New Zealand Law Society
Te Kāhui Ture o Aotearoa

Natural Hazards Insurance Bill

13/05/2022

Natural Hazards Insurance Bill 2022

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Natural Hazards Insurance Bill (**Bill**).

1.2 The Bill seeks to replace the Earthquake Commission Act 1993 and change the name of the Earthquake Commission to Toka Tū Ake – Natural Hazards Commission (**Commission**). It also seeks to clarify the role of the Commission and enhance the durability and flexibility of the legislation.

1.3 This submission has been prepared with input from the Law Society's Public and Administrative Law Committee.[1]

1.4 The Law Society does not wish to be heard.

2 Purpose of Act, and functions and objectives of Commission (clauses 3, 25 & 26)

2.1 Clause 3(c) states that a purpose of the Act is to enable the Commission to facilitate the purchase of reinsurance or other risk transfer products in respect of "other Crown risks". The Commission also appears to have a function (under clause 125(2)(d)) and an objective (under clause 126(h)) to facilitate the purchase of risk transfer products in respect of "other Crown risks".

2.2 The Bill does not clarify what these "other Crown risks" are, and whether they are distinct from the risks associated with the Commission's primary functions relating to natural hazards. The Public Inquiry into the Earthquake Commission recommended that the Commission's role be clarified in the Act.[2] We therefore invite the select committee to consider whether the purpose of the Act, and the functions and objectives of the Commission, should be clarified by defining the term "other Crown risks" (although we note that the current drafting would enable ancillary functions to be added and retain flexibility as to the Commission's role).

3 Disclosure to persons with proper interest (clause 140)

3.1 Clause 140 allows the Commission to disclose information to:

(a) the Crown, a Crown entity or an Office of Parliament (clause 140(a)), *or*

(b) a recipient who has a "proper interest" in receiving the information for performing their functions or exercising their powers or for law enforcement purposes (clause 140(b)).

3.2 Clause 140(a) does not outline the circumstances in which information held by the Commission can be disclosed to the Crown, another Crown entity or Office of Parliament.

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[1] More information about this Committee is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/public-and-administrative-law-committee/.

[2] Report of the Public Inquiry into the Earthquake Commission (Public Inquiry into the Earthquake Commission, March 2020).

This clause is, in our view, overbroad and appears to go much further than what could be disclosed under the Privacy Act regime.

3.3 The heading of clause 140 suggests the Crown, Crown entities and Offices of Parliament should also have a "proper interest" in receiving the information held by the Commission. The Report of the Public Inquiry into the Earthquake Commission recommended broad information sharing powers to ensure a linked-up response to claims management,[3] and clause 140 may have been drafted in this way to give effect to this recommendation. However, the proposed information sharing powers are overbroad and depart from similar information sharing arrangements between government agencies which have been approved by the Privacy Commissioner.

3.4 It would be preferable to include some threshold criteria for what constitutes a "proper interest" in receiving information under clause 140. This could be achieved by simply removing the word "or" between clauses (a) and (b), or replacing it with the word "and".

3.5 We also invite the Select Committee to consider whether it is necessary to include the Offices of Parliament within this clause. Each Officer of Parliament operates under their own legislation, with information-gathering powers specific to their functions. Assuming each of those entities is to retain jurisdiction over the Commission, it is preferable for their information-gathering powers to be contained in their primary legislation. Alternatively, if clause 140 is intended to widen those existing powers, we reiterate that the clause may be overbroad.

4 Restrictions on recording or disclosing information (clause 147)

4.1 Clause 147(b) prohibits an authorised person from recording, copying, or disclosing information unless it is for an "authorised purpose".

4.2 The Bill could be improved by including a definition of "authorised purpose". It is possible that the 'authorised purpose' exception refers to the authorisations for information gathering powers, which are provided for in clauses 141-147 of the Bill.[4] If so, it would be helpful to clarify this by inserting cross-references to the relevant clauses in the Bill.

5 Misleading information (clause 150)

5.1 Clause 150(1) appears to be missing the word "must". This clause should read: *"A person must not give misleading information …"*

6 Orders in Council to amend Schedule 2 (clause 156)

6.1 Clause 156 allows for Orders in Council to amend Schedule 2, which sets out the types of property that are excluded from insurance cover under the proposed Act. Clause 156 therefore enables the Minister to reduce cover for certain types of property by amending the Act, but without the Parliamentary scrutiny of such an amendment.

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[3] Above n 2.

[4] We note that clause 141(2)(c)(iii) specifically requires an authorisation to set out the purpose for which the powers under clauses 142, 144, and 145 may be exercised.

6.2 This ability to amend primary legislation through an executive order is generally known as a 'Henry VIII' clause. These clauses are usually objectionable under the principles of the rule of law, particularly where they can fundamentally affect rights or obligations.

6.3 We therefore invite the select committee to consider whether a Henry VIII clause is appropriate where it will allow parts of the property outside of the dwelling to be removed from insurance without Parliament amending the Act. In our view, Parliamentary scrutiny of any such an amendment is preferable. Parliamentary scrutiny also offers the ability to consider any transitional arrangements that are required to deal with a scenario where property that was previously insured under the Act would no longer be insured if it is added to the categories of excluded property.

6.4 We do however note that the Bill contains some limitations to the Minister's power to reduce cover:

(a) Clause 156(2) provides that the Minister cannot make property that is part of a dwelling 'excluded property';[5] and

(b) Clause 156(3) sets out some pre-conditions which must be satisfied before the Minister can exercise the power:

> The Minister must not recommend that an Order in Council be made unless satisfied that the amendment is necessary or desirable to do 1 or more of the following:
>
> (a) remove ambiguity about whether property of a particular kind is or is not excluded property:
>
> (b) modernise the kinds of property that is or is not excluded property (for example, as a consequence of technological changes):
>
> (c) make other changes of a minor or technical nature.

6.5 If Parliament wishes to retain clause 156, a further amendment could be included to ensure the power is only exercised to remove items from the list of 'excluded property' – that is, so regulations can only be used to increase cover under the Act but not decrease it.

David Campbell
Vice-President

[5] As a result, the Minister's powers can only be used to eliminate parts of property that do not form part of the dwelling. The current Schedule 2, for example, means swimming pools are not covered.