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Corporate Law
Labour and Commercial Environment Group
Ministry of Business, Innovation & Employment
PO Box 3705
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Emailed to: corporate.law@mbie.govt.nz

To Whom It May Concern,

RE: SUBMISSION ON DISCUSSION DOCUMENT – 'APPROVED DISPUTE RESOLUTION SCHEMES: MINIMUM COMPENSATION CAP FOR INSURANCE DISPUTES'

Introduction

1. Thank you for the opportunity to submit on the proposed introduction of a minimum compensation cap for approved dispute resolution schemes ('schemes') on real property insurance disputes. If you have any questions about our submission please contact our legal counsel Nick Mereu on (04) 495 8008 or by email to nick@icnz.org.nz.

Overview of our submission

2. In our view the discussion document provides a solution that is in search of a problem. We strongly disagree that there is a 'problem' with Canterbury Earthquake insurance claim disputes for residential property, and we do not believe that an amendment to the schemes' monetary limit in the manner outlined by MBIE would impact the resolution of these disputes. As regards the proposal, our greatest concern is that the proposed reform would apply retrospectively. We elaborate on this at paragraphs 7 and 8 below.

3. Ultimately, our Members are ambivalent about the amount of the proposed cap, but would support a more comprehensive review of the suitability of the schemes' current monetary limit in the context of the whole financial industry, as part of the upcoming *Financial Service Providers (Registration and Dispute Resolution) Act 2008* ('FSP Act') review, rather than for the reasons outlined in the discussion document.

About ICNZ

4. ICNZ is the industry representative for fire and general insurers in New Zealand. We aim to assist our members in the key areas that affect their business through effective advocacy and communication.

5. ICNZ currently has 28 members who collectively write more than 95 percent of all fire and general insurance in New Zealand. ICNZ members, both insurers and reinsurers, make up a significant part of the New Zealand financial services system. ICNZ members currently protect more than half a trillion dollars' worth of New Zealanders' assets.

6. ICNZ plays an active role in representing the insurance industry. Our members are licensed under the *Insurance (Prudential Supervision) Act 2010* and are signatories to the Fair Insurance Code, which requires our members to act according to industry best practice standards. We also perform an important role in informing and educating consumers about key insurance issues and risks.

Amendments to jurisdiction should not apply retrospectively

7. MBIE proposes to allow the schemes to consider complaints if the cause of the event giving rise to the claim occurred on or after 16 August 2010.[1] This would open up a jurisdiction that did not exist at the time of the Canterbury earthquakes or in the years following the earthquakes. We submit this is contrary to the rule of law. We note The Treasury's Technical Guide for Departments, which states that 'it is a general expectation and requirement of the rule of law that legislation should only apply prospectively.'[2]

8. We also submit that a retrospective jurisdiction would be unfair for all insureds that have already settled a residential property claim with their insurer in good faith. These insureds did not have access to jurisdiction when weighing up their dispute resolution pathways and dispute settlement options. We submit that if legislation is introduced to amend the schemes' monetary limit, then that legislation should apply prospectively.

In our view, 'the problem' has not been adequately identified or defined

9. We are unsure who has concerns that the current $200,000 monetary limit is a barrier to resolving residential property claims, or what evidence this concern is based on.[3] Further, in our view the average cost of Canterbury repairs and rebuilds is not good evidence of the schemes' current jurisdiction being an obstacle to the efficient resolution of insurance disputes.[4] Not all rebuilds and repairs are disputed, and the total cost of a rebuild or a repair is rarely disputed.

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1 Paragraphs 22.b and 39 of the discussion document.
2 The Treasury, "Disclosure Statements for Government Legislation: Technical Guide for Departments", June 2013, at page 56, available at: http://www.treasury.govt.nz/publications/guidance/regulatory/disclosurestatements/23.htm.
3 Paragraph 14 of the discussion document.
4 Paragraph 15 of the discussion document.

Disputes are more frequently between the insurer and insured's respective technical advisers that have used different methodologies to arrive at different repair or rebuild estimates.

10. To identify whether there is a 'problem' or not, we must consider whether the existing civil jurisdictions are providing Canterbury earthquake disputants with an efficient, effective and affordable means of dispute resolution, as is MBIE's stated objective.[5] We will address that objective in the following paragraphs.

11. First, we would distinguish Canterbury Earthquake disputes from business-as-usual residential property disputes. The Canterbury Earthquakes and the claims disputes issues that flow from them are the exception rather than the rule. The issues in dispute can have been novel to property insurance in New Zealand, and extremely complex in many cases. We submit a business-as-usual approach should be taken to business-as-usual rules, rather than justifying change on the basis of a one-in-2,500-year catastrophe. We also submit – assuming there is a problem that needs to be addressed – that it is difficult to justify a nationwide response to a localised problem.

12. Second, the High Court has made adjustments that appear to be resolving Canterbury Earthquake disputes efficiently and effectively. The High Court committed to swift resolution of Canterbury earthquake litigation. 387 earthquake cases have been filed with the High Court since 2010.[6] The High Court established a dedicated list and appointed particular judges to hear all earthquake cases. Early case management is fast-tracked, with matters being set down for a first judicial conference within 60 days of the claim being filed with the Court. Judgments from appeals of High Court decisions are delivered within 53 days.[7] We understand this adjusted process is more efficient than non-earthquake cases filed in the Courts' ordinary civil jurisdiction. We also understand that cases experiencing delays do so not because of the Court's process, but because the Court is waiting for the parties to obtain or provide technical reports such as engineering assessments of property. Earthquake litigation has tested many novel and complex issues of insurance law, has attracted a great deal of discussion amongst insurance lawyers, and has in many cases given insurers and insureds certainty where there was uncertainty before. In our view, the High Court Earthquake List ('the HC EQ list') appears to be resolving disputes efficiently and effectively.

13. We note that approximately 230 of the 387 cases on the HC EQ list – 181 of the 245 cases that are currently active – have been filed by one Plaintiff lawyer, Grant Shand.

14. Third, there does not appear to be a significant problem of insureds being turned away from the schemes because of the schemes' current monetary limit. Our members advise that they can and do waive the schemes' jurisdiction in appropriate cases.[8] We have inquired of the Insurance

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5 Paragraph 20 of the discussion document.

6 From the periodically-published High Court Earthquake List, last update 29 January 2015, available at https://www.courtsofnz.govt.nz/business/high-court-lists/earthquake-list-christchurch/CHCH_HCEQList29012015.pdf.

7 The Chief High Court Judge provided a report on the Canterbury Earthquake Litigation List on 30 September 2014, available at: http://www.courtsofnz.govt.nz/business/high-court-lists/earthquake-list-christchurch/140930_EarthquakeLitigationListReport.pdf.

8 See paragraphs 27 and 28 below for what our members consider 'appropriate cases' to be.

and Savings Ombudsman's office ('ISO'), and we understand that only six enquiries have been made since 1 September 2010 to date where the outcome of the enquiry was that the ISO did not have jurisdiction to take the complaint further because of the monetary limit in ISO's terms of reference. Financial Services Complaints Limited ('FSCL') has also advised us that its corresponding number is nominal.

15. We would appreciate further analysis of whether there is a problem before MBIE intervenes to regulate.[9]

If there is a problem with efficient, effective and affordable resolution of Canterbury Earthquake claims disputes, amending the schemes' monetary jurisdiction will not fix it

16. 142 of the 387 cases filed on the HC EQ list involve the Earthquake Commission ('EQC'). EQC is not required to belong to a scheme. Any dispute that EQC is party to could not be resolved any more efficiently by having the insurer's share of liability subject to scheme jurisdiction. Likewise, 95 cases on the HC EQ list involve Southern Response. Southern Response is already subject to ISO's jurisdiction and agreed to waive the monetary limit in respect of all of its disputes.

17. As noted above, much of the delay involved in Canterbury Earthquake litigation on the HC EQ list is caused by delays in the parties providing technical evidence to the Court. This type of delay would not be solved by allowing a scheme rather than a court to hear the dispute.

18. Increasing the monetary limit may not result in more disputes being dealt with by the schemes, especially for Canterbury Earthquake-type disputes, in any case. We note that the schemes can and do decline jurisdiction to hear a dispute where there is a better forum to handle the dispute, such as a court where questions of fact or law are complex or novel legal issues arise.[10] We note that the Australian Securities and Investments Commission ('ASIC') supports this jurisdictional distinction between the courts and the schemes.[11] Plaintiff lawyers also would need to be on-board with referring disputes to the schemes rather than the courts.

19. We reiterate that we do not have evidence of any barrier to insureds accessing one of the dispute schemes or the courts to have their dispute heard.

Our views on affordability of dispute resolution

20. We accept MBIE's views that the cost of court proceedings can be significant, that the value of the limit or cap should not be eroded over time by inflation and should therefore be indexed or

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9 We note paragraph 1.2 of The Treasury's Regulatory Guidance for Departments which states departments should not propose regulatory change without 'clearly identifying the policy or operational problem it needs to address, and undertaking impact analysis to provide assurance that the case for the proposed change is robust' available at: http://www.treasury.govt.nz/publications/guidance/regulatory/systemreport/04.htm#_toc1.2

10 Paragraph 8.2(a) of FSCL's Terms of Reference and paragraph 5.2(e) of ISO's Terms of Reference.

11 Paragraph 121 of ASIC's Consultation Paper 102: Dispute resolution – review of RG 139 and RG 165, available at http://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-102-dispute-resolution-review-of-rg-139-and-rg-165/.

reviewed on a periodic basis, and that the level of the limit or cap should be consistent across schemes. However, we do not think these points justify an increase in the manner and to the level proposed in the discussion document.

21. For Canterbury Earthquake claims, insureds have access to free, independent professional advice to facilitate claims settlement. The Residential Advisory Service works in partnership with Community Law Canterbury to provide legal advice, which would include assessments of the chances of success if the courts or the schemes were required to intervene. In our view this service reduces barriers to affordability of dispute resolution by reducing the upfront cost of legal advice.

22. We note that the courts routinely award costs to successful litigants. If an insured received legal advice that litigation was likely to succeed, and the dispute was worth more than $200,000, then it is for the insured to decide whether to take the risk of winning or losing. Losing litigation may entail a significant legal bill, especially if the court awards costs to the insurer, however this 'affordability' issue exists for all litigants, not just claimants under insurance policies.

Care must be taken in comparisons with other jurisdictions

23. We also note the argument that a $350,000 cap would align with the caps in place in Australia and the United Kingdom for kindred dispute resolution schemes, and with the District Court's jurisdiction in New Zealand.[12] We would caution against simply copying an exchange-rate adjusted cap from overseas to use in New Zealand. Foreign jurisdictions may have different rationales for different caps that are not transferable to New Zealand. Equally there may be circumstances particular to New Zealand that justify a particular level of cap. In our view a rational basis for setting the level of a cap should be drawn from an analysis of the vast majority of consumer-level disputes in the general insurance industry.[13]

24. In our view the District Court's civil jurisdiction is not a relevant point to align the dispute schemes' jurisdiction with. Insurers can appeal District Court decisions. Insurers cannot appeal dispute scheme decisions if the insured accepts the decision. The District Court's jurisdiction is also a monetary limit rather than a compensation cap, meaning if MBIE's proposal was to go ahead, there would not be alignment between the schemes' jurisdiction and the District Court jurisdiction because the schemes could consider disputes of any value.

The amount of the cap proposed

25. Most of our Members are ambivalent about the exact amount of the cap, however we do note that $350,000 is a significant increase on the $200,000 status quo. As noted above, we do not consider the average cost of rebuild or repair in Canterbury to be an appropriate benchmark for scheme jurisdiction for all residential property disputes.

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12 Paragraph 29 of the discussion document.

13 Following ASIC's analysis at proposal E3 of Consultation Paper 102, above n 11.

26. We would support periodic review of the Schemes' monetary limit or compensation cap, provided there was sufficient consultation and lead-in time to any changes.

27. The reason most of our members are ambivalent about the exact dollar amount of the cap is that, when assessing jurisdiction for particular disputes, the complexity of that dispute is more determinative of the appropriateness of jurisdiction, rather than the value of that dispute. High-value commercial property disputes can involve straightforward questions of fact and law; low-value travel insurance claims can involve complex questions of fact and law; and vice versa.

28. We submit that complex questions of fact and law should be reserved for the greater formality of the courts' jurisdiction, irrespective of the amount in dispute. In our view, there is a vast difference in approach to disputes between the schemes and the courts. Court proceedings are presided over by judges who are experienced senior lawyers. There are rights to a hearing and legal representation for the parties. Discovery is comprehensive. Expert witnesses can be examined and cross-examined. Judgments are made publicly available in writing. Both parties have appeal rights. One of our members adds that while there is not a clear and direct link between the value of a dispute and the complexity of that dispute, there is a correlation. Higher value disputes that are worth contesting through a third party dispute resolution forum (be it the courts or otherwise) tend to be more factually and legally complex.

29. As noted above, the schemes can already decline jurisdiction for disputes within their monetary limit because there is a more appropriate place to deal with the dispute. We expect schemes would decline jurisdiction on this ground more often if a high cap were introduced.

30. Finally, we support MBIE's view that an increase in cap may impact the cost of insurance.

A monetary limit is preferable to a compensation cap

31. MBIE prefers a compensation cap as schemes would not need to spend time and resources determining whether a complaint is within their jurisdiction. It would also allow schemes to consider any complaint regardless of value.

32. We disagree, and submit that:
    a. The monetary value of a dispute is only one of a number of jurisdictional boundaries which the schemes must assess a complaint for, meaning schemes must spend time assessing disputes for jurisdiction anyway.
    b. For the vast majority of disputes, it is relatively simple to identify the amount in dispute, meaning jurisdictional assessments of monetary value in dispute would not take much time anyway.[14]

[14] We note ASIC's comments at paragraph 109 of Consultation Paper 102, above n 11. ASIC did not provide evidence to support its view, thus our recommendation that MBIE speak to the schemes directly about the amount of time they spend assessing jurisdiction on the monetary limit.

c. Allowing schemes to consider complaints of any value would allow insureds to forum-shop. One ICNZ member has serious concerns that insureds' lawyers will make a complaint to a dispute scheme as a 'trial run' to assess their courtroom prospects. The insurer would need to disclose documents and arguments under the schemes' terms of reference.[15]

33. For these reasons the status quo (a monetary limit) is our preference. We recommend that MBIE consults the schemes directly for data on how much time the schemes spend assessing whether a dispute is within the schemes' existing monetary limit.

Miscellaneous comments on the proposal

34. We make three further general comments on the proposal outlined by MBIE.

35. First, the proposal would apply to real property disputes and 'real property' means 'buildings or other property permanently attached to land, as well as the land itself'[16] We note that land cover is provided under the *Earthquake Commission Act 1993,* which makes New Zealand an outlier from a global perspective: private insurers do not (and will not be likely to) insure land.

36. Second, the proposal was not limited to residential property because of definitional issues.[17] However, relying on the schemes' terms of reference would permit large commercial property disputes to be brought before the schemes. A body corporate or incorporated association – many of which would have less than 19 full time employees – that owns a commercial building may take out a policy that covers damage to the building. In our view it is inappropriate to give commercial property owners with large insurance claims disputes access to consumer-level dispute resolution schemes.

37. Finally, we note MBIE's proposal to apply the increased cap to intermediaries selling residential property insurance, such as insurance brokers.[18] We only wish to comment on this aspect of MBIE's proposal to note that amendments to the maximum compensation that could be awarded against a broker could impact the broker's professional indemnity insurance. We do not anticipate an increase from $200,000 to $350,000 would have a significant impact on premiums for professional indemnity insurance for insurance brokers as we understand most brokers carry at least $500,000 in professional indemnity cover. We recommend that MBIE speak to the Insurance Brokers Association of New Zealand if it wishes to pursue this matter further.

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15 We note ASIC also considered this point in Consultation Paper 102, above n 11, at paragraphs 110 and 111. ASIC argued the concern would be addressed by allowing schemes to require the insured to give up their right to pursue the balance of their claim against the insurer in another forum. In our view this does not address the concerns about early disclosure of evidence and arguments as the insured only needs to give up this right at settlement, after the parties have been through the schemes' process. The rationale applies for claims of any value, but is of greater concern to our members for higher value claims given the amounts at stake.

16 Paragraph 31 of the discussion document.

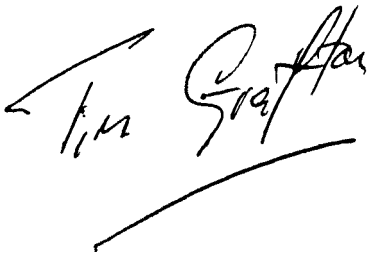
17 Paragraph 33 of the discussion document.

18 Paragraph 32 of the discussion document.

Next steps

38. Thank you again for the opportunity to submit. If you have any questions about our submission please contact our chief executive Tim Grafton on (04) 495 8001 or tim@icnz.org.nz, or our legal counsel Nick Mereu on (04) 495 8008 or nick@icnz.org.nz. We look forward to hearing from you.

Yours sincerely,



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