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Te Kāhui Inihua o Aotearoa

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By email: insurancereview@mbie.govt.nz

Financial Markets Policy Team
Ministry of Business, Innovation and Employment

Dear Sir/Madam,

Submission on exposure draft of Insurance Contracts Bill

Thank you for the opportunity to submit on the exposure draft of the Insurance Contracts Bill (**Bill**) and the associated consultation paper. As earlier indicated, we are supportive of the consolidation and modernisation of insurance contract law in Aotearoa New Zealand.

By way of background, the Insurance Council of New Zealand - Te Kāhui Inihua o Aotearoa (**ICNZ**'s) members are general insurers and reinsurers that insure about 95 percent of the Aotearoa New Zealand general insurance market, including about a trillion dollars' worth of Aotearoa New Zealand assets and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents, travel and motor vehicle insurance) to those purchased by small businesses and larger organisations (such as Product and Public Liability, Business Interruption, Professional Indemnity, Commercial Property and Directors' and Officers' insurance).

Please contact Nick Whalley (nickw@icnz.org.nz) if you have any questions about our submission or require further information.

1. **Overarching comments**

The reform of Aotearoa New Zealand's Insurance Contract Law has been long awaited and the issuing of this Bill is a significant milestone which should be congratulated. Overall, we can see that a very thoughtful and considered approach has been taken in putting the Bill together.

It is also pleasing to see that a balanced approach has been taken and in a number of significant areas policy officials have clearly considered our earlier feedback. As you can also see from our feedback below, in a number of other respects, we are totally or at least partially supportive of the approach adopted under the Bill.

Where we are not supportive of aspects of these reforms, this is because we either do not consider the proposals achieve the policy intention, greater alignment with other approaches makes sense or insufficient regard has been had to practical realities (including the role that intermediaries such as insurance brokers may play). Where this occurs, we have explained in detail why this is the case and proposed solutions to address the issue.

We have also identified a number of technical / drafting issues and other matters and propose solutions to address these. In other areas, we have highlighted where we consider enhancements can be made to this regime, in keeping with practical realities and the policy intention envisaged.

In a small number of cases, we have dismissed certain proposals outright (i.e., codification of the duty of utmost good faith, presentation, form and publication requirements in regulations). This is because, with respect, the requirements seem unnecessary, disproportionate and/or are likely to create new issues or to have unintended consequences.

For proposals where several options are presented, our chosen options reflect our view of the most appropriate compromise given the competing considerations involved (i.e., the need to ensure good customer

outcomes, and promote fairness, certainty and sustainability in the insurance industry). This includes our position on proposals regarding the Unfair Contract Term regime (where we support a broad interpretation of the 'main subject matter' being adopted).

Reflecting upon the vast scale of reforms, a sufficiently long lead time needs to be provided for implementation once changes are finalised in law (i.e., 2 years minimum). Ideally the timing of changes under the Bill, any supporting regulations, as well as other significant regulatory changes the insurance industry is confronted with over the next few years, should be coordinated, so that connections can be worked through and all matters implemented in an efficient and coordinated fashion.

In a few areas, we call out the need for guidance to be developed in close consultation with industry to support the regime, which also needs to be reflected in implementation timelines.

ICNZ has consulted thoroughly and extensively with both members and peers, to understand the implications of the changes for insurers' customers and their businesses, and to ensure we provide comprehensive and considered feedback. As always, we would welcome the opportunity to discuss any of these matters in more detail with you.

2. Summary of our response on key issues

In this section we provide a summary of our response to key aspects of the Bill. Please see section 3 below for full detailed responses to each of the questions raised in the consultation paper and some other comments.

Part	Comment
Part 1: preliminary provisions	We support the stated purpose of the Bill subject to a reference to certainty of contract being inserted. The definition of 'contract of insurance' needs to be adjusted to remove the reference to reinsurance and to clarify ambiguities.
Part 2: disclosure duties and duty of utmost good faith	*1. Disclosure requirements* We are supportive of the disclosure obligation for consumers being recast as a duty to take reasonable care not to make a misrepresentation. However, the way this has been presented in the Bill is confusing, inconsistent and requires adjustments in places. This includes: • Reframing the considerations that determine whether this duty has been met into one consistently framed and overarching provision (aligned with the equivalent United Kingdom (**UK**) legislation). • Adjusting the requirement to consider a policyholder's particular characteristics and circumstances (so that it is more realistic and workable). • Clarifying and expanding upon the treatment of omissions (including making it clear that there are circumstances when an omission will amount to misrepresentation). The definition of 'consumer insurance contract' should be amended to include an objective element as the current subjective test proposed would be unworkable in practice. This is because insurers need to know whether a product is a consumer or non-consumer product before it is distributed and they cannot practically run multiple processes for the same product. Guidance also needs to be developed to set out disclosure expectations at renewal, and the particular characteristics and circumstances that ought to be taken into account, in practical terms. From a non-consumer disclosure perspective, guidance is also required to assist with determining the appropriate treatment when a customer is taking a mixed consumer/non-consumer insurance policy or one that does not neatly fall in either consumer or non-consumer category.

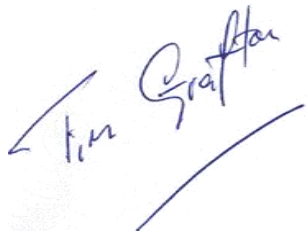
	2. Disclosure remedies We endorse the move to a proportional response to consumer and non-consumer disclosure issues. However, our strong preference is for the particulars of the proportional response to closely model the equivalent UK regime (rather than the straight premium deduction from claims as proposed under the Bill). Doing so better incentivises the right behaviour (e.g., fulsome answers to questions) and avoids the 'gaming' and distortion that may arise under the proposed option. *3. Notification requirements* In the Bill, regard needs to be had to the role of intermediaries in fulfilling notification requirements, and notification requirements regarding third party information, which are currently ambiguous, need to be refined. Consideration also needs to be given to what constitutes the appropriate notification when a large number of policyholders are involved (and an intermediary is not) and to insurers being able to notify in the policy document itself in circumstances when the policy provides an ability for the policyholder to cancel it at short notice. The consequences of breaching these duties also need to be reworked so that again regard is had to the role of the intermediary and to ensure that impacts of these breaches are proportional, not unduly punitive and better align with the subject matter underlying them. *4. Codification of duty of utmost good faith* We continue to be of the view that codification of the duty of utmost good faith is unnecessary. As proposed under the Bill, we are also concerned that this would create additional issues and have unintended consequences. *5. Requirements for intermediaries to pass on information* We support the introduction of a requirement for an intermediary to pass on information. However, an adjustment needs to be made when there is a misrepresentation. The circumstances when 'deemed knowledge' arises should also be adjusted so that, aligned with the common approach abroad, this only applies when an agent of the insurer is involved.
Part 3: terms of insurance contracts	*1. Exclusion for claims-made policies from the statutory treatment of late notifications* We support the carve-out for claims-made policies from the treatment of late notification under cl 68(3) of the Bill and consider the 60-day period proposed is workable. However, the requirement to notify policyholders in writing no later than 14 days after end of the policy term would not be. The most appropriate time to notify the policyholder about this matter would be prior to the contract first being put in place. Again, regard needs to be had to the role of the intermediary in this context and the position when a large number of policyholders are involved. *2. Carve-out from statutory treatment of increased risk exclusions* We support the inclusion of the excluded increased risk terms listed in cl 71 of the Bill. However, we strongly believe a regulation making power should also be provided in order to make adjustments. Additionally, consideration should be given to adding exclusions for age for Personal Accident and Travel insurance purposes, the period that a property owner leaves a property vacant and to capture situations where houses are used for commercial purposes. Such scenarios statistically increase risk while not necessarily being causative of loss in a particular situation.

	3. Third party claims for liability insurance money While overall we support the new approach proposed, we are concerned that the ability of a third party to, as of right, obtain the extensive details about the insurance cover. This puts these parties in an unfair advantage and may be distortionary in our view. We suggest instead that a more limited set of information be provided for as of right, with the ability of the third party to apply to the court for more details if necessary. We also suggest a number of technical changes to this part of the Bill.
Part 4: payment of monies to insurance intermediaries	We are supportive of increases to penalties and the proposal to charge interest when an intermediary fails to notify about an outstanding payment. However, additional changes should be made with more of a preventative focus and with a view to greater alignment with equivalent requirements other intermediaries have when handling client money or property. This includes: • Materially reducing the period of time that insurance brokers may hold onto premiums before passing them onto insurers. Consideration should be given to this period being mandatory so that parties cannot, by contract, impose a longer timeframe. • Introducing greater protection and control measures for funds held by insurance brokers on behalf of others.
Part 7: unfair contract terms and presentation of consumer policies	*1. Unfair contract terms* We support Option B as set out in cl 172 of the Bill, namely a broader definition of the 'main subject matter' exception to the Unfair Contract Term (**UCT**) regime. We consider that this strikes the most appropriate balance between competing interests and a sensible middle ground. We are concerned that Option A would not sufficiently protect essential terms that define the transfer of risk underlining insurance contracts. This would also increase risk and uncertainty for insurers, which could ultimately be to policyholders' detriment in terms of reduced affordability or availability of cover. The grounds for greater intervention in this context are also anecdotal at best and ignore the roles cl 68 and 71 of the Bill will already play in regulating what terms insurers can rely upon. If Option B is progressed, guidance would need to be developed on the main subject matter of an insurance contract and, in particular, the types of exclusion or limitation terms that would be captured. *2. Proposed form, presentation and publication requirements* We strongly support policy wordings being presented in a clear, concise and effective manner and the introduction of requirements for this in relation to consumer policies. We also endorse steps being taken to enhance consumer understanding of insurance in broader terms. However, consideration needs to be given to the appropriate accountability when broker policy wordings are involved, and we continue to question whether such presentation requirements should be able to be imposed through regulations. We do not support presentation requirements for matters such as font size and format. It is also unclear what problem the introduction of such publication requirements would solve. Regard also needs to be given to the costs, proportionality and uncertain benefits involved in introducing such requirements.
Timing and transitional arrangements	We support the approach to commencement proposed under the Bill and described in the consultation paper. One cannot overstate the immense scale of the work required to implement these changes, and a sufficiently long lead time needs to be allowed for this (i.e., 2 years at a minimum). It will also be important for all the required legislative and regulatory changes to be finalised and accordingly available in an integrated package, so that they can be efficiently implemented together.

Other comments	*1. Concerns about the extension of the UCT regime to 'small trade' standard form insurance contracts* The Bill leaves the extension of the UCT regime to standard form 'small trade' insurance contracts from 1 April 2025 (or earlier as stipulated by Order(s) in Council) unchanged. This is problematic in our view as the relevant annual value threshold of $250,000, as it relates to premium for insurance, would capture large business operations. Such application would not be consistent with the intention of the original reforms and the extension to 'small trade' contracts. It may also mean that insurers have to review more policy wordings than would otherwise be the case. A $10,000 annual value threshold would be much more appropriate in this context. We are also concerned that the current commencement date for the extension of the UCT regime to 'small trade' standard form insurance contracts may be problematic and this may need to be amended. *2. Need for guidance in additional areas* It would be helpful if guidance could also be developed on: • The different definitions of intermediaries and treatments of policyholders under various parts of the Bill and related legislation, with all differences, connections and overlaps clearly explained. • The FMA's expanded remit under the Bill, including any connections/overlaps this may have with other regulators' functions. The FMA should also closely work with the Commerce Commission to ensure their respective roles under the UCT regime are clearly understood and communicated to industry, with a view to avoiding unhelpful inconsistencies, uncertainty and duplication.

Thank you again for the opportunity to submit on this matter. If you have any questions, please contact our Regulatory Affairs Manager by emailing nickw@icnz.org.nz.

Yours sincerely,



Tim Grafton
Chief Executive

Nick Whalley
Regulatory Affairs Manager

3. Responses to questions in consultation paper and other comments

Part 1: preliminary provisions	
1	*Do you have any feedback on Part 1 of the Bill?*

1. Commencement and implementation

See comments in response to question 37 below.

2. Purpose

We support the stated purpose of the Bill, subject to a minor amendment being made to refer to promoting certainty in relation to insurance contracts, which is fundamental to supporting the ongoing sustainability of the insurance market. We recommend that cl 3(b) be amended with an addition as follows:

> (*b) ensure that the provisions included in contracts of insurance, and the practices of insurers in relation to those contracts, operate fairly, <u>while ensuring that certainty of contract is upheld</u>.*

It also needs to be acknowledged that this Bill is not the only regulatory regime that focusses on 'fairness' as this relates to the provision of insurance and it should not be considered exhaustive in this regard. For example, fairness is also a central feature of the incoming CoFI regime, the existing common law duty of utmost good faith and the ICNZ's Fair Insurance Code (**FIC**).

3. Definition of 'contract of insurance' (cl 6)

In our view it is not appropriate for the definition of 'contract of insurance' in the Bill to include reinsurance. No policy rationale for this being included has been identified during this review and the provisions in the Bill do not anticipate an application to reinsurance contracts. We also do not see the inclusion of reinsurance as furthering the purpose of the Bill or of being of broader relevance to what these reforms are seeking to accomplish.

Reinsurance, for example, plays a critical role in enabling domestic general insurers to underwrite risks such as earthquake risk. Reinsurance contracts are fundamentally different from insurance contracts in nature and substance in that they are only entered into by commercial insurance sector participants. Uncertainty about whether they might be subject to aspects of this Bill could create extra complications for Aotearoa New Zealand based insurers seeking reinsurance while not providing any apparent benefits.

We understand the intention is for the conflict of law provision (cl 7) to address this issue by excluding the application to reinsurance contracts governed by the law of another jurisdiction. However, this does not address the situation when a reinsurance contract governed by the law of Aotearoa New Zealand is involved, which is not uncommon. This issue is more efficiently and definitively resolved by reinsurance simply being excluded from the definition of 'contract of insurance'. Reinsurance contracts are also exempted from the equivalent Australian law.[1]

Consistent with comments above, for clarity, the definition of 'insurer' should exclude 'reinsurance'.

The Bill draws upon the definition of 'contract of insurance' under the Insurance (Prudential Supervision) Act 2010. As that definition is currently the subject of review, it will be necessary to review the outcome of that and consider where any consequential changes are appropriate or necessary in due course. In the context of that review ICNZ raised concerns about the vague references to "*a sum of money or <u>its equivalent</u>*" and "*by way of indemnity or <u>otherwise</u>*" (our emphasis), which are also included in the version of the definition under the Bill. The authoritative textbook Colinvaux's Law of Insurance in New Zealand also comments on this matter.[2]

[1] Section 9(1)(a) of Insurance Contracts Act 1984. While reinsurance is not explicitly excluded from the equivalent UK regime (Insurance Act 2015), there is only one explicit reference to reinsurance under this Act and there are a number of noted uncertainties and potential issues with the application of that regime to reinsurance. See https://www.clydeco.com/clyde/media/fileslibrary/Admin/CC010256_Insurance_Act_2015_26-07-16-web.pdf, pages 50 to 51 for more detail.

[2] Colinvaux's Law of Insurance in New Zealand 2nd Edition (2017), paragraphs 10.2.4 and 10.2.5.

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 are supportive of the disclosure obligation for consumers being recast as a duty to take reasonable care not to make a misrepresentation, drawing upon the approach in the United Kingdom's (**UK's**) Consumer Insurance (Disclosure and Representations) Act 2012 (**UK legislation**).[3] Some of our members have already adopted such an approach when dealing with disclosure from their consumer customers (i.e., moving from asking open-ended questions to more specific ones).

We understand that there was never any intention to take a markedly different approach to the UK legislation under this part of the Bill, and that the different provisions used in the Bill are simply due to stylistic drafting preferences. However, as outlined below, we consider that the way things have been drafted do amount to substantive differences which would create issues that could be avoided if an approach more aligned with the UK legislation was adopted. The greater alignment with the UK legislation proposed above will provide more certainty and enable guidance from UK regulators and case law to be able to be drawn upon.

Consistent with our earlier feedback, we also endorse the approach to disapply ss 35 and 37 of the Contract and Commercial Law Act 2017 as these relate to insurance contracts.[4]

1. Requirements to have regard to a consumer's particular circumstances needs to be realistic

While we support regard being had to consumer's particular circumstances, including in circumstances where they are vulnerable,[5] it needs to be acknowledged that in the context of assessing whether a policyholder has fulfilled their duty to take reasonable care, insurers' ability to make this assessment will generally be limited. There is no systemic ability to obtain this information without adding undue complexity for customers and there are 'road-blocks' which may prevent this from occurring. Specifically:

- A customer may provide an insurer with information during an application for a policy that is subsequently withdrawn and left incomplete. An insurer does not record or keep this information, nor are they entitled to.
- There will be circumstances when the customer chooses to engage solely via a digital platform and underwriting decisions are made automatically based upon their inputs without any other interaction. This method of distribution is likely to be increasingly common, particularly for consumer policies.
- In a situation when an intermediary such as an insurance broker is involved, the insurer will be reliant upon them to pass on information and generally, under the relevant distribution agreement, will be prohibited from communicating with customers directly themselves.
- In many circumstances, the individuals who may know about a customer's particular circumstances (e.g., one dealing with them at claims time) may not have any involvement in selling policies directly to them.
- Even in circumstances when a member of an insurer's sales and service team personally interacts with the policyholder, what they may be able to ascertain about their particular circumstances at the time of disclosure may be extremely limited. While great care is taken to identify and

[3] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, pages 4 to 6.
[4] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, pages 12.
[5] This is consistent with our views in the context of the Conduct of Financial Institutions (CoFI) regime, ICNZ's Fair Insurance Code (FIC) that applies to its members, and its' strategic focus on promoting good customer outcomes (aligned with its vision of ensuring 'New Zealanders have trust and confidence in the insurance industry'), and the broader focus of the financial services sector and its regulators on appropriately engaging with consumer vulnerability.

appropriately triage individuals when signs of vulnerability are identified, insurers will not always become aware of a specific vulnerability.

In light of these matters, we do not consider that the strong emphasis placed under cl 16 of the Bill on having regard to a particular policyholder's characteristics or circumstances is realistic.

2. How the disclosure duty is presented in the Bill may confuse

From a drafting perspective, we are concerned that the provisions outlining how this duty may be satisfied are unduly complex and may confuse insurers and policyholders alike. Currently the factors that must be considered in assessing whether a policyholder has taken reasonable care not to make a misrepresentation are set across five separate provisions (cls 14 to 18), some of which have different frames of reference. For example, whereas cl 14 provides for an objective 'reasonable care' standard, cl 15 contains mixed objective and subjective elements and cl 16 has an entirely subjective focus. Also, whereas cls 15 and 16 focus on whether the policyholder has taken reasonable care, cl 17 focuses on whether the policyholder has made a misrepresentation and cl 18 focusses on whether the policyholder has breached a duty.

3. The treatment of omissions has not been comprehensively and clearly addressed

Clause 17 also narrowly focusses on the position when questions are responded to in three limited and specific ways and it is unclear what the position is in other circumstances when omissions are involved, which also may not turn upon the questions the insurer asks. The reference to 'obviousness' in this context is also not sufficiently clear.

As currently drafted, we are wary that this clause may be interpreted as watering down the reasonable care requirement to such an extent that the focus is only on the insurer's questioning and an insured can answer partially, irrelevantly, or not at all, without any comeback. It seems, instead, that the intention here is to simply highlight that such conduct will put an insurer on notice to ask more questions or to dig deeper. However, as above, much of this may be lost when an intermediary is involved, or insurance is taken out digitally. This provision also tends to assume a person-to-person interaction between the policyholder and a member of the insurer's staff which may not be the case.

Additionally, it is not made clear that some omissions are still capable of breaching this duty. Ensuring that such matters are clearly and comprehensively covered off is important given the change in approach (i.e., in simple terms, a shift in onus to the insurer, replacing a duty on the consumer to volunteer material information with a duty on the insurer to extract this information from consumers through questioning and for them to answer these fully and not mispresent things).

For completeness, we also acknowledge that, as per cl 15(1)(d) of the Bill, how clearly the importance of answering the questions and the possible consequences of failing to do so is communicated, should have a bearing on whether this duty has been breached.

4. Drafting recommendations to address identified issues

To address the issues outlined above it is necessary for cls 15 to 17 of the Bill to be redrafted:

- To set out the matters comprehensively and consistently to be considered in assessing whether the consumer has fulfilled their disclosure duty in one overarching provision, in line with the approach in the equivalent test under s 3 of the UK legislation.[6]
- Build on the existing cl 15 but include elements currently separately addressed in cls 16 to 18 in incongruous terms. Specifically, this should include as additional subclauses under cl 15:
    - Drawing upon the current cl 16, refer to the earlier listed factors in cl 15 as being subject to considering the particular characteristics or circumstances of the actual policyholder, if these are known or ought to have been (as per ss 3(3) and (4) of the UK legislation). Incorporating the substance of cl 16 into cl 15 and reconciling all objective and subjective elements in one provision would better reflect the way these matters would be considered in practical terms.
    - Drawing upon the current cl 17, having regard to the role different kinds of omissions may play in assessing whether the duty has been met. While it may be reasonable to put the

[6] Section 3 of the Consumer Insurance (Disclosure and Representations) Act 2012.

onus on the insurer to ensure that all questions in a proposal form are answered, and pick up when it is clear to them that incomplete or irrelevant answers are provided, as above, there are situations where this is not the case and the policyholder's conduct should constitute a misrepresentation (consistent with s 2(3) of the UK legislation). Reframing cl 17 and integrating it into cl 15 would also provide an opportunity to not unduly focus on the insurer's questioning in assessing whether the policyholder has breached their duty. Reference should be made to 'failing to provide an answer to a question' rather than 'failing to answer a question' which is ambiguous.

- Drawing upon the current cl 18, refer to the earlier listed factors in cl 15 as being subject to this consideration (as per s 3(5) of the UK legislation). We prefer the use of the term 'dishonesty' (as per the UK legislation) rather than 'fraudulence' as this would capture a broader set of circumstances and lower evidential threshold in a way that is more appropriate in this consumer context. We also suggest that, like the UK legislation, reference be made to a misrepresentation made dishonestly "*as always being taken as showing lack of reasonable care*". This will ensure this provision clearly aligns with an assessment of reasonable care and is non-exhaustive. We are concerned that the current provision may be constituted as meaning that it is only fraudulent representations that will breach the duty.

- Explicit reference to the role an intermediary may have in informing the insurer about whether the disclosure duty has been breached and the insurer's reliance and limitations in such circumstances.

Reflecting on the comments above, we suggest cl 15(1) be specifically amended to add new subclauses as follows:

> *(g) any particular characteristics or circumstances of the policyholder known by the individuals (if any) who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms;*
>
> *(h) whether the policyholder failed to provide an answer to any question asked by the insurer or whether any of the policyholder's answers were obviously incomplete or irrelevant.*

Additionally, consistent with the UK legislation, "*A misrepresentation made dishonestly is always to be taken as showing lack of reasonable care*" should be added as a new cl 15(2A).

The existing cls 16, 17 and 18 of the Bill could then be removed.

5. Definition of 'consumer insurance contract' (cl 10)

We are concerned with the way 'consumer insurance contract' is currently defined and it needs to be amended to be workable in our view.

A completely subjective assessment focussing only on what purpose the particular policyholder is entering a contract for, as drafted, is inappropriate and unworkable in practice. It is completely impractical for an insurer to know about this purpose in every situation and even if it did, this may change. For example, as drafted, a commercial insurance policy may be taken by a particular policyholder in relation to domestic purposes that the insurer is unaware of. Alternatively, it may be that an insurer is not aware of a policyholder taking a policy intended to be used by businesses, but this ends up being deemed to be a consumer policy.

This approach also makes it extremely challenging for insurers to efficiently and confidently assess which disclosure requirements (i.e., consumer v. non-consumer) apply, deploy the appropriate disclosure approach and assess whether these requirements are met. Insurers need to be able to design insurance products, and provide systems for their distribution and administration, knowing clearly whether it is a consumer product or a non-consumer product (or in some limited circumstances both – see our response to question 5 below). It is not practical for this to turn on a particular customer's intent or circumstances.

To resolve this issue, and better align the treatment equivalent approaches under the Consumer Guarantees Act 1993 (**CGA**) and the incoming Conduct of Financial Institutions (**CoFI**) regime,[7] we suggest this definition be amended as follows:

*(1) In this Act, **consumer insurance contract**—*

(a) means a contract of insurance that is ordinarily entered into by a policyholder wholly or predominantly for personal, domestic, or household purposes; and

(b) includes a proposed contract that would be a contract of that kind if it were entered into;

(c) but does not include a contract of insurance acquired by a policyholder, or held out by the policyholder as being acquired, for the purpose of trade.

Greater alignment with the equivalent definition of 'consumer insurance contract' under the CoFI regime is particularly important for consistency because that CoFI definition is determinative of whether plain English, as well as any presentation and form, and publication requirements, apply under the Bill.[8] The potential for some specific insurance products to be 'consumer' in some regulatory contexts and 'non-consumer' in others would create additional complexities and uncertainties for insurers.

Greater alignment with the equivalent CGA definition will ensure that the over 30 years of caselaw that has developed under that regime can be drawn upon.

This change would also enable insurers to efficiently and confidently assess requirements based upon how a particular policy is ordinarily used.

6. Clause 11 should be removed

Clause 11, which provides a presumption in favour of a contract being treated as a consumer insurance contract, should be removed. There is no presumption in the CGA that a person is a consumer and no apparent justification to apply a presumption to an insurance contract in this context. The UK legislation also does not appear to have such a presumption.

7. Guidance is required related to the application of duties at different stages

While cl 15(1)(f)(i) refers to whether disclosure is made a renewal, as a relevant factor in assessing whether a consumer has exercised reasonable care, it is unclear what this means for the approach insurers should adopt at renewal in practical terms. We support guidance being developed, in consultation with industry, setting out the specific expectations for how the duty to not misrepresent is addressed at renewal. In this context, an important balance needs to be struck between ensuring information is verified and/or updated on one hand, while maintaining the simplicity of the renewal process for both insurers and policyholders on the other (i.e., not being so extensive that it substantially increases insurers' cost of service or is so cumbersome and drawn out that the consumer disengages, finding the questioning overwhelming, unnecessary or repetitive). We do not consider that it would be appropriate or efficient, for example, for insurers to be required at renewal to again run through all the questions that were asked prior to the contract originally being put in place. In developing this guidance, care also needs to be taken to ensure renewal questioning can be operationalised in a streamlined and systematic way, rather than relying upon manual procedures.

Additionally, in light of the challenges outlined above with identifying a policyholder's particular characteristics or circumstances, we would also appreciate it if guidance could be developed with industry on the particulars that are realistically expected to be taken into account.

It would also assist if guidance was developed on disclosure requirements when there is a change in the customer's circumstances during the policy term. For example, it is unclear whether the new disclosure regime affects any clause in an insurance contract requiring customers to notify the insurer about any change in circumstances during the policy period and, if so, in what respect. In this regard, we note that disclosure of some changes in circumstances are fundamental to the risk being underwritten (e.g., change of the situation of risk). Additionally, it would be useful to understand how

[7] See the definition of 'consumer' in s 2 of the CGA and 'consumer insurance contract' under cl 446S of the Financial Markets (Conduct of Institutions) Amendment Bill.

[8] Clause 179 of the Bill amends Part 6 the Financial Market Conduct Act 2013 introducing requirements for policy wordings to be presented in a clear, concise and effective manner into that Act which draw upon the definition of 'consumer insurance contract' referred to in footnote 7.

the proportionate remedies for breaches of disclosure requirements would apply in such circumstances.

8. The implication of the retrospective application of the duty need to be carefully worked through

Clause 19 also creates a transitional issue for insurers and their customers as it appears to have retrospective application. Notwithstanding the savings provision in Schedule 4 of the Bill, how the renewal of contracts that were entered into on one legal basis, and now subject to another, should be addressed. Insurers will need to know the extent that they can rely on the customer's representations prior to the Bill coming into force. For example, it is unclear whether insurers would need to obtain disclosures from customers pursuant to new requirements prior to its implementation. This will need to be the subject of careful consideration, engagement with the sector and detailed guidance.

Alternatively, a more straight-forward approach, would be to simply amend cl 19 to add a new subclause to limit this retrospectivity as follows:

> *(1) The duty set out in this subpart:*
> *(a) replaces any duty relating to disclosure or representations by a policyholder to an insurer that existed in the same circumstances before this subpart came into force; and*
> *(b) notwithstanding clause 2 of Schedule 1, applies only to a new contract of insurance entered into on or after this subpart comes into force where that contract does not operate as a renewal of a preceding contract.*

9. Amendments to the treatment of group insurance

Clause 21(d) provides that, in the context of group insurance, a person may provide information indirectly to the insurer. We recommend that a small amendment be made to cl 22(1) to make it consistent with cl 21(d), so that information provided indirectly by the insured is captured, as follows:

> *B must take reasonable care not to make a misrepresentation to the insurer, either directly or indirectly, before the contract of insurance is entered into or it is varied in order to provide cover for B.*

Clause 23 provides that a breach of duty by one person does not affect the contract of insurance so far as it relates to others in the group. In our view, this clause should not apply to the extent that the person who has breached the duty is acting on behalf of others in our view. We suggest an amendment be made as follows in this regard:

> *23* ***Breach by 1 member of group does not affect others***
>
> *(1) If there is more than one person who has a duty under this subpart in relation to a contract, a breach on the part of one of them of the duty does not affect the contract so far as it relates to the others.*
>
> *(2) Subsection (1) does not apply to the extent that the person who breached a duty under this subpart was acting for or on behalf of others to the contract.*

3	*Do you have any feedback on the Bill's provisions in relation to remedies for breach of the consumer duty?*

We endorse the move to a proportional response to consumer and non-consumer disclosure issues that arise, acknowledging that this is something our members are already doing in a more generalised 'reasonable' way under the ICNZ's FIC.[9]

Our strong preference is for the particulars of the proportional response to closely model the equivalent UK regime. In a situation where the breach of the disclosure duty is not reckless or deliberate, and the insurer would have entered the contract on different terms, the claim should be reduced by the same proportion the premium has been underpaid (consistent with the approach in

[9] Clause 15 which provides that, amongst other things, members will respond reasonably to information that customers did not disclosure.

the UK). That is, rather than treating the increase in premium payable as a straight deduction from the claim payment (as currently proposed under the Bill). This position:

- **Provides the most effective benchmark for pricing risk and the fairest reflection of the allocation of risk between the insurer and policyholder.** It also better reflects that the relationship between premiums and claims across a portfolio of risks is non-linear, with premium amounts being consideration for a promise to pay by an insurer for potentially exponentially larger sums. Premium is calculated based on actuarial and statistical modelling and probability of risk and uncertain eventualities across a broad portfolio of business which may, or may not, come to pass. To treat an individual customer's underpayment of premium as being directly connected and a straight deduction from their claim payment would be to mischaracterise matters and may have a significant effect on pricing at a portfolio level.
- **Avoids the greater opportunity for 'gaming' that may arise with the other option (as proposed under the Bill),** sending a clear message about how serious breaching the duty to take reasonable care will be. While we acknowledge that the focus here is on non-reckless or unintentional disclosure issues, these matters should have a very high threshold. The alternative approach opens the risk that a customer is not particularly careful or is 'economical' about what is disclosed, with a view to reducing their premium, knowing that should this be later discovered, this could be easily resolved by a small deduction from their claim payment (and which represents what the customer would have paid anyway, had they taken reasonable care). While, by and large, the proportion of cases where such issues are borne out at claims time may be small, as above, such conduct nevertheless has a distortionary impact irrespective of whether a claim is made - in other words, not all breaches of disclosure requirements will become apparent at claims time, but insurers will nevertheless have a higher potential exposure. This additional exposure could become more apparent should a large claim event occur.

While we accept that the approach adopted in the Bill would be simpler, we do not consider that the characterisation of approach proposed under the Bill as being more equitable, as suggested in the consultation document, is accurate. That assessment ignores the impact on the wider customer base (with those providing accurate and full disclosure effectively cross-subsiding those that have not) and the broader distortionary impacts involved (reflecting upon the nuanced relationship between premium and claims payments at a portfolio level described above). We also understand that no particular issues have been identified with the approach adopted in the UK that would warrant a different approach being adopted here.

Stepping back, we consider that this UK approach strikes the better balance and provides the most reasonable approach, ensuring that the legislative response appropriately incentivises customers to meet their disclosure obligations in full while also providing the insurer with appropriately proportionate remedies for when they do not. This approach would nonetheless leave flexibility for insurers to take a more generous approach to misrepresentations should they choose to do so based on the circumstances of the individual case, as they do currently.

It is also noteworthy that prior to its introduction, whether the UK approach should operate on a proportional or straight premium deduction basis, was the subject of detailed economic analysis by London Economics.[10] They analysed the effect of different remedies for non-disclosure on a hypothetical pool of 1000 policyholders and reported (amongst other things):

- Where some policyholders did not fill out the insurance application forms accurately, they did not pay the premiums they should have paid. If the insurer was only entitled to charge the full premium they would have charged had they known of the full facts, this remedy would only be available against those individuals who had made a claim and not the entire pool of individuals that made a misrepresentation. The conclusion was that this option only very marginally reduced the economic loss suffered by the insurer compared with the position the insurer would have been in assuming the insurer had no legal remedy at all – i.e., the insurer was barely better off

[10] See London Economics' report to the UK and Scottish Law Commissions' joint consultation paper (Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured) entitled 'A proposed model for assessing the economic impact of proposed changes to the law relating to non-disclosure and misrepresentation.' This report can be found in Appendix B of the Joint Consultation Paper, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp182_ICL_Misrep_Non-disclosure_Breach_of_Warranty.pdf.

under this approach than it would have been if the law allowed no remedy for misrepresentation.

- If the insurer is entitled to proportionately reduce the claim based on the premium that would have been charged had the insurer been aware of the true state of affairs, the insurer would receive $0 economic profit, which is the same result had all policyholders made accurate representations.

London Economics also concluded that:

> *…allowing claims on the payment of additional premiums substantially under-compensates the insurer and provides some individuals with possible incentives to misrepresent or not fully disclose to the detriment of the insurer.*
>
> *In the illustration presented here, proportionality appears to provide a more appropriate way of compensating insurers for the potential loss caused by misrepresentation.*

For completeness and in any eventuality, where a contract is part of a series of renewing contracts and/or claims have previously been paid, we support the ability under the Bill for an insurer to retrospectively adjust them based upon each of the contracts where the misrepresentation would have had an impact. The ability to do so best reflects the position the parties would have been in had the disclosure issue not arisen. This includes the insurer being able to obtain the additional premiums over potentially multiple policy periods that would have been paid had proper disclosure been made, as outlined in example in Schedule 2 of the Bill.

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?*
	No comment as not relevant to general insurers.
5	*Do you have any feedback on the Bill's provisions in relation to the disclosure duty for non-consumers?*

While, as earlier indicated, it was not our first preference, the requirement for non-consumer customers to provide a 'fair presentation of the risk' is workable and appropriate and we are supportive of an approach equivalent to that in place in the United Kingdom (**UK**) under their Insurance Act 2015 being adopted.[11]

We also endorse the decision made to prevent the contracting out of disclosure requirements and the application of one disclosure standard for all commercial customers, which are other aspects of the regime we had previously advocated for.[12]

1. Resolving the position where a customer is taking a policy that has both consumer and non-consumer components

A particularly challenging issue insurers will need to work through is determining the appropriate disclosure treatment when a customer is taking a policy that has both consumer and non-consumer components (e.g., insuring a house with an attached or shared business premises or a vehicle used for both personal and business purposes) or does not neatly fall in either category (e.g., a policy covering a lifestyle block). Additionally, some policies may be to the benefit of more than one policyholder, one of whom being in trade and the other not. For example, a Contracts Works policy entered into for the benefit of both the homeowner and the contractor. The law also recognises that a single policy document may be a series of separate policies.[13] Accordingly, we consider that the Bill should make it clear that an insurance policy can be both a consumer and non-consumer policy by amending cl 10 to add a new subclause as follows:

[11] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, pages 7 and 8.
[12] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, pages 8 and 10.
[13] *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated* [2015] NZSC 59.

(2) In this Act, a contract of insurance may be both a consumer insurance contract for one or more purposes and a non-consumer insurance contract for one or more other purposes.

(3) Where (2) applies:

(a) provisions of this Act related to consumer insurance contracts apply to the extent that an insurance contract is a consumer insurance contract, and

(b) provisions of this Act related to non-consumer insurance contracts apply to the extent that an insurance contract is a non-consumer insurance contract.

While this change, cl 12 of the Bill, and including an objective component in the definition of 'consumer insurance contract' (as recommended earlier above) would assist in assessing whether the consumer or non-consumer disclosure requirement applies, appropriately robust trigger points will need to be developed in insurers' and their distribution partners' systems and processes to ensure this is efficiently and consistently identified and applied. Working through these matters is another key area where it would assist for detailed guidance to developed in consultation with industry. We expect this guidance would extend to how the disclosure requirements would apply when a policy is both consumer and non-consumer (e.g., does the policy wording need contain notice of both disclosure requirements).

2. Amending what is material (cl 34)

The example of material circumstances set out under cl 34(2)(a) expresses the threshold too highly in our view. We do not consider that a fact has to be 'special' or 'unusual' to be material and suggest accordingly that this subclause be amended as follows:

(a) acts that make the risk more likely to eventuate;

This would then mirror cl 33(2), which provides that a policyholder does not need to disclose circumstances that diminish risk.

3. The implication of the retrospective application of the duty needs to be carefully worked through

Consistent with comments expressed about the retrospective application of cl 19 above, the retrospective application of cl 37 also creates a transitional issue that will require careful consideration, engagement with the sector and guidance. Alternatively, a more straight-forward approach would be to amend cl 37 to add a new subclause to limit this retrospectivity as follows:

37 ***Duty replaces previous duties***

(1) The duty set out in this subpart:

(a) replaces any duty relating to disclosure or representations by a policyholder to an insurer that existed in the same circumstances before this subpart came into force; and

(b) notwithstanding clause 2 of Schedule 1, applies only to a new contract of insurance entered into on or after this subpart comes into force where that contract does not operate as a renewal of a preceding contract.

4. Suggested amendments to provisions related to what policyholders know (cls 39 and 41)

Clause 39(2)(b) should be amended to make it clear that an insured under a joint policy is included as an individual responsible for the other joint insureds' insurance as follows:

(b) an individual is ***responsible*** *for the policyholder's insurance if the individual participates on behalf of the policyholder in the process of procuring the policyholder's insurance (whether the individual does so as the policyholder's employee or agent, as an employee of the policyholder's agent, as a joint policyholder with the policyholder under a joint contract of insurance, or in any other capacity);*

An insurer will generally not know whom within an organisation has authority or responsibility in respect of that organisation's insurance, particularly when an intermediary such as an insurance broker is involved. The insurer should accordingly be able to rely on individuals who hold themselves out as being responsible for the policyholder's insurance. As a result, we suggest cl 41(b) be amended as follows:

(b) responsible for the policyholder's insurance or who hold themselves out as being responsible for the policyholder's insurance.

6	*Do you have any feedback on the Bill's provisions in relation to remedies for breach of the non-consumer duty?*
	See the response to question 3 above. While the arguments are in principle the same, in relation to the non-consumer duty, there is an even stronger reason for proportional remedies consistent with the UK approach as here there is a positive obligation on the prospective policyholder to outline the risk to be insured, and so greater scope to underplay this for tactical reasons.
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?*
	As earlier indicated, while we do not consider that the introduction of a notification duty regarding third party information is necessary, we do support introducing a regulatory requirement for insurers to warn about their disclosure duties and the potential consequences of breaching them.[14] This is a welcome change and something ICNZ's own FIC already requires its members to do (albeit in broader terms).[15] We also support the fact that both notification duties can be fulfilled orally or in writing. This provides flexibility and supports innovation (e.g., we envisage this encompasses notification through a range of digital channels). *1. Capturing the role of intermediaries in providing notifications* We acknowledge that the ultimate intention is to ensure the policyholder is made aware of these matters but would assume the intention is to enable these notification requirements to be satisfied by the most appropriate party in the chain of distribution which, as above, may be an intermediary. To fulfil this requirement, it should be acceptable for an insurer to notify the intermediary, and this should be acknowledged explicitly in the Bill in our view (e.g., under cls 55 and 57). *2. Amendments to cl 55 to reflect where a policyholder can cancel at short notice* Many insurance policies allow the policyholder to cancel the policy within a specified period (usually 15 or 30 days) and receive a full refund of any premium paid. For these policies, we consider that the insurer should be able to comply with the duty under cl 55 within the policy document itself (including by providing a copy with the required information prior to entering the contract). To reflect this, we suggest cl 55 be amended to include a new subclause as follows: *(4) The insurer may comply with the duty set out in subsection (1) by providing the information required by subsection (1) in the contract of insurance or variation, provided that the contract or variation:* *(a) is provided to the policyholder, or their agent, prior to the contract or variation being entered into; or* *(b) allows the policyholder a reasonable period of time to cancel the contract or variation and obtain a full refund of any premium paid in respect of that contract or variation.* *3. Proposed amendment to provision related to variations (cl 56)* It would also assist if cl 56 was amended to clarify what 'kind of insurance' means. For example, it could be taken to mean materially different kinds of covers in the same category (e.g., Broadform Public Liability or Statutory Liability covers). Alternatively, it could be taken to include any new cover which the insured did not have before the variation (e.g., a variation extending cover for defective workmanship in a Contracts Works policy). The intent of this provision is most logically applied to materially differ kinds of cover. To address any uncertainty in this regard, we recommend that cl 56(a)(i) be amended as follows: *(a) the variation—*

[14] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, pages 6 and 7.
[15] See page 3, heading 'Our general responsibilities to you' (para 6) and page 5, 'Our general expectations of you'.

(i) will provide a materially different class of insurance cover that was not provided by the contract of insurance immediately before the variation; or

4. Proposed amendment to access to third party information notification requirement (cl 57)

In terms of cl 57, we now understand that the intention is to, amongst other things, capture scenarios where an insurer may seek access to third party information at claims time (rather than necessarily prior to cover being put in place). This should be more clearly stated in this provision as, based upon our reading of it, we had assumed this requirement only applied when information is sought prior to cover being put in place or varied.

Additionally, considering the broad range of information and usages this notification requirement is intended to relate to, and consistent with remarks above under 2. above, it would assist if the insurer was able to comply with cl 57 within the policy document itself. Accordingly, we recommend that a subclause be added as a new subclause (cl 5A) as follows:

> *(5A) If, under a proposed contract of insurance, or a proposed variation of a contract of insurance, a policyholder will give a consent to access, the insurer may comply with the duty set out in subsection (2) or subsection (4) by providing the information required by subsection (2) or subsection (4) (as applicable) in the contract of insurance or variation, provided that the contract or variation:*
>
> *(a) is provided to the policyholder or their agent prior to the contract or variation being entered into; or*
>
> *(b) allows the policyholder a reasonable period of time to cancel the contract or variation and obtain a full refund of any premium paid in respect of that contract or variation.*

It would also assist if the language "*whether (and if so, the extent to which)*" in cl 57(2) was clarified. We understand that the intention here is to inform the consumer about the types of third party information the insurer is likely to access and when this is likely to happen. With that in mind, we recommend cl 57(2) be redrafted as follows:

> *(2) If the insurer intends to access and take into account information to which the consent relates, the insurer must, before the contract is entered into, clearly inform the policyholder orally or in writing of:*
>
> *(a) the nature of the information that the insurer intends to access and take into account, and*
>
> *(b) when accessing this information is likely to occur.*

Consideration also needs to be given to what constitutes appropriate notification to 'the policyholder' when there is a large number of policyholders, and an intermediary is not involved. In a situation where an insurance policy had a number of policyholders (e.g., a Directors' and Officers' or Professional Indemnity policy, large numbers of individual entities insured under an insurance scheme or a 'group insurance'[16] policy), our expectation is that notifying one nominated representative would be sufficient.

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?*

First, we consider it is inappropriate for the outcome of breaching both duties to be the same. These requirements are different and, if breached, warrant different responses.

1. Appropriate response for breach of duty to inform about disclosure duties

The currently proposed response seems disproportionate to the harm that may result for the policyholder and unduly punitive. This mechanism should be amended to be more consistent with the proportional approach found elsewhere in the Bill so that it only applies when a link between the misrepresentation and the insurer's breach is established. Accordingly, cl 58(2) should be amended as follows:

[16] As defined in cl 21 of the Bill.

(2) Subsection (1) applies only if the insurer's breach caused or otherwise contributed to the qualifying misrepresentation or breach.

2. Appropriate response for breach of duty to inform about access to third party information

We are concerned that the current proposed response is not related to the breach in this context, and propose that the consequence of breaching the duty to inform about access to third party information instead be to invalidate any consent by the policyholder to access information – so that if the insurer has accessed third party information relying on that consent, it will be treated as a privacy breach, with remedies available to them under the Privacy Act 2020.

3. *Other comments*

Consistent with comments elsewhere, provision needs to be made under the Bill for the role an intermediary plays in providing the relevant notification and the consequences if they fail to do so.

9	*Do you have any feedback on how the Bill codifies the duty of utmost good faith?*

While we appreciate that policy decisions were made in late 2019 and, in codifying the duty of utmost good faith, attempts have been made to reflect the current common law position and leave the courts flexibility to develop the law further, we do not consider this intention has been achieved (more below). Plainly put, this approach does not codify the duty as it is currently understood and will create confusion and uncertainty for little benefit and without clear rationale. In our view this long-standing concept in insurance law should be left to the courts to continue to develop, noting also that insurers will soon be subject to the fair conduct obligations under the CoFI regime.

Specific issues we have identified with this aspect of the Bill include:

- While the relevant heading, sub-heading and contextualising provision (cl 60) refer to utmost good faith as a duty, this is not something specifically referred to in the provision itself (cl 59). This provision also does not outline what 'utmost good faith' entails or set out any explicit expectations on the insurer or policyholder in these respects.
- The Bill may be taken to codify a different measure of 'utmost good faith' than that referred to in common law (which we understand is not the intention) and we are concerned about how that would be interpreted by the Courts as modifying existing common law. For example, it is unclear the extent to which these provisions would modify the rule that the duty of utmost good faith applies until proceedings are issued, at which point this is overtaken by the rules of the Court.[17]
- Additionally, the approach could introduce uncertainty about how this duty relates to other obligations under this Bill and other legislation, particularly as this is a private law duty rather than one applied by regulators.[18]
- The Bill may be taken to provide plaintiffs with a freestanding private law right to claim against their insurer. Again, we do not understand that this extension to the common law is intended.
- Clause 60(2) goes further than is necessary by carving out any disclosure a customer could make to an insurer, not just those relevant before a contract is entered into, as will be necessary to recognise the changes provided for in the Bill.

We also query whether, given anyone reading the clause would need to undertake further research to find out more (given the very concise nature of the provision), what purpose is served by including it at all.

Drawing upon the comments above, and reflecting that the intention is to leave the common law unchanged (save for the new disclosure requirements set out in the Bill), we recommend that cls 59 and 60(2) be amended as follows:[19]

59 Common law duty of utmost good faith

17 *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1, [2001] 1 All ER 743, [2003] 1 AC 469 and *Pegasus Group Ltd V QBE Insurance (International) Ltd &* Anor (HC AK CIV 2006-404-6941, 1 December 2009).

18 Although acknowledging it is not subject to s 449 of the Financial Markets Conduct Act 2013.

19 For examples of other legislative provisions that expressly leave common law and equity intact see ss 81(3) and (4) of the Trusts Act 2019, s 201(2) of the Contract and Commercial Law Act 2017 and s 20(1) of the Crimes Act 1961.

Nothing in this Act affects the rules of common law and equity relating to a contract of insurance being a contract based on the utmost good faith.

60 Effect of section 59 on other law

*(1) The effect of **section 59** is not limited or restricted in any way by any other law, including the other Parts of this Act.*

*(2) However, **section 59** does not apply to the extent that any rules of common law or equity are modified by the duties in subpart 1 and subpart 4 of Part 2.*

10 *Do you have any feedback on the Bill's provisions relating to information provided by a policyholder to a specified intermediary?*

We support the inclusion of cls 63 and 64 of the Bill requiring 'specified intermediaries' to take all reasonable steps to pass on information to insurers, with liability arising and recourse available to the insurer if they fail to do so, which are enhancements we previously advocated for.[20]

We also agree that it is not necessary or appropriate to include employees of insurers within the definition of 'specified intermediary' as was the case under the old s 10(3) Insurance Law Reform Act 1977 (**ILRA77**) definition of 'representative of insurer'.

1. Adjusting what information intermediaries should be required to pass on from consumers

As drafted, under cl 20 of the Bill, all information provided by the policyholder to the 'specified intermediary' is deemed to be known by the insurer, irrespective of whether the information is passed on, except for misrepresentations. We are concerned that an insurer may not have an accurate appreciation of the risk if the relevant intermediary only passes on parts of the information provided by the policyholder without advising the insurer that certain information is withheld - the information withheld likely being material to the risk underwritten (including an assessment of the moral risk of the policyholder concerned).

We suggest cl 63(3) be amended, so that the relevant intermediary must provide the policyholder an opportunity to correct the misrepresentation and, if not, the intermediary has a duty to inform the insurer of this, as follows:

> *(3) However, if A believes on reasonable grounds that a representation is a misrepresentation, A must provide the policyholder with a reasonable opportunity to correct the misrepresentation. If the misrepresentation is not corrected within a reasonable period of time, A must take all reasonable steps to inform the insurer of the misrepresentation before the insurer enters into the consumer insurance contract or agrees to the variation.*

2. Reframing the definition of 'specified intermediary' for the purposes of deemed knowledge

We strongly suggest that the proposed definition of 'specified intermediary' be reframed so that the deemed knowledge provisions in cls 20 and 45 only apply to intermediaries that are insurers' agents (e.g., tied agents such as airlines, travel agents, retailers, car dealers or insurers' banking partners). That is, rather than extending this definition to agents of the insured (such as independent insurance brokers or brokerages), as currently proposed. This position:

- Aligns this aspect of the regime with the approach to deemed knowledge in Australia and the UK, acknowledging that New Zealand is currently an outlier in this respect.
- Better reflects the practical reality of what an insurer will have awareness of when intermediary agents of the insured are involved. As above, agents of the insured such as insurance brokers

[20] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, page 18. While initially we were opposed to there being two separate requirements for intermediaries to pass on information, we understand the need for them now (in this context), given different consumer and non-consumer disclosure requirements have been adopted.

	have arrangements which generally limit insurer awareness and oversight, such that it would be inappropriate to impute knowledge in such circumstances.[21] • Also reflects that, with the shift to proportional remedies for breaching disclosure requirements, the impacts of deemed knowledge provisions are much less significant than they once were. When reframing the concept of 'specified intermediary' (if supported), we suggest that the term 'insurer's representative' be used with specific definition provision simply referring to the 'intermediary being an agent of the insured' rather than describing matters in more detailed or prescriptive terms. This approach would enable specific contractual arrangements and common law to be drawn upon in making this assessment. Being more prescriptive here runs the risk that the approach under the Bill does not completely align with common law concepts of agency. *3. Other comments* We acknowledge the different definitions used throughout this Bill and CoFI related to intermediaries. While we agree there is no easy way around this (given each concept serves different purposes), this is another area where it would be helpful for guidance to be developed so that these differences are well signalled and understood. We expand upon this matter under the 'Other Comments' heading at the end of this section. As recently discussed, we are interested in MBIE's views on the potential tension between intermediaries' obligations under cl 63 of the Bill and the duty under s 431K of the Financial Markets Conduct Act 2013 (**FMC Act**) to give priority to a client's interests. To the extent that any potential inconsistency exists, it should be made clear that the duty in s 431K does not limit intermediaries' obligations under cl 63.
11	*Do you have any other feedback on the drafting of Part 2 of the Bill?*
	Consistent with comments above, for clarity, the definition of 'non-consumer insurance contract' (cl 10(2)) should exclude 'reinsurance'.
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?*
	Yes. Some claims-made policies already provide for such a late notification period. Subject to the more specific feedback directly below, we also support the carve out under the Bill for claim-made policies from the prohibition against insurers relying upon breaches of notification requirements (other than when they have suffered prejudice), which is something we previously advocated for.[22]
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?*
	No. We consider that a requirement to notify policyholders in writing within 14 days after the end of the policy term would be inappropriate, unworkable and is unnecessary. For completeness, while we acknowledge that, as currently drafted, cl 69(2) would technically enable notification to be provided prior to the policy term, we understand that this is not currently the intention. *1. The most appropriate time to provide this notification would be at inception or renewal*

[21] The particular dynamics between insurers and insurance brokers is expanded upon further in our submission on CoFI last year, https://www.icnz.org.nz/fileadmin/user_upload/ICNZ_Submission_on_COFI_-_Underlining_Regulations_and_treatment_of_intermediaries_180621.pdf, pages 34 and 35.

[22] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, page 20.

The most appropriate time to notify the policyholder about this matter would be prior to the contract initially being put in place along with details about other fundamental aspect of the relevant policies. This matter could be easily addressed then by a statement being included in the relevant policy wording or schedule (potentially, alongside insurers' existing statements about specific claims-made notification requirements), which would also assist from a contractual certainty perspective.

To reflect this, cl 69(2) should be amended as follows:

> *(2) The insurer may comply with subsection (1)(c) by providing the required information:*
>
> *(a) in a prominent form in the contract of insurance; or*
>
> *(b) to the policyholder or the policyholder's agent at any time up to 14 days after the end of the relevant period, including at or prior to the inception or renewal of the contract of insurance.*

Problems with requiring this notification to be provided at the end of the policy term include:

- Insurers do not always immediately know that policyholders have failed to renew, or have taken their insurance elsewhere, which is what makes this issue relevant. In this situation, the 14-day period might expire before they become apprised of this. Complications also arise when the policyholder has appointed a new insurance broker at the end of the old policy term, but the necessary information has not been passed on. These types of policies (typically Professional Indemnity, Directors' and Officers', Statutory Liability and Employer's Liability) are almost exclusively entered into by commercial parties, the vast majority of whom will be represented by intermediaries such as insurance brokers. Additionally, in some cases where insurance brokers are involved, consistent with remarks above, insurers cannot contact customers directly and may not even have their contact details. In such circumstances, insurers would be reliant on the intermediary to notify them. This would result in unintended cover for claims where they did not do this. The insurer may also not know whether the notification has been provided until a claim is subsequently made.
- It can be difficult for the policyholder (or their respective representative) to be promptly contacted at the end of the policy term and engaged with in other circumstances. This is particularly the case when the customer is busy winding up their business, transitioning to a new one or cannot be located for other reasons. Additional complications may arise when the business has become insolvent (with a liquidator or receiver potentially appointed and now controlling its affairs).

Additionally, the way the requirement has been framed (i.e., with reference to the end of the policy) means that this is not something that can be managed during renewal (e.g., as a required notification). This is not something that insurers currently do, would require entirely new system functionality and processes to be developed and create additional ongoing administrative burden. There would also be very little additional benefit to policyholders receiving a separate communication after the end of the policy term, in addition to their usual pre-renewal documentation.

4. Other comments

The fact that in the vast majority of cases the insurer will be reliant upon an intermediary such as an insurance broker to provide notification also needs to be reflected. If a notification requirement is to be included here, it should be acceptable for an insurer to notify the intermediary (consistent with our feedback above) and this should be acknowledged explicitly in the Bill in our view (e.g., under cl 69).

In situations when intermediaries are not involved, or if notifying them is considered insufficient, consideration needs to be given to what constitutes appropriate notification to 'the policyholder' when a large number of individuals could be beneficiaries of the policy. This issue is particularly pertinent for claims-made Directors' and Officers' or Professional Indemnity policies. Consistent with the comments above, our expectation is that notification to one nominated policyholder representative would be sufficient in such situations. A requirement to notify all possible individuals would be completely impractical (i.e., insurers would not necessarily have their names, let alone their individual contact details).

14	*Do you have any other comments on clause 69 of the Bill (Time limits for making claims under claims-made liability policies)?*
	See responses to questions 12 and 13 above.
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)?*
	Subject to the remarks below, we support the inclusion of the excluded increased risk terms listed in cl 71(3), which align with those previously proposed by the Law Commission. This is a change we have supported throughout the review.[23] *1. Additional exclusions to include in the list* The following should be added to the list under cl 71(3): • defining age for Personal Accident and Travel insurance purposes, and • excluding loss that occurs while a property is unoccupied. 'Any property' should also be added between 'aircraft' and 'goods' in cl 71(3)(c) to reflect situations where houses are being used for commercial purposes. The above are all significant factors that statistically increase the risk of loss even though they may not be necessarily causative of loss in a particular claim. Additionally, to better reflect the nature of geographical area exclusions, the reference to 'must' in cl 71(3)(b) should be replaced with 'must or must not.' We also suggest adding 'crew' to 'master or pilot of a ship' under cl 71(3)(a). *2. There also needs to be the ability to adjust this list by regulation* We strongly believe that a regulatory making power is appropriate and needs to be provided to enable the list under cl 71(3) to be amended. This would allow this list to be monitored and promptly updated in consultation with industry as necessary, as changes in the insurance market or new technology develops (e.g., insurance for autonomous vehicles or to new approaches to insurance to reflect further developments in the 'sharing economy'). We are concerned that having to rely upon legislative amendment would be impractical and highly unlikely to be able to keep pace with the changes required. Any concerns about a lack of awareness of these changes could be addressed through direct communications to customers and potentially by a communications campaign by the regulator, highlighting them to the public. In the consultation paper it is proposed that this regulation making power not be provided for, with reliance instead being placed on legislative changes to make any updates. However, the starting point is that cl 71 effectively overrides insurance policies, before providing a discrete list of exceptions to this. Accordingly, all that a regulation making power would enable is to limit the extent to which cl 71 overrides contractual arrangements. We do not believe that this is something that requires explicit consideration by Parliament. Additionally, given it would be highly likely for this matter to be progressed through an omnibus Bill, the key decision-making step will be made by Cabinet in any event. Our other key concern is that this is likely to lead to the provisions not being updated in a timely way. Finally, given the extent of regulation making powers provided under law generally, and which insurers are already subject to specifically, we consider it would be out of step to not provide a regulation making power in this context and just because such a mechanism is provided for does not necessary mean it must be used. We suggest a new subclause (cl 71(4)) be added to reflect this regulatory making power as follows:

[23] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, page 19.

(4) The Governor-General may, by Order in Council, make regulations prescribing any increased risks exclusions, that raise a greater statistical likelihood of loss that may not cause the loss in a particular case, that section 71 does not apply to.

16 *Do you have any other feedback on Subpart 4 of Part 3 of the Bill (Third party claims for liability insurance money)?*

We are pleased to see the repeal of Part 3 of the Law Reform Act 1936 and, subject to the comments directly below, endorse the reformulation of the mechanism for third parties claims to attach to insured's liability insurance as proposed, acknowledging that this aligns with what we have previously sought in a number of material respects.[24]

Appreciating the comments below are highly technical in nature, we welcome the opportunity to discuss them in more detail.

1. Amendment to what claimant may recover from insurer clause (cl 84)

The reference in cl 84(1) to the claimant recovering the amount of the 'insured liability' from the insurer implies that the insurer's liability has already been established. This is premature, may not be the case and conflicts with cls 84(2) and 87 which anticipates situations where the insurer's liability will not arise.

To address this issue, we suggest that cl 84(1) be amended as follows:

84 ***Claimant may recover from insurer***

(1) If a person (the ***claimant****) has a claim against a specified policyholder for insured liability, the claimant may seek to recover the amount under that claim from the insurer in a proceeding before a court.*

2. Amendment to requirement to obtain leave of the court (cl 85)

For clarity and consistency, cl 85 should be amended, in line with the equivalent provision under the New South Wales (**NSW**) legislation, as follows:[25]

85 Claimant must have leave of court

(1) A proceeding may only be brought by a claimant against an insurer under this subpart with the leave of the court.

(2) Leave must be refused if:

(a) the claimant cannot establish that the policyholder is a specified policyholder; or

(b) the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law.

3. Amendment to defences provision (cl 87)

We strongly suggest that cl 87(2) be removed. The parties should be in the same position they would have been in had the policyholder not become a specified policyholder; no better and no worse. This subclause would instead place the third party claimant in a better position than the policyholder and the insurer in a worse one. The insurer should be entitled to rely on the policy, including all defences. The inclusion of this provision is also inconsistent with the equivalent provision in the NSW legislation.[26]

It also cannot be intended that the insurer must continue to provide cover in circumstances where the policyholder breaches a fundamental term of the contract (e.g., admits liability, commits fraud, or makes a material non-disclosure or misrepresentation when renewing cover).

It also needs to be acknowledged that, for claims-made policies, the event giving rise to liability may have occurred many years prior to the claim being brought. There may be many relevant acts and omissions by the insured since that time and subsequent renewals of the policy (e.g., a breach of the disclosure duty at subsequent renewals or late notification of claim that prejudices the insurer).

[24] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, page 21.
[25] Section 5 of the Civil Liability (Third Party Claims Against Insurers) Act 2017.
[26] Section 7 of the Civil Liability (Third Party Claims Against Insurers) Act 2017.

Additionally, the insurer may be prejudiced if the policyholder (or its officers) does not assist in the defence of the claim.

Also see consequential issues if cl 87(2) is not removed below.

If the position above is not accepted and cl 87(2) is not removed, as an alternative, we suggest the current cl 87(2) be replaced with the subclause as follows:

> *(2) Despite subsection (1) and section 86, the insurer is not entitled to rely on a defence arising from an act or omission by the specified policyholder that occurred after whichever of the following is latest, when the specified policyholder:*
> *(a) made a claim under the contract of insurance in respect of the event that gave rise to the liability; or*
> *(b) became a specified policyholder.*

As we understand that cls 68 and 69 (which relate to provisions prescribing manner or time of claims or proceedings) would continue to apply in such circumstances, for clarity we also recommend that cl 87 be amended to include a new subclause as follows:

> *(3) Nothing in this subpart limits or affects section 68 or section 69.*

4. Consequential issues (if cl 87(2) is not removed)

It would only be appropriate to retain cls 88 and 89 as currently proposed under the Bill if, as advocated for above, cl 87(2) is removed. If this is not the case:

- In respect of cl 88 (limitation defence does not apply in certain cases), the insurer may be prejudiced if it could not rely on exclusions in the policy. For example, the insured may not have notified the insurer of the third party claim, accordingly depriving it of its right to conduct the defence.
- In respect of cl 89 (judgment against specified policyholder not being a bar to a claim against the insurer), the insurer may be required to pay out on a judgment it had no knowledge of, let alone ability to conduct the defence for.

5. Amendment to effect of payments made by insurer to specified policyholder provision (cl 91)

Clause 91 goes beyond preventing collusive arrangements between an insurer and its policyholder. An insurer who settles a bona fide dispute with the policyholder about policy coverage should not be penalised if the settlement was made in good faith and without knowledge of any potential direct third party claimant(s). Only those settlements made with the intention to defeat a third party's claim should be captured by cl 91 in our view. This provision would especially prejudice the insurer if they did not know of the policyholder's insolvency (or potential insolvency). Clause 91 is also silent on whether it applies when the insurer settles with a solvent policyholder who subsequently becomes insolvent. Additionally, as currently drafted, this provision puts the third party in a better position than it would have been in had there been no insolvency.

To address these issues, we recommend that cl 91 be amended as follows:

> ***91 Effect of payments made by insurer to specified policyholder***
> *A payment made by the insurer to the specified policyholder under this subpart in settlement or compromise of an insured liability discharges the liability of the insurer to the specified policyholder under the contract of insurance in respect of the insured liability, provided:*
> *(a) the insurer entered into the settlement or compromise in good faith; and*
> *(b) the settlement or compromise was not entered into with the intention to defeat the claimant's recovery against the insurer.*

6. Other comments

As recently indicated, we would also be interested in MBIE's views on how this new third party claim mechanism interfaces with the insolvency regime, in particular, how a payment by an insurer to the third party claimant would be treated under that regime and whether it could be treated as a voidable transaction. If subpart 4 was intended to apply in priority to others interests under the

	insolvency regime, we consider that this would need to be expressly provided for in the Bill similar to cl 115(2).[27]
17	*Do you have any feedback on Schedule 3 of the Bill (Information and disclosure for third party claimants)?*
	We are concerned about the extremely broad scope of the information a third party claimant can obtain as of right as proposed under cl 4 of Sch 3 of the Bill. Ready access to details such as terms of the contract, sums insured and whether cover has been exhausted would provide that claimant with a considerable and unique advantage relative to others, enabling them to adjust their claim to maximise recovery, reflecting the full extent of cover available in a way that would not otherwise be possible. In this context, it needs to be remembered that the intention is to simply put the relevant claimant in the position they would have been in had the policyholder not been insolvent. We consider that this proposal, if adopted, would put that claimant in a much better position than that. For example, this may prejudice recovery rights under claims brought by other third parties later which will rank lower in priority. We are also concerned about the distortionary impact such an entitlement may bring about. This could in turn impact loss ratios and consequentially the premiums insurers would need to charge for these insurance policies. There is also a risk that this may result in insurers reducing the capacity they are prepared to offer for these products. By way of broader context, Directors' and Officers' insurance and Professional Indemnity insurance, which are the most common insurance policies these charges would apply to, are already experiencing a period of market hardening due to recent claims trends.[28] In light of the above, drawing upon cls 4(1)(a), (b)(i), (iii) and (iv), we strong suggest that the information that can be accessed as of right be pared back to: • Confirmation of the existence of a relevant insurance policy. • Who the insurer is and whether they have disclaimed the supposed liability. • Whether there are, or have been, any proceeding between the insurer and the policyholder in respect of the supposed liability. The requirement in (iii) to disclose the contents of all documents served in the proceedings has the potential to be unduly onerous so should not be included. In the vast majority of cases, this information will be sufficient for the claimant to properly assess its position and options (e.g., to determine whether it is entitled to claim), without creating the unfair advantage or risk of distortion outlined above. If the claimant wishes to obtain additional details about the insurance, they can apply to the court under civil procedure rules as is currently the case. Specifically, the High Court Rules allow an 'intending plaintiff' to apply for an order for particular discovery before a proceeding is commenced.[29] The applicant here simply needs to show that they are entitled to claim but that it is impossible or impractical to formulate it without certain documents. We note that civil procedure rules for preliminary discovery similarly have a role to play in the equivalent regime in New South Wales.[30] These civil procedure rules provide an effective threshold and check against abuse because the claimant would be required to take active steps to obtain this information (i.e., by making an application) and as a determination of the court is involved. Additionally, for certainty, consistency with other provisions under Subpart 4 and to further limit the risk of unfair advantage this entitlement would bring about, we suggest it be made clear in either cl 93 or Sch 3 that the third party claimant's right to access information is limited to circumstances where the relevant policyholder is insolvent and not merely impecunious.

[27] Which provides that the provisions relating to the distribution of client money on the insolvency of a broker applies despite anything to the contrary in the Insolvency Act 2006 or the Companies Act 1993.
[28] https://www.iod.org.nz/resources-and-insights/research-and-analysis/under-pressure-d-and-o-insurance-in-a-hard-market/# and https://www.willistowerswatson.com/-/media/WTW/Insights/2020/09/wtw-au-professional-indemnity-market-update-september-2020.pdf?modified=20200903105955.
[29] See HCR8.20.
[30] As indicated on pages 23 and 24 of the consultation paper.

18	*Do you have any comments on not carrying over section 10(1) of the ILRA 1977?*
	We support s 10(1) not being carried over to the Bill. We agree that this provision is confusing and unhelpful. To the extent that an agency relationship is established, this is most appropriately governed by the terms of the specific contractual arrangements in place and the application of common law.
19	*Do you have any other feedback on the drafting in Part 3 of the Bill?*
	No.
Part 4: payment of monies to insurance intermediaries	
3	*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?*
	Yes. While, as below, we are supportive of increases to penalties and the proposal to charge interest when there is a failure to notify, in our view, changes proposed to this part of the regime are exclusively focussed on responding once an issue has unfolded. There should be a greater focus on ensuring the underlying arrangements are robust and efficient, accordingly facilitating greater confidence in transacting money and removing inefficiencies from the wider system. New requirements will need to be proportionate, and we recognise that reducing the delay in which premiums are transferred to insurers will reduce the risks and costs arising. *1. We support additional preventive changes being made* Additional changes should be made with more of a preventative focus, with a view to better mitigating issues before they unfold and greater alignment with equivalent requirements for other intermediaries handling client money or property. This includes: • **Reducing the period of time that insurance brokers may hold onto premiums before passing them onto insurers to a much shorter period**, such as within 20 days of the end of the month following receipt of the money from the policyholder.[31] This would align with standard commercial invoicing arrangements and reflects that, the longer the period funds are not passed on, the greater the costs for insurers in covering the resulting cash flow shortfall and an increased risk the payment does not occur at all. We can see no principled reason or policy rationale for the current approach, which is also outdated, out of step with conventional commercial practice and modern payment systems. Additionally, as expanded upon below, it is inefficient in our view. • **Giving consideration to the time period that payments must be passed on within being mandatory, ideally with no ability to extend this under a contract**. This would ensure there is consistent and efficient treatment across the intermediated insurance market. It will also provide a more level-playing field for all involved, removing the opportunity for larger parties to leverage their market power to negotiate more favourable terms. • **Introducing greater protection and control measures for funds insurance brokers hold on behalf of others.** We support brokers' ability to invest others' funds,[32] and to keep the returns, being limited to the time that is necessary and for more stringent requirements being introduced for funds held in insurance broking client accounts. In terms of premiums, this change is important because the amounts held is generally for insurance that is already in effect. It would be logical for these requirements to align with the equivalent requirements for Intermediaries of other financial products under the client money and property service rules of the FMC Act (e.g., funds to be held separately and on trust, only placed in an Aotearoa New Zealand or certain

[31] This is a longer period than we have previously advocated for (i.e., 5 days following receipt of funds) and reflects the other changes now proposed. See https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, page 24 for our previous position.

[32] Including insurers' premiums and policyholders' claim payments.

	overseas bank account and accounted, disclosed and reported on). The absence of such requirements currently is also an anomaly when compared to the rules that apply to other industries (such as the legal or accounting profession), where there are strict rules around what can be done with client funds, which recognise that these funds are being held temporarily for the ultimate benefit of others. As expanded upon below, such changes will result in a fairer allocation of risk between the insurer and the broker. *2. The arguments opposing such changes are flawed* The argument that the length of time insurance brokers can hold onto funds for is distinguishable from other scenarios because, unlike them,[33] policyholders are not negatively impacted by these funds not being passed on, ignores that: • The insurer is exposed to the risk that these payments are not passed on to them, yet are required to honour insurance cover in place notwithstanding that they have not been paid for it (and possibly may never be). While an insurer can look to recover from the insurance broker in such circumstances, doing so carries its own costs and uncertainty (e.g., it may be that the broker is insolvent and funds cannot be recovered or are only partially recovered). • The insurer incurs significant cash flow carrying costs due to premiums not being promptly passed on to them. This includes the use of money cost of having to advance levies to Government agencies such as Fire and Emergency New Zealand (**FENZ**) and Earthquake Commission levies, Goods and Services Tax and reinsurance premium, notwithstanding that they are yet to be paid. These levy payments can be very significant, with the FENZ levy on some individual commercial policies amounting to tens of thousands of dollars and exceeding the premium charged by the insurer. • Ultimately, this risk and these costs impact all customers by increasing the costs of providing insurance in New Zealand. We also challenge the argument rationalising the status quo on the basis that, if insurance brokers are unable to invest others' funds to derive income, they may have to raise commissions. This ignores the risk and costs under the status quo arrangements (as above) that imposes costs elsewhere in the system, and that insurance brokers are in the business of arranging and managing insurance arrangements on behalf of their clients not deriving income off amounts that have only been provided to them to pass on to others. If change in this area ultimately resulted in adjustments to commission rates, this would also be more transparent.
4	*Do you have any feedback on the proposed penalties for non-compliance with Part 4 of the Bill?*
	These modernised penalties seem reasonable and appropriate, particularly as they align with the treatment of others handling client money under the FMC Act. As above, greater consistency with these similar regulatory requirements is logical in our view.
5	*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?*
	Yes, it is important for insurance brokers to have a statutory duty to promptly notify insurers when payments are outstanding, given they will often have no awareness of whether premiums have been received by the policyholder (or should have been, but have not). We note, however, that the need for this is largely because intermediaries can hold premium for such a long period of time. If this is reduced to a shorter period, any notification issues would be reduced. Consistent with this, we would be supportive of interest being charged when this duty is breached. As outlined in the consultation paper, this will ensure there is a consequence of non-compliance and should further incentivises compliance as a result.

[33] Intermediaries of other financial products under the client money and property service rules of the FMC Act.

	We note that further work is required to define how this notification requirement would work in practice.
6	*Do you have any other feedback on Part 4 of the Bill?*
	No.
Part 5: contracts of life insurance	
7	*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.*
	No comment.
8	*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?*
	No comment.
9	*Do you have any feedback on the Bill's requirements relating to assignments and registrations generally?*
	No comment.
10	*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?*
	No comment.
11	*Do you have any other feedback on Part 5 of the Bill?*
	No comment.
Part 6: regulation-making powers and miscellaneous provisions	
12	*Do you have any feedback on Part 6 of the Bill?*
	While we can appreciate why MBIE may wish to reserve regulation-making powers, it will be important that these are used judiciously and in the absence of any information on how they might be used it is difficult to comment further. As outlined elsewhere, regulations made under these provisions could have impacts on insurers systems and processes, as well as their interactions with intermediaries and customers. Any proposed regulations should be consulted on and consideration given to how these fit with other requirements, with a view to ensuring all changes under this regime are implemented in an efficient, consistent and integrated way. We also note that any future use of regulation making powers could, depending on the nature of the changes, trigger a whole new implementation phase (e.g., if regulations were made on form and presentation required policies to be reworked and reissued again).
Part 7: unfair contract terms and presentation of consumer policies	
13	*Do you see any unintended consequences from removing sections 18-20, 34-39 and 42 from the MIA?*

We acknowledge the provisions proposed for repeal under the Marine Insurance Act 1908 (**MIA**), which we continue to support as we understand they are redundant (i.e., ss 34 to 39 and 42).

We also support the removal of ss 18 to 20 of the MIA, given that intention is for disclosure requirements to be now addressed under Part 2 of the Bill.

We now understand that the decision to retain ss 40 and 41 of the MIA has been made because MBIE's further investigation has determined these provisions may still be relied upon. We also understand that the proposed amendment to s 40 (incorporating s 11 of the ILRA77) preserves the status quo position, with the MIA previously being subject to the ILRA77, but this enactment is now proposed to be repealed.

14 *In relation to unfair contract terms: which option do you prefer and why?*

We support efforts being made to appropriately tailor the Unfair Contract Term (**UCT**) regime under the Fair Trading Act 1986 (**FTA**) to insurance contracts. This is necessary to reflect the unique nature of insurance contracts and ensure that the 'main subject matter' exception accurately reflects what this means for an insurance contract. In weighing up the costs and benefits of the options in this complex and nuanced area, we consider it is necessary to consider:

- How the UCT regime is best tailored to reflect the unique nature of insurance contracts?
- What is the problem trying to be solved in terms of unfair terms in insurance contracts that might exist (e.g., are these anecdotal, theoretical or specially identifiable?)
- What benefits would accrue to extending the UCT regime to further aspects of insurance contracts and what risks would this bring?
- What impact would each option have on the certainty of insurance contracts in Aotearoa New Zealand, and what consequences could flow for insurers and policyholders from the reduced certainty resulting from extending the regime?

1. We support Option B

Having considered and discussed the above at length with our members, we support Option B as set out in clause 172 of the Bill. That is, a broader definition of the 'main subject matter' exception, encapsulating terms in insurance contracts that define the risk accepted by the insurer and the insurer's liability, including ones that exclude or limit liability in certain circumstances, ones that identify the event/subject/risk insured, the specific sum insured and excesses/deductibles.

Overall, the implementation of Option B would still represent a material extension to the current scope of the UCT regime for insurance contracts by widening the scope of coverage for consumer contracts and bringing in commercial ('small trade') contracts with the same widened scope (unless otherwise altered, which we comment on further below). Of the two options it would represent a more appropriate balance between ensuring there is sufficient contractual certainty while extending the scope of the UCT regime. Also, compared with Option A, this option would reduce the likelihood of significant unintended consequences.

This position also reflects that, as indicated in our earlier submission:[34]

- The transfer of risk from policyholder to insurer underlining insurance contracts (and the terms of contracts which define these) warrant a different relationship than that of the standard seller of goods and services and the customer. Insurance contracts can be distinguished from many other types of contracts in that the contract and the product itself are, in effect, one and the same.
- Another critical difference that flows from the above is that whereas the 'main subject matter' in another type of contract is the particular product or service being purchased upfront, properly construed in an insurance contract the 'main subject matter' is made up by the bundle of terms (including limitations and exclusions) that define the particular circumstances that may trigger a

[34] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, pages 13 and 14.

promise to pay at some time in the future. This reflects that whether and how these may specifically play out is uncertain. To restrict matters to the subject of insurance (i.e., event, subject or risk insured) and amount insured for (i.e., sum insured and excess) as per Option A would be unduly restrictive, simplistic and ignores other key elements (i.e., limitations and exclusions) that together form the overall risk transfer that is explicitly considered by insurers in determining the price they charge. Under that option, the terms of an insurance contract setting out the risks covered would be open for review, with the insurer potentially required to justify why they are necessary to protect their legitimate interests and the risk of them being found not to be. This goes to the commercial bargain at the heart of the insurance contract and accordingly is more impactful than what is applied to other sectors.

- If an insurer cannot with certainty and confidence define/ring-fence a risk and rely upon this, (because key terms that define the risk transfer can be challenged), insurers (and reinsurers behind them) could end up paying out claims in circumstances which were never intended. This could also create risks in relation to reinsurance cover and would generally increase the risk and uncertainty of providing insurance to Aotearoa New Zealand consumer and non-consumer policyholders, which would likely be reflected in an uplift in pricing. This uncertainty arises from the increased possibility of this occurring relative to the status quo, even if it is perceived unlikely that such terms would be found to be unfair. The ability of insurers to offer cover ultimately depends on their ability to attract capital from investors and reinsurers.

Insurers tailor products to meet a particular market demand, in line with their own risk appetites. One way of tailoring products is to exclude or limit identified risks. For example, with commercial insurance, this can play a key role in tailoring insurance to meet the requirements of business customers in certain segments, while also working within the risk appetite of insurers and reinsurers.

Again, if an insured risk cannot accurately be delineated and priced, including that risk within the insurance contract would, all other things being equal, raise the cost of that contract. Adopting Option A could result in more conservative underwriting and/or pricing given concerns around the applicability of certain clauses being called into questions, which could in turn have impacts on the availability and affordability of insurance. Alternatively, in some cases, an insurer might not offer insurance at all due to this issue. In some circumstances, for example, an insurer may only be willing to underwrite a risk because particular associated risks are excluded. If an insurer cannot with certainty rely on these exclusions, then a likely outcome is that the insurer will not be willing to take on that risk at all.

We are particularly wary of the potential unintended consequences of adopting Option A from an end user/customer perspective (i.e., in terms of the affordability and availability of insurance), which we consider runs the risk of playing out in a similar way to how recent changes to consumer credit law negatively impacted upon consumers access to lending.

It also needs to be reiterated that Option B still represents a material change to the status-quo - substantively extending the coverage of the UCT regime to insurance contracts and requiring a range of terms within insurance contracts to be reviewed and potentially updated. This includes reviewing terms related to matters currently excluded from the UCT regime (e.g., terms describing the basis on which claims may be settled (ss 46L(4)(d)). Such clauses are a key tool insurers use to appropriately manage their potential liabilities, so there is certainty about their exposures and that the provision of insurance remain sustainable.

In this context, it is also worth reiterating that the relevant Regulatory Impact Statement from 2019 which,[35] in evaluating this matter, concluded:

> *The evidence base for the problem of unfair contract terms in insurance is weakest, because it is largely based on anecdotal evidence of contract terms which may or may not be unfair in the circumstances in question. As the regulator has not yet taken any enforcement action on unfair contract terms in insurance contracts, it is difficult to know the extent of the problem and the*

[35] https://www.mbie.govt.nz/dmsdocument/7480-impact-statement-insurance-contract-law-reforms-proactiverelease-pdf, page 3.

harm. We have not sought legal advice to go through insurance contracts to identify potentially unfair contract terms.

More broadly it needs to be acknowledged that this is an area that is largely untested and is best assessed at a wider system level. The UCT regime should also not be assumed to equate to a particular grievance a customer may have (which may have no bearing on a particular contractual term) or terms that customers simply do not like. For the avoidance of doubt, whether a particular term in an insurance contract might be determined to be 'unfair' under the UCT regime will ultimately turn on the drafting of the contract, the relevant context and the application of the law.

We also note that the original consultation and Regulatory Impact Assessment in 2019 related solely to consumer insurance contracts and that also applying the UCT regime in a very broad way to non-consumer insurance contracts, as is now proposed, has a different set of implications, uncertainties and risks. For example, some commercial contracts include terms based on long standing international precedents and being required to diverge from these accordingly may be challenging. It may also be necessary for insurers to use certain terms in order to secure reinsurance cover for certain risks.

2. Responding to opposing views

Responding to arguments against the adoption of the broader approach (drawing upon comments made in the consultation paper in this respect):

- We note that the insurers' ability to rely upon the defence under s 46L(1)(b) of the FTA would not provide sufficient certainty and protection should the narrower option (Option A) be selected and a broader set of terms run the risk of not being able to be relied upon. As acknowledged in the consultation paper, we would also expect that this could negatively impact insurers' ability to get reinsurance support. What exacerbates the risks to insurers is the potential for an important term to be determined to be unfair after, for example, a major event resulting in insurer(s) being required to pay claims they had not expected or provisioned for.
- While a policyholder may not be able to negotiate terms with the relevant insurer, it is possible that there may be other options in the market that customers can choose from with more generous terms. A customer is generally able to easily research and compare options (and applicable terms) online. An intermediary such as an independent insurance broker could also serve a valuable function in this context, having access to options from a range of insurers and negotiating their own standard form contracts to obtain the best terms possible on behalf of their clients.

It should also be remembered that policyholders have the benefit of proposed cls 68 and 71 under the Bill. Putting the proposed treatment of claims-made policies to one side, in simple terms cl 68 provides that an insurer cannot rely upon a term with a time limit for notifying a claim or commencing proceedings unless it has suffered prejudice. Briefly, cl 71 provides that, subject to a limited set of proposed more broadly statistically relevant exclusions, an insurer cannot rely upon an exclusion that relates to increased risk if those excluded circumstances were not causative of loss in the particular circumstances. These statutory overlays are unique to insurance contracts and already provide policyholders with strong protections that also need to be considered.

There are also a number of clauses that are unique to insurance contracts, which have been around a long time, that the courts have interpreted in a particular way to protect customers. For example:

- Insurance policies commonly contain a 'reasonable care' clause. These clauses typically require customers to take reasonable care to prevent loss or damage and comply with all laws. Despite the clear wording of these clauses, the courts generally interpret such clauses as requiring the insured not to cause damage intentionally or recklessly or not to fail deliberately or recklessly to comply with the law.
- In the *Sleight* case,[36] the court held that certain obligations under the CGA applied to the insurer to ensure repairs were carried out with reasonable care and skill, notwithstanding that the policy

[36] *Sleight v Beckia Holdings Ltd* [2020] NZHC 2851.

was a 'to pay' policy, with repairs under it to be undertaken by a builder engaged by the customer and not the insurer.

The courts also apply the 'contra proferentem' rule of interpretation, under which any ambiguity in a clause is interpreted against the interests of the party that drafted it (i.e., the insurer). This is particularly relevant to exclusion clauses, where the courts will interpret the exclusion in favour of the insurance customer in cases of uncertainty.

Furthermore, while we acknowledge that something like Option A has been adopted in Australia, we note that that regime has only recently come into force and accordingly it is not possible to evaluate its wider effects at this stage. It is also needs to be acknowledged that, unlike the position in Australia, insurance policies in Aotearoa New Zealand are generally written on an 'all-risks' basis, with all claims within broadly defined parameters covered unless expressly excluded. This provides generous and transparent coverage of perils for Aotearoa New Zealand policyholders. This contrasts with a 'Defined Perils' policy common in Australia (and some other jurisdictions), where a policy provides cover only if the loss is caused by one of the perils expressly listed. This approach can lead to considerably longer and more complex policies (and potentially less cover) and means comparisons with the effects from the UCT regime in Australia need to be considered very carefully. The increased uncertainty that would result by making exclusions subject to the UCT regime under Option A could, for example, encourage insurers in Aotearoa New Zealand to move away from all risks policies.

Finally, we consider that Option B more closely aligns with the EU and UK approach and so dispute the characterisation that the narrow option (Option A) aligns with the approach in the UK. The regimes there provide that terms describing the insured risk and the insurer's liability should be regarded as the 'main subject matter'. The relevant Recital 19 of the EU Council Directive 93/13/EEC specifically indicates that clearly defined restrictions to cover are not subject to assessment for fairness because they will have been "taken into account in calculating the premium' to be paid.[37]

3. Other comments

If Option B is progressed as proposed, further work would need to be undertaken to more specifically define the types of exclusion or limitation terms that would be subject to the UCT regime. We consider that this is a matter best covered off in detailed guidance developed in close collaboration with industry.

In some of our feedback above we have referred to 'policyholders' or 'customers' in generic terms, reflective of the fact that the UCT regime will also apply to 'small trade' standard form contracts as well as consumer ones and this is likely to include most standard form commercial insurance contracts. We provide feedback on the inappropriateness of this extension (and specifically the relevant $250,000 annual value threshold) under the 'Other Comments' heading at the end of this section.

As earlier indicated, a number of insurance brokers have developed their own policy wordings that insurers then underwrite but may have limited input into. Intermediaries' responsibilities in such circumstances should also be reflected in the UCT regime in our view.

15	*Do you have any feedback on the drafting of either of the options?*
	No, although see comments directly above (under heading 3.).
16	*Do you have any comments on the obligation that consumer insurance contracts be worded and presented in a clear, concise and effective manner?*

[37] See the preamble in the EU Council Directive 93/13/EEC implemented in the UK in regulation referred to in the applicable FCA guidance, https://www.fca.org.uk/publication/undertakings/fsa-undertaking-lg-insurance.pdf.

As earlier indicated, ICNZ's FIC already provides for this requirement in substance,[38] and most insurers have moved towards ensuring that their consumer insurance policies, and all communications associated with them, are clear, concise and easy to understand. However, we acknowledge this requirement may be relevant to others who are yet to complete this work.

We support the alignment between this requirement and s 61 of the FMC Act and the fact that, under the proposed s 447A(3), material provided alongside the contract is to taken into account in assessing whether the insurer has met this requirement.

Consideration needs to be given to the role of broker policy wordings

As currently drafted, the proposed presentation and form requirements for consumer insurance contracts under cl 179 of the Bill apply only to insurers. However, insurers will often have no control over or input into broker policy wordings, except for the possibility of amending the policy in a particular set of circumstances via endorsements. While insurers ultimately underwrite insurance contracts with broker wordings, these broker-led documents are often presented to insurers on a 'take it or leave it' basis and the insurer's ability to influence how they are presented and formatted is very limited.[39] Another complication is that broker wordings, while developed by one broker, are often underwritten by multiple insurers. Given the proactive nature of these obligations and that brokers are already subject to oversight by the FMA, there are no obvious barriers to ensuring that the authors of a policy, whether insurer, broker or other intermediary are subject to a requirement for that policy wording to be worded in a clear, concise and effective manner.

The requirements set out in cl 179 should accordingly be amended to apply to the party responsible for the wording of the policy. This will ensure that the broker, or the other intermediary, policy wordings are held to the same standard and competitive forces do not detract from good customer outcomes being achieved in these respects.

Given the above, we recommend that cls 447, 447A and 447B of the FMC Act be amended as follows (i.e., to specifically provide that, where a policy wording has been developed by a licensed Financial Advice Provider that is not a licensed insurer, then it is that entity, rather than the licensed insurer(s) underwriting the policy, that would be responsible for ensuring the contract is worded and presented in clear, concise, and effective manner):

> ***447 When subpart applies and definition for the purpose of subpart***
>
> *…*
>
> *(2) For the purposes of this subpart,* ***person responsible for contract of insurance*** *means whichever of the following persons was most responsible for the drafting of the contract of insurance:*
>
> *(a) licensed insurer; or*
>
> *(b) financial advice provider (within the meaning of section 6 of the FMCA) that is not a licensed insurer.*
>
> ***447A Person responsible for contract of insurance must ensure contract is worded and presented in clear, concise, and effective manner***
>
> *(1) The person responsible for a contract of insurance to which this subpart applies must ensure that the contract is worded and presented in a clear, concise, and effective manner.*
>
> *(2) The person responsible for the contract of insurance must, when performing the duty under subsection (1), have regard to whether the wording and presentation of the*

[38] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, page 15 referring to paragraph 9 of ICNZ's Fair Insurance Code, which states that insurers will "*give you access to your policy wording, which sets out in plain English what is insured, what is not insured and what your obligations are*."

[39] Further details about broker wordings are included in submission on CoFI last year, https://www.icnz.org.nz/fileadmin/user_upload/ICNZ_Submission_on_COFI_-_Underlining_Regulations_and_treatment_of_intermediaries_180621.pdf, page 35.

contract assists consumers to understand their rights and obligations under the contract.

(3) All other information that is or will be provided to policyholders (whether by the person responsible for contract of insurance or another person) to ensure that they are reasonably aware of the implications of entering into contracts of insurance with the insurer may be taken into account in determining whether the person responsible for contract of insurance has complied with this section.

…

447B Contract of insurance must comply with prescribed requirements relating to form and presentation

The person responsible for contract of insurance under a contract of insurance to which this subpart applies must ensure that the contract complies with all requirements of the regulations relating to the form and presentation of the contract.

17	*Do you have any comments on the regulation-making powers in clause 184?*
	See responses to questions 35 and 36 below.
18	*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.*
	As above, we strongly support policy wordings being presented in a clear, concise and effective manner and accordingly support introducing requirements for this in relation to consumer policies. We also endorse steps being taken to enhance consumer understanding in broader terms including, in appropriate cases, providing up-front navigational aids and explanatory notes. A number of general insurers have moved in this direction in recent years, in conjunction with plain English policy wordings, their website content and other customer facing materials. We have also seen more use of videos, infographics and diagrams to explain things. *1. Presentation requirements do not need to be the subject of regulation* That said, as outlined in our earlier submission as in this review,[40] we continue to question whether it is necessary or appropriate for such presentation requirements to be the subject of regulations. We also do not support presentation requirements for matters such as font size and format. We are not aware of any problems in this respect, and such requirements would be unduly prescriptive and relate to matters which insurers are best placed to determine themselves, as they are already doing. It is in insurers' interests for their documents to be easy to read and navigate and, as described above, they have worked hard to ensure that the form and presentation of their insurance contracts are customer friendly. Insurers' obligations under (amongst other things) the FIC and FMC Act (including fair conduct requirements regarding the design, monitoring of products and communicating with customers under the incoming CoFI regime), also ensure the right consumer friendly approach is adopted in these respects, in much more principled and flexible terms than as proposed here. The requirements proposed here also tend to assume a focus on old-fashioned hard-copy documentation. As mentioned in our feedback on proposed presentation requirements regarding fair conduct programmes last year,[41] such requirements could be problematic given information is now primarily presented in scalable digital form. Helpfully, documents in this format are also searchable, may contain hyperlinks to other parts and can be zoomed in on. We expect customer's ability to interact with electronic documents will continue to improve and evolve.

[40] https://www.icnz.org.nz/fileadmin/Assets/Submissions/ICNZ_submission_on_ICLR_Options_Paper_050719.pdf, pages 14 to 16.
[41] https://www.icnz.org.nz/fileadmin/user_upload/ICNZ_Submission_on_COFI_-_Underlining_Regulations_and_treatment_of_intermediaries_180621.pdf, page28.

There is also a tension between providing helpful information and increasing the size/manageability of the document. Mandatory statements introduced by regulations may ultimately result in things being misleading or more confusing than helpful.

2. *To the extent regulations are introduced we support a less prescriptive approach*

To the extent that these regulations were to progress, we would endorse the less prescriptive approach proposed and support the intention not to provide detailed requirements on how each aspect of an insurance contract is to be presented or prescribe standard forms for key fact sheets or summaries. As above, insurers are best placed to make these assessments and it is important that there is flexibility to do so and to enable innovation into the future.

3. Any such requirements will need to be thoroughly worked through

As any presentation requirements will likely require insurers to review all their existing consumer-facing materials (and potentially go through the expense and time of creating new content and processes), the specific requirements proposed should be robustly tested with consumers in the first instance to determine their usefulness. These should also be tested with industry to assess proportionality (i.e., costs versus benefits) and workability. A substantial period would be needed for implementation once requirements were finalised. See our response to question 37 for more details in this regard.

19 *Do you think regulations specifying publication requirements for insurers would help consumers to make decisions about insurance products? If so, please explain.*

While we note that again only preliminary feedback is sought on this matter at this stage, it needs to be acknowledged that it is unclear what problem the introduction of such publication requirements would solve, and none is clearly identified in the consultation paper. As a first step, this should be articulated, with reference to empirical evidence. In assessing these matters, again it would be important to, at an initial stage, test any proposals with the public to get an understanding from them about how outputs might be used and how useful they would find them.

1. The merits of this proposal are unclear

Another important consideration that needs to be worked through in this context is proportionality, reflecting upon the benefits relative to the costs involved:

- **In terms of any purported benefits of such requirements**, one would also want to avoid bombarding consumers with additional information which may only confuse matters, not address underlying issues, and risk oversimplifying elements or distract them from other important considerations in weighing up their insurance options (e.g., the scope of cover and service).
- **On costs,** it is important to understand that a considerable amount of work would be required to define publication requirements including the appropriate contextual information. There would also be considerable costs required in implementing the required system and process changes.

In terms of complaints, ICNZ is already working with its members to expand upon existing complaints reporting, and we are happy to discuss this work in more detail. In our view, it is preferable for such matters to be progressed proactively at an industry level rather than more inflexibly via regulation, with a focus on individual insurer requirements, given the complexities involved (see more below) and the desirability of ensuring a consistent and joined up approach is adopted in all technical respects.

It is unclear how useful requiring an insurer to publish any information about contract cancellations and disputes they are, or have been involved in, could ever be, given the wide range of circumstances and explanations that may sit behind them, which would be extremely difficult to systematically contextualise. Serious privacy and confidentiality issues would also have to be overcome.

Stepping back, we do not understand how these publication proposals logically fit within the wider context of Insurance Contract Law reforms. To the extent appropriate, such matters would seem to be better addressed in the context of the CoFI regime, given its broader focus on fair conduct obligations across financial institutions (including in so far as any particular consumer-facing

communications are concerned) or the Financial Advice regime in so far as intermediaries are also involved.

2. If publication requirements were progressed

If, notwithstanding the above, any publication requirements in regulation were to be progressed, officials would need to work closely with the insurance industry to ensure they are workable. Ensuring there is a clear, precise and consistent understanding of the particular metrics to be published will be particularly important in this respect. For example, the regulations would need to clearly define what a 'complaint' or 'dispute' is, so that any information disclosed is consistent and an insurer is not penalised from reporting on policyholder interactions as a complaint, which another insurer treats differently. Regard would also need to be had to the role intermediaries play in this context including, in so far as complaints/disputes relate to them (as opposed to the insurer), or issues arise between them and the insurer, and any overlapping complaints reporting responsibilities.

So as not to mislead or be unfair, it will be critical for information to be able to be clearly contextualised (e.g., by comparing complaints/disputes relative to market share, proportion of claims overturned by external dispute resolution scheme, percentage of complaints versus customer claims). Information should be presented based on rates or percentages rather than absolute numbers. If relevant and workable, regard could also be had to the scale of the claim event, complexity of the matter and specific service expectations.

3. Other comments

The power to make regulations requiring the disclosure of specified information (s 447C of the FMC Act, added by cl 179 of the Bill) should expressly exclude the power to require an insurer to disclose private or commercially sensitive information or trade secrets.

Timing and transitional arrangements

20 *Do you have any initial feedback on when the Bill's provisions should come into effect?*

We support the approach to commencement proposed under the Bill and as described in the consultation paper. Providing for commencement by Order(s) In Council provides flexibility to make the appropriate assessment about implementation once all key components under this regime (including the legislation and regulations) are finalised.

One cannot overstate the vast scale of change required to implement changes under this Bill. We understand that the work required to:

- review, amend and deploy policy wordings to meet requirements (including potentially reviewing the overarching product design and pricing they relate to) and related materials, and
- update systems and processes to meet new disclosure, notification and potential complaint/dispute reporting requirements, will be particularly resource intensive and require extensive staff training.

Implementing these changes will also take a considerable period of time, with further complications arising when intermediaries are involved, and distribution arrangements need to be updated and their own systems and processes modified. A lengthy implementation period would also better support insurers to transition to the new disclosure requirements, noting their retrospective application (see cls 19 and 37).

While it is not possible to confidently comment on the appropriate lead time to commencement at this juncture (given a number of significant proposals are still be worked through and confirmed), our members' preliminary view is that a period of at least 2 years from the date that all requirements (including related regulations and guidance) are finalised is likely to be appropriate.

As expanded upon elsewhere in our feedback, it will be important for all the required legislative and regulatory changes to be finalised together in an integrated package with one overarching timeframe for implementation. This will ensure the required work can be undertaken in one comprehensive exercise, with any connections identified and worked through together. Insurers would not want to

	find themselves in the position of needing to make multiple consecutive changes to policies or processes. We also endorse the approach proposed to consult with industry and to consider the timing of, sequencing and potential alignment with, the implementation of significant regulatory changes, in determining the appropriate commencement date(s). As well as the CoFI regime noted in the consultation paper, over the next few years the insurance industry will at least be confronted with having to make significant changes for: (1) the new IFRS 17 Account Standard; (2) Natural Hazard Insurance Bill (which replaces the EQC Act); (3) Climate-related Financial Disclosure regime; (4) changes to the FENZ levy regime; (5) changes to the Insurance Supervision Prudential regime and (6) new interim and then final Solvency Standards.[42] Particular regard should be had for opportunities for alignment with changes under the Natural Hazard Insurance Bill and FENZ levy regime as, like the changes under this Bill, these will also bearing on the content and structure of insurance products and the systems and processes that support them.
21	*Do you have any feedback on the transitional provisions in Schedules 1 or 4, or other proposed transitional arrangements?*
	No.
Schedule 5: amendments to other Acts	
22	*Do you have any feedback on Schedule 5 of the Bill?*
	The amendment inserted after s 37(3) for the Contract and Commercial Law Act 2017 should be numbered (4) not (3).

Other comments

	1. Concerns about the extension of the UCT regime to 'small trade' standard form insurance contracts <u>A. The proposed treatment</u> The Bill leaves the extension of the UCT regime to standard form 'small trade' to insurance contracts from 1 April 2025 (or earlier as stipulated by Order(s) in Council) unchanged. From the relevant commencement date, a non-consumer insurance contract will be captured under the UCT regime, if it is a 'small trade' contract under ss 26B and 26E of the FTA. That is a standard form contract where each of the parties are engaged in trade, that is not a consumer contract, and that does not form part of a trading relationship that exceeds the annual value threshold of $250,000 when the relationship first arises. <u>B. The problems with this approach</u> We accept that, in delaying the extension of the UCT regime to standard form 'small trade' insurance contracts, the Government's earlier stated purpose was to enable these new protections to be rolled out in the insurance industry in a co-ordinated fashion with the outcomes of this review, so that insurers would not have to review their contracts twice.[43] However, it needs to be acknowledged that, since those

[42] Further details about these and other reforms the insurance industry is confronted with over the next years are set out in our submission late last year on FMA funding and levies, https://www.icnz.org.nz/fileadmin/user_upload/ICNZ_submission_on_FMA_funding_and_levies_051121.pdf, page 4 and 5.
[43] See the Explanatory Note to Schedule 1AA of Supplementary Order Paper 39, https://www.legislation.govt.nz/sop/government/2021/0039/latest/096be8ed81ad520f.pdf.

policy decisions were made, the nature of the underlying UCT regime as it relates to insurance contracts has now changed fundamentally (i.e.. with the removal of the unique treatment of insurance contracts under s 46L(4) of the FTA and the introduction of either Option A or Option B instead) such that this matter should be revisited, given the broader application of the UCT regime to the insurance contracts concerned.

As earlier indicated to policy officials, the $250,000 annual value threshold is far too high for insurance contracts.[44] In an insurance context, this figure refers to insurance premiums, which would capture an insurance programme of a large commercial client, which is not the intention of this reform. A commercial insurance contract involving a premium of $250,000 would capture underwriting tens of millions of dollars of business liabilities. This threshold would include businesses operating from multiple sites, with large factories or other commercial properties, complex vertical integration and ownership structures and extremely large fleets of vehicles and volumes of stock. These are not unsophisticated or vulnerable clients, but ones who have significant bargaining power and expertise. It is also possible that such entities may also have their own in-house insurance personnel.

These clients will also have multiple protections because, in addition to the conduct obligations that fall on insurers (including under the incoming CoFI regime), insurance brokers are subject to their own independent conduct obligations under the Financial Advice regime enforced by the Financial Market Authority's (**FMA**).

Adopting this $250,000 threshold for insurance will mean that insurers will need to go through the costly and resource intensive task of likely reviewing all their standard form commercial policy wordings for compliance with the UCT regime - there being no meaningful distinction in product offerings for commercial insurance clients below and above a $250,000 premium threshold.

In some cases, our members may have over one hundred standard form commercial insurance contracts or more to review, with some wording being 40+ pages.

C. The suggested solution to this issue

We suggest a $10,000 annual value threshold would be much more appropriate in the insurance context. This would reflect much better what is 'small trade' in an insurance context. This threshold aligns with feedback previously provided to us by members about the level of annual premiums their 'small trade' customers typically pay up to with an appropriate buffer.

This lower threshold would much better reflect the intention of the extension of the UCT to 'small trade' contracts It would also mean that, in the event an insurer had different product offerings for small and larger commercial customers aligned with this $10,000 threshold, its review of the relevant policy wordings and the costs and resourcing required to that end, would be significantly reduced.

To reflect this change, we suggest that s 26D of the FTA be amended as follows:

> ***26D Small trade contracts: trading relationship, annual value threshold, and other definitions***
>
> *(1) This section applies for the purposes of section 26C(1)(c).*
> *(2) **Trading relationship**, in relation to a contract that is not a contract of insurance, means a relationship consisting of—*
> *(a) that contract; and*
> *(b) any other contract (whether current or prospective) between the same parties on the same or substantially similar terms.*
> *(3) **Trading relationship**, in relation to a contract that is a contract of insurance, means a relationship consisting of—*
> *(c) that contract; and*

(d) *any other contract of insurance (whether current or prospective) between or for the benefit of the same parties.*

(4) *A trading relationship—*

(a) ***first arises*** *when the first or only contract of the relationship is entered into; and*

(b) ***exceeds the annual value threshold when the relationship first arises*** *if,*

(i) *in relation to a contract that is not a contract of insurance, at that time,—*

A *it includes a transparent term or transparent terms providing for consideration (including GST, if applicable) of $250,000 or more to be paid under it, in relation to any annual period, for the goods, services, or interest in land concerned; or*

B *consideration (including GST, if applicable) worth $250,000 or more is more likely than not to become payable under the relationship, in relation to any annual period, for the goods, services, or interest in land concerned; or*

(ii) *in relation to a contract that is a contract of insurance, at that time,—*

A *it includes a transparent term or transparent terms providing for consideration (including GST, if applicable) of $10,000 or more to be paid under it, in relation to any annual period; or*

B *consideration (including GST, if applicable) worth $10,000 or more is more likely than not to become payable under the relationship, in relation to any annual period.*

A new example 4 could also be inserted as follows:

> ***Example 4***
> *G is in trade and on 1 December 2022 enters into Professional Indemnity and Material Damage contracts of insurance with insurer H for an annual premium of $10,000 and $5,000 respectively. Neither contract of insurance is a small trade contract because the annual value threshold is exceeded when the trading relationship first arises.*

2. The commencement date for the extension of the UCT regime to 'small trade' standard form insurance contracts may need to be extended

Putting the comments direct above to one side, we are concerned that the current commencement date for the extension of the UCT regime to 'small trade' standard form insurance contracts (i.e., 1 April 2025 (or earlier as stipulated by Order(s) in Council) may be problematic. This commencement was set on the assumption that this Bill would make changes to the treatment of insurance contracts beforehand, which may not be the case. While there is plenty of time for this Bill to be enacted before then, this commencement may need to be consequentially amended to align with the commencement of the Bill. It would be very disruptive for insurers if this change came into effect on a different date to the changes under the Bill.

3. Co-ordinating FMA's new enforcement function under the UCT regime

As noted in the consultation paper, the intention is for the FMA to share responsibility for enforcing UCT provisions for the financial services sector with the Commerce Commission under the omnibus Regulatory Systems Amendment Bill planned to be introduced in 2022. The FMA is anticipated to be primarily responsibility for enforcement in contracts for financial services and financial advice products (other than in relation to consumer credit contracts).

As outlined in our submission to the MBIE and FMA in late 2022 on FMA funding and levies, [45] having multiple regulators police this area runs the risk of different interpretations of requirements and regulatory approaches leading to unhelpful confusion and complexity. To avoid this, effective co-ordination and planning between agencies will be critical. This will also ultimately save costs for regulators and the regulated population.

To reflect the demarcation of responsibilities and the required co-ordination, an amendment could be made to the existing Memorandum of Understanding (**MOU**) between the FMA and the Commerce Commission. To date we understand that arrangements under this MOU have worked well and we

[45] https://www.icnz.org.nz/fileadmin/user_upload/ICNZ_submission_on_FMA_funding_and_levies_051121.pdf, pages 7 and 18.

are not aware of any duplicating actions for misleading/deceptive conduct being undertaken by the FMA and the Commerce Commission in respect of the fair dealing provisions under the FMC Act these arrangements relates to.

4. Guidance is required on FMA's expanded remit

This Bill expands the FMA's remit in a number of entirely new areas. It will be important that the parameters of this remit are clearly communicated and understood and connections with responsibilities of other regulators, particularly the Reserve Bank of New Zealand and the Commerce Commission (noting the comments directly above), spelled out. It needs to be specifically clear to the industry which regulator to go to for which matters, understand when and how various regulatory functions may overlap or merge, and ideally not have to report/notify multiple regulators about the same matter. This is another area where having guidance would assist.

5. Inconsistent definitions and scopes

There are related, but inconsistent, definitions and scopes within the Bill and between Bill and other regimes it connects with, including the FTA and incoming CoFI Bill, which also amends the FMC Act. These include:

- **Different definitions related to intermediaries**, including 'specified intermediary', 'insurance intermediary' and 'broker' under the Bill, 'intermediary' under the CoFI Bill and 'agents' in common law.
- **Inconsistent definitions of 'consumer insurance contract' in the Bill and CoFI**. The treatment of group insurance under the Bill and CoFI is different - whereas group insurance is included in the definition of a 'consumer insurance contract' in the former it is not in the latter.[46] As some provisions under Part 7 of the Bill amend parts of FMC Act also amended by CoFI, it is the CoFI definition not the definition in the Bill that apply to them.
- **Different scopes of the UCT regime under the FTA** (consumer and small trade standard form contracts) and disclosure requirements under Part 2 of the Bill (consumer versus non-consumer insurance contracts).

As above, in some places we recognise there is a place for different definitions in different contexts. While in others we recommended changes that would result in greater consistency. In any case, it would assist if detailed guidance was developed to highlight these differences, how they are intended to interact and to help clarify the relevant regulatory expectations for all sector participants in these respects.

6. Recognising intermediaries' role in fulfilling other notification requirements

Consistent with our answers to questions 7 and 13 above, we consider that explicit regard should be had in the Bill to the role of intermediaries in fulfilling other notification requirements under the regime (e.g., under cls 73 and 74 regarding the pro rata condition of average).

[46] Compare cl 446S(2) of the CoFI Bill with subpart 1 and 2 of Part 2 of the Bill.