THE INSURANCE AND REINSURANCE LAW REVIEW

TENTH EDITION

Editor
Simon Cooper

THE LAWREVIEWS

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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 the contributors for their work in compiling this volume.

One of the defining features of 2021 was the covid-19 pandemic, which has inflicted terrible human misery around the world. The insurance industry, like most other aspects of the economy, has been badly impacted by the pandemic. Although the financial loss to the industry seems likely to be manageable, it has undoubtedly raised issues about the suitability of a range of policy wordings for the modern commercial environment, while also raising various legal issues related to, for example, causation and the quantification of loss. The different jurisdictions represented in this book will have different responses to these developments so it is vital to hear from the lawyers in each of those countries on the factors that will govern the international response.

The year 2021 was another very bad year for insured losses from natural catastrophes. Hurricane Ida was the largest single loss event but other extreme weather events including deep winter freezes, severe thunderstorms, floods and heatwaves had a significant impact. These losses reinforce the continuing concern that climate change will see a long-term increase in the number and severity of such losses. From a legal perspective, the changing nature of natural catastrophes will raise issues of policy construction in relation to, for example, aggregation clauses and the obligation on reinsurers to follow their insured's underlying settlements.

The past year also saw no respite in the number or scale of cyber events, including the data breaches at the Microsoft Exchange Server and ransomware attacks on organisations as diverse as Bombardier, Acer, JSB Foods and Kia Motors. The insurer Axa also suffered a major ransomware attack which, interestingly, came shortly after the company indicated it would be amending some of its policies to exclude cover for the payment of ransoms. 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. Aggregation will also be an area of uncertainty in relation to the treatment of all losses of this kind, and again different jurisdictions are likely to provide different responses.

Looking ahead, 2022 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. The current instability in international relations means there may also be an increased focus on issues such as the impact of sanctions on insurance recoveries and the scope of war exclusion clauses; for example, in relation to state involvement in cyber events.

I hope that you find this volume of use in seeking to understand today's legal challenges, and I would like to thank, once again, all the contributors.

Simon Cooper
Ince
London
April 2022

Chapter 24

NEW ZEALAND

Melissa Hammer[1]

I INTRODUCTION

The New Zealand insurance sector comprises a number of national and overseas insurers and includes some global reinsurers. Whilst the market is small by international standards, there are around 88 licensed insurers currently operating in New Zealand, accounting for approximately NZ$26 billion in assets.[2] The market also includes government-owned general insurers. General insurance makes up the majority of the market.

New Zealand's law relating to insurance contracts is sourced in case law and various pieces of legislation with development incremental and ongoing reform pending.

II REGULATION

i Insurance regulators

New Zealand insurers are subject to both prudential and conduct requirements. Together, the Reserve Bank of New Zealand (Reserve Bank), the Financial Markets Authority (FMA) and the Commerce Commission regulate parts of the insurance sector, but no regulator has full oversight of an insurer's conduct during the term of the policy.

The insurance sector in New Zealand is primarily governed by the Insurance (Prudential Supervision) Act 2010 (I(PS)A) and is regulated by the Reserve Bank.

The purpose of I(PS)A is to promote the maintenance of a sound and efficient insurance sector and public confidence in the insurance sector. I(PS)A applies to all persons carrying on insurance business in New Zealand. A person carries on insurance business if that person acts or has acted as an insurer in New Zealand or elsewhere and is liable under a contract of insurance to a New Zealand policyholder.[3]

I(PS)A establishes a licensing framework for insurers and imposes prudential requirements. It gives the Reserve Bank a supervisory role to ensure compliance with I(PS)A and powers to deal with insurers in financial distress and other difficulties. I(PS)A is also supplemented by regulations including the Insurance (Prudential Supervision) Regulations 2010.

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1 Melissa Hammer is a partner at Anderson Lloyd. She gratefully acknowledges the assistance and contributions of Laura Robinson and Emma McClean.

2 https://www.rbnz.govt.nz/financial-stability/overview-of-the-new-zealand-financial-system/insurance.

3 I(PS)A, Section 8.

Licenced insurers also need to adhere to a number of solvency standards issued by the Reserve Bank, including the minimum amount of capital an insurer must hold. Different standards apply depending on the type of insurance business.[4] There is a fixed capital amount under each solvency standard that must be maintained.

The FMA also monitors and regulates insurer conduct in New Zealand under the Financial Markets Conduct Act 2013 (FMCA). Insurers are required by the Financial Service Providers (Dispute Resolution and Registration) Act 2008 (FSPA) to register on the Financial Service Providers Register (FSPR) which is supervised by the FMA. The public can check the FSPR including the types of financial services an insurer is registered to provide.

Additionally, there are a number of other statutes that apply to an insurer including tax and accounting legislation with oversight from the Department of Inland Revenue,[5] consumer protection legislation with oversight by the Commerce Commission[6] and privacy legislation.[7] As a corporate entity, parts of an insurer's business are also subject to supervision by the Companies Office under the Companies Act 1993.

Particular state-owned insurers are regulated under the Accident Compensation Act 2001 (compulsory accident cover) and by the Earthquake Commission under the Earthquake Commission Act 1993.

In addition to government regulation, the Insurance Council of New Zealand (ICNZ) has a Fair Insurance Code that sets minimum standards for ICNZ's members in regard to their general responsibilities, claims handling and resolution of complaints. It requires its members to act ethically and to be financially sound. ICNZ represents the fire and general insurance industry and most major insurers are members of the ICNZ.

ii Requirements for authorisation under I(PS)A and FMCA

I(PS)A

I(PS)A provides that every person who carries on insurance business in New Zealand must hold a licence (including reinsurers).[8] As a result, non-admitted insurers cannot operate in New Zealand. It is an offence for a person to use a name or title containing restricted words such as 'insurance' and 'reinsurance' unless licensed or permitted.[9] However, there is some concern that there may be a growing non-licensed insurance sector. For example, a licence under I(PS)A is not required for insurance business written by foreign insurance firms that are not required to register as overseas companies under the Companies Act.[10]

I(PS)A sets out the process by which licence applications can be made to the Reserve Bank and the key requirements, including provision of a fit and proper policy. Essentially, an insurer must prove it has appropriate risk, governance and ownership arrangements. Specific requirements for licensing are set out in Section 19 of I(PS)A including requirements to hold a current financial strength rating, the ability to operate prudently and in accordance

4 See Solvency Standard for Life Insurance Business, Solvency Standard for Non-life Insurance Business, Solvency Standard for Captive Insurers Transacting Non-life Insurance Business, Solvency Standard for Non-life Insurance Business in Run-off, Solvency Standard for Variable Annuity Business.

5 Such as, Goods and Service Tax Act 1985, Income Tax Act 2007, Tax Administration Act 1994.

6 For example the Fair Trading Act 1986, the Consumers Guarantees Act 1993.

7 Privacy Act 2020.

8 I(PS)A, Section 15(1).

9 I(PS)A, Section 16.

10 Reserve Bank 'Insurance Policy Review: I(PS)A' (October 2020).

with regulations and the conditions of the licence, and to maintain the minimum amount of capital specified in the applicable solvency standard. An insurer must also have assessed the fitness and propriety of all directors and senior managers, including the appointed actuary.

The Reserve Bank keeps a public register of licensed insurers.[11]

A licence is valid until it is cancelled under Section 30 of I(PS)A. A licence may be cancelled where an insurer has asked for it be cancelled, an insurer has ceased to carry on insurance business, or an insurer has breached a condition of the licence.[12]

FMCA

The FMCA was amended in 2021 to include a new regime for the regulation of financial advisers. Under the FMCA, a 'financial advice product' includes a contract of insurance. An insurer giving financial advice therefore needs to be licensed as a 'financial advice provider' and is required to be registered on the FSPR.

The FMCA imposes a number of fair dealing and comprehensive disclosure obligations, including a prohibition on misleading and deceptive conduct in relation to the supply of insurance services. Financial advice providers must also comply with the Financial Advice Services Code of Conduct, give priority to the client's interests where conflict exists and exercise care, diligence and skill when giving advice.

iii Position of brokers and insurance intermediaries

Many people buy their insurance through an insurance broker. Brokers and insurance intermediaries are primarily regulated under the Insurance Intermediaries Act 1994 (IIA), FMCA and the FSPA and are supervised by the FMA. Licensing requirements and fair dealing and disclosure obligations under the FMCA also apply to brokers and insurance intermediaries.

The IIA regulates payments to insurance intermediaries and sets out the duties of a broker to the insured and the insurer, including in relation to premiums, as well as distribution in the event of insolvency. The IIA also shifts risk to the insurer and provides that a payment by an insured to an intermediary discharges the insured's liability to the insurer, but that a payment by an insurer to an intermediary does not discharge the insurer's liability to the insured.[13] It is not possible to contract out of the IIA.[14]

iv Regulation of individuals employed by insurers

Individuals employed by insurers are subject to some requirements under I(PS)A and can attract some personal liability. For example, directors must certify that any new director, the chief executive officer, chief financial officer and appointed actuary are fit and proper persons to hold their respective roles.[15] The Reserve Bank can also apply to the District Court to remove such persons if it has reasonable grounds to believe that person is not fit and proper.[16] Additionally, those employees providing financial advice are subject to regulation by the FMA under the FMCA and FSPA.

11 I(PS)A, Section 54A.
12 I(PS)A, Section 30.
13 IIA, Section 5.
14 IIA, Section 6.
15 I(PS)A, Section 37.
16 I(PS)A, Section 222.

v Compulsory insurance

New Zealand has a unique no fault accident compensation scheme for personal injury governed by the Accident Compensation Act 2001. This scheme is funded through levies and taxations and prohibits claims being brought for personal injury which are covered under the Accident Compensation Act. It is not therefore compulsory in New Zealand to have, for example, vehicle insurance or employer liability insurance.

Premiums are also paid by the insured through their insurer for cover under the Earthquake Commission Act 1993. This provides that where buildings and property are insured against fire, the property is also deemed to be insured against earthquake and other natural disasters.

In February 2021, the government released a discussion paper for consultation on a proposed social income insurance scheme, which has the support of Business New Zealand and the New Zealand Council of Trade Unions. It is anticipated there may therefore be reform in this area.

vi Compensation and dispute resolution regimes (within the financial services context)

Under the FSPA, insurers providing services to retail (not wholesale) clients must be members of an approved independent dispute resolution scheme. Currently there are four approved schemes (Banking Ombudsman, Insurance and Financial Services Ombudsman, Financial Services Complaints Limited and Financial Dispute Resolution Service). Consumers are required to take their complaint to the insurer and follow its internal dispute processes first prior to utilising the approved schemes.

vii Proposed changes to the regulatory system

The Reserve Bank is undertaking a review of I(PS)A and the solvency standards.[17] The purpose of the review is to assess I(PS)A's performance in light of its purposes to ensure that it provides for a cost-effective supervisory regime that promotes the soundness and efficiency of the insurance sector. The Reserve Bank is also assessing the consistency of the regime with international guidance and other legislation administered.

viii Other notable regulated aspects of the industry

I(PS)A does not provide express prohibitions on who can own or control an insurer. However, as part of the licensing process, the Reserve Bank must be satisfied that the insurer's ownership structure is appropriate having regard to the size and nature of the insurer's business including the type of insurance business and risks that are proposed to be insured.[18]

The Reserve Bank must also be notified before a change of control or structure[19] and it must be convinced that the matters in Section 19 of I(PS)A relating to the issuing of a licence are still satisfied. It is an offence to fail to comply with these provisions.

17 Reserve Bank 'Insurance Policy Review: I(PS)A' (October 2020).

18 I(PS)A, Section 19.

19 I(PS)A, Section 27.

III INSURANCE AND REINSURANCE LAW

i Sources of law

Insurance law is primarily governed by common law, more particularly the law of contract. Additionally, there are a number of insurance-related statutes that regulate insurance terms (excluding marine insurance which is governed by the Marine Insurance Act 1908). These include the Insurance Law Reform Act 1977, the Insurance Law Reform Act 1985, the Fair Trading Act 1986 and the Life Insurance Act 1908.[20]

The Insurance Law Reform Act 1977 primarily governs contracts of insurance, misstatements and breach of contract. The Insurance Law Reform Act 1985 removes the insurable interest requirement from policies and restricts the sale of life insurance to minors.

The Contract and Commercial Law Act 2017 (CCLA) is also applicable to insurance contracts, particularly for cancellation.

ii Making the contract

Essential ingredients of an insurance contract

An insurance contract, like any contract, is binding if it meets established contract law principles (i.e., that the terms are certain, there has been offer and acceptance, valid consideration and that the parties have intended to create legal relations). An insurance contract must contain an insuring clause and the property or liability insured must be defined.

I(PS)A 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 policy holder a sum of money or its equivalent, whether by indemnity of otherwise, on the happening of one or more uncertain events.[21]

In New Zealand, there is no particular legislation governing the form and content of an insurance policy, although in practice the contract is written and found in the policy schedule combined with the policy wording.

Common clauses include conditions relating to the scope of the indemnity, the policy period, the date at which the premium must be paid, the conduct of the insured during the policy and the claims procedure.

Some types of insurances are prohibited by legislation, such as an indemnity for a fine under the Health and Safety at Work Act 2015. The Companies Act also places restrictions on director and officer insurance.

Utmost good faith, disclosure and representations

Both the insurer and the insured have a duty of utmost good faith. This means the insured must disclose all material circumstances to the insurer and must not misrepresent any facts before contracting and during the life of the policy. In practice that requires an insured to disclose any material facts even if they go beyond particular questions asked by the insurer. Recently, the Court of Appeal has observed that there is not an implied term of good faith in every insurance contract which applies across the board to every aspect of the parties' dealings in connection with the contract, and rather that the obligations owed are context specific.[22]

20 See Section V for discussion on reform proposed in this area.

21 I(PS)A, Section 7.

22 *Southern Response v. Dodds* [2020] NZCA 395.

Failure to observe this duty gives the insurer the right to avoid the policy and refuse claims. However, the Insurance Law Reform Act 1977 prohibits an insurer's right to avoid a policy unless the disclosure was substantially incorrect and material (and for 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 Ministry of Business, Innovation and Employment (MBIE) is undertaking a review of insurance contract law (discussed below) and has proposed to reform this duty to require consumers to 'take reasonable care not to make a misrepresentation' (effectively to answer any questions asked by the insurer truthfully and accurately) and by requiring insurers to respond proportionately to any non-disclosure by policyholders.[23]

iii Interpreting the contract

General rules of interpretation

Insurance contracts are interpreted in accordance with general contract law principles. The Supreme Court in *Bathurst Resource Ltd v. L&M Coal Holdings Ltd*[24] has recently reviewed the position for contract interpretation in New Zealand and in particular the admissibility of pre-contractual communications and post-contract conduct.

Historically, contracts have been interpreted based on the contractual wording alone and pre-contractual negotiations have been excluded from the interpretation exercise. The New Zealand courts in more recent cases allowed pre-contractual negotiations and subsequent conduct to be used as an aid in interpretation where that evidence is objective, primary and relevant. However, there was no clear position after separate judgments were issued in the Supreme Court in *Vector Gas*.[25]

The Supreme Court in *Bathurst* clarified that the touchstone of admissibility is the Evidence Act 2006. Evidence will be relevant if it has a tendency to prove, or disprove, anything of consequence to determining the meaning the contractual document would convey to a reasonable person with all the background knowledge. Evidence of prior negotiations may therefore be admissible if it shows a common mutual understanding. Evidence of prior negotiations will not be admissible if it only shows a party's subjective intention or belief of the meaning of the words.

The threshold for admitting post-contract conduct is high and is unlikely to be admissible (and relevant). It will only be admissible if it proves anything relevant to the objective approach to interpretation.

Incorporation of contractual terms

Additionally, the Supreme Court in *Bathurst* clarified the legal position on the incorporation of contractual terms. Traditionally, New Zealand courts have applied the UK five-stage test in *BP Refinery*.[26] That test has since been overtaken in the UK by the new approach in *Belize*.[27] In response, New Zealand courts had typically applied a mixed approach.

23 MBIE Cabinet Paper 'Insurance Contract Law Reforms' (December 2019).

24 [2021] NZSC 85.

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

26 *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1977) 16 ALR 363; (1977) 52 ALJR 20.

27 *Attorney General of Belize v. Belize Telecom Ltd* [2009] UKPC 10.

The Supreme Court clarified that the five-stage test in *BP Refinery* continues to apply in New Zealand with a few additional qualifications. The key points emphasised by the Court include that the starting point is the words of the contract. An unexpressed term can only be implied if the term would spell out what the contract, read against the relevant background, must be understood to mean, and the inquiry is an objective one. The *BP Refinery* test is helpful to test whether the proposed term is strictly necessary.

iv Intermediaries and the role of the broker

Conduct rules

As noted above, intermediaries and brokers are primarily regulated under the IIA, FMCA and the FSPA.

Agency/contracting

The Insurance Law Reform Act 1977, Section 10, provides that a representative of the insurer acting within the scope of his or her authority is deemed at all times during the negotiations to be the agent of the insurer, and an insurer is deemed to have notice of all matters material to a contract of insurance known to the insurer's representative.

In practice, the broker is generally viewed as acting for the insured; however, usually the broker receives a commission from the insurer on the procurement of the insurance contract.

v Claims

Notification

The contract of insurance will set out in detail the claims procedure. In general, these terms usually require early notification of the occurrence or circumstance that may give rise to a claim against the insured. Where there is an express time limit for notification, Section 9 of the Insurance Law Reform Act 1977 provides that it will only apply when the insurer has been prejudiced by the insured's delay.

Unless set out in the policy, there is no particular form in which a claim must be made, although adequate details must be given and the insured's duty of good faith applies.

Good faith and claims

The Court of Appeal in *Taylor v. Asteron Life Limited*[28] recently considered the 'fraudulent claims' rule in New Zealand for the first time. High Court decisions had consistently applied a standard of dishonesty in making claims, not the more demanding standard of disclosure applying when entering the policy, and treated the rule as a manifestation of the wider principle of good faith. None of the High Court decisions had addressed the rule in the context of cancellation under the CCLA.

The Court followed the UK decision in *Versloot Dredging*[29] and held that the 'fraudulent claims' rule can, and should, be accommodated within the general principles of the law of contract and should be seen as a term implied by law in all insurance contracts to the effect

28 [2020] NZCA 354.

29 *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG* [2016] UKSC 45.

that the insured must act honestly in making a claim, and if the insured fails to do so and dishonestly makes a claim that is false in some material respect, the whole of the fraudulent claim will be disallowed. This implied term is subject to the express terms of the contract.

The Court also confirmed that the insurer's entitlement to cancel a policy is governed by the CCLA. Whether an insurer can cancel a policy therefore turns on the terms of the policy; whether the insured has breached the relevant terms; and whether that breach entitles the insurer to cancel. That will be the case if, and only if, the contract expressly provides the right to cancel or the test for cancellation in Section 37 of the CCLA is met (i.e., there must be breach of an essential term or the consequences of the breach are substantial).

Dispute resolution clauses

Some insurance contracts will prescribe how a dispute is to be determined (including good faith negotiation requirements or referral to arbitration or mediation). However, Section 8 of the Insurance Law Reform Act 1977 provides that arbitration clauses governed by that legislation are not binding on the insured.

IV DISPUTE RESOLUTION

i Jurisdiction and choice of law

It is common for insurance contracts to include an express jurisdiction and choice of law clause.

ii Litigation

Litigation stages and appeals

Once a claim is filed in court and served on the defendant, an exchange of pleadings takes place. Each case is then managed by the court under the relevant court's rules. Where a claim is defended then generally, subject to any interlocutory applications, discovery (the exchange of documents and evidence) takes place followed by the exchange of written briefs of evidence. A hearing will then be held where witnesses will usually give evidence and will be cross-examined and legal submissions will be filed or given to the court orally.

Any action tried in the High Court against an insurer must be before a judge without a jury. An unsuccessful party can appeal, which may require leave of the Court.

Evidence

Witness evidence is usually given by way of a signed brief of evidence that records the oral evidence to be given at trial. Evidence can also be filed in the form of written affidavits depending on the court procedure followed. The hearing will usually involve cross-examination of the witnesses. The rules of evidence are governed by the Evidence Act 2006 and the relevant rules of the court.

Costs

The court's rules govern the costs award and are usually at the discretion of the court. New Zealand operates a scale costs regime that is based on prescribed time allocations, daily rates and the complexity of the case. The presumption is that the unsuccessful party is required to

pay the costs of the successful party. However, parties have the ability to apply for increased indemnity or reduced costs awards. Costs are usually determined on the papers following written submissions.

iii Arbitration

Format of insurance arbitrations

There is no specialist legislation governing insurance arbitrations; the Arbitration Act 1996 applies. The Arbitration Act contains mandatory provisions regarding procedure which apply unless modified by the parties. The arbitrator must decide the dispute in accordance with the rules of law chosen by the parties as applicable and can only decide the dispute according to general considerations of justice and fairness if expressly authorised by the parties.

An appeal to the High Court is limited to questions of law and requires the consent of the parties or the leave of the Court.

Procedure and evidence

Arbitrations usually follow a similar procedure to court proceedings in which a claim is first filed followed by discovery or briefs of evidence and then a hearing with cross-examination. However, under the Arbitration Act the parties can agree on the procedure. Failing agreement, the arbitrator has the power to conduct the proceedings in the manner considered appropriate.[30]

Costs

Unless the parties agree otherwise, the Arbitration Act provides that the cost and expenses of the arbitration are fixed by the tribunal in its award or in the absence of an award, each party bears their own expenses and shares the cost of the arbitration in equal parts.[31]

iv Alternative dispute resolution

In New Zealand there are no insurance specific settlement procedures. However, parties (including insurers) commonly attend mediation, which can occur even where litigation has been commenced and at any stage. Mediation involves facilitation by an independent mediator and is often used, given the high cost of litigation. The procedure is at the discretion of the parties and the mediator.

The High Court will also undertake judicial settlement conferences in limited circumstances (such as where mediation cannot be afforded). In this forum, similar to a private mediation, a judge will act as a facilitator and the procedure is privileged.

V YEAR IN REVIEW

There have been a number of significant cases in the last year which continue to have ongoing implications for the insurance market, as well as pending reform. Insurance-related litigation has been impacted by the rise of class actions in New Zealand.

30 Schedule 1, Chapter 5.

31 Rule 6, Schedule 2.

The majority of outstanding claims from the 2010 and 2011 Canterbury earthquakes are now being processed by a specialist tribunal, the Canterbury Earthquakes Insurance Tribunal. However, insurers are also seeing new claims being litigated arising out of inadequate repairs to earthquake-damaged buildings.

i Insurance contract law reform

In addition to the review of I(PS)A discussed above, MBIE continues with its review of New Zealand's insurance contract law to ensure it is facilitating the insurance market to work well and to enable individuals and businesses to effectively protect themselves against risk.[32]

In November 2019, the government, after releasing papers for consultation, has agreed to reform insurance contract law in a number of ways including:

a placing the responsibility on insurers to ask consumers the right questions when processing new insurance policies, rather than leaving it to consumers to know what to tell their insurer;

b requiring insurance policies to be written and presented clearly so that consumers can easily understand them;

c ensuring insurers respond proportionately when consumers do not disclose something they should have or misrepresent themselves;

d strengthening protection for consumers against unfair terms in insurance contracts; and

e extending the FMA's powers to monitor and enforce compliance with new requirements.

The exposure draft bill was due for release and consultation in early 2022.

ii Recent cases

CBL Insurance Ltd (in liq) (CBL)

CBL was placed into liquidation in 2018 on the application of the Reserve Bank after concerns about imprudent management and regulatory breaches.

There are a number of proceedings related to the collapse of the company.

In a recent decision, *CBL Insurance Ltd (Liq) v. Harris*,[33] the liquidators of CBL brought proceedings against CBL's directors, seeking to recover losses. The liquidators also sought to recover NZ$278 million from CBL's appointed actuaries, PricewaterhouseCoopers (PwC), alleging that the actuaries had failed in their duties to CBL contributing to CBL's collapse.

Under I(PS)A, actuaries must be natural persons. However, CBL contracted with PwC rather than with the actuaries. The contract provided for a cap on liability and that only PwC could be sued – not PwC's employees. The liquidators sought to sue the actuaries personally. The Court held that the framework under I(PS)A does not provide for a private cause of action against actuaries and struck out the claim. It also upheld the cap on liability.

In December 2019, the FMA issued civil proceedings against CBL, its directors and its chief financial officer alleging multiple breaches of the FMCA and civil pecuniary penalties. The Serious Fraud Office has also laid criminal charges. Additionally, a class action is underway by the shareholders of CBL against its former directors and the company itself (including for breaches of the FMCA and FTA). These cases are all ongoing.

32 MBIE 'Insurance Contract Law Reform'.

33 [2021] NZHC 1393.

Misstatement and class actions: Southern Response Earthquake Services Ltd (Southern Response)

Southern Response (a government-owned insurer) was responsible for home insurance claims from the Canterbury earthquakes. It obtained two versions of a detailed repair analysis but did not disclose the full analysis when negotiating settlements of insurance claims. In most cases, the insured determined the costs of repairing or replacing the property based on the abridged analysis and settled with Southern Response accordingly.

The Court of Appeal in *Southern Response Earthquake Services Ltd v. Dodds*[34] upheld the High Court decision, which found that Southern Response is liable for misrepresentation pursuant to Section 35 of the CCLA and for misleading and deceptive conduct pursuant to Section 9 of the Fair Trading Act, which induced the claimants to settle their claim.

The Court awarded losses being the additional costs not disclosed but dismissed a claim for general damages as there was an insufficient causal link between the representations made and any inconvenience or stress suffered.

A class action was brought on behalf of all policyholders who settled with Southern Response based on the incomplete analysis (except those who elected to 'opt-out' of the proceeding) and who were now entitled to further compensation. As part of this claim, the Supreme Court recently revisited the question of whether representative claims are to be brought on an 'opt-out' or 'opt-in' basis. In *Southern Response Earthquake Services Ltd v. Ross*,[35] the Supreme Court found an opt-out order was appropriate.

This decision could expose insurers to significant liabilities in respect of class action claims. It is estimated that up to 3,000 homeowners may be entitled to further compensation following the Supreme Court's ruling. Since the Court ruling, a private settlement has been reached and leave to discontinue the class action has been granted, subject to conditions.

Aggregation clauses: IAG New Zealand Ltd v. Moore [2020] NZSC 122

This case considered the interpretation of an aggregation clause. The particular clause at issue was 'the most that we [IAG] pay for any loss (or any series of losses caused by one event) is the sum insured shown in the schedule'. The policy defined 'one event' as 'a single event or series of events which have the same cause'.

The clause was interpreted in accordance with ordinary contractual principles; however, the Court of Appeal disagreed with the High Court decision that each earthquake was a 'series of loss' caused by a 'series of events'. The Court of Appeal found that 'series of losses' indicates the losses are temporally proximate and 'linked in some way'. Similarly, the Court emphasised the requirement of a 'proximate temporal sequence' in determining whether there was a series of events. The Court found the earthquakes were quite separate events and the aggregation clause did not apply.

IAG was declined leave to appeal to the Supreme Court.

34 [2020] 3 NZLR 383.

35 [2020] NZSC 126.

VI OUTLOOK AND CONCLUSIONS

The insurance sector in New Zealand remains in a state of flux with significant regulatory reform pending. It is likely the covid-19 global pandemic will continue to cause delays in reform, and it has resulted in a backlog in the court system. The insurance industry continues to adapt to the challenges arising from the pandemic.

More broadly, the insurance sector faces similar challenges to those in the rest of the world, including digitisation (which has increased as a result of the pandemic and more businesses operating online and from home), cybercrime, climate change and frequent and more severe weather-related events. Climate risk is a real and credible threat to financial stability of the economy. Natural hazard claims combined with rising costs because of supply constraints and low investment returns present a challenge to insurer profitability, and are anticipated to put a strain on premiums and claims.

Appendix 1

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Melissa Hammer is a partner in the Anderson Lloyd Litigation Team. Melissa has broad expertise having worked as both a civil litigator and Crown prosecutor. She specialises in acting in civil disputes, in particular insurance, health and safety and professional indemnity claims, insolvency matters, contractual, property and equity related disputes as well as criminal and regulatory prosecutions. Melissa is an experienced advocate in the courtroom and has been recognised for her expertise in dispute resolution including being selected for the *NZ Lawyer Rising Stars* 2021 list. Prior to joining Anderson Lloyd, Melissa commenced her career as a judges' clerk in the Wellington High Court. She has also spent time working in a leading insurance litigation practice in Auckland.

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