

Contracts of Insurance Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

31 May 2024

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Contracts of Insurance Bill (**Bill**).
- 1.2 The Law Society is generally supportive of the Bill.
- 1.3 However, it submits that the Bill does not sufficiently take into account concerns put forward by insurance industry groups in their submissions on the 2022 exposure draft of the Bill. These include concerns about workability and legal issues presented in the Bill as drafted, outlined in this submission.
- 1.4 This submission has been prepared with assistance from the Law Society's Commercial and Business Law Committee.¹
- 1.5 The Law Society previously submitted on the exposure draft of the Contracts of Insurance Bill.²
- 1.6 The Law Society does not wish to be heard in relation to this submission.

2 General Comment

- 2.1 The Bill aims to modernise insurance law in New Zealand, enhancing consumer and business protection against risk, and encouraging insurers to provide insurance in the country. It represents a renewal of the previous 'Insurance Contracts Bill', a Government Bill introduced in 2022. In substance, it remains largely the same as the prior Bill.
- 2.2 The Bill will update and consolidate insurance law, which is currently found in both case law and existing statutes (some of which are over a century old).
- 2.3 Many of the recommendations made in the Law Society's previous submission during the consultation phase in 2022 have not been implemented in the current version of the Bill. We further acknowledge that during the long gestation of the Bill (first considered in 1998) significant input from the legal profession has occurred. This submission is, therefore, relatively short and does not seek to re-iterate earlier points.

3 Application of Unfair Contracts Regime

- 3.1 The new Bill makes significant changes to the application of the Fair Trading Act 1986 (**FTA**).
- 3.2 Currently, the FTA:
 - (a) Applies to consumer and small trade contracts.
 - (b) Provides that a small trade contract must relate to a trading relationship with an annual value below \$250,000 (FTA, ss 26C and 26D).

¹ More information on the Law Society's law reform committees and sections can be found here: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/commercial-li/>

² The Law Society's previous submission can be found here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/MBIE-draft-Insurance-Contracts-Bill-12-5.pdf>

- (c) Contains a list of terms relating to insurance contracts that are excluded from the unfair contracts regime (**regime**) in section 46L(4). The terms listed are to be taken as reasonably necessary to protect the legitimate interests of the insurer.

3.3 Under the Bill, the following amendments are proposed:

- (a) Clause 177 proposes to repeal section 46L(4) and (5). However, clause 176 then imports a narrower list of terms that would be excluded from the regime in insurance contracts, on the basis that they are the “main subject matter of the contract”. Clause 46KA(2)(a) – (e) lists the terms that define the risks taken on by the insurer in the contract, including exclusion clauses and the sum insured or assured, which means that those terms will continue to be outside of the regime.
- (b) The effect of that amendment is (1) to exempt those clauses from the regime entirely; but (2) to apply the regime to terms requiring the payment of premium, terms specifying requirements for disclosure or relating to the effect of non-disclosure, and terms relating to the duty of utmost good faith. The Bill also contains detailed provisions relating to the requirements for disclosure, discussed below.
- (c) However, where the contract is in trade, the annual maximum value before the FTA is disapplied is much lower: it has been reduced to \$20,000. It is not clear to the Law Society why that value threshold is so low.

3.4 The Law Society is supportive of these changes, but suggests a higher threshold where the contract is in trade. The Bill provides an increased level of protection for policyholders and opens insurance policies up to a fairness review by the courts. This may increase the uncertainty for insurers but is representative of the societal shift in attitude. Consumer-facing industries have had to adapt and comply with unfair terms legislation as a normal part of doing business over recent years.

4 No Misrepresentation

- 4.1 The Bill would make major changes to the insured’s duty of disclosure by (among other things) replacing the onus on consumers to disclose all material facts with a duty not to make a misrepresentation.
- 4.2 A new clause has been added to the Bill which states that a policyholder must not be taken to have made a misrepresentation where the insurer was not misled by the consumer, or the misrepresentation did not affect the underwriting decision of the insurer.
- 4.3 The Law Society considers that this may create challenges for insurers, who will have to calculate premiums on an assumption that policyholders who misdescribe their risks may nevertheless be entitled to a partial indemnity. This may result in an increase in premiums for careful and honest policyholders who present their risks accurately, as

well as those who do not. At the same time, it may reduce some unfairness for insureds who act honestly but make mistakes.³

A handwritten signature in black ink that reads "David Campbell". The signature is written in a cursive, slightly slanted style.

David Campbell
Vice-President

³ Noting that some remedies will continue to exist for the insurer where the disclosure would have materially affected the terms.