Submission template

Exposure draft Insurance Contracts Bill

This is the submission template for responding to the Consultation Paper accompanying the Exposure draft Insurance Contracts Bill.

The Ministry of Business, Innovation and Employment (MBIE) seeks your comments by **5pm on 4 May 2022**.

Please make your submission as follows:

1. Fill out your name, organisation and contact details in the table: "Your name and organisation".
2. Fill out your responses to the discussion document questions in the table: "Responses to discussion document questions". Your submission may respond to any or all of the questions in the discussion document. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.
3. If you would like to make any other comments that are not covered by any of the questions, please provide these in the "Other comments" section.
4. When sending your submission, please:
    a. Delete this first page of instructions.
    b. Note that, except for material that may be defamatory, MBIE intends to upload PDF copies of submissions received to MBIE's website. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission. If your submission contains any confidential information:
        i. Please state this in the cover page or in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.
        ii. Indicate this on the front of your submission (eg the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).
    c. Note that submissions are subject to the Official Information Act 1982 and may, therefore, be released in part or full. The Privacy Act 2020 also applies.
5. Send your submission as a Microsoft Word document to insurancereview@mbie.govt.nz.

Please direct any questions that you have in relation to the submissions process to insurancereview@mbie.govt.nz.

Submission on *Exposure draft Insurance Contracts Bill*

Your name and organisation

Name	Chris Boys
Organisation (if applicable)	Canterbury Earthquake Insurance Tribunal
Contact details	Privacy of natural persons

[Double click on check boxes, then select 'checked' if you wish to select any of the following.]

☐ The Privacy Act 2020 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

☐ MBIE intends to upload submissions received to MBIE's website at www.mbie.govt.nz. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

I do not want my submission placed on MBIE's website because… [Insert text]

Please check if your submission contains confidential information:

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because… [Insert text]

Responses to consultation paper questions

In my response I use the following references:
Insurance Law Reform Act 1977 = "ILRA77"
Insurance Contracts Act 1984 (Australian Commonwealth) = "the Australian Act"
Insurance Law Reform Act 1985 = "ILRA85"
Insurance Intermediaries Act 1994 = "IIA"
Law Commission Report 46 (*Some Insurance Law Problems*, May 1998) = "LCR46"
Insurance Act 2015 (UK) = "the UK Act"

Part 1: preliminary provisions	
1	*Do you have any feedback on Part 1 of the Bill?*
	The definition of the term "avoid" is self-referential, it defines a term of art using that term. I would suggest either changing the definition to "in relation to a contract of insurance, means to void the contract from its beginning; in effect the contract is deemed to have never existed".
Part 2: disclosure duties and duty of utmost good faith	
2	*Do you have any feedback on the Bill's provisions in relation to the duty for consumers to take reasonable care not to make a misrepresentation, including the matters that may be taken into account to determine whether a consumer policyholder has taken reasonable care not to make a misrepresentation?*
	I am generally in support of the proposed reforms in section 2. I make the following comments: 1. I am very supportive the inclusion of the presumption at section 11. 2. The list of relevant matters at cl 15 and 16, should be included within cl 14. 3. Clause 20(2) and cl 63(3) are problematic as the mechanism relies upon the subjective judgment of an intermediary. It is not clear what the purpose of 20(2) is.
3	*Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?*
	I think the balance of the remedies is appropriate. However, the calculation of premia and the terms to be imposed require analysis of historical underwriting criteria. Often with staff churn and industry changes records are not necessarily well kept. In my view an additional mechanism requiring records and under writing guidelines to be provided to a regulator are necessary.
4	*Do you have any feedback on the Bill's provisions on remedies for breach of the consumer duty in relation to life insurance policies where the misrepresentation was not fraudulent and more than three years ago?*
	I think the current framework, based on s4 ILRA77 should be kept as is. In my experience the current situation provides the correct balance. This is evidenced by the fact that there is little litigation on the subject and very few complaints made to dispute resolution schemes about it. As a specialist practitioner I only ever had a single enquiry relating to s4.

5	*Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?*
	The issue is that the mechanisms still rely on an insured party needing to anticipate what an insurer will consider material. This is problematic as, particularly in more specialised covers, even experienced brokers and lawyers may not be able to anticipate materiality. I think there is room for additional information to be provided by insurers about their underwriting criteria. Unlike consumer insurance this would not be onerous in a commercial setting. I also believe that the same requirements around questions asked by insurers for consumers in cl15(1)(c) should apply. In cl32(1)(b) I would replace the words "*would be* reasonably clear" to "*is* reasonably clear".
6	*Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?*
	I believe the changes are reasonable.
7	*Do you have any feedback on the provisions in relation to the insurer's duties to inform policyholders of the disclosure duties, and insurer access to third party information, including how the duties apply for variations of insurance contracts?*
	I think that a standard disclosure wording should be issued by a regulator for use by the insurers in their exercise of the duty. It should be provided in writing. This is more likely to be read and understood. There is a risk that variations in wording between insurers could lead to misunderstandings. Cl46 should contain a provision reinforcing that if access to third party records referred in cl57 is given by an insured, the insurer is deemed to have knowledge of the contents of those records. I have had several clients who did not disclose as they reasonably believed that the records of a particular circumstance contained the disclosure and had been considered by the insurer.
8	*Do you have any feedback on the consequences in the Bill if an insurer breaches duties to inform policyholders of the disclosure duties, and insurer access to third party information?*
	There must be a regime of pecuniary penalties. Otherwise the current feeling amongst the insured public, that duties on the insurer are in effect non-existent, will be reinforced. If the failure to inform occurs and there was an alleged non-disclosure by the insured, the insurer should lose the right to rely on the non-disclosure. There, should also be the ability for a Court, Tribunal, or regulator to award damages, or levy fines. With the access to Third Party information, if insurer either fails to inform the insured of the cl 57(2) information, they should lose the right to rely on non-disclosures contained in information within the scope of 57(2) (for instance medical records in a medical policy). This is because many people consider that when they make such records available to an insurer they have in essence fulfilled their disclosure obligations.
9	*Do you have any feedback on how the Bill codifies the duty of utmost good faith?*
	I applaud the inclusion, its omission from the Marine Insurance Act 1908, was problematic and added to misunderstandings about the nature of the duty(s) in New Zealand.

	I would like to see the inclusion of a claims handling duty, such as that set out in s13A of the UK Act, specific to consumer insurance. There has been criticism of the UK provision, by commenters such as Eggers and Picken that it essentially creates a blanket business interruption cover by implication, however, by limiting the duty to consumer contracts it provides a remedy for those affected by unreasonably long delays and incentivises efficient claims handling, which is ultimately a cost savings for an insurer, as the longer a claim is open the more fees and costs are incurred in handling that claim. The Queens Bench recently made comments about the application of s13A in *Quadra v XL* [2022] EWHC 431 at [134] to [147], which shows how the duty could operate. In the context of Christchurch earthquake claims there are confirmed instances of delay being used to pressure acceptance of claims (see *H Trust v Southern Response* [2019] CEIT 0011 at [159] to [171]. Delay undermines the public's trust in the industry and a provision addressing it would ultimately benefit the industry.
10	*Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?*
	I can see how the inclusion adds some clarity, however, brokers already owe duties to the insurer in tort and through business agreements, I'm not certain that the changes add more than clarifying the remedy(s) available.
11	*Do you have any other feedback on the drafting of Part 2 of the Bill?*
	It is relatively long and there are some areas which use overly technical language.
Part 3: terms of insurance contracts	
12	*For claims-made policies, do you consider that 60 days after the end of the policy term is an appropriate period for allowing the policyholder to notify relevant claims or circumstances that might give rise to a claim?*
	Yes, any longer and there are implications for the provision of defences of claims mad against the insured. The purpose of a claims made policy is so that the insure can mitigate the risk by defending the claim. 60 days provides some leeway but still enables a prompt defence to be raised.
13	*Do you consider that insurers should be required to notify policyholders in writing no later than 14 days after the end of the policy term of the effect of failing to notify a claim or circumstances that might give rise to a claim before the end of the 60 day period?*
	Yes.
14	*Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?*
	As above
15	*Do you have any feedback on the exclusions listed in clause 71(3), which are not subject to the rule for increased risk exclusions in clause 71(1)?*

	I don't believe that the age, identity, or qualification provision at cl71(3)(a) should be included. The other carve outs in cl71 relate to circumstances where there is a clear correlation between the risk and the loss and the causal connection is related to the increased risk. However, if a driver pilot or operator is implicated in a loss there are usually clear causal factors which apply allowing exclusions to be robustly and justly applied.
16	*Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?*
	I am supportive of the changes, particularly cl88. For clarity cl 91 should spell out that policy limits, sub-limits, and other terms apply as if the claim had been brought by the specified policyholder. The Canterbury Earthquake Insurance Tribunal should be identified as a Court as our jurisdiction can include questions of relevant liability.
17	*Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?*
	Schedule 3 should have a mechanism for enforcement and a punitive clause for failure to comply. Obtaining information and company records for liquidated companies is often difficult as liquidators and former Directors and Principals have no incentives to do so. Another possible mechanism, is requiring insurers to provide information, in a similar vein to solicitors who hold wills for deceased individuals.
18	*Do you have any comments on not carrying over section 10(1) of the ILRA 1977?*
	I believe s10(1) should be retained. While the provisions of cl45 and the specified intermediary provisions do capture some of the work done by s10(1), it had the effect of clarifying the issue of agency at policy formation and renewal. The abolition means that a more complicated set of criteria about agency, tests as to whether the intermediary fell within the specified sections of the legislation will apply. I don't believe 10(1) is in any way confusing.
19	*Do you have any other feedback on the drafting in Part 3 of the Bill?*
	Cl70(3) does not account for the fact that an insurer has had the benefit of premia for the period of the delay and has accrued investment income as a result. The provision fails to account for this. I believe that cl75 should have a provision similar to s17 of the Australian Act added which allows for clarity around recovery where insured property is sold or acquired after loss.
Part 4: payment of monies to insurance intermediaries	
20	*Do you consider that changes should be made to requirements for how insurance brokers must hold premium money such as restrictions on brokers' ability to invest or more stringent requirements in line with the client money and property rules in the FMC Act?*
	These aspects are governed by the IIA, Bordereaux, and other contractual arrangements between brokers and insurers. Insurers are not at-risk entities that need protection from brokers. I don't believe changes are required from the IIA provisions.

21	*Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?*
	As above
22	*Is it necessary to retain clause 102 (broker to notify insurer within 7 days if a premium has not been received by the broker), and if so, what should be the consequence for breach of clause 102?*
	As above
23	*Do you have any other feedback on Part 4 of the Bill?*
	As above
Part 5: contracts of life insurance	
24	*If you consider that change needs to be made regarding interest payable from 91st day after date of death, please provide any further reasons and provide feedback on whether interest should only begin accruing after 90 days if the insurer has been notified of the death claim and (where relevant) letters of administration or probate have been obtained.*
	90 days is an overly long period given that in the modern banking and information systems, claims and payments can be processed in days or a few weeks. 30 days is a more reasonable period. Moreover, insurers derive investment income for the period during which they hold funds.
25	*Do you have any feedback on the proposal that any mortgaging of life insurance policies under new policies be dealt with under the Personal Property and Securities Act 2009?*
	It makes sense to treat life policies like any other asset/instrument. I support the change.
26	*Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?*
	I support the updates.
27	*Are section 75A of the LIA (relating to a policy entered into by a person for the benefit of the person's spouse, partner or children) or section 2(1) of the Life Insurance Amendment Act 1920 (relating to the reversion or vesting of life policy assigned to a spouse or partner) still necessary?*
	I think these provisions should be retained as they protect beneficiaries but are balanced to protect against fraud.
28	*Do you have any other feedback on Part 5 of the Bill?*
	No
Part 6: regulation-making powers and miscellaneous provisions	
29	*Do you have any feedback on Part 6 of the Bill?*

	I believe that a specialist insurance Tribunal should be established to bridge the gap between the complaint schemes, which lack perceived independence and the capacity to handle complex matters, and the larger claims where it is economic to use the High Court. The District Courts lack of civil capacity leaves a void for disputed claims worth less than $500,000.
Part 7: unfair contract terms and presentation of consumer policies	
30	*Do you see any unintended consequences from removing sections 18-20, 34-39 and 42 from the MIA?*
	No, the changes make sense and are long overdue
31	*In relation to unfair contract terms: which option do you prefer and why?*
	I prefer option two. This is for several reasons • 171 is prescriptively drafted, and this may present issues when the phrase "transparent term" requires interpretation is tricky factual circumstances. • The narrow mechanism of 171 may make the application of and interpretation of exclusion clauses problematic. Exclusion clauses are important mechanisms for defining cover and limiting insurers liability, there needs to be clarity around the application of exclusionary terms. 171 is too vague on how these could be applied (for instance many exclusions such as those which limit cover but do not fully exclude, could be argued to fit within 46KA(3)(b)(ii).) • The drating on cl172, fits better in the schema of both pieces of legislation.
32	*Do you have any feedback on the drafting of either of the options?*
	In both option one cl 171, 46KA(3)(b)(i) and option 2 cl 172, 46KA (2)(b) " sum insured" should be changed to "basis of indemnity" as otherwise unvalued policies (for instance as when new covers with no fixed sum insured) will not be captured.
33	*Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?*
	This is tricky. The plainly worded AMI policies pre 2010, were problematic in that the generality of the language used left too much room for interpretation. While plain and clear language is admirable, modern insurance policies do a considerable amount of work in the anticipation of uncertainty and risk, and the (necessary) complexity of the responses required for insured events. I also doubt that many insureds actually read their policies, let alone understand them. Standardised clauses or wordings are a solution. Lloyds underwriters often create bespoke policies by using standard form clauses which are issued by panels of underwriters with explanatory material. Given that many terms in policy classes are effectively generic standardised terms would provide certainty for insureds, would minimise litigation (as standard clause interpretations need only a single case to decide the point rather than a decision for each iteration. I believe these would be beneficial to the industry and to insureds. I do agree that supplementary and explanatory material should specified as being used as interpretive aids when wordings are in dispute. This is in line with the direction of modern thinking on contractual interpretation.

	As to format and size, I am not convinced that this will make any real difference given most policy wordings are available electronically where size and font are simply not an issue.
34	*Do you have any comments on the regulation-making powers in clause 184?*
	As above the use of standard clauses should be required. I see issues with limiting the length of policies, as these are complex instruments due to the complex works the contracts are required to do. Historically short wordings were possible as they were closely defined specified events covers. Modern comprehensive "all risks" policies are complex by necessity. I have misgivings about a regulator dictating what is or isn't acceptable in this regard.
35	*Do you think regulations specifying form and presentation requirements for consumer, life and health insurance contracts (eg a statement on the front page that refers to where policy exclusions can be found) would be helpful? If so, please explain.*
	Yes, but only to a point. More helpful is for there to be better understanding of issues, through better education of the public.
36	*Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.*
	Only on a limited basis. Differences in cover require a complex understanding of the industry (knowledge about claims handling processes) and skills to interpret contracts. Most lawyers let alone consumers lack those skills and knowledge. Price tends to be a bigger issue, but often there are no decisions actually available to consumers due to a lack of competition in the market. For instance, 18 months ago in Wellington, there are only two insurers offering new homeowner's policies (as opposed to renewals of existing policies). There is in reality no actual choice in many parts and sectors in New Zealand.
Timing and transitional arrangements	
37	*Do you have any initial feedback on when the Bill's provisions should come into effect?*
	As soon as possible. This legislation is three decades overdue.
38	*Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?*
	They make sense in the circumstances.
Schedule 5: amendments to other Acts	
39	*Do you have any feedback on Schedule 5 of the Bill?*
	I think that there is an issue with the division of regulatory functions between the FMA, the Courts and dispute schemes. I am also not convinced that the FMA has the focus or competence to effectively regulate. ASIC took time to achieve the competence and confidence of the industry and public to be an effective regulator. In my view a stand alone body and an independent tribunal also need to be established.

Other comments

This legislation is long overdue. New Zealand is the last Common Law country to properly reform this area of law. This bill must become law.