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Insurance & Reinsurance 2022

New Zealand: Law and Practice
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NEW ZEALAND

Law and Practice

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1. BASIS OF INSURANCE AND REINSURANCE LAW

1.1 Sources of Insurance and Reinsurance Law

The sources of insurance law in New Zealand are primarily from the law of contract, as well as insurance principles at common law. There are some specific statutes that apply to particular types of insurance (for example, the Life Insurance Act 1908 and Marine Insurance Act 1908). Two other relevant statutes are the following.

- The Insurance Law Reform Act 1977 (ILRA) applies to contracts of insurance. In summary, it regulates misstatements, requires a link between a breach of policy terms and the loss before an insurer can rely on that breach, and that an insurer can only rely on a time limit for notifying a claim where the insurer has been prejudiced by the late notification.
- The Insurance Law Reform Act 1985 revoked the insurable interest requirement from policies, and regulates the sale of life insurance products to minors.

Reinsurance contracts are generally regulated by the common law.

2. REGULATION OF INSURANCE AND REINSURANCE

2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

Insurance and reinsurance activity in New Zealand is regulated both in terms of conduct and prudential requirements. New Zealand's Reserve Bank (RBNZ) regulates insurers and reinsurers carrying on insurance business in New Zealand. The Financial Markets Authority (FMA) monitors insurers in relation to the financial advice they

give and investment products they sell (including policies of insurance).

Conduct Requirements

Conduct requirements are prescribed by the Financial Advisers Act 2008, which regulates financial advisers providing financial advice relating to insurance policies.

Advisers are required to register on the Financial Service Providers Register (FSPR) (Financial Service Providers (Dispute Resolution and Registration) Act 2008). The FMA supervises the FSPR.

Insurers providing services to retail customers must be members of an approved dispute resolution scheme. This does not apply to reinsurers.

Life insurance policies must comply with the Financial Markets Conduct Act 2013 (policies sold after 1 December 2014).

Codes of conduct apply to most insurers. Almost all life insurers belong to the Financial Services Council, which has a Code of Conduct members must comply with. The Insurance Council of New Zealand (ICNZ), of which most major insurers are members, also has a Fair Insurance Code that requires its members to act ethically and to be financially sound.

Prudential Requirements

The Insurance (Prudential Supervision) Act 2010 (IPSA) sets the regulatory and prudential requirements framework for insurers carrying on business in New Zealand.

Under the IPSA, insurers and reinsurers are treated in the same way, with the regime applying to every "person" carrying on insurance business. A "person" includes a company or association of persons operating or formed in New Zealand. If the "person" meets the registration requirements

under the Companies Act 1993, they are also subject to the IPSA regime.

The “carrying on business” test is met if the person acts or has acted as an insurer in New Zealand or elsewhere, and the person must also be liable to a New Zealand policyholder under a contract of insurance.

General Regulation

Insurers carrying on business are also subject to corporate tax and company statutes, as well as consumer protection and anti-money laundering legislation, including as follows:

- the Companies Act 1993;
- the Consumer Guarantees Act 1993;
- the Fair Trading Act 1986;
- the Financial Reporting Act 2013;
- the Anti-Money Laundering and Counter Financing of Terrorism Act 2009;
- the Goods and Service Tax Act 1985;
- the Income Tax Act 1994;
- the Tax Administration Act 1994; and
- the Taxation Review Authorities Act 1994.

2.2 The Writing of Insurance and Reinsurance

The RBNZ licenses insurers and reinsurers, and applies the IPSA regime (see **2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance**).

A licence is required to carry on insurance business in New Zealand. There are no specifically different licensing requirements between the requirements for writing consumer insurance, SME insurance and corporate insurance.

The insurer must demonstrate to RBNZ that its governance processes and risk management processes are adequate, and that its directors and senior managers are fit and proper (including the appointed actuary).

The RBNZ can issue a licence subject to conditions.

The IPSA regime exempts overseas insurers from compliance with some provisions where its home jurisdiction imposes solvency and fit and proper requirements that are equivalent to those in New Zealand.

There is no distinction in the IPSA regime applying to the underwriting of excess layers or to reinsurance contracts.

2.3 The Taxation of Premium

General (Non-life) Insurers

Persons carrying on a general (non-life) insurance business in New Zealand are subject to income tax in the same manner as any other taxpayer in business, although specific rules apply to insurers in relation to timing and recognition of income.

General insurance and reinsurance premiums paid offshore to non-resident insurers, with no taxable presence in New Zealand, are taxable at 2.8% of the gross premium amount. Companies or persons paying a premium are treated as being the non-resident insurer’s agent and must obtain a separate Inland Revenue Department (IRD) number and account for the tax on the premium income.

Agency obligations also extend to other New Zealand residents – for example, brokers – who may initially collect premiums for payment to a non-resident insurer. If there is any default, the insured person is responsible for the tax.

The following insurers are required to register for and return goods and services tax (GST) at the rate of 15% on premiums charged to persons that are resident in New Zealand:

- general insurers that operate through a fixed establishment in New Zealand and enter into business-to-business and/or business-to-consumer insurance contracts; and
- non-resident general insurers that enter into business-to-consumer insurance contracts.

However, these insurers are able to recover as a credit the “tax fraction” (3/23) of any payments made for claims under those contracts of insurance.

No GST is payable by GST-registered general insurers on reinsurance premiums paid to non-resident reinsurers.

Life Insurers

Life insurance income is generally only taxable in New Zealand to the extent that policies are offered or entered into in New Zealand. The 2.8% of gross premium tax rules that apply to payments of premium to non-resident general insurers do not apply to payments of premium to non-resident life insurers.

Life insurance premiums are exempt from GST, and GST credits cannot be claimed in respect of payments made for claims under contracts for life insurance.

3. OVERSEAS FIRMS DOING BUSINESS IN THE JURISDICTION

3.1 Overseas-Based Insurers or Reinsurers

Overseas-based insurers and reinsurers are able to carry on business in New Zealand if they are licensed by the RBNZ (see **2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance** and **2.2 The Writing of Insurance and Reinsurance**). The RBNZ must be satisfied that the insurer’s ownership and gov-

ernance structures are appropriate for the size and nature of its business.

The RBNZ’s Governance Guidelines direct it to consider, as relevant, beneficial ownership of an insurer and whether the insurer is part of a group. The RBNZ can also consider the personal behaviour, business conduct and judgement of the individuals who ultimately own the insurance business (including syndicate leads).

Lloyd’s of London has a licence with the RBNZ that allows Lloyd’s members to carry on business in New Zealand. Lloyd’s members must comply with some aspects of the IPSA regime. However, the RBNZ has a wide power to exempt these underwriters from IPSA requirements.

3.2 Fronting

Fronting is not prohibited in New Zealand but is likely to be subject to scrutiny as part of the RBNZ licensing approval process.

4. TRANSACTION ACTIVITY

4.1 M&A Activities Relating to Insurance Companies

There was relatively little merger and acquisition activity relating to insurance companies in New Zealand in 2021.

5. DISTRIBUTION

5.1 Distribution of Insurance and Reinsurance Products

The distribution of insurance and reinsurance products in New Zealand depends largely on the type of insurance product.

Consumer insurance – including home and contents, motor, boat, health and life insurance – are

offered both through intermediaries and direct to the public.

Two unique forms of statutory insurance cover in New Zealand are as follows:

- natural disaster cover under the Earthquake Commission Act 1993, which provides cover for up to NZD150,000 plus GST, including for property damage caused by earthquake, landslide, volcanic eruption or tsunami; and
- personal injury cover under the Accident Compensation Act 2001, which also bars the bringing of legal proceedings for personal injury except in very limited circumstances.

Commercial insurance is heavily intermediated through larger broking houses.

Home and Contents

New Zealand home policies typically insure a property (and the contents within) for accidental loss or damage. These policies are typically written subject to sum-insured limits on floor area and special features following the Canterbury Earthquakes (the former practice was indemnity value). This product is sold both directly to the market by insurers, as well as through intermediaries and major domestic banks (but is underwritten by usual domestic insurers).

Health

New Zealand has a comprehensive public health system, but also a network of private healthcare providers. Policies offered typically provide cover for elective procedures that might otherwise require a lengthy wait for the same procedure in the public system.

Motor

Motor policies are offered for both domestic and business use. It is common for insurers to offer policies covering third-party liability, and optional fire, theft and windscreen replacement

protection, for a substantially reduced rate than comprehensive replacement insurance.

Life

Life policies – including death, trauma, permanent disability and income protection policies – are primarily offered direct to consumers and through a number of web-based product comparison providers.

Corporate

Many corporates in New Zealand avail themselves of various combined insurance products available from major insurers. These typically comprise broadform third-party cover, property damage, employer liability, directors and officers cover, and professional liability, as well as business interruption and contractors' works insurance. A unique feature of New Zealand policies is a no-fault statutory liability cover, which typically provides cover for legal liability for fines or penalties, the costs of defending a prosecution and/or for unintentional breaches of an act of Parliament (note that New Zealand's health and safety legislation, however, prohibits insuring against a fine).

6. MAKING AN INSURANCE CONTRACT

6.1 Obligations of the Insured and Insurer

Both an insurer and an insured owe each other a duty of utmost good faith.

The insured must disclose all material circumstances and not misrepresent facts to the insurer. This duty applies when entering into the insurance contract, as well as during the currency of the insurance policy.

Material circumstances are those a prudent insurer would take into account when calculating

the premium, providing terms and conditions to the particular insured or risk, or deciding whether to insure the risk.

The insurer also has an implied obligation to pay claims within a reasonable time of their being lodged. The insurer also must disclose all relevant documents to the insured that relate to the investigation of the claim by the insurer.

See **6.4 Legal Requirements and Distinguishing Features of an Insurance Contract** regarding the review of insurance contract law that has been signalled by the New Zealand government. The scope of the review includes the potential reform of disclosure obligations and narrowing the broad remedies available to an insurer for non-disclosure and misrepresentation (and on this point, see **6.2 Failure to Comply with Obligations of an Insurance Contract**). The review signalled by the government covers all forms of insurance.

6.2 Failure to Comply with Obligations of an Insurance Contract

An insurer may avoid an insurance contract ab initio if the insured does not disclose relevant information, or makes a material misrepresentation at policy inception or on renewal.

The ILRA regulates the types of misstatement that an insurer may rely on in avoiding life insurance and other insurance policies. Marine insurance policies are governed by similar principles to the ILRA under the Marine Insurance Act 1908 (MIA).

An insured may bring an action against the insurer for a breach of the duty of utmost good faith. This can arise from failures in claims handling processes.

The most typical form of redress for an insured where there is a failure to act in good faith is by

complaint to a dispute resolution service (see **6.6 Consumer Contracts or Reinsurance Contracts** and **9.7 Alternative Dispute Resolution**).

The dispute resolution service first investigates the complaint, and typically conciliates the issue. Other alternative dispute resolution methods are also used; for example, mediation. If there is no conciliated or mediated outcome, the dispute resolution service will issue a binding decision up to a certain limit.

6.3 Intermediary Involvement in an Insurance Contract

A broker typically acts on behalf of the insured; for example, at the time of obtaining cover and making a claim. However, at the time of negotiating an insurance contract, the broker may act on behalf of the insurer. In that case, its role as an agent of the insurer is to procure persons to insure with that insurer rather than any other.

Where acting for an insured, brokers have a general duty to exercise reasonable care and skill in all the circumstances, and to act as a reasonable and competent broker would in the insurance market at the same time. Brokers also have a number of other duties that apply at different times and are owed to different parties, including as follows:

- Where instructions are sent by email and are unconditional, the broker has a duty to act on those instructions and has no duty to confirm them or check that they have been duly received.
- The broker has a duty to procure insurance for the insured within a reasonable time.
- The broker must explain to the insured the scope of the cover provided in the insurance contract and whether this meets their requirements.
- While the broker must ensure the policy is reasonably fit for the insured's needs, it is not required to find the insured the cheap-

est insurance of its type in the market for the particular risks covered.

- Brokers also have duties in relation to disclosure. The broker must ask questions and obtain all material facts from the insured, but it also has an independent duty to the insurer to disclose to the insurer those material facts known to it (Marine Insurance Act 1908, Section 19).

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

A contract of insurance is defined as “a contract involving a transfer of risk and under which a person (insurer) agrees, in return for a premium, to pay to or for the account of another person (policyholder) a sum of money or its equivalent, whether by way of indemnity or otherwise, on the happening of one or more ‘uncertain events’” (Section 7(1) of the IPISA).

Contracts of reinsurance come within the definition of a contract of insurance.

An “uncertain event” means an event about which, from the policyholder’s perspective, there is an element of uncertainty as to when or whether it will take place, and that event is beyond the insurer’s control (Section 7(2) of the IPISA).

A contract of insurance is binding if it complies with the following general contractual principles:

- the parties intended to create legal relations;
- there was a valid offer and acceptance;
- the terms are certain; and
- each party provided consideration.

There are no prescribed legislative requirements as to the form and content of life insurance policies. In New Zealand, typical market practice is for the contract to be in writing. The policy can

only be mortgaged, transferred or assigned if it is in writing.

The requirement for an insurable interest in life insurance and indemnity policies was abolished in New Zealand in 1985 (under the Insurance Law Reform Act 1985).

6.5 Multiple Insured or Potential Beneficiaries

Third parties cannot generally make a claim under an insurance contract, in accordance with the privity of contract doctrine.

A third party can claim under a contract where the contract allows such a claim or confers a benefit on that third party (Contract and Commercial Law Act 2017, or the CCLA); typically, such third parties are named on the placing slip or policy schedule (or the terms of a policy may automatically extend cover to parties directly involved in the risk, such as on a contract works (all risks) policy). Many policies exclude the application of the privity provisions of the CCLA.

A third-party plaintiff can claim directly against the insurer of an insolvent insured defendant. An amount equal to the liability incurred by the insured to the third party crystallises as a charge on the insurance monies from the date of the event giving rise to the liability (Section 9 of the Law Reform Act 1936). A third party claiming in this manner requires the leave of the High Court to commence the claim.

6.6 Consumer Contracts or Reinsurance Contracts

Reinsurance

Reinsurance contracts are regulated in the same way as other contracts of insurance under the IPISA regime. The FMA regulates both insurance and reinsurance companies regarding financial advice they give, and certain investment products that they sell.

Consumer Contracts

Insurers are subject to the consumer protection provisions in the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 (FTA). The FTA prohibits unfair contract terms in standard-form consumer contracts.

Arbitration clauses in contracts for consumer insurance are not binding under the ILRA. It is more common for consumers to access the dispute resolution procedures required under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. This ensures that customers have access to a free dispute resolution service if they have a dispute with their insurer. Reinsurers are not required to register.

7. ALTERNATIVE RISK TRANSFER (ART)

7.1 ART Transactions

New Zealand insurers engage in conventional reinsurance rather than ART products and the regulator has yet to pronounce on whether ART would suffice to satisfy the reinsurance requirements demanded of insurers regulated in New Zealand.

In principle, however, New Zealand regulators can grant permission for an insurer to carry on insurance business if it is satisfied that the insurer has sufficient security to meet claims, even without reinsurance.

7.2 Foreign ART Transactions

See 7.1 ART Transactions.

8. INTERPRETING AN INSURANCE CONTRACT

8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence

A policy of insurance is a contract between the insurer and the insured, and it is subject to the same rules of interpretation that apply to any contract in New Zealand (see 1.1 Sources of Insurance and Reinsurance Law and 6.4 Legal Requirements and Distinguishing Features of an Insurance Contract).

As a general rule, New Zealand law excludes extrinsic evidence regarding the previous negotiations of the parties where an objective reading shows the parties intended the contract to bear a particular meaning. Words are to be given their ordinary and natural meaning and the policy should be treated as a whole. Other inadmissible evidence in the insurance context includes declarations of subjective intent and premium calculations used by the underwriters. Such evidence may, however, be relevant to the question of whether there was a misrepresentation or mistake vitiating the contract. Evidence relating to the content of earlier insurance contracts between the parties is admissible.

Most policies written in New Zealand will incorporate the insured's original proposal by reference.

8.2 Warranties

A warranty is a promise by the insured to do or not do some particular thing ("promissory warranty") or an undertaking by the insured that a particular fact does or does not exist ("affirmative warranty"). Warranties in an insurance contract do not need to be expressly described as such.

The formal requirements for the creation of a warranty are outlined in Section 36(2) of the Marine Insurance Act 1908, and the general principle is that a warranty is expected to be found on the face of the policy itself.

At common law, warranties had to be strictly complied with. If a warranty was breached, the risk was discharged automatically, and the insurer had the right to repudiate the contract from the time of the breach. The Contractual Remedies Act 1979 and the ILRA restrict an insurer's common law rights to repudiate a contract or deny liability under it for a breach of a warranty or a condition.

8.3 Conditions Precedent

A condition precedent may be created in a number of ways and does not need to be expressly described as such:

- the consequences of a breach of condition may be clearly prescribed;
- the condition may be expressly described as a “condition precedent”;
- the policy may contain a general clause that describes all conditions as conditions precedent; and
- it may be implied by the wording or the significance of the condition that it was intended to be a condition precedent.

These clauses are generally construed narrowly by the courts. The relevant act or omission must fall precisely within the language of the policy for there to be a breach. A breach of a condition precedent entitles the insurer to avoid liability under the policy altogether.

9. INSURANCE DISPUTES

9.1 Insurance Disputes over Coverage Coverage Disputes

Beyond the complaints procedures dealt with by the dispute resolution services (see **2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance** and **6.6 Consumer Contracts or Reinsurance Contracts** and **9.7 Alternative Dispute Resolution**), the civil courts of New Zealand will typically deal with insurance disputes as follows.

- The District Court has general civil and commercial jurisdiction to deal with insurance disputes of up to NZD350,000.
- The High Court typically deals with disputes with a value exceeding NZD350,000. Most commercial insurance disputes are dealt with in the High Court, which has a special “Earthquake list” court that operates and streamlines the hearing of the large volume of cases arising out of the Canterbury Earthquake sequence of 2010–11.
- The Canterbury Earthquakes Insurance Tribunal was established in 2019 and is an alternative resolution body for resolving disputes about earthquake insurance claims for physical loss or damage to residential buildings, property and land.

A judge alone hears insurance disputes in the New Zealand courts.

Limitation

A claim must be brought within six years of the act or omission on which the claim is based, with limited exceptions (including where the claimant has late knowledge).

Policies may include shorter limitation periods. Section 9 of the ILRA prevents an insurer from relying on such a limitation period unless the

insurer has suffered prejudice by reason of non-compliance.

Third Parties

See **6.5 Multiple Insured or Potential Beneficiaries**. Note that an insured has no direct claim against a reinsurer if the reinsurer refuses to pay, which is because the relationship between the insurer and the reinsurer is a contractual one and not one of assignment, agency or partnership.

9.2 Insurance Disputes over Jurisdiction and Choice of Law

Parties are generally free to choose the jurisdiction and choice of law, including as set out in an insurance contract.

In the absence of an express choice of jurisdiction clause, the courts take into account a wide range of (mainly practical) factors in determining jurisdiction, including:

- whether the parties, witnesses and evidence are located in New Zealand;
- what the governing law of the insurance contract is;
- what relief a New Zealand court could grant; and
- whether there are already overseas proceedings under way.

9.3 Litigation Process

Insurance litigation in New Zealand is typically conducted in the High Court (usually claims over NZD350,000). The District Court may also hear insurance disputes (for claims up to NZD350,000).

Most insurance litigation is resolved through private mediation before it gets to a full hearing in court. Alternatively, a judge may assist parties at a judicial settlement conference.

A typical commercial insurance case heard on the ordinary track in the High Court will take between two and three years from filing to get to a full hearing, assuming there are no significant interlocutory applications to be heard. Complex proceedings will take longer. There is a fast track available, but this is not regularly used.

A party generally has the right (without leave) to appeal to the Court of Appeal, and, in turn (but with leave), the Supreme Court. Appeals or applications for leave to appeal must generally be made within 20 working days of the decision being made.

9.4 The Enforcement of Judgments

New Zealand judgments are enforced through the civil courts. The most common form of enforcement against a domestic commercial party is liquidation.

Foreign judgments may be enforced in New Zealand, but require a judicial process in New Zealand first.

- Australian civil court judgments against someone in New Zealand may be registrable in New Zealand and enforced in New Zealand under the Trans-Tasman Proceedings Act 2010;
- New Zealand has reciprocal agreements with certain countries under the Reciprocal Enforcement of Judgments Act 1934, which allows judgments (from some common law countries) to be enforceable in New Zealand; and
- other judgments, such as those from the United States of America, may be enforceable at common law in New Zealand, but require proving in a New Zealand court first.

9.5 The Enforcement of Arbitration Clauses

Arbitration clauses in commercial insurance and reinsurance contracts are enforceable in New Zealand. Arbitration clauses are not binding in consumer insurance.

An arbitration agreement may be made orally or in writing. It is typically contained as a clause in a contract, or a separate agreement. There is no form of words specifically required under the Arbitration Act 1996 (the “Arbitration Act”).

In New Zealand, the courts generally endeavour to give effect to the intention of parties to refer disputes to arbitration. Courts will strive to give arbitration clauses a broad interpretation. This policy reflects the objective of the Arbitration Act 1996, which encourages the use of arbitration in New Zealand to resolve disputes.

Under the Arbitration Act, court intervention in the conduct of arbitration is limited. The High Court may intervene in the arbitration process to make interim orders where:

- the parties cannot agree on the appointment of an arbitrator;
- to determine the jurisdiction of the arbitral tribunal; and
- on questions of law on an appeal from an arbitral tribunal.

9.6 The Enforcement of Awards

Regardless of the country in which it was made, an arbitral award must be recognised as binding. On a written application to the District Court (for awards of less than NZD350,000) or the High Court (for awards of NZD350,000 or more), arbitral awards must be enforced by entry as a judgment in terms of the award, or by action (Arbitration Act 1996, Second Schedule, Article 35).

The District Court Rules 2014 and the High Court Rules 2016 outline the procedure for recognising and enforcing arbitral awards.

New Zealand is party to a number of international conventions, which are transposed into New Zealand’s Arbitration Act:

- The Geneva Convention on the Execution of Foreign Arbitral Awards (opened for signature at Geneva on 26 September 1927), implemented by the Arbitration Act (schedule 3).
- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted at New York by the United Nations Conference on International Commercial Arbitration on 10 June 1958) (the New York Convention), implemented by the Arbitration Act (schedule 3).
- The Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965). New Zealand became a signatory on 2 September 1970 and the statute implementing this Convention is the Arbitration (International Investment Disputes) Act 1979.

9.7 Alternative Dispute Resolution

Alternative dispute resolution plays a significant role in the resolution of commercial insurance disputes in New Zealand, in particular, mediation (see **9.3 Litigation Process**).

Consumer insurance disputes tend to be resolved by scheme dispute resolution providers. Insurers must have an internal dispute resolution process that must be followed first. If resolution is not achieved, a consumer may refer the complaint to the relevant dispute resolution scheme.

There are four approved schemes currently operating in New Zealand:

- The Banking Ombudsman.
- The Insurance and Financial Services Ombudsman (IFSO) – most insurers in New Zealand are members of this scheme. IFSO can make decisions on complaints that are binding only on insurers. IFSO typically confines any awards within policy terms. It has a limited discretion to award up to NZD3,000 for special inconvenience or cost to the customer.
- The Financial Dispute Resolution Service.
- Financial Services Complaints Limited.

9.8 Penalties for Late Payment of Claims

Insurers in New Zealand do not typically face punitive damages claims. It is possible for general damages to be awarded for the late payment of claims if insurers improperly delay settling claims, which would be at a nominal amount, but this is not typical.

9.9 Insurers' Rights of Subrogation

Insurers may exercise the rights of the insured in pursuing a third party for the insurer's loss in meeting the indemnity under its contract of insurance. There is no need to have a separate clause entitling subrogation, as this is an implied term in insurance contracts. However, the contract itself may also expressly state such a term.

10. INSURTECH

10.1 Insurtech Developments

Insurtech developments in New Zealand are limited to date. Some insurers have developed web-based apps for their clients to access, but which are typically only portals to access basic information and submit claims.

There are some recent notable insurtech product innovations.

- AIA Vitality is a health and well-being programme that AIA policyholders may subscribe to, and access via a smartphone app and connected devices (eg, a smartwatch). Greater participation in the programme generates policy benefits (including premium discounts) and other rewards to redeem at health and well-being retailers.
- Tower Insurance (Tower) has developed a smartphone app called "GoCarma", which monitors a driver's performance and uses averages to analyse those driving habits. Tower policyholders can be rewarded with discounts on excesses for safe driving habits. Tower states that scores using the app will not affect the premiums a person pays or any other conditions of policy cover.

10.2 Regulatory Response

The RBNZ does not have a formal position on insurtech issues. The products described in **10.1 Insurtech Developments** require compliance with privacy laws, which are regulated by the Privacy Commissioner.

11. EMERGING RISKS AND NEW PRODUCTS

11.1 Emerging Risks Affecting the Insurance Market

Cyber

Cyber-risks to institutions such as insurers are increasing. The RBNZ recently issued non-binding guidance in April 2021, intending to ensure insurers have a sound risk management and auditing framework in place to assess, monitor and respond to cyber-risks. The guidance intends to raise awareness among boards and senior management, and to promote accountability for managing cyber-risk within institutions (including insurers).

Environmental Liability

The New Zealand courts are taking a strict approach to environmental liability, particularly given how damaging the consequences of a pollution incident can be on the environment. Insurance providers in New Zealand are beginning to offer cover for environmental liability, which can include cover for risks such as bodily injury, property damage and/or environmental damage caused by sudden or gradual pollution incidents arising from the insured's property or that occur when the insured is providing services. These types of policies can also cover the cost of emergency response, where there is a legal obligation to contain and/or remediate environmental contamination.

Statutory Liability

A policy unique to New Zealand and Australia is cover for statutory liability. This policy provides cover for legal liability for fines, penalties or reparation, and for costs of defending a prosecution, for unintentional breaches of an act of Parliament. The theme in coverage and exclusion clauses is that strict liability offences are covered, as these offences require no intent or negligence to prove a contravention. Intentional and reckless behaviour is therefore specifically excluded, as is continuous offending. Liability under specific acts is also excluded, such as the Crimes Act 1961.

UAV Operators Liability

Rapidly emerging and developing technologies have demanded a new form of insurance for operators of unmanned aerial vehicles (UAVs) in New Zealand. Insurance providers are now offering tailored cover for these operators that address specific risks associated with this area of technology. For example, the policy may cover damage to the UAV itself (including the airframe, launch station and ground control system), third-party liability, statutory liability and potential risks in relation to privacy.

11.2 New Products or Alternative Solutions

The New Zealand market is responding to emerging risks by offering new products into the market such as cyber, environmental and UAV operator liability cover, as outlined in **11.1 Emerging Risks Affecting the Insurance Market**.

12. RECENT AND FORTHCOMING LEGAL DEVELOPMENTS

12.1 Developments Impacting on Insurers or Insurance Products

COVID-19 significantly slowed the operation of the courts in New Zealand in 2021 and is forecast to continue into 2022.

While the courts were considered an “essential service”, a typical insurance litigation claim was not considered as a priority proceeding. This has resulted in a substantial backlog of non-priority cases, though courts are steadily addressing this backlog.

COVID-19 has also caused delays in insurance law reform, as follows:

- The Financial Services Legislation Amendment Act 2019 (FSLAA) was passed in April 2019. The legislation imposed additional core duties on all financial advisers (including insurance brokers). These duties include putting the client's interests first, disclosing certain information to clients, and maintaining minimum standards of conduct and competence. FSLAA came into full force on 15 March 2021.
- Review of insurance contract law. The RBNZ, the insurance regulator, released terms of reference for a review back in March 2018. The issues for review were wide-ranging and

included reforms of disclosure obligations, and proposed removing the ability for insurers to exercise drastic remedies for non-disclosure and misrepresentation (including avoiding the contract). All forms of insurance are subject to the review. An exposure draft of proposed legislation is now expected to be issued for public consultation in late 2021.

- The Financial Markets (Conduct of Institutions) Amendment Bill was introduced to Parliament on 11 December 2019 and had its first reading on 12 February 2020. The Financial Markets Conduct Act 2013 is amended by the Bill. Its provisions will require certain financial institutions (including insurers) and their intermediaries (for example, brokers) to comply with a principle of fair conduct and associated duties and regulations. Progress of the legislation through Parliament was slowed in 2021, due to the impact of COVID-19. The Bill was referred to the Parliamentary Finance and Expenditure Committee, which issued its final report on 7 August 2020. It is still progressing through Parliament.

- The RBNZ has been undertaking a review of the IPISA since April 2016. The review was relaunched in October 2020 and is reviewing the supervisory regime to ensure it remains cost effective, risk-based and promotes the soundness and efficiency of the sector. It is expected to take two to three years. The RBNZ is consulting on the following:

- (a) Scope of the legislation – the organisations and products that are captured; whether definitions of “insurance” and “carrying on business” are workable or need modification.
- (b) Overseas insurers – is the supervision regime for overseas insurers effective and

are any changes required?

- (c) Statutory funds – are current mechanisms for statutory funds effective and appropriate?
- (d) Solvency regime – how the provisions for solvency standards and requirements operate and whether they support good regulation and supervision. Whether the definitions in IPISA require reform or updating.

In addition, at the start of December 2020, the New Zealand Law Commission released an issues paper asking whether New Zealand should have class actions and litigation funding, and, if so, how these should be regulated. New Zealand does not currently have legislation that provides a framework for class actions or commercial litigation funding. In the absence of formal frameworks, the courts and opposing parties have sought to navigate these two issues and establish rules for much of the past decade, particularly on claims against companies and directors following the Global Financial Crisis. A further consultation paper was released on 30 September, and submissions closed on 12 November 2021. The Law Commission is currently considering those submissions and will then work to develop recommendations and report to government. The Commission’s final report on class actions and litigation funding is due in May 2022.

13. OTHER DEVELOPMENTS IN INSURANCE LAW

13.1 Additional Market Developments

See **12.1 Developments Impacting on Insurers or Insurance Products.**

Duncan Cotterill is one of the longest-established law firms in New Zealand and is consistently ranked as one of New Zealand's top ten law firms. It is a full-service firm with specialist teams for corporate and commercial, property, construction, health and safety, tax, employ-

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