

24 February 2023

Rules Committee – Te Komiti mō ngā Tikanga Kooti

By email: rulescommittee@justice.govt.nz

Dear Committee Members,

ICNZ submission on Improving Access to Civil Justice report

Thank you for the opportunity to submit on the Rules Committee (**Committee**)'s Improving Access to Civil Justice report (**Report**).

By way of background, the Insurance Council of New Zealand - Te Kāhui Inihua o Aotearoa (**ICNZ**)'s members are general insurers and reinsurers that insure about 95 percent of the Aotearoa New Zealand general insurance market, including about a trillion dollars' worth of Aotearoa New Zealand assets and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents, travel and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as Product and Public Liability, Business Interruption, Professional Indemnity, Commercial Property and Directors' and Officers' insurance).

Please contact Jane Brown (jane@icnz.org.nz) if you have any questions about our submission or require further information.

Submission

ICNZ was pleased to see the release of the Committee's Report, and in particular, the recommendations relating to the Disputes Tribunal (**Tribunal**), which are largely consistent with the submission made by ICNZ in 2021.¹ There is however, one recommendation which we believe should receive further consideration by the Committee. Our commentary on this is set out below.

Recommendation 7: Resolving dispute according to the law

In ICNZ's 2021 submission, we strongly supported a suggestion from the Rules Committee that if the jurisdiction of the Tribunal were to increase there was an argument that referees should be required to give effect to the law in all cases.² Despite the view from the Committee at that time, recommendation 7 of the Report states that section 18(6) of the Disputes Tribunal Act 1988 should

¹ https://www.icnz.org.nz/wp-content/uploads/2023/01/ICNZ_submission_on_the_Rules_Committee_Improving_Access_to_Civil_Justice_consultation_020721.pdf

² https://www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules_committee/access-to-civil-justice-consultation/Second-Civil-Justice-Consultation-Paper-PUBLISHED-01-06-2021.pdf, at para 46(a).

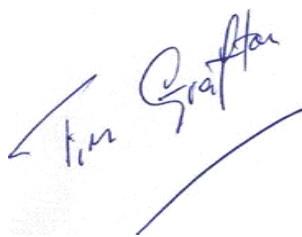
remain as, “The Tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so *shall have regard to the law* but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities” (our emphasis), with the addition of the words “where that would result in a substantial injustice” added to the end of the provision.³ While we acknowledge the change to the provision, we do not believe that it goes far enough, particularly in light of the increase in the Tribunal’s jurisdiction to \$70,000, and we are concerned that it has the potential for subjective application.

The commentary in the Report notes that while a literal reading of s 18(6) could lead to a conclusion that the Tribunal overrides legal principle, “in reality this is rare” and the section is only applied where some unexpected unconscionability would arise from the strict application of the usual rules. The Report also recognises the need to uphold the certainty of contract, a point that ICNZ agrees with. The Supreme Court reinforced this point in their decision in *Xu v IAG*⁴ where they noted the importance of legal precedent and the potentially destabilising effect on insurers if they could not rely on court decisions. It is essential that insurers can confidently draft contracts of insurance based on legal precedent and price according to the risk those positions present. Uncertainty in an insurance context can impact on pricing as insurers must consider and account for all possible outcomes.

While the Report goes on to say that rights of appeal provide a check on the use of s 18(6) and the addition of the words “where that would result in a substantial injustice” are intended to be used to further limit the section’s application, we still believe that the drafting is not sufficient. In light of the increased jurisdiction, we believe that the provision should be redrafted to require Tribunal referees to give effect to the law so that there is no longer a risk of uncertainty being introduced. We urge the Committee to reconsider this point.

Please contact Jane Brown (jane@icnz.org.nz) if you have any questions on our submission or require further information.

Yours sincerely,



Tim Grafton
Chief Executive



Jane Brown
General Counsel

³ <https://www.courtsofnz.govt.nz/assets/Rules-Committee-Improving-Access-to-Civil-Justice-Report.pdf>, page 26.

⁴ *Xu v IAG* [2019] NZSC 68, at [45].