

3 March 2023

Law Commission – Te Aka Matua o te Ture
Wellington

By email: huarahi.whakatau@lawcom.govt.nz

Dear Madam/Sir,

ICNZ submission on He Arotake I te Ture mō ngā Huarahi Whakatau a ngā Pakeke – Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper

Thank you for the opportunity to submit on the Law Commission (**Commission**)’s Review of Adult Decision-Making Capacity Law: Preliminary Issues Paper (**Issues Paper**).

By way of background, Te Kāhui Inihua o Aotearoa – the Insurance Council of New Zealand (**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 would like to take the invitation in question 18 of the Issues Paper (*Is there anything else you would like to tell us?*) to draw the Commission’s attention to a scenario that travel insurers believe needs to be given legal consideration. Insurers have encountered situations where an insured is hospitalised abroad due to illness or injury and does not have the capacity to make decisions, and the details provided by the insured either cannot be used to contact the next-of-kin, or the next-of-kin are not prepared to make decisions about the insured’s welfare.

In one instance, an insurer contacted next-of-kin of an insured traveller who refused to make any decisions on the traveller’s behalf, who at that time was incapacitated in a foreign country. The insurer also contacted the Ministry of Foreign Affairs and Trade (MFAT) for assistance, but ultimately it was the insurer who was left to make the decisions about the traveller’s wellbeing. To complicate the situation, the incident which had incapacitated the traveller was not covered under the

traveller's policy. As the foreign hospital was threatening to discharge the traveller in an unconscious state, the insurer made an ex gratia payment to transfer the traveller to an acute medical facility until they were in a sufficiently conscious and stable state to be able to make their own decisions.

From a customer-focussed and humanitarian perspective, the insurer did the right thing, but this is obviously an unacceptable and untenable situation. Travel insurers should not be required to make decisions relating to the wellbeing of their insureds (beyond the decision-making required under the contract of insurance). Doing so extends well beyond what would be expected in an insurer-insured relationship and potentially sets a dangerous precedent about insurers being expected to go beyond their contractual bounds. It also raises the question of what would have happened if the traveller had not taken out travel insurance at all.

In 2019, ICNZ raised concerns about this situation with MFAT, and at their suggestion, also with the then Minister of Foreign Affairs Winston Peters and Minister of Justice, Andrew Little. In his response to ICNZ, Minister Little noted that the Commission had been asked to undertake a review of law related to impaired decision-making capacity and that he had passed ICNZ's letter to officials to consider as part of the review. Given the time that has passed since then, we wanted to make sure that there is still awareness around this issue, as we do not believe that it has been resolved.

In initial correspondence with MFAT also in 2019, they took the view that they would likely only intervene in a situation such as the one above, where the relevant person is a minor. They also took the view that decision-making for incapacitated travellers was not an issue as they had not encountered an incident where next-of-kin could not be able to be found. To be clear, this is contrary to insurers' experience.

Possible solutions to the issue

ICNZ has looked to other jurisdictions for possible solutions to resolve this issue and we draw your attention to New South Wales, where a much more satisfactory position exists. In that State, there is a hierarchy of who may make decisions on a person's behalf. If someone does not have next-of-kin or an Enduring Guardian, the NSW Civil and Administrative Tribunal has the authority under the *Guardianship Act 1987* to appoint a guardian. That person is authorised to make personal and lifestyle decisions of the person under guardianship, where the person has a decision-making disability. This includes an ability to consent to medical treatment.

Alternately, in his letter of response to ICNZ, the then-Minister of Foreign Affairs noted that the Family Court in Aotearoa has the power to appoint a welfare guardian for a person who does not have capacity to make decisions, but that this power does not have explicit extraterritorial effect. Another option might be to expand the territorial limits of the power via amendment to the legislation.

We urge you to consider the available options and would be happy to work with you to consider the feasibility of such options.

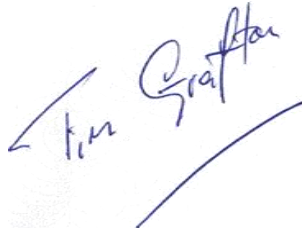
Conclusion

While we recognise that a scenario where a New Zealand traveller becomes incapacitated in a foreign country and there is no next-of-kin available or able to act as decision-maker is unlikely to be a common occurrence, if it does happen, the consequences are potentially life threatening. We

therefore encourage the Commission to consider as part of this review, how the law should respond in such a situation so that insurers do not become de facto decision-makers for their insureds.

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

Yours sincerely,

A handwritten signature in blue ink that reads "Tim Grafton". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Tim Grafton
Chief Executive

A handwritten signature in blue ink that reads "Jane Brown". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Jane Brown
General Counsel