Submission template

Exposure draft Insurance Contracts Bill

This is the submission template for responding to the Consultation Paper accompanying the Exposure draft Insurance Contracts Bill.

The Ministry of Business, Innovation and Employment (MBIE) seeks your comments by **5pm on 4 May 2022**.

Please make your submission as follows:

1. Fill out your name, organisation and contact details in the table: "Your name and organisation".
2. Fill out your responses to the discussion document questions in the table: "Responses to discussion document questions". Your submission may respond to any or all of the questions in the discussion document. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.
3. If you would like to make any other comments that are not covered by any of the questions, please provide these in the "Other comments" section.
4. When sending your submission, please:
    a. Delete this first page of instructions.
    b. Note that, except for material that may be defamatory, MBIE intends to upload PDF copies of submissions received to MBIE's website. MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission. If your submission contains any confidential information:
        i. Please state this in the cover page or in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.
        ii. Indicate this on the front of your submission (eg the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).
    c. Note that submissions are subject to the Official Information Act 1982 and may, therefore, be released in part or full. The Privacy Act 2020 also applies.
5. Send your submission as a Microsoft Word document to insurancereview@mbie.govt.nz.

Please direct any questions that you have in relation to the submissions process to insurancereview@mbie.govt.nz.

Submission on *Exposure draft Insurance Contracts Bill*

Your name and organisation

Name	Privacy of natural persons
Organisation (if applicable)	The Insurance & Financial Services Ombudsman Scheme
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]

Please check if your submission contains confidential information:

☐ 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]

Responses to consultation paper questions

Part 1: preliminary provisions	
1	*Do you have any feedback on Part 1 of the Bill?*
	We have no feedback.
Part 2: disclosure duties and duty of utmost good faith	
2	*Do you have any feedback on the Bill's provisions in relation to the duty for consumers to take reasonable care not to make a misrepresentation, including the matters that may be taken into account to determine whether a consumer policyholder has taken reasonable care not to make a misrepresentation?*
	We agree with the proposed approach, having supported a change to the law since 1998.
3	*Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?*
	We agree with a proportionate approach. In terms of the duty of reasonable care and, in particular, footnote 4 on page 14, will there be the same overlay as there is in common law, that the duty will only be breached if an insured is grossly careless, grossly negligent or reckless?
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?*
	It would be helpful if the Bill clarified the position in relation to subsequent policy cover increases, so that it is clear the remedy is only applicable to the policy change (e.g. a non-disclosure or misrepresentation where an insured has a life policy sum insured of $100,000 and increases to $250,000; we believe the remedy should only apply to the $150,000 increase). We note that insurers do not exclusively use s4 ILRA in relation to life policies, but use common law non-disclosure more often. Policy wordings are usually designed to allow an insurer to use either, at its own election. Therefore, we believe alternative remedies should be provided in the Bill.
5	*Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?*
	Clauses 35 and 35 appear to reflect ss5 and 6 ILRA 1977, with an overlay of common law. These provisions do not differentiate small businesses from non-consumers and we believe that this could be unduly harsh, given the mandate for approved dispute resolution schemes under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 ("FSP Act") to extend services to "*consumers and businesses that have no more than 19 full-time equivalent employees*", s63(i)(c) FSP Act. The IFSO Scheme has received over 70,000 complaints enquiries since it started in 1995, and notes that the level of insurance knowledge for small business owners is similar to that of consumers. We therefore recommend including small businesses within the consumer

	protections under the Bill, in the same way those small businesses are included under the FSP Act. We also note that some small businesses have mixed use of assets and have policies which cover both commercial and personal assets and activities e.g. farm policies cover both the primary residence and commercial outbuildings. Therefore, if the small business distinction remains, clarity will be needed around this mixed-use situation.
6	*Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?*
	We believe the proposed remedies are appropriate.
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?*
	We have already seen issues arising in online applications, where consumers are required to tick a box confirming that they have read the terms and conditions of the policy/contract. We suggest adding the word "*effective*" to the Bill, meaning that insurers have an obligation to ensure they "*clearly <u>and effectively</u> inform the policyholder*" of the duty of disclosure and about access to medical records. This would require an insurer to take further steps to ensure the consumer understands the terms and conditions.
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?*
	We trust MBIE or the FMA would take responsibility for enforcement if there were breaches.
9	*Do you have any feedback on how the Bill codifies the duty of utmost good faith?*
	While the commentary on page 18 refers to the duty of utmost good faith applying to both parties, this is not reflected in clauses 59 and 60 and should also refer to the insurer's duty. This has always been a very vague area in common law and the duty needs to be explicit under legislation.
10	*Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?*
	We have serious concerns about why the Bill proposes to move away from the deemed knowledge approach in s10 of the ILRA 1977. This approach provides more protection for consumers than what is currently proposed in the Bill. In our 27 years of experience, we have seen many complaints where allegations have been made that an intermediary told an insured that information was not material and they did not need to disclose the information to the insurer in the application. The deemed knowledge approach appropriately places the onus on the insurer to ensure that the intermediary is correctly advising insureds about how to complete an insurer's application form. The insurer is also in the best position to take any remedial action. **We believe this new approach needlessly removes an existing consumer protection and unfairly shifts the consequences of an intermediary's failure onto a consumer.**

	We also see an issue in situations where the intermediary does not receive a specific commission e.g. in arrangements with banks, the bank staff do not receive a commission. This would mean that these arrangements would fall outside of the current proposal in the Bill, meaning a large proportion of consumers would not be covered by this protection. **We have serious concerns about the drafting of this aspect of the Bill and recommend a review.**
11	*Do you have any other feedback on the drafting of Part 2 of the Bill?*
	We have no feedback.
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?*
	We have no feedback.
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?*
	We have no feedback.
14	*Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?*
	We have no feedback.
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)?*
	While not necessarily an issue, we wonder whether the drafter realised they have limited the field of the exceptions in clause 71(3), in comparison to the common law overlay to the previous s11. Our example is complaint 118023, which we have attached as an addendum to this submission.
16	*Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?*
	We have no feedback.
17	*Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?*
	We have no feedback.
18	*Do you have any comments on not carrying over section 10(1) of the ILRA 1977?*
	We believe, from our experience of using s10, that consumer protection has been weakened by not carrying over s10, as set out in our concerns in response to question 10. We have

	serious concerns about this aspect of the Bill and consider it to be an inappropriate shifting of risk onto consumers.
19	*Do you have any other feedback on the drafting in Part 3 of the Bill?*
	We have no additional feedback.
Part 4: payment of monies to insurance intermediaries	
20	*Do you consider that changes should be made to requirements for how insurance brokers must hold premium money such as restrictions on brokers' ability to invest or more stringent requirements in line with the client money and property rules in the FMC Act?*
	We agree that changes should be made, as suggested.
21	*Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?*
	We have no feedback.
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?*
	We have no feedback.
23	*Do you have any other feedback on Part 4 of the Bill?*
	We have no feedback.
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.*
	We do not believe a change needs to be made regarding interest payments. We do not believe interest should only accrue if the insurer has been notified of the death claim, because beneficiaries are sometimes not aware of a life policy existing until a later date.
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?*
	We have no feedback.
26	*Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?*
	We have no feedback.
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?
	We have no feedback.
28	*Do you have any other feedback on Part 5 of the Bill?*
	We have no feedback.
Part 6: regulation-making powers and miscellaneous provisions	
29	*Do you have any feedback on Part 6 of the Bill?*
	We agree with the provisions.
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?*
	No.
31	*In relation to unfair contract terms: which option do you prefer and why?*
	The IFSO Scheme prefers Option A. Given that insurance contracts are one of the most common consumer contracts, we do not believe that there are sufficiently sound reasons for it to be excluded from broader consumer protections. Option A is the approach used in UK and Australia, meaning it is a tested approach and many of the major insurers have parent companies or reinsurers based in the jurisdictions already operating under this approach. We would be pleased to see some exclusions in the industry become obsolete as a result of the new legislation.
32	*Do you have any feedback on the drafting of either of the options?*
	We have no feedback.
33	*Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?*
	We agree with the provisions.
34	*Do you have any comments on the regulation-making powers in clause 184?*
	We agree with the provisions.
35	*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.*
	We support a broad level of standardisation, noting the difficulties arising in a competitive insurance market for more specific standardisation.
36	*Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.*

	While the IFSO Scheme does not support a prescriptive approach to the form and presentation of insurance contracts, regulations requiring greater disclosure of information by insurers to assist their customers to make more informed decisions would be supported e.g. the Banking Ombudsman Scheme now publishes information about all banks within the scheme in terms of numbers of complaints, both internally and externally. The same could be done by insurers to assist their customers.
Timing and transitional arrangements	
37	*Do you have any initial feedback on when the Bill's provisions should come into effect?*
	We believe the provisions should come into effect as soon as possible, given that the initial Law Commission report supporting many of these changes was released 24 years ago, in May 1998.
38	*Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?*
	We have no feedback.
Schedule 5: amendments to other Acts	
39	*Do you have any feedback on Schedule 5 of the Bill?*
	We have no feedback.

Other comments

	The IFSO Scheme has supported changes to insurance law for the last 24 years. It is essential that New Zealand updates and consolidates insurance law in legislation, bringing it into line with the UK and Australia, to ensure transparency and encourage consumer confidence in the financial sector.

GROUP: Insurance - Fire & General
SERVICE: Commercial Property (Small Business)
OUTCOME: Not upheld
CLOSED:

Issues: Insurance Law Reform Act 1977, Scope of Cover

Background
(C = Customer and P = Participant insurer)

C's "*1/2 ROUND BARN / TEMPORARY ACCOM*[M]*ODATION*" was insured with P.

The barn was destroyed by fire and C made a claim to P.

P accepted the claim for the cost of the barn. However, it declined to pay the cost of the fit-out (which had been built when C converted the barn into temporary accommodation), because the relevant consents had not been obtained for the fit-out when it was built. Therefore, the fit-out was outside the scope of cover of the policy.

C challenged the declinature, on the ground section 11 of the Insurance Law Reform Act 1977 ("ILRA") applied, because the lack of the relevant consents had not caused or contributed to the fire. Moreover, C believed P had agreed to cover the fit-out, because the insured property on the proposal and certificate of insurance was noted as "*1/2 Round Barn/Temp*[orary] *Accom*[modation]" and "***1/2 ROUND BARN/TEMPORARY ACCOM*[M]*ODATION*"** respectively.

The case manager's assessment

- Section 11 of the ILRA

The case manager considered whether section 11 of the ILRA applied to the circumstances of the claim.

In *Barnaby v South British Insurance Ltd* (1980) 1 ANZ Insurance Cases 60-401, the court stated the following about the application of section 11 of ILRA:

> "*The key to this section is to be found in the last words of para. (b): the section is designed to deal with those kinds of exclusion clauses which provide for circumstances likely to increase the risk of a loss which the policy actually covers. The most common examples are found in the field of motor vehicle insurance, such as driving a motor vehicle whilst under the influence of alcohol, or driving a motor vehicle which is in an unsafe condition. The section is not designed to deal with exclusion clauses which specify the kind of loss or the quantum of loss to which the cover does not apply at all … A 'fault, defect, error or omission in design' is not a circumstance the existence of which excludes liability on the part of the insurer for a loss otherwise covered, nor is it a circumstance likely to increase the risk of occurrence of a loss otherwise covered – it is a kind of loss which the policy does not cover at all"* (case manager's emphasis).

Therefore, the court in *Barnaby* drew a clear distinction between: 1. those exclusions which exist because they increase the risk to the insurer, but for which the underlying circumstances of the loss are "*otherwise covered*" by the policy; and 2. those excluded circumstances for which the policy provides no cover at all.

Essentially, therefore, section 11 of the ILRA cannot be used to remedy those situations which fall outside the risk accepted by the insurer and reflected in the cover offered to the insured.

The policy provided cover if there was "[s]*udden and unforeseen accidental physical loss or damage* [to C's farm assets], *unless excluded by this policy*". In regard to settlement of the claim, it also provided that P was:

> "***not bound to*** *… pay the costs of rebuilding … any part of …* [C's] ***farm buildings*** *… which at the time they were built, were otherwise than in accordance with a building permit or other applicable consent issued by the relevant authority*".

The settlement provision provided that P was not bound to pay the costs of rebuilding farm buildings which did not have the relevant building consents. Therefore, P was not liable for such costs in any circumstances and its exposure to this risk could not be increased. Consequently, the case manager did not believe section 11 of the ILRA applied to the circumstances of the claim.

- Did P have actual knowledge about the lack of consents for the fit-out?

The proposal and certificate of insurance described the insured property as "*1/2 Round Barn/Temp*[orary] *Accom*[modation]" and "***1/2 ROUND BARN/TEMPORARY ACCOM*[M]*ODATION***". Therefore, C believed that P had agreed to provide cover for the fit-out and was liable to indemnify him for it, regardless of the settlement provision.

However, the courts have indicated that an insurer cannot waive its rights without actual knowledge of all relevant fact(s): *CIT v Oceanus Mutual Underwriting Assoc (Bermuda) Limited* (1984) I Lloyd's Rep 476, per Kerr LJ at p 498; *Hadenfayre Ltd v British National Insurance Society Ltd & Ors* (1984) 2 Lloyd's Rep 393, per Lloyd J at p 400.

The case manager did not believe P had actual knowledge of the fact that C had built the fit-out without obtaining the relevant consents. Accordingly, P was entitled to rely on the settlement provision to decline the part of the claim relating to the fit-out.