

THE INSURANCE AND  
REINSURANCE  
LAW REVIEW

EIGHTH EDITION

Editor  
Peter Rogan

THE LAWREVIEWS

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REINSURANCE  
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# CONTENTS

PREFACE.....	vii
<i>Peter Rogan</i>	
Chapter 1 INSURTECH AND ARTIFICIAL INTELLIGENCE .....	1
<i>Simon Cooper</i>	
Chapter 2 CYBER INSURANCE.....	7
<i>Simon Cooper</i>	
Chapter 3 FRAUD INSURANCE CLAIMS: WHERE ARE WE NOW?.....	13
<i>Simon Cooper</i>	
Chapter 4 LATIN AMERICA OVERVIEW.....	20
<i>Duncan Strachan and Kayleigh Stout</i>	
Chapter 5 AUSTRALIA.....	38
<i>David Gerber and Craig Hine</i>	
Chapter 6 AUSTRIA.....	50
<i>Peter Konwitschka, Manuela Zimmermann, Marguerita Sedrati-Müller, Natascha Garo, Daniel Höhnl, Sebastian Jackwerth-Feige, Daniel Lackner, Caroline Lichtenberg and Julia Peric</i>	
Chapter 7 BRAZIL.....	61
<i>Bruno Balduccini, Diógenes Gonçalves, Carlos Eduardo Azevedo and Mariana Magalhães Lobato</i>	
Chapter 8 BULGARIA.....	72
<i>Irina Stoeva</i>	
Chapter 9 CAMBODIA .....	83
<i>Antoine Fontaine</i>	

## Contents

---

Chapter 10	CAYMAN ISLANDS .....	99
	<i>John Dykstra and Abraham Thoppil</i>	
Chapter 11	CHILE.....	110
	<i>Ricardo Rozas</i>	
Chapter 12	CHINA.....	122
	<i>Zhan Hao, Wang Xuelei, Yu Dan, Chen Jun, Wan Jia and Zhang Xianzhong</i>	
Chapter 13	COLOMBIA.....	134
	<i>Neil Beresford, Raquel Rubio and Andrés García</i>	
Chapter 14	DENMARK.....	157
	<i>Henrik Nedergaard Thomsen and Sigrid Majlund Kjerulff</i>	
Chapter 15	ENGLAND AND WALES.....	170
	<i>Simon Cooper and Mona Patel</i>	
Chapter 16	FRANCE.....	192
	<i>Alexis Valençon and Nicolas Bouckaert</i>	
Chapter 17	GERMANY.....	210
	<i>Markus Eichhorst</i>	
Chapter 18	GREECE.....	227
	<i>Dimitris Giomelakis, Nikolaos Mathiopoulos, George Asproukos and Marilena Papagrigoraki</i>	
Chapter 19	INDIA .....	238
	<i>Neeraj Tuli and Celia Jenkins</i>	
Chapter 20	IRELAND.....	253
	<i>Sharon Daly, Darren Maher, April McClements and Gráinne Callanan</i>	
Chapter 21	ISRAEL.....	273
	<i>Harry Orad</i>	
Chapter 22	ITALY .....	288
	<i>Alessandro P Giorgetti</i>	
Chapter 23	JAPAN .....	310
	<i>Shinichi Takahashi, Takahiro Sato and Ayako Onishi</i>	

## Contents

---

Chapter 24	MALTA.....	327
	<i>Edmond Zammit Laferla and Petra Attard</i>	
Chapter 25	MEXICO .....	337
	<i>Yves Hayaux-du-Tilly</i>	
Chapter 26	NEW ZEALAND.....	351
	<i>Tom Hunt and Marika Eastwick-Field</i>	
Chapter 27	PORTUGAL.....	365
	<i>Miguel Duarte Santos</i>	
Chapter 28	SPAIN.....	376
	<i>Jorge Angell</i>	
Chapter 29	SWEDEN.....	392
	<i>Peter Kullgren, Anna Wahlbom and Joonas Myllynen</i>	
Chapter 30	SWITZERLAND .....	403
	<i>Lars Gerspacher and Roger Thalman</i>	
Chapter 31	TURKEY.....	414
	<i>Pelin Baysal and Ilgaz Önder</i>	
Chapter 32	UNITED ARAB EMIRATES .....	432
	<i>Sam Wakerley, John Barlow and Shane Gibbons</i>	
Chapter 33	UNITED STATES .....	446
	<i>Michael T Carolan, William C O'Neill, Martha E Conlin and Thomas J Kinney</i>	
Appendix 1	ABOUT THE AUTHORS.....	461
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	485

# PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant; it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with emerging markets in Asia and Latin America developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all of the contributors for their work in compiling this volume.

Although 2019 looks likely to be benign in terms of insured losses from natural catastrophes, there is continuing concern that climate change will see a long-term increase in the number and severity of such losses; the scope of the Australian wildfires at the end of the year may be a portent of things to come. From a legal perspective, the changing nature of natural catastrophes will raise issues of policy construction in relation, for example, to aggregation clauses and the obligation on reinsurers to follow their insured's underlying settlements.

Aggregation may also be an area of uncertainty in relation to the treatment of catastrophic losses such as the coronavirus outbreak originating in China but with worldwide consequences.

The year 2019 saw no respite in the number or scale of cyber events, including the huge data breaches at Facebook and at other global organisations such as Microsoft, Capital One, First American Corporation and government organisations in countries ranging from Bulgaria to Singapore. Events such as these test not only insurers and reinsurers but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues, and new points for the courts and arbitral tribunals to consider. Most recently the courts in England and Wales have held that cryptocurrencies such as bitcoin are 'property' for legal purposes.

Looking ahead, 2020 is likely to see new developments and new legal issues. In particular, the impact of insurtech on the way in which insurance is underwritten, serviced and distributed will continue to present challenges around the world. This is reflected in our chapter on artificial intelligence.

I hope that you find this eighth edition of *The Insurance and Reinsurance Law Review* of use in seeking to understand today's legal challenges, and I would like once again to thank all the contributors.

**Peter Rogan**

Ince

London

April 2020

# NEW ZEALAND

*Tom Hunt and Marika Eastwick-Field*<sup>1</sup>

## I INTRODUCTION

New Zealand has an established insurance market comprising a number of local and overseas general insurers and life insurers. A small number of global reinsurers have branches in New Zealand, although the majority of risk is reinsured overseas.

The core principles of insurance law in New Zealand are sourced from long-standing English common law authorities, supplemented by a combination of New Zealand statute law and voluntary code.

## II REGULATION

### i The insurance regulator

The Reserve Bank of New Zealand (RBNZ) is the prudential regulator and supervisor of all insurers and reinsurers carrying on insurance business in New Zealand, and is responsible for administering the Insurance (Prudential Supervision) Act 2010 (IPSA).

The Companies Office and the Financial Markets Authority (FMA) also have roles. The Companies Office administers and regulates companies law, and the FMA administers and regulates persons subject to the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA) and the financial adviser regime (which can include insurers and insurance intermediaries).<sup>2</sup>

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<sup>1</sup> Tom Hunt and Marika Eastwick-Field are partners at Russell McVeagh. The authors would like to thank and gratefully acknowledge the assistance of Ling Yan Pang, Nicole Browne, Che Ammon and Sharnika Leleni.

<sup>2</sup> Until 29 June 2020 the regulation of financial advisers and brokers will be governed by the existing Financial Advisers Act 2008 (FAA) regime. From 29 June 2020, the Financial Services Legislation Amendment Act 2019 (FSLAA) will repeal the FAA and introduce a new regime for the regulation of financial advisers and brokers into the Financial Markets Conduct Act 2013 (FMCA). This chapter focuses on the position applicable from 29 June 2020 under the new regime.

## ii Regulation and authorisation

### *IPSA*

The IPSA requires each person who carries on insurance business in New Zealand to be licensed as an insurer.<sup>3</sup> Whether an insurer ‘carries on insurance business in New Zealand’ (a concept that encompasses both insurers and reinsurers) is a question of fact that must be decided having regard to all of the insurer’s circumstances.

To obtain a licence, an insurer must apply to the RBNZ and provide information to establish that it meets certain requirements, including those relating to solvency and credit rating, risk management, corporate governance, compliance with anti-money laundering legislation, and that the insurer is able to satisfy ongoing prudential requirements (including that the insurer holds, and has the ability to maintain, a minimum amount of capital in accordance with solvency standards set by the RBNZ).<sup>4</sup>

Overseas insurers may be eligible for exemptions from parts of the licensing requirements if they are supervised by a recognised overseas regulator and they meet certain standards in their home jurisdictions.

There are also specific rules that allow Lloyd’s to obtain a licence on behalf of all Lloyd’s underwriters.

### *FPSA*

Insurers must register on the Financial Service Providers Register (FSPR) in accordance with the FPSA. Insurers that provide services to retail clients are also required to be members of an approved dispute resolution scheme.

### *Companies Act 1993*

As corporate entities carrying on business in New Zealand, insurers must be registered with the Companies Office. This requirement also applies to insurers that are incorporated outside New Zealand but that carry on business in New Zealand.

### *FMCA*

The FSLAA was enacted in 2019 to repeal and replace the current FAA regime for the regulation of financial advisers and brokers (including in relation to insurance products). The FSLAA will incorporate the new regime into the FMCA and is aimed at simplifying and streamlining the existing regime. The changes include replacing the current types of financial advisers with three new types (financial advice providers, financial advisers and nominated representatives), permitting the provision of robo-advice to retail customers, introducing a fit-for-purpose licencing structure, imposing conduct and competence obligations on anyone who provides financial advice and creating shorter, simplified disclosure requirements.

Under the new regime, anyone giving financial advice (which could include insurers, brokers or other intermediaries) will need to be licensed as, or engaged by, a ‘financial advice provider’. Financial advice providers can engage individuals as ‘financial advisers’ and/or ‘nominated representatives’ to provide financial advice on their behalf, but will remain liable

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3 IPSA, Section 15.

4 IPSA, Part 2, Subpart 1.

for the acts or omissions of those individuals. Financial advice providers and financial advisers are also required to be registered under the FSPA. The new regime comes into effect from 29 June 2020 with a transitional period of two years.

### **iii Position of non-admitted insurers**

As mentioned in subsection ii, owing to the requirement that each person who carries on insurance business in New Zealand must be licensed, non-admitted insurers are effectively prohibited from operating in New Zealand. In addition, the IPSA also places restrictions on the use of certain words including ‘insurance’, ‘assurance’, ‘underwriter’, ‘reinsurance’ or any word that has the same or a similar meaning. Subject to some limited exceptions, it is an offence for a person to carry on any activity in New Zealand (either directly or indirectly) using a name or title that includes a restricted word unless the person is licensed or permitted to do so under the IPSA.<sup>5</sup>

### **iv Position of brokers**

Brokers are primarily regulated under the Insurance Intermediaries Act 1994 (IIA), the FSPA and, from 29 June 2020, the FMCA.

The IIA governs insurance intermediaries and brokers. It is primarily focused on ensuring that the risk of the default or insolvency of the intermediary or broker falls on the insurer rather than the insured. The IIA does not impose any registration requirements and no regulator has specific jurisdiction for monitoring compliance with the IIA. The IIA’s obligations are, instead, most commonly raised in civil disputes between insurers, insureds and insurance intermediaries. If an entity is an insurance intermediary, certain deeming provisions apply in relation to payments made to or received by that intermediary in order to bind the insurer in the event of default by the intermediary. Obligations on brokers are more onerous and include duties in relation to payments due to the insured and operating of client broking accounts. Reform of the IIA is proposed as part of a general review of insurance contract law in New Zealand.<sup>6</sup>

The FSPA imposes regulatory requirements on brokers who fall within its ambit (as determined by the activities that the broker undertakes). Brokers that are subject to the requirements of the FSPA must be registered on the FSPR and belong to an approved dispute resolution scheme if they advise retail clients. The FSPR enables the public to check that financial service providers are registered, along with certain other details including the types of financial services that they are registered to provide.

As discussed above, from 29 June 2020 the FMCA will impose licensing and conduct obligations on brokers that provide financial advice on insurance products.

### **v Regulation of individuals employed by insurers**

Individuals employed by insurers are regulated by the IPSA to a limited degree. Directors of licensed insurers are required to certify that any new director, the chief executive officer, chief financial officer and appointed actuary (who may or may not be an employee of the insurer) are fit and proper persons to hold their respective roles (and the criteria on which

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<sup>5</sup> IPSA, Section 219.

<sup>6</sup> Discussed in Section V below.

the certification is based must be specified in the insurer's fit and proper policy).<sup>7</sup> The RBNZ has powers to take action against persons appointed to these roles that it views as being inappropriate to be involved in the management or governance of an insurer. The RBNZ may also apply to the district court for a person to be banned from participating in an insurance business in relation to certain wrongdoings.<sup>8</sup>

Employees of insurers that provide financial advice are regulated under the FMCA (from 29 June 2020) and FSPA. Individuals can also be liable for 'involvement' in a contravention of the FMCA by another.

## **vi Compulsory insurance**

Unlike some jurisdictions, there is no compulsory motor vehicle or workers compensation insurance in New Zealand. The government operates a 'no fault' accident compensation scheme for personal injury by accident suffered by any New Zealand resident or visitor to New Zealand. The scheme is administered by the Accident Compensation Corporation under the Accident Compensation Act 2001, and is funded through levies and taxation. No private legal proceedings can be brought for personal injury covered by the scheme, and there is therefore only limited need for personal injury liability insurance.

Where residential buildings and personal property are insured against fire, the property is also deemed to be insured against earthquake and other natural disaster under the Earthquake Commission Act 1993. The insured pays a premium for this cover to the Earthquake Commission through the insurance company.<sup>9</sup>

The Maritime Transport Act 1994 imposes certain insurance requirements in respect of oil pollution liabilities and for offshore marine installations.

## **vii Compensation and dispute resolution regimes**

As discussed in subsection iv, insurers that provide services to retail clients are required by the FSPA to be a member of an approved dispute resolution scheme.<sup>10</sup> There are four approved schemes, though most insurers are members of the Insurance and Financial Services Ombudsman Scheme (the IFSO Scheme),<sup>11</sup> which focuses primarily on insurance.

The IFSO Scheme is free to access for the insured and can consider complaints from consumers and small businesses up to NZ\$200,000 (unless the insurer agrees to a greater amount). It cannot make a determination in relation to commercial insurance policies.

Insurers are also required to have an internal dispute resolution process. This process must have been exhausted before a dispute can be brought to the IFSO Scheme. If a dispute is brought to the IFSO Scheme, it will be investigated, and attempts will be made to resolve the dispute through negotiation or mediation (or both). If this process fails, then the IFSO Scheme can make a determination on the dispute that will be binding on insurers, but not on consumers or small businesses who may seek redress through an alternate dispute resolution process or through the courts.

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7 IPSA, Section 37.

8 IPSA, Section 222.

9 As discussed in Section V.ii, there is currently a public inquiry into the Earthquake Commission's operational practices.

10 FSPA, Section 11.

11 As of February 2019.

### **viii Taxation of premiums**

In general, a person carrying on an insurance business is subject to income tax in the same manner as any other taxpayer in business. Income and deductions will generally be recognised using ordinary tax principles, but with the overlay of specific statutory rules. As such, insurers are generally subject to income tax on insurance premiums received.<sup>12</sup>

For tax purposes, New Zealand distinguishes between two categories of insurers: general insurers and life insurers. General insurance is defined as insurance that is not life insurance.

New Zealand has specific statutory rules addressing:

- a* the income tax treatment of a general insurer's outstanding claims reserves, which seek to align income tax treatment with financial reporting and actuarial practice;
- b* certain premiums derived by non-resident general insurers (addressed below);
- c* the calculation of the income of life insurers, which require separate calculations to reflect two bases of taxable income:
  - a shareholder base (representing income derived for the benefit of shareholders); and
  - a policyholder base (representing income derived for the benefit of policyholders);
- d* the timing of recognition of the income of life insurers, which seeks to address the timing and allocation issues inherent with life insurance products, particularly in respect of participating life policies; and
- e* certain life insurance premiums paid to underwriters at Lloyd's of London (addressed below).

Where a non-resident general insurer derives a premium with a New Zealand source that is not attributable to a fixed establishment of the insurer in New Zealand, 10 per cent of the gross premium is income of the insurer. This income is given separate treatment for income tax purposes and the insurer is not permitted any deductions against this income. Therefore, this is the net amount subject to tax. If the non-resident general insurer does not file a return and pay the relevant New Zealand tax, New Zealand deems certain persons to be agents of the insurer and requires the agent to file a return and pay the tax. Under these rules the person paying the premium may be liable for the non-resident insurer's tax liability. Similar rules also apply to certain life insurance premiums derived by underwriters at Lloyd's of London. If those rules apply, 10 per cent of the gross premium is income of the insurer, the insurer is not permitted deductions against that income and the person paying the premium may be required to calculate the income tax payable, file a tax return and pay the insurer's tax liability.

Insurance premiums are generally subject to New Zealand's goods and service tax (GST) (currently at a rate of 15 per cent), with the exception of premiums for life insurance. The provision of life insurance is not subject to GST (either because it is exempt or because it is zero-rated for GST purposes, depending on the particular circumstances). Some other exceptions can also apply, for example in relation to certain credit-related insurance contracts.

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12 As of February 2019, companies are subject to an income tax rate of 28 per cent.

### **ix Other notable regulated aspects of the industry**

Under the IPSA, approval must be obtained from the RBNZ in relation to a change of control, or change in corporate form, of any licensed insurer.<sup>13</sup> This allows the RBNZ to consider the same matters as when it first licenses an insurer to ensure the change in control or corporate form will not affect the insurer's ability to operate effectively.

## **III INSURANCE AND REINSURANCE LAW**

### **i Sources of law**

Insurance law in New Zealand is governed by a combination of common law, statute and voluntary code.

The foundation for insurance law is the general law of contract, supplemented by insurance-specific principles, such as the doctrine of utmost good faith and the principle of indemnity.

Marine insurance is treated as a distinct subset of insurance law and is governed by the Marine Insurance Act 1908. There is no equivalent code in New Zealand relating to non-marine insurance. However, there are a number of statutes that are relevant to the terms of non-marine insurance, including the Life Insurance Act 1908, the Insurance Law Reform Acts of 1977 and 1985, and the Fair Trading Act 1986 (FTA).<sup>14</sup> Reform of these statutes is proposed as part of the proposed general review of insurance contract law in New Zealand.<sup>15</sup>

Members of the Insurance Council of New Zealand (ICNZ) also agree to adhere to the Fair Insurance Code. The ICNZ currently has 30 members and three associate members.<sup>16</sup> The Code sets a minimum standard of service for insurers, describes the responsibilities owed between the insurer and the insured, and encourages professionalism in the insurance industry. The public made submissions on the updated version of the Code in 2019, with the updates to be implemented in 2020.

### **ii Making the contract**

#### ***Essential ingredients of an insurance contract***

The IPSA defines a contract of insurance as a contract involving the transference of risk and under which the insurer agrees, in return for a premium, to pay to or for the account of the policyholder a sum of money or its equivalent, whether by way of indemnity or otherwise, on the happening of one or more uncertain events.<sup>17</sup> This definition generally accords with the position at common law.

An insurance contract generally requires an insuring clause, and must identify the property or liability to be insured and the scope of the indemnity. This information is customarily set out in the policy schedule (which contains details specific to the particular

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13 IPSA, Sections 26 to 27.

14 As discussed in Section V.iii, as at March 2019 some of the provisions of these statutes are being reviewed.

15 Discussed in Section V below.

16 [www.icnz.org.nz/about-us/our-members](http://www.icnz.org.nz/about-us/our-members).

17 IPSA, Section 7.

insured) and the policy wording (which sets out further details as to the nature and scope of the insurance cover, as well as claims conditions and other provisions relevant to the insurance).

### ***Recording the contract***

Insurance contracts are usually recorded in a written document or combination of documents (usually a policy schedule signed or stamped by the insurer, together with a document containing the policy wording). However, the only express legislative requirement is found in the Marine Insurance Act 1908, which requires that a contract of marine insurance is signed or sealed by the insurer.<sup>18</sup>

### ***Regulation of contractual terms***

The Life Insurance Act 1908 contains provisions relating to the assignment of life insurance policies, in relation to life policies taken out by or for the benefit of minors, and protecting the surrender value of life insurance policies if premia are not paid.

The Insurance Law Reform Act 1977 limits an insurer's ability to avoid a policy because of misstatements by the insured, or to decline a claim in reliance on certain types of exclusions or because of non-compliance with time limits for making a claim. It also provides that arbitration clauses in insurance policies (other than those entered into by the insured in trade) are not binding on the insured.

The Insurance Law Reform Act 1985 abolishes the common law requirement for an insurable interest in policies of life insurance and indemnity (other than where the Marine Insurance Act 1908 applies). It restricts the application of 'average' clauses in policies for dwelling houses and allows purchasers of land and fixtures to have the benefit of the vendor's insurance during the period between the contract of sale and settlement.

In March 2015, the FTA was amended to prohibit unfair contract terms in standard form consumer contracts. These prohibitions apply to a limited extent to consumer insurance contracts (although the legislation recognises that there are some terms that are necessary to protect the insurer and that will therefore not be considered unfair, such as provisions that identify the subject matter or risk insured, impose obligations of good faith, specify the sum insured or applicable deductible, or describe the basis on which claims are settled).

As mentioned, a review of insurance contract law is under way, which is discussed in Section V.

### ***Statutory charge under Law Reform Act 1936***

Pursuant to the Law Reform Act 1936, any insurance that is available to meet liability to pay damages or compensation is charged (to the amount of the claim, subject only to the policy limit) in favour of the claimant from the time of the event giving rise to the claim.<sup>19</sup> The courts have held that the effect of the charge is to prevent an insurer from advancing defence costs to the insured where to do so would erode the amount of insurance proceeds subject to the charge.<sup>20</sup>

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18 Marine Insurance Act 1908, Section 24.

19 Law Reform Act 1936, Section 9. This is also part of the review of insurance contract law – see Section V.

20 See *BFSL 2007 Ltd v. Steigrad* [2013] NZSC 156.

The court decisions that clarified the application of this legislation and its impact on defence costs have resulted in significant changes to the structure of liability policies in recent years. Whereas it was previously common to issue liability policies with aggregate limits of cover for both defence costs, and damages and compensation, it is now common for insureds to purchase separate or additional defence costs cover.

Reform of the statutory charge under the Law Reform Act 1936 is proposed as part of the general review of insurance contract law in New Zealand.<sup>21</sup>

### ***Prohibited insurance***

Certain types of insurance are prohibited by statute. For example, insurance that purports to indemnify a person for liability to pay a fine or infringement fee under the Health and Safety at Work Act 2015, or the Employment Relations Act 2000, is unlawful and of no effect. As a result of recent amendments, there is a similar prohibition in the Credit Contracts and Consumer Finance Act 2003.<sup>22</sup>

The Companies Act 1993 contains restrictions on a company's ability to effect insurance for its (and its related companies') directors and employees.<sup>23</sup> A company must be authorised by its constitution, and have the prior approval of its board, before effecting the insurance. A company cannot effect insurance for its directors and employees in respect of criminal liability (e.g., fines) or defence costs in respect of criminal proceedings unless the director or employee is acquitted. The directors who vote in favour of effecting the insurance must certify that the cost of the insurance is fair to the company.

Similar restrictions apply under the Financial Markets Conduct Act 2013 (in respect of conduct regulated by financial markets legislation) to 'specified persons' (e.g., issuers, offerers and licensees) that are not companies subject to the Companies Act 1993.<sup>24</sup>

### ***Information provided to the insurer at placement***

The insured is subject to a general duty to disclose any material fact to the insurer.<sup>25</sup> The insured's duty of disclosure extends beyond the answering of questions specifically asked by the insurer. Failure to disclose material facts can entitle the insurer to avoid the policy. However, where an insured discloses facts that reasonably point toward the existence of further relevant facts, the insurer may be treated as having waived disclosure if it did not make further enquiries.<sup>26</sup>

This duty of disclosure is codified in respect of marine insurance in the Marine Insurance Act 1908, which also expressly states that the following circumstances do not have to be disclosed in the absence of enquiries: circumstances that diminish risk; circumstances that are known or presumed to be known to the insurer; and any circumstance that is superfluous to disclose by reason of any express or implied warranty.<sup>27</sup>

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21 Discussed in Section V below.

22 Credit Contracts and Consumer Finance Act 2003, Section 107E.

23 Companies Act 1993, Section 162.

24 Financial Markets Conduct Act 2013, Sections 526 to 530.

25 *Quinby Enterprises Ltd (In Liquidation) v. General Accident Fire and Life Assurance Corporation Public Ltd* [1995] 1 NZLR 736.

26 *Jaggar v. QBE Insurance International Ltd* [2007] 2 NZLR 336.

27 Marine Insurance Act 1908, Section 18.

The House of Lords has confirmed that the duty of utmost good faith is an extra-contractual duty and therefore cannot give rise to common law damages.<sup>28</sup> While the Contract and Commercial Law Act 2017 imposes a general right to damages for misrepresentation (which could provide a pecuniary remedy for a breach of the duty of utmost good faith),<sup>29</sup> such remedies are unlikely to be available for breach of a simple failure to disclose unless it can be established that there was a positive misrepresentation that there was nothing further to disclose.

As noted above, the Insurance Law Reform Act 1977 precludes an insurer's right to avoid a policy for misstatement by the insured unless the misstatement was substantially incorrect and material (and, in the case of life insurance policies, made either fraudulently or within three years of the date that the policyholder dies or the contract is sought to be avoided).

The scope of the insured's duty of disclosure, and the consequences of non-disclosure, are part of the review of insurance contract law in New Zealand.

### iii Interpreting the contract

#### *General rules of interpretation*

There are no special rules that apply to the interpretation of insurance contracts.<sup>30</sup> Accordingly, insurance agreements are interpreted according to the general law of contract, which aims to ascertain the meaning that the document would convey to a reasonable person having all the background knowledge that would have been reasonably available to the parties at the time they entered into the agreement.<sup>31</sup>

The ordinary and natural meaning of the language at issue will be a 'powerful, albeit not conclusive' indicator of what the parties meant, but might not be determinative if the wider or commercial context reliably shows otherwise.<sup>32</sup>

The New Zealand position on the admissibility of pre-contractual communications and post-contractual conduct represents a departure from the long-standing position in England and Wales. In *Gibbons Holdings Ltd v. Wholesale Distributors Ltd*, the Supreme Court held that mutual conduct of parties after the formation of a contract could be used to construe the agreement.<sup>33</sup> In *Vector Gas Ltd v. Bay of Plenty Energy Ltd*,<sup>34</sup> the Supreme Court considered the extent to which preliminary negotiations could be used to aid the interpretation of a contract. The controversial decision, which resulted in four separate judgments, drew criticism for introducing undue uncertainty into contractual interpretation.<sup>35</sup> While the decision in *Firm PI 1 Ltd v. Zurich Australian Insurance* re-emphasises the focus that will be given to the

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28 *Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd* [1995] 1 AC 501.

29 Contract and Commercial Law Act 2017, Section 35.

30 *QBE Insurance (International) Ltd v. Wild South Holdings Ltd* [2014] NZCA 447, [2015] 2 NZLR 24 at [18].

31 *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffman.

32 *Firm PI 1 Ltd v. Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [63], [79]; *Zurich Australian Insurance v. Body Corporate 398983* [2013] NZCA 560, [2014] NZLR 289 at [35].

33 *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

34 *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

35 Jessica Palmer and Andrew Geddis 'What Was That Thing You Said? The NZ Supreme Court's Vexing Vector Gas Decision' (2012) 31 UQLJ 287 at 294.

express wording of the particular contract, the New Zealand courts retain a greater ability than their UK counterparts to take into account pre-contractual communications as an aid to interpretation.

### ***Intermediaries and the role of the broker***

#### *Agency/contracting*

Brokers generally act as agents of the insured. However, as a result of statutory reform in the Insurance Law Reform Act 1977, a person acting for the insurer during the negotiation stage within the scope of their actual or apparent authority remains an agent of the insurer throughout that process.<sup>36</sup> The insurer is subsequently deemed to be imputed with notice of all matters material to the contract of insurance known to this representative concerned in the negotiations before the insurance proposal is accepted.<sup>37</sup>

#### *Commissions*

Typically, a broker, who is the effective cause of placement of the risk, is entitled to remuneration on a commission basis. In practice, the amount of commission is typically agreed with the insurer (not the insured) and brokers deduct the commission from the amount of premium before passing it on to the insurer. In 2019, the government introduced the Financial Markets (Conduct of Financial Institutions) Amendment Bill. The Bill will allow the Governor-General to prescribe regulations relating to incentives (defined as including a commission, benefit, or other monetary or non-monetary incentive) and introduces an obligation on financial institutions and intermediaries to comply with any relevant incentives regulations. The content of these regulations is not yet known.

## **iv Claims**

### ***Notification***

Insurance policies in New Zealand commonly include express requirements for prompt notice of claims to be given to the insurer. However, where an insurance contract prescribes a time limit within which notice of any claim must be given, the time limit will only apply where the insurer has been prejudiced by the insured's delay (and will not be binding in respect of time limits for notification following death in life insurance policies).<sup>38</sup> Unless the policy provides otherwise, there is no particular form in which notice must be given.

### ***Good faith and claims***

An insured is under a general duty not to make fraudulent claims.

It is accepted that an insurer is under a duty to admit liability and to pay promptly, failing which there is a liability in damages for breach of an implied term of the contract to the extent that the delay is the fault of the insurer.<sup>39</sup> In *Young v. Tower Insurance Ltd*, the court confirmed that a duty of good faith on the part of the insurer is implied in every insurance

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36 Insurance Law Reform Act 1977, Section 10(1); see also *Nairn v. Royal Insurance Fire & General (New Zealand) Ltd* (1990) 6 ANZ Insurance Cases 60-010(HC).

37 Insurance Law Reform Act 1977, Section 10(2).

38 Insurance Law Reform Act 1977, Section 9.

39 *Dome v. State Insurance General Manager* (1987) 5 ANZ Insurance Cases 60-835; *Rout v. Southern Response Earthquake Services Ltd* [2013] NZHC 3262.

contract. While the court did not delineate the full scope and limits of that duty, at a bare minimum it requires the insurer to disclose all material information that the insurer knows or ought to have known and to act reasonably, fairly and transparently (in both cases, including the initial formation of the contract, and during and after the lodgement of a claim), and to process the claim in a reasonable time.<sup>40</sup>

## IV DISPUTE RESOLUTION

### i Jurisdiction, choice of law and arbitration clauses

Many insurance contracts contain express jurisdiction and choice of law clauses. Some insurance contracts also contain provisions requiring any disputes to be determined by arbitration rather than by the courts. These provisions in retail insurance contracts will not be binding on an insured under the Insurance Law Reform Act 1977, unless the parties have agreed to submit a dispute to arbitration after the dispute has arisen. As discussed in Section II.vii, dispute resolution schemes, such as the IFSO Scheme, are available for retail insurance clients where disputes are not resolved through the insurer's internal dispute resolution processes.

There are no specific limits on an arbitrator's jurisdiction. The district court has jurisdiction to hear civil claims where the quantum does not exceed NZ\$350,000. Claims that exceed NZ\$350,000 are heard in the High Court.

### ii Litigation

#### *Litigation stages*

Proceedings are usually commenced by the filing and service of a statement of claim and notice of proceeding (although other processes are also available, depending on the nature of the claim). Following the filing of pleadings, the parties are usually required to complete discovery. Written briefs of evidence will then be exchanged, before a hearing at which witnesses will give evidence (and be cross-examined) and legal argument will be presented.

An unsuccessful party may, subject to the rules applicable to the court, appeal a judgment to a higher court. In some cases, this will require obtaining leave of the court.

#### *Evidence*

In civil cases, evidence is often given by way of a signed written brief of evidence (which is either taken as read or forms the basis of the oral evidence given by the witness at trial). The opposing party will have an opportunity to cross-examine the witness.

A party to proceedings can call expert witnesses. Experts must adhere to a code of conduct and may be required to confer prior to the hearing.

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40 *Young v. Tower Insurance Limited* [2016] NZHC 2956, [2018] 2 NZLR 291.

### **Costs**

Generally, costs follow the event; that is, the unsuccessful party will be required to pay the costs of the successful party. Costs are often ordered on a 'scale' basis in accordance with applicable rates set out in the relevant rules of the court, although the court has the ability to award increased or indemnity costs in certain circumstances.

### **iii Arbitration**

#### ***Format of insurance arbitrations***

The Arbitration Act 1996 provides the framework for the arbitration of disputes held in New Zealand. Certain provisions of the Arbitration Act 1996 apply automatically to all arbitrations governed by the Act, whereas the application of other (more procedural) rules depends on whether the arbitration is a domestic or international arbitration and whether the parties have chosen to exclude or adopt those rules.

#### ***Procedure and evidence***

The Arbitration Act 1996 provides that parties are free to agree on the procedure of the arbitral tribunal. Failing such agreement, the tribunal has the power to conduct the proceedings in the manner considered appropriate.<sup>41</sup> Many arbitrations in New Zealand are run in a manner very similar to court proceedings.

If the place of arbitration is outside New Zealand, with an international arbitral institution, the independent rules that govern the proceedings of that institution will apply.<sup>42</sup>

### **Costs**

Under the Arbitration Act 1996, unless the parties agree otherwise, the costs and expenses of the arbitration can be fixed by the tribunal in its award. In the absence of an award on costs, each party will bear their own expenses and will share the cost of the arbitral tribunal in equal parts.

### **iv Alternative dispute resolution**

Mediation is a commonly utilised disputes resolution process in New Zealand whereby parties seek to resolve their dispute by agreement with the assistance of an independent facilitator. The District Court Rules 2014 also encourage parties to attempt to resolve disputes by agreement by utilising the judicial settlement conference process available through the courts.

## **V YEAR IN REVIEW**

The New Zealand insurance industry has been the subject of significant regulatory scrutiny and legislative change over the past 12 months in the wake of the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and the FMA's and RBNZ's joint review of conduct and culture within life insurers.

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41 Arbitration Act 1996, Schedule 1, Clause 19.

42 Arbitration Act 1996, Section 7.

The New Zealand government's response has been to signal that it will be 'fast-tracking' the incorporation of customer protections measures in the financial sector.<sup>43</sup> The proposed legislative reform includes the following.

**i Reform of insurance contract law**

In December 2019, MBIE released a report on the reform of insurance contract law which proposes the repeal and consolidation of New Zealand's existing insurance statutes (including the IIA, the Insurance Law Reform Acts of 1977 and 1985, the Life Insurance Act 1908, and Part 3 of the Law Reform Act 1936). One of the key proposals is the eradication of the pre-inception duty of disclosure on insureds and its replacement with a less onerous duty to answer questions truthfully and accurately.<sup>44</sup> The report proposed that requiring insureds to 'take reasonable care not to make a misrepresentation' was more appropriate than requiring insureds to ascertain what was 'material' to disclose. The report also proposes that insurers' remedies be proportionate to the nature of any non-disclosure, an approach currently adopted in the United Kingdom.

**ii Financial Markets (Conduct of Institutions) Amendment Bill**

Draft legislation (the Financial Markets (Conduct of Institutions) Amendment Bill) was introduced in late 2019 to provide for a new conduct regime for banks, insurers, non-bank insurers, non-bank deposit takers and their intermediaries. The Bill introduces a new licensing requirement for financial institutions that undertake services such as the provision of consumer credit contracts, credit-related insurance and 'consumer insurance contracts'. A fair conduct principle will be introduced, as well as new duties concerning the establishment, compliance with, publication and review of fair conduct programmes. Other notable inclusions are additional protections for whistle-blowers, and restrictions (to be elaborated on in regulations, yet to be published) relating to commissions and remuneration.

**iii Focus on solvency**

The recent Financial Stability Report released by the RBNZ in November 2019 highlighted that 'solvency ratios have declined for many life and general insurers, leaving insurers with low buffers over regulatory minimums, and further falls . . . likely for some life insurers due to recent falls in interest rates.'<sup>45</sup> This raises 'concerns about the ability of insurers to meet the minimum requirement in the event of an adverse shock or a major loss of event' and it is the view of the RBNZ that this, as well as declining long-term interest rates, are demanding stronger solvency standards to be introduced.<sup>46</sup>

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43 New Zealand Government 'Australian Royal Commission findings concerning, but NZ move to protect consumers already in train' (4 February 2019) <https://www.beehive.govt.nz/release/australian-royal-commission-findings-concerning-nz-moves-protect-consumers-already-train>.

44 Ministry of Business, Innovation and Employment 'Insurance Contract Law Reforms' (4 December 2019) at 4-5, 18-27.

45 Reserve Bank of New Zealand Financial Stability Report (November 2019) at 38.

46 At 39.

#### **iv Assignability of replacement benefits**

The Supreme Court has recently clarified the assignability of replacement benefits. In *Xu v. IAG*, the Supreme Court considered the effect of a purported assignment of an IAG ‘standard replacement policy’, which allowed the insured to elect between the recovery of ‘replacement benefits’ (in the event the insured elected to reinstate the property) or an indemnity payment (if they did not reinstate). In *Xu*, the original policyholders, the Bryants, had sold their earthquake-damaged property and assigned their insurance policy to the Xus. The Bryants had made a claim under the policy prior to assignment, but had not yet elected to reinstate. The Supreme Court considered whether, as assignees, the Xus could subsequently elect to reinstate the property and thereby claim replacement benefit cover. The majority ultimately found that they could not, as the right to replacement benefits was conditional on the original policyholder electing to reinstate the property. In principle, the Court accepted that an accrued right to payment under an insurance policy may be assigned. The Court considered, however, that the entitlement to replacement benefits is entirely contingent on reinstatement by the insured (and not their assignee). The Court’s reasoning largely derived from the judgment of Cooke P in *Bryant v. Primary Industries Insurance Co Ltd*, where His Honour found that the right to replacement was personal to the insured. The Supreme Court, in *Xu*, were dissuaded from departing from this decision, arguing that to abut from this principle would have a destabilising effect on the insurance industry, given *Bryant* was clearly ‘influential’ as to the terms on which insurers offered replacement insurance.

#### **v Focus on Wellington property insurance**

In 2019, the Wellington Insurance Taskforce, including expert advisers from the science, engineering, insurance, law, and academic fields, as well as apartment owners and property developers, was convened in response to growing anecdotal evidence about cost and availability of insurance for some in Wellington City. The Taskforce released a Discussion Document in November 2019<sup>47</sup> which recommended the establishment of an integrated Wellington Risk Leadership Group to lead a shift of focus to a holistic approach to risk management and resilience and oversee the design of an implementation plan.

## **VI OUTLOOK AND CONCLUSIONS**

The New Zealand insurance industry is currently in a state of significant change and reform. The proposed legislative changes in insurance regulation will require all industry participants to assess not only their statutory compliance programmes but, in many cases, also their business models and approach.

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<sup>47</sup> <https://wellington.govt.nz/-/media/your-council/news/files/2019/insurance-taskforce-recommendations.pdf?la=en>.

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