

The Insurance Contracts Bill: a much needed update with its fair share of benefits and unintended consequences

New Zealand's current insurance legislation is unwieldy, disjointed and at times, unfair. That is set to change.

On 24 February 2022, the Ministry of Business, Innovation and Employment released an exposure draft of the Insurance Contracts Bill for public consultation. The Bill tidies up a number of curly insurance law issues, rationalises New Zealand's various insurance statutes into one and, importantly, modernises insurance contracts law in line with other jurisdictions.

Submissions on the Bill close on 4 May 2022. If you want to discuss the Bill or get assistance with submissions, please get in touch. We have experts who know the insurance market, and who help with regulatory compliance, indemnity issues and claims (for insurers and insureds).

We have summarised what we think are the most important changes that, despite having obvious benefits, may require further thought to ensure the Bill is fair and workable.

Current Law	Proposed Law	Positives	Potential problems
Duties of disclosure			
A policyholder must disclose everything "which would influence the judgement of a prudent underwriter in fixing the premium or determining whether [it] will take the risk": refer s18 Marine Insurance Act 1908.	<p>Consumer policyholders</p> <p>"must [now] take reasonable care not to make a misrepresentation to the insurer before the consumer insurance contract is entered into or varied": refer clause 14.</p> <p>Non-consumer policyholders</p> <p>"must [now] make to the insurer a fair presentation of the risk before the non-consumer insurance contract is entered into or varied": refer clause 31.</p>	<ul style="list-style-type: none"> Consumers no longer have to guess what the insurer wants to know. Consumers can expect insurers to ask the right questions. "Non-consumers" have a slightly less onerous duty than before. Knowledge of companies is codified as knowledge of senior management or the person responsible for the policyholder's insurance. 	<ul style="list-style-type: none"> Care must still be taken with omissions. Cautious insurers may demand large amounts of detailed information. Policyholders are taken to know everything that could have been revealed by a reasonable search. The question of what is reasonable is likely to be a battleground. The changes for 'non-consumers' are not as significant. Disclosure of information to ensure the insurer has a fair presentation of the risk remains an important governance issue.
Consequences of non-disclosure			
Policies can be avoided for material non-disclosure, if the misrepresentation was 'substantially incorrect' and material. For life policies it must also be fraudulent or made within three years of the date when the insurer wants to avoid the policy: refer ss 4 and 5 Insurance Law Reform Act 1977.	<p>"Proportionate remedies"</p> <p>For non-life policies, the insurer has a remedy if, without that misrepresentation, it would not have entered into the contract (or would have done so on different terms). The remedy will differ depending on if the misrepresentation was deliberate or reckless (or neither): refer subpart 3, part 2.</p> <p>For life-policies, the test remains the same.</p>	<ul style="list-style-type: none"> Less protracted disputes about the consequences of non-disclosure. Clearer and fairer consequences for inadvertent non-disclosure. Return of premiums on cancellation for in-advertent non-disclosure will have a positive impact on consumers. A clear incentive for insurers to ask the right questions and carry out some due diligence when offering cover. 	<ul style="list-style-type: none"> Potential impacts on re-insurance arrangements. Insurers may want to think about the implications of returning premiums and how this affects their risk profile and investment approach. Insurers should consider submitting on whether other remedies should be provided for the life sector.

Codified duty of good faith			
Insurers and insureds have common law duties of good faith	A contract of insurance is based on utmost good faith: refer clause 59.	<ul style="list-style-type: none"> • Utmost good faith not limited or restricted by other law so, aside from disclosure requirements, insurers and insureds can still rely on common law remedies. 	<ul style="list-style-type: none"> • Unclear what advantages this will have or whether it simply states the existing law/practice. • Missed opportunity to codify additional requirements of good faith including by potentially incorporating elements of the Fair Insurance Code.
Plain Language			
No existing legal requirements	“Must ensure that the [policy] is worded and presented in a clear, concise and effective manner.”: clause s 47A(1).	<ul style="list-style-type: none"> • Easier for everyone to use • Hopefully fewer disputes about meanings as what is insured (and what is not) is clearly identified. • Consumers in a better position to choose cover as comparison between policies may be easier. 	<ul style="list-style-type: none"> • Insurers will need to update all consumer policies (although many insurers have done so already). • Plain English makes policies more accessible, but there will still disputes about the meaning of words. • New case law likely to interpret new policy wordings. • Uncertainty introduced with loss of phrases which have established interpretation through case law.
Time/ notification exclusions (generally)			
Insureds must prove on the balance of probabilities that the loss that they want indemnity for was not caused or contributed to by anything that is excluded: refer s11 Insurance Law Reform Act 1977.	Additional requirement imposed. For the exclusion to apply, the insurer has to not only suffer prejudice but it has to be inequitable if it did not: refer clause 68(3). Increased costs as a result of delay are not considered prejudice, but the insurer does not have to pay for them: refer clauses 70(2) and 70(3).	<ul style="list-style-type: none"> • Policyholders can take greater comfort if they notify outside of the strict requirements of the policy. • May increase fairness to policyholders who, for example, are not aware they are covered. • May not change very much in practice given that insurers will often deduct increased costs rather than declining a claim outright. 	<ul style="list-style-type: none"> • Increased uncertainty for insurers. • Some limited potential for insurers to be required to indemnify despite the fact that they have suffered prejudice due to late claim. • Potential for complex arguments on the extent to which delay increased the costs of a loss.
Special rule for claims-made policies			
As above	Insurers can only rely on a time exclusion for claims made policies if the claim is notified more than 60 days after the expiry of the policy period and the insurer “clearly informed the policyholder in writing of the effect of failing to notify the insurer” no later than 14 days after the end of the relevant period: refer clause 69.	<ul style="list-style-type: none"> • Policyholders have an added window of 60 days to notify claims. • May increase fairness to policyholders who, for example, are not aware they are covered or that they must make claims within the policy period. 	<ul style="list-style-type: none"> • Increased uncertainty for insurers. • Insurers may have to indemnify even if they have suffered prejudice due to a late claim. • Additional administrative costs for insurers.

Increased risk exclusions			
As above	Same as before, except increased risk exclusions will apply in some cases even if they did not cause or contribute to the loss, including “the age, identity, qualifications or experience of a driver.” Refer: clause 71(3)(a).	<ul style="list-style-type: none"> • May lead to decreased premiums and easier vehicle insurance pricing. • Removes the need for difficult arguments about, for example, whether a driver’s age contributed to the loss in marginal cases. 	<ul style="list-style-type: none"> • Some potential for harsh results – for example, younger drivers who were not at fault.
Unfair contracts insurance scope defined in narrow terms			
Some terms in insurance contracts cannot be declared as unfair: Fair Trading Act 1986. This is different to other contracts, where the only terms that cannot be declared as unfair are ones that define the main subject matter of the contract, set the upfront price, or are required or expressly permitted by law.	The insurance exceptions will be removed, but clarification provided about how the main subject matter exception applies to insurance contracts.	<ul style="list-style-type: none"> • Policyholders will have a greater level of protection under the unfair contracts regime. 	<ul style="list-style-type: none"> • Insurers will need to assess policies and decide if they are still protected from the unfair contracts regime. • Insurers may want to make submissions on how the main subject matter exception is defined for insurance contracts, to ensure an appropriate balance between consumer and insurer interests.

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