IBANZ
INSURANCE BROKERS
ASSOCIATION OF NEW ZEALAND INC

4 May 2022

Financial Markets Policy
Building Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6145
By email: ***insurancereview@mbie.govt.nz.***

**Consultation Paper – Exposure draft Insurance Contracts Bill: Insurance Brokers Association of New Zealand Inc submissions**

1. Please find attached the submissions of the Insurance Brokers Association of New Zealand Inc (IBANZ) on the Ministry of Business, Innovation and Employment's Consultation Paper – Exposure draft Insurance Contracts Bill (22 February 2022).

2. IBANZ has over 100 member firms operating in the general (non-life) insurance market. IBANZ members employ approximately 5,000 staff of which approximately 2,500 staff are currently financial advisers.

3. IBANZ members place general insurance cover equating to approximately 50% of all general insurance premiums ($3.5 billion) for approximately 1 million New Zealand customers and for approximately 14 of the 30 general insurers operating in New Zealand. The total New Zealand gross written general insurance premiums in the 12 months to 30 September 2020 were more than $6.9 billion.[1]

4. Our members commonly consider a number of different insurance contracts underwritten by a range of insurers and place cover on a daily basis.

5. In the general insurance broking sector, up to 20% of clients may change insurers (i.e. replace their financial product) each year. This is a standard general insurance practice, and is undertaken in consultation with the client so they receive the benefit of improved policy terms, coverage, conditions or pricing.

6. Please let us know if you would like us to expand on any of the submissions made by IBANZ.

7. Our detailed submissions are below.

**General submissions**

IBANZ supports the intentions of the Bill and particularly the objective of ensuring that contracts of insurance and their associate market practices operate fairly to promote the confident and informed participation of insurers, policyholders and other participants in the New Zealand insurance market.

To successfully achieve the Bill's fairness objective, an understanding of how insurance works in substance is required. Insurance has the effect of sharing insured risks across a broad group of policyholders; by using those policyholders' premiums, after costs, to compensate a smaller proportion of claimants who actually suffer the covered losses. Accordingly, if the Bill confers additional benefits on individual policyholders or has costly

[1] Insurance Council of New Zealand Market Data. An additional approximately $400 million of cover was placed through Lloyds.

effects on insurers or intermediaries, the changes will ultimately impact adversely on all policyholders through increased premiums or reduced cover. Insurance is largely a "closed system"; an impact in one area has consequences elsewhere. So a balanced and proportional approach to insurance contract regulation is necessary to maintain an efficient market, and avoid causing escalating premiums or reduced coverage, in the general interests of policyholders.

Cost efficiency also benefits the community more broadly by making the benefits of insurance more readily available to the public, including the well-documented, many, under-insured in the New Zealand market.

It is also necessary to recognise, when seeking to follow foreign laws, that New Zealand's insurance market does not have the scale of larger foreign markets, including Australia, and needs to rely heavily on foreign reinsurers to spread insured risks. Accordingly, additional compliance costs can be difficult to absorb in the New Zealand insurance market, and would be detrimental to all insurance market participants, including policyholders who benefit from competition. Avoiding undesirable or unnecessary structural changes in the market is important as these changes can lead to a reduction in competition, impede independent financial advice, impose unnecessary costs and undermine established protections for policyholders, including the ability for specified intermediaries to provide independent advice or advocate for their clients.

IBANZ responds to those MBIE's particular questions relevant to its members below.

## SUBMISSION ON *EXPOSURE DRAFT INSURANCE CONTRACTS BILL*

### Your name and organisation

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| **Name** | Melanie Gorham |
| **Organisation (if applicable)** | Insurance Brokers of New Zealand Inc (IBANZ) mel@ibanz.co.nz |
| **Contact details** | Privacy of natural persons |

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

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

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

| I do not want my submission placed on MBIE's website because… [Insert text] |
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### Please check if your submission contains confidential information:

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

| I would like my submission (or identified parts of my submission) to be kept confidential because… [Insert text] |
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## Responses to consultation paper questions

| **Part 1: preliminary provisions** | |
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| 1 | *Do you have any feedback on Part 1 of the Bill?* |
| | **Definition of contract of insurance**<br>IBANZ submits that it may be desirable to include a degree of flexibility around the definition of "contract of insurance" in clause 6 of the Bill, by adopting overriding wording similar to section 10(1) and (2) of Australia's Insurance Contracts Act 1984 which includes contracts which would ordinarily be regarded as contracts of insurance and excludes contracts which ordinarily would not be regarded as contracts of insurance. Notably the United Kingdom's Consumer Insurance (Disclosure and Representations) Act (CIDRA) and Insurance Act 2015 do not define contract of insurance. This flexible approach allows for the consideration by the Courts of new products as they evolve.<br><br>In relation to clause 6(2)(b), IBANZ submits that the reference should be beyond "the insure**d**'s control". Not "the insure**r**'s control". While the latter is adopted in IPSA, the far more common concept is whether a loss is "unforeseen and unintended" by the insured. IBANZ submits that the insurer is unlikely to control any risk faced by the insured, but if the insured controls the risk it is not an uncertain event.<br><br>Corresponding changes should be made to IPSA. |
| **Part 2: disclosure duties and duty of utmost good faith** | |
| 2 | *Do you have any feedback on the Bill's provisions in relation to the duty for consumers to take reasonable care not to make a misrepresentation, including the matters that may be taken into account to determine whether a consumer policyholder has taken reasonable care not to make a misrepresentation?* |
| | **"Consumer insurance" contract definition**<br>In some cases, defining whether contracts are either consumer or non-consumer insurance contracts based on the contract's predominant purpose is likely to lead to considerable uncertainty.<br>Greater certainty would be achieved if consumer insurance contracts are contracts solely taken out by natural persons. In New Zealand, section 11 of the Credit Contacts and Consumer Finance Act 2003, the borrower under a consumer credit contract has to be a natural person. In the United Kingdom, a consumer insurance contract is a contract with an individual (Section 1 CIDRA). This approach should be followed here. |

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| | As importantly, there are many business insurance contracts which should not be consumer insurance contacts, but could meet the definition depending on the circumstances. These include:<br>• Building insurance contracts taken out by apartment developers, which effectively insure domestic homes during construction. These contracts would be consumer insurance contracts, even if the cover is provided to the developer rather than consumers;<br>• Commercial vehicle insurance when the vehicle is used predominantly for domestic purposes (how would the insurer/intermediary know when the policy is initiated whether the personal use is predominant);<br>• Apartment block insurance, when the apartments are let predominantly as hotel rooms but some are retained by their owners as private dwellings or holiday homes: how would insurers/intermediaries know which test to apply as the predominant purpose may change over time or be unknown at the outset;<br>• Unit titles, when the body corporate is a professional body capable of meeting the non-consumer disclosure standard;<br>• Directors & Officers insurance, which has a commercial purpose, but provides personal protection for the insured.<br>While the draft's definition aligns with the Australian Insurance Contracts Act, section 1 of CIDRA in the United Kingdom defines a "consumer insurance contract" as an insurance contract between an insurer and "an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession".<br>IBANZ submits that the consumer insurance contract would be more clearly defined if it references the policy type (so insurers and policyholders are able to determine efficiently the approach they should take to the applicable duty of disclosure, and the extent the insurer needs to pose questions). For this purpose, IBANZ proposes that a consumer insurance contract is limited solely to insurance which is purchased by a consumer, such as home and contents insurance for private dwellings, private motor vehicle, caravan or motorhome insurance, pleasure craft, contract works insurance for homeowners renovating or constructing, life insurance, income protection insurance, trauma, health and total permanent disability insurance, personal travel and personal transit insurance, personal cyber insurance, lifestyle block insurance (including associated liability), credit card protection, mortgage protection insurance and pet insurance:- in all cases solely where the insured and the policyholder are natural persons. It is also separately submitted that the definition expressly does not apply to commercial property insurance, business interruption insurance, Side A Directors & Officers insurance, partner asset protection insurance, bloodstock insurance, building insurance, and any other form of trade, business or profession insurance.<br>These comments apply equally to clause 21 of the Bill. |
| 3 | *Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?* |
| | No |
| 4 | *Do you have any feedback on the Bill's provisions on remedies for breach of the consumer duty in relation to life insurance policies where the misrepresentation was not fraudulent and more than three years ago?* |
| | No comments |

| 5 | *Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?* |
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| | **Knowledge held**<br>Clauses 39 to 41 of the Bill attribute to the policyholder, the knowledge of the individuals responsible for the policyholder's insurance. Clause 45 of the Bill attributes to the insurer knowledge of an individual who works for a specified intermediary. IBANZ submits that knowledge held by all individuals employed or engaged by intermediaries should not be included in the insurer's deemed knowledge because insurers will require intermediaries to provide them with all deemed knowledge, and it would be impossible for the intermediaries to monitor that knowledge adequately. Additionally, it is not uncommon for the individuals responsible for the policyholder's insurance to have a private relationship with the policyholder outside the work context, through which, a great deal may be known about the policyholder. The specified intermediary would need to evaluate all this knowledge to determine if anything material is known, which would be very burdensome, if the private knowledge of the individuals responsible for the policyholder's insurance are deemed to be held by the specified intermediary.<br>The same point applies to 43(3): "information includes information held within the policyholder's organisation or by any other person (such as the policyholder's agent..."<br><br>**Deemed Knowledge of Policyholder**<br>It seems unfair to deem that a policyholder knows information which is available to a policyholder through a reasonable search (clause 43 of the Bill) if the policyholder is actually unaware that the relevant data is available if a reasonable search was to be made. Policyholders are often asked for a great deal of information, and a policyholder may not be aware that relevant information is held and available from the policyholder's employer or available on the internet if inquiries were to be made (such as traffic offence information which is available on the internet). In those circumstances, where the information is available but the policyholder does not know that it exists and/or that it would be productive to look, the policyholder's inquiries may not constitute a reasonable search. It would be helpful to define "reasonable search" as being a reasonable search where a reasonable person would expect the relevant information would be available, if a reasonable search is undertaken and the circumstances would justify the policyholder undertaking the reasonable search. |
| 6 | *Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?* |
| | **Remedy for policyholders who have not made deliberate or reckless qualifying misrepresentations**<br>The remedy for a qualifying misrepresentation which is not deliberate or reckless, where the insurer would have charged a different premium, is solely recovery of the additional premium, and not apportioning of the cover (See page 14 of the Consultation Paper and clause 5 of Schedule 2 of the Bill).<br>IBANZ submits the proposal would create an incentive to make deliberate or reckless misrepresentations in order to get cheaper cover and pay the balance of the full price only if a claim is made. It is necessary to remove this incentive. |
| 7 | *Do you have any feedback on the provisions in relation to the insurer's duties to inform policyholders of the disclosure duties, and insurer access to third party information, including how the duties apply for variations of insurance contracts?* |

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| | **Duty to inform policyholders of their duties and their consequences**<br><br>As the insurer’s duty in clause 55 of the Bill is to inform policyholders of the general nature and effect of the policyholder’s duty and the potential consequences set out in the Act, would apply equally to all insurers in respect of their obligations under the Act, it would be sensible for the disclosures to be standardised through prescribed wording. For efficiency, intermediaries should be able to pass on the same disclosure (depending on which consumer/non consumer category applies), rather than making different disclosures depending on who is the insurer. This would avoid the need to repeat disclosures if multiple insurers are involved and reduce the opportunity for error or misunderstanding by the insured of which disclosure applies to each policy where there are different insurers and/or if they have both consumer and non-consumer policies.<br><br>Equally, it would be ideal if standardised options could be prescribed for disclosure of the extent insurers may access and take account of information for which consent to access is sought, for the same reasons.<br><br>The prescribed disclosures would need to be tailored for renewals or variations, particularly during the transition phase, and allow for variations for particular circumstances where the prescribed disclosures are inapplicable or otherwise misleading (like Regulation 9(2) of the Financial Markets Conduct Regulations).<br><br>**Clarity on the insurer’s ability to delegate its disclosure obligations**<br><br>Most intermediated insurance business is conducted between insurer and intermediary, with the insurer having no direct contact with the insured. In practice, the insurer will often look to transfer its disclosure obligations to intermediaries or assume that the intermediary has made the required disclosures as to the insured’s disclosure duties. It would be desirable for Subpart 6 of Part 2 to confirm that the insurer is deemed to perform its obligations as to the insured’s disclosure duties if the intermediary makes the required disclosures to the policyholder.<br><br>The **Insurance (Prudential Supervision) Act 2010** deals with it this way:<br><br>*“64 Disclosure of current rating to policyholder*<br>*(2) If an insurance intermediary, in arranging a contract of insurance or the renewal of a contract of insurance, discloses to the policyholder in writing and before the contract is entered into or renewed the matters referred to in subsection (1) in relation to the proposed insurer, the insurer must be treated as having complied with that subsection.”* |
| 8 | *Do you have any feedback on the consequences in the Bill if an insurer breaches duties to inform policyholders of the disclosure duties, and insurer access to third party information?* |
| | No |
| 9 | *Do you have any feedback on how the Bill codifies the duty of utmost good faith?* |
| | The actual underwriter/inducement test should not be omitted. |
| 10 | *Do you have any feedback on the Bill’s provisions relating to information provided by a policyholder to a specified intermediary?* |
| | **Clauses 63 to 66 should be removed**<br><br>IBANZ acknowledges that insurers are currently deemed to know things known by specified intermediaries in relation to the contract of insurance (clause 45(1)(b)). However, this does not require that the commercial arrangements between an insurer and a specified intermediary needs to be interfered with. The parties are both commercial |

businesses capable of agreeing their own arrangements. The parties can agree between themselves the consequences if a specified intermediary fails to disclose material information known to the specified intermediary. Where the specified intermediary is authorised to bind the insurer, no disclosures may be required. Equally, the risk/reward allocation between the intermediary and the insured may mean that limits are placed on the specified intermediary's liability because the small amount of commissions received does not justify significant risk allocations. The two commercial parties do not require a Court to order compensation, as the commercial arrangements should appropriately record the parties' agreement in this respect, which would ordinarily reflect the usual risk/reward considerations agreed between commercial parties.

If the specified intermediary is disproportionally exposed to significant risks for failing to disclose material information to the insurer, the specified intermediaries may increase their questions put to policyholders so they can properly evaluate their non-disclosure risk, making the contracting process more inefficient and expensive. The commercial dynamic may be disrupted, and this may be so severe that specified intermediaries stop providing advice, which would perpetuate the level of underinsurance in New Zealand. The lack of Errors & Omissions insurance (or Professional Indemnity insurance purchased by intermediaries) availability may also increase the specified intermediaries' caution. Commissions may need to increase to compensate for additional risks imposed by legislation.

Accordingly clauses 63 to 66 should be removed, as they serve no commercial need and their imposition may have untoward consequences for policyholders.

**Specified Intermediaries may be subject to conflicting obligations**

If the duty to pass on material information to the insurer is retained in the Bill, the requirements should recognise that specified intermediaries may be subject to duties of confidentiality, privacy or client interest priority under section 446K of the FMCA or other legal or contractual restrictions which prevent specified intermediary disclosures to the insurer.

Specified intermediaries have duties primarily or preferably solely to their clients, often as a result of their terms of engagement or when providing advice. Requiring full disclosure of all material information known to specified intermediaries could undermine the specified intermediaries' role as the client's adviser or the specified intermediaries' ability to give advice on the policyholder's proper disclosures. Policyholders could be concerned that full disclosure to specified intermediaries of all circumstances would result in all those circumstances being unnecessarily disclosed to the insurer (out of the specified intermediaries' abundance of caution), diminishing the insured's desire to fully disclose all facts to the specified intermediaries, which would hinder the specified intermediaries evaluating all the facts when formulating advice or acting as policyholder advocates. The same principle underlies the justification for legal privilege; required disclosure would prevent the effectiveness of the advice process.

For the reasons given above, the specified intermediaries' duty of disclosure to the insurer, if they are retained at all, in clauses 63 to 66, of the Bill should be removed, or at least made subject to exceptions reflecting the specified intermediary's conflicting duties to their clients, of confidentiality, of privacy, under law or under their terms of engagement.

**Specified Intermediaries disclosure obligations should apply solely to those responsible for the policyholder's insurance within the Specified Intermediary**

Clause 63 of the Bill covers all representations made to the specified intermediary, which would include all disclosure made to anyone in the specified intermediary, even the receptionist, telephonists or other support staff and administrators; who may not even recognise the disclosure as such or indeed that the information is material and received in any form by voicemail, or text, or message to an inactive voice or email box. Clause 63 of the Bill needs a provision (like those elsewhere in the Bill) that clarifies that only

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| | disclosures made to persons within the specified intermediary who are responsible for the policyholder's insurance should be subject to the specified intermediary's duty of disclosure.<br>**Specified Intermediaries should not be asked to judge whether policyholder's disclosures are misrepresentations**<br>IBANZ submits that "not required" to pass on, rather than "prohibited" from passing on, misrepresentations is the preferred formulation in clause 63(3). A specified intermediary is placed in an invidious position when it suspects a misrepresentation if it is required to form a judgment as to whether a disclosure is a misrepresentation – how can the specified intermediary be sure?<br>An intermediary may decide to withdraw from acting for an insured, if the intermediary's misgivings and risk are sufficient, rather than to have to disclose information which its client forbids it from doing. This will deprive an insured from receiving the appropriate advice.<br>Imposing an obligation on specified intermediaries to assess all disclosures because of risks imposed by the Bill on its disclosure or non-disclosure of what it is told would make the intermediation of insurance highly inefficient. A prohibition on passing on insured's misrepresentations creates tension, where they could be in breach of sub- section (3) if they pass the information on to the insurer but could be in breach of sub-section (2) if they don't.<br>Accordingly, clause 63(3) should not be expressed as a prohibition because that would require a specified intermediary to make assessments of all representations made by the policyholder.<br>**Section 65 is excessive**<br>Imposing a statutory liability on specified Intermediaries for failure to pass on material representations would be disproportionate, and unnecessarily interfere with the arrangements between insurers and specified intermediaries. Insurers charge premiums for risks which cover the risks of unremedied misrepresentations. Specified intermediaries are not paid commissions which are sufficient to cover this type of risk, and many limit their potential liabilities to clients which would otherwise be completely disproportionate to the remuneration.<br>At the extremes, a $20,000 engagement could result in a $100m or even $500m liability to an insurer; whereas the intermediary may limit its liability to its client to $1m or 5m. If insurers wished to impose liability on specified intermediaries, they can seek to do so by contract, but like many financial service arrangements where the risk exposure is disproportionate to the remuneration paid, there would need to be suitable liability limitations. Uncapped liabilities would threaten the viability of specified intermediary businesses and chill the appetite of some intermediaries to act for some clients.<br>It would be inappropriate to disturb the balance of the arrangements between insurers and specified intermediaries, for the reasons given above. |
| 11 | *Do you have any other feedback on the drafting of Part 2 of the Bill?* |
| | No |
| **Part 3: terms of insurance contracts** | |
| 12 | *For claims-made policies, do you consider that 60 days after the end of the policy term is an appropriate period for allowing the policyholder to notify relevant claims or circumstances that might give rise to a claim?* |

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**IBANZ submits that section 9 of the Insurance Law Reform Act 1977 should not be changed.**

Section 9 of the Insurance Law Reform Act 1977 and the case law that has interpreted it has for almost two generations protected New Zealand insureds from the application of unfair claims-made policy conditions which may impose "sudden death" to claims that could and should be covered but for whatever reason were not notified in accordance with strict policy terms.

Even with care and good advice, it is possible for an insured to miss a reporting timeframe, or not identify that a notifiable circumstance exists and should be reported, and, in such cases, later notice would rarely in our experience cause any prejudice to the insurer.

On the other hand, when "hornets nest" or "laundry list" circumstances are notified, insurers routinely claim that the notified circumstances are too vague; and/or in future policy periods a different or even the same insurer may state a circumstance was notifiable under a previous policy and is now excluded under a "prior or pending" exclusion. The insured can be unfairly excluded from cover in either circumstance as a result.

It can be difficult to determine when a reportable circumstance crystallises. The wording of notification clauses may also vary from:

- may give rise to a claim; to
- would be expected by a reasonable insured to give rise to a claim.

The highly fraught situation faced by insureds and their advisers due to the operation of claims-made and circumstances notified policies outside of New Zealand was the subject of Clayton Utz partner Fred Hawke's 2014 article for the Insurance Law Journal "Schrodinger's claim: The quantum mechanics of circumstance notification". The precis comments:

> "What happens when an insured attempts to notify its current insurer under a claims-made liability policy of matters likely to give rise to a claim against the insured but the insurer purports to reject the notification, on the ground that it does not contain sufficiently detailed and specific information to enable a causal connection to be established between the matters notified and any future claims? Can the insured confidently assume that the current insurer, having repudiated the notification, a future insurer would not be able to apply the prior known circumstance exclusion to any claims arising from it?
>
> Insurers justifiably object to generic or shopping list circumstance notifications, on the basis that there is no clear causal relationship between the facts disclosed and future claims that may be alleged to have arisen from them. At the same time insured[s], especially in the financial services sector, have to be able to give effective notification of the potential for an indeterminate number of future claims against them to arise from identified systemic misfeasance, without having to provide details of each individual instance, if clams-made insurance is to continue to serve its purpose of enabling insurer and insured to draw a line at the end of the period of insurance and successive insurers to demarcate their respective responsibilities."

The current section 9 of the Insurance Law Reform Act 1977 allows clear demarcation, at least up to the point where sufficient prejudice is suffered by the late-notified insurer. The Bill will allow claims that should be covered to fall between two stools.

IBANZ submits that section 9 of the Insurance Law Reform Act 1977 should not be changed. It demonstrably does not cause undue prejudice to New Zealand insurers, nor noticeably increase premiums or distort or prevent an efficient liability insurance market.

The unintended and undesirable result of altering section 9 is that insureds under claims-made policies will feel very constrained from changing insurers, even if the premiums are

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| | above market and the coverage terms are sub-par. Even now, there are risks to changing insurers of claims-made policies, which will be well known to insurers. The risks of there being unappreciated and un-notified circumstances if section 9 is lost and could well outweigh all other considerations. Intermediaries will not want to take the risk for themselves or their clients of gaps in cover. Insurers will know the risks for insureds and price the premium for renewals of their claims-made policies accordingly.<br><br>If changes must be made (and IBANZ sees no requirement for them):<br><br>**The sixty day period for claims under claims-made policies should be one year or longer**<br><br>IBANZ is aware that other jurisdictions may be more stringent, but, if changes must be made (and IBANZ sees no requirement for them), IBANZ submits that requiring notification 60 days after the end of policy term is far too short, because often the circumstances giving rise to the claim will not be sufficiently identifiable to support a claim within 60 days after the end of a policy. IBANZ submits that if the Parliament cannot be persuaded to require there be no time limit, that the time period be at least a year (which is a common “discovery period”) be allowed, to avoid considerable unjustified harm to New Zealand insureds.<br><br>There is no need to impose a time limit for notification of a valid claim. Insurers have accounted for incurred but not reported claims (IBNRs) and are well experienced reserving for them on an actuarially assessed basis. IBANZ supports requiring that reporting of claims-made or circumstances which may give rise to a claim must be allowed after expiry of the cover period, but submits that the claim reporting period should be substantially longer; at least a year if not the full Limitations Act time period. There is no need to distinguish between claims-made policies and all other policies; all insurance policies should allow for valid claims to be made for the full Limitation Act. |
| 13 | *Do you consider that insurers should be required to notify policyholders in writing no later than 14 days after the end of the policy term of the effect of failing to notify a claim or circumstances that might give rise to a claim before the end of the 60 day period?* |
| | The cautions/notification provision in 69(1)(c) will not address the concerns raised in response to Question 12. Even clear notifications can be overlooked or fail to cause the insured to identify and notify circumstances which may give rise to a claim. |
| 14 | *Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?* |
| | IBANZ submits that clause 69 should be removed. If that is not possible, a 60 days grace period is far too short. IBANZ recommends as long a “discovery” period as possible to (partially) protect the legitimate interests of insureds, 12 months would not be excessive. |
| 15 | *Do you have any feedback on the exclusions listed in clause 71(3), which are not subject to the rule for increased risk exclusions in clause 71(1)?* |
| | IBANZ recommends that the original drafting of section 11 of the ILRA 1977 be retained as it was and that it replaces the proposed clause 71 in the Bill.<br><br>Section 11 was capable of protecting an insured from any exclusion (or condition, or warranty, and potentially even aspects of the insuring clauses) which proved irrelevant to the loss claimed for.<br><br>IBANZ disagrees that the items in clause 71 (3)(a)-(c) should be automatically assumed to be relevant to the risk of loss. For example, an exclusion for offshore sailing might not increase the risk of a collision – quite the opposite, as inshore sailing involves many more vessels in a confined area. The court or arbitrator should retain the flexibility to decide. |

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| 16 | *Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?* |
| | No |
| 17 | *Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?* |
| | IBANZ submits that 28 days in clause 5 of schedule 3 is too short in some cases where the policy documents and other requested information is not readily available. R should also be able to recover its costs of extracting the relevant information and providing the information to A. This can involve days or in some cases weeks' work, if paper files have to be located, retrieved and reviewed. |
| 18 | *Do you have any comments on not carrying over section 10(1) of the ILRA 1977?* |
| | No |
| 19 | *Do you have any other feedback on the drafting in Part 3 of the Bill?* |
| | No |

| Part 4: payment of monies to insurance intermediaries | |
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| 20 | *Do you consider that changes should be made to requirements for how insurance brokers must hold premium money such as restrictions on brokers' ability to invest or more stringent requirements in line with the client money and property rules in the FMC Act?* |
| | **The premium payment requirements are unnecessary and undesirable – remove subpart 2 of Part 4.**<br><br>IBANZ submits that the 50 day premium on-payment requirements imposed on brokers requiring them to pay insurers are unnecessary and/or undesirable. Subpart 2 of Part 4 of the Bill should be removed. Subpart 2 regulates payments between two commercial parties, which are capable of dealing with the payment arrangements between themselves by contract without unnecessarily restrictive prescription, supported by the force of law and, even more particularly, without substantial statutory penalties if due payments are not made on time. It is most unusual to have statutory penalties for late payments between commercial parties.<br><br>The fact that insurers and intermediaries have negotiated longer periods than the prescribed 50 days (the Consultation Paper states longer periods of 80 to 90 days have been agreed) illustrates that the parties should be able to agree suitable timeframes. If anything is retained in the Bill, it should be a provision stating that, unless the parties agree otherwise, a minimum period of 50 days is required before on-payment is required, to protect smaller brokers from unrealistic shorter timeframes. Payment handling is a significant task. It takes time for invoicing, closings, collections, reconciliations, refund handling, commission attribution and bordereau reporting. Premium funding arrangements also add to the required tasks.<br><br>**Brokers should be able to invest broking money**<br><br>MBIE correctly identifies the distinction between the broker client accounts and client money accounts in other contexts – the amount held in broker client accounts is not held at the client risk; rather it is held at the insurer's risk; either as premium amounts paid for established cover or it is claim/reimbursement payments for payment to insureds at the insurer's risk. There is no need therefore for additional consumer protections in respect of those amounts.<br><br>Brokers derive income from these investments, which are used to pay for administration and collection of premiums. It would be inefficient if broker client account balances could not be invested. The ongoing premium balances brokers need to retain for administration purposes would then be held in inefficient low-yielding call accounts. Such a change would not benefit policyholders, as specified intermediaries' loss of returns would need to be compensated by increased fees or commissions.<br><br>The relevant insurer's risk is remote; solely if the broker defaults. Insurers should not deal with brokers whom they cannot trust to handle client funds responsibly. The broker is the party holding the paid premiums and accordingly, is the only party which is able to invest the funds in an economically efficient manner. Insurers can't – they don't hold the funds. Brokers take the direct investment risks, so they should receive the available returns on what need to be prudent investments.<br><br>Insurers have sufficient time to pay Fire Service levies and EQC premiums. |
| 21 | *Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?* |
| | **The penalties for failure to pass on premiums are inappropriate and disproportionate**<br><br>The failure to pay an insurer received premiums is a commercial matter between the broker and the insurer. Ordinarily breaches of a commercial obligation to pay a contractual counterparty would be dealt with by default interest – any form of penalty |

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| | would be prohibited by common law. The proposed penalties would in many cases be significantly more than ordinarily permitted default interest and should not be imposed. Insurers are of sufficient size to negotiate suitable arrangements for late payments with brokers which are equitable between them. Imposing prescribed arrangements is not likely to lead to the best commercial outcomes, and adds further risks to the dynamic, for which compensating income would need to be paid, which would ultimately end up in increased premiums or broker fees. |
| 22 | *Is it necessary to retain clause 102 (broker to notify insurer within 7 days if a premium has not been received by the broker), and if so, what should be the consequence for breach of clause 102?* |
| | **Clauses 102 to 105 should be removed**<br>The insurer should know from the brokers' regular bordereau reporting what premiums are unpaid, and so reporting of non-payment is unnecessary and reflects a time when bordereau reporting was paper based. Now, with electronic systems and regular electronic reports, clause 102 is unnecessary. Bordereau reports notify insurers regularly of all premium payments received by brokers, often on a monthly basis. From these reports, insurers can derive unpaid premiums through a single reconciliation. Bordereau reports list payments received, not unpaid premiums, so they would not meet the clause 102 unpaid amount notification requirements, but insurers have records of unpaid premiums and can reconcile these records with bordereau reports to determine the latest unpaid premium list. Accordingly, clause 102 is not necessary, and not a matter suitable for statutory intervention. The reporting obligations imposed by commercial agreements between the insurer and the broker can more suitably deal with delayed reporting and the suitable liabilities for breach, which contracts generally do.<br>If clause 102 is unnecessary, because insurers can address in their commercial agreements with brokers, any broker failures to report non-payments or make bordereau reports, it follows that the parties should be able to agree suitable remedies. It is a commercial matter, not one requiring statutory interest and other statutory penalties. Accordingly, clause 103 should be removed also. Likewise, removal of clause 104 and 105 should be consequential amendments arising from removal of clauses 102 and 103.<br>More importantly, section 103 should be removed, even if section 102 is retained, because it is illogical for the specified intermediary to pay interest on money that has not been received. |
| 23 | *Do you have any other feedback on Part 4 of the Bill?* |
| | No |
| **Part 5: contracts of life insurance** | |
| 24 | *If you consider that change needs to be made regarding interest payable from 91st day after date of death, please provide any further reasons and provide feedback on whether interest should only begin accruing after 90 days if the insurer has been notified of the death claim and (where relevant) letters of administration or probate have been obtained.* |
| | N/A |
| 25 | *Do you have any feedback on the proposal that any mortgaging of life insurance policies under new policies be dealt with under the Personal Property and Securities Act 2009?* |
| | No |

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| 26 | *Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?* |
| | No |
| 27 | *Are section 75A of the LIA (relating to a policy entered into by a person for the benefit of the person's spouse, partner or children) or section 2(1) of the Life Insurance Amendment Act 1920 (relating to the reversion or vesting of life policy assigned to a spouse or partner) still necessary?* |
| | N/A |
| 28 | *Do you have any other feedback on Part 5 of the Bill?* |
| | No |
| **Part 6: regulation-making powers and miscellaneous provisions** | |
| 29 | *Do you have any feedback on Part 6 of the Bill?* |
| | No |
| **Part 7: unfair contract terms and presentation of consumer policies** | |
| 30 | *Do you see any unintended consequences from removing sections 18-20, 34-39 and 42 from the MIA?* |
| | N/A |
| 31 | *In relation to unfair contract terms: which option do you prefer and why?* |
| | Option B.<br>Exclusions and limitations are central to a policy's degree of risk and the calculation of its premiums, and so cannot be removed on fairness grounds without rebalancing the risk/premium trade off inherent a policy. The risk of an exclusion/limitation being removed if Option A was chosen would need to be factored into premiums, particularly as exclusions/limitations are typically beneficial for pricing through excluding or limiting high cost remote risks. The risk of an exclusion/limitation being removed would therefore lead to higher premiums and increased policyholder costs, for only a very remote benefit to potentially few policyholders. The risk of an exclusion/limitation being removed may also discourage reinsurers to participate in the New Zealand market, which would reduce competition and potential cover. |
| 32 | *Do you have any feedback on the drafting of either of the options?* |
| | No |
| 33 | *Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?* |
| | No |
| 34 | *Do you have any comments on the regulation-making powers in clause 184?* |
| | No |

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| | *Do you think regulations specifying form and presentation requirements for consumer, life and health insurance contracts (eg a statement on the front page that refers to where policy exclusions can be found) would be helpful? If so, please explain.* |
| | N/A |
| | *Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.* |
| | N/A |
| | |
| | *Do you have any initial feedback on when the Bill's provisions should come into effect?* |
| | No |
| | *Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?* |
| | No |
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| | *Do you have any feedback on Schedule 5 of the Bill?* |
| | No |

**Other comments**

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| | |

Yours sincerely,

Privacy of natural persons

**Melanie Gorham**
**CEO IBANZ Inc**