

Submission on *Exposure draft Insurance Contracts Bill*

Your name and organisation

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Responses to consultation paper questions

Part 1: preliminary provisions

1 *Do you have any feedback on Part 1 of the Bill?*

No.

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?*

We generally support these provisions.

3 *Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?*

The proposed remedy for non-life insurance misrepresentations where the insurer would have entered the contract on different terms is a reduction in the amount paid on the claim measured by the difference in premium the insurer would have charged if the correct information had been disclosed by the policyholder. In our experience as a law firm providing legal services to insurers and the insurance industry, insurer investigations into misrepresentations are frequently time consuming. The limited remedy for misrepresentations which cannot be shown to be reckless or deliberate may be unworthwhile from the insurer's perspective. In our view the proposed remedy provides insufficient incentive to the insured to take care that representations are accurate.

There is potential for dispute as to the amount of the premium the insurer would be "likely" to have charged if the correct information was disclosed. The insured will not usually have access to any objective evidence of what premium the insurer would "likely" have charged. In most cases, the insured will likely need to accept the insurer's assessment, unless the amount involved is significant enough to warrant expenditure on an expert assessment from an independent underwriter.

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?*

No.

5 *Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?*

We generally support these provisions.

6 *Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?*

We repeat our response to question 3: the proposed remedy for misrepresentations where the insurer would have entered the contract on different terms is a reduction in the amount paid on the claim measured by the difference in premium the insurer would have charged if

the correct information had been disclosed by the policyholder. In our experience as a law firm providing legal services to insurers and the insurance industry, insurer investigations into misrepresentations are frequently time consuming. The limited remedy for misrepresentations which cannot be shown to be reckless or deliberate may be unworthwhile from the insurer's perspective. In our view the proposed remedy provides insufficient incentive to the insured to take care that representations are accurate.

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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?

These duties seem appropriate.

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?

No.

Do you have any feedback on how the Bill codifies the duty of utmost good faith?

The statement in clause 59 that insurance contracts are based on utmost good faith is a simple statement of the existing law and will not assist a policyholder in understanding what the duty entails. The clause states a general principle and falls short of a codification of the requirements of the duty of utmost good faith.

Clause 60 is likely to cause confusion, as it deals only with the duty of good faith in relation to disclosure and fails to refer to any other aspect of the policyholder's existing duty of good faith, such as a duty to be honest in relation to claims made under a policy. A lay reader may understand from clause 60 that the matters referred to in relation to disclosure are a complete statement of the extent of the duty of good faith owed by a policyholder. We assume this is not intended, but the wording of the clause is not sufficiently clear.

Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?

No.

Do you have any other feedback on the drafting of Part 2 of the Bill?

No.

Part 3: terms of insurance contracts

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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, 60 days is appropriate if a notification requirement is to be imposed on insurers.

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?

No. While this would be appropriate for a consumer insurance policy, claims-made policies are typically for non-consumer (commercial) risks, in which the insured is usually represented by an insurance broker who acts as the policyholder's agent. Intermediated insurers do not have direct contact with policyholders, so the insurer would need to provide the notification to the broker, with the intent the broker passes the notification on to the policyholder. Brokers will already be aware of the consequences of non-notification within the 60 day period, and as part of their obligations to their client the broker would provide this advice to the policyholder in any event. No point is served by including this requirement in the Act, in relation to policyholders who are represented by an insurance broker.

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Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?

The changes made by clause 69 are positive ones, in keeping with the intention that claims should be notified promptly.

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)?

We support the proposed clause 71(3).

16

Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?

The proposed changes remove the priority of claims over insurance proceeds which currently applies under section 9 of the Law Reform Act 1936, which the MBIE Consultation paper says is to encourage prompt claims. We see this as problematic and undesirable, as it creates a race to secure insurance funds where multiple parties have claims arising from an insured liability event or series of events. In this scenario, a liability insurer facing multiple claims will be able to choose which claims to meet. This may permit a liability insurer to elect to pay claims in which it has an indirect interest as insurer for one of the claimants, which is particularly undesirable given the small insurance market in NZ. Retaining priority of claims enables a fairer and more orderly distribution of insurance funds based on objective criteria.

We consider it important that transitional provisions are included in the new Act to preserve existing rights to charges over liability insurance funds for events which occurred prior to the commencement of the new Act. Section 9 of the LRA 1936 should continue to apply to actions brought against insurers under that section prior to its repeal, as proposed in the Consultation paper in relation to Timing and transitional arrangements.

More generally, in our experience section 9 of the LRA 1936 works satisfactorily and insurers have adapted their wordings to deal with the defence costs issue which arose in the *Steigrad/Bridgecorp* litigation. We do not consider the new provisions dealing with third party claims for liability insurance money are necessary, nor are they an improvement on the existing law.

17 *Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?*

The proposed access to information and disclosure for third party claimants is a positive change enhancing the ability of claimants to pursue claims which are insured under liability policies.

18 *Do you have any comments on not carrying over section 10(1) of the ILRA 1977?*

We agree this section should not be carried over.

19 *Do you have any other feedback on the drafting in Part 3 of the Bill?*

No.

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?*

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21 *Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?*

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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?*

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23 *Do you have any other feedback on Part 4 of the Bill?*

No

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.*

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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?*

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26 *Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?*

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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?

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Do you have any other feedback on Part 5 of the Bill?

No

Part 6: regulation-making powers and miscellaneous provisions

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Do you have any feedback on Part 6 of the Bill?

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Part 7: unfair contract terms and presentation of consumer policies

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Do you see any unintended consequences from removing sections 18-20, 34-39 and 42 from the MIA?

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In relation to unfair contract terms: which option do you prefer and why?

We support Option B. Policy terms limiting the scope of cover delineate the risk the insurer takes on under the insurance policy and directly influence the premium charged. Such terms should not be subject to change by the Courts.

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Do you have any feedback on the drafting of either of the options?

No.

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Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?

While it is desirable for consumer insurance contracts to be clearly worded, in our experience as a law firm providing legal services to insurers, this is the aim of insurers providing consumer insurance cover in any event and unclear wording is generally inadvertent. We are doubtful the introduction of a statutory requirement for clear wordings backed by possible penalties will have much impact in practice.

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Do you have any comments on the regulation-making powers in clause 184?

No.

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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.

No.

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Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.

Possibly, but standardising publication of policies would require considerable thought and reduce flexibility for insurers to compete by offering different policy features.

Timing and transitional arrangements

Do you have any initial feedback on when the Bill's provisions should come into effect?

No.

Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?

As stated above for question 16, we consider it important that transitional provisions are included in the new Act in relation to Third Party claims for Liability Insurance Money, to preserve existing charges under section 9 of the Law Reform Act 1936 which accrued prior to the commencement of the new Act. Section 9 of the LRA 1936 should continue to apply to actions brought against insurers under that section prior to its repeal, as proposed in the MBIE Consultation paper in relation to Timing and transitional arrangements.

Do you have any feedback on Schedule 5 of the Bill?

No.

Other comments

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