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31 May 2024

Committee Secretariat
Finance and Expenditure Select Committee
Parliament Buildings
Wellington

Dear Committee Members

ICNZ SUBMISSION ON THE CONTRACTS OF INSURANCE BILL

1. Thank you for the opportunity to make this submission on the Contracts of Insurance Bill. We would like to appear in person before the Select Committee to make an oral submission on the Bill.

2. Te Kāhui Inihua o Aotearoa The Insurance Council of New Zealand (**ICNZ**) represents general insurers that insure about 95 percent of the New Zealand general insurance market, including about a trillion dollars' worth of property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by consumers (such as home and contents insurance, travel insurance, and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property insurance, and directors and officers insurance).

3. ICNZ welcomes the introduction of the Contracts of Insurance Bill (**the Bill**). The reform of New Zealand's insurance contact law is long awaited. The new Bill will generally modernise and rationalise the law to support well-functioning insurance markets for both consumers and insurers. While we support the reforms generally, there are aspects of the Bill that need to be refined to ensure these objectives are achieved.

4. We have outlined where changes are required in this submission and proposed amendments to the Bill. They are related to ensuring the purposes of the legislation are achieved, on ensuring workability of the obligations and to avoid unnecessary costs. Some of these are matters we raised in relation to the 2022 Exposure Draft but have yet to be addressed. We have also identified areas where the law has not been modernised enough to take into account modern business practices.

5. ICNZ would like to acknowledge the work of officials and the thoughtful and considered approach that has been taken progressing this legislation to this point. We look forward to engaging with the Select Committee and its advisers on further refining this important piece of legislation.

Summary

6. ICNZ strongly supports the introduction of an objective test to the Bill's definition of 'consumer insurance contract'. This change will allow insurers to categorise their products as either consumer or non-consumer products and design their marketing, distribution and other processes accordingly.

7. ICNZ strongly supports making the remedies for non-disclosure by a customer proportional. We welcome the formula set out in the Bill for calculating proportionate remedies for non-deliberate and non-reckless qualifying misrepresentations or qualifying breaches.

8. Overall, the implementation of the proposed amendments to how the Unfair Contract Terms (**UCT**) regime will apply to insurance contracts will represent a material extension to the current scope of the regime for insurance contracts by widening the scope of coverage for consumer contracts and bringing commercial ('small trade') insurance contracts under the same scope. We strongly support the approach in the Bill of setting out which contract terms should be regarded as defining the 'main subject matter' of an insurance contract for the purposes of the UCT regime.

9. The UCT regime will apply to both consumer and small trade contracts. One of the factors in determining whether a contract is a small trade contract is the annual value threshold. The Bill sensibly modifies this threshold for small trade insurance contracts. We consider the original threshold was far too high for insurance contracts and that $20,000 is a much more realistic threshold than $250,000. However, we note our previous feedback that a $10,000 threshold is more appropriate as otherwise contracts will be captured that are not small trade.

10. We still consider the duty of utmost good faith does not need to be codified. While we consider the way it is provided for in clause 63 is much improved from the 2022 Exposure Draft, we have suggested amendments to clarify the intent of the clause.

11. We consider that the Bill should reduce the period of time that insurance brokers may hold onto premiums before passing them onto insurers to a much shorter period, such as within 20 days of the end of the month following receipt of the money from the policyholder. Delaying the payment of premiums to insurers increase insurers' costs and this ultimately has a negative impact on the affordability of insurance.

12. We do not consider the introduction of a late payment duty is required or that a separate right to claim damages for breach is necessary. We consider its inclusion would create new uncertainty. If contrary to our views, the duty is retained then we strongly submit against attempting to define a maximum time period for the payment of claims. Every claim has its own specific circumstances so it is not possible to have a 'one size fits all' time period.

Key Issues

Definition of 'consumer insurance contract' is supported (clause 10)

13. ICNZ strongly supports the introduction of an objective element to the Bill's definition of 'consumer insurance contract'. This is because insurers under the Bill need to know whether a product is a consumer or non-consumer product before it is marketed and distributed as they cannot practically run multiple processes for the same product. An objective assessment is also consistent with the definition of 'consumer' under the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 (the test focuses on whether the good or service is one that is 'ordinarily acquired' for personal, domestic, or household purposes. A subjective test would have been unworkable and would have created too much uncertainty.

Proportional remedies for non-disclosure by customer (clauses 5(2) and 14(2) of Schedule 2)

14. ICNZ strongly supports the approach in the Bill to make the remedies for non-disclosure by a customer proportional. We welcome the formula for calculating proportionate remedies for non-deliberate and non-reckless qualifying misrepresentations or qualifying breaches as set out in cls 5(2) and 14(2) of Schedule 2.

15. Premium is calculated based on actuarial and statistical modelling and probability of risk and uncertain eventualities across a broad portfolio of business. To treat an individual consumer or commercial customer's underpayment of premium in the event of a relevant claim as being directly connected and a straight deduction of the underpaid premium made from their claim payment would be to mischaracterise matters and may have a significant effect on pricing at a portfolio level.

16. A straight-line premium deduction ignores the impact on the wider customer base (with those providing accurate and full disclosure effectively cross-subsidising those that have not) and the broader distortionary impacts involved (reflecting upon the nuanced relationship between premium and claims payments at a portfolio level described above).

17. We note that as currently drafted, cl 5 of Schedule 2 does not enable insurers to charge a higher premium if they would have done so but for the misrepresentation or breach. We consider it is vital for insurers to be able to increase their premium to reflect the actual risk they are covering instead of only being about to recover any shortfall in premium if the insured makes a claim. It would be financially unworkable for insurers to have to carry increased risk on their books without being able to charge additional premium for it. We therefore suggest an amendment to cl 5 of Schedule 2 in our clause by clause feedback table in the Appendix (see page 39).

Application of the UCT regime to insurance contracts (clause 176)

18. ICNZ strongly supports the efforts made to appropriately tailor the UCT regime under the Fair Trading Act 1986 to insurance contracts. This is necessary to reflect the unique nature of insurance contracts and ensure that the 'main subject matter' exception accurately reflects what this means for an insurance contract. Certainty of contract is critical for supporting the provision of insurance contracts.

19. We note the 2022 Exposure Draft of the Bill proposed two options for the application of the UCT regime to insurance contracts: a 'narrow' or 'wider' version of the main subject matter of the contract (Options A and B respectively). We support the approach adopted in the Bill, which is a refined version of Option B.

20. We are of the strong view that, of the two options, Option B (as modified in the Bill) represents a more appropriate balance between ensuring there is sufficient contractual certainty while extending the scope of the UCT regime, and would reduce the likelihood of significant unintended consequences.

21. The implementation of the proposed amendments to how the UCT regime should apply to insurance contracts would still represent a material extension to the current scope of the UCT regime for insurance contracts overall by widening the scope of coverage for consumer

contracts and bringing in commercial ('small trade') insurance contracts under the same scope. We reiterate below our arguments around why Option A would have been highly undesirable.

22. Insurance contracts are fundamentally different from other contracts for the following reasons:

    - The transfer of risk from the policyholder to the insurer underwriting the risk through an insurance contract (and the terms of contracts which define these) warrant a different relationship from that of the standard seller of goods and services and the customer. The terms of an insurance policy are integral to the very product itself.

    - In an insurance contract the 'main subject matter' is made up of the bundle of terms (including limitations and exclusions) that define the particular circumstances that may trigger a promise to pay at some time in the future. This reflects that whether and how these circumstances may specifically play out is uncertain. To restrict matters to the subject of insurance (i.e., event, subject or risk insured) and amount insured for (i.e., sum insured and excess) as per Option A would be unduly restrictive, simplistic and ignore other key elements (i.e., limitations and exclusions) that together form the overall risk transfer that is explicitly considered by insurers in determining the price they charge.

    - If an insurer cannot with certainty and confidence define or ring-fence risks which it is willing to insure against those it is not (because key terms that define the risk transfer can be challenged), insurers (and reinsurers behind them) could end up paying out claims in circumstances which were never intended. This could also create risks in relation to reinsurance cover and would generally increase the risk and uncertainty of providing insurance to both consumer and non-consumer policyholders, which would in turn likely have a negative impact on insurance affordability or availability. The ability of insurers to offer cover ultimately depends on their ability to attract capital from investors and reinsurers.

    - The New Zealand context is also relevant. For instance, and unlike the position in Australia for example, insurance policies in New Zealand are generally written on an 'all-risks' basis, with all claims within broadly defined parameters covered unless expressly excluded. This provides generous and transparent coverage of perils for New Zealand policyholders. This contrasts with a 'Defined Perils' policy common in Australia (and some other jurisdictions), where a policy provides cover only if the loss is caused by one of the perils expressly listed. This approach can lead to considerably longer and more complex policies (and potentially less cover) and means comparisons with the effects from the UCT regime in Australia need to be considered very carefully. The increased uncertainty that would result by making exclusions subject to the UCT regime under Option A could, for example, encourage insurers in New Zealand to move away from all risks policies.

23. It is important to acknowledge that beyond the changes to the UCT regime policyholders have the benefit of a range of protections under the Bill and at law (most of which are unique to contracts of insurance).

24. The Bill includes a number of clauses which protect policyholders, including:

- Clause 64: a representation made by a policyholder in connection with a proposed contract of insurance or variation is not capable of being converted into a warranty.

- Clause 72: provisions prescribing manner or time of claims or proceedings are not binding unless the insurer has been prejudiced by the policyholder's failure to comply and it would be inequitable if the provision did not bind the policyholder.

- Clause 75: subject to a limited set of proposed more broadly statistically relevant exclusions, an insurer cannot rely upon an exclusion that relates to increased risk if those excluded circumstances were not causative of loss in the particular circumstances.

- Clause 76: an insurer may not include a pro rata condition of average in home and contents insurance contracts.

- Part 2 and Schedule 2 of the Bill provide for amended disclosure duties for both consumer and non-consumer policyholders, and provide for more proportional remedies for breach of those duties.

25. The new Conduct of Financial Institutions (**CoFI**) regime under a new Subpart 6A of the Financial Markets Conduct Act 2013 (**FMCA**) that comes into effect in early 2025 also provides overarching obligations on insurers to treat consumers fairly and provides specific insurance contract related obligations. The 'fair conduct principle' requires insurers to "ensure that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group" and an insurer's Fair Conduct Programme needs to provide for "regularly reviewing the relevant services or associated products that are provided to consumers on an ongoing basis to determine whether they are likely to continue to meet the requirements and objectives of those consumers (when viewed as a group)".

Application of the UCT regime to small trade insurance contracts (clauses 175 and 178)

26. The UCT regime set out in the Fair Trading Act was extended in 2022 to 'small trade' contracts generally, with the application to insurance contracts deferred to align with this Bill to support the efficient implementation of product changes. A small trade contract is defined by reference to a number of factors including a $250,000 annual value threshold (i.e. a contract that forms part of a trading relationship that falls beneath that threshold may be a small trade contract). A commercial insurance contract involving a premium of $250,000 would capture underwriting of tens of millions of dollars of business liabilities and so does not represent a 'small trade' contract. We consider the original threshold was far too high for insurance contracts and that $20,000 is a much more realistic threshold than $250,000. We note we originally made submissions asking for a $10,000 threshold, which we consider is more appropriate, as the $20,000 threshold will capture contracts that are not 'small trade'.

27. Please see our further submissions as to when the annual value threshold should be assessed in our detailed submissions in our clause by clause feedback table in the Appendix on pages 29 - 30.

28. We also support the policy intent behind extending the deadline for application of the UCT regime to small trade insurance contracts in clause 178. This will enable related changes in

the Bill to come into effect at the same time – making the review and updating of insurance contracts more efficient and less costly for insurers, brokers and their customers. We propose an amendment to cl 178 in our clause by clause feedback in the table below to ensure that certainty is provided.

Duty of utmost good faith (see clause 63)

29. For the reasons set out in ICNZ's 2022 Submission on the Exposure Draft of the Insurance Contracts Bill[1] and ICNZ's 2023 Submission on MBIE's further consultation on the Insurance Contracts Bill (pages 7-9)[2], ICNZ's strong view remains that the duty of utmost good faith does not need to be and should not be codified. The duty of good faith is a long-standing concept in insurance law which the courts should be left to continue to develop. Part 1 of the Bill clearly replaces the duty of disclosure and thereby overrides aspects of that duty.

30. Codification of the duty of good faith risks creating additional issues and having unintended consequences. We were particularly concerned the duty as expressed in the Exposure Draft of the Bill would have led to uncertainty as to how far the duty as characterised there might extend or whether any private or statutory rights of action may inadvertently have been created. Despite cl 63 being much improved from the equivalent clause in the 2022 Exposure Draft, after further reflection we remain of the view that the duty of good faith does not need to be or should not be codified. We therefore suggest below an amendment to cl 63 to align with what we see as its intent (i.e. that the Bill replaces the duty of disclosure (and associated remedies) on policyholders prior to entry into contracts of insurance).

31. The common law in this area is also evolving. Historically, the duty of utmost good faith applied to the formation of an insurance contract (i.e. pre-contractual disclosure) and when a claim is made by the policyholder. The duty does not apply across the board to every aspect of the parties' dealings in connection with the contract, but rather the obligations owed are context specific: refer to the recent Court of Appeal decision *Southern Response v Dodds* [2020] NZCA 395. There is also authority suggesting that the post-contract duty is one of 'good faith' rather than 'utmost good faith'.

32. Further, the duty was not developed to protect customers but insurers. It recognised the imbalance of information in favour of the policyholder about the subject matter of the insurance and the details of claims, where the insurer relies on the customer's honesty. See: *Blanshard v National Mutual Life Association of Australasia Ltd* (2004) 13 ANZ Insurance Cases 61-621 at [50]; *Taylor v Asteron Life Ltd* [2020] NZCA 354 at [98]; and *Southern Response Earthquake Services Ltd v Dodds* [2020] NZCA 395 at [193] – [194]).

33. Express contract terms requiring parties to act in good faith have also been held unenforceable for uncertainty: See cases cited by The Law Commission and The Scottish Law Commission, Insurance Contract Law Issues Paper 6, "Damages for Late Payment and the Insurer's Duty of Good Faith" at [4.50]. In addition, insurers would have faced difficulty in defining and pricing risk based on the version of the duty provided in the Exposure Draft of the Bill. For example, could the duty have resulted in an insurer being unable to rely on policy exclusions, even despite the existence of cl 75 of the Bill?

[1] https://www.icnz.org.nz/wp-content/uploads/2023/01/ICNZ_submission_on_the_Exposure_Draft_of_the_Insurance_Contracts_Bill_040522.pdf

[2] https://www.icnz.org.nz/wp-content/uploads/2023/09/25-Aug-2023-ICNZ-submission-on-Insurance-Contracts-Bill-further-consultation.pdf

34. To give effect to what we see as the intent of cl 63, and for the above reason, we therefore suggest a new subpart 7 of part 2 as follows:

> **Subpart 7—Effect on duties of disclosure**
> **63 Effect of Part on duties of disclosure**
> The duties set out in **subparts 1 and 4** replace any duty or rule of law relating to disclosure or representations by a policyholder to an insurer that existed in the same circumstances before those subparts came into force.
> **Guidance note**
> This Act replaces duties (and associated remedies) in connection with the disclosure of information by policyholders before a contract of insurance is entered into or varied.

35. While we consider that the amendment above is a more simple approach, should cl 63 nonetheless be retained in its current form, we recommend one change to cl 63(4) and the Guidance Note to ensure that it is clear that the utmost good faith rule remains unaffected by the Bill.

> (4) The utmost good faith rule is modified to the extent required by this section <u>but otherwise remains unaffected by this Act</u>.
>
> ~~(5) 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.~~
>
> **Guidance note**
>
> ~~The law recognises that contracts of insurance are based on the utmost good faith. This imposes duties on both the insurer and the policyholder.~~
>
> This Act replaces duties (and associated remedies) in connection with the disclosure of information by policyholders before a contract of insurance is entered into or varied. The utmost good faith rule is modified to that extent but otherwise continues as a rule of law <u>unaffected by this Act.</u>

Duties of brokers in relation to premiums (Part 4, Subpart 2)

36. We support the inclusion of provisions in the Bill that seek to impose greater safeguards on the management of premium money by brokers before it is paid to insurers than exist under the Insurance Intermediaries Act 1994. We note that the current arrangements provided for and enabled under the Bill increase the costs and risks of providing insurance in New Zealand. In short, under current arrangements brokers receive premium money from customers and are able to leave it in an interest earning non-trust account for a period of time and to then keep the interest earned on this money.

37. This delay in the insurer receiving the premium when they are already on risk has direct costs for insurers and also increases the risk that should a broker becomes insolvent the premium is never received. In that case the customer is protected by virtue of clause 101 (Payment of policyholder to intermediary discharges policyholder's liability to insurer) but the insurer remains on risk without payment.

38. We consider that the Bill should reduce the period of time that insurance brokers may hold onto premiums before passing them onto insurers to a much shorter period, such as within 20 days of the end of the month following receipt of the money from the policyholder.

39. The shorter time period would align with standard commercial invoicing arrangements and reflects that the longer the period funds are not passed on, the greater the costs for insurers in covering the resulting cashflow shortfall and an increased risk the payment does not occur at all. These costs are costs that may ultimately be borne by customers.

40. The insurer is exposed to the risk that these payments are not passed on to them, yet are required to honour insurance cover in place notwithstanding that they have not been paid for it (and possibly may never be). While an insurer can look to recover from the insurance broker in such circumstances, doing so carries its own costs and uncertainty (e.g., it may be that the broker is insolvent and funds cannot be recovered or are only partially recovered).

41. The insurer incurs significant cash flow carrying costs due to premiums not being promptly passed on to them. This includes the use of money cost of having to advance levies to Government agencies such as Fire and Emergency New Zealand (FENZ) and Earthquake Commission levies, Goods and Services Tax and reinsurance premium, notwithstanding that they are yet to be paid.

42. Ultimately, this risk and these costs impact all customers by increasing the costs of providing insurance in New Zealand.

Implied term about payment of claims (clause 70)

43. We do not consider the introduction of a late payment duty is required or that a separate right to claim damages for breach is necessary. We consider its inclusion would create new uncertainty.

44. We note a policyholder already has the right to claim damages for any losses it has suffered that flow from an insurer's non-payment (under ordinary contractual principles, where one party suffers loss because the other party has failed to meet its contractual obligations, the innocent party may claim damages for foreseeable losses suffered (*Hadley v Baxendale*: see also Colinvaux's *Law of Insurance in New Zealand* (2nd ed) at 8.4.3(4) and *Harris v New Zealand Insurance Co Ltd* (1987) 4 ANZ Insurance Cases 60-817 (HC), aff'd *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10 (CA)). There is no reason to single out insurers in the way proposed by cl 70, especially given the existing protections for consumers and the reality that it is also in insurers' best interests to pay claims within a reasonable timeframe.

45. In addition, policyholders already have a statutory right that recognises their 'loss of use' of the money. This is in the form of interest under the Interest on Money Claims Act 2016 (**IMA**).

46. The purpose of the IMA in s 3 is instructive:

3 Primary purpose

(1) The primary purpose of this Act is to provide for the award of interest as compensation for a delay in the payment of debts, damages, and other money claims in respect of which civil proceedings are commenced.

(2) That purpose is to be achieved by the award of interest in accordance with the following principles:
   (a) interest is to be awarded on all money claims except those expressly excluded by this Act:
   (b) interest is to be paid from the day on which the money claim is quantified until the day of payment:
   (c) the interest rate to be used for the purposes of this Act is to reflect fairly and realistically the cost to a creditor of the delay in payment of a money claim by a debtor and, in particular,—
      (i) the rate is to be capable of fluctuating in accordance with changes in the retail 6-month term deposit rate published by the Reserve Bank of New Zealand; and
      (ii) interest is to be compounded so that it yields the per annum simple interest rate over the period of a year; and
      (iii) interest is to be calculated using a calculator that is publicly available on an Internet site maintained by or on behalf of the Ministry:
   (d) in special circumstances, a court is to have power to award any interest or compensatory lump sum it may direct, or make no award.

47. Delays by insurers in paying claims are addressed by the making of an award of interest. If 'special circumstances' exist, a policyholder may be entitled to receive a 'compensatory lump sum'. This could apply if a customer could demonstrate loss over and above a standard loss of use of money claim. These statutory rights are in addition to the existing rights a policyholder has to claim damages flowing from an insurer's non-payment, as described above.

48. We also note the ICNZ's Fair Insurance Code already sets out timeframes for claims handling and CoFI also places obligations on insurers including to act ethically and in good faith when handling a claim.

49. It is important to note that insurers already have a financial incentive to pay claims as quickly as possible including because unpaid claims liabilities must be expressly provided for in an insurer's finances and for solvency purposes as a contingency, and because delays may create an exposure to inflation in repair or remediation costs.

50. We note members of the Committee have expressed an interest in receiving submissions on what is a reasonable timeframe for resolving claims. We strongly submit against attempting to define a maximum time period for the payment of claims. Every claim has its own specific circumstances so it is not possible to have a one size fits all timeframe. The range in the nature of insurance claims from the small and simple to the large and complex is enormous. Many claims can be settled swiftly, however, more complex claims can require extensive processes.

51. Settling complex insurance claims is a multifaceted process that involves various steps, from the initial reporting of the incident to the final resolution. Following notification of the claim and a determination the loss is covered, it is necessary to investigate the claim, assessing the damage, and determining the value of the loss. This may include site inspections, interviews with the claimant and witnesses, and gathering documentation. The claimant must provide all necessary documentation to support their claim and/or otherwise participate in the claims process. Complex claims may involve legal proceedings, especially if there is a dispute over liability or the value of the claim.

52. We are also aware disaster may affect an insurer's ability to process claims in a business as usual manner. In such circumstances, insurers may receive a large number of claims, and may be especially reliant on third parties to assess the damage incurred by policyholders (e.g. engineers and builders etc.).

53. The factors that may be taken into account in cl 70(3) demonstrate that it is not practical to have a set timeframe. We support the six criteria listed ((a) – (f)) and if this duty is progressed, we suggest the following three examples be added to the list of relevant circumstances to cl 70(3).

    - whether the insurer has received all information necessary to investigate and assess the claim (taking into account the extent to which the policyholder and any third parties have co-operated with the insurer);

    - whether the claim follows a large-scale event or number of events within a short period of time (whether or not those events are related);

    - whether the claim is connected to a claim under the Natural Hazards Insurance Act 2023 (**NHI Act**) or is subject to involvement of the Natural Hazards Commission Toka Tū Ake.

54. The relevance of including the Natural Hazards Insurance Commission is that in settling these claims the insurer, as agent of the Commission, is subject to both the statutory requirements of the Earthquake Commission Act 1993 (Natural Hazards Insurance Act 2023 from 1 July 2024) and to the Commission's decisions as principal. We note for example that following the major weather events of early 2023, it is the EQC-related claims that have materially lower settlement rates due to the complexities of assessing and determining natural disaster damage (particularly land damage) under the Act. While claims under the NHI Act solely (i.e. land cover) would not be subject to the Bill, claims involving an NHI aspect and over cap (private insurer)[3] aspect could be and resolving a land claim or the below cap NHI Act part of the claim can delay settlement of the claims for the affected residential buildings under the insurance contract issued by the licensed insurer. The time impacts can be significant, for example private insurers are still receiving in 2024 over cap claims from the 2010-11 Canterbury Earthquakes. Therefore, in considering the application of cl 70 such matters should be taken into account as relevant.

55. If the duty expressed in cl 70 is progressed, we also consider the provision should only apply to consumer contracts and not to non-consumer contracts.

Policyholder disclosure duty (Part 2, subpart 1)

56. Members of the Select Committee have expressed an interest in receiving submissions on whether the policyholder disclosure duty is sufficiently clear, and plain language.

57. ICNZ is supportive overall of the disclosure obligation for consumers being recast as a duty to take reasonable care not to make a misrepresentation. However, the way this has been

[3] If a residential building suffers natural hazard damage, a policyholder is entitled to be paid by the Commission an amount up to the 'building claim entitlement' in respect of that building. See ss 31 and 35 to 37 of the NHI Act. Any amounts that exceed the building claim entitlement is subject to the applicable insurance cover with the private insurer.

presented in the Bill is in places confusing, inconsistent and requires adjustments. We note the equivalent UK statue on which the changes are based is more straightforward in this respect.

58. For the reasons set out at page 8 of the ICNZ 2022 Submission, ICNZ remains of the view that aspects of the disclosure provisions are unduly complex and may confuse insurers and policyholders alike. Currently the factors that must be considered in assessing whether a policyholder has taken reasonable care not to make a misrepresentation are set across six separate provisions (cls 14 to 19), some of which have different frames of reference. For example, whereas cls 14 and 16 provide for an objective 'reasonable care' standard, cl 15 contains mixed objective and subjective elements and cl 17 has an entirely subjective focus. ICNZ has provided detailed comments on the relevant clauses in the clause by clause feedback table in the Appendix (at pages 14 - 16).

Third party claims against insurers (Part 3, subpart 5)

59. The overall purpose of subpart 5 of Part 3 (Third party claims against insurers) is for the third party claimant not to be prejudiced by the financial position of the insured where the insured is bankrupt, in liquidation or receivership, or is subject to some other insolvency proceeding. Subpart 5 of Part 3 aims to effectively place the parties (including the insurer) in the same position they would have been had the insured not been bankrupt etc. We are concerned however that, as set out in our clause by clause feedback (at pages 26 - 28), some clauses would put the third party claimant in a better position than it would have been in if the policyholder was not a specified policyholder. This creates an imbalance in obligations, and in doing so risks discouraging insurers from offering some forms of coverage. We have set out in our clause by clause feedback our recommendations to address this issue.

Implementation timeframes (clause 2)

60. Clause 2 provides that the Bill's provisions will come into force by Order in Council or by the third anniversary of Royal Assent. We support this approach, and consider allowing up to three years is appropriate noting that the work involved will be significant and the potential for regulations to be made following enactment which will require further implementation work.

61. Insurers will require a significant period to undertake implementation of all the changes in the Bill as there are a range of impacts, particularly on insurance products/policies and supporting collateral. In addition, insurers will also need to update their systems and processes to meet new disclosure and notification requirements. This work will be resource intensive and require extensive staff training.

62. Further complications arise when intermediaries are involved with the products themselves (e.g. broker wordings), and/or when distribution arrangements need to be updated and intermediaries' own systems and processes modified.

63. The commencement date needs to factor in a sufficient period overall for this work, the implementation of other relevant regulatory changes, and to occur at a sensible time of year recognising that (once developed) the deployment of product changes effectively occurs in the months leading up to the commencement date as renewals come up and new contracts for the period after the commencement date are entered into.

64. Whether any additional regulatory material will be issued subsequent to the passing of the Bill itself will also need to be factored into the commencement date determined. This is particularly the case for anything that might impact insurance products/policy wordings as insurers and relevant insurance intermediaries cannot sensibly commence work on reviewing and updating policies until all regulatory requirements are known.

65. We recommend the Government engages with the insurance sector on the appropriate timing for commencement once the Bill has been enacted.

Clause by clause comments and recommendations on the Bill

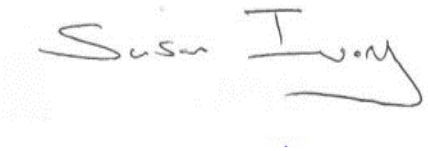
66. Given the significance of the Bill for the general insurance sector, ICNZ has a number of detailed technical and drafting comments on the provisions of the Bill. These are set out in the clause by clause feedback in the table set out in the Appendix.

Conclusion

67. Thank you again for the opportunity to submit on this matter. Please contact Susan Ivory (susan@icnz.org.nz) if you have any questions on our submission or require further information.

Yours sincerely

Hon. Kris Faafoi
Chief Executive



Susan Ivory
Regulatory Affairs Manager

Appendix: Clause by clause feedback on the Bill

Clause 2 Commencement
See our comments on implementation timeframes in the Key Issues section of our submission.
Part 1 Preliminary Provisions
Clause 3 Purpose
We recommend that cl 3(b) be amended with an addition as follows: *The purpose of this Act is to reform and modernise the law relating to contracts of insurance to— […]* *(b) ensure that the provisions included in contracts of insurance, and the practices of insurers in relation to those contracts, operate fairly, <u>while ensuring that certainty of contract is upheld</u>.* Certainty in relation to insurance contracts is fundamental to supporting the ongoing sustainability of the insurance market. Contracts of insurance are fundamentally different from most other types of contracts. Insurance contracts involve transfers of risk and pricing that risk, which is the basis of an insurer's promise to pay a claim (or claims), depends on finely calibrated actuarial assessments of uncertain events. Insurers use insuring clauses and contractual terms that provide benefits for the insured, to outline the risks they will accept. This Bill is not the only regulatory regime that focusses on 'fairness' as this relates to the provision of insurance and it should not be considered exhaustive in this regard. For example, fairness is also a central feature of the incoming CoFI regime, the existing common law duty of utmost good faith and ICNZ's Fair Insurance Code.
Clause 6 (Meaning of contract of insurance)
The definition of 'contract of insurance' includes a 'contract of reinsurance' (cl 6(b)). In our view, this is not appropriate. No policy rationale for this being included has been identified during the Insurance Contract Law Review and the provisions in the Bill do not anticipate an application to reinsurance contracts. Reinsurance contracts are fundamentally different from insurance contracts in nature and substance in that they are only entered into by commercial insurance sector participants. Uncertainty about whether they might be subject to aspects of this Bill could create extra complications for New Zealand based insurers seeking reinsurance while not providing any apparent benefits. Reinsurance contracts are exempted from the equivalent Australian law.
Part 2 Disclosure Duties
Clause 10 Meaning of consumer insurance contract and non-consumer insurance contract
See our comments on this clause in the Key Issues section of our submission above.
Clause 11 Presumption relating to consumer insurance contract
ICNZ opposes cl 11. It is unnecessary to provide a presumption in favour of a contract being treated as a consumer insurance contract. In comparison, there is no presumption

in the Consumer Guarantees Act or Fair Trading Act that a person is a consumer and there is no apparent justification to apply such a presumption to an insurance contract in this context.

Part 2 Subpart 1 Disclosure duty for consumer insurance contracts

Clause 14 Policyholder must take reasonable care

A contract of insurance is often taken out jointly by more than one person, but only one person goes through the process of purchasing the insurance policy on behalf of them all. An insurer should be able to rely on the representations made by one person on behalf of others to be covered by the insurance contract without having to make enquiries of the others (and prospective policyholders should not be burdened by the requirement that all of them have to provide in substance the same information to the insurer). The inability to do this would have major implications for the establishment of insurance contracts in this context that would add complications for insurers and their customers. We therefore recommend that a new subclause (4) be inserted into cl 14, as follows:

> ***14. Policyholder must take reasonable care***
> *[…]*
> *(4) A misrepresentation made by a policyholder before a consumer insurance contract was entered into or varied is deemed to have been made by all policyholders of that insurance contract.*

Clause 15 Matters that may be taken into account

See our comments on cls 17 and 19 below, where we also recommend changes to clause 15.

Clause 17 Particular characteristics or circumstances of policyholder

ICNZ supports the requirement for an insurer to have regard to a consumer's particular circumstances. However, this duty needs to be realistic and be workable in practice, in particular in relation to what an insurer "ought to have been, aware of". An insurer has a limited ability in practice to know if an insured has any particular characteristics or circumstances that should be taken into account by the insurer. There is no systemic ability to obtain this information without adding undue complexity for customers and there are 'roadblocks' which may prevent this from occurring. For example:

- A customer may provide an insurer with information during an application for a policy that is subsequently withdrawn and left incomplete. However, an insurer does not record or keep this information, nor are they entitled to.

- There will be circumstances when the customer chooses to engage solely via a digital platform and underwriting decisions are made automatically based upon their inputs without any other interaction. This method of distribution is likely to be increasingly common, particularly for consumer policies.

- In a situation when an intermediary such as an insurance broker is involved, the insurer will be reliant upon them to pass on information and generally, under the relevant distribution agreement, the insurer will be prohibited from communicating with customers directly themselves.

- In many circumstances, the individuals who may know about a customer's particular circumstances (e.g., one dealing with them at claims time) may not have any involvement in selling policies directly to them.

- Even in circumstances when a member of an insurer's sales and service team personally interacts with the policyholder, what they may be able to ascertain about their particular circumstances at the time of disclosure may be extremely limited. While great care is taken to identify and appropriately triage individuals when signs of vulnerability are identified, insurers will not always become aware of a specific vulnerability.

Accordingly, for the reasons above, we recommend that two changes should be made, as follows:

- The substance of cl 17 should be included as an additional matter to be taken into account in cl 15, which seems to be the intent of cl 17 (i.e. cl 17 would become an additional subclause of clause 15); and

- Clause 17 (as inserted into cl 15 as a new subclause) should remove the words "or ought to have been".

Clause 18 Fraudulent misrepresentation is always a lack of reasonable care

ICNZ considers that the word "fraudulently" in cl 18 should be replaced by the word "dishonestly" (adopting the position in the Consumer Insurance (Disclosure and Representations) Act 2012 (UK), s 3(5)). We are concerned that the current provision may be constituted as meaning that it is only fraudulent representations that will breach the duty. An insured who is dishonest (but who is not necessarily proven to be fraudulent) should not be considered to have complied with the duty to take reasonable care.

Dishonesty and fraud are related but distinct concepts. Dishonesty is a broad term that refers to actions that are not honest or lack integrity and can manifest in many ways, including lying, omitting important information, or otherwise misleading someone. Dishonesty does not necessarily involve a deliberate attempt to deceive for personal gain. Fraud, on the other hand, is a specific type of dishonesty that involves deliberate deception with the intent to secure an unfair or unlawful gain. Fraud is a criminal offence and requires proof of intent to deceive and the purpose of obtaining an advantage, typically financial, at the expense of another.

Clause 19 Failure to answer or obviously incomplete or irrelevant answer

ICNZ does not consider that cl 19 is warranted nor do we understand what mischief it seeks to address. As currently drafted, cl 19 may be interpreted as watering down the reasonable care requirement for the policyholder to such an extent that the focus is only on the insurer's questioning and an insured can withhold information that the insured knows is material to the insurers by answering questions partially, irrelevantly, or not at all.

Clause 19 also appears to assume a person-to-person interaction between the policyholder and a member of the insurer's staff which may not be the case (many insurance policies are purchased digitally). It is also important to note that cl 15(1)(d) and (e) of the Bill adequately protect the insured without the need for cl 19 (those clauses require the following matters to taken into account in determining whether the insured

has taken reasonable care: how clear, and how specific, any questions asked by the insurer; and how clearly the insurer communicated to the policyholder the importance of answering those questions and the possible consequences of failing to do so).

It seems that the intention behind cl 19 is to simply highlight that such conduct by an insured will put an insurer on notice to ask more questions or to dig deeper, and is therefore a relevant matter to take into account under cl 15 in determining whether an insured has taken reasonable care not to make a misrepresentation.

While not supportive of the retention of cl 19, ICNZ considers at the very least the following two changes should be made to cl 19:

- Clause 19 should be made subject to cl 18 (a deliberate omission of information, or a deliberately incomplete or irrelevant answer, may amount to dishonesty); and

- The substance of cl 19 should be included as an additional matter to be taken into account in cl 15.

Following on from the comments above, we recommend cl 15(1) be amended to add new subclauses as follows:

> *(h) any particular characteristics or circumstances of the policyholder known by the individuals (if any) who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms;*
>
> *(i) whether the policyholder failed to provide an answer to any question asked by the insurer or whether any of the policyholder's answers were obviously incomplete or irrelevant.*

Clause 20 Representations to specified intermediaries &
Clause 46 What insurer knows

We strongly suggest that the deemed knowledge provisions in cls 20 (Representation to specified intermediaries) and 46(b) (What insurer knows) only apply to intermediaries that are insurers' agents (e.g., tied agents such as airlines, travel agents, retailers, car dealers or insurers' banking partners). That is, rather than extending this definition to agents of the insured (such as independent insurance brokers or brokerages), as currently proposed. This position:

- Aligns this aspect of the regime with the approach to deemed knowledge in Australia and the UK, acknowledging that New Zealand is currently an outlier in this respect.

- Better reflects the practical reality of what an insurer will have awareness of when intermediary agents of the insured are involved. Agents of the insured such as insurance brokers have arrangements which generally limit insurer awareness and oversight, such that it would be inappropriate to impute knowledge in such circumstances.

- Also reflects that, with the shift to proportional remedies for breaching disclosure requirements, the impacts of deemed knowledge provisions are much less significant than they once were.

We therefore recommend that cls 20 and 46(b) be amended as follows:

> ***20 Representations to ~~specified intermediaries~~ insurer's representatives***
> *If a policyholder makes a representation to ~~a specified intermediary~~ an insurer's representative before the consumer insurance contract is entered into or varied, the representation must be treated as having been made to the insurer.*
>
> ***46 What insurer knows***
> *An insurer knows something only if it is known to 1 or more of the following:*
> *[…]*
> *(b) any individual who is, or works for, ~~a specified intermediary~~ an insurer's representative in relation to the contract of insurance.*

A new definition of 'insurer's representative' would need to be inserted into cl 5. We suggest the following:

> ***insurer's representative**, in relation to a contract of insurance, —*
> *(a) means a person who acts for an insurer in arranging the contract of insurance between another person and the insurer; but*
> *(b) does not include an employee of the insurer.*

Further comments on Part 2, Subpart 1

The Bill is silent on how the new duty not to misrepresent is intended to apply at renewal of a contract of insurance. Despite renewal being one of the matters that may be taken into account in determining whether the policyholder has taken reasonable care (see cl15(1)(g)(i)), it is unclear what this means in practical terms.

A balance needs to be struck between ensuring information is verified and/or updated on the one hand, while maintaining the simplicity of the renewal process for both insurers and policyholders on the other (i.e., not being so extensive that it substantially increases insurers' cost of service or is so cumbersome and drawn out that the consumer disengages, finding the questioning overwhelming, unnecessary or repetitive). We do not consider that it would be appropriate or efficient, for example, for insurers to be required at renewal to again run through all the questions that were asked prior to the contract originally being put in place.

It is also unclear whether the new disclosure regime affects any clause in an insurance contract requiring customers to notify the insurer about material changes in circumstances during the policy period and, if so, in what respect. In this regard, we note that disclosure of some changes in circumstances are fundamental to the risk being underwritten (e.g. change of the situation of risk, or an insured changing the use of an asset from personal to commercial).

We consider that the addition of the following clauses in the Bill should solve the above issues:

To be inserted into subpart 1 of part 2:

Renewal of contract of insurance

(1) This section applies to a contract of insurance that has the effect of operating as a renewal of a preceding contract.

(2) A failure by the policyholder to notify the insurer of any material change in circumstance that the policyholder knows or ought to know is capable of being a misrepresentation for the purposes of this subpart.

(3) However, subsection (2) does not require the policyholder to disclose a circumstance if—

(a) it diminishes the risk; or

(b) the insurer knows it; or

(c) the insurer ought to know it; or

(d) the insurer is presumed to know it; or

(e) it is something as to which the insurer waives information.

(4) It is presumed that an insurer is entitled to rely on representations previously provided by the policyholder when deciding whether to renew the contract and, if so, on what terms, unless the contrary is proved.

(5) This section does not limit section 15.

To be inserted into subpart 3 of part 2

Material change of circumstance since contract of insurance entered into

(1) This section applies to any provision in a consumer insurance contract requiring the policyholder to notify the insurer of any material change in circumstance that has occurred since the contract was entered into.

(2) A failure by the policyholder to notify the insurer of any material change in circumstance that the policyholder knows or ought to know is a qualifying misrepresentation for the purposes of this subpart if the insurer proves that without the misrepresentation, the insurer would not have agreed to cover the change in circumstance at all, or would have done so only on different terms.

(3) The only remedies available for failing to notify the insurer of a material change in circumstance are set out in Schedule 2 with all necessary modifications.

(4) The standard of care required under this section is that of a reasonable policyholder.

To be inserted as a new subclause (4) of cl 65:

65 Certain provisions of no effect

[…]

(4) This section does not limit any provision in a non-consumer insurance contract requiring the policyholder to notify the insurer of any material increase or alteration in the risk covered that has occurred since the contract was entered into.

Part 2, Subpart 2 Group insurance

Clause 22 When subpart applies

We consider that cl 22(1)(c) as drafted creates uncertainty because it is uncertain whether an objective or subjective test (or a mixture of both) applies. We recommend, therefore, the following amendments (which would align cl 22(1)(c) with section 7(1)(c) of the Consumer Insurance (Disclosure and Representations) Act 2012 (UK):

22 When subpart applies
[...]
(c) the contract would have been a consumer insurance contract if entered into by B rather than by A; and

Clause 23 Person who has benefit of contract also has duty

We also consider that clause 23(1) should be amended to be consistent with cl 22(1)(d) (i.e. B may provide information either directly or indirectly to the insurer and therefore may directly or indirectly make a misrepresentation), as follows:

23 Person who has benefit of contract also has duty
(1) B must take reasonable care not to make a misrepresentation to the insurer, either directly or indirectly, before the contract of insurance is entered into or it is varied in order to provide insurance cover for B.

Clause 24 Breach by 1 member of the group does not affect others

We consider that cl 24 should not apply to the extent that a person who has breached a duty under this subpart was acting for or on behalf of other insureds. Our recommended amendments are:

24 Breach by 1 member of group does not affect others
(1) If there is more than one person who has a duty under this subpart in relation to a contract, a breach on the part of one of them of the duty does not affect the contract so far as it relates to the others.
(2) Subsection (1) does not apply to the extent that the person who breached a duty under this subpart was acting for or on behalf of others to the contract.

Part 2, Subpart 4 Disclosure Duty for non-consumer insurance contracts

Clause 33 Policyholder has duty of fair presentation

As set out above in our submission on cl 14 (at page 14 above), contracts of insurance are often taken out jointly by more than one person, but only one person goes through the process of purchasing the insurance policy on behalf of them all. For the reasons set out in relation to cl 14 above, we consider that a new subclause (2) should be added to cl 33, as follows (the current cl 33 would become cl 33(1)):

33 Policyholder has duty of fair presentation
[...]
(2) A breach of the duty of fair presentation made by one policyholder before a non-consumer insurance contract was entered into or varied is deemed to have been made by all policyholders of that insurance contract.

Clause 36 What is material

The example of material circumstances set out under cl 36(2)(a) expresses the threshold too highly in our view and does not align with the definition of 'material' in cl 36(1) (i.e. something is material if it would influence an insurer whether to take on the risk and on what terms). A fact need not be 'special' or 'unusual' to be material and we recommend accordingly that this subclause be amended as follows:

36 What is material
[...]

(a) ~~special or unusual facts relating to the risk~~ facts that make the risk more likely to eventuate;

This would also then mirror cl 35(2), which provides that a policyholder does not need to disclose circumstances that diminish risk.

Clauses 40 (Knowledge of policyholder) and 42 (What other policyholders know)

Clause 40(2)(b) should be amended to make it clear that an insured under a joint policy is included as an individual responsible for the other joint insureds' insurance as follows:

> ***40 Knowledge of policyholder***
> ...
> *(b) an individual is **responsible** for the policyholder's insurance if the individual participates on behalf of the policyholder in the process of procuring the policyholder's insurance (whether the individual does so as the policyholder's employee or agent, as an employee of the policyholder's agent, as a joint policyholder with the policyholder under a joint contract of insurance, or in any other capacity);*

An insurer will generally not know whom within an organisation has authority or responsibility in respect of that organisation's insurance, particularly when an intermediary such as an insurance broker is involved. The insurer should accordingly be able to rely on individuals who hold themselves out as being responsible for the policyholder's insurance. As a result, we also recommend cl 42(b) be amended as follows:

> ***42 What other policyholders know***
> ...
> *(b) responsible for the policyholder's insurance or who hold themselves out as being responsible for the policyholder's insurance.*

Clause 46 What insurer knows

See commentary on cl 20 and the suggested amendments to cl 46 above.

Part 2, Subpart 6 Insurer's duties to inform policyholder of certain matters

Clauses 56, 58 and 59

Interaction with the Privacy Amendment Bill

It appears cls 58 and 59 were drafted without factoring in the Privacy Amendment Bill that has been introduced to Parliament, in particular the proposed new Information Privacy Principle 3A (IPP3A). The proposed IPP3A sets out requirements an agency must comply with when collecting information about an individual other than from the individual concerned.

Reading the proposed new IPP3A and cls 58 and 59 together seems to mean that in practice insurers would need to inform the policyholder before collecting information from a third party (under the Bill) *and* after collecting the information from a third party (under IPP3A). This is duplication and likely confusing for the customer as to why their insurer would be providing so much notification.

We therefore consider cls 58 and 59 should be removed from the Bill in light of the proposed new IPP3A to avoid duplication of obligations and customer confusion if IPP3A is enacted in its current form. (This would also require the consequential removal of reference to those clauses in cl 185(2)).

While cls 58 and 59 are notifications prior to the information being collected from a third party (and IPP3A after), in practice the customer will be aware beforehand that an insurer may collect information from a third party as IPP2(2)(c) requires insurers to obtain the customer's consent to do so and as part of that insurers will tell the customer why they need the third party information, e.g., to assess and manage an application or claim.

It is appropriate for privacy related matters to be provided for in the Privacy Act and therefore regulated by the Privacy Commissioner rather than having similar provisions in the Bill which will be regulated by the Financial Markets Authority (**FMA**). There is potential for overlap and confusion with two statutes and regulators addressing the same issue.

'All' reasonable steps is not the appropriate requirement

There is a fundamental distinction between the requirement to take 'reasonable steps' and the requirement to take 'all reasonable steps'. To take just one case example, in the recent case of *Remediation NZ Limited v Enviro NZ Limited* [2024] NZHC 860 at [123], the High Court held that a party who commits to taking 'all reasonable steps' in a contract must exhaust all reasonable paths or actions to achieve the desired outcome.

We therefore consider that the requirement in cl 56(1) and (assuming, contrary to our view, that cls 58 and 59 remain in the Bill) cls 58(2) and 59(2) for the insurer to take 'all' reasonable steps to inform policyholders of the matters set out in the clause would create uncertainty and be unduly burdensome on both insurers and policyholders. For example, would an insurer sending the required information by email to the insured satisfy the requirement to take all reasonable steps when the same information could also be sent by post? Requiring all reasonable steps may lead to insurers sending the same information by multiple communication channels to ensure that the duty is complied with. We therefore recommend the removal of the word "all" in cls 56(1), 58(2) and 59(2) (if cls 58 and 59 were to remain in the Bill which as we have submitted above, we do not think they should do). We note also that cl 60 allows the policyholder to be informed orally or in writing which also supports the removal of the word "all" given cl 60 appropriately contemplates that informing the policyholder may be done in different ways.

We also query whether a difference is intended between the phrases "consent to access information" in cl 58 and "consent to access particular information" in cl 59. If no difference is intended, then we suggest the removal of the word "particular" in cl 59.

Role of intermediaries

The ultimate intention of the notification requirements is to ensure the policyholder is made aware of the required matters. However, the clauses ignore the reality that intermediaries, e.g. brokers or banks, deal with customers directly and it is these parties who may be the most appropriate in the chain of distribution to satisfy the notification requirements.

Clause 61 treats the requirements in subpart 6 as having been complied with if any requirements prescribed by regulation are complied with. We consider that cl 61 could be amended to include a similar provision in relation to insurers complying with the subpart if intermediaries provide the required information. Please see proposed amendments to cl 61 below (alternatively, the proposal could be incorporated into the Bill as a new clause).

Notification to the 'policyholder'

Consideration needs to be given to what constitutes appropriate notification to 'the policyholder' under cl 56 when more than one policyholder is involved, or the policy is a group insurance policy (as contemplated by cl 22) and there is no intermediary.

Our expectation is that notifying one nominated representative would be sufficient notification to all policyholders of the duty in clause 56, in circumstances where the insurer reasonably considers that the nominated representative is acting for the policyholders. Please see proposed amendments to clause 61 below.

Proposed amendments to clause 61

For the reasons above, we consider that cl 61 should be amended, as follows:

> ***61 Requirement treated as complied with if <u>certain requirements</u> complied with ~~in prescribed manner~~***
>
> *(1) A requirement under this subpart to take ~~all~~ reasonable steps to ensure that the policyholder is clearly informed of certain information must be treated as having been complied with if—*
>
> *<u>(a) both of the following apply:</u>*
>
> *<u>(i)</u> the information is given in writing in the manner prescribed by the regulations; and*
>
> *<u>(ii)</u> the requirements prescribed by the regulations for the purposes of this section (if any) are complied with<u>; or</u>*
>
> *<u>(b) either of the following apply:</u>*
>
> *<u>(i) in the case of an intermediary who is an agent of the insurer, that intermediary complies with the requirement; or</u>*
>
> *<u>(ii) in the case of an intermediary who is an agent of the policyholder, the information is given to that intermediary.</u>*
>
> *<u>(2) The requirement in section 56 must be treated as having been complied with if the information is provided to a person who the insurer or intermediary (as the case may be) reasonably considers is acting on behalf of all policyholders.</u>*
>
> *<u>(3)</u> This section does not limit the means by which the requirement may be satisfied.*

Clause 61 Requirement treated as complied with if complied with in prescribed manner

We welcome the certainty that would result from the prescribed matters contemplated by cl 61 being enacted. Note a consequential amendment would be required to remove "all steps" as per comments on cls 56,58 and 59 above.

Clause 62 Consequences of breach

The proposed consequences of an insurer breaching subpart 6 of Part 2 as set out in cl 62 would, in circumstances where the breach had no effect on the policyholder's breach of the duty of fair presentation of the risk, be disproportionate and unduly punitive.

For the reasons above, cls 58 and 59 are out of place in this Bill and should be removed. The Privacy Act 2020 prescribes the requirement that all agencies (including insurers) must comply with when handling personal information and provide remedies for their breach. Additional requirements and remedies should not be provided for in the Bill.

Accordingly, cl 62(2) should be amended to link the breach by the insurer to the harm suffered by the policyholder, as follows:

(2) ***Subsection (1)*** *applies ~~regardless of whether~~ only if the insurer's breach caused or otherwise contributed to the breach of the duty of fair presentation.*

Clause 62(1) also creates unnecessary ambiguity by referring to an insurer breaching "this subpart" (i.e. subpart 6 of part 2) in relation to non-consumer insurance contracts. The only duty this subpart imposes on an insurer in relation to a non-consumer insurance contract is the duty in cl 56 requiring the insurer to inform the policyholder of the nature and effect of the fair presentation duty and the consequences for failing to comply.

Clause 62(1) would be clarified by making the following amendment:

(1) If an insurer breaches ~~this subpart~~ section 56(1) in relation to a non-consumer insurance contract, the insurer has a remedy under Schedule 2 only if the policyholder knew that the qualifying breach was a breach of the duty of fair presentation.

Clause 63 Effect of Part on utmost good faith rule of law

See our comments on clause 63 in the Key Issues section of our submission.

Clause 66 Duty for specified intermediary in relation to consumer insurance contract

We support the introduction of a requirement for an intermediary to pass on information.

However, we suggest cl 66 be amended, to prescribe the steps that a specified intermediary should take when they believe on reasonable grounds that a representation is a misrepresentation.

We are also concerned that confining representations the intermediary must pass on to those that have "a tendency to answer the question in whole or in part" is too narrow. For example, a representation may not tend to answer a question, but it may be relevant to the question and put an insurer on notice that it needs to make further inquiries. We therefore recommend that definition of "relevant" in subsection (3) is deleted.

For consistency with equivalent clauses in the Bill, the word "reasonably" should be removed from section 66(1)(c).

We recommend the following amendments.

(1) This section applies if—

(a) a person (A) is a specified intermediary in relation to a consumer insurance contract; and
(b) the policyholder makes a representation to A before the contract is entered into or varied; and
(c) A knows, or ought ~~reasonably~~ to know, that the representation is relevant to a question asked by the insurer of the policyholder.
(2) A must take all reasonable steps to pass on the representation to the insurer before the insurer enters into the consumer insurance contract or agrees to the variation.
(3) However, if A believes on reasonable grounds that a representation is a misrepresentation, A must provide the policyholder with a reasonable opportunity to correct the misrepresentation. If the misrepresentation is not corrected within a reasonable period of time, A must take all reasonable steps to inform the insurer of the misrepresentation before the insurer enters into the consumer insurance contract or agrees to the variation.
*~~(3) A representation is **relevant** to a question if it has a tendency to answer the question in whole or in part.~~*
(4) Compliance with this section does not place any person in breach of the consumer insurance contract, or make any person liable for a civil wrong.
(5) This section is subject to anything to the contrary expressed or implied in an agreement between A and the insurer.

Clause 67 Duty for specified intermediary in relation to non-consumer contract

For consistency with equivalent clauses in the Bill, cl 67(2) should be amended as follows:

(2) A must , before the insurer enters into the contract of insurance or agrees a variation, take all reasonable steps to disclose to the insurer every material circumstance that is known, or ought to be known, by any individual –
(a) who is A; or
(b) who works for A in relation to the contract of insurance.

Part 3, Subpart 1 – Implied term about payment of claims

Clause 70 Implied term about payment of claims

See our comments in the Key Issues section of our submission.

Part 3, Subpart 2 – Restrictions on terms

Clause 73 Claims made policies

The 2022 Exposure Draft Bill provided for a 60 day period, which we supported. This has however been replaced with a 90 day period in the Bill. A 60-day period would be preferable and would increase certainty for insurers at the end of the policy term. A 90-day period nonetheless remains an improvement on the absence of a defined period under the current law.

Clause 75 Increased risk exclusions

ICNZ supports the inclusion of the excluded increased risk terms listed in cl 71(3) (subject to the below), which align with those previously proposed by the Law Commission. This is

a change we have supported throughout the review (see ICNZ 2019 Submission on the Options Paper[4] at page 19 and ICNZ 2022 Submission at page 21).

Factors that statistically increase the risk of loss

However, there are some additional factors that statistically increase the risk of loss or an event occurring, even though they may not be necessarily causative of loss in a particular claim, which are not currently provided for in cl 75. For example, unoccupied houses or property being left unattended are more likely to be subject to burglary or vandalism, or an undetected need for repairs, than occupied houses or if the property was not unattended.

We therefore consider that cl 75(c) should include unoccupied or unattended property as an additional increased risk exclusion that should be exempted from cl 75.

'Any property' should also be added between 'aircraft' and 'goods' in cl 75(3)(c) to reflect situations where houses are being used for commercial purposes. Additionally, to better reflect the nature of geographical area exclusions, the reference to 'must' in cl 71(3)(b) should be replaced with 'must or must not.'

Regulation making power

We strongly believe that a regulatory making power is appropriate and needs to be provided to enable the list under cl 71(3) to be amended. It must be acknowledged that the starting point is that cl 75 effectively overrides insurance policies, before providing a discrete list of exceptions to this. Accordingly, all that a regulation making power would enable is to limit the extent to which cl 75 overrides contractual arrangements. This would allow this list to be monitored and promptly updated in consultation with industry as necessary, as changes in the insurance market or new technology develops (e.g., insurance for autonomous vehicles or to new approaches to insurance to reflect further developments in the 'sharing economy').

We are concerned that having to rely upon legislative amendment in the absence of a regulation making power would be impractical and highly unlikely to be able to keep pace with the changes required. Any concerns about a lack of awareness of these changes could be addressed through direct communications to customers and potentially by a communications campaign by the regulator, highlighting them to the public.

Proposed changes

Taking into account the above, we therefore suggest amendments to cl 75(3) and a new subclause (4) as follows.

(3) However, this section does not apply to an 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 <u>or must not</u> occur; or

[4] https://www.icnz.org.nz/wp-content/uploads/2023/01/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf

(c) *excludes loss that occurs while a vehicle, an aircraft, a ship, any property, or any goods is or are being used for commercial purposes other than those permitted by the contract of insurance; or*

(d) *excludes loss that occurs while property is left unoccupied or goods are left unattended.*

(4) The Governor-General may, by Order in Council, make regulations prescribing any increased risks exclusions that section 75 does not apply to.

It is also important to note that, even with the proposed amendments outlined above, the provision is far more policyholder-friendly than the equivalent United Kingdom provision (an exclusion does not apply if the policyholder can show non-compliance with the exclusion in respect of a particular type of loss or loss at a particular location or time "*could not have increased the risk of the loss*" (Insurance Act 2015 (UK), s 11)).

Part 3, Subpart 5 – Third party claims against insurers

Clause 88 Claimant may recover from insurer

The reference in cl 88(1) to the claimant recovering the amount of the 'insured liability' from the insurer implies that the insurer's liability to the policyholder has already been established. This is premature and may not be the case. To address this issue, we suggest that cl 88(1) be amended as follows:

88 Claimant may recover from insurer

*(1) If a person (the **claimant**) has a claim against a specified policyholder for insured liability, the claimant may seek to recover the amount under that claim from the insurer in a proceeding before a court.*

Clause 89 Claimant must have leave of court

For clarity and consistency, cl 89 should be amended, in line with the equivalent provision under the New South Wales legislation (Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW), s5), as follows:

89 Claimant must have leave of court

(1) A proceeding may only be brought by a claimant against an insurer under this subpart with the leave of the court.

(2) Leave must be refused if:

(a) the claimant cannot establish that the policyholder is a specified policyholder; or

(b) the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law.

A third party claimant should not be able to make a claim directly against an insurer in circumstances where the policyholder is not a specified policyholder, or where the insurer is not liable to indemnify the policyholder under the contract of insurance. Allowing this would in effect override the terms of the cover that the insurer has provided to the policyholder. This could in turn have major implications for liability insurers and could cause them to reconsider the cover they make available.

Clause 91 Defences generally

We strongly recommend that cl 91(2) be removed to ensure that the parties remain in the same position they would have been in had the policyholder not become a specified policyholder. The overall purpose of subpart 5 of Part 3 is for the third party claimant not

to be prejudiced by the financial position of the insured by effectively placing the parties (including the insurer) in the same position they would have been had the insured not been a specified policyholder. We are concerned that, as set out below, some clauses would put the third party claimant in a better position than it would have been in if the policyholder was not a specified policyholder.

Subclause 91(2), if included, would place the third party claimant in a better position than the policyholder and the insurer in a worse one. The insurer should be entitled to rely on the insurance policy, including all defences, as that is the basis on which the policy was issued (including the decision whether to take on the risk, the terms imposed, and the premium charged). The inclusion of this provision is also inconsistent with the equivalent provision in the NSW legislation (Civil Liability (Third Party Claims Against Insurers) Act 2017, s 7) on which this was modelled.

It also cannot be intended that the insurer must continue to provide cover in circumstances where the policyholder breaches a fundamental term of the contract, even after they become a specified policyholder (e.g. admits liability or commits fraud). Additionally, the insurer may be prejudiced if the policyholder (or its officers) does not assist in the defence of the claim.

Also, it will often be the case that the insurer will be unaware that the policyholder has become a specified policyholder and will therefore not be in a position to protect its interests had it known.

If the position above is not accepted and cl 91(2) is not removed from the Bill, as an alternative, we suggest the current cl 91(2) be replaced with the subclause as follows:

> *(2) Despite subsection (1) and section 90, the insurer is not entitled to rely on a defence arising from an act or omission by the specified policyholder that occurred after the later of when the specified policyholder:*
> *(a) made a claim under the contract of insurance in respect of the event that gave rise to the liability; or*
> *(b) became a specified policyholder and the insurer was aware, or ought to have been aware, that the policyholder was a specified policyholder.*

Noted below in relation to cls 92 and 93 are some of the issues that arise should cl91(2) not be removed or amended.

Also, as we understand that cls 72 and 73 (which relate to provisions prescribing manner or time of claims or proceedings) would continue to apply in such circumstances, for clarity we also recommend that cl 91 be amended to include a new subclause as follows:

> *(3) Nothing in this subpart limits or affects section 72 or section 73.*

Clause 92 Limitation defence does not apply in certain cases &
Clause 93 Judgment against specified policyholder no bar to claim against insurer

It would only be appropriate to retain cls 92 and 93 as currently proposed under the Bill, if as advocated for above, cl 91(2) is removed. If this is not the case:

- In respect of cl 92 (Limitation defence does not apply in certain cases), the insurer may be prejudiced if it could not rely on exclusions or conditions in the policy.

While it is correct to say that an insurer should not be able to rely on a defence not available to the specified policyholder vis-à-vis the third party claimant, the insurer should equally not be deprived of its right to rely on the terms of contract of insurance in relation to the third party claim. For example, the insured may not have notified the insurer of the third party claim, accordingly depriving it of its right to conduct the defence.

- In respect of cl 93 (Judgement against specified policyholder not being a bar to a claim against the insurer), the insurer may be required to pay out on a judgment it had no knowledge of, let alone ability to conduct the defence for.

These issues further illustrate why cl 91(2) needs to be removed or modified as we have proposed above.

Clause 95 Effect of payments made by insurer to specified policyholder

Clause 95 goes beyond preventing collusive arrangements between an insurer and its policyholder, which is presumably its primary intent. An insurer who settles a bona fide dispute with the policyholder about policy coverage should not be penalised if the settlement was made in good faith without knowledge of any potential direct third party claimant(s). Only those settlements made with the intention to defeat a third party's claim should be captured by cl 95 in our view. This provision would especially prejudice the insurer if they did not know of the policyholder's insolvency (or potential insolvency) or the third party had a potential claim under this subpart directly against the insurer. An insurer, therefore, through no fault of its own ends up paying twice for the same claim.

Clause 95 is also silent on whether it applies when the insurer settles with a solvent policyholder who subsequently becomes insolvent. Additionally, this provision puts the third party in a better position than it would have been in had there been no insolvency.

To address these issues, we recommend that cl 95 be amended as follows:

> ***95 Effect of payments made by insurer to specified policyholder***
> *A payment made by the insurer to the specified policyholder under this subpart in settlement or compromise of an insured liability discharges the liability of the insurer to the specified policyholder under the contract of insurance in respect of the insured liability, provided:*
> *(a) the insurer entered into the settlement or compromise in good faith; and*
> *(b) the insurer did not know that the policyholder was a specified policyholder or had no knowledge that the specified policyholder had an insured liability to a claimant who could make a claim under this subpart when the settlement or compromise was made.*

Part 4, Subpart 2 – Duties of broker in relation to premium

See our comments on brokers' duties in the Key Issues section of our submission.

Part 6 – Regulations and miscellaneous provisions

Clause 165 General regulations

Clause 165(1)(c) provides the power to make regulations declaring matters for the purposes of cl 10(3) (which relates to declarations concerning consumer insurance contracts and non-consumer insurance contracts). Regulations made under subclause

(1)(c) may only be made on the recommendation of the Minister (subcl (2)), who must comply with the requirements set out in subcl (3).

We support this power existing. However, we consider that the Minister should also be required to consult with the insurance sector before enacting regulations for the purposes of cl 10(3). Regulations made under this provision could have impacts on insurers' policies, systems and processes, as well as their interactions with intermediaries and customers. Consultation would also allow insurers the opportunity to provide input on the amount of time that may be needed to comply with any regulations. In addition, any unintended consequences of proposed regulations can be drawn to the Minister's attention.

We therefore recommend a new subclause (b) be added to cl 165(3), as follows (the current subclauses (b) and (c) would become (c) and (d) respectively:

> *(b) consult other persons or representatives of other persons affected, or reasonably likely to be affected, by the declaration; and*

Clause 175 Section 26D amended (Specified trade contracts: trading relationship, annual value threshold, and other definitions)

We consider the application of the unfair contract regime to when the trading relationship "first arises" to be arbitrary and contrary to the purpose of the UCT regime. An insured who purchases insurance cover that starts as a small trade contract but subsequently the trading relationship exceeds the threshold would by the logic of the "small trade" provisions no longer require the protection of the UCT regime. There appears to be no reason in principle why this insured should be treated differently from any other insured who pays the same amount of premiums, but did so on day 1. Further, this application of the UCT regime potentially encourages insureds to 'game the system' by not purchasing all required insurance cover on day 1 to ensure that the threshold is not exceeded when the relationship first arises. We therefore request the requirement for the threshold to be assessed only when the first contract is entered into does not apply to contracts of insurance. We propose a new subsection (3A) of s 26D of the Fair Trading Act).

In addition, it is not clear whether the UCT regime would apply to an insured who purchases multiple policies. An insured may obtain insurance cover for different types of risks, which may or may not all be contained in the one policy document. For example, an overarching liability policy may include 'sub-policies', each of which the insured may choose to purchase, including general liability, statutory liability, directors and officers liability, employers liability, and professional liability cover. Each type of cover constitutes a separate policy. However, the insured may be invoiced a global amount for the entire package (such amount may or may not be broken down for each policy). Alternatively, an insured may purchase separate policies, each of which is subject to a separate invoice.

To clarify the position, and to ensure that customers are not treated differently based on whether or not they purchase a global insurance policy, we recommend that s 26D of the Fair Trading Act be amended as below. The proposed amendments would also ensure that the intention of s 26D(2) of the Fair Trading Act also applies to contracts of insurance. That section provides that a "*trading relationship*" in relation to a contract includes that contract and "*any other contract* [...] *between the same parties on the same or substantially similar terms*." It appears that s 26D(2) is intended to capture an insured who purchases two or more insurance policies with an insurer but, as currently drafted,

there could be uncertainty as to whether different insurance contracts covering different risks are on "the same or substantially similar terms".

> ***26D Specified trade contracts: trading relationship, annual value threshold, and other definitions***
>
> *(1) This section applies for the purposes of section 26C.*
>
> *(2) **Trading relationship**, in relation to a contract that is:*
>
> *(a) not a contract of insurance, means a relationship consisting of—*
>
> *(i) that contract; and*
>
> *(ii) any other contract (whether current or prospective) between the same parties on the same or substantially similar terms.*
>
> *(b) a contract of insurance, means a relationship consisting of—*
>
> *(i) that contract; and*
>
> *(ii) any other contract of insurance (whether current or prospective) between or for the benefit of the same parties.*
>
> *[…]*
>
> *(3) A trading relationship in relation to a contract that is not a contract of insurance —*
>
> *(a) first arises when the first or only contract of the relationship is entered into; and*
>
> *[…]*
>
> *(3A) A trading relationship in relation to a contract that is a contract of insurance **exceeds an annual value threshold**, in relation to the specified amount, if —*
>
> *(i) it includes a transparent term or transparent terms providing for consideration (including GST, if applicable) of at least the specified amount to be paid under it, in relation to any annual period; or*
>
> *(ii) consideration (including GST, if applicable) of at least the specified amount is more likely than not to become payable under the relationship, in relation to any annual period.*

Section 26D would also benefit from a new example, which could be as follows (assuming an annual value threshold of $20,000):

> ***Example 4***
>
> *G is in trade and on 1 December 2023 enters into a Professional Indemnity contract of insurance with insurer H for an annual premium of $15,000. On 1 February 2024, G enters into a Material Damage contract of insurance with insurer H for an annual premium of $5,000. Neither contract is a consumer contract and there are no other contracts in the trading relationship.*
>
> *The Professional Indemnity contract of insurance starts as a small trade contract because the annual value threshold of $20,000 is not exceeded when it was purchased. However, neither contract of insurance is a small trade contract when the Material Damage contract of insurance is purchased because the annual value threshold is exceeded when the Material Damage contract of insurance is purchased.*

Clause 176 New section 46KA inserted (Other matters relating to insurance contracts)

See our comments on the application of the UCT regime to insurance contracts in the Key Issues section of our submission.

Clause 178 Schedule 1AA amended

We also support the policy intent behind extending the deadline for the application of the UCT regime to small trade insurance contracts in cl 178. This will enable related changes in the Bill to come into effect at the same time – making the review and updating of insurance contracts more efficient and less costly for insurers, brokers and their customers.

However, due to the enormity of the task (all policies and their associated collateral will need to be reviewed and updated) and the planning and resourcing required, we are concerned that an earlier date may subsequently be enacted by Order in Council, as provided for by paragraph (b) of the definition of 'specified date' in cl 1 of Schedule 1AA of the Fair Trading Act.

For certainty, we therefore recommend the following amendments to cl 178:

> ***178 Schedule 1AA amended***
>
> *(1) In Schedule 1AA, clause 1(3), replace the definition of specified date with the following:*
> ***specified date** means the later of 1 April 2028 or the date that all parts of the Contracts of Insurance Act come into force.*
>
> (2) *Clause 1(4) and Clause 1(5) are repealed.*

Clause 180 Section 6 amended (Interpretation)

It appears that the definition of 'life insurance' proposed to be included in s 6(1) of the FMCA could inadvertently capture other types of insurance contracts. The definition of 'life insurance' refers to insurance of the kind described in s 84(1)(a) to (f) of the Insurance (Prudential Supervision) Act 2010 (**IPSA**), however, it does not specifically refer to the exclusions to this contained in s 84(2) – (4) of that section of IPSA, which relate to death by accident type benefits in general insurance policies. The apparent purpose here is to capture conventional life insurance policies (alongside health and consumer insurance contracts) and not to capture some types of commercial insurance contracts that happen to also have death by accident covers, and so the additional references contained in s 84(2) – (4) of IPSA should be included here, as follows:

> ***life insurance** means insurance of the kind described in section 84(1)~~(a)~~ to ~~(f)~~ (4) of the Insurance (Prudential Supervision) Act 2010*

Clause 183 New subpart 6 of Part 6 inserted

Clause 183 inserts new ss 447 – 447C in the FMCA. These sections set out new obligations for insurers' to assist policyholders to understand insurance contracts and to make information publicly available.

New ss 447A and 447B on the form and presentation of contracts

We support policy wordings being presented in a clear, concise and effective manner and the introduction of requirements for this in relation to consumer policies. We therefore support a principled provision being included to this effect in the new s 447A.

We however submit that regulations (as contemplated by the proposed s 447B (Insurer must ensure contract complies with prescribed requirements relating to form and presentation) and also provided for in cl 188 (through amendments to s 546 of the FMCA) and are not necessary given the requirement for insurance contracts to be 'clear, concise and effective' is broad and would cover all aspects of the contract presentation. We note that many insurers have made, or are working towards making, their consumer insurance contracts more easily understood by customers, including by getting plain English certification and by making their insurance contracts and other material more easily read on modern devices (e.g. tablets and phones). We also note that making contracts easy to read can for instance lead to them being longer (in terms of pages) as the documents are more spread out in terms of layout (e.g. larger fonts and fewer words per page).

Also as currently drafted, the proposed presentation and form requirements for consumer insurance contracts under cl 183 of the Bill apply only to insurers. However, insurers will often have no control over or input into broker policy wordings, except for the possibility of issuing a separate endorsement to the policy wording to address a particular set of circumstances. While insurers ultimately underwrite insurance contracts in broker wordings, these broker-led documents are often presented to insurers on a 'take it or leave it' basis and the insurer's ability to influence how they are presented and formatted is very limited. Another complication is that broker wordings, while developed by one broker, are often underwritten by multiple insurers. Given the proactive nature of these obligations and that brokers are already subject to oversight by the FMA, there are no obvious barriers to ensuring that the authors of a policy, whether insurer, broker or other intermediary are subject to a requirement for that policy wording to be worded in a clear, concise and effective manner.

The requirements set out in cl 183 should accordingly be amended to apply to the party responsible for the wording of the policy. This will ensure that the party that is actually able to update the policy (if necessary) has the duty to do so. In addition, the broker or intermediary policy wordings would be held to the same standard as all policies, to the benefit of consumers. It will also ensure that the duties in the subpart apply to the lead insurer where multiple insurers underwrite a policy.

Finally, we note the appeal for the regulator being able to prescribe requirements relating to form and presentation. However, such prescription would be fraught with risk. Prescribing requirements for one aspect (e.g. font size or overall length) could easily lead to a reaction in another aspect (e.g. splitting a policy in two to comply with length requirements). In addition, requiring change could result in insurers having to make a large number of consequential and largely unnecessary changes (with associated costs). Prescription could also undermine efforts at innovation. These issues are discussed further below in relation to cl 188.

Should this regulation making power be retained and ever contemplated to be used, there would need to be very careful consideration as to the costs and benefits and thorough engagement with the insurance industry on the workability and time required to implement. Care would also need to be taken as to how any regulations would apply to policy designs (e.g. a requirement to make exclusions more prominent as suggested in MBIE's 2019 Regulatory Impact Statement[5] has different implications for all risks policies vis-à-vis a specified risks policy).

[5] https://www.mbie.govt.nz/dmsdocument/7480-impact-statement-insurance-contract-law-reforms-proactiverelease-pdf

Clause 183 does not provide for intermediary authored insurance policies ('broker wordings') or the role of intermediaries in developing and distributing policies and in some cases claims administration. As outlined above in relation to form and presentation requirements, it is important that any new requirements apply to all relevant insurance sector participants.

To achieve this, and subject to our other feedback on these new provisions, we recommend that ss 447, 447A and 447B of the FMCA be amended as follows (i.e., to specifically provide that, where a policy wording has been developed by an intermediary or a lead insurer, then it is that entity, that would be responsible for ensuring the contract is worded and presented in a clear, concise, and effective manner):

447 When this subpart applies

[…]

*(2) For the purposes of this subpart, **person responsible** means the person who was principally responsible for drafting the contract of insurance.*

447A Person responsible ~~Insurer~~ must ensure contract is worded and presented in clear, concise, and effective manner

(1) The person responsible for ~~An insurer under~~ a contract of insurance to which this subpart applies must ensure that the contract is worded and presented in a clear, concise, and effective manner.

(2) The person responsible ~~An insurer~~ must, when performing the duty under subsection (1), have regard to whether the wording and presentation of the contract assists consumers to understand their rights and obligations under the contract.

(3) All other information that ~~the insurer~~ is or will be provided to policyholders (whether by the person responsible or any another person) to ensure that they are reasonably aware of the implications of entering into contracts of insurance with the insurer may be taken into account in determining whether the person responsible has complied with this section.

[…]

447B ~~Insurer~~ Person responsible must ensure contract complies with prescribed requirements relating to form and presentation

~~An insurer under~~ The person responsible for a contract of insurance to which this subpart applies must ensure that the contract complies with all requirements of the regulations relating to the form and presentation of the contract

New s 447C requiring insurers to make information to be prescribed in regulations publicly available

The regulation making power in s 447C(4) is very broad and the need for it to be so open-ended is not made clear. We do not consider this clause to be necessary or proportionate, at least in its current form. There is also overlap with some of the prudential supervision functions that the Reserve Bank has under IPSA, which do not seem appropriate for the remit of the FMA as the conduct regulator.

The examples given also do not appear to be in clear alignment with s 447C(4)(a) and (b).

If s 447C were to remain, then we consider that subsection (4) should be tightened so it more expressly sets out the type of information that is intended to be subject to the regulations, which seems to be the information set out in the example (i.e. claim acceptance rates, the length of time to settle claims, contract cancellations, complaints, and disputes).

We therefore suggest that the substance of the Example could be incorporated into subsection (4) itself to address these concerns. In addition, the section should also expressly provide that an insurer does not need to provide information that is a trade secret, would unreasonably prejudice its commercial position , or is subject to legal professional privilege, along the lines of the exceptions to disclosure found in the Official Information Act (s 9(2)(b) and (h)), Privacy Act (ss 52 and 53(d)) and Local Government Official Information and Meetings Act 1987 (s 7(2)(b) and (g)).

We expect that any publication requirements would apply to insurers generally (e.g. to enable comparison), rather than to individual insurers (consistent with the purposes of promoting the confident and informed participation of participants in the insurance market (s 3(a)) and assisting consumers make decisions relating to the provision of insurance (s 447C(1)(a)).

Accordingly, we propose amendments to s 447C, as follows:

447C Insurer must make information publicly available

(1) This section has the following purpose~~s~~ (in addition to those set out in sections 3 and 4):
- *(a) to assist consumers to make decisions relating to the provision of insurance:*
- *(b) ~~to promote and facilitate transparency in connection with an insurer's insurance business~~.*

*(2) **Subsection (1)** does not limit section 3 or 4.*

(3) An insurer under a contract of insurance to which this subpart applies must, at the prescribed times or on the occurrence of the prescribed events and otherwise in the prescribed manner, make publicly available the information that is required to be made publicly available by the regulations.

(4) The regulations may require disclosure of any information in connection with ~~either or both~~ any of the following:
- *(a) contracts of insurance entered into by ~~the~~ insurers:*
- *(b) ~~business, operation, or management of the insurer as an insurer~~ claims made under contracts of insurance entered into by insurers:*
- *(c) disputes insurers are or have been involved in with policyholders:*
- *(d) complaints made by policyholders against insurers.*

Example

The regulations may require ~~an~~ insurers to disclose information about claim acceptance rates, the length of time to settle claims, contract cancellations, complaints made against ~~the~~ insurers, and disputes ~~the~~ insurers ~~is~~ are or ~~has~~ have been involved in with policyholders.

(5) An insurer is not required to disclose any information if to do so would –
- *(a) disclose a trade secret; or*
- *(b) be likely to unreasonably prejudice the commercial position of the insurer; or*
- (c) *breach legal professional privilege.*

If publication requirements in regulations were to be progressed, then consultation with the industry would be needed before any regulations are enacted to ensure workability and to consider whether the costs of imposing any new requirements would outweigh any benefits. Insurance products and insurers' portfolios are not like for like so a prescriptive and/or one size fits all approach would not work and could be misleading if purported equivalencies do not reflect reality (i.e. varying data reflects more the segments an insurer underwrites rather than its performance).

In addition, ensuring there is a clear, precise and consistent understanding of the particular metrics to be published would also be particularly important. For example, the regulations would need to clearly define what a 'complaint' or 'dispute' is, so that any information disclosed is consistent and an insurer is not penalised from reporting on policyholder interactions as a complaint, which another insurer treats differently. Regard would also need to be had to the role intermediaries play in this context including, in so far as complaints/disputes relate to them (as opposed to the insurer), or issues arise between them and the insurer, and any overlapping complaints reporting responsibilities.

To avoid being misleading to consumers or unfair to insurers, it will also be critical for information to be able to be clearly contextualised (e.g., by comparing complaints/disputes relative to market share, proportion of claims overturned by external dispute resolution scheme, percentage of complaints versus customer claims, type of insurance cover, etc). Information should for example be presented based on rates or percentages rather than absolute numbers. If relevant and workable, regard could also be had to the scale of the claim event, complexity of the matter and specific service expectations.

For the reasons above, we therefore recommend a new subclause (6A) is inserted into s 546 of the FMCA, as follows:

> *(6A) The Minister must consult with members of the insurance industry before making a recommendation under section 546(1)(oga) or (ogb)*

Clause 188 Section 546 amended (Regulations for purposes of Part 6 (market services))

As outlined above in relation to cl 183 and new s 447B of the FMCA it is unclear what problem this regulation-making power seeks to address, and we question whether it is necessary or appropriate for such presentation requirements to be the subject of regulations. We do not support presentation requirements for matters such as font size and format. We are not aware of any problems in this respect, and such requirements would be unduly prescriptive and relate to matters which insurers are best placed to determine themselves, as they are already doing.

Insurance contracts of varying kinds can vary in length for all sorts of content or presentational reasons. Imposing requirements that require insurers to redraft their contacts or even to re-layout them to comply could impose major costs and impacts on insurers with very little benefit to policyholders. It is not simply a matter of opening up a word document, making some edits and creating a new PDF. In many cases the content and policy wordings and associated functionality is built into insurers' systems and processes.

There is also a tension between providing helpful information and increasing the size and manageability of all documents to be provided to a policyholder. Mandatory statements

introduced by regulations may ultimately result in things being misleading or more confusing than helpful.

In addition, the Bill effectively already provides for similar matters in cl 183, which inserts a new subpart 6B (duties to assist policyholders to understand insurance contracts) into the FMCA. This new subpart and new s 447A would require consumer insurance contracts to be worded and presented in a clear, concise, and effective manner, without the complexities and downsides associated with prescriptive requirements.

Should regulations ever be made relating to form and presentation of consumer insurance contracts there would need to be very careful consultation to with insurers to determine the costs and benefits of imposing any such requirements, the workability and the timeframe that would be significant to roll out any changes.

If, contrary to the above, the s 546(1)(oga) and (ogb) regulation-making powers are kept, then amendments should be made.

Specifically new subsection (oga)(ii) should be removed.

We oppose requirements being prescribed as to the layout or method of presentation, length, and size of type used, for contracts of insurance. Any such requirements may stifle innovation or lead to unintended consequences (e.g. splitting up an insurance policy into separate policies to meet length requirements).

As any presentation requirements will likely require insurers to review all their existing consumer-facing materials (and potentially go through the expense and time of creating new content and processes), the specific requirements proposed should be robustly tested with consumers in the first instance to determine their usefulness. These should also be tested with industry to assess proportionality (i.e., costs versus benefits) and workability. A substantial period would be needed for implementation once requirements were finalised.

To the extent that the regulations were to be enacted, we would endorse a less prescriptive approach and support the intention not to provide detailed requirements on how each aspect of an insurance contract is to be presented or prescribe standard forms for key fact sheets or summaries. Insurers are best placed to make these assessments and it is important that there is flexibility to do so and to enable innovation into the future.

Schedule 1 Transitional, savings, and related provisions

Clause 1 New disclosure duties apply to new contracts and variations

Renewals

By virtue of cl 1, the disclosure duties in Part 1 of the Bill have retrospective effect to contracts of insurance that were entered into before Part 1 comes into force but renew on or after the commencement of Part 1. In these circumstances, the contract was originally entered into on one legal basis but would now be subject to another.

This presents challenges for insurers. For example, it would be a significant imposition on both insurers and customers to require insurers to re-obtain disclosures from all current policyholders pursuant to the new requirements.

We are keen to discuss with the Select Committee and its advisers how the disclosure regime should apply with respect to existing policyholders to ensure that insurers can discharge their obligations in a practical manner.

For example, one way forward could be to allow a longer timeframe for complying with the duties for renewals than for new business (i.e. beyond a three year commencement date).

Another could be to provide that the fact that a contract of insurance was originally entered into under the old disclosure regime should be a factor taken into account under cl 15 in determining whether the policyholder has taken reasonable care. This would allow regard to be had to the fact a different regime was in effect, for example, when interpreting insurers' original questions.

Variations

Applying the new disclosure duties to variations of contracts that were entered into before Part 1 comes into force is not practical. The variation of a contract can often be minor and unrelated to the policy wording (e.g. a change to a sum insured or excess for example). Insurers will already need to establish new systems for new contracts and to require this also for variations at the outset would create yet another new process to be developed, implemented and managed, and would complicate the process for customers seeking routine variations in their contracts. We are therefore keen to discuss with the Select Committee and its advisers how the disclosure regime should apply to variations of existing contracts.

Schedule 2 Insurer's remedies for qualifying misrepresentation or breach

Clause 5 Insurer would have entered into contract of different terms &
Clause 14 Insurer may reduce proportionately amount to be paid

We welcome the formula for calculating proportionate remedies for non-deliberate and non-reckless qualifying misrepresentations or qualifying breaches as set out in cls 5(2) and 14(2) of Schedule 2.

The proportional reduction in claims payable under the policy:

- Aligns with the position in the United Kingdom (see cls 6 and 11 of Schedule 1 of the Insurance Act 2015 (UK)) on which the changes to the duty of disclosure have otherwise been modelled.

- Provides the most effective benchmark for pricing risk and the fairest reflection of the allocation of risk between the insurer and policyholder. The relationship between premiums and claims across a portfolio of risks is non-linear, with premium amounts being consideration for a promise to pay by an insurer for potentially exponentially larger sums. Premium is calculated based on actuarial and statistical modelling and probability of risk and uncertain eventualities across a broad portfolio of business which may, or may not, come to pass. To treat an individual consumer or commercial customer's underpayment of premium in the event of a relevant claim as being directly connected and a straight deduction from their claim payment would be to mischaracterise matters and may have a significant effect on pricing at a portfolio level.

- Avoids the greater opportunity for 'gaming' that may arise with a straight premium reduction as was provided in the 2022 Exposure Draft of the Bill – i.e. a customer is not particularly careful or is 'economical' about what is disclosed, with a view to reducing their premium, knowing that should this be later discovered in the event that they make a claim, this would be easily resolved for them merely by a small deduction from their claim payment (and which would represent what the customer should have paid anyway, had they taken reasonable care).

- A straight-line premium reduction ignores the impact on the wider customer base (with those providing accurate and full disclosure effectively cross-subsiding those that have not) and the broader distortionary impacts involved (reflecting upon the nuanced relationship between premium and claims payments at a portfolio level described above).

- It is also noteworthy that prior to its introduction in the United Kingdom, the decision as to whether to adopt a proportional or straight premium deduction basis, was the subject of detailed economic analysis by London Economics.[6] London Economics analysed the effect of different remedies for non-disclosure on a hypothetical pool of 1000 policyholders and reported (amongst other things):

    - Where some policyholders did not fill out the insurance application forms accurately, they did not pay the premiums they should have paid. If the insurer was only entitled to charge the full premium they would have charged had they known of the full facts, this remedy would only be available against those individuals who had made a claim and not the entire pool of individuals that made a misrepresentation. The conclusion was that this option only very marginally reduced the economic loss suffered by the insurer compared with the position the insurer would have been in assuming the insurer had no legal remedy at all – i.e., the insurer was barely better off under this approach than it would have been if the law allowed no remedy for misrepresentation.

    - If the insurer is entitled to proportionately reduce the claim based on the premium that would have been charged had the insurer been aware of the true state of affairs, the insurer would receive $0 economic profit, which is the same result had all policyholders made accurate representations.

    - London Economics also concluded that:

        > "[…] *allowing claims on the payment of additional premiums substantially under-compensates the insurer and provides some individuals with possible incentives to misrepresent or not fully disclose to the detriment of the insurer.*

[6] See London Economics' report to the UK and Scottish Law Commissions' joint consultation paper (Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured) entitled 'A proposed model for assessing the economic impact of proposed changes to the law relating to non-disclosure and misrepresentation.' This report can be found in Appendix B of the Joint Consultation Paper (see https://www.scotlawcom.gov.uk/files/6412/7892/7069/dp134.pdf).

In the illustration presented here, proportionality appears to provide a more appropriate way of compensating insurers for the potential loss caused by misrepresentation."

As currently drafted, cl 5 of Schedule 2 does not enable insurers to charge a higher premium if they would have done so but for the misrepresentation or breach. We consider it is vital for insurers to be able to increase their premium to reflect the actual risk they are covering instead of only being about to recover any shortfall in premium if the insured makes a claim. It would be financially unworkable for insurers to have to carry increased risk on their books without being able to charge additional premium for it. We therefore suggest subclause (2) of cl 5 of Schedule 2 is added to as below. We note that the intention of this amendment is to enable the insurer to charge a higher premium going forward, rather than from when the contract was entered into. We consider that this approach strikes the correct balance between the interests of the insured and the insurer.

5 Insurer would have entered into contract on different terms

(2) In addition, if the insurer would have entered into the contract, but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim. ***The insurer may also vary the terms of the contract to charge a higher premium for the remainder of the contract.***

We also consider that cl 5 of Schedule 2 would benefit from adding an example, such as the following:

Example
Person A makes a qualifying misrepresentation to insurer B in relation to A's home policy that was neither deliberate nor reckless. A was actually charged $900 in premiums, but B would likely have charged $1,000 if the misrepresentation had not been made.
A makes a claim under its Home policy. The amount otherwise payable on the claim would have been $100,000. However, B only has to pay 90% of the claim, being $90,000.

Schedule 3 Information and disclosure for third party claimants

Clause 4 Information that may be requested

We are concerned about the extremely broad scope of the information a third party claimant can obtain as of right as proposed under cl 4 of Schedule 3 of the Bill. Ready access to details such as terms of the contract, sums insured and whether cover has been exhausted would provide that claimant with a considerable and unique advantage relative to others, enabling them to adjust their claim to maximise recovery, reflecting the full extent of cover available in a way that would not otherwise be possible. In this context, it needs to be remembered that the intention is to simply put the relevant claimant in the position they would have been in had the policyholder not been insolvent. We consider that this proposal, if adopted, would put that claimant in a much better position than that. For example, this may prejudice recovery rights under claims brought by other third parties later which will rank lower in priority.

We are also concerned about the distortionary impact such an entitlement may bring about. This could in turn impact loss ratios and consequentially the premiums insurers

would need to charge for these insurance policies. There is also a risk that this may result in insurers reducing the capacity they are prepared to offer for these products.

In light of the above, drawing upon cls 4(1)(a), (b)(i), (iii) and (iv), we strongly suggest that the information that can be accessed as of right be pared back to:

- Confirmation of the existence of a relevant insurance policy.
- Who the insurer is and whether they have disclaimed the supposed liability.
- Whether there are, or have been, any proceeding between the insurer and the policyholder in respect of the supposed liability. The requirement in (iii) to disclose the contents of all documents served in the proceedings has the potential to be unduly onerous so should not be included.

In the vast majority of cases, this information will be sufficient for the claimant to properly assess its position and options (e.g., to determine whether it is entitled to claim), without creating the unfair advantage or risk of distortion outlined above.

If the claimant wishes to obtain additional details about the insurance, they can apply to the court under civil procedure rules as is currently the case. Specifically, the High Court Rules allow an 'intending plaintiff' to apply for an order for particular discovery before a proceeding is commenced (See HCR8.20). The applicant here simply needs to show that they are entitled to claim but that it is impossible or impractical to formulate it without certain documents. We note that civil procedure rules for preliminary discovery similarly have a role to play in the equivalent regime in New South Wales. These civil procedure rules provide an effective threshold and check against abuse because the claimant would be required to take active steps to obtain this information (i.e., by making an application) and as a determination of the court is involved.

Clause 6 Person to whom notice is given may require payment of reasonable charge

Clause 6 of Schedule 3 requires 'R' to provide the required information to 'A' regardless of whether A pays any reasonable charges required by R. This is illogical and unreasonable. There is little incentive for A to pay the fee, and subclause (3) provides little value to R given that the costs of any proceeding to recover the fee are in all but the most exceptional cases likely to be disproportionate to the amount involved. Clause 6 is also out of step with the Privacy Act 2020 (ss 45(1)(b) and 66(1)(b)), the Official Information Act 1982 (s 15(3)), and the Local Government Official Information and Meetings Act 1987 (s 13(4)), where costs can be made payable in advance.

We therefore recommend that subclause (2) be amended, as follows:

> *(2) R may require A to pay all or part of the charge in advance.*

Additionally, for certainty, consistency with other provisions under subpart 4 and to further limit the risk of unfair advantage this entitlement would bring about, we suggest it be made clear that the third party claimant's right to access information is limited to circumstances where the relevant policyholder is insolvent and not merely impecunious.