect it will take to determine your claim, and update you at least once every 20 business days, or another such interval as we may agree with you, until your claim is resolved)."* *When delays occur in the claims handling process, they are often due to external factors that an insurer has limited or no control over and customers may not be aware of. Examples of factors that cause delays include:* • *A shortage of car repairers and building related trades means repair timeframes for vehicles or property are longer than customers may expect.* • *Council requirements and processes contributing to delays in customers being able to repair damaged property.* • *Due to the typically localised nature of adverse weather events/flooding there can be a lack of resources available to assess and respond to damaged properties, leading to a processing backlog.*
19	Have you ever felt pressured to accept an offer of settlement from an insurance company? If so, please provide specific examples.
	At the heart of some disputes is insureds' misunderstanding their entitlements and the rights of the insurer to determine the basis of settlement for claims. This was highlighted recently by IFSO as generating many enquiries to their office.[8] Often the root cause for consumers believing their insurer is not offering a reasonable settlement is that they do not understand the insurance contract. Disputes can for instance arise where an insurer elects to repair rather than replace damaged property even though that may be clearly outlined in the policy.

[8] From https://www.stuff.co.nz/dominion-post/business/103934900/Consumers-still-expect-too-much-from-insurance

	The free access for consumers and small businesses to external dispute schemes provides an option for customers who believe the offer of settlement from their insurance company is unreasonable. Insurers continue to strive for plain English language in their policy wordings but consumers also have access to advice from their brokers or other advisers. *In relation to the claims associated with Canterbury earthquakes, insurers helped establish and fund the Residential Advisory Service (RAS), which assisted claimants to navigate through insurance issues. RAS provides free legal and technical advice and funded individuals to help facilitate the settlement of complex claims arising from multi-unit buildings. RAS continues today to provide more intense support to individuals including those with psychosocial dependencies.*
20	When purchasing (or considering the purchase of) insurance, have you been subject to 'pressure sales' tactics?
	ICNZ recognises this is a question intended primarily for consumers and consumer representatives to answer. *We note that consumers have a "cooling off" period (typically of 14 to 30 days) which is their opportunity to read and understand the insurance contract. Should they choose, they may cancel during this time without cost. Furthermore, in general insurance customers can usually cancel at any time and receive a prorated refund unless there has already been a total loss claim.* *In reference to the comments in paragraphs 83-85, ICNZ is not aware of evidence of pressure sales tactics being used in relation to general insurance in New Zealand. Where evidence of significant issues has been identified in the past, action has been taken under industry self-regulation and we note a substantial fine was imposed under the Fair Insurance Code in 2016.*
21	What evidence is there of insurers or insurance intermediaries mis-selling unsuitable insurance products in New Zealand?
	Based on available information, including from regulators, we are not aware of current examples of insurers or insurance intermediaries mis-selling unsuitable general insurance products in New Zealand. *ICNZ expects its members to conduct their business in accordance with the Fair Insurance Code and otherwise in a legal, honourable and proper manner. ICNZ's Association Rules require that no member shall act in a manner that brings or has the potential to bring the insurance industry into disrepute. ICNZ would investigate any information suggesting any of its members were acting contrary to these expectations and if appropriate take disciplinary action again as we have done previously.*
22	Are sales incentives causing poor outcomes for purchasers of insurance? Please provide examples if possible.
	ICNZ recognises the role of sales incentives in potentially causing poor outcomes for purchasers of insurance and other financial services is receiving attention in various policy/regulatory processes. We note in particular recent investigations by the FMA into concerns about conflicted remuneration in the life and health insurance industry and commentary made by the FMA on churn by intermediaries in the life insurance sector. *ICNZ strongly supports the planned introduction of increased disclosure in regard to commissions and incentives for financial advice and welcome the opportunity to work with*

	government on other approaches to increase transparency, efficiency and customer outcomes.
23	Does the insurance industry appropriately manage the conflicts of interest and possible flow on consequences that can be associated with sales incentives?
	Individual ICNZ members will have specific approaches to remuneration, sales incentives (if any) and managing conflicts of interest. Insurance intermediaries such as brokers are also subject to their own duties and have their own approaches to managing conflicts of interests. *As noted above ICNZ supports robust disclosure requirements and welcomes the planned introduction of regulations requiring commission/incentive related disclosure.*

Exceptions from the Fair Trading Act's unfair contract terms provisions

Provisions related to 'unfair contract terms' (**UCT**) were introduced into the *Fair Trading Act 1986* for consumer contracts relatively recently (in 2015) with a limited exception provided for insurance contracts to recognise the unique nature of these type of contracts. ICNZ advocated for this approach in 2015 and remains of the view that it remains appropriate three years later.

Other countries take varying approaches to the application of UCT frameworks to insurance contracts. A consultation is currently being undertaken in Australia on extending the UCT requirements to insurance contracts.[9] We note the Insurance Council of Australia has expressed "serious concerns" with regard to the Proposals Paper that was released in June and commented that "on an initial reading, the Government's proposal has profound implications for insurance contracts, the scope of cover offered and the pricing of insurance".[10] There are notable differences with regard to our respective frameworks that need to be remembered, for example the use of exclusions is different in New Zealand as we start with an all perils cover whereas in Australia they start with a list of prescribed events that are insured. In generally accepting more risk, which is to the benefit of the consumer in New Zealand, the need to specify the risk and exclusions is more pressing.

Insurance contracts can be distinguished from many other types of consumer contracts in that the contract for the product and the product are, in effect, one and the same thing. There a range of aspects of insurance contracts that need to be considered in the context of UCT regulation:

- Insurance contracts involve transfers of risk and pricing that risk, which is the basis of an insurer's promise to pay a claim (or claims), depends on finely calibrated actuarial assessments of uncertain events. Insurers use insuring clauses and contractual terms that provide benefits for the insured, to outline the risks they will accept. Insurers use exclusion clauses to outline the risks they will not accept. Both of these types of term are tools to define the risk.
- Unlike other standard form consumer contracts, in assessing the insured risk an insurer is dependent on the accuracy, completeness, and honesty of the information provided by the insured at commencement and during the life of the contract. That is, there is a significant information asymmetry for insurers, for example, an insured home may be temporarily uninhabited, affecting the risk of theft or fire or a driver may have a serious record of dangerous driving or alcohol-related convictions.

[9] Proposals Paper, Extending Unfair Contract Terms Protections to Insurance Contracts, Australian Treasury, June 2018.

[10] http://www.insurancecouncil.com.au/assets/media_release/2018/Unfair%20Contract%20Terms%2027%20June%202018.pdf

- The ability to control the payment and management of claims to ensure that the value of the claim is accurately assessed, and that claim resolution is managed efficiently, is critical. For example, terms providing rights of access/assessment by loss adjusters or requiring an insured to select a car repairer from a list of car repairer approved by the insurer are essential to appropriate claim management.

Each of the above matters is central to the provision of insurance because they affect an insurer's ability to accurately define the insured risk, price it and to manage the costs associated with claims. As well as the commercial effects of this at an aggregate level these factors flow through to solvency requirements for insurers under the *Insurance (Prudential Supervision) Act 2010*.

The availability of insurance cover in New Zealand depends materially on the provision of reinsurance by overseas reinsurers to local insurers. Product design is constrained by the risk appetite of reinsurers. The needs for reinsurance affects the risks insurers can accept and also the limitations and exclusions in insurance contracts. The potential for policy terms (particularly terms of a kind that have been standard in New Zealand and internationally for many years) to be overturned by a Court introduces uncertainty.

Some of the issues that would arise for the application of the generic UCT provisions to insurance contracts are outlined as follows, and as a consequence of these there is considerable uncertainty as to the terms to which general UCT provisions and exclusions in section 46K of the *Fair Trading Act 1986* may (or may not) apply. Section 46M(a) for instance could have implication for exclusions provided within insurance contracts, as well as an insurers' ability to avoid the contract in the event of non-disclosure, as they could be deemed "terms that permit, or have the effect of permitting, one party (but not another party) to avoid or limit performance of the contract". Clauses 46M(b), (d) and (h) could have similar impacts.

The standard exemptions provided in section 46K of the Act would not provide an effective exemption for insurance contracts, as standard insurance contracts contain a number of terms which could arguably be deemed to not relate directly to the "main subject matter of the contract" or not set "the up-front price payable under the contract". Accordingly, the generic provisions could cause considerable implications for the provision of general insurance.

It can be difficult to isolate the terms that define the insured risk in an insurance contract. The scope of the insurance cover is determined by the interaction of several different provisions (the insuring clause, policy schedule, definitions, conditions, qualifying exceptions and exclusions). Further, there are standard policy terms that arguably do not define the "main subject matter" of an insurance contract *per se*, but which are central to an insurer's ability to assess the risk, accurately price it, manage the risk over the life of the contract, and efficiently settle any claims.

If a particular term on which an insurer relies, for example an ability to adjust insurance cover as events change or to manage claims in a particular way was declared to be "unfair" and therefore unenforceable, that would have consequences for the position across all affected policies and could mean insurer/s would be required to pay for losses arising from a risk for which they have not collected any premiums. If insurers were unable to include certain exclusions it would change their ability to underwrite risks and may result in insurers not offering cover or substantially increasing premiums. Insurers might be required to withdraw certain types of cover from high-risk market segments until more certainty is obtained. It may also have an impact on the insurer's position in regard to solvency requirements.

The provisions in section 46L(4) of the *Fair Trading Act 1986* that were introduced in 2015 provide greater certainty by introducing a list of insurance-specific terms that will be exempt. Insurers are still subject to the general UCT rules, for example, a term in an insurance contract may still be found to be "unfair" if it is not transparent or not expressed in plain language or is outside the scope of section 46L(4). So with respect to insurance contracts, a term cannot be found to be unfair if it fits within one of these exemptions, or if it fits within one of the general exemptions outlined under section 46K (i.e. if it defines the main subject matter, sets the upfront price payable or is permitted by any enactment).

ICNZ's overarching view is that given the UCT provisions in the *Fair Trading Act 1986* were introduced relatively recently and making any changes would have potential costs and risks in terms of uncertainty and increased litigation, there needs to be a strong case for change, beyond conceptual arguments that the *partial* exception for insurance contracts is prima-facie inappropriate.

ICNZ is however supportive of the concept of moving the specific UCT provisions from *the Fair Trading Act 1986* to insurance law given the unique nature of insurance contracts. We support consideration being given to whether any refinements are required to sub-section 46L(4) of the Act, although our initial view is that the drafting that came into effect in March 2015 remains appropriate.

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.
	ICNZ is not aware of the current specific exceptions for insurance contracts from the UCT provisions under the Fair Trading Act causing problems for consumers.
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?
	ICNZ does not consider there are systemic issues with terms in insurance contracts being unfair in the common sense. *Since the introduction of UCT provisions in 2015 industry participants have continued to carefully consider their policy wordings to ensure they are compliant. We are aware some changes have been made to policies in response (e.g. some policy terms related to the retention of premiums or fees following cancellation).*
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"?
	Overall the specific exceptions in sub-section 46L(4) provide certainty that the necessary elements of an insurance policy cannot be invalidated by UCT provisions. The following table outlines reasons why each clause in in sub-section 46L(4) is necessary to protect the legitimate interests of insurers and thereby facilitate the efficient underwriting and provision of insurance to New Zealand consumers. Some contextual comments are also provided.

Subclause of section 46L(4)	**Rationale/Comments**
(a) a term that identifies the uncertain event or that otherwise specifies the subject matter insured or the risk insured against:	• For insurance to function effectively terms defining the insured risk and therefore the expected loss that are taken into account in the calculation of the premium should not be able to be considered unfair. • This subclause relates to the insuring clause and related exclusions and recognises that the concept of "main

	subject matter" is not well suited to insurance contracts. • Specifying the risk is also critical to removing specific risks or aspects of risk that fall outside the insurers commercial appetite or risks that they cannot price.
(b) a term that specifies the sum or sums insured or assured:	• Terms that specify the amount of the risk being assumed (whether total value or sub-limits) are fundamental to the nature of the bargain between insurer and insured. • The sum insured is a key input to the calculation of the premium and is also relevant to some other regulatory requirements.
(c) a term that excludes or limits the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances:	• For insurance to function effectively terms defining the insured risk and are taken into account in the calculation of the premium should not be able to be considered unfair.
(d) a term that describes the basis on which claims may be settled or that specifies any contributory sum due from, or amount to be borne by, an insured in the event of a claim under the contract of insurance:	• The amount of excess payable under an insurance contract is a fundamental part of assessing and pricing the risk and therefore should be excluded from review. We note excesses are used for two reasons: removing small claims that are uneconomic to process; and to incentivise good risk behaviour by insureds. Without excesses the cost of insurance would increase. • The concept of "sets the upfront price payable under the contract" is not well suited to this situation and so this clause makes clear such vital terms are not unfair and therefore creates certainty. • The ability to control the payment and management of claims to ensure that the value of the claim is accurately assessed, and that claim resolution is managed efficiently, is critical (for example, terms providing rights of access/assessment by loss adjusters or requiring an insured to select a panel beater from a list of panel beaters approved by the insurer).
(e) a term that provides for the payment of the premium:	• This clause avoids any uncertainty regarding whether the payment of premium constitutes the upfront price payable under a contract. The payment of premium by all insureds is essential to enable the settlement of claims for those insureds who suffer loss during the period.
(f) a term relating to the duty of utmost good faith that applies to parties to a contract of insurance:	• This is to recognise the existence and reciprocal nature of the duty of good faith. This is unique to insurance and not something present in other types of consumer contracts. • Sub-clauses (f) and (g) are to an extent linked – a contractual term noting the common law duty of utmost good faith applies (f) will require disclosure to the common law duty and common law remedies if that duty is not observed, which operates over and above

		any contractual terms requiring disclosure or specifying the effects of non-disclosure.
	(g) a term specifying requirements for disclosure, or relating to the effect of non-disclosure or misrepresentation, by the insured.	• The duty of disclosure is an insurance specific concept that is subject to specific legal requirements. Given this exempting such terms from the scope of generic UCT frameworks is appropriate. • Issues with non-disclosure and misrepresentation are separately discussed in the Issues Paper and addressed in this submission above. Any changes in this area should be made through changes to insurance contracts law.

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

It is not possible to provide direct evidence of the effects if there were no exceptions. Because the legislation contains the specific exception for aspects of insurance contracts in section 46L(4) of the Act there is no case law to refer to in respect of insurance terms being deemed unfair in this respect.

The nature of an insurance contract is such that limitations and exclusions are necessary to define the cover which the insurer is willing to provide. This enables the risk that the insurer is willing to provide to be matched with what the insured is willing to pay. Without an ability to delineate what risks are acceptable to an insurer (and reinsurer), premiums would increase significantly making insurance unaffordable for many consumers.

If there were no exceptions for insurance contracts, as currently provided in sub-section 46L(4), this would generally introduce uncertainty and risk. This would in turn ultimately be reflected in the availability of insurance and the pricing by insurers and re-insurers.

As noted above any power to review a contract and declare terms unfair (and therefore void) could potentially force insurers to cover risks for which they have not collected adequate premiums; for which they do not have any reinsurance; and for which they have not made any reserve provisioning. This could have consequences for the financial stability of insurers and the pricing of insurance contracts, and could impede the provision of certain types of insurance going forward.

Difficulties comparing and changing providers and policies

Consumers (and businesses) demand a range of features and benefits, which the competitive insurance market provides. Insurers compete on both prices and features, to the benefit of policyholders. Well-informed consumers help to support competition in the provision of services such as insurance. It is crucial consumers understand the insurance policy/ies they have purchased.

Insurance is more complex than many other services, both in terms of the various types of insurance and the inherent complexity associated with underwriting risks (i.e. the level of cover). Good underwriting is necessary to drive lower costs for consumers.

We recognise that consumer engagement and understanding of insurance policies is an ongoing challenge but note this appears to be a challenge for consumer contracts of all kinds around the world. Nonetheless it is important to continually focus on finding ways to better equip consumers to consider their insurance needs, and to make it simpler for consumers to choose an appropriate policy. ICNZ's members have for instance made efforts in recent years to improve the understandability of policies

in recent years and the FIC provides for the use of plain English wording. Increasing use of online and mobile platforms is also driving innovation and new thinking in terms of how to communicate the key elements of a policy to a customer.

As identified in 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. However, for a range of reasons they need to be considered with care and potentially 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) or commercial relationships or other conflicted remuneration and that conflicts of interest are appropriate managed (e.g. differing rates of commission in regard to each insurer being compared).

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. An Australian Competition and Consumer Commission report[11] in 2014 found the over-simplification of information on these sites can obscure important differences between products and policies. By focussing on price, comparison websites can also increase the chance of policyholders inadvertently finding they were not properly covered when they needed to lodge a claim. A focus on price alone also has the potential to encourage a "race to the bottom" in terms of policy coverage.

28	Is it difficult for consumers to find, understand and compare information about insurance policies and premiums? If so, why?
	Consumers are able to access information about policies (and the polices themselves) on the websites of many insurers. Quotes can be sourced online or over the phone. *Consumers can also use insurance brokers to give them advice and approach the market to source the most advantageous terms and pricing from amongst a number of insurers.*
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.
	ICNZ is only able to comment on general insurance. In regard to the main types of general insurance used by consumers (e.g. home and contents, car insurance) the extent of information available is similar. *As a general rule the availability of information differs depending on the distribution model. Where products are provided directly to consumers there is more information publicly available about them on websites etc compared with products available through intermediaries, which rely more on the advice provided and may be more customised.*

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

30	What barriers exist that make it difficult for consumers to switch between providers?
	There are no barriers as such for switching between general insurance providers and switching is fairly straightforward in practical terms. Switching providers is easiest at the time of renewal as you simply let the policy lapse and buy a new policy from a different provider. If a consumer instead wants to switch during the annual term of a policy they will be entitled to a return of unused premium (generally proportional to the remaining period and provided no total loss claim has been made).
31	Do these barriers to switching differ depending on the type of insurance? E.g. life, health, house and contents, car insurance etc.
	As noted above there are no barriers in the general insurance market. *There are specifics risks for consumers associated with switching life and health insurance (e.g. coverage of pre-existing conditions) but these are not matters that apply to general insurance.*
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?
	As noted above there are a range of existing options for consumers to access information on insurance policies, compare policies, make informed decisions and switch between providers. We do not believe there is a role for government intervention in this area. *Improved financial literacy helps consumers to make informed choices in terms of financial services including insurance. ICNZ recognises the need to help increase financial literacy, particularly amongst more vulnerable consumers, and the industry funds and partners with organisations in this area. Further government funding of financial literacy initiatives could assist consumers to better understand insurance and make more informed decisions.*

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?
	*ICNZ agrees that section 9 of the Law Reform Act 1936 (**LRA**) has caused problems in New Zealand. We outline these problems below, but also note that the operation of the section has particularly caused confusion for insurers who operate in a trans-Tasman space. In particular, the decision in the Steigrad case[12] reached by the New Zealand Supreme Court is in stark contrast to that reached in the Australian case of Chubb v Moore.[13] The implications on these cases are discussed in more detail in section 34 below.* *ICNZ has consistently advocated for reform in this problematic area, first writing to MBIE in October 2016, a further letter to MBIE in January 2017 and another to the Minister of Commerce and Consumer Affairs in August 2017.*

[12] BFSL 2007 Limited & Ors (In Liquidation) v Steigrad [2013] NZSC 156 [23 December 2013].
[13] Chubb Insurance Company of Australia Limited v Moore [2013] NSWCA 212.

34	What are the most significant problems with the operation of section 9 of the LRA that any reform should address?

By way of brief explanation, section 9 creates a statutory charge over sums insured under a liability insurance contract. The charge applies in favour of a claimant who has been wronged by the insured. The claimant can then bring a claim directly against the insurer. Section 9 was originally enacted to give an injured worker a statutory charge against the proceeds of his employer's liability insurance, in case the employer became insolvent. In the Law Commission's words, it allowed an injured third party to "stand outside the insolvency regime". Absent section 9, any liability sums insured by the insolvent employer would not be paid directly to the injured worker, but would instead be paid into the general pool of money distributed pari passu with the insolvent employer's other creditors. We understand this remains the position at common law for claims against an insolvent tortfeasor generally; for workplace injury claims we now have the accident compensation scheme. The accident compensation scheme addresses the original policy concern behind section 9 and arguably removes the need for a statutory charge as a matter of policy.

A report from New Zealand's Law Commission in 1998 identified some problems with section 9 and recommended reform.[14] The recommended reforms have not been made. The United Kingdom has since amended its equivalent statutory charge[15], as has New South Wales, which is discussed in more detail below.

We agree with the problems identified in the Issues Paper, being:

- *Practical issues prioritising multiple charges where the insurance policy limit is insufficient to fully satisfy each claim, particularly where the claims arise on the same day.*
- *How the charge operates where a policy covers both liability and defence costs up to a combined limit – as noted in section 33 above, the position in New Zealand and Australia has differed on whether the section 9 charge applies to the full combined limit of the policy, or up to the limit minus any defence costs payable by the insurer to the insured.*
- *What time limit should apply to a third party's claim against an insurer.*

We set out these issues in more detail, along with a number of specific problems with section 9 in the following paragraphs.

Determining priority of claims

Multiple claims from different claimants can create competing charges for the same sum insured, creating problems for insurers in determining the priority of those charges. Leaky building, finance company director, and Blue Chip cases in recent years provide practical examples, which we can provide further details of on request. Section 9(3) ranks competing charges in date order, or, if occurring on the same day, the charges rank equally.[16] This

[14] See "Some Insurance Law Problems", Law Commission Report 46, available at http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R46.pdf .

[15] The Third Party (Rights against Insurers) Act 2010 came into force in August 2016. A copy is available at https://www.legislation.gov.uk/ukpga/2010/10/pdfs/ukpga_20100010_en.pdf .

[16] There are two additional problems to note here. First equal distribution could be unfair in certain circumstances. Second, the wording of section 9(3) differs from section 9(1), where the charge applies "on the happening of the event giving rise to the claim for damages or compensation". "Event" is not defined, meaning the time a charge descends in section 9(1) and the time competing claims are ordered in section 9(3) could, absurdly but technically, be different dates.

provides some clarity for insurers about how to settle claims, but not when charges arise on the same day and are, in the aggregate, greater than the sum insured. The problems are not, therefore, limited to leaky building, finance company director and Blue Chip cases.

Further, when there are competing claims from injured third parties with competing charges, one claimant can hold up expeditious, commercial, good faith settlements with other claimants. This delays good faith claims settlement efforts by liability insurers and increases costs for all involved in a dispute. To contrast, the United Kingdom operates a "first past the post" entitlement for injured claimants, putting the incentive on injured claimants to compile and advance their claims in a timely manner.

Determining when the charge crystallises

Section 9(1) says it is on "the event giving rise to the claim". This has been held to mean any one of: the date of the insured defendant's negligent actions; the date of judgment determining the insured defendant's liability; and the date when loss or damage occurs.[17] *Pinpointing the relevant date is even harder in cases with a long period of time between the insured defendant's negligent act, the date that act causes loss or damage, the date the insured becomes aware of that damage, and the date of judgment against the insured. Again, leaky building cases, product liability cases and exposure cases (like asbestos exposure) are problematic.*

Determining when an insurer has "actual notice" of the charge

Section 9(6) allows an insurer to make payments out of the sum insured for valid claims, without having to worry about future possible section 9 charges that may arise and apply to the sum insured retrospectively. However, the insurer can only rely on section 9(6) when the insurer does not have "actual notice" of other section 9 charges. Unfortunately, "actual notice" is not defined and its meaning is unclear and uncertain on the facts of particular cases.

Claims-made policies

There is inconsistency between the wording of section 9 and the operation of claims-made liability insurance, conflicting legal authority, and therefore uncertainty about whether the charge applies to claims-made (including claims-made and notified) insurance policies.[18]

Liability insurance is currently sold on two main bases: occurrence and claims-made (including claims-made and notified). Occurrence policies cover the insured for legal liabilities arising from insured acts that occur in the policy period. 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. Claims-made and claims-made and notified policies are common to professional indemnity insurance in New Zealand

There are two major uncertainties when attempting to charge claims-made policies under section 9. To illustrate the problem, say an engineer buys a claims-made policy with insurer A in 2012, designs a defective building in 2012, switches to insurer B in 2015, and in 2018 the building falls down and claims are made against the engineer. The first uncertainty is whether the charge attaches to the engineer's 2012 sum insured with insurer A. Section 9 attaches the charge retroactively, on the date of the event giving rise to liability. But this would be a problematic result for insurers, who offer claims-made insurance for commercial certainty –

[17] See *State Insurance General Manage v Maaka* (1989) 5 ANZ Insurance Cases 60-943 (CA) reversing the High Court's initial finding, and *QBE Insurance Ltd v Aulich* (2003) 12 ANZ Insurance Cases 61-578, for the three different interpretations of the date of the "event" in section 9(1).

[18] For an in-depth overview of the problems arising and the conflicting authority see Chapter 16.4.3(2) of Colinvaux's Law of Insurance in New Zealand (2nd Edition, 2017).

when the policy period ends, if no claims have been made, the insurer's liability is at an end. But it would be equally problematic for the section 9 charge to attach to insurer B, given the insured's negligent act occurred well before the engineer contracted with insurer B to pass on the risk of legal claims being made against the engineer.

Clarity is needed about how the statutory charge applies to claims-made and claims-made and notified policies.

Limitation periods

Section 9 does not limit how far back in time a section 9 charge can apply. We understand that ordinary Limitation Act timeframes apply for the underlying claim, so the clock starts ticking for the claimant on the date of the act or omission on which the claim is based. This is not such a problem for insurers underwriting occurrence policies, but is a problem if section 9 applies to claims-made policies (as above).

Defence costs

There is uncertainty about whether the charge applies to money reserved for the insured defendant's legal defence costs.

In Steigrad, our Supreme Court decided that the statutory charge applies to the full sum insured under the insurance policy, including any amounts the insurer had already paid to the defendant to defend the claim.

For insurers, Steigrad meant having to pay more than the amount they had contracted for – harming their balance sheet; reducing business certainty; and increasing the cost of insurance. For insured defendants, Steigrad meant that their insurance may no longer protect them but instead would protect the person(s) suing them that they may have to self-fund their defence costs in the event of a claim; and that the cost of their insurance may increase.

The Steigrad decision was controversial in the legal community. The Supreme Court decision was split 3-2, and the majority of judges that considered the case across the High Court, Court of Appeal and Supreme Court reached the opposite conclusion: an insurer could pay money out of the sum insured to defend its customer.

Steigrad was also controversial in the insurance industry. Liability insurance is a financial product that exists solely and exclusively to protect the financial risk to the insured of legal liability to third parties. It is not a fund for plaintiffs. It was also the long-accepted, well-established trans-Tasman industry practice to advance defence costs out of the sum insured. As stated in relation to Question 33 above, the confusion arising from section 9 is compounded by a decision from the New South Wales Court of Appeal, Chubb v Moore, regarding an identical provision to section 9 at the same time as Steigrad, but which came to the opposite decision to our Supreme Court. The Australian court concluded that to the extent that a charge is imposed on insurance moneys that are or may become payable under the relevant D&O policies to meet the insured's liability, those moneys are limited to moneys payable to meet that liability and do not extend to defence costs incurred before judgment or settlement. This stark divergence in law between close trading partners with multiple insurers operating on both sides of the Tasman is less than ideal.

Our members have responded to the Court's decision in Steigrad and most have amended their policy wordings and structures to allow a liability insured to buy separate cover for the liability owed to claimants and defence costs respectively. Our reason for raising the issue is twofold:

- *New Zealand and Australia's top legal minds are at odds about how to interpret section 9. We currently have a situation where an insured in New Zealand will need to*

buy separate cover for indemnity costs and defence costs, whereas an insured with an offshore insurer will not need to do so. This itself underscores the need for reform.

- *The insurance solutions to Steigrad mentioned above have not yet been tested in the Courts. The approach taken by the industry and the approach recommended by the industry's legal advisers may not be the approach condoned by the Courts. We need clarity and certainty about whether the charge applies to money set aside for the insured's legal defence costs.*

Reinsurance

Clarity is needed on whether section 9 should apply to contracts of reinsurance. New Zealand's High Court in Ruscoe[19] decided that section 9 allows a claimant who is insured by an insurer that subsequently goes insolvent to cut through the insurer and make a claim against the reinsurer. But section 9 was never intended to apply to contracts of reinsurance. The equivalent United Kingdom legislation specifically excludes reinsurance. The High Court's interpretation was on particular facts and leaves broad and important questions of policy and principle unanswered. For example, New Zealand insurers often purchase reinsurance offshore, creating conflict of laws issues between the law governing the contract of insurance between the insured claimant and the insurer, and the contract of reinsurance between the insurer and the reinsurer. How section 9 applies to different types of reinsurance contract is also uncertain.

The New South Wales Law Reform Commission considered this issue in its report on the review of section 6 of the Law Reform (Miscellaneous Provisions) Act 1946[20] (the equivalent Australian provision) and recommended that any new provision should expressly not extend to reinsurers under contracts of reinsurance. This recommendation has been enacted in section 4(4) of New South Wales' Civil Liability (Third Party Claims Against Insurers) Act 2017 which is discussed in section 36 below.

We submit that there needs to be clarity as to whether section 9 should apply to contracts of reinsurance and we consider it should not.

Offshore insurers

Section 9 does not apply to sums insured with offshore insurers and does not charge money paid by an offshore insurer to a New Zealand insured.[21]

There are two main differences for plaintiffs seeking access to insurance monies where the insured has chosen to insure offshore instead of with a New Zealand insurer. First, the plaintiff must lodge two separate proceedings to access offshore sums insured: one proceeding in New Zealand to obtain judgment against the insured, and one overseas to pursue the money owed under the insurance contract, wherever that insurer is domiciled. Alternatively, the plaintiff could join the insolvent insured's insurer to this proceeding. Second, if the insured is insolvent, since section 9 does not charge the offshore sums insured, the plaintiff must share the proceeds of the insurance policy with the insolvent insured's other creditors.

In contrast, because the United Kingdom's statutory charges focuses on the insolvency of the insured, if the insured's insolvency is being administered then the United Kingdom courts have

[19] *Ruscoe v Canterbury Policy Holders* [2012] 2 NZLR 438.
[20] See http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20143.pdf.
[21] See *Ludgater Holdings Ltd v Gerling Australia Insurance Co Ptd Ltd* [2010] 3 NZLR 713, *Bridgecorp Ltd (in rec & in liq) v Certain Lloyd's Underwriters under Policy No 888/50405V04A & Ors* [2014] NZHC 842 and *McCullagh and Lawrence v Underwriters Severally & Ors* [2015] NZHC 1384 (18 June 2015).

	jurisdiction to attach the charge to sums insured offshore and give priority to claimants seeking access to those funds. *There needs to be clarification as to whether, as a matter of policy as well as law, the government intends to give injured plaintiffs in New Zealand direct access to the defendant's insurance moneys, where that defendant has chosen to insure offshore, or whether government instead prefers such plaintiffs to be subject to the insolvency regime.* ***Miscellaneous issues of law and policy*** *Other issues with section 9 that we raise but do not explore for the purposes of this submission are:* • *Whether a claim for "damages or compensation" under section 9(1) includes claims for pure economic loss.* • *Whether section 9 is intended only to apply where the insured is insolvent or unavailable (as in the United Kingdom), or more generally (as in the status quo).* • *Whether section 9 supports or supplants the commercial purpose of liability insurance (that the insurance exists to protect the insured, rather than third party claimants and joint tortfeasors).* *Where the insured has gone insolvent and irrespective of whether the liability insurer is based offshore or not, whether section 9 is intended to give injured claimants or all creditors access to proceeds of the liability insurance policy.*
35	What has been the consequence of the problems with section 9 of the LRA?
	Please see the above response to Question 34 setting out the consequence of the problems with section 9 of the LRA.
36	If you agree that there are problems with section 9 of the LRA, what options should be considered to address them?
	In 2017 New South Wales passed the Civil Liability (Third Party Claims Against Insurers) Act 2017.[22] *The new legislation abolishes the statutory charge over liability sums insured, in favour of an ability for an injured plaintiff to take direct legal action against the defendant's insurer with the leave of the court. ICNZ believes that the New South Wales solution is an appropriate way forward for New Zealand and will address with many of the above problems. The New South Wales experience is particularly relevant to New Zealand because it was one of the only Australian jurisdictions to have a statutory charge like section 9. The wording of the New South Wales provision was almost identical to section 9.* *We stress the positive progress being made in Australia, compared to the archaic law we continue to face in New Zealand. This divergence is unacceptable if we seek to encourage greater trans-Tasman economic relations.* *Further, for clarity and completeness, we note that section 9 is intended to protect plaintiffs who have suffered harm and have valid claims against an insured person. We do not oppose the policy underlying section 9. We oppose the uncertainty and unfairness that it brings when applied in practice. We argue for reform to section 9 to make it clear, certain, and fair.*

[22] A copy is available at https://www.legislation.nsw.gov.au/~/pdf/view/act/2017/19/full.

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?
	ICNZ agrees with the statement in paragraph 126 of the Issues Paper that "section 9 of the ILRA means that an insured that fails to notify the insurer of a third-party claim or potential claim within time limits under a "claims-made" policy is excused from that failure unless the insurer suffers prejudice". This is problematic because it undermines the purpose behind a claims-made policy as the insurer faces the possibility of claims some way into the future that it can only reject if it can establish prejudice.
38	What has been the consequence of the problems with section 9 of the ILRA?
	The problems with section 9 can perhaps best be summed up by the Law Commission in their 1998 review. The Commission took the view that allowing the insured to extend time beyond the expiry of cover for the notification of a claim was "….to change in a fundamental way the promise made by the insurer to the insured. The insurer's purpose of knowing where it stands at the end of the period of cover is defeated because of the possibility of future claims that the insurer can resist only if it can establish prejudice"[23]. *The current operation of section 9 creates uncertainty for insurers. Insurers hold claims reserves, which are the resources required at any time to meet the costs (indemnity, defence costs and other miscellaneous disbursements) of all claims not finally settled at that time. Section 9 inserts 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.*
39	If you agree that there are problems with section 9 of the ILRA, what options should be considered to address them?
	ICNZ supports the recommendation from the Law Commission in their report.[24] To counter what they regarded as unfairness to insurers, the Commission recommended the insertion of two new subsections into section 9: *(3) Subsection (1)(b) does not apply to a provision of a claims made policy that defines the period within which claims made against the insured or claims arising out of circumstances notified to the insurer are within the risk accepted by the insurer under the policy.* *(4) In this section **claims made policy** means a contract of insurance in which the period during which liability for claims against the insured is within the risk accepted by the insurer is defined by reference to the time when such claims are made or claims or circumstances which may give rise to a claim are notified to the insurer.* *We note however, as in Colinvaux's Law of Insurance in New Zealand[25], that the above amendments would not prevent the operation of section 9 where a claim is notified within the*

[23] Law Commission, *Some Insurance Law Problems*, above n 14, at para 40.
[24] Law Commission, *Some Insurance Law Problems*, above n 14, at para 41.
[25] See Chapter 16.1.13.

	policy period but does not comply with the time limit in the policy. It is only intended to apply where notification is outside the policy year.

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?
	ICNZ does believe that the operation of section 11 has been problematic. It has meant that insureds can be entitled to cover for risks that were not intended to be covered. There are also difficulties around whether or not a clause falls within section 11 (is it a clause that defines the risk run and therefore outside section 11, or is it a clause imposing limits on recovery for an insured risk and inside section 11?[26]) *The most notable consequence is that insurers may end up covering risks that they had not expressly underwritten for and were not intending to cover. Each insurer has a different risk appetite and is willing to accept different risks. The operation of section 11 removes some of the ability to make these decisions. A useful discussion on this point is set out at paragraph 43 of the Law Commission's 1998 report.* *Section 11 is also open to potential abuse. For example, where someone chooses to insure their car for private use and then uses it for commercial purposes. Under section 11 if the insured has an accident while using the car for commercial purposes but the commercial use was not the cause of the damage, the insurer will not be able to decline the claim. This is despite the fact that when the insurer entered into the contract for insurance they did so on the basis that the vehicle was exclusively for private use and only priced for the risk associated with a privately-used vehicle.* *ICNZ notes the tension between ensuring insurers cannot unreasonably rely on an unrelated cause to decline a claim and ensuring insureds cannot deliberately choose to insure for a certain level of cover but then be entitled to claim for more come claim time (such as in the private versus commercial use of a car outlined above). However, we believe the current section is unfair to insurers (and note that the Law Commission was of the same opinion) and needs to be reformed.*
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?
	ICNZ agrees with the problem areas identified by the Law Commission and is not of the view that there are any other exclusions required.
42	If you agree that there are problems with section 11 of the ILRA, what options should be considered to address them?
	In Australia, an insurer is required to pay a claim despite breach if the insured can prove that no part of the loss was caused by the breach, and the insurer is required to pay a proportion if the assured can prove that some part of the loss was not caused by the breach.[27] We note that

[26] See chapter 5.6.7 of Colinvaux's Law of Insurance in New Zealand (2nd Edition, 2017).
[27] Insurance Contract Act 1984 (Australia), s54(2)-(5).

	according to Professor Rob Merkin QC this provision has given rise to more litigation that any other section in the Insurance Contract Act 1984. *In the United Kingdom, section 11 of the Insurance Act 2015 is designed to move away from the New Zealand and Australian causation test and instead asks whether the breach was in principle capable of contributing to the loss that actually occurred. There has been no case law testing the effect of this section.* *We note that both the Australian and United Kingdom regimes have run into trouble in this area, and neither regime appears to be working particularly effectively. We would therefore agree with the recommendations made by the Law Commission in their 1998 report[28] and add subsection (3) to the legislation:* *(3) A provision is not an increased risk exclusion for the purposes of this section that* *(a) defines the age, identity, qualifications or experience of a driver of a vehicle, a pilot of an aircraft, or an operator of a chattel; or* *(b) defines the geographical area in which a loss must occur if the insurer is to be liable to indemnify the insured; or* *(c) excludes loss that occurs while a vehicle, aircraft, or other chattel is being used for commercial purposes other than those permitted by the contract of insurance.*

Registration of assignments of life insurance policies

43	Do you agree that the registration system for assignment of life insurance policies still requires reform?
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?
	ICNZ has no comments on Questions 43 and 44 – these are not issues for general insurers.

Responsibility for intermediaries' actions

There are a variety of different insurance intermediaries including brokers and underwriting agents. Various intermediaries can act for either or both insurers and consumers depending, and with different levels of authority, on the arrangements in place and the context. Some intermediaries are tied to specific insurers whereas others can engage with multiple insurers (e.g. brokers). Some intermediaries' provide financial advice and are therefore subject to duties to consumers and responsibilities as a consequence of this. In some cases multiple intermediaries are involved in a single insurance contract (e.g. the insured engages through an insurance broker and the insurer though its underwriting agent).

Brokers play a significant role in the insurance sector, particularly in regard to commercial insurance (almost all commercial insurance is placed through brokers). This role has grown significantly over the last three to four decades and the market dynamics have changed as a consequence of the entry of large international broking houses and ongoing consolidation. The bulk of broking services are now provided by a relatively small number of large broking houses. As well as broker business a significant proportion of general insurance is also being sold to consumers through other financial services

[28] Law Commission, *Some Insurance Law Problems*, above n 14, at para 48.

entities (in particular banks), generally as a form of tied agent. It is timely to consider whether the current legal provisions remain appropriate, given the evolution of intermediaries and growth over the period, the evolving regulatory framework and the issues identified.

Before turning to the legal situation, it is worth considering the role of brokers as they are the intermediary who acts on behalf of customers, and provide advice to them, whereas other intermediaries generally act for insurers. Brokers are intermediaries who attempt to obtain the best possible terms for a contract of insurance between their client and an insurer. In doing this they:

A. advise their clients (consumers/businesses) both in the general sense and subject to obligations under regulatory frameworks in regard to "financial advice" and financial services.
B. manage the relationship with the insured.
C. generally work with multiple insurers (in contrast to tied agents of the insurer).
D. have different levels of authority from insurers depending on the commercial arrangements in place between them (i.e. can bind the insurer).
E. are separate commercial entities from insurers and derive their income from commissions and fees.

The agency status of brokers is defined at certain points in the contractual process by the *Insurance Intermediaries Act 1994* and ILRA, but these only apply to certain situations. While these are intended to protect consumers in certain situations they can create other issues and it is important responsibilities are clear and parties are not unreasonably expected to bear responsibility for the failings of others.

The consequence of the current statutory approach is potential uncertainty (e.g. for customers regarding what rights they have in relation to which parties and who the broker is working for) and the potential to leave policyholders without recourse to the insurer in some situations due to errors by the broker (e.g. failure of a broker to properly explain the features of a policy to the customer). There are also issues of accountably in terms of obligations under other regimes that are placed on insurers (e.g. under the *Fire and Emergency New Zealand Act 2017* or the *Insurance (Prudential Supervision) Act 2010*) but which rely on brokers to carry them out.

ICNZ has consistently supported the position of brokers as the agent of the insured and this is provided for in the Fair Insurance Code (clause 2). We note the New Zealand provision are unique in the common law world, in the United Kingdom for example the insured bears greater responsibility for a broker's acts and omissions during the placement process. That the broker is the agent of the insured would also align with the assumption of many consumers given the broker will usually be contacting multiple insurers to identify the best deal for the customer.

We note the 2008 Cabinet Paper[29], which contained recommendations to reform insurance contract law in New Zealand resulting from the Review of Financial Products and Providers, identified issues with insurance intermediaries and agency status. It recommended change to the current law and proposed a complex framework to replace it.

Given the matters identified above, ICNZ is of the view that consideration should be given during this Review to the provisions relating to the responsibilities of, and for, different kinds of intermediaries. In further exploring issues and potential changes in this area it is necessary amongst other things to consider the various duties and obligations that are or will be imposed on insurers and intermediaries

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

under the relevant legal frameworks for financial services and advice, prudential supervision and beyond. Duties imposed under insurance specific law should seek to clarify responsibilities and encourage honest, fair and transparent behaviour across the sector. They should be placed on those parties best able to exercise them and should reflect commercial practicalities. The potential for conflicted duties or responsibilities should be avoided or clearly managed. Ultimately the objective is to help maintain and build confidence in the insurance sector in New Zealand.

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.
	We agree with the problems noted in paragraph 138 and the potential for both insurers and consumers to be disadvantaged. *We note that if the consumer doesn't have redress to the insurer under the current law this would usually be because the intermediary was clearly acting as the consumer's agent and the consumer will have redress against the intermediary. Intermediaries are in many cases substantial entities and/or will have professional liability insurance.*
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?
	ICNZ considers both these aspects are potentially problematic. *For example, Section 10 of the ILRA provides that a representative of the insurer who acts for the insurer during the negotiation of a contract of insurance, is deemed to be the agent of the insurer. As a result, the insurer is deemed to have notice of all matters material to the risk and known to the representative. A representative of the insurer extends to any person receiving "any person entitled to receive from the insurer commission or other valuable consideration" from the insurer. A problem raised by sections 10(2) and (3) of the ILRA is that it makes insurance brokers as well as insurer's agents the agent of the insurer in respect of information they receive. The broker will make decisions about what information to convey to the insurer. A difficulty with the current law is that while it makes the insurer responsible for the actions of the broker in this instance it does nothing to impose a duty on the broker to provide all information disclosed or address the duty that the broker has to the customer.* *The deemed agency status also has the potential to be uncertain as it relies on the intermediary being entitled to commission or other valuable consideration and this is not defined in detail in the ILRA.* *With regard to lack of a requirement for the intermediary to disclose their agency status to the consumer. It is important this occurs as the consumers approaches the broker, who then works to get the best deal for a customer from amongst a range of insurers. It is not necessarily obvious to a customer that the broker may be in law the insurer's agent at certain points in the process, but not at others, or what the implications of this might be.*
47	If you consider there to be problems, what options should be considered to address them?
	The models applying in the United Kingdom[30] and Australia should be considered carefully as well as the approach outlined in the 2008 Cabinet paper. Regard could also be had to whether

[30] Refer for example to Schedule 2 of the *Consumer Insurance (Disclosure and Representations) Act 2012*.

some of the issues identified could be addressed through specific provisions or duties rather than relying on deemed agency status in certain situations.

One partial solution to the issues identified in relation to Question 46 above is the inclusion of an express obligation on the representative of the insurer that they must give the insurer all notice of all matters material to a contract of insurance that they have knowledge of. This would resolve any concern that the broker may have that advising the insurer is in conflict with their duties to the insured. Such a change would leave customers with the protection that they currently have and would help with claims efficiency as instances involving the failure of brokers to disclose information to insurers take time and investigation to establish the knowledge of the broker.

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?

ICNZ agrees the deferral of payment provided under section 8 of the Insurance Intermediaries Act 1994 causes the following problems outlined in the Issues Paper:

- *Insurers are liable for re-insurance costs on policies for which they have not yet received the premium.*
- *Insurers can be liable to pay FENZ levies on insurance contacts within a shorter period than the default period of 50 days[31] or what is negotiated. We note however that FENZ levies are being extended in future by one month under revised legislation to "levy payer that is liable to pay the levy in relation to a contract of insurance must pay the levy to FENZ not later than the 15th day of the third month after the end of the month in which the contract of insurance was entered into" (refer section 88 of the Fire and Emergency New Zealand Act 2017).*
- *The ability to earn interest on monies held in insurance broking client accounts creates an incentive for insurance intermediaries to hold onto premiums for as long as possible.*

The deferral of payment over a substantial period also creates the following issues not identified in the Issues Paper:

- *Insurers are "on-risk" and liable to pay any claims but still have not received premium. As well as being conceptually problematic this creates practical difficulties where this arises (e.g. payment of premium is a pre-requisite).*
- *Increases the period of risk for an insurer not receiving premium due to a broker becoming insolvent in the period between when they receive the premium and when they provide it to the insurer.*
- *There can be mismatches in GST payments.*

The above complexities and risks all create additional costs for insurers.

[31] The Fire and Emergency Levy under section 50 of the current Act is payable on "the 15th day of the second month following the end of the month in which the contract of fire insurance or other arrangement was made". This means insurers have a minimum of 43 days and a maximum of 76 days to pay levy to Fire and Emergency New Zealand.

49	If you agree that there are problems, what options should be considered to address them?
	In principle it would be most efficient for all parties if the payment of premium was transferred from intermediaries' to insurers as swiftly as practical given normal commercial arrangements and processes. *We do however recognise however the following factors:* • *Existing industry customs are reflected in the payment terms under planned changes to the FENZ Levy etc.* • *Intermediaries won't necessarily be paid at the point the insurance contract commences (e.g. their customers might be on 30-day credit terms).* • *Section 8(3)(a) of the Insurance Intermediaries Act 1994 allows the broker and insurer to agree the relevant period, which is in fact what the industry practice is (with 90 days being common).* • *Current industry payment systems are set up to manage the current arrangements and requiring changes could have effects and costs.* *In exploring this further it will be important to consider the issues identified and those factors outlined immediately above. We note retaining flexibility to negotiate payment terms allows insurers and intermediaries to put in place payment terms that are workable.*

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.
	We do not believe that it needs repealing, but section 8 of the ILRA (arbitration clauses not binding) needs to be clarified. Section 8 applies to consumers (i.e. persons not acting in trade) and was added in 1997 as part of the Arbitration Act 1996. Section 11 of the Arbitration Act 1996 contains a similar provision (which was updated in 2011) but exempts insurance contracts governed under section 8 of the ILRA. *It does not make sense to have two separate provisions in two separate statutes. We believe that it would be more appropriate to bring insurance contracts into section 11 of the Arbitration Act.*
51	Are there elements of the common law that would be useful to codify? If so, what are these and what are the pros and cons of codifying them?
	Possible issues to codify would be: *a. multiple circumstances notification; and* *b. when does loss occur and time begin to run for claim purposes.* *The above issues tend to be confusing and are sometimes inconsistently dealt with by case law. However, it may be that these are too policy specific to be able to codify in a meaningful manner.* *We would discourage further codification of the common law beyond these points. While codification can provide a level of certainty it can be challenging to get right. Codification also removes the flexibility of the common law. Flexibility in a legal system is beneficial as it allows a faster response to changes in the legal environment than would be possible if government*

	intervention is required. This has been proven in the litigation that has occurred in relation to Canterbury earthquake cases, which has illustrated the swift application of "test cases".
52	Are there other areas of law where the interface with insurance contract law needs to be considered? If so, please outline what these are and what the issues are.
	The Contract and Commercial Law Act 2017 combines and codifies what used to be a disparate group of statutes relating to contract law, includes provisions addressing, among other things: *a. Privity of contract – this may be relevant when considering questions around the rights of additional insureds/persons noted for their interest on policies;* *b. Contractual remedies for misrepresentation – it is unclear how these provisions, which address damages for misrepresentation and rights of cancellation for material breach (including material misrepresentation), sit with existing statutory remedies for non-disclosure/misrepresentation under the ILRA 1977, let alone common law remedies re avoiding the policy for material misrepresentation/non-disclosure.* *We believe that the interplay between the provisions in this Act and any new piece of legislation will need to be considered.*
53	Is there anything further the government should consider when seeking to consolidate the six Acts into one?
	*ICNZ does not believe that the Marine Insurance Act 1908 (**NZ MIA 1908**) should be included in any consolidation of the existing legislation.* *We believe the best approach would be one similar to the United Kingdom where the Marine Insurance Act 1906 (**MIA 1906**) has been retained. The provisions in the United Kingdom legislation relating to non-marine policies have now been incorporated into the Consumer Insurance (Disclosure and representations) Act 2012 and the Insurance Act 2015. What is left of the MIA 1906 is only relevant to the marine market.* *ICNZ is concerned that if NZ MIA 1908 were incorporated into a new piece of legislation the language used will require modernisation which brings risks with it. While the Act is based on the MIA 1906, the language goes back to the 18th century and modernisation may alter the intent of the legislation and negate decades worth of legal precedent. Given the inherently international nature of marine insurance it is important to stay in step with key jurisdictions such as the United Kingdom.* *We further note that in the opinion of ICNZ's members, the operation of NZ MIA 1908 has not been problematic, particularly in areas where more consumer-focussed policies might face difficulties.* *We note that if NZ MIA 1908 is retained, it will likely need amending to reflect the effects of any new consolidated legislation (as was done to the MIA 1906). ICNZ would welcome the opportunity to assist with making any changes, and as a first step appends a section of paper by Professor Rob Merkin QC comparing the New Zealand, United Kingdom, and Australian marine insurance legislation.*

Other comments

	We welcome any other comments that you may have.
	Other issues that should be factored into the Review include: • *The wider regulatory regime controlling what is and isn't insurance and ensuring relevant alignment between Insurance Contract Law and the prudential regime under the Insurance (Prudential Supervision) Act 2010.* • *The potential role of 'claims advocates' and 'public loss adjusters' and their commission-based remuneration arrangements. There is an inherent difficulty with claims advocates being remunerated out of a percentage of the claim payment, when the insurer is only obliged to pay the value or the loss or the cost of reinstatement and no more. This caused significant issues in the Christchurch recovery. Such entities appear to be completely unregulated and not subject to a code of conduct.*

Conclusion

Thank you again for the opportunity to submit on the Issues Paper. We look forward to further engagement as the Review of Insurance Contract Law progresses and 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

APPENDIX: COMMENTARY ON POTENTIAL CHANGES TO MARINE INSURANCE LAW

In the UK, MIA 1906 has been amended by *Consumer Insurance (Disclosure and Representations) Act 2012* (**CIDRA**) and *Insurance Act 2015* (**IA**) to apply the principles of those Acts to marine policies. Otherwise, MIA 1906 has been left untouched. In Australia, MIA 1909 has remained in full force subject only to the transfer of pleasure craft to *Insurance Contracts Act 1984*. In order to explain why this is the case, it is necessary to outline the remaining provisions of MIA 1906.

In what follows, the numbering used is that of the NZ MIA 1908 (and note that the Australian MIA 1909 has different numbering but is for the most part identical to MIA 1906). The only substantive difference between MIA 1906 and NZ MIA 1908 is that there is no equivalent in the latter of the former's general principle of utmost good faith. However, that difference is no longer material: IA 2015 has amended MIA 1906 to convert utmost good faith into a general principle but with no stated sanction; and the NZ courts have since the end of 2016 regarded utmost good faith as an implied term. So, for all relevant purposes, MIA 1906 and NZ MIA 1908 are identical.

Sections 1-4: definitional. No substantive law involved.

Sections 5-16: insurable interest. This requirement has been abolished for non-marine insurance by ILRA 1985, with a saving for marine insurance. Australia has abolished insurable interest for non-marine insurance but retains equivalent sections. The English Law Commission is reviewing the matter and in 2016 published a draft bill which effectively preserves insurable interest for both marine and non-marine. The view was that insurable interest, which has been a legal requirement since 1745, does not do any harm and might as well be retained. Expressly dealt with in London market policies.

Section 17: insurable value. Fixes as the date at which the value of subject matter insured under a marine policy has to be assessed the date of the policy. This does not apply to non-marine insurance and is ousted by standard market wordings.

Sections 18-21: presentation of the risk. Effectively ousted by ILRA, repealed in England by IA 2015 and operative in Australia only for non-consumer marine policies.

Sections 22-26: formalities. The English Law Commission saw no need to amend the provisions relating to policy documents and their contents because they don't apply in practice.

Sections 27-31: classes of marine policy. Definitional, no substantive law involved.

Sections 31: premium to be arranged. Ordinary common law rule relating to certainty of contracts.

Section 32 and schedule: construction. Concerned with the interpretation of the Lloyd's SG Policy in use from 1779 to 1982. No longer in use.

Sections 33 and 80: double insurance and contribution. Common law principles that operate without major problem. Note the restriction on the use of other insurance clauses in a non-marine insurance in Australia.

Sections 34-36: nature and effect of warranties. Repealed by IA 2015 and of no effect in NZ by reason of ILRA, s 11.

Sections 37-42: implied marine warranties. Rendered largely redundant by measures against warranties.

Sections 43-50: policy coverage under voyage policies. Sections apply only to voyage policies and bring the risk to an automatic end on the happening of certain events. It was initially proposed to repeal these sections along with the rules on warranties, but they were retained because in practice the matters covered by them are regulated by express policy wordings. They have no application to non-marine transit covers.

Sections 51-52: assignment of policy. Marine policies, unlike non-marine policies, are assignable in order to facilitate CIF and similar arrangements. No controversy.

Sections 53-54: premium payment. Based on London marine market practice. Left untouched despite brokers requesting repeal because they are rendered personally liable for premiums. Probably inconsistent with *Insurance Intermediaries Act 1994*.

Section 55: causation and perils. Default proximate cause rule and list of included and excluded perils. Not controversial, and the list of perils is in any event subject to standard wording.

Sections 56-63: meaning of loss. Much of this relates to constructive total loss, which is not recognised outside marine insurance. To some extent superseded by London market wordings.

Sections 64-66: general average. No application outside marine insurance and in practice ousted by international convention and London market wordings.

Sections 67-76: measure of indemnity. Applicable only to marine insurance, and in practice ousted by London market wordings.

Section 77: successive losses. Held in *Ridgecrest* not to apply to non-marine insurance, but based on a misunderstanding of what the section says. Non-controversial, all governed by policy wordings.

Section 78: suing and labouring. Not relevant to non-marine insurance, and recent judicial decisions have converted this provision into a causation principle that the assured cannot recover if he is the cause of his own loss. In practice in marine policies, always subject to detailed express wording. Now seen in professional indemnity policies, but non-controversial.

Section 79: subrogation. Ordinary common law/equitable principles. Modified in Australia for non-marine, but relatively uncontroversial.

Section 81: average. No application in non-marine insurance, regulated in NZ by *Insurance Law Reform Act 1985* and often ousted in standard marine wordings.

Sections 82-84: return of premium. Uncontroversial, minor amendments in UK to make rules consistent with CIDRA 2012 and IA 2015 where insurer avoids the policy.

Sections 85-89: bits and pieces. No substantive law.