**Insurance Law Reform in New Zealand**

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**Background to insurance law in New Zealand**

As a common law jurisdiction, New Zealand adopted the Marine Insurance Act 1906 (UK) as the Marine Insurance Act 1908 (NZ) (“MIA 1908”), with one important but unexplained alteration, namely the omission of the utmost good faith principle in s 17 of the 1906 Act. As will be seen, that has not proved to be significant. For some 70 years thereafter the New Zealand courts applied the much same substantive law principles to insurance contracts as those adopted by the English courts.

Three important variations may be noted. First, the principle in the UK’s Third Parties (Rights against Insurers) Act 1930, conferring a right to enforce a judgment against an insolvent assured against the assured’s liability insurers, was implemented in an entirely different form by s 9 of the Law Reform Act 1936, in the form of a statutory charge on the insurance proceeds.[[1]](#footnote-1) Secondly, the Earthquake and War Damage Act 1944 addressed the problem of the uninsurability of loss caused by New Zealand’s all too frequent natural catastrophes, by establishing a scheme whereby primary layer insurance was offered by the state, funded by a levy on insurance premiums, for damage to dwellings. This was extended by the Earthquake Commission Act 1993 and again by the Natural Hazards Act 2023 where the amount of cover was raised to $300,000.[[2]](#footnote-2) Thirdly, the Accidents Compensation Act 1972 took the dramatic step of all but eliminating claims for damages for personal injury and replacing them with no-fault compensation payments for all injuries whatever the cause: that measure has led to New Zealand being unique in not imposing compulsory liability insurance for the use of motor vehicles.

The basic consensus between the UK and NZ in the development of the substantive rules of insurance law was shattered by the NZ Insurance Law Reform Act 1977 (“ILRA 1977”). This was the result of the brief report of the Contracts and Commercial Law Reform Committee, *Aspects of Insurance Law,* published in July 1975. This drew attention to some of the less satisfactory aspects of insurance law and was implemented by ILRA 1977 with little discussion or opposition. A series of important changes were made. First, as regards misrepresentation, a distinction was drawn in ss 4-7 between life and non-life policies, the former becoming incontestable after three years in the absence of fraud. Secondly, s 8 banned the use of arbitration in non-trade insurances.[[3]](#footnote-3) Thirdly, s 9 prevented reliance by insurers on contractual time limits for notification of claims and losses unless prejudice could be established. Fourthly, for the purposes of the presentation of the risk, by s 10 insurers were deemed to know any facts in the possession of any agent remunerated by the insurer, a provision intended to catch the vast majority of brokers who were paid by agreed commission deductions from gross premiums. Finally, s 11 removed the right of insurers to rely upon breaches of risk conditions unless the breach was causally connected to the loss. All of this overrode the MIA 1909, thereby rendering warranties all but unenforceable and reversing the established s 19 principle in the 1909 Act that a broker’s knowledge is imputed to the assured rather than to the insurers.

Two other pieces of NZ legislation have impacted on insurance. The Contractual Remedies Act 1979 – now re-enacted in the Contract and Commercial Law Act 2017 (“CCLA 2017”) – completely altered the law on misrepresentation (although not non-disclosure) by replacing avoidance with cancellation, thereby creating an uneasy tension between MIA 1908, ILRA 1977 and CCLA 2017 on the remedies in insurance cases. The Insurance Law Reform Act 1985 (“ILRA 1985”) repealed the requirement for insurable interest in non-marine contracts (ss 6-9); resolved the problem of risk passing before ownership in the sale of buildings by transferring the vendor’s policy to the purchaser (ss 13-14); and banned average clauses in policies on dwellings (s 15).

**The reform process**

Further reform of insurance law ceased to be a legislative priority after 1985. In 1998 the New Zealand Law Commission published in its 1998 Report on *Some Insurance Law Problems*,[[4]](#footnote-4) suggesting some minor tweaks to the regime, but no action was taken. What proved to be the catalyst was the earthquake sequence in Christchurch, a series of four devastating events between September 2010 and June 2011, generating at least 500,000 claims for property damage and business interruption. Policyholders and insurers were faced with a lethal cocktail of problems: many people were underinsured; policies had not contemplated sequential damage of the type that occurred;[[5]](#footnote-5) many properties were deemed to be too dangerous to inhabit, leaving assureds with no claim unless there was actual damage;[[6]](#footnote-6) claims handlers acting for both insurers and assureds were overwhelmed; and the insurance market and the Earthquake Commission, which at the time carried first layer losses of $100,000 for dwellings and $20,000 for possessions, proved unable to work together in handling the many claims to which both were required to respond. There were massive delays in processing, policyholders facing homelessness felt pressured to accept whatever was offered to them and repair work was often carried out in a shoddy fashion leading to a further wave of demands on insurers to put matters right.[[7]](#footnote-7)

All of this led to numerous and vociferous media and other protests against the insurance industry, including at least one instance of picketing of the premises of Southern Response, which had picked up many claims as state-owned successor in title to an insolvent insurer AMI. The Government took the view that the way to satisfy demand was legislation. There was a convenient “oven-ready” solution. The English and Scottish Law Commissions had embarked on consultation for reform of insurance law in 2005, and by 2016 four measures had been passed: the Third Parties (Rights against Insurers) Act 2010;[[8]](#footnote-8) the Consumer Insurance (Disclosure and Representations) Act 2012 (“CIDRA 2012”); the Insurance Act 2015 (“IA 2015”); and the Enterprise Act 2016. As is well known, these measures recast the law on claims against the liability insurers of insolvent assureds; abolished the duty of disclosure for consumers; adopted a “fair presentation of the risk” regime for non-consumers; mitigated the effects of warranties; limited reliance by insurers on breach of a condition irrelevant to the loss; created a new stand-alone principle of utmost good faith; allowed the award of damages for late payment; and reclassified fraudulent claims in a contractual context.

In NZ some of this was already in place – and indeed, more favourably to assured than the UK measures – under ILRAs 1977 and 1985. Other matters, such as utmost good faith and late payment damages, had been addressed by the Courts in extensive earthquake litigation.[[9]](#footnote-9) A consultation by the Ministry of Business, Innovation and Employment was launched in February 2018, and a draft Bill was rapidly promulgated. This repealed all of the earlier legislation, codified the key provisions of the ILRA 1977 and ILRA 1985 and adopted key elements of the UK’s CIDRA 2012 and IA 2015 by disposing of a number of sections of MIA 1908. With beautiful but familiar irony, absolutely nothing in the Bill touched upon the actual complaints of Christchurch policyholders. That was left to two quite separate moves: a resetting of relations between the insurance market and Earthquake Commission (now the Toka Tū Ake – Natural Hazards Commission), culminating in the Natural Hazards Act 2023 one key effect of which is to allow claims to be handled on behalf of what is now the Natural Hazards Commission by private insurers; and the passing of the Canterbury Earthquakes Insurance Tribunal Act 2019, which moved the many outstanding earthquake claims out of the courts and into a speedier dispute resolution process.

The consumer lobby was delighted by the Bill, the insurance market hated it. Intense consultation followed, albeit hampered by COVID-19, and by September 2023 the Ministry of Business, Innovation and Employment (“MBIE”) had its Contracts of Insurance Bill ready to go. At that point a general election was called, and the ruling Labour Party lost its majority, to be replaced by a Centre Right coalition. The fate of the Bill was uncertain until, by fortuity, Dr Duncan Webb MP, the minister in the Labour government latterly responsible for the MBIE Bill and by background an insurance law academic, won the backbench ballot for private member’s bills. He immediately put forward the MBIE Bill but with a few tweaks to make it more consumer-friendly. The Government responded on 2 May 2024 by putting forward its own Bill, for the most part the MBIE Bill stripped of Dr Webb’s modifications and referred the Bill to the Finance and Expenditure Committee (“FEC”). That body received oral and written evidence, and reported back to Parliament on 3 September 2024, recommending a number of changes. All of those recommendations were accepted and the legislation – now split into two Bills – skated through the remaining Parliamentary stages and passed on 14 November 2024.

The remainder of this article considers the substantive provisions of the Contracts of Insurance Act 2024 (“COIA 2024”) and the Contracts of Insurance (Repeals and Amendments) Act 2024 (“RAA 2024”). As a general statement pre-empting detailed discussion, there is much in the NZ legislation to be envied in the UK.

**Scope of the legislation: reinsurance**

COIA applies to “contracts of insurance”, defined by s 6 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 1 or more uncertain events.” As in the UK there are various exceptions, including various banking transactions and roadside assistance.

There is one significant scoping difference. The UK decided that reinsurance should be included in the reform legislation, although chose to make that point not by saying so but rather by an oblique reference tucked away in the IA 2015, s 4(5) disclosure provisions. The FEC was persuaded to exclude reinsurance by reason of representations arguing that most of the business was written overseas by non-NZ reinsurers. This seems to have been a serious error for cases where both the insurance and reinsurance are governed by NZ law as set out in COIA 2024. No thought was given to the consequences of the exclusion:

1. Under COIA 20124 insurers are liable for damages for late payment whereas reinsurers are not, even if the delay in paying the assured is attributable to reinsurance disputes.
2. Insurers are unable to rely upon late notification of losses or breaches of policy terms unrelated to the loss, whereas reinsurers are free to do so. That can give rise to a situation at first sight analogous to *Forsikringsaktieselskapet Vesta v Butcher*,[[10]](#footnote-10) where House of Lords took liberties with conflict of laws rules to hold that a reinsurance agreement governed by English law should be construed in the same way as the underlying insurance governed by Norwegian law in order to prevent the reinsurers from relying on defences open under English law but not under Norwegian law. The NZ problem is that both contracts are governed by the same law, which specifically excludes reinsurance. It would take some stretch to extend *Vesta* to such a case.
3. RAA 2024 repeals the disclosure and misrepresentation provisions of MIA 1908, which were previously held (at least in England under the equivalent UK MIA 1906 provisions) to be applicable to reinsurance. The effect of excluding reinsurance from the replacement measure, COIA 2024, means that there is no longer any statute in NZ governing disclosure duties in reinsurance cases. The common law does not help, because that was replaced by MIA 1908 and does not revive on the repeal of MIA 1908. Arguably, therefore, there is no long a duty of disclosure at all for reinsurance. There are misrepresentation rules, in CCA 2017, but they are entirely at odds with established law principles.

**Contracting out**

COIA 2024, s 166 does not permit contracting out in all cases, consumer or otherwise. That creates an interesting contrast with IA 2015, ss 16 and 17 of which do permit contracting out in most commercial cases subject to transparency requirements. Indirect contracting out for consumers by choice of a law which would not under NZ laws have otherwise been applicable, is banned by s 7, although it is permissible in non-consumer contracts.

**Presentation of the risk**

As far as consumers are concerned, COIA 2024 has closely followed the approach in the UK in CIDRA 2012, although there are some differences. CIDRA 2012, s 1, defines a consumer as “an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession.” By contrast, COIA 2024, s 10 refers not to a consumer but rather to a consumer insurance contract, defined as “a contract of insurance ordinarily entered into by a policyholder wholly or predominantly for personal, domestic, or household purposes.” The focus on the policy rather than the policyholder is intended to make the inquiry objective rather than dependent upon the assured’s intentions.

COIA 2024, ss 12-16 are drafted in somewhat different terms from CIDRA 2012, but the essence is the same. There is no duty of disclosure and instead a duty on the consumer to take reasonable care not to make a misrepresentation, with dishonesty to be taken as showing lack of reasonable care. There was some discussion in FEC as to whether the test should be fraud rather than dishonesty, on the basis that dishonesty did not necessarily imply an intention to make a gain at the insurers’ expense and so was too wide: that view was ultimately rejected in favour of the UK approach. The list of matters that may be taken into account is much the same in both jurisdictions, although COIA 2024, borrowing from s 27 of the Insurance Contracts Act 1984 (Cth)[[11]](#footnote-11), includes as a criterion “if the policyholder failed to answer a question or gave an obviously incomplete or irrelevant answer to a question, what steps the insurer took in response to that failure or answer”, thereby reversing the common law rule that silence means “no” and casting on the insurers the onus of following up an unsatisfactory answer.

There are some significant variations to remedies set out in COIA 2024, schedule 1, some more and some less generous to the assured than the position in the UK. In the case of deliberate or reckless breach, CIDRA 2012 allows the insurer both to avoid and also to retain the premiums “to the extent (if any) that it would be unfair to the consumer to retain them.” COIA 2024 has no such restriction on retention of premiums. If there is no deliberate or reckless breach but the policy would not have been entered into on any terms, both jurisdictions allow avoidance and retention of premiums by the insurer, but in COIA 2024 the pre-existing carve-out for life policies is retained: no avoidance is possible after three years following the misrepresentation. This gives effect to incontestability clauses commonly found in life policies. Finally, if the premium would have been increased, the UK allows a proportionate reduction in the amount of recovery based on the ratio between premium paid against the premium that would have been paid. In so providing, the alternative suggestion that the insurer should simply be entitled to the increased premium was rejected even though it was fully consistent with the principle that matters should be treated as if the breach of duty had not occurred. The English and Scottish Law Commissions took the view that some additional sanction should be imposed. The same arguments were put to MBIE in the consultation process, but it was ultimately decided by the NZ Government that the insurer should be allowed both to demand the correct premium for the remainder of the contract period and to reduce the amount of the claim proportionately. This seems unduly harsh.

As far as non-consumers are concerned, the UK and NZ provisions on the duty of fair presentation in non-consumer cases are – subject to the question of intermediaries discussed below – all but identical other than for slight drafting variations. The relevant provisions are found in ss 28-51 of, and schedule 1 to, COIA 2024. The principles are familiar. The duty of fair presentation encompasses duties to disclose and not to misrepresent, the assured is required to undertake a reasonable search in order to ascertain material facts and remedies for breach are proportional.

Life policies and group life policies are again treated in the same way in both jurisdictions. Under COIA 2024, s 17, where a policyholder insures the life of another, the duties relate to the knowledge of the life assured. Under COIA 2024, ss 18-21, group policies are treated as composite: duties are owed by the policyholder itself (typically an employer), but information has to be provided by each beneficiary and a breach of duty by a beneficiary affects their rights but not the rights of others. The only difference between the jurisdictions is that in NZ health insurance has been added to the life regime: it was pointed out to FEC that health policies may take the same form as life policies and should be treated in the same way.

In both jurisdictions there is a prohibition on pre-contractual representations being converted into warranties, so that any statement made by the assured in the application process has to be judged by reference to the statutory criteria for presentation of the risk rather than being treated as an unconditional promise of truth.[[12]](#footnote-12)

**Genetic testing**

There is no legislation in the UK on the role of genetic testing in life insurance; instead the matter is governed by a Code on Genetic Testing and Insurance agreed between the Government and the Association of British Insurers and operative since 2018. The Code is voluntary, reviewed annually and binds only ABI members. In outline, the Code precludes insurers from demanding a genetic test and, if there has been a test, not to ask for or take into account the results of any test other than for Huntingdon’s Disease for policies in excess of £500,000.

The initial drafts of the NZ legislation made no reference to the point, and it was first raised before FEC, where fears were expressed that assureds were unwilling to undertake testing for genetic disease because the results would then be disclosable to insurers with the result that insurance might be impossible to obtain for some groups. That aside, there was the question whether members of particular risk groups could be forced to undertake genetic testing as a condition of acceptance. Noting that insurers were precluded from asking for, or relying upon the results of, genetic tests, in Canada and – shortly – in Australia, a debate emerged as to the attitude that should be taken in NZ. The opposition parties pressed for an outright ban. Ultimately, however, FEC recommended by a majority that a wait and see approach should be adopted.

That policy is enshrined in ss 83-85 of COIA 2024. This empowers the Governor General, on the recommendation of the relevant Minister, to make regulations for prohibiting or regulating the conduct of insurers in connection with genetic testing. It is uncertain at this stage exactly what the regulations will stipulate, but there is power to ban any requirement for genetic testing and any reliance on the results of genetic testing.

**The role of intermediaries**

The notion established in ILRA 1977, s 10, that an insurance intermediary paid by the insurers should be treated as the agent of the insurers for the purposes of the presentation of the risk, was a reversal of the common law. Section 10 was prompted by a series of cases exemplified by *Newsholme Brothers v Road Transport & General Insurance Co Ltd*,[[13]](#footnote-13) where a commission agent employed by the insurer was made aware of material facts when visiting the assured but failed to pass them on to the insurers but the agent’s knowledge was not imputed to the insurers. Section 10 treated the knowledge as that of the insurer. The section was deliberately drafted to catch any intermediary who was remunerated by the assured, and that necessarily caught the vast majority of insurance brokers whose payment by deduction of commission from net premium is deemed by the common law to be provided by the insurer rather than the assured.[[14]](#footnote-14) The rather unsatisfactory position in NZ from 1977 onwards that ILRA 1977 imputed the knowledge of the broker to insurers, whereas s 19 of the MIA 1908 – which remained on the statute book despite the 1908 Act being subject to the 1977 Act – imposed a duty of disclosure on brokers.

It was determined by MBIE from the outset of the reform process that the effect of ILRA 1977, s 10, would be retained within the regime for consumer and non-consumer presentation of the risk. This was not a problem in consumer cases. The use of intermediaries in consumer cases is now a rarity. The only duty on a consumer is to avoid misrepresentation rather than to disclose, so the only situation in which the interposition of a broker can matter is where the assured has made true statements to the intermediary but they have been falsified when passed to the insurers. CIDRA 2012 makes no provision for that possibility, although the use of an intermediary is one of the factors to be taken into account in determining whether the assured has acted reasonably. Section 16 of COIA 2024 attempts to deal with this issue by stating that any representation made by the assured to a “specified intermediary”, namely, any person paid by the insurer, including a broker, is treated as having been received by the insurer. The insurer is protected by s 62(1)-(2), which imposes a duty on the broker to pass on any representation by a consumer, failing which the insurer may claim compensation from the broker for any loss under s 64 although is immune from proceedings by the assured under s 62(3). This is well-intentioned but highly problematic. It means that a false statement made by the assured to the broker but which the broker knows to be false and is therefore not passed on, is deemed by s 16 to have been received by the insurer. The broker is in breach of duty to the insurer under s 62 for not passing it on, but if the false statement is passed on then the broker would surely be in breach of its duty to the assured in presenting a risk that is tainted and potentially voidable. Section 63(3) suggests that the insurer is immune from proceedings for fulfilling the statutory duty to pass on information, but that surely cannot be the case if the broker knows the information to be false. That aside, no insurer is going to initiate proceedings against a broker in a market where insurers rely upon brokers for business. It might have been better to omit s 16 and to leave the matter to the good sense of the courts.

The position as regards non-consumer insurance is much the same, albeit modified to include the additional disclosure requirement. IA 2015, s 4, visits upon the assured the knowledge of any individual who is part of the assured’s senior management or responsible for the assured’s insurance. The latter concept encompasses any individual who participates on behalf of the assured whether as employee or agent: brokers are squarely within this definition. Sections 36 and 38 of the COIA 2024 are in the same terms, so that at first sight the knowledge of a broker is imputed to the assured. However, that is negatived by s 42, which deems an insurer to know facts known to a “specified intermediary”. That means that if the broker is aware of material facts not known to the assured or has been informed of material facts but has not passed them on to the insurers, those facts are known to the insurer and therefore are excluded from the duty of fair presentation. The remedy for the insurers is set out in s 63, which imposes a duty on the broker to the insurer to take reasonable steps to disclose every material circumstance in its possession to the insurer, failing which the court may order compensation against the broker in favour of the insurer under s 64. An insurer suing a broker for loss sustained under a consumer policy is unlikely enough, but an action in the context of a commercial policy would be – unless one or other party was insolvent – all but unthinkable.

**Utmost good faith**

It was noted above that NZ MIA 1908 studiously omitted any reference to a general duty of utmost good faith. The UK MIA 1906, s 17, did provide a contract of marine insurance is one of the utmost good faith, but did so in terms which on the face of things confined the duty to presentation of the risk and set out the sole remedy of avoidance which is plainly only appropriate for a pre-contractual breach. Readers will be familiar with the hoops through which the English courts jumped to try to establish a pre-contractual duty of utmost good faith on insurers (given that the last thing that the assured would want to do is to avoid the policy) and a post-contractual duty of utmost good faith for either party carrying a remedy congruous to the breach. Ultimately the position reached by the common law was that policy discretions were to be exercised for proper purposes and in the parties mutual interests,[[15]](#footnote-15) that there was no good faith requirement for payments to be made in a timely fashion[[16]](#footnote-16) and that the juridical basis of fraudulent claims was contractual.[[17]](#footnote-17) IA 2015 broke the link between pre-contractual disclosure and utmost good faith, confirmed that fraudulent claims were a matter of contract,[[18]](#footnote-18) set out an implied term for late payment[[19]](#footnote-19) and established a general principle of utmost good faith with no stated remedy[[20]](#footnote-20) and in practice likely to be concerned primarily with the interpretation and operation of express contract terms.

The absence of any statutory basis for utmost good faith in NZ did not prevent the courts from making sporadic references to the principle, particularly in the context of policy discretions[[21]](#footnote-21) and fraudulent claims.[[22]](#footnote-22) The clear existence of a stand-alone duty was not confirmed until the decision in *Young v Tower Insurance Ltd*.[[23]](#footnote-23)Gendall J in this case articulated a general implied term of utmost good faith – akin to that recognised in s 13 of the Insurance Contracts Act 1984 (Cth) – which had particular application to claims-handling and late payment. In *Dodds v Southern Response Earthquake Insurance Services Ltd*[[24]](#footnote-24) the NZ Court of Appeal subsequently rejected a general implied term which had the potential to give rise to claims for damages,[[25]](#footnote-25) and preferred the narrower approach that utmost good faith could found the basis for the implication of specific terms. The contractual basis for fraudulent claims established in England was adopted in NZ by Cooke J in *Taylor v Asteron Life Ltd*.[[26]](#footnote-26)

The question whether utmost good faith should be included in the NZ legislation generated much discussion, and it was ultimately decided to leave the matter for the development of the common law. Accordingly, COIA 2024, s 59, follows IA 2015 in divorcing utmost good faith from pre-contract disclosure and from the remedy of avoidance, and instead s 59(5) states that “The utmost good faith rule means the rule of law to the effect that a contract of insurance is a contract based on the utmost good faith”, thereby recognising its existence but making no attempt to define its ambit. The position may thus be thought to be identical to that in the UK. COIA 2024 does, however, go much further than English law in imposing pre-contractual disclosure obligations on insurers. There are three provisions that have no counterpart in English law.

1. COIA 2014, ss 52-53, borrowed from the Australian legislation, requires an insurer in advance of any contract being made to take reasonable steps to inform a policyholder of the general nature and effect of the rules on pre-contractual presentation of the risk and the potential consequences of non-compliance.

1. In the case of a consumer contract where consent is sought from the assured to obtain information – typically, medical records – from a third party, COIA 2014, ss 54-55 require the insurer to take reasonable steps to inform the assured whether the insurer intends to exercise that consent and, if so, to inform the assured of the nature of the information to be accessed. The nature of the duties under ss 52-55 and the consequences of their breach are spelt out in ss 56-58. The information may be provided orally, but regulations will establish a template which may be used by insurers should they so choose. If the information is not provided in respect of a consumer contract, then under s 58 that failure is to be taken into account in determining whether the assured had acted reasonably in answering the questions posed by the insurer. That is consistent with the position under the UK’s reasonableness criteria, which are much the same as those in COIA 2024. The difference between the two systems is for business insurance. If the information is not provided in respect of a non-consumer contract, the insurer’s remedies for breach of the duty of fair presentation that is not dishonest or reckless are stripped away: no avoidance is possible, the premium may not be increased and the claim must be paid in full.
2. Section 20 of RAA 2024 amends the pre-existing Financial Markets Conduct Act 2013. A new series of sections, ss 447-447C, are added to the 2013 Act. Their effect is to impose a duty on the insurer to assist applicants for life and consumer policies to understand the terms of insurance contracts.

**Late payment**

It has been noted above that the common law rejected the notion that damages could be awarded for late payment of insurance proceeds. That rejection was based on the technical point that where an assured suffers an insured loss, the insurer is under an immediate duty to hold the assured harmless by providing an indemnity and that failure to do so is a breach of contract giving rise to damages. If damages are awardable from the date of loss, there cannot be any question of damages being awarded for non-payment of damages; the remedy can only be interest.[[27]](#footnote-27) In *Sprung v Royal Insurance*[[28]](#footnote-28) the Court of Appeal rejected the suggestion that there could be an implied contract term requiring timely payment. The English and the Scottish Law Commissions regarded the technical basis for the prohibition as faintly ridiculous,[[29]](#footnote-29) and recommended the adoption of an implied term allowing for damages for late payment. This gave rise to a range of legal and practical objections from the insurance market and an assertion that there was no need to legislate because there was no problem in practice. The obvious response was that if there was no problem of late payment then insurers had nothing to fear. The proposal was not included in the Insurance Bil presented to the UK Parliament in July 2014, as that was a Law Commission Bill subject to an expedited procedure and not appropriate for controversial measures. The Government instead promised to introduce the measure in a Government Bill, which – to the surprise of many – duly occurred in the Enterprise Act 2016 which added s 13A to IA 2015.

The question of late payment had not been considered by the New Zealand courts, until the decision of Gendall J in *Young v Tower Insurance*[[30]](#footnote-30)in 2016. Up to that point, damages had been awarded for non-payment, but that was based on wrongful repudiation of liability, which is plainly a breach of contract.[[31]](#footnote-31) The New Zealand courts had no cause to discuss the issue raised by *Sprung*. In *Young* the issue was not late payment but failure by the insurers to disclose reports indicating that their payment offer was inadequate. Gendall J ruled that a part of the implied term of utmost good faith imposed upon insurers required timely payment. What was timely rested upon “the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside an insurer’s control.” It will immediately be noted that Gendall J was repeating verbatim the reasonableness criteria set out in s 13A of the IA 2015.[[32]](#footnote-32) The analysis was immediately adopted by Nation J in *Sadat v Tower Insurance Ltd*[[33]](#footnote-33)and repeated by Gendall J in *Kilduff v Tower Insurance Ltd*.[[34]](#footnote-34) Although the Court of Appeal in  *Dodds v Southern Response Earthquake Insurance Services Ltd*[[35]](#footnote-35) and *Taylor v Asteron Life Ltd*[[36]](#footnote-36)later rejected the generalised implied term of utmost good faith, they did not consider the question whether there could be a specific implied term for timely payment flowing from the overarching principle of utmost good faith.

Despite the uncertain position at common law, MBIE’s initial version of the Contracts of Insurance Bill did not include any provision for late payment. The Webb Bill sought to address the problem by a clause under which interest would be payable from the day on which it became unreasonable for the insurer to withhold payment, which was deemed to be no later than 12 months from which the claim was made unless in the circumstances it was reasonable for the insurer to withhold payment until a later date. Recognising that there was a need to address the problem of late payment, FEC chose to do so directly by adopting a late payment clause closely following IA 2015, s 13A. This was implemented by COIA 2024, s 66.

The NZ measure differs from s 13A in one crucial respect. Section 13A sets out a two-step test. The first step is to ask whether payment has been made within a reasonable time. The criteria for reasonableness in s 13A(3) are those adopted by Gendall J in *Young*: the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance, and factors outside an insurer’s control. The second step is to ask whether there were reasonable grounds for disputing the claim: if so, then under s 13A(4) there is no breach of the implied term. This drafting proved to be significant in *Quadra Commodities SA v XL Insurance Co SE*,[[37]](#footnote-37) where it was found that the insurer had not paid within a reasonable time but that there was no entitlement to damages because there were reasonable grounds for disputing the claim.

By contrast, COIA 2024, s 66 is not so divided. Instead, “whether the insurer has reasonable grounds for disputing the claim” is added to the list of criteria for determining whether the claim was paid within a reasonable time. In other words, this question does not provide a defence to unreasonable late payment as held in *Quadra*, but rather is simply one element in the overall question as to whether there has been unreasonable late payment at all. The deliberations of FEC do not indicate that *Quadra* had influenced this redrafting, but it is apparent that there is potentially greater scope for recovery of damages in NZ than in the UK. It goes without saying, however, that the assured must prove loss by reason of breach of the implied term for timely payment. In commercial cases that may amount to no more than interest on the loss of the use of money where the assured has sufficient resources to make good the insured damage.[[38]](#footnote-38) The UK is reluctant to award sums for distress and inconvenience on the basis that insurance contracts are not designed for that purpose,[[39]](#footnote-39) and while that makes sense where the assured is a company[[40]](#footnote-40) there is no logic to that argument where the assured is a consumer: it has indeed been rejected in NZ by the Canterbury Earthquake Insurance Tribunal applying the now statutory principle in *Young v Tower*.[[41]](#footnote-41)

In both the UK and NZ, damages are distinct from any statutory or contractual right to interest. In practice in many cases court orders for interest are likely to remove any loss, although NZ has one interest provision with no UK counterpart. COIA 2024, s 121, re-enacting a measure adopted by the ILRA 1985, s 3, requires interest to be paid under a life policy if the proceeds have not been paid in full after 30 days running from the notification to the insurers of the life assured’s death.

**Policy terms**

*Classification of policy terms*

Perhaps the greatest divergence between UK and NZ law is to be found in the regulation of policy terms. The common law position is formalistic, with the consequences of breach turning upon the classification of the clause itself. A condition precedent is an “unless” provision applicable – most importantly – to the making of a claim, so that if there is non-compliance the claim is lost and there is no possibility of relief from forfeiture.[[42]](#footnote-42) A condition which is not a condition precedent is treated as straightforward contract term of innominate nature, so that the insurer cannot treat the contract as repudiated for breach but will be entitled to damages for proven loss.[[43]](#footnote-43) In practice most conditions are either specifically stated to be conditions precedent or at least are subject to a general clause deeming all conditions to be conditions precedent.[[44]](#footnote-44) A warranty is an unconditional promise by the assured as to existing facts or future conduct, any trivial or other breach of which automatically brings the risk to an end. The law on marine warranties was developed in the wartime conditions of the late eighteenth and early nineteenth centuries and was codified in MIA 1906, but it extended to all policies.[[45]](#footnote-45) The courts did develop an exception whereby warranties could in some circumstances be construed as suspensory provisions, precluding recovery only for a loss occurring during a period of breach,[[46]](#footnote-46) but it was never clear exactly when that interpretation would be adopted.[[47]](#footnote-47) New Zealand was the first common law jurisdiction to move away from the formalistic approaches to breach.

*Notification and other non-risk clauses*

Section 9 of ILRA 1977 attacked the problem of conditions precedent imposing time limits on claims or the issue of proceedings, and provided that such clauses could be relied upon only to the extent that the insurer has been prejudiced by the policyholder’s failure to comply with the provision, thereby replicating the effect of innominate conditions at common law whereby an insurer is entitled to reduce its liability for a late claim by the degree – typically highly speculative[[48]](#footnote-48) – that a defence or subrogation proceedings might have been available to the insurer had there been compliance. Section 9 was restricted to time limits, unlike its Australian counterpart, s 54(1) of the Insurance Contracts Act 1984 (Cth) which applies the same restriction to any condition unrelated to the assured’s risk of loss. The section has now been re-enacted as COIA 2024, s 68.

In practice, what is now s 68 has not given rise to problems for first party claims. Insurers rarely invoke late claims provisions and, when they do, prejudice arguments are typically dismissed summarily.[[49]](#footnote-49) The section is, under ILRA 1977, supplemented by COIA 2024, s 70, which applies where there has been a late claim for damage to property and the cost of repairs has increased in the meantime. The insurer may in such a case hold the indemnity to the repair costs that would have been incurred had the claim been made within the time limits laid down by the policy. There does not seem to be a reported instance of this provision being invoked.

ILRA 1977, s 9 was found to give rise to difficulties in the context of claims made liability policies. The effect of the provision was that if circumstances likely to give rise to a claim became notifiable in the policy period, with the effect under the policy that any later claim would be brought back into the year of notification, insurers could find themselves being notified of circumstances by the assured after the expiry of the policy and therefore after the year had been written off. That was not thought to amount to prejudice.[[50]](#footnote-50) The position was even less satisfactory where the policy was written on a claims made and notified basis, because the assured’s obligation to notify in the policy year as demanded by the policy could be excused under s 9.[[51]](#footnote-51)

Much the same issue has bedevilled the Australian courts,[[52]](#footnote-52) with the outcome that the notification of circumstances has been removed from claims made liability policies (other than Directors and Officers) and instead the right to notify circumstances in the policy year is governed by the statutory right to do so in s 40 of the Insurance Contracts Act 1984 (Cth) which is not subject to the s 54(1) concession allowing late claims.

All of this was thought to undermine the very essence of a claims made or claims made and notified policy, namely, to treat notification as an element of the risk itself rather than a mere procedural obligation. The problem has been addressed for the first time by COIA 2024, s 69. This implements a recommendation of the NZ Law Commission in its 1998 Report and provides that the right to notify out of time as conferred by s 68 applies only for the first 30 days after the expiry of the policy. This is a partial but not complete solution to the problem. It may still be the case that a circumstance notified late under an expired policy can also be notified under the renewed policy, at least in cases where the duty of fair presentation in respect of a potential claim was not infringed when the renewed policy was taken out.[[53]](#footnote-53) In such a case there is double insurance and each of the insurers is liable subject to contribution.[[54]](#footnote-54)

It may be noted that the consultation leading to the passing of IA 2015 in the UK raised the question of whether there should be legislation precluding reliance on claims provisions, or at least time limits in claims provisions, equivalent to that in Australia and NZ. The insurance industry persuaded the Law Commissions that this would give rise to the very issues encountered in respect of claims made, and claims made and notified, liability policies. However, as COIA 2024 has demonstrated, that problem is easily remedied.

*Increase of risk clauses*

Section 11 of ILRA 1977 has been re-enacted – with one important modification – by COIA 2024, s 71. This groundbreaking provision applies to any increased risk exclusion, defined as a contract term – normally in the form of an exclusion – that defines the circumstances in which the insurer is required to provide an indemnity. Section 71(1) states that the assured is not bound by an increased risk exclusion if the assured proves that the loss “was not caused, or contributed to, by the happening of the event or the existence of the circumstance referred to in the increased risk exclusion.” In other words, there has to be a causal link between the assured’s breach of the policy term and the loss. Much the same principle is to be found in Australia, in s 54(2) of the Insurance Contracts Act 1984 (Cth). These sections are blind to the classification of the term, so that they apply whether the obligation is in a condition or a warranty.

The causation test does give rise to problems in borderline cases, eg, where the collapse of a building was held to be caused by winds rather than the assured’s act in removing a retaining wall,[[55]](#footnote-55) and there has been some difficulty in determining whether the limitation is inherent in the coverage provided by the policy and thus unaffected by the legislation, or whether it is an exclusion from the cover and thus caught.[[56]](#footnote-56) In the latter respect the section was criticised by the NZ Law Commission in its 1998 Report for treating risks inherent in the nature of the coverage as exclusions: by way of example, there could be coverage where a vehicle insured for domestic use only was put to commercial use and damaged by a fortuity unconnected with use, such as a flood. COIA 2024 retains s 71, but by s 71(3) disapplies the general from a series of the limitations most commonly relied upon by insurers in fixing premiums, namely, any increased risk exclusion that: (a) defines the age, identity, qualifications, or experience of a driver of a vehicle, a pilot of an aircraft, an operator of goods, or a master, pilot, or crew member of a ship; or (b) defines the geographical area in which the loss must occur; or (c) excludes loss that occurs while a vehicle, an aircraft, a ship, or any goods is or are being used for commercial purposes other than those permitted by the contract of insurance.

This may be compared with the UK’s approach to increase of risk clauses in IA 2015. Market objections prevented the introduction of a causation-based equivalent to s 71, and it was necessary to find a form of wording that prevented an insurer from relying upon an exclusion irrelevant to the loss but did not refer to causation. Two provisions were adopted. First, the rule that a breach of warranty had automatic and non-curable terminating effect on the risk was removed from MIA 1906. It was replaced by IA 2015, s 10 with a suspensory provision under which a warranty can be relied upon only if there was a breach by the assured at the time of loss. Secondly, by IA 2015, s 11 – which applies to conditions, and to warranties in breach at the time of loss – the assured is able to recover despite non-compliance with a contract term if the assured shows “that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.” The difficulties surrounding this wording, including whether it is really causation in disguise, have been discussed at length elsewhere,[[57]](#footnote-57) and the first judicial indications are not helpful to assureds. It was held in *MOK Petro Energy FZC v Argo (No 604) Ltd*[[58]](#footnote-58)that a warranty requiring both inspection and certification of certain pipelines provided a defence to insurers where the assured had complied with the inspection element but had failed to obtain certification of that fact even though certification could have no possible causal connection to any loss. The reasoning, that the warranty was not severable, could not have been relevant to the inquiry under COIA 2024, s 71, as the only question would be whether the breach caused the loss.[[59]](#footnote-59)

The result of the NZ reforms has been to all but expunge warranties from insurance law, including marine insurance. although as regards marine insurance only partly so in Australia,[[60]](#footnote-60) There is no reason for their continued use. By contrast, IA 2015 allows warranties to limp along, albeit deprived of effect in the vast majority of cases. There is one further important step taken in NZ that the Law Commissions here refused to countenance on the ground that there was no need to poke a stick into a nest of sleeping vipers. RAA 2024 repeals all of the sections on warranties in MIA 1908 (NZ). All references to the Napoleonic-era warranties relating to good safety, neutrality and nationality have been expunged, and the problematic warranty of legality[[61]](#footnote-61) – based on a misunderstanding of the common law approach to illegal insurances by the draftsmen of MIA 1906/1908 although assimilated with the common law by subsequent judicial decision[[62]](#footnote-62) – has been repealed. Only one provision remains, the warranty of seaworthiness, but even that has been stripped of its sting by being brought into line with COIA 2024, s 71. MIA 1908, the added s 40(6) states that an insurer may not rely on the warranty of seaworthiness “f the assured proves that the loss for which the assured seeks to be indemnified was not caused, or contributed to, by the matters that gave rise to the breach of the warranty.” It may be thought that the UK missed the same opportunity to rid the legislation of redundant and misconceived sections.

*Unfair terms*

The Consumer Rights Act 2015 (UK) has its counterpart in the NZ Fair Trading Act 1986, the unfair terms provisions of which were based on earlier UK manifestations of the implementation of EC Council Directive 93/13/EEC on Unfair Contract Terms. Section 46K(1) of the 2015 Act excludes from consideration of fairness a term that defines the main subject matter of the contract or sets the upfront price payable under the contract. In that way, as applied to insurance, the Courts were unable to pronounce upon the fairness or otherwise of the cover offered for the premium charged. Amendments to the legislation in 2015 added a list of terms deemed to be fair.

The MBIE Bill chose to move away from the deemed fairness approach and instead to modify the definition of “main subject matter” in order to exclude certain matters from consideration for fairness. The Bill put forward two alternative models for reform. Option A proposed to limit the exemption for the “main subject matter” to the thing being insured itself, eg, a building or a life. There was no exemption for the terms on which the insurance was provided Option B proposed to treat a series of other matters as forming a part of the main subject matter, including: identification of the risk insured; the sum insured and any excess to be borne by the assured; and any policy terms excluding or limiting liability. The Webb Bill unsurprisingly went for Option A. The FEC, after consultation, was ultimately persuaded that the correct approach was Option B.

Accordingly, s 46KA of the Fair Trading Act 1986, added by RAA 2024, states that a term is not to be analysed for unfairness to the extent that the term: (a) identifies the uncertain event or otherwise specifies the subject matter insured or the risk insured against; or (b) relates to the amount of a premium payable under a life policy or a contract of health insurance; or (c) specifies the sum or sums insured or assured; or describes the basis on which a claim under the contract of insurance may be settled; or (e) specifies any contributory sum due from, or amount to be borne by, a policyholder in the event of a claim under the contract of insurance; or (f)excludes or limits the liability of the insurer to indemnify the policyholder on the happening of certain events or on the existence of certain circumstances. This list more or less replicates the provisions deemed to be fair under the earlier version of the legislation.

The approach is somewhat narrower in terms of consumer protection than that under the UK Consumer Rights Act 2015, where no special provision is made for insurance. However, the UK Act has had limited use, and it is unlikely that the new measures in NZ will greatly affect the operation of insurance policies, particularly given the terms of COIA 2024, s 71.

**Third party rights**

Section 9 of the Law Reform Act 1936 (NZ) set out what is to UK eyes a curious means of protecting claimants against the insolvency of the holders of liability policies. Rather than follow the lead of the Third Parties (Rights against Insurers) Act 1930 (UK), it was decided to resuscitate the old Workmen’s Compensation statutory charge. A similar approach was adopted in New South Wales. Section 9 provided that on the happening of the event giving rise to a claim for damages by the third party against the assured, there was an immediate charge on the policy moneys, the charge crystallising once judgment had been obtained against the assured. If there were later liabilities and further charges were created, priority was determined by the order of creation. A claim against the insurer could be brought only with the leave of the court, which would be given only if the assured was not a good defendant, most importantly if the assured had become insolvent or had died. Where the policy moneys were subject to a charge and a claim was brought against the insurers, they were entitled to rely both on the absence of any liability by the assured to the third party and also to any policy defences.

There were various problems with the charge. It was unclear how s 9 of the 1936 Act operated in the context of claims or claims made and notified policies, although the view taken in New South Wales was that the charge could not operate in circumstances where the insurance monies were not available at the date of the event giving rise to liability.[[63]](#footnote-63) There were no rules as to the territorial scope of the charge and the view adopted in NZ was that the debt had to be situated within the jurisdiction.[[64]](#footnote-64) Most importantly, if the policy provided a combined limit for indemnity and defence costs, the charge applied to the full sum, which meant that if the insurers paid defence costs and the assured was then found liable for the full amount insured under the policy, the defence costs could not be deducted. That decision produced an immediate change to policy wordings, with defence costs being separated out from the indemnity or indeed insured under a separate contract. Finally, there was no mechanism by which the third party could obtain insurance information.

Section 9 was reviewed by the NZ Law Commission in its 1998 Report, and a move towards the UK position was proposed. Thereafter the UK adopted the Third Parties (Rights against Insurers) Act 2010 (“TPRAIA”) and New South Wales repealed the charge provisions by the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) under which a form of statutory subrogation was effected. MBIE thus had two reform models, and opted for a hybrid which borrowed the best bits of each. The relevant provisions are ss 86-97 of, and sched 3 to, COIA 2024. In outline, the third party has a direct claim against the assured’s liability insurers in the event of the assured becoming subject to an insolvency procedure. The leave of the court is required for substantive proceedings to be brought: this seems somewhat pointless given that there is an insolvency, but it may be that the requirement is simply a filter allowing hopeless claims to be struck out before full proceedings are commenced. Once leave has been given, the third party acquires the assured’s rights against the insurers: the insurers may rely upon any defence open to the assured against the third party and also any defence open to the insurers against the assured. Jurisdiction, as under the UK TPRAIA, based on the insolvency proceedings taking place in NZ.

The third party’s ability to obtain insurance information is closely based on TPRAIA 2010. This was strongly opposed by the insurance industry, who feared that it opened to the door to a “cards on the table” approach to litigation whether or not the assured was insolvent. Much the same arguments were made in the UK, and fears were mollified on the same ground: there has to be an insolvency before the information provisions are triggered. There is one interesting difference between the two regimes. The NZ scheme permits any person who receives notice to supply insurance information to impose a “reasonable charge” to meet the cost of doing so. This was thought to be a way of safeguarding against bad or speculative claims.

The NZ legislation, unlike that in the UK, makes specific provision for settlements between the assured and the insurers, and for payment to the assured by the insurers, in advance of the third party establishing the assured’s liability.

1. On the first point, COIA 2024, s 83 states that the insurer’s liability to the third party is not reduced or discharged by a compromise or settlement, subject to an exception for one entered into in good faith by the insurer and on terms that would be reasonable if the parties were each acting independently. The UK courts have not discussed this issue in any detail, other than accepting that there may be circumstances in which the insurer and assured can be regarded as having conspired to deprive the third party of rights under the policy.[[65]](#footnote-65) It may be that COIA 2024 simply reproduces that principle.
2. On the second point, COIA 2024, s 83 lays down the rule that payment to the assured does not reduce the insurer’s liability to the third party. This is a distinct improvement on TPRAIA 2010. It has recently been held in *Wood v Desai[[66]](#footnote-66)* that any payment by the insurer to the assured in advance of the assured’s liability being established discharges the insurer’s liabilities under the policy. Further, even if the sums remain in the assured’s possession, they simply form a part of the assured’s assets available for distribution to unsecured creditors on the usual *pari passu* basis.

**Matters carried over**

To complete the picture, it is necessary to refer briefly to pre-existing legislation that has been re-enacted in COIA 2024. The ban on arbitration clauses in consumer contracts, with a saving for post-dispute arbitration agreements, is maintained by COIA 2024, s 67. This contrasts with the rather more cumbersome approach in England. Section 89 of the Arbitration Act 1996 extends the unfair contract terms regime in the Consumer Rights Act 2015 to consumers,[[67]](#footnote-67) so that an arbitration clause is unfair only if it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.[[68]](#footnote-68) There is automatic unfairness only if the claim is for a “modest amount”, fixed by statutory instrument at £5,000 or less.[[69]](#footnote-69)

The ban on average clauses in home and contents insurance policies introduced by ILRA 1985 is maintained by COIA 2024, s 72. Thus, in the case of underinsurance, the assured is entitled to recover up to policy limits the full amount of any partial loss without a proportional deduction representing the degree of underinsurance. By COIA 2024, s 73, an average clause is permissible in other contracts (excluding marine, where the assured is deemed to be its own insurer for any uninsured sum[[70]](#footnote-70)) only where, before the contract is entered into, the insurer clearly informs the policyholder in writing of the nature and effect of the condition.[[71]](#footnote-71)

The abolition of the insurable interest requirement for non-marine policies by ILRA 1985 has been maintained by COIA 2024, ss 75 and 76. The UK, by contrast, still clings to the outmoded and all but useless Life Assurance Act 1774 despite the clear recommendation by the Law Commission’s Insurable Interest Bill 2018 for its repeal.

As regards contracts for the sale of buildings, the separation between the passing of risk (exchange) and conferring title (conveyance) means that once contracts have been exchanged the risk of loss passes to the purchaser. Payment then becomes due on completion date whatever happens to the building in the interim period, and a purchaser could well face an obligation to pay the full price for a smouldering ruin. In the UK it is common practice for buildings policies to provide that if the building is sold the purchaser is entitled to the benefit of the policy unless the purchaser has its own insurance. That principle is statutory under COIA 2024, ss 78-81: these sections transfer the benefit of the vendor’s policy to the purchaser and remove any argument that the vendor has suffered no loss because of the right to be paid by the purchaser. Should the purchaser have its own insurance, s 82 preserves the purchaser’s claim against their own insurer despite any entitlement to the benefit of the vendor’s policy.

Sections 100-120 of COIA 2024, reproducing the Insurance Intermediaries Act 1994, ensure that in the event of a broker’s insolvency, the risk of loss is borne by the insurers and not the assured. Premiums paid by the assured to the broker are deemed to have been received by the insurers, and losses paid to the broker by the insurers are not deemed to have been received by the assured until actually paid over. There are also detailed rules on accounting. The position is much the same in the UK rules made by the insurance regulators.

Finally, sections 121-162 of COIA 2024, re-enacting the Life Assurance Act 1908, set out the rules for assignment, investment and vesting of life policies.

**Appraisal**

The 2024 NZ insurance legislation, much like CIDRA 2012 and IA 2015, is designed to create a fair balance between the interests of insurers and policyholders. The move to UK-style presentation of the risk rules was heavily criticised by insurers during consultation. A number were fearful of the consequences of abolishing the consumer duty of disclosure, although there was reassurance in the fact that the UK’s experience over a decade had not proved damaging and that Australia had chosen to adopt pretty much the same consumer rules in the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (Cth), amending the Insurance Contracts Act 1984 (Cth) to implement the recommendations of the *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* published on 4 February 2019.[[72]](#footnote-72) The fair presentation rules for non-consumer insurance were less controversial: the introduction of proportional remedies was tempered by the obligation on the assured to conduct a “reasonable search”. All of that aside, the messy situation whereby presentation rules were spread across three irreconcilable pieces of legislation could not be allowed to continue.

The remainder of the legislation is primarily consolidation and codification. Insurers were opposed to late payment rules and to the statutory recognition of utmost good faith, but the courts had pre-empted legislative reform on both points. The changes to risk clauses, late notification and third party claims had all been foreshadowed by the NZ Law Commission in 1998 and – other than the provisions of disclosure of insurance information following insolvency – were not controversial. Insurers secured their wish that the unfair contract terms regime should apply only lightly in insurance cases. In short, there is little in the legislation that does not represent practice, particularly under the Fair Insurance Code as last issued in 2020.[[73]](#footnote-73)

The NZ measures have also highlighted gaps in the UK insurance regime that ultimately emerged from the Law Commissions' fifteen-year review and the implementing measures. There is still no protection against claims conditions expressed as conditions precedent, where trivial and inconsequential breaches can lead to the entire loss of a claim. The UK rules on breach of irrelevant conditions are badly drafted and easily evaded by bundling obligations into a single clause. There is no statutory regime guaranteeing the provision of insurance to those whose property is, by reason of natural hazards prompted by climate change, all but uninsurable. Warranties can still be used. Insurable interest remains in place. Much of the MIA 1906 has been overtaken by events but no steps were taken to expunge redundant parts. However, the prospect of further insurance law reform in the UK is at least a generation away. Much of the common law world has retained MIA 1906 unamended: it is still law in some 80 countries. Only the UK and NZ have amended its terms and reversed key principles of the common law. Nations looking to update their laws now have two benchmarks for reform.

1. \* KC (hon), LLD, Professor of Commercial Law, University of Reading. The author was consultant to the New Zealand Ministry of Business, Innovation and Employment during the consultation on and drafting of the Bill that ultimately passed into law.

   This idea had first been adopted in the UK’s Workmen’s Compensation 1894 legislation but then abandoned in 1906 as unworkable. [↑](#footnote-ref-1)
2. The UK, when faced with the problem of uninsurability of dwellings built on flood plains, chose not to go down that route and instead has opted for the Flood Re scheme, providing reinsurance for those insurers willing to insure on commercial terms and following the lead of the Reinsurance (Prevention of Terrorism) Act 1989. [↑](#footnote-ref-2)
3. UK insurers had earlier voluntarily agreed with Government to abandon for consumers the use of arbitration on all matters other than quantum. [↑](#footnote-ref-3)
4. NZLC 46. [↑](#footnote-ref-4)
5. The Supreme Court initially allowed recovery for each earthquake (*Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 129), but that was cut back by the Court of Appeal to prevent double recovery (*QBE Insurance (International Ltd v Wild South Holdings Ltd* [2014] NZCA 447). More recently the Court of Appeal has held that each earthquake was an “event” not forming part of a “series” and therefore not subject to aggregation (*Moore v IAG New Zealand Ltd* [2020] NZCA 319). [↑](#footnote-ref-5)
6. *Kraal v Earthquake Commission* [2014] NZCA 13. [↑](#footnote-ref-6)
7. Which they were obliged to do: *Sleight v Beckia Holdings Ltd* [2020] NZHC 2851. The same view has been taken in Australia, albeit without reference to *Sleight*: *Baralaba Coal Co Pty Ltd v AAI Ltd* [2024] FCA 532. [↑](#footnote-ref-7)
8. Technically the result of an earlier consultation on privity of contract. [↑](#footnote-ref-8)
9. See below. [↑](#footnote-ref-9)
10. [1989] AC 852. [↑](#footnote-ref-10)
11. ‘Cth’ stands for Commonwealth of Australia and denotes federal legislation that applies to all Australian states. [↑](#footnote-ref-11)
12. COIA 2024, s 60, replicating CIDRA 2012, s 6 and IA 2015, s 9. This provision applies only to statements and promises, not to continuing obligations under the policy: *Tynefield Care Ltd v New India Assurance Company Ltd* [2024] 5 WLUK 700 [↑](#footnote-ref-12)
13. [1929] 2 KB 356. [↑](#footnote-ref-13)
14. A rule that goes back to *Power v Butcher* (1829) 10 B & C 329. [↑](#footnote-ref-14)
15. *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718. It is difficult to distinguish this from the general common law principle in *Braganza v BP Shipping Ltd* [2015] UKSC 17 applicable to all contractual discretions. [↑](#footnote-ref-15)
16. *Sprung v Royal Insurance* [1999] Lloyd’s Rep IR 111. [↑](#footnote-ref-16)
17. *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG, The DC Merwestone* [2016] UKSC 45. [↑](#footnote-ref-17)
18. IA 2015, s 12. [↑](#footnote-ref-18)
19. IA 2015, s 13A, added by the Enterprise Act 2016. [↑](#footnote-ref-19)
20. IA 2015, s 14. [↑](#footnote-ref-20)
21. *Van der Noll v Sovereign Assurance Co Ltd* [2013] NZHC 3051. [↑](#footnote-ref-21)
22. *Sampson v Gold Star Insurance Ltd* [1980] 2 NZLR 742. [↑](#footnote-ref-22)
23. [2016] NZHC 2956. [↑](#footnote-ref-23)
24. [2020] NZCA 395. [↑](#footnote-ref-24)
25. Surprisingly, although s 13 of the Australian legislation creates an implied term, there has only been one case in the 40 years of its life where damages have been awarded: *Moss v Sun Alliance Australia Ltd* (1990) 55 SASR 145 (late payment). [↑](#footnote-ref-25)
26. [2020] NZCA 354. [↑](#footnote-ref-26)
27. *President of India v Lips Maritime Corp, The Lips* [1988] AC 395. [↑](#footnote-ref-27)
28. [1999] Lloyd’s Rep IR 111, followed in *Pride Valley Foods Ltd v Independent Insurance Co Ltd* [1999] Lloyd’s Rep IR 120. [↑](#footnote-ref-28)
29. However, it is a clear principle of the common law, and it has since been adopted in Australia in *Worth v HDI Global Speciality SE* [2021] NSWCA 185 and *Admiral International Pty Ltd v Insurance Australia Ltd* [2022] NSWCA 277. [↑](#footnote-ref-29)
30. [2016] NZHC 2956. [↑](#footnote-ref-30)
31. *New Zealand Insurance Co Ltd v Harris* (1990) ANZ Ins Cas 60–952; *Kerr v State Insurance General Manager* (1987) 4 ANZ Ins Cas 60–781; *Stuart v Guardian Royal Exchange Assurance Co of New Zealand Ltd (No.2)* (1988) 5 ANZ Ins Cas 60–844; *Keefe v State Insurance General Manager* (1988) 5 ANZ Ins Cas 60–845; *Johnson v Australian Casualty Co Ltd* (1992) 5 ANZ Ins Cas 61-109; *Fussell & McNamara v Broadbase Christchurch Ltd* (2011) 16 ANZ Ins Cas 61-913; *Edwards v AA Mutual Insurance Co* [1985] 3 ANZ Ins Cas 60–668; *Bloor v IAG New Zealand Ltd* [2010] 16 ANZ Ins Cas 61-845.That concept gave rise to much discussed but unresolved question as to whether damages could be awarded only where the assured accepted the repudiation and terminated the contract for breach. [↑](#footnote-ref-31)
32. This was the result of research conducted on behalf of the judge: the point was not raised in argument. [↑](#footnote-ref-32)
33. [2017] NZHC 1550. [↑](#footnote-ref-33)
34. [2018] NZHC 704. [↑](#footnote-ref-34)
35. [2020] NZCA 395. [↑](#footnote-ref-35)
36. [2020] NZCA 354. [↑](#footnote-ref-36)
37. [2022] EWHC 431 (Comm). [↑](#footnote-ref-37)
38. *Delos Shipholding SA v Allianz Global Corporate and Specialty SE* [2024] EWHC 719 (Comm). [↑](#footnote-ref-38)
39. *The Italia Express* [1992] 2 Lloyd’s Rep 281. [↑](#footnote-ref-39)
40. Which was the case in *The Italia Express*. That aside, the claim was for a marine loss, and the court noted that MIA 1906 provided an exhaustive definition of measure of indemnity which did not include damages for distress. [↑](#footnote-ref-40)
41. *H v SR* [2019] NZCEIT 11. [↑](#footnote-ref-41)
42. *Diab v Regent Insurance Co Ltd* [2006] UKPC 29. [↑](#footnote-ref-42)
43. See, eg, *Scottish Coal Co Ltd v Royal and Sun Alliance Insurance Plc* [2008] Lloyd’s Rep IR 718. [↑](#footnote-ref-43)
44. See, eg, *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) Plc* [2017] EWHC 391 (Comm). [↑](#footnote-ref-44)
45. See, eg, *Yorkshire Insurance Co v Campbell* [1917] AC 218. [↑](#footnote-ref-45)
46. *Dawsons v Bonnin* [1922] 2 AC 413. [↑](#footnote-ref-46)
47. See, eg, *CTN Cash and Carry Ltd v General Accident Fire and Life Assurance Corp* [1989] 1 Lloyd’s Rep 299 [↑](#footnote-ref-47)
48. *Milton Keynes BC v Nulty* [2011] EWHC 2847 (TCC), affirmed without reference to this issue *Nulty v Milton Keynes BC* [2013] EWCA Civ 15. [↑](#footnote-ref-48)
49. As in *Morrison v Vero Insurance New Zealand Ltd* [2014] NZHC 2344, a claim for earthquake damage. [↑](#footnote-ref-49)
50. *Sinclair Horder O’Malley & Co v National Insurance Co of New Zealand Ltd* [2995] 2 NZLR 257. [↑](#footnote-ref-50)
51. *Bradley West Clarke List v Keeman* (1997) 6 NZBLC 102,292, although this was doubted *obiter* n *Managh v Renall* (1996) 9 ANZ Insurance Cases 61-361. [↑](#footnote-ref-51)
52. *East End Real Estate Pty Ltd v CE Heath Casualty & General Insurance Ltd* (1992) 25 NSWLR 400. [↑](#footnote-ref-52)
53. Eg, because there was insufficient appreciation of the risk of a claim. [↑](#footnote-ref-53)
54. A point that has arisen in Australia: *Watkins Syndicate 0457 at Lloyds v Pantaenius Australia Pty Ltd* [2016] FCAFC 150; *Zurich Australian Insurance Ltd v CIMIC Group Ltd* [2024] NSWCA 229. [↑](#footnote-ref-54)
55. *Tweddle v State Insurance Ltd* (1991) 6 ANZ Insurance Cases 61-052 [↑](#footnote-ref-55)
56. That distinction was first drawn in *Barnaby v South British Insurance Co Ltd* (1980) 1 ANZ Insurance Cases 60-401. [↑](#footnote-ref-56)
57. Merkin and Gurses, “Insurance Contracts after the Insurance Act 2015” 132 LQR 445 (2016). [↑](#footnote-ref-57)
58. [2024] EWHC 1935 (Comm). [↑](#footnote-ref-58)
59. The present author would be happy to make the case that it was wrong under English law as well: the breach could not have had anything to do with the loss that had occurred and in manner in which it had occurred.. [↑](#footnote-ref-59)
60. Marine Insurance Act 1909 (Cth), s 9A, extending the 1984 Act to pleasure craft. [↑](#footnote-ref-60)
61. Merkin, “Criminals, Fraudsters and Idiots: Are They Uninsurable?” (2018) 24 NZBLQ 3. [↑](#footnote-ref-61)
62. *Suez Fortune Investments Ltd v Talbot Underwriting Ltd, The Brilliante Virtuoso* [2019] EWHC 2599 (Comm). [↑](#footnote-ref-62)
63. *The Owners of Strata Plan No 50530 v Walter Construction Group Ltd* [2007] NSWCA 124 [↑](#footnote-ref-63)
64. *Livingstone v CBL Corporation Ltd* [2021] NZHC 755. [↑](#footnote-ref-64)
65. *Rowe v Kenway* (1921) 8 Ll LR 225; *AB v Transform Medical Group (CS) Ltd* [2020] CSOH 3. [↑](#footnote-ref-65)
66. [2024] EWHC 1893 (Ch). [↑](#footnote-ref-66)
67. As to the meaning of “consumer” for these purposes, see *Payward Inc v Chechetkin* [2023] EWHC 1780 (Comm) and *Eternity Sky Investments Ltd v* *Zhang* [2024] EWCA Civ 630. [↑](#footnote-ref-67)
68. The principles governing the application of this test are set out in *Mylcrist Builders Ltd v* *Buck* [2008] EWHC 2172 (TCC). [↑](#footnote-ref-68)
69. Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999 No 2167. [↑](#footnote-ref-69)
70. MIA 1906/1908, s 81. [↑](#footnote-ref-70)
71. A non-mandatory form of wording is to be provided by regulations made under COIA 2024, s 74. [↑](#footnote-ref-71)
72. <https://www.royalcommission.gov.au/banking/final-report> [↑](#footnote-ref-72)
73. [Fair\_Insurance\_Code\_2020.pdf](https://www.icnz.org.nz/wp-content/uploads/2023/01/Fair_Insurance_Code_2020.pdf) [↑](#footnote-ref-73)