

11 April 2024

Hon Judith Collins KC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Contracts of Insurance Bill

Purpose

1. We have considered whether the Contracts of Insurance Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 12860/7.2). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), and s 25(c) (right to be presumed innocent until proved guilty). Our analysis is set out below.
4. We recently considered whether the Insurance Contracts Bill, a member's Bill in the name of Hon Dr Duncan Webb MP, was consistent with the Bill of Rights Act. The Insurance Contracts Bill is functionally very similar to this Bill, and for the purposes of consistency with the Bill of Rights Act our advice does not differ substantively from that advice.

The Bill

5. The purpose of the Bill is to ensure that insurance contract law is effective for facilitating well-functioning insurance markets for both insurers and policyholders. It seeks to enable consumers and businesses to effectively protect themselves against risk, while minimising costs and impacts on insurers' willingness to provide insurance in New Zealand.
6. The Bill consolidates statutes and key aspects of the common law relating to insurance which are currently fragmented across 6 different Acts. It:
 - a. reforms the law relating to the disclosure of information by policyholders to insurers before an insurance contract is entered into or varied,
 - b. modifies the law relating to the duty of utmost good faith that all insurance contracts are based on,
 - c. ensures the insurer's remedies for misrepresentations and breaches provide proportionate consequences based on how the insurer would have responded to the information at the time of entry into the contract,

- d. removes insurance-specific exceptions from the unfair contract terms provisions in the Fair Trading Act 1986,
- e. amends the Financial Markets Conduct Act 2013 to require insurance contracts to be worded and presented in a clear, concise, and effective manner, and
- f. brings together different requirements from across the Life Insurance Act 1908, Part 3 of the Law Reform Act 1936, the Insurance Law Reform Act 1977, the Insurance Law Reform Act 1985, and the Insurance Intermediaries Act 1994. These include the following:
 - i. imposing a new time limit for making claims under claims-made liability policies,
 - ii. providing that certain policy exclusions are not subject to a rule that insurers cannot rely on an exclusion to deny a claim if the exclusion did not cause or contribute to a loss,
 - iii. allowing a third party who has been wronged by a policyholder to claim directly against the policyholder's insurer.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

- 7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form.
- 8. The Bill provides certain disclosure duties on policy holders and insurers when entering or verifying consumer insurance contracts, including providing for remedies for breaches of such duties.¹
- 9. We consider these provisions *prima facie* limit s 14 of the Bill of Rights Act. Where a provision is found to limit s 14 of the Bill of Rights Act, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified under s 5 of the Bill of Rights Act.
- 10. The s 5 inquiry asks whether the objective of the provisions is sufficiently important to justify some limitation on the right or freedom, and if so, whether the limitation is rationally connected and proportionate to that objective and limits the right or freedom no more than reasonably necessary to achieve that objective.
- 11. The purpose of the Bill is to ensure that insurance contract law is effective for facilitating well-functioning insurance markets for both insurers and policyholders. We consider that this purpose is sufficiently important to justify some limitation on the freedom of expression, and the disclosure duties imposed on policy holders and insurers are directly relevant to promoting well-functioning insurance markets.

¹ Including in part 2, subpart 4, which addresses disclosure duties for non-consumer insurance contracts, part 2, subpart 6, which relates to insurers' duties, part 4, subpart 2 which relates to the duties of brokers in relation to premiums, and schedule 3 clause 5 which relates to a third party claimant requesting information.

12. In addition, we consider that the requirements are highly specific to the fair and transparent transacting of insurance contracts and therefore limit the freedom of expression no more than is reasonably necessary and in proportion to the importance of the objective.

Section 25(c) – Right to be presumed innocent until proved guilty

13. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proved guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt and that the state must bear the burden of proof.
14. The Bill provides that it is an offence for a company to:
 - a. issue a form of proposal for insurance that contains an application for shares in the company; or
 - b. allot shares to a person who makes a proposal for insurance without first receiving an application for shares that is contained in a document separate from the proposal for insurance.
15. If a company contravenes these prohibitions, they commit an offence and are liable on conviction to a fine not exceeding \$50,000.²
16. The qualifying threshold of this offence lacks *mens rea* – the intention or knowledge of wrongdoing. By requiring defendants to demonstrate a reasonable excuse or vindicate their own innocence, the Bill creates a strict liability offence that *prima facie* limits s 25(c) of the Bill of Rights Act.
17. Strict liability offences have been found to be more likely to be justified under s 5 of the Bill of Rights Act where:
 - a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - c. the penalty for the offence is proportionate to the Bill's objective.
18. On balance, we consider that the strict liability offence in the Bill is justified. This offence occurs in the insurance industry which is highly regulated. Defendants are well placed to justify their non-compliance with these provisions. The maximum penalty proposed by the Bill is typical for strict liability offences within highly regulated industries and are therefore proportionate to the Bill's purpose.

² Under clause 99 of the Bill.

Conclusion

19. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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