

Mr Otto Thoresen  
Director General  
Association of British Insurers  
51 Gresham Street  
LONDON  
EC2V 7HQ

Your ref:  
Our ref: PO616/RB/EJ/SG

19 November 2013

*Dear Mr Thoresen*

**Recovery of Medical Costs for Asbestos Diseases (Wales) Bill**

Thank you for your letter of 18 November about the ABI's concerns about the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.

As I explained in my letter to you of 1 May, my statutory function as Presiding Officer in respect of the National Assembly's legislative competence for a Bill is to express my decision, on or before the Bill's introduction into the Assembly, as to whether its provisions are within competence or not. After that point, whether a Bill proceeds and whether and how it is amended, is a matter for political debate and decision in the Assembly.

Your letter does not appear to raise any substantive new points for me. Nevertheless, as I did with our previous exchange, I will make this correspondence available to Assembly Members, as background to their Stage 3 consideration.

I am also copying your letter and my reply for information to the Member in Charge of the Bill, Mick Antoniw AM, the Minister for Health and Social Services, Professor Mark Drakeford AM, and the Counsel General.

*Rosemary Butler*

**Rosemary Butler AM**  
**Presiding Officer**

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Croesewir gohebiaeth yn y Gymraeg a'r Saesneg/We welcome correspondence in both English and Welsh



18 NOV 2013

PO 616



Association of British Insurers 51 Gresham Street, London EC2V 7HQ Tel: 020 7600 3333 Fax: 020 7696 8999  
Otto Thoresen Director General

Direct Tel. 020 7216 7401  
E-mail [otto.thoresen@abi.org.uk](mailto:otto.thoresen@abi.org.uk)

Mrs Rosemary Butler AM  
Presiding Officer  
The National Assembly for Wales  
Cardiff Bay  
Cardiff  
CF99 1NA

18 November 2013

Dear Presiding Officer

**Recovery of Medical Costs for Asbestos-Related Diseases (Wales) Bill**

I write ahead of the proposed Stages 3 and 4 of this Bill, which are due to take place on Wednesday 20 November.

As you know, the UK insurance industry has already expressed serious concerns about this Bill, providing written and oral evidence to the Health and Social Care Committee during Stage 1, and writing to you on 18 April to argue that the Bill is, among other things, outside the legislative competence of the Assembly. The Bill's Stage 3 was subsequently suspended.

As the Assembly now proposes to consider the Bill further, I am writing again to confirm that our concerns about the Bill remain. In essence, none of the points raised in my letter of 18 April has been addressed. I do not withdraw any of those points, but I would like to reiterate at this point my concern about the legislative competence of the Assembly in relation to clause 15 concerning the liability of insurers. Amendments recently put down do not resolve this issue.

If amended, clause 15 of the Bill would read as follows:

**15 Liability of insurers**

- (1) Where the liability or alleged liability of the person by whom or on whose behalf a compensation payment is made is, or (if established) would be, covered to any extent by a policy of insurance, the policy is to be treated as covering the person's liability under section 2.
- (2) Liability imposed on the insurer by subsection (1) cannot be excluded or restricted.
- (3) For that purpose excluding or restricting liability includes:
  - (a) making the liability or its enforcement subject to restrictive or onerous conditions,



- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy, or
- (c) excluding or restricting rules of evidence or procedure.
- (4) Regulations may in prescribed cases limit the amount of any liability imposed on an insurer by subsection (1).
- (5) This section applies in relation to policies of insurance issued before (as well as those issued after) the date on which this section comes into force.
- (6) References in this section to policies of insurance and their issue include references to contracts of insurance and their making.

This change is wholly cosmetic, and would do nothing to bring clause 15 within the scope of the Assembly's legislative competence. As you will be aware, in considering legislative competence, the Supreme Court looks at the substance of individual provisions passed into law by devolved legislatures. In its substance, clause 15(1) would still legislate for financial services, by making provision about the effect of insurance policies, in breach of paragraph 4 of Schedule 7 to the Government of Wales Act 2006. Its "pith and substance" would still be the issue of what insurance policies cover, and not a minor modification of the type held by the Supreme Court to be within the Assembly's powers to legislate for ancillary matters. Clause 15 would therefore remain outside the scope of the Assembly's legislative competence.

Should Assembly Members wish to see legislation on the effect of insurance policies, then the correct course of action would be to lobby for legislation to be brought forward in the Westminster Parliament, which retains full power to legislate in this area. This would enable the legislation to be considered fully against the proper background of other financial services legislation, and would allow consultation with the insurance industry's regulators in the Treasury and the Financial Conduct Authority, neither of which were consulted, as far as I am aware, during Phase 1 of this Bill.

I hope that Assembly Members will reconsider clause 15, and remove it from the Bill. If this is not done, we will need to examine our options in relation to this matter.

Yours sincerely

A handwritten signature in black ink, appearing to be 'O. Thoresen', written in a cursive style.

**Otto Thoresen**  
**Director General**