

11 April 2024

Hon Judith Collins KC, Attorney-General

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

Purpose

1. We have considered whether the Insurance Contracts Bill (the Bill), a member's Bill in the name of Hon Dr Duncan Webb MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 25(c) (right to be presumed innocent until proved guilty). Our analysis is set out below.

The Bill

3. The overarching purpose of the Bill is to promote an effective, fair and transparent market for insurance products, and to ensure that the interests of consumers are appropriately recognised and protected.
4. The Bill consolidates statutes and key aspects of the common law relating to insurance. It:
 - a. largely removes current exceptions under the Fair Trading Act 1986 that prevent certain terms in insurance contracts from being found unfair;
 - b. codifies that insurance contracts must be "of utmost good faith" and makes it clear that remedies exist for breach of duty, including in the handling of claims;
 - c. requires consumer insurance policies to be clear and in plain language;
 - d. addresses some long-standing technical issues with insurance law, including:
 - i. rules around information provided by policy holders to insurance intermediaries;
 - ii. the operation of exclusions which are not causative of loss;
 - iii. the ability to claim against an insurer when the policy holder is insolvent;
 - iv. rules around time limits for making a claim under an insurance policy;
 - v. various rules around life insurance policies.
5. The Bill also creates some regulation-making powers, such as the power to provide a form of words which will be deemed adequate where the insurer is required to notify some matter, or the ability to clarify whether certain insurance contracts are consumer contracts or not.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

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

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

12. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proved guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt and that the state must bear the burden of proof.
13. The Bill provides that it is an offence for a company to:
 - a. issue a form of proposal for insurance that contains an application for shares in the company; or
 - b. allot shares to a person who makes a proposal for insurance without first receiving an application for shares that is contained in a document separate from the proposal for insurance.

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

14. If a company contravenes these prohibitions, they commit an offence and are liable on conviction to a fine not exceeding \$50,000.²
15. The Bill also provides that it is an offence for a person to claim money on the death of a minor under the age of 16 years under a life policy. If a person contravenes this prohibition, they are liable on conviction to a fine not exceeding \$20,000.³
16. The qualifying threshold of these offences lacks *mens rea* – the intention or knowledge of wrongdoing. By requiring defendants to demonstrate a reasonable excuse or vindicate their own innocence, the Bill creates a strict liability that *prima facie* limits s 25(c) of the Bill of Rights Act.
17. Strict liability offences have been found to be more likely to be justified against s 5 of the Bill of Rights Act where:
 - a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
 - b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - c. the penalty for the offence is proportionate to the Bill's objective.
18. On balance, we consider that the strict liability offences in the Bill are justified. These offences occur in the insurance industry which is highly regulated. Defendants are well placed to justify their non-compliance with these provisions. The maximum penalties proposed by the Bill are typical for strict liability offences within highly regulated industries and are therefore proportionate to the Bill's objective.

Conclusion

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



Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

² Under clause 96 of the Bill.

³ Under clause 151(2)(a) of the Bill.