



24 June 2009

Richard Dean
Manager Insurance Division
Reserve Bank of New Zealand
PO Box 2498
Wellington 6011

By email: richard.dean@rbnz.govt.nz

Dear Mr Dean

Draft Insurance (Prudential Supervision) Bill

The Society's Commercial and Business Law Committee (the Committee) welcomes the opportunity to comment on the draft Insurance (Prudential Supervision) Bill.

Clause 6 - Interpretation

The definition of "captive insurer" refers to an insurer that is a subsidiary of an entity that is not an insurer. "Subsidiary" is defined as a "subsidiary within the meaning of sections 5 to 8 of the Companies Act 1993". Those sections in turn refer to the term "company" which means a company registered under Part 2 of the Companies Act. This does not cover an overseas company (which is registered under Part 18 of the Companies Act). The definition of "captive insurer" will require an amendment if it is intended to include a subsidiary of an overseas company.

Clause 8 – Meaning of carrying on insurance business in New Zealand

Clause 8(1)(c) refers to liability under a "contract of insurance". It is recommended that the term "contract of insurance" be defined in clause 6.

Clause 11 – Bank must have regard to directions about government policy objectives

This clause refers to the Bank having regard to a government policy that relates to the Bank's functions under the Act, and to every direction given by the Minister under this section. It is unclear whether this means that the Bank must follow a direction. To avoid allegations of undue political influence, it may be preferable to specify that a ministerial direction will be given only to further the purposes and principles of the Act (clauses 3 and 4).

Clause 15 – Application for licence as insurer

In clause 18(1)(h) the Bank must be satisfied that the applicant's incorporation and ownership structure, governance structure, and financial strength are appropriate. The Committee recommends that the Bank should be required to publish guidelines as to what it considers acceptable, to provide certainty.

Clause 22 – Bank may modify conditions of licence

The written notice given by the Bank pursuant to clause 22(3)(a) should be required to specify a date (being a reasonable time in the future) on which the Bank intends the conditions or variations to become effective.

Clause 31 – Fit and proper matters

These matters of detail would be better included in regulations, which can be changed more easily than amending the Act.

Clause 33 – Power to remove directors and relevant officers

Before the Bank acts under this section a consultation process with an opportunity for submissions on behalf of the relevant officer or director should be undertaken.

Clause 34 – How power to remove is exercised

Following the comments on clause 33 above, the notice period in which a removal by the Bank becomes effective must be at a future date that allows time for consultation and submissions.

Clause 45 – Bank’s decision on approval

Under clause 45(1)(b) the Bank may refuse to give its approval to a proposed amalgamation or transfer. The Bank is not required to give reasons. Giving an applicant reasons would provide the upper limits for the applicant to restructure the amalgamation or transfer proposal making it more acceptable to the Bank. This would provide an equivalent process to clause 46(3)(b).

Clause 46 – Bank may modify conditions of approval

This clause may make contractual certainty difficult. The Bank should not have the power to modify its conditions of approval, unless it is satisfied that this is necessary due to a change in circumstance or additional information not available at the time of the original decision becomes available.

Clause 58 – Bank may require licensed insurer to certify compliance with solvency margin

Verification by the insurer’s actuary could be costly. The requirement to certify compliance with the solvency margin could be an annual requirement as well as at such other times as the Bank considers necessary. The intention would be that the Bank could only request additional certification where it had reasonable grounds to believe the solvency margin was not being maintained.

Clause 62 – Licensed insurer must have current credit rating

Clause 62(2)(a) refers to the exception to the rating requirement, where the annual gross premium income is less than a prescribed amount. Where regulations are proposed that will have the effect of altering that minimum amount, it is unclear whether there will be a consultation process prior to the alteration. If so, this should be referred to in the legislation. The definition of “annual gross premium income” is not as wide as that used in clause 21(2)(c)(ii). The rating exception could potentially be based more widely, so the definition used in clause 21(2)(c)(ii) should be used in this clause.

Clause 65 – Disclosure of current rating to policy holderClause 66 – Disclosure by insurers not required to be rated

Some of the detail of these provisions would be better located in regulations, to enable them to be more easily amended from time to time. In addition, it would be useful to have an outside time period (for example, 7 working days) applicable to clause 65(2)(b), so that it is easy to see whether or not clause 65(4) has been complied with.

Clause 68 – Other advertising of ratings

The exception in subsection 3 may prove problematic. Unless an advertiser states clearly in the advertisement that the credit rating information is available on its website, the existence of the website, and the inclusion of the information on it may not be obvious. It is recommended that this exception be removed, or amended so that mention of the website must be made in the advertisement.

Clause 78 – Financial condition reportClause 81 – Requirement that life insurer have statutory funds

In clause 78(1) there is a requirement for a licensed insurer to ensure that, after the end of every accounting period, an investigation by the insurer's actuary is made. In addition, under clause 81 the licensed insurer must ensure that within 3 months after end of each of its accounting periods, copies of the accounts together with the auditor's report are delivered to the Bank. The auditor's report must state the extent to which it has relied on the actuary's report.

The overall effect is that within 3 months the actuaries must complete their investigation and report and, in reliance on this, the auditors must complete their audit. While the timing is ultimately a matter for industry submissions, the 3-month time period seems tight and 5 months, as permitted under the Financial Reporting Act, is considered preferable.

Clause 90 – Expenditure and application of statutory fund

There is a restriction in clause 90(3) against an insurer mortgaging or charging the assets of a statutory fund, except to secure a bank overdraft. While the Committee has no general concern about this, it is aware of structures where charges have been granted in favour of a trustee for policyholders. Clause 90(3) should be amended to provide that this applies, except with the previous written agreement of the Bank.

Clause 94 – Investment performance guarantee: limit of certain liabilitiesClause 95 – Investment of statutory funds

The 5% threshold in section 94(2) and the 2.5% threshold in clause 95(3) might be better placed in regulations, for ease of future amendment.

Clause 100 – Duties of Directors in relation to statutory funds

While clause 100(2) does not directly conflict with section 131 of the Companies Act 1993, for the benefit of directors, a provision similar to that in clause 115(9) might be included in relation to clause 100 (that the clause applies despite anything to the contrary in the Companies Act).

Clause 104 - Restructure of statutory fundsClause 105 – Termination of statutory funds

Clauses 104(4)(a) and 105(4)(a) refer to “unfairness” to the policy owners. The Committee considers the term to be too subjective and recommends that a more objective term such as “financial disadvantage” or “prejudice” be used.

Clause 112 – Basis of allocation of operating profit or loss

The percentages referred to in clauses 112(1)(a) and 112(2)(a) might be more conveniently placed in regulations, to easily enable changes. New Zealand might want to adhere to international standards, which change over time.

Clause 136 – Confidentiality of informationClause 137 – Limits on further disclosure of information

Clauses 136 and 137 refer to “or any other enactment”. This Act should not be used as a mechanism to enable the Bank to disclose information for carrying out duties under other statutes. Therefore, each reference to “any other enactment” should be deleted.

Matters for General ConsiderationControls over owner and changes in owner

The issue of whether it is appropriate for the Bank to have an ongoing assessment of the suitability of ownership of any licensed insurer has been raised. Ownership is one of the factors taken into account at the time of initial application, but this is not (in the current draft) monitored on an ongoing basis. The Committee recommends that there be ongoing monitoring of ownership, to meet the objectives of clauses 3 and 4.

Restriction on content of constitution of licensed insurers who are companies incorporated under the Companies Act 1993

The Reserve Bank is seeking views as to whether it is necessary or appropriate to include a provision that, where an insurer is a subsidiary company, its constitution must not include any provision under which the directors may act otherwise than in the best interests of the insurer.

The Committee believes this to be a sensible inclusion, but if adopted the position of “subsidiaries” of overseas entities should also be considered.

If you have any queries regarding this submission please contact Diana Brown, Committee Secretary, tel 04 463 2967 or email diana.brown@lawsociety.org.nz.

Yours sincerely



John Horner
Convener, Commercial and Business Law Committee