

30 May 2024

Finance and Expenditure Committee
Parliament Buildings
Wellington
By email

SUBMISSION on Contracts of Insurance Bill

1. Introduction

Thank you for the opportunity to make a submission on the Contracts of Insurance Bill (the Bill). This submission is from Consumer NZ, an independent, non-profit organisation dedicated to championing and empowering consumers in Aotearoa. Consumer has a reputation for being fair, impartial and providing comprehensive consumer information and advice.

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2. General comments

Consumer NZ welcomes the Contracts of Insurance Bill.

We have been calling for reform and modernisation of insurance law for many years. Currently New Zealand consumers have significantly less protection than those overseas so change in this sector is long overdue.

We wish to speak to our submission.

3. Comments on the Bill

Given the short timeframe for submissions and the high number of consultations open for submissions at the moment we have not been able to undertake a clause-by-clause analysis of the Bill. However, we wish to make the following comments on the Bill.

Clause 2 – Commencement

We urge the Committee to consider staggering the introduction of the Bill so that consumers are better protected sooner, rather than later. This Bill has taken many years to progress so we think some of the consumer protection provisions of the Bill should come into effect earlier than other provisions. For example, we think the duty on insurers to settle claims in a reasonable time and the changes to the duty of disclosure should come into effect within 12 months of Royal assent.

Clause 3 – Purpose

We are disappointed consumer protection is not mentioned in the purpose clause of the Bill. In our view, protecting the interests of consumers is a fundamental purpose of the Bill and should be specifically stated in the Bill, as it was in clause 3(c) of Duncan Webb’s Member’s Bill.

Clause 14 – Policyholder must take reasonable care

We strongly support the new duty on policyholders to take reasonable care not to make a misrepresentation to the insurer before the contract is entered into or varied. We agree with Duncan Webb that “the old rule that you’ve got to tell the insurer everything they want to know, even if you don’t know they want to know it, was madness.”¹

Subpart 3 and Schedule 2 – Remedies for breach of disclosure duty for consumer insurance contracts

We support the proportionate consequences in the Bill for breach of the disclosure duty for consumer insurance contracts. We agree insurers should have a range of proportionate remedies available to them, from avoidance for deliberate and reckless misrepresentation to reducing the

¹ Retrieved on 23 May 2024 from https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20240502_20240502_32#:~:text=This%20bill%20reforms%20this%20duty,sure%20risks%20are%20presented%20fairly.

amount paid on a claim for cases where the insurer would have entered the contract on different terms. However, we do not think it is appropriate to allow an insurer to avoid a claim where the non-disclosure was neither fraudulent nor reckless. In our view, insurers should not be able to avoid contracts for non-fraudulent/non-reckless non-disclosure, even if the insurer would not have entered the contract. If this distinction is not made in the Bill, people who are reckless and fraudulent will be treated the same as those who innocently fail to disclose something. We think that is unfair and needs addressing.

We are also concerned there is a risk some insurers could simply declare they would not have agreed to enter, or vary, the insurance contract, or would have only agreed to it on substantially different terms. Therefore, it is critical consumers can challenge these decisions in a court, or dispute resolution scheme.

We support the provisions in the Bill prohibiting life insurers from avoiding a contract of insurance for a misrepresentation, unless an exception applies.

Clause 30 – Burden of proof

We agree the burden of proof should be on the insurer to prove the misrepresentation was deliberate or reckless.

Clause 56 – Insurer must inform policyholder of duty

We support clause 56 which requires the insurer to take reasonable steps (before a policy is entered into or varied) to inform the policyholder of their duty to take reasonable care not to make a misrepresentation and the consequences of failing to comply with that duty.

If this obligation isn't placed on insurers, its possible many consumers would not know about the duty they are under and the consequences for failing to comply with that duty.

Clause 63 – Effect of Part on utmost good faith rule of law

We consider a better explanation of the duty of utmost good faith is required and urge the Committee to re-consider an approach similar to that taken in the Exposure Draft Bill and Duncan Webb's Bill, but with more detail as to what the duty of utmost good faith requires.

We support codification of the duty of utmost good faith as many policyholders are unaware of the existence of this duty and codification has the potential to improve this.

Clause 70 – Implied term about payment of claims

We support the Bill including a clause that requires insurance claims are settled within a reasonable time. However, we consider the wording of this clause should be amended for two reasons.

First, we think insurers should have to accept and pay, or deny claims, within a reasonable time. Insurers should not just be required to pay claims within a reasonable time. Therefore, we urge the Committee to reconsider the wording of this clause. In our view, a clause similar to clause 60 of Duncan Webb’s Bill is required. This states that a contract of insurance is based on the utmost good faith and states that this requires an insurer to accept (or reject), assess and settle a claim within a reasonable period of time.

Second, further guidance should be provided on what constitutes a reasonable time. In our view, there should be fixed timeframes that insurers are required to meet, unless exceptional circumstances apply. In Australia, the General Insurance Code of Practice requires insurers to decide to accept or reject a claim or advise they need more information within 10 business days of receiving a claim. Once accepted, the Code requires insurers to decide a claim within 4 months of receiving it unless exceptional circumstances apply. If there are exceptional circumstances, the insurer must decide to accept or deny a claim within 12 months of receiving it.

We would like to see similar timeframes in New Zealand for dealing with claims. Without these specifics, insurance companies will be able to continue with their ‘delay, deny and defend’ tactics and consumers will suffer, as a result.

We note the insurance industry administers aspects of natural hazard cover for Toka Tū Ake (EQC). We also note growing reports of significant delays in resolving insurance claims with an EQC component due to delays caused by EQC processes and policies. The administration of a claim with an EQC component is meant to appear, from a consumer perspective, like their insurer is handling the claim. However, delays may be caused by EQC rather than the insurance company so the requirement for timely resolution of claims should extend to EQC as well.

Also, as mentioned above, we think insurers should have to comply with this provision soon, rather than giving them 3+ years to comply.

Clause 176 – Amendments to Fair Trading Act

We have serious concerns about clause 176 of the Bill. In our view, this clause does not provide much of an improvement on the status quo and will mean consumers are not protected from genuinely unfair terms in insurance contracts in the same way they are for other contracts.

We urge the Committee to reconsider adopting a narrow definition of the ‘main subject matter of the contract’ because it:

- gives better protections to policyholders.
- recognises consumers do not always understand, or have the ability to negotiate, the terms of insurance contracts.
- would be consistent with the approach taken in Australia and the UK.
- would be an improvement from the status quo.
- means exclusion clauses, such as blanket mental health exclusions, can be scrutinised for unfairness.

Unfair Terms Regime

The other major issue with the Bill is that it doesn’t address the fact consumers are not able to do anything about unfair terms, other than make a complaint to the Commerce Commission. This is an issue we raised with the Minister of Commerce and Consumer Affairs in our Briefing to Incoming Minister.

The unfair terms provisions of the Fair Trading Act came into effect in 2015. However, only a few unfair terms cases have come before the courts. In practice, this means businesses are getting away with including and enforcing unfair terms against consumers every day and there is nothing consumers can do about it. This is a significant barrier to justice for consumers.

Consumers need to be able to take action about unfair terms themselves and should be able to raise these issues at the Disputes Tribunal and other dispute resolution services, like they can in Australia and the UK.

The Fair Trading Act should also be amended to ensure companies are penalised for including unfair terms in their contracts, rather than just having their terms declared unfair and void.

In Australia, changes to the Australian Consumer Law in 2023 will allow courts to impose substantial penalties on businesses and individuals who include unfair terms in their standard form contracts. ACCC Deputy Chair Mick Keogh has said “The changes to the unfair contract terms laws should motivate businesses to take steps to ensure their standard form contracts are fair, including by removing or amending concerning terms.”

If comparable amendments to the Fair Trading Act are not introduced in New Zealand, there will continue to be very little incentives for businesses to clean up their contracts and consumers will suffer, as a result.

Clause 183 – Clear, concise and effective contracts

We strongly support the inclusion of new subpart 6B to assist policyholders to understand insurance contracts.

Our research has consistently shown that policyholders find insurance contracts difficult to understand. In our latest insurance survey², we found only 19% strongly agreed that they clearly understand the terms and conditions of their insurance policies.

Therefore, we support clause 183 requiring insurers to ensure contracts are worded and presented in a clear, concise and effective manner.

However, we urge the Committee to consider requiring a summary of key terms, like that required in other countries.

In the UK, for example, insurers are required to provide product information in Key Facts documents for existing and potential customers. Key Facts documents contain a summary of the policy in easy to understand terms and make it easier for consumers to compare policies.

Australia has similar requirements for a “key facts sheet”.

We’d like to see provisions in the Bill requiring insurers to provide a similar summary of key facts and most consumers agree. In our latest insurance survey, 89% of respondents said they would find it useful if insurers provided a simple, one-page summary outlining the core features of the policy.

² Our data is from a nationally representative survey of 4087 people and was carried out online from 10 October to 31 October 2023.

Changes to disputes schemes

We have previously expressed concerns about the existence of four separate dispute schemes. In our view, the existence of four schemes, with different rules and low levels of awareness, are not helpful to consumers in resolving disputes.

Australia and the UK now both have only one dispute scheme. We consider a single scheme could provide a more efficient and transparent process. We have raised this issue with the Minister of Commerce and Consumer Affairs and are pleased to see he is taking steps to address these concerns.

We note that while we consider a single dispute scheme is preferable, it is likely the scheme would need to have different divisions – dealing with, for example, insurance, banking and other financial services due to the specific expertise required in each of these areas.

Genetic discrimination

Finally, given this Bill is intended to overhaul insurance law and consolidate the previous piece-meal approach to legislation, we encourage the Committee to consider including new provisions in the Bill banning discrimination on the basis of genetic testing.

Overseas, many countries have banned or restricted the use of genetic test results in insurance.³ However, in New Zealand, insurers can lawfully discriminate against applicants on the basis of genetic test results. This needs to be addressed in the Bill as people are declining testing, that could potentially save lives, on the basis of insurance coverage. Alternatively, for those who have had tests, they may have to pay more for, or have exclusions applied to, their policies.

In 2017, Canada introduced a complete ban on the use of genetic test to discriminate in any area, including insurance and employment.

In 2019, the Australian life insurance industry introduced a five-year self-regulation partial moratorium on the use of genetic tests.

We consider similar rules should apply in NZ. *ENDS*

³ Retrieved on 23 May 2024 from <https://www.rnz.co.nz/news/business/488841/insurance-companies-accused-of-using-genetic-tests-to-deny-coverage-hike-premiums>