

Departmental Disclosure Statement

Contracts of Insurance Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

11 April 2024

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Part One: General Policy Statement

This Bill is an omnibus Bill that amends more than one Act and is introduced under Standing Order 267(1)(a) because the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. That single broad policy is to reform insurance contract law and to consolidate and modernise existing insurance legislation in New Zealand.

Purpose of Bill

The purpose of this Bill is to ensure that insurance contract law is effective for facilitating well-functioning insurance markets for both insurers and policyholders. It seeks to enable consumers and businesses to effectively protect themselves against risk, while minimising costs and impacts on insurers' willingness to provide insurance in New Zealand.

Insurance contract law reform, consolidation, and modernisation

Insurance contracts are governed by various pieces of legislation and case law. At present the law is fragmented across 6 different Acts, some over 100 years old, and would benefit from consolidation and modernisation.

Insurance contract law reforms have been long awaited and there is consensus across industry and consumer groups that these changes are needed.

A series of reviews including by the Law Commission have identified a number of long-standing issues with insurance contract law, which are addressed by this Bill. The Bill has also been informed by similar reforms that have been made to Australian and United Kingdom insurance legislation.

Disclosure duties and insurer's remedies for misrepresentations

Consumers are sometimes unable to make an insurance claim for losses because they innocently did not disclose matters to the insurer that they were unaware they had to disclose.

The Bill reforms the law relating to the disclosure of information by policyholders to insurers before an insurance contract is entered into or varied as follows:

- policyholders under consumer insurance contracts have a duty to take reasonable care not to make a misrepresentation to the insurer:
- policyholders under non-consumer insurance contracts have a duty to make a fair presentation of the risk.

The Bill also –

- modifies the law relating to the duty of utmost good faith that all insurance contracts are based on. Pre-contract disclosure duties on policyholders, and the insurer's remedies for breach, will only be those set out in the Bill:
- ensures the insurer's remedies for misrepresentations and breaches provide proportionate consequences based on how the insurer would have responded to the information at the time of entry into the contract, and whether the policyholder's misrepresentation or breach was deliberate or reckless.

Unfair contract terms

A number of terms in insurance contracts cannot be declared “unfair” under the Fair Trading Act 1986 due to insurance-specific exceptions.

The Bill removes insurance-specific exceptions from the unfair contract terms provisions in the Fair Trading Act 1986 and instead clarifies which insurance terms are part of the “main subject matter” of the contract (which cannot be declared unfair).

Understanding and comparing insurance policies

Unlike many other jurisdictions, New Zealand has no legal requirements in relation to the presentation of insurance policies to help consumers to understand and compare insurance products.

The Bill amends the Financial Markets Conduct Act 2013 to require insurance contracts to be worded and presented in a clear, concise, and effective manner.

Consolidation and modernisation of existing legislation

The Bill brings together different requirements from across the Life Insurance Act 1908, Part 3 of the Law Reform Act 1936, the Insurance Law Reform Act 1977, the Insurance Law Reform Act 1985, and the Insurance Intermediaries Act 1994. These include the following:

- modifying provisions relating to when time limits for making claims are binding on policyholders to better take into account claims-made policies;
- providing that certain policy exclusions are not subject to a rule that insurers cannot rely on an exclusion to deny a claim if the exclusion did not cause or contribute to the loss;
- allowing a third party who has been wronged by a policyholder to claim directly against the policyholder’s insurer. This replaces an existing statutory charge mechanism, due to multiple issues with how this operates.

Payment of claims in a reasonable time

The Bill provides that if a policyholder makes a claim, the insurer must pay any sums due within a reasonable time.

Intention to divide Bill

It is intended that the Bill will be divided by the select committee or at the committee of the whole House stage into separate Bills as follows:

- *Parts 1 to 6 and Schedules 1 to 3* will become the Contracts of Insurance Bill;
- *Part 7 and Schedules 4 to 6* will become the Contracts of Insurance (Repeals and Amendments) Bill.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
MBIE 2018 review of insurance contract law, including consultation on an issues paper: https://www.mbie.govt.nz/have-your-say/insurance-contract-law-review/	
Law Commission 1998 project on insurance law: https://www.lawcom.govt.nz/our-work/insurance-law/	
Law Commission 2003 project on life insurance: https://www.lawcom.govt.nz/our-work/life-insurance/	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
Impact Statement: Insurance contract law reforms, MBIE, November 2019. A copy can be accessed here: https://www.mbie.govt.nz/dmsdocument/7480-impact-statement-insurance-contract-law-reforms-proactiverelase-pdf .	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
MBIE's Regulatory Impact Assessment Panel assessed the RIS as follows: Meets the criteria necessary for Ministers to make informed decisions on the proposals in the Cabinet paper.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
<p>Exemptions have been granted by The Treasury from RIS requirements for Cabinet policy approvals following the exposure draft consultation. Changes covered by the exemptions include, for example, moderating the thresholds for bringing in small trade insurance contracts into the unfair contracts regime and to make payment within reasonable time an implied term of insurance contracts. The exemptions are on the grounds that:</p> <ul style="list-style-type: none"> the proposals have no or only minor impacts on businesses, individuals, and not-for-profit entities in the context of decisions on the wider framework some of the proposals have also been addressed by previous impact analysis. 	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The MBIE RIS relies on a range of qualitative data to assess the impacts of the proposed options, including anecdotal evidence from public submissions. Limited quantitative evidence of the problems identified or quantitative assessments of the costs and benefits of the options was available.</p> <p>The MBIE RIS provides analysis on where the costs of the reforms fall. It signals that insurers will likely face moderate-to-high initial costs to implement the proposals. However, the proposals are not expected to significantly increase costs on an ongoing basis.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The potential costs or benefits are impacted by the level of effective compliance with obligations or standards.</p> <p>The level of compliance is expected to determine the benefits that accrue to consumers over the long term from the improvement resulting from more reasonable disclosure rules and greater clarity over contract terms and of their and insurers' respective duties.</p> <p>MBIE's RIS expected that the Financial Markets Authority will have an increase in costs including the costs of monitoring and enforcement as well as developing guidance.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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New Zealand is not bound by an international treaty in relation to the matters in this Bill. MFAT considers the Bill is consistent with New Zealand's international obligations.
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Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

MBIE considers that the Bill is consistent with the principles of the Treaty of Waitangi. Te Arawhiti was consulted. It is comfortable with MBIE's assessment. Te Puni Kōkiri was consulted. It did not identify any particular impacts on Māori in the bill.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible here: https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/ .
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Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
<p>The Bill applies existing civil liability provisions from sections 56 and 58 and under section 449 of the Financial Markets Conduct Act in the event of a contravention of certain duties:</p> <ul style="list-style-type: none"> • insurers' duties to inform policy holders of certain matters (Part 2, subpart 6) • brokers' duties in relation to payments due to policy holders (replacing the current criminal liability) (clause 108) • brokers' duty to establish and maintain an insurance broking client account (replacing the current criminal liability) (clause 110) • insurer's duties to comply with requirements in regulations relating to the form and presentation of an insurance contract (clause 183, new section 447B Financial Markets Conduct Act, and clause 185(1). <p>The Bill carries over and modernises current offences. It makes it an offence:</p> <ul style="list-style-type: none"> • to issue a form or proposal for insurance that contains, or purports to be, an application for shares in the company with fines on conviction not exceeding \$50,000 for a company and \$10,000 for a company director (clause 99). • for a broker to contravene their duties in relation to premiums, without reasonable excuse, with liability on conviction to a fine not exceeding \$5,000 for an individual or \$10,000 in any other case (clause 104) • for a life insurer to fail to comply (without reasonable excuse) with requirements in clauses 123-139, with liability on conviction to a fine not exceeding \$50,000 (clause 142) • for a life insurer to knowingly breach clauses 149, 150 or 151(1) for life insurers, with liability to a conviction to a fine not exceeding \$50,000 (clause 152(1)). • to knowingly attempt to defeat the provisions of the Bill concerning payments on the death of minors, with liability to a fine of not exceeding \$20,000 (clause 152(2)). 	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted and is comfortable with the penalties and offences in the Bill.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
Clauses 66 and 67 (Duty for specified intermediary in relation to a consumer insurance contract or a non-consumer insurance contract) requires intermediaries that receive commission from an insurer to pass on material information that the insurer is deemed to know. This may include personal information that has been disclosed to an intermediary by a consumer.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner was consulted on the exposure draft of the Bill and subsequently on an updated version of the duty to pass on information. The Office of the Privacy Commissioner provided feedback on the duty and was comfortable in view of the response provided that the privacy risk had been considered and was assessed by MBIE to be low in practice.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Three phases of public consultation have been undertaken by MBIE in the development of the policy and drafting of the Bill:</p> <ul style="list-style-type: none"> • Consultation on the insurance contract law issues in April – July 2018. MBIE prepared an issues paper and invited public submissions. • Consultation on options to address insurance contract law issues in April – June 2019. MBIE prepared a paper outlining options to address the insurance contract law issues that had been identified, public submissions on the paper were invited. • Consultation on an exposure draft of the Bill in February – May 2022. <p>Feedback indicated there is consensus across industry and consumer groups that the reforms made by the Bill are needed. There was support for the objectives of the Bill and the general approach taken in the exposure draft Bill to addressing the policy issues.</p> <p>MBIE also conducted further targeted consultation in August 2023 with industry groups such as the Insurance Council of New Zealand, the Financial Services Council, and the Insurance Brokers Association of New Zealand, and their feedback has been taken into account.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>Clause 165(1)(e) provides for regulations to be made by Order in Council to amend the amount in clause 149(1)(b). This power to amend the Act by regulation is necessary to future-proof clause 149(1)(b), which includes a nominal monetary figure (\$15,000), against inflation over time. Regulations can only be made on the recommendation of the Minister (clause 165(2)). Before recommending the Minister must be satisfied that any amendment is necessary or desirable to take into account any increase in the Consumer Price Index (clause 165(5)).</p> <p>Clause 165(1)(c) provides that regulations can be made by Order in Council that declare that the definition of consumer insurance contract, or non-consumer insurance contract, includes or does not include a particular kind of contract of insurance. In the event that uncertainty arises about how a particular kind of contract is to be categorised, clause 165(1)(c) can provide certainty to policy holders and insurers. Regulations can only be made on the recommendation of the Minister (clause 165(2)). Under clause 165(3), the Minister must, before recommending such regulations:</p> <ul style="list-style-type: none"> (a) consult the FMA; and (b) have regard to the economic substance of the contracts of insurance to which the declaration will relate; and (c) be satisfied that the declaration is necessary or desirable in order to promote either or both of the matters in section 3(a) or (b), which are: <ul style="list-style-type: none"> (a) promoting the confident and informed participation of insurers, policyholders, and other participants in the New Zealand insurance market; (b) ensuring that the provisions included in contracts of insurance, and the practices of insurers in relation to those contracts, operate fairly. <p>The purpose and effect of clause 165(1)(c) is similar to section 562 of the Financial Markets Conduct Act 2013. Section 562 gives the FMA the ability to declare that a financial product is a financial product of a particular kind.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Clause 165 of the Bill provides a power to make secondary legislation (by Order in Council) for the following purposes:</p> <ul style="list-style-type: none"> • providing for anything this Act says may or must be provided for by regulations (clause 165(1)(a)) • prescribing, for the purposes of any provision of this Act that requires a thing to be done in a manner prescribed by the regulations, the manner in which the thing must be done, including prescribing— <ul style="list-style-type: none"> (i) by whom, when, where, and how the thing must be done: (ii) the form that must be used in connection with doing the thing: (iii) what information or other evidence or documents must be provided in connection with the thing: (iv) requirements with which information, evidence, or documents that are provided in connection with the thing must comply (clause 165(1)(b)) • prescribing matters for the purposes of section 125(b) (which relates to interest payable for contracts of life insurance in respect of assets related money) (clause 165(1)(d)) • providing for anything incidental that is necessary for carrying out, or giving full effect to, this Act (clause 165(1)(f)). <p>This secondary legislation is necessary to provide for the efficient operation of the legislation such as clarifying detailed matters of when, where and how things must be done in a way that can be flexible and adjust over time as needed.</p> <p>The regulation power under clause 165(1)(d) is subject to safeguards. Regulations can only be made on the recommendation of the Minister (clause 165(2)). Before recommending the Minister must be satisfied that the regulations are consistent with objectives specified in clause 165(4).</p> <p>Clause 166 of the Bill also provides a power to make secondary legislation (by Order in Council) for the following purposes in relation to Part 4 of the Bill:</p> <ul style="list-style-type: none"> (a) specifying the duties and obligations of brokers in relation to insurance broking client accounts, including obligations to make payments into those accounts: (b) providing for the protection of money deposited in insurance broking client accounts or invested from claims by persons other than the person for whom, or on whose behalf, the money is held: (c) restricting the combining of any insurance broking client account with any other account or the combining of any property in which money from such an account is invested with any other property: (d) providing for the audit, review, and inspection of the accounts and records kept by brokers: (e) exempting any broker, or class of broker, from any requirements relating to any such audit, review, or inspection: (f) stating which provisions of regulations made under this section (if any) are Part 6 services provisions for the purposes of the FMCA (see section 449(4) and Part 8 of that Act, in which Part 6 services provisions are specified to be civil liability provisions). <p>Secondary legislation made under the bill must be presented to the House or Representatives and may be disallowed by the House of Representatives.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO