Terms of reference

REVIEW OF THE MARINE INSURANCE ACT 1909

I, DARYL WILLIAMS, Attorney-General of Australia, acting pursuant to section 20 of the *Australian Law Reform Commission Act 1996* refer the following matter to the Australian Law Reform Commission:

The *Marine Insurance Act 1909* (the Act).

1. In carrying out its review of the Act, the Commission should comply with the requirements set out in sections 21 and 24 of the *Australian Law Reform Commission Act 1996* and the Commonwealth requirements for regulation assessment, including those set out in the Competition Principles Agreement. The Commission must report on the appropriate arrangements for regulation, if any, taking into account the following:

(a) any parts of the legislation which restrict competition should be retained only if the benefits to the community as a whole outweigh the costs; and if the objectives of the legislation can be achieved only be restricting competition;

(b) the desirability of having a regime consistent with international practice in the marine insurance industry, noting in particular that the Act is based very closely on the *Marine Insurance Act 1906* (UK) and whether any change to the Act might result in a competitive disadvantage for the Australian insurance industry;

(c) the effects on the environment, welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business, including small business and efficient resource allocation;

(d) compliance costs and the paper work burden on small business should be reduced where feasible.

2. The Commission in its report should also:

(a) identify the nature and magnitude of the social, environmental or economic problems that the Act seeks to address;

(b) clarify the objectives of the Act;

(c) assess alternatives, including non-legislative alternatives to the Act;

(d) analyse, and as far as reasonably practicable quantify the benefits, costs and overall effects of the Act and any proposed alternatives to it.

3. The Commission must invite submissions from the public and may hold public hearings.

4. The Commission is to draft any appropriate legislation and explanatory memorandum to give effect to the recommendations in its report under this reference.

5. The Commission is to report not later than 31 December 2000.*

Dated: 21 January 2000

[signed]
Daryl Williams
Attorney-General

* The Commission has requested the Attorney-General to extend the deadline for reporting to 30 April 2001.

Participants

The Commission

The Division of the Commission constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this reference comprises the following:

President
Professor David Weisbrot

Deputy President
Dr Kathryn Cronin

Members
Ian Davis (full-time Commissioner from June 2000)
Justice John von Doussa (part-time Commissioner)
Justice Ian Coleman (part-time Commissioner)
Justice Mark Weinberg (part-time Commissioner)

Officers
Law Reform Officers
Bruce Alston
Alison Creighton

Researchers
Paula O'Regan
Angela Repton

Project Assistants
Alayne Harland

Legal interns
Stephanie Lenn
Joana Neumann
Thane Somerville

Typesetting
Anna Hayduk

Library

Sue Morris

Advisory Committee

The Hon Justice David Byrne, Supreme Court of Victoria
The Hon Justice Ken Carruthers QC
The Hon Justice Richard Cooper, Federal Court of Australia
Associate Professor Damien Cremean, Deakin University
Professor Martin Davies, University of Melbourne
Dr Sarah Derrington, Director, Centre for Maritime Law, University of Queensland
Mr Stuart Hetherington, Partner, Withnell Hetherington
Mr Michael Hill, Managing Director, Associated Marine Insurers Agents Pty Ltd
Mr Frazer Hunt, Partner, Michell Sillar
Mr Drew James, Partner, Norton White
Mr Derek Luxford, Partner, Phillips Fox
Mr Norman Lyall, Consultant, Ebsworth & Ebsworth
Mr Peter McQueen, Partner, Blake Dawson Waldron
Mr Anthony Meagher SC, Barrister
Mr Gregory Nell, Barrister
Ms Anthe Philippides SC, Barrister, Vice President, MLAANZ
Mr Ron Salter, Partner, Phillips Fox
The Hon Ian Sheppard
Mr Alexander Street SC, Barrister
The Hon Justice Brian Tamberlin, Federal Court of Australia
Dr Michael White QC, Executive Director, Centre for Maritime Law, University of Queensland

1. Introduction

The Marine Insurance Act

1.1 The *Marine Insurance Act 1909* (Cth) (MIA) is based on earlier United Kingdom legislation.

> 'For over 200 years, marine insurers used the same standard form policy to cover all kinds of risks, and its strange and antiquated wording was the subject of litigation in thousands of cases. The resulting body of law was complicated and confusing, and, as a result, the United Kingdom Parliament passed a codifying statute, the Marine Insurance Act 1906 (UK), in an attempt to introduce sense and order.'[1]

1.2 Three years later Australia enacted provisions virtually identical to those of the United Kingdom legislation. In his second reading speech on the Marine Insurance Bill, federal Attorney-General Mr Groom explained to the House of Representatives that

> 'At the present time, in each of the States of Australia any one who desires to ascertain what the law as to marine insurance is, has to consult common law authorities and decisions. Of these there are no less than 2,000 in existence. Under these circumstances, of course the law is in some cases difficult to ascertain. In some instances, the authorities are uncertain; on some points where certainty is required, no certainty can be gathered; and some decisions rest upon old conditions which have now become obsolete … Marine insurance is a highly technical branch of the law. It requires for the complete mastery of it years of careful research and practice. At the same time it is a branch of the law which greatly affects the commerce of our people. It is, therefore, above all things highly desirable that this branch of the law should be made clear, definite and certain.'[2]

1.3 While the MIA is a code and regulates all aspects of marine insurance it does not replace the common law. Section 4 of the Act provides that

> '4. The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to contracts of marine insurance.'

1.4 Marine insurance cases provided the context for the development of many of the principles relating to modern insurance law, particularly by Lord Mansfield.

> 'The modern practice of insurance, and therefore the modern rules of law, grew out of the inescapable risks of sending and bringing goods across the sea … Because of

---

1 M Davies and A Dickey *Shipping law* The Law Book Company Limited Sydney 1990, 310.
2 House of Representatives *Hansard* 6 October 1908.

> England's early modern ascendancy, with the Netherlands, in trade in goods by sea, it was not surprising that the common law of insurance in England developed from decisions made by English courts on what we would now call marine insurance.'[3]

1.5 The common law principles of insurance, such as those relating to utmost good faith and duties of disclosure, are, in the main, applicable to all types of insurance, although in Australia the common law has been extensively modified by legislation. The nature and extent of the statutory modification varies depending upon the type of insurance under consideration and, in particular, whether the insurance is marine or non-marine insurance.

1.6 The MIA contains provisions dealing among other things with the parties to a contract of marine insurance, how the contract is formed, the form that it takes, which perils are insured against and which are not, the concept of proximate cause, determination of loss and how it is to be valued, the extent of the indemnity that the insured receives, and the subrogation of the insurer to the rights and remedies of the insured.[4] While the MIA uses the term 'assured', this paper adopts the more modern usage 'insured'.

Review of the Marine Insurance Act

1.7 The Commission is required under its terms of reference to conduct a general review of the *Marine Insurance Act 1909* (Cth). The Commission is required specifically to report on the competition policy aspects of the MIA, international practice in the marine insurance industry, and the effects of the Act on other areas such as the environment, welfare and equity, occupational health and safety, economic development and business issues.

1.8 A review of the MIA was commenced by the Attorney-General's Department, which published an issues paper in 1998.[5] The Commission took over this review and met with interested parties through the first half of this year leading up to the publication of this paper. Consultations with members of the legal profession, the marine insurance industry and other interested parties will continue. A final report will be given to the Attorney-General by 30 April 2001.[6]

---

3 See M Kirby Foreword to D Kelly and M Ball *Principles of insurance law in Australia and New Zealand* Butterworths 1991 referring to W Holdsworth's *History of English law* 2nd ed vol 8, 294.

4 As summarised in M Davies and A Dickey *Shipping law* The Law Book Company Limited Sydney 1990, 311.

5 http://law.gov.au/publications/marine_insurance.html (14 July 2000).

6 The terms of reference provided for the Commission to report by 31 December 2000. The Commission has requested the Attorney-General to extend the deadline for reporting to 30 April 2001 (see para 3.41–3.45).

1.9 In 1982 the Commission reported on its review of the law of insurance con–tracts.[7] Marine insurance (but not aviation and transport insurance) was expressly excluded from the terms of reference for the Commission's insurance contracts review, which resulted in the enactment of the *Insurance Contracts Act 1984* (Cth) (ICA). One focus of the Commission's report concerned reform to ensure fairness, given the relative bargaining power between insurers and insureds.[8]

The subject matter of marine insurance

1.10 The MIA requires only that the subject matter of a contract of marine insurance be 'designated in a marine policy with reasonable certainty'.[9] Section 9 of the MIA defines the subject matter of marine insurance.

> '9(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.
> (2) In particular there is a marine adventure where:
> (a) any ship, goods, or other movables are exposed to maritime perils. Such property is in this Act referred to as 'insurable property';
> (b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;
> (c) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.'

1.11 In keeping with s 9 of the MIA, the following subject matter is insurable under a marine policy: ships; goods; movables; freight; profits; commissions; disbursements; wages; ventures undertaken by a company; third party liability.[10] In practice, contracts of marine insurance commonly fall into one of three basic categories

- cargo insurance
- hull insurance, or
- P & I (protection and indemnity).

Cargo insurance

7 ALRC *Insurance contracts* ALRC Sydney 1982 (ALRC 20).
8 id 'Terms of Reference'.
9 MIA s 32(1).
10 S Hodges *Cases and materials on marine insurance law* Cavendish London 1999, 83.

1.12 Cargo insurance is the dominant business of Australian marine insurers. It generates around 61% of the premium revenue of Australian marine insurers.[11] More detailed information about the Australian and international marine insurance markets is set out in chapter 3.

1.13 Cargo cover in Australia is based on three sets of policy clauses — the Institute Cargo Clauses (ICC) (A), (B), and (C).[12] The ICC(A) provide 'all risks' cover, subject to specified exclusions. The ICC(B) and ICC(C) provide cover for named risks, subject to the same exclusions. The list of risks covered in ICC(C) is a sub-set of those in ICC(B).

1.14 The advantage for the insured of 'all risks' cover is that the insured does not have to show how the loss occurred, only that it did occur. It then falls to the insurer to prove that the loss fell within one of the exclusions in the policy for which the insurer is not liable.

1.15 The exclusions in the Institute clauses are often modified by the parties. For example, while the clauses exclude loss caused by 'inherent vice' or delay where the cargo consists of perishable goods, cover may be extended to include inherent vice, delay and rejection by the government authority of the importing country.[13] Separate sets of Institute clauses exist for particular cargos such as coal, oil, rubber and frozen meat, and for particular types of transport, such as container transport.[14]

1.16 There is a close relationship between contracts for the sale of goods, contracts for carriage of goods, financing and marine cargo insurance. Goods are commonly sold on FOB (free on board),[15] CFR or C & F (cost and freight)[16] or CIF (cost, insurance, freight)[17] terms. Most of Australia's bulk export cargos are shipped FOB. Australia has a small international fleet and foreign-owned ships are often chartered.

---

11 International Union of Marine Insurance *Report on marine insurance premiums 1997* IUMI and CEFOR: http://www.cefor.no (16 June 2000).

12 Freight is the subject of a separate set of Institute clauses.

13 B Turner and T Bunn 'Placing a risk — Cargo insurance' *Paper* MLAANZ Conference Brisbane 7-11 September 1996.

14 H Bennett *The law of marine insurance* Clarendon Oxford 1996, 105.

15 FOB: 'Free on board' means that the seller fulfils its obligation to deliver when the goods have passed over the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export.

16 CFR or C & F: 'Cost and freight' means that the seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel, is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment.

17 CIF: 'Cost, insurance and freight' means that the seller has the same obligations as under CFR but with the addition that it has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium.

The exporter is only required to arrange the loading of the cargo and the overseas buyer arranges the charter and cargo insurance.[18]

1.17 It is obviously important that the buyer's insurance cover attaches by the time risk in the goods passes from the seller to the buyer. To achieve this, cargo cover is usually provided 'warehouse to warehouse'. The insurance attaches from the time the goods leave the warehouse or place of storage named in the policy, continues during the ordinary course of transit and terminates on delivery.

1.18 It is not uncommon for the ownership and risk in the goods to change several times during transit, including while the ship is at sea. Cargo insurance policies are therefore generally assignable, with the contract of insurance assigned to consecutive buyers.

Hull insurance

1.19 Hull insurance is a term used to describe the insurance of a ship or vessel. Although the term suggests only the hull is covered, in fact this type of insurance covers hull, machinery, fittings, stores and provisions, not just the body or frame of the ship.[19]

1.20 As stated, the Australian-flagged shipping fleet is small, with about 95% of Australia's ship-borne international trade carried by foreign ships.[20] Nevertheless, hull insurance constitutes around 33% of the premium revenue of Australian marine insurers.[21] A diverse range of vessels is covered, from Sydney ferries and fishing boats to freighters. Pleasure craft constitute an important segment of the Australian domestic hull insurance market, although the insurance of pleasure craft is no longer covered by the MIA.[22]

1.21 In the Australian market, hull insurance cover is based on the Institute hull clauses. There are two sets of Institute hull clauses, distinguishing between time and voyage policies respectively — the Institute Time Clauses (ITC) Hulls and the Institute Voyage Clauses (IVC) Hulls. Both sets of hull clauses provide named risks cover, subject to various exclusions. These clauses may be significantly varied by the parties.

---

18 B Evans 'Coal shipments and issues surrounding bulk carriers' *Paper* MLAANZ Conference Brisbane 7-11 September 1996, 7.

19 See MIA sch 2, cl 15 (definition of the term 'ship'); Institute Hull Clauses refer simply to the 'vessel': eg ITC Hulls cl 1.1.

20 Commonwealth of Australia *Australia's oceans policy — Specific sectoral measures* Environment Australia 1998, 2.6, 16.

21 International Union of Marine Insurance *Report on marine insurance premiums 1997* IUMI and CEFOR: http://www.cefor.no (16 June 2000).

22 ICA s 9A inserted by the *Insurance Laws Amendment Act 1998* (Cth).

Offshore energy insurance

1.22 Offshore oil and gas projects may become an important segment of the marine insurance market. These projects involve exploration and production using mobile vessels and fixed platform structures. There are significant potential losses from damage to vessels and structures and from consequential losses due to capping, business interruption and death and injury.[23] Insurance related to offshore energy exploration and production constitutes around 2% of the premium revenue of Australian marine insurers.[24] It is not clear what proportion of this premium revenue relates to contracts of insurance covered by the MIA. The Commission understands that most Australian offshore energy projects are insured with United Kingdom insurers[25] although at least some large policies of this kind are written subject to Australian law and practice.

Liability insurance

1.23 Marine liability insurance (insurance in respect of legal liabilities to third parties arising from owning or operating ships) constitutes around 4% of the premium revenue of Australian marine insurers.[26] This type of insurance is provided mainly by mutual insurance organisations, known as clubs, based overseas. The most common type of club is the P & I club, which provides protection and indemnity insurance. There are no Australian-based P & I clubs.[27]

1.24 P & I insurance provides cover for a wide range of liabilities beyond that provided by ordinary policies of marine insurance, such as protection and indemnity; war risks; and defence risks.[28] Protection and indemnity cover includes cover against exposure to liabilities such as

- loss of life and personal injury claims to crew members, stevedores, passengers and others
- loss of personal effects
- hospital, medical, funeral and repatriation expenses in respect of sick or injured crew members
- diversion costs

---

23 International Underwriting Association http://www.iua.co.uk/matmain.htm (19 June 2000).
24 International Union of Marine Insurance *Report on marine insurance premiums 1997* IUMI and CEFOR: http://www.cefor.no (16 June 2000).
25 UK insurers receive over 50% of global premium revenue associated with such projects: see ch 3 table 3.1.
26 International Union of Marine Insurance *Report on marine insurance premiums 1997* IUMI and CEFOR: http://www.cefor.no (16 June 2000).
27 The United Kingdom is the centre of P & I insurance but there are major P & I clubs in Scandinavia, Japan, China and the USA.
28 H Bennett *The law of marine insurance* Clarendon Oxford 1996, 13.

- environmental damage
- collision (to the extent that such claims are not covered under hull policies)
- damage to docks, wharves and other stationary objects.[29]

1.25 P & I clubs are associations of shipowners and charterers owned and controlled by shipowner or charterer 'members'. They operate on a non-profit-making mutual basis. Members pool their resources to meet losses suffered by individual members. The clubs charge each member an annual fee, known as a call, for each ship in the club. The fee varies according to the risk that an individual member's vessels represent to the club. Relevant factors include the extent of cover required, the type and size of the vessel, trade volume and type, and the nationality of crew.[30] If there is a shortfall because of high claims, members may be required to pay an additional call. If there is a surplus, a return may be made to the members or used to meet losses on other years.[31]

1.26 Most P & I clubs belong to the International Group of P & I Clubs, whose members insure over 90% of the world's merchant tonnage.[32] Although the clubs compete with each other for business, they find it beneficial to pool their larger risks within the International Group. The pooling arrangement provides participating clubs with 'at cost' mutual insurance among member clubs, and enables the bulk purchase of reinsurance protection at much more favourable levels than would otherwise be available in the commercial reinsurance market.[33]

Mutual insurance and the MIA

1.27 The provisions of the MIA, with some modification, are stated to apply to mutual insurance such as that provided by the P & I clubs. Section 91 of the MIA states as follows.

> '91(1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.
> (2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee or such other arrangements as may be agreed upon, may be substituted for the premium.
> (3) The provisions of the Act in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

---

29 Club cover is constantly changing and developing as and when new liabilities are placed on shipowners. If a new liability arises which is not covered and for which it is felt cover should be given, clubs will often confer about necessary alterations to the club rules, which define the available cover: Overview of the SSM Bermuda Club http://www.simsl.com (1 June 2000).

30 'Overview of the SSM Bermuda Club' http://www.simsl.com (1 June 2000).

31 ibid.

32 About the UK P & I club http://ukpandi.com/2about.html (1 June 2000); 'Overview of the SSM Bermuda Club' http://www.simsl.com (1 June 2000).

33 About the UK P & I club http://ukpandi.com/2about.html (1 June 2000).

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.'

1.28 Most of the P & I clubs expressly incorporate the provisions of the MIA (UK) or the equivalent legislation, or the marine insurance rules of their own countries, into their rules.[34]

International conventions

1.29 Marine insurance operates against the background of highly regulated national and international regimes in relation to shipping and the carriage of goods. It is pertinent to note that marine insurance is not, and in the foreseeable future is unlikely to become, the subject of an international convention or model law. Shipping law is governed by an extensive framework of international conventions, many of which are adopted and enacted in Australia by federal legislation. Conventions cover areas which include limitations on the liability of shipowners for maritime claims,[35] marine cargo liability, marine pollution, salvage,[36] marine safety and search and rescue.[37]

Marine cargo liability

1.30 International conventions impose terms regulating the contractual relationship between shippers (ie cargo owners) and carriers (ie shipowners or charterers). The main conventions are the Hague or Hague-Visby Rules[38] and the Hamburg Rules.[39] Australia has adopted a hybrid marine cargo liability regime based on provisions of these conventions.[40]

---

34 LBC *The laws of Australia* vol 22 Insurance and Income Security '22.1 Insurance' para 306.

35 id, vol 34 Transport '34.3 Shipping' para 109–13. The International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships October 1957 was enacted in Australia by the *Navigation Amendment Act 1979* (Cth). The 1957 Convention has been replaced by the Convention on Limitation of Liability for Maritime Claims November 1976, enacted in Australia by the *Limitation for Maritime Claims Act* 1989 (Cth).

36 International Convention on Salvage April 1989.

37 See para 1.32.

38 The Hague Rules were articles of the Brussels Convention (The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading done at Brussels on 25 August 1924). The Hague Rules were amended by the Visby Protocol (Protocol amending the Brussels Convention done at Brussels on 23 February 1968) and secondly by the SDR Protocol (Protocol amending the Brussels Convention, amended by the Visby Protocol done at Brussels on 21 December 1979).

39 The Hamburg Rules are articles of the Hamburg Convention (the United Nations Convention on The Carriage of Goods by Sea, adopted at Hamburg on 31 March 1978).

40 The *Sea-Carriage of Goods Act 1924* (Cth) incorporated the Hague Rules into Australian law. This Act was repealed by the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA) which gave effect to amended Hague Rules (the Hague–Visby Rules). In September 1997, the *Carriage of Goods by Sea Amendment Act 1997* (Cth) was enacted, followed in July and December 1998 by *Carriage of Goods by Sea Regulations 1998* (SR 1998 No 174) and the *Carriage of Goods by Sea Regulations 1998* (No 2) (SR 1998 No 324). These regulations modified the operation of the amended Hague Rules as they apply in Australia. The modified Rules moved the scope of Australia's marine cargo liability regime some way towards that of the Hamburg

Marine pollution

1.31 Many international conventions aim to protect the marine environment and establish regimes for ocean management. The main conventions involving Australia include the following.

- MARPOL 73/78 Convention.[41] This convention deals with the prevention of all forms of pollution from ships, except the disposal of land-generated waste into the sea by dumping.[42]

- Intervention Convention.[43] This convention came into force in Australia in 1984 and allows parties whose coastlines are threatened by oil and other polluting substances to take action outside the limits of their territorial seas.[44]

- Civil Liability Convention.[45] This convention deals with liability for oil pollution damage from oil tankers carrying more than 2 000 tonnes of oil. Subject to specific exemptions, the liability is strict. Ships must be insured.

- Fund Convention.[46] This convention is supplementary to the Civil Liability Convention and establishes a regime for compensating victims when the compensation under the Civil Liability Convention is inadequate.[47]

Maritime safety

1.32 The Safety of Life at Sea (SOLAS Convention)[48] is regarded as the most important of all international treaties concerning the safety of merchant ships. The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships. An International Safety

---

Rules, but maintained the Hague Rules basis of Australia's regime, consistent with the regimes of Australia's major trading partners.

41 The International Convention for the Prevention of Pollution from Ships London November 1973 (MARPOL 73) and the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships of 2 November 1973, as amended London February 1978.

42 Australian Marine Safety Authority 'Protection of the sea: Conventions and legislation in Australia' http://www.amsa.gov.au (9 May 2000). Disposal of land-generated waste into the sea by dumping is covered by the Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (the London Dumping Convention) which entered into force for Australia on 20 September 1985.

43 Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties Brussels 1969.

44 LBC *The laws of Australia* vol 34 Transport '34.3 Shipping' para 152.

45 International Convention on Civil Liability for Oil Pollution Damage Brussels November 1969, which came into force in Australia in October 1996.

46 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 Brussels December 1971.

47 Australian Marine Safety Authority 'Protection of the sea: Conventions and legislation in Australia' http://www.amsa.gov.au (9 May 2000).

48 International Convention for the Safety of Life at Sea 1960, 1974.

Management Code (ISM Code) has been mandated under the SOLAS Convention. The ISM Code is intended to provide an international standard for the safe management and operation of ships and for pollution prevention.[49]

1.33 Australia is a signatory to numerous other maritime safety conventions, including the International Convention for Safe Containers 1972, the Convention on the International Maritime Satellite Organization 1976, the International Convention on Maritime Search and Rescue 1979 and the International Regulations for Preventing Collisions at Sea 1972.[50]

Structure of this paper

1.34 The issues discussed in chapter 2 ('Approaches to reform'), chapter 3 ('Competition and the marine insurance market'), and chapter 4 ('Competition policy') present some of the important legal policy issues relevant to reform of the MIA and to the approach to be taken by the Commission in the conduct of this inquiry. Particular areas for possible reform that receive consideration are warranties (chapter 5), the duty of utmost good faith (chapter 6) and the requirement of an insurable interest (chapter 7). Other areas for possible reform, including issues relating to mixed risks, evidence of marine insurance contracts, double insurance, agents and brokers and subrogation are considered in chapter 8. Chapter 9 deals with issues relating to the removal or modification of obsolete terms or concepts in the MIA.

---

49 See J Donaldson '"Safer ships; cleaner seas" — full speed ahead or dead slow?' (1998) 2 *Lloyd's Maritime and Commercial Law Quarterly* 170, 173.

50 International Maritime Organization 'Status of Conventions' http://www.imo.org/imo/convent/safety.htm (8 June 2000).

2. Approaches to reform

Introduction

2.1 The Commission's preliminary research and consultations reveal a range of views on the scope for reform of the MIA. A key threshold question is whether and to what extent the law of marine insurance should continue to differ from the law applying to most other contracts of general insurance as incorporated and modified by the *Insurance Contracts Act 1984* (Cth) (ICA).

2.2 Substantial change to the law of marine insurance could retain a marine insurance regime separate from other forms of insurance or subsume, partially or completely, marine insurance within the law applying to non-marine general insurance. Another possible framework for reform would be a combined transport insurance regime, covering marine, aviation and transport insurance (an MAT Act). Aviation and transport insurance are currently governed by the common law and the ICA.

2.3 Such wholesale changes have not been embraced in the Commission's consultations to date. Insurers, lawyers, judges and fishing industry organisations have expressed overall satisfaction with the current regime while focusing their attention on specific areas of the MIA that may require reform.

2.4 There are also good reasons to approach reform of the MIA with caution. There is concern that changes to marine insurance law may impact adversely on and isolate the Australian market by severing the association between Australian and United Kingdom law and practice, a link shared with marine insurance regimes in other common law systems.[51] Further, the present codification of marine insurance law and practice is said to have stood the test of time, contributing to a business environment in which the meaning of contracts is well understood and is backed up by comprehensive case law.[52]

2.5 While the Commission has not formed a concluded view, preliminary research and consultation has revealed limited support for comprehensive changes to the MIA. Insurers and lawyers have emphasised the utility of the MIA in codifying the law and as a guide to interpreting contracts, particularly in respect of the

---

51 See para 2.7–2.20.

52 Insurers and legal practitioner *Consultation* Brisbane 11 May 2000; Judges *Consultation* Sydney 15 May 2000.

definitions contained in the Act.[53] On the other hand, there is support for reform in selected areas, aimed at making the MIA fairer and more equitable and at removing uncertainties in the practical application of the law.

2.6 The MIA is a reflection of marine insurance law and industry practice in 1906 and in many ways does not reflect current practice. However, any re-codification of industry practice itself might be unnecessary. It may be better for such matters to be left to the parties or to industry self-regulation.

The influence of United Kingdom law

2.7 Australia's association with marine insurance law and practice in the United Kingdom is derived from shared legislative provisions and case law. It is influenced by London's leading role in the world marine insurance market[54] and the industry practice of using standard contracts developed in the United Kingdom. One view is that

> '[i]t remains crucial to the Australian industry that it is able to assure those in other countries who obtain policies of insurance from Australian organizations that their terms, and their interpretation by Australian courts, will be consistent with the Marine Insurance Act 1906 (UK).'[55]

2.8 The MIA is virtually identical to the MIA (UK) which, as discussed above, codified the English common law in 1906. Other common law jurisdictions which also have legislation in all significant respects identical to the MIA (UK) include

- New Zealand — Marine Insurance Act 1908
- Canada — Marine Insurance Act 1993
- Singapore — the MIA (UK) has force and effect under the Application of English Law Act 1993
- Malaysia — the MIA (UK) has force and effect under the Civil Law Act 1956
- Hong Kong — Marine Insurance Ordinance of 1964
- India — Marine Insurance Act 1963.

---

53 For example, in relation to partial and total loss and salvage charges: Insurers, brokers and legal practitioners *Consultation* Perth 29 March 2000; Insurers *Consultation* Melbourne 7 April 2000; Legal practitioners *Consultation* Sydney 13 April 2000.

54 However, it has been noted that the emergence of strong national markets in such regions as Australasia and Asia, the loss of the separate trade association for the company marine insurance market in London in the form of the Institute of London Underwriters, and the disarray of Lloyd's have all contributed to the shrinking in the size and importance of the London market. This trend is said to be likely to continue: M Hill *Correspondence* 21 March 2000.

55 S Hetherington 'Reform meets resistance in Australia' (2000) 11 *The Maritime Advocate* 36, 37.

2.9 However, there are some differences between the MIA, the MIA (UK), and legislation applying to marine insurance in these jurisdictions.

2.10 There have been minor amendments to the United Kingdom legislation that have not always been followed elsewhere. In 1959, the provision rendering time policies made for periods over 12 months invalid was repealed.[56] The same amending legislation also removed the statutory requirement for marine policies to specify the subject matter insured and the risk insured; the voyage or period of time covered; the sum insured; and the name or names of the insurers.[57] No equivalent changes have been made to the MIA.

2.11 In New Zealand, the law of insurance generally, including marine insurance as codified by the Marine Insurance Act 1908 (NZ), has been extensively modified by the Insurance Law Reform Act 1977 (NZ). This legislation reformed the law relating to, among other things, misrepresentations in contracts of insurance and breach of insurance warranties.[58]

2.12 The 1993 Canadian legislation was enacted in response to a decision of the Supreme Court of Canada (the *Triglav* case),[59] which held that a contract of marine insurance is a contract of maritime law clearly within the jurisdiction of the federal parliament as part of navigation and shipping. Marine insurance was governed previously by provincial marine insurance Acts modelled on the MIA (UK)[60] or left to the common law. As a result of the *Triglav* case, it appeared that provincial legislation governing contracts of marine insurance would be, at least in part, inoperative. Industry groups urged the government to enact a federal marine insurance Act to resolve this uncertainty as to the scope and application of provincial marine insurance Acts and to use the MIA (UK) as the model. The intention was that the Canadian legislation preserve 'the substance of the provisions of the British act while modifying the form in which they are expressed to meet the current drafting standards'.[61]

2.13 Accordingly, the Canadian legislation does not differ in substance to any great degree from the MIA (UK). However, its drafting improvements may offer some guidance in reforming the MIA. For example, adopting the Canadian definition of 'marine insurance' might help address some uncertainties about the respective

---

56 Finance Act 1959 (UK), repealing MIA (UK) 25(2) cf MIA s 31(2).

57 Finance Act 1959 (UK), repealing MIA (UK) 23(2)–(5) cf MIA s 29(b)–(e). See also para 8.40 and Draft proposal 18.

58 Insurance Law Reform Act 1977 (NZ) s 5, 6, 11, 14. See also para 5.37, 5.58.

59 *Zavarolvalna Skupnost Triglav v Terrasses Jewellers Inc and Bank of Montreal* [1983] 1 RCS 283.

60 eg Insurance (Marine) Act 1979 (BC); Marine Insurance Act 1973 (NB).

61 Parliament of Canada *Commons debates* 23 March 1993, 1025.

coverage of the MIA and the ICA in relation to insurance of mixed marine and non-marine transit risks.[62]

2.14 Of interest is that Canadian case law, applying the provisions of the Canadian MIA, appears to diverge from Anglo-Australian law in several relevant areas, including in relation to warranties,[63] perils of the sea,[64] and insurable interest.[65]

2.15 The USA does not have federal marine insurance legislation[66] but its case law has been in close accord with United Kingdom legislation and case law. Federal admiralty law in the USA, including that related to marine insurance, has been greatly influenced by the English common law and federal courts in the USA have sought explicitly to keep federal marine insurance law in harmony with English law.

2.16 However, the law in the USA has been complicated by the decision in *Wilburn Boat v Fireman's Fund Insurance Co*,[67] which resulted in State rather than federal law (including laws relating to general insurance) being applied to policies of marine insurance. As a consequence American law increasingly diverges from the law in the United Kingdom. These differences include variations with respect to misrepresentation, non-disclosure, and express and implied warranties.[68]

2.17 In order to address concerns about uncertainty in American law and to address issues of harmonisation with the laws of other jurisdictions, it has been suggested that the USA enact a federal marine insurance Act or that the American Law Institute undertake to produce a Restatement of the law of marine insurance.[69] Professor Thomas Schoenbaum has stated that any new federal law of marine insurance should

---

62 Marine Insurance Act 1993 (Can) s 6 and see para 8.13–8.14 and Draft proposal 13.

63 See para 5.15–5.18.

64 See para 5.119.

65 See para 7.10.

66 Alone among the States, California has a chapter of its Insurance Code devoted to marine insurance. Many of its provisions are similar to those in the MIA (UK): G Staring 'Is the doctrine of utmost good faith out of date?' *Paper* Marine Insurance Seminar CMI 35th International Conference, Sydney October 1994.

67 348 US 310, 1955 AMC 467 (1955).

68 See M Clarke 'The marine insurance system in common law countries: Status and problems' *Paper* Marine Insurance Symposium Oslo 4–6 June 1998; R Bocko et al 'Marine insurance survey: A comparison of United States law to the Marine Insurance Act of 1906' (1995) 20 *Tulane Maritime Law Journal* 5; T Schoenbaum 'The duty of utmost good faith in marine insurance law: A comparative analysis of American and English law' (1998) 29(1) *Journal of Maritime Law and Commerce* 1; T Schoenbaum 'Warranties in the law of marine insurance: Some suggestions for reform of English and American law' (1999) 23 *Tulane Maritime Law Journal* 1.

69 E Cattell 'An American Marine Insurance Act: An idea whose time has come' (1995) 20 *Tulane Maritime Law Journal* 1; M Sturley 'Restating the law of marine insurance: A workable solution to the Wilburn Boat problem' (1998) 29(1) *Journal of Maritime Law and Commerce* 41. The Maritime Law Association of the United States is currently embarked on a project 'to collect, study and synthesize the case law and applicable state statutory law into a … plain statement of the maritime law … and settle those issues which are presently deemed unsettled and subject to interpretation and construction under the law of the several states': E Cattell 'Some thoughts on disclosure, good faith and warranties in current American maritime law' *Paper* Tulane/BMLA London Seminar May 9–10 2000.

be based on the MIA (UK) but that the subject of good faith and warranties should be 'addressed afresh' to remedy the divergence that exists in these areas between United Kingdom and American law.[70]

2.18 Other countries which do not have legislation based on the MIA have nevertheless been influenced by English law. For example, in Japan standard contractual clauses in marine insurance contracts are based on Institute clauses and hence are influenced by English law.

> 'This is not because English law is perceived as anything like perfect but because it is recognised that marine insurance law is international and English law is widely applied at least in substance.'[71]

2.19 It must also be borne in mind that United Kingdom and Australian common law vary in important respects that affect the application and interpretation of marine and non-marine policies alike. One important example is the doctrine developed in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[72]which has no equivalent in the United Kingdom. Other differences relating to the inability of insurers to proceed by way of subrogation against one co-insured for damage caused to another co-insured were discussed in *Woodside Petroleum Development Pty Ltd v H & R-E & W Pty Ltd*.[73]

2.20 It is clear, therefore, that, influential as it is, English law is only the original core of the law of marine insurance from which there has been divergence that in particular cases will produce different outcomes.

Combining marine and non-marine insurance

The MIA and the ICA

2.21 Australia has several insurance law regimes. As discussed above, contracts of marine insurance are governed by the MIA. This provides a code which touches on all major aspects of modern marine insurance law. Common law rules, in so far as

---

70 T Schoenbaum 'Marine insurance' (2000) 31 (2) *Journal of Maritime Law and Commerce* 281, 291. It has been suggested that courts in the USA appear to treat the owners of yachts and fishing vessels as 'consumers', rather than as business people, and provide a greater degree of protection against the impact of a strict application of marine insurance rules, such as those in relation to the doctrine of utmost good faith and breach of warranty: E Cattell 'Some thoughts on disclosure, good faith and warranties in current American maritime law' *Paper* Tulane/BMLA London Seminar May 9–10 2000.

71 M Clarke 'The marine insurance system in common law countries: Status and problems' *Paper* Marine Insurance Symposium Oslo 4–6 June 1998.

72 (1987) 4 ANZ Ins Cas ¶74–674; (1987) 8 NSWLR 270 (NSWCA); (1988) 165 CLR 107 (HC). The principle enunciated in *Trident* is that a person who, though not a party to a public liability insurance policy, falls within the class of persons expressed to be insured by it, may enforce the indemnity for which the policy provides.

73 (1997) 10 ANZ Ins Cas ¶61–395 (Anderson J); (1999) 20 WAR 380 (WA Full Court).

they are not inconsistent with the express provisions of the MIA, continue to apply to contracts of marine insurance.[74]

2.22 Most non-marine insurance is governed by the ICA, including the insurance of risks in respect of commercial aircraft and land transport.[75] The ICA does not apply to contracts covered by the MIA[76] although in 1998 the insurance of pleasure craft was excluded from the MIA and brought within the ICA.[77] As with the MIA, the ICA does not purport to be a complete code in relation to insurance contracts. However, while the drafters of the MIA sought to codify rather than change the general law of marine insurance, the ICA intentionally and extensively modifies common law principles.[78] In this respect Australia is unique in the common law world. This change necessarily colours the approach to reform of any aspect of insurance law in this country, not least by forcing reformers to justify the existence of disparate regimes of insurance law more than might be the case in other nations.

2.23 There are many significant differences between the MIA and the ICA, for example in relation to insurable interest, the duty of utmost good faith, warranties and remedies for breach of warranty. Marine insurance is said to be 'in a class by itself and is subject to its own long standing code which has the dual advantages of internal consistency and of detail'.[79] In general the MIA provisions, as compared with those of the ICA, favour the interests of the insurer over the insured. Marine and non-marine insurance contracts are subject to different legal regimes not simply because of historical accident but because the issues, players and markets are different. This is reflected in the commercial focus of the MIA and the consumer orientation of the ICA (see paragraphs 2.26–2.28 below).

2.24 A range of insurance contracts is covered by neither the ICA nor the MIA. The ICA specifically excludes contracts of health insurance, insurance relating to workers' compensation and third party injury motor vehicle insurance.[80] Some of these, such as workers' compensation and third party injury motor vehicle insurance, are governed by comprehensive State or federal legislative schemes.[81] Reinsurance

---

74 MIA s 4.

75 However, a contract of marine insurance may cover mixed sea and land risks: MIA s 8. See para 8.1–8.2.

76 ICA s 9(d).

77 ICA s 9A inserted by the *Insurance Laws Amendment Act 1998* (Cth).

78 ICA s 7, LBC *The laws of Australia* vol 22 Insurance and Income Security '22.1 Insurance' para 2.

79 LBC *The laws of Australia* vol 22 Insurance and Income Security '22.1 Insurance' para 269 (specifically in the context of reform of the concept of insurable interest).

80 ICA s 9.

81 eg third party motor vehicle: *Motor Accidents Act 1988* (NSW); *Transport Accident Act 1986* (Vic); workers compensation: *Workers Compensation Act 1987* (NSW); *Accident Compensation Act 1985* (Vic)*; Safety Rehabilitation and Compensation Act 1988* (Cth); *Seafarers Rehabilitation and Compensation Act 1992* (Cth). The insurance of commercial aircraft between 1986 and 1997 came under the common law as it was outside the ICA: *Statute Law (Miscellaneous Provisions) No 1 Act 1986* (Cth). The insurance of commercial aircraft is now once more covered by the ICA: *Financial Laws Amendment Act 1997* (Cth).

is also specifically excluded by the ICA and is governed by the common law. Reinsurance is not excluded by the MIA if it otherwise covers maritime perils.

2.25 A final element in the legal patchwork governing insurance contracts is that the law relating to insurance agents and brokers, including those operating in marine insurance and areas of insurance covered by the ICA, is presently subject to the *Insurance Agents and Brokers Act 1984* (Cth).

Commercial or consumer orientation

2.26 In consultations insurers have highlighted the need to retain a distinction between insurance covered by the ICA, which often involves ordinary consumers, and the commercial focus of insurance under the MIA regime.[82]

2.27 However, while most marine insurance transactions are 'business-to-business' and many insureds have the professional services of a broker, there are sectors of the marine insurance market which could benefit from the consumer protection provisions of the ICA. For example, the insurance of small fishing and other vessels, and of the household contents of people moving home, may involve insured parties who lack relevant market experience. However, even for these consumers it is argued there is adequate protection as shipowners, even of small vessels, are commonly advised by brokers and, like other small businesses, have access to advice and assistance from trade organisations.[83] The majority of people moving house do so by road or rail and receive the consumer protection of the ICA. Those relocating overseas often have their transit insurance paid by their employer, again a business-to-business deal.[84]

2.28 In 1998, the ICA was amended by the *Insurance Laws Amendment Act 1998* (Cth) to exclude pleasure craft from the operation of the MIA. The explanatory memorandum noted that the MIA was 'primarily designed to cover insurance contracts relating to the international carriage of goods' and the intention was that individuals who owned pleasure craft should receive the consumer protection benefits of the ICA.[85] This essentially removed from the MIA those insurance contracts that most needed consumer protection. Insurers and others have told the

---

82 Insurers *Consultation* Melbourne 6 June 2000; Insurers and broker *Consultation* Sydney 27 March 2000.

83 ibid.

84 ibid. But note that the consumer protection warranties implied by s 74(3) of the *Trade Practices Act 1974* do not apply to contracts of insurance or the transportation of goods if done for the purposes of the business for whom they are transported, as qualified by the High Court in *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388.

85 Explanatory memorandum: Insurance Laws Amendment Bill 1997. The memorandum also noted that the MIA had not been amended since its enactment due to 'international constraints'.

Commission that in practice prior to this reform ICA principles were already being applied by the market to pleasure craft insurance.[86]

2.29 A similar approach could be taken to fishing vessels. It has been suggested that small fishing or other commercial vessels could be included under the ICA, as was done with pleasure craft. However, fishing vessels insured under the MIA range from large offshore trawlers and long liners, which may be part of major national or international fishing fleets, to oyster punts and small harbour or coastal fishing vessels. Including fishing vessels under the ICA may require reference to a tonnage or other size limit, below which the insurance of the vessel would be subject to the ICA, not the MIA.[87] Alternatively, the distinction might be based on the usage of vessels.[88]

2.30 Including the insurance of fishing vessels under the ICA could address the main problems reported by fishing organisations — unfair treatment by insurers relying on breaches of warranty to deny liability for claims where the breach is trivial or not causally connected to the loss.[89] It would not, however, address concerns about access to insurance at affordable premium levels. If insurance availability or affordability is currently a problem for some shipowners in any sector, this problem would presumably be exacerbated if the insurance of those vessels were to be transferred from the MIA to the ICA, a regime which is more favourable to the interests of insureds.

2.31 Insurers and lawyers have suggested that permitting insurers to rely only on breaches which cause or contribute to the loss (or are fraudulent) to deny liability may see the MIA 'catching up' with insurance practice without the need to move the insurance of some fishing vessels into the ICA regime.[90]

Reform of the MIA

2.32 Leaving aside reforms that encompass subsuming marine insurance within the law applying to non-marine insurance, possible reforms to the MIA vary from radical reform of substantive provisions to modernisation of the MIA with few substantive changes.

---

86 Legal practitioners *Consultation* Sydney 1 May 2000; Insurers and legal practitioners *Consultation* Sydney 15 May 2000.

87 Legal practitioners *Consultation* Sydney 1 May 2000.

88 The inclusion of fishing vessels under the ICA by reference to usage has been preferred in the Commission's consultations with legal practitioners and insurers, although overall there was little support for bringing fishing vessels under the ICA: Advisory Committee member *Advisory Committee meeting* Sydney 25 May 2000; Insurers *Consultation* Melbourne 6 June 2000.

89 See para 5.45–5.48.

90 Insurers *Consultation* Brisbane 11 May 2000; Insurers *Consultation* Sydney 15 May 2000; Insurers *Consultation* Melbourne 6 June 2000.

2.33 Changes to the law relating to warranties, duties of utmost good faith and disclosure, and the requirement for an insurable interest would have a significant impact on marine insurance practice. Reform of these areas and arguments against change are discussed in chapters 5–7.

2.34 A further consideration militating against substantial reform is the possible move towards harmonisation of international marine insurance regimes. The terms of reference require the Commission to consider the desirability of having a regime consistent with international practice in the marine insurance industry and issues related to the international marine insurance market may place limits on the desirable scope of reform.

2.35 The Comité Maritime International (CMI)[91] has established an international working group to develop recommendations for national laws on marine insurance. The CMI is due to report in February 2001. This initiative has important implications for the conduct of the Commission's inquiry (see paragraphs 3.41-3.45).

2.36 Instead of radical reform, another possibility may be to modernise the MIA without significantly changing the substantive law of marine insurance. Examples include repealing the Second Schedule (the Lloyd's Ships and Goods Policy) and removing references to outdated concepts such as bottomry and respondentia. These reforms are discussed in chapter 9. Even then, such changes must be viewed with caution. The Second Schedule contains important terms and concepts that are well understood through practice and case law and it would be difficult accurately to reflect the body of law they represent in new definitions.

Question 1. Should marine insurance be maintained as a separate insurance law regime? Should marine insurance be brought within the ICA or, if not, is some greater consistency with the law of general insurance as modified by the ICA nevertheless desirable?

Question 2. If not, should changes to the law of marine insurance be restricted to selected areas only — for example in relation to the operation of warranties, the duty of disclosure, the requirement for an insurable interest and the coverage of incidental land risks?

91 The CMI is an international non-governmental organisation formed in 1897 with the object of unification of all aspects of maritime law. Its members include the maritime law associations of over 50 countries. See http://www.comitemaritime.org (14 July 2000).

Question 3. Alternatively, should MIA simply be updated to reflect modern industry practices without changing significantly the law or practice of marine insurance?

Question 4. Following the 1998 reforms relating to pleasure craft, should the insurance of small fishing and other commercial vessels, perhaps defined by reference to usage or a tonnage or other size limit, be excluded from the MIA and made subject to the ICA?

Question 5. Are there other sectors of the marine insurance market that, for consumer protection or other reasons, should be subject to the ICA?

Marine, aviation and transport insurance

2.37 Another option that arises from a consideration of marine and non-marine insurance is the possibility of creating a marine, aviation and transport (MAT) insurance regime.

2.38 In England, MAT insurance is a recognised category of insurance, a statutory definition of which is the 'effecting and carrying out of contracts of insurance'

> '(a) Upon vessels used on the sea or on inland water or upon the machinery, tackle, furniture or equipment of such vessels and against damage arising out of or in connection with the use of vessels on the sea or on inland water, including third party risks and carrier's liability;
> (b) Upon aircraft or upon the machinery, tackle, furniture or equipment of aircraft or against damage arising out of or in connection with the use of aircraft, including third-party risks and carrier's liability;
> (c) Against loss of or damage to railway rolling stock;
> (d) Against loss of or damage to merchandise, baggage and all other goods in transit, irrespective of the form of transport;
> (e) Against death or personal injury sustained as a result of travelling as a passenger on any of the forms of transport mentioned above.'[92]

2.39 The UK Law Commission, in excluding MAT insurance from its 1980 recommendations for reform of insurance law, provided reasons for the continued separation of MAT from other general insurance.

---

92 Insurance Companies (Classes of General Business) Regulations 1977 (UK) SI No 1552, para 3, sch 1 and 2. The UK Law Commission expressed some reservations about adopting this definition of MAT insurance as it includes death or injury to passengers but does not include offshore installations such as oil rigs, nor insurance against financial loss connected with the use or operation of ships, offshore installations or aircraft such as loss of freight on salvage: UK Law Commission *Insurance law — Non-disclosure and breach of warranty* HMSO 1980, Cmnd 8064, Law Com No 104, 16.

- The law and practice in this area appeared to be working satisfactorily and was not in need of reform. The MIA (UK) together with subsequent case law contained comprehensive provisions which provide a context of certainty of law and practice.

- In view of London's position as a leading centre for marine and transport insurance in a competitive international market it would be undesirable to disturb this certainty.[93]

- Contracts falling within marine, aviation and transport insurance are generally effected by 'professionals' whose everyday business dealings involve making and carrying out insurance contracts and who 'operate in a market governed by longstanding and well known rules of law and practice'.[94]

2.40 In Australia, MAT insurance is variously governed by the MIA, the ICA and the common law. If part of the rationale for maintaining the MIA as a separate regime rests on the commercial nature of the transactions governed by it, then arguments may also be advanced for removing aviation and transport insurance from the ICA and into the same regime as the MIA.

> 'The insurance of aviation risks has historically developed from the marine market as a distinct class of business. Much of the terminology and practices of the aviation market derive from the marine market and therefore need to be understood by reference to the equivalent terminology and practices of the marine market although there are differences between them, not least, that the marine market is governed by the codifying statue, the Marine Insurance Act 1906, whereas there is no similar statute governing the non-marine market which includes aviation.'[95]

2.41 By the same token, if aviation and other non-marine transport insurers are comfortable with the ICA, and pleasure craft insurers have adapted to it with little apparent difficulty, marine insurers may find that the ICA holds little to fear, at least to the extent that they operate in a purely Australian context.

---

93 Issues of certainty and international competitiveness are discussed at para 3.17–3.21.

94 UK Law Commission *Insurance law — Non-disclosure and breach of warranty* HMSO 1980, Cmnd 8064, Law Comm No 104, 14–15.

95 *Kuwait Airways Corporation v Kuwait Insurance Company SAK* [1999] 1 Lloyd's Rep 803, 809 (Hobhouse LJ). The Commission has heard that the aviation and marine hull insurance markets are 'completely separate' and that aviation hull insurers are 'comfortable' outside the marine market: Insurers *Consultation* Melbourne 6 June 2000; Insurers *Consultation* Melbourne 7 April 2000. Nevertheless marine and aviation insurance are sometimes aggregated in insurance industry statistical collections. APRA 'General insurance market statistics' http://www.isc.gov.au/iands/Marketstats/gen_stats.htm (9 March 2000). In London marine and aviation hull insurance are treated as part of the same market. This is said to be for historical rather than business reasons. There is little connection between the marine and the aviation hull or cargo markets in Norway, France and the US: Insurers *Consultation* Melbourne 6 June 2000.

2.42 Introducing a regime covering all commercial MAT insurance may have particular advantages in relation to cargo insurance where transport is commonly multimodal.[96]

2.43 A regime for all MAT would eliminate the existing uncertainties that may be caused by the overlapping coverage of the MIA and the ICA in respect of mixed risks or the uncertainty as to which regime applies.[97]

2.44 In practice, outside Sydney and Melbourne, the same person at the same desk can be writing all forms of MAT insurance, particularly in relation to cargo insurance.[98] Therefore a MAT regime may reflect market practice better than current legislation.[99]

2.45 If marine insurance is to remain separate from the ICA consideration may need to be given to replacing the MIA with legislation covering marine, aviation and other transport insurance which share many characteristics in the way in which they are dealt with by the market. Such reform may be a goal for the longer term, rather than something that should be dealt with by this inquiry.

Question 6. Should the MIA be replaced with legislation covering marine, aviation and other transport insurance (an MAT Act)? Should such a regime be structured in relation to all MAT insurance or should it primarily deal with cargo insurance?

A flexible insurance regime

2.46 The MIA applies to all contracts of marine insurance but most provisions may be varied by the parties to the contract. This flexibility is often stated to be a strength of the MIA.[100] The tradition in relation to marine insurance contracts has been to treat 'flexibility as more important than uniformity'.[101]

---

96 International multimodal transport is defined in the United Nations Convention on International Multimodal Transport of Goods as 'the carriage of goods by at least two different modes of transport': United Nations Convention on International Multimodal Transport of Goods 1980, Art 1. This convention is not in force.

97 MIA s 7–8. See the discussion at para 8.1–8.15; Advisory Committee member *Advisory Committee meeting* Sydney 25 May 2000.

98 Legal practitioner *Consultation* Brisbane 11 May 2000; Advisory Committee member *Advisory Committee meeting* Sydney 25 May 2000.

99 Advisory Committee member *Advisory Committee meeting* Sydney 25 May 2000.

100 Insurers and brokers *Consultation* 27 March 2000.

101 D Taylor 'The need for reform of marine insurance' *Paper* MLAANZ–BIMCO Conference Brisbane 17-19 March 1999.

2.47 In contrast, s 52 of the ICA declares void any provision in a contract of insurance which purports to exclude, restrict or modify the operation of the Act to the prejudice of any person other than the insurer.[102]

2.48 Much of the MIA is concerned simply with the 'interpretation of the contract contained in the common form of marine policy'.[103] The MIA codified the scattered common law relating to the circumstances in which extrinsic evidence of the 'usages of trade' might be led to add to, fill out or explain the terms of the policy. *Arnould's law of marine insurance and average* observes that usage is of special importance in commercial contracts, nowhere more so than in marine insurance, for it has always been accepted that such usages need not be set out in the policy.[104] In consequence, many provisions of the MIA apply 'unless the policy otherwise provides'; 'subject to any express provision in the policy'; 'unless the contrary be expressed'; 'unless otherwise agreed' or similar.[105] In addition, s 93 of the MIA states

> '93(1) Where any right, duty or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.'

2.49 The MIA provides also that the application of certain provisions of the MIA may be waived by the insurer.[106] An example is s 61, which provides that the insurer is liable for any loss proximately caused by a peril insured against. A number of exclusions are stated but the parties are free to add or subtract from them. For example, s 61(2) excludes, unless the policy otherwise provides, 'inherent vice or nature of the subject matter insured'. In practice, even before the enactment of the MIA, marine insurance contracts often included Inchmaree clauses[107] which cover breakage of machinery on ships, and a range of other risks that otherwise would not be covered.[108]

---

102 F Marks and A Balla *Guidebook to insurance law in Australia* (3rd ed) CCH Sydney 1998 ¶2006, 555. However, certain sections do not apply in relation to contacts of insurance covering the risk of the loss of or damage to an aircraft as a result of war. See also ICA s 9(3).

103 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1981 para 61 referring to *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1, 34. Scott LJ continued 'we have all got into the mental habit of thinking of it as substantive law; particularly since its codification in statutory shape … the act simply fixes the interpretation which it requires the court to put on the old form of policy unless the special terms of the particular contract vary it'.

104 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1981, para 63.

105 MIA s 8, 15, 21, 22, 30, 33, 35, 38, 51, 56, 58–59, 61–62, 66, 71–72, 74–77, 79, 80, 82–83, 93. Many of these provisions imply terms, where the policy is otherwise silent, which are broadly favourable to the insurer, eg, s 21, 51, 58–59, 61.

106 MIA s 24, 48, 61, 68.

107 *Thames & Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co (The Inchmaree)* (1887) 12 AC 484.

108 ITC Hulls cl 6.2; IVC Hulls cl 4.2; ITC Freight cl 7.2; IVC Freight 4.2.

2.50 Even in relation to the provisions relating to insurable interest, the duty of disclosure and warranties, there is room for the parties to agree on terms that diverge from the basic principles of the MIA.

2.51 The MIA itself allows the requirement of an insurable interest at time of loss to be modified if the subject matter is insured subject to a 'lost or not lost' clause.[109]

2.52 The scope of the duty of disclosure can be modified by waiver. Section 24(3) provides for a range of circumstances that need not be disclosed, including any circumstance as to which information is waived by the insurer.[110] It is open for the parties to agree that the duty of disclosure will be circumscribed. For example, the parties might agree that

- the insurer may avoid the contract only where the non-disclosure or misrepresentation was fraudulent or
- if the insurer is not entitled to avoid the contract, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been but for the non-disclosure or misrepresentation.[111]

2.53 Section 40(3) of the MIA also provides that a breach of warranty may be waived by the insurer. It is common practice for some warranties otherwise implied by the MIA to be waived or modified in contracts of marine insurance. For example, under cl 5.2 of the Institute Cargo Clauses (A) the underwriters waive any breach of the implied warranties of seaworthiness and fitness of the ship to carry the subject matter insured to destination unless the insured or its servants are privy to such unseaworthiness or unfitness. In addition, express warranties can exclude implied warranties.[112] If a breach of a warranty can be waived, then a contract of marine insurance could also be agreed which expressly provides that a breach of a warranty by the insured only enables the insurer to avoid liability if the breach causes or contributes to the loss (a reform often suggested in marine insurance law and proposed by the Commission in chapter 5 below).[113]

2.54 This flexibility of the MIA is said by many to be the key to its continuing relevance.

---

109 MIA s 12(1).
110 MIA s 24(3)(d).
111 That is, picking up the provisions of the ICA s 28. See para 6.37, 6.74.
112 MIA s 41(3).
113 See ch 5 and Draft proposal 3.

> 'The significant achievement of the MIA is that its provisions have managed by and large to be applicable to the evolution in the marine insurance market practice over the last 90 years.'[114]

2.55 In consultations the importance of retaining this flexibility and freedom of contract has been consistently emphasised and is one reason marine insurers prefer the separate MIA regime. Contingency cover is given as an example of where the prescriptive approach of the ICA may not be appropriate to marine insurance. Marine contingency cover is used to insure risks which will be also insured under another policy; for example, by the bailee of goods owned by the insured. This protects the insured against the risk that the bailee's insurance may be inadequate. Contingency cover contains an other insurance clause that limits the contingency insurer's liability to the loss in excess of that covered by other insurance. However, the ICA renders void any provision in a contract of general insurance which limits or excludes the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance.[115] The additional risk such a provision creates for a marine insurer who provides contingency cover might mean that such cover cannot be offered or can be offered only at an uncompetitive premium.[116]

2.56 The prescriptive approach of the ICA may not be appropriate for the particular circumstances of marine insurance, especially given the need for flexibility in meeting the varying demands of clients in an international market. One insurer stated that it is particularly important that marine insurance support the flexibility of international trade.[117] The Commission and others are concerned to retain such flexibility. However, in encouraging freedom of contract or the election of a legal regime, any reforms to the MIA could be circumvented.[118] Against this it has been asserted that marine insurance brokers would ensure that insureds elect the most favourable regime.[119] Uncertainty on this matter is not a desirable outcome.

Question 7. In practice, how often are contracts of marine insurance silent on terms which are otherwise implied by the MIA? Is there a continuing justification for the MIA to prescribe 'default' contractual terms?

Industry self-regulation

114 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington 5–8 November 1995.
115 ICA s 45(1).
116 Insurers and brokers *Consultation* Sydney 27 March 2000.
117 Insurers *Consultation* Melbourne 7 April 2000.
118 See para 2.60–2.85.
119 Advisory Committee member *Advisory Committee meeting* Sydney 25 May 2000.

2.57 An alternative model for governing the terms of marine insurance contracts is for the marine insurance industry to be solely responsible for determining standard contractual terms. For example, in Norway, successive Marine Insurance Plans constitute the key marine insurance conditions and have done so for 125 years.[120] The Norwegian Plan sets out the legal principles, rules and sanctions of Norwegian marine insurance law and incorporates practical commercial details which had previously been contained in policy forms.[121]

> 'Formally, the Plan constitutes a standard contract which must be incorporated by individual agreement by way of reference made in the policy. In many ways however the Plan bears much resemblance to a piece of legislation except of course, that the drafting has been carried out by private groups and it has not been passed by Parliament.'[122]

2.58 The last major revision of the Plan was conducted by a committee set up under the aegis of Det Norske Veritas. Known primarily as a classification society, Det Norske Veritas is an independent foundation established in 1864 with an international membership and global role in providing services 'safeguarding life, property and the environment'.[123] The committee convened included representatives of the Norwegian Shipowners' Association; the Central Union of Underwriters; the Mutual Hull Clubs Committee; the protection and indemnity (P&I) insurers; the Norwegian Shipowners Mutual War Risks Insurance Association; the Federation of Norwegian Engineering Industries and Det Norske Veritas.[124] There is a standing committee responsible for ongoing revision of the Plan.

2.59 The Commission would be interested in comments on the effectiveness or otherwise of such a framework in the Australian marine insurance context. Clearly

---

120 Norway is an important marine insurance jurisdiction in the global hull market. According to 1997 figures from the International Union of Marine Underwriters, Norway ranked fourth and received around 9% of global hull premiums.

121 The Norwegian Marine Insurance Plan provides all risks cover covering unforeseen or unknown perils. Marine hull insurance policies under the MIA and Institute clauses provide named risks cover. An important difference is that under the Plan the insured does not have to prove that the risk the claim is based upon is covered by the insurance. An insurer wishing to reject the claim must present sufficient information to prove that the claim is based on a risk that is excluded by the insurance. Another difference from hull insurance under the MIA is that if the insured is in breach of terms imposed by the insurer, the policy remains in force and will cover subsequent damage in the normal manner, provided that the infringement did not cause the damage: Central Union of Marine Underwriters (CEFOR) *Annual report 1998* CEFOR 1998, 11: http://www.storebrand.no (28 March 2000); H Bull 'Norwegian marine insurance plan of 1996' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1, Intersentia Antwerp 1999; S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 330.

122 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 68.

123 http://www.dnv.com/dnvabout/ (31 March 2000).

124 Norwegian Marine Insurance Plan http://exchange.dnv.com/nmip/books/plan/preface.htm (29 March 2000).

any such arrangement would conflict with trade practices legislation without appropriate authorisation or exemption.

Question 8. Should the Commission examine options for enhanced industry self-regulation of the terms of contracts of marine insurance including industry frameworks such as the Norwegian Marine Insurance Plan?

Choice of law rules and jurisdiction

2.60 Jurisdiction and choice of law rules are relevant factors in considering reform of the MIA. By choosing a foreign forum or a foreign law, the parties to contracts of marine insurance may be able to evade the remedial effect of any reforms to the MIA.

2.61 In particular, by specifying that the law of another country will apply to the interpretation of the contract, an Australian insurer may be able to avoid the effect of reforms broadly favourable to the interests of the insured in areas such as breach of warranties and the duty of disclosure.

Choice of law rules

2.62 Choice of law rules determine which law should be applied when a fact situation is linked to more than one legal system.[125]

2.63 At common law, the proper law of the contract governs almost all issues pertaining to a contract. If the parties expressly or impliedly choose the law of a specific place to govern the contract, the courts will, in general, give effect to that choice. In the absence of such a choice the court will find the place with the 'closest and most real connection'[126] with the contract and apply the law of that place, termed 'the objective proper law'.[127]

2.64 In the Commission's report *Choice of law*, it was observed that parties are permitted to choose the law to govern their contract because this accords with the

125 In practice, it is only necessary to refer to choice of law rules when there is a difference (or conflict) between the laws of two legal systems which are connected with the problem and when the parties do not agree on which law should apply. Unless the matter is disputed the court or other tribunal will generally apply the law of the place where it is sitting (the law of the forum, or lex fori): ALRC *Choice of law* ALRC Sydney 1992 (ALRC 58) para 1.3.

126 The court will consider matters such as the places of residence or business of the parties, the place of contracting, the place of preformation, and the nature and subject matter of the contract: ALRC 58 para 8.3.

127 ibid.

principle of freedom of contract.[128] Such deference to the parties' choice of law has been justified by reference to the parties' familiarity with the chosen law, and because certain types of standard commercial contracts, especially maritime contracts, have been developed in English legal and commercial practice.[129]

2.65 The Institute clauses state that the insurance is subject to English law and practice. Therefore, subject to any overriding provision in the contract, the MIA (UK) will apply. In Australia this provision is usually amended to apply Australian law and practice to contracts of marine insurance.[130]

2.66 The principle of freedom of contract may be constrained by legislation to prevent parties circumventing the effect of Australian laws. As discussed below, the ICA and the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA) both contain provisions constraining party choice of law and, in the case of COGSA, party choice of forum.

Jurisdiction

2.67 Rules determining the choice of the substantive law governing the contract need to be distinguished from procedural rules in the jurisdiction of a particular court (or tribunal or arbitration). The issue of choice of law generally arises only when the question of jurisdiction is settled.[131]

2.68 Any given fact situation with interstate or international elements may give rise to problems of jurisdiction, such as whether the courts of the jurisdiction in which the proceedings have been commenced have the power to deal with this particular dispute between these particular parties. For example, questions may arise in Australia about the respective jurisdictions of the Federal Court and State Supreme Courts.[132]

Insurance Contracts Act

---

128 ALRC 58 para 8.3–8.5. Apart from freedom of contract, other justifications for allowing parties to choose their own law are that it promotes certainty and economic efficiency and fulfils their expectations.

129 ALRC 58 para 8.4.

130 The English Court of Appeal has held that while English forms of marine insurance contracts have become part of the currency of international commerce and are widely used throughout the world, the absence of express provisions for the governing law and jurisdiction does not mean that there is a strong indication that English law should apply: *Amin Rasheed Shipping v Kuwait Insurance* [1983] 1 All ER 873.

131 ALRC 58 para 1.4. It has been held that the use of an English arbitration clause is not definitive of a choice of English law *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1970] 2 Lloyd's Rep 99. But cf *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172.

132 See para 2.86–2.87.

2.69 ICA s 52 forbids the contracting out of the ICA where this would prejudice a person other than the insurer. Section 8 of the ICA also prevents the parties from avoiding the ICA by choosing the law of another jurisdiction as the governing law of the contract.[133]

2.70 Section 8 provides that the ICA extends to contracts of insurance the proper law of which is, or would be (apart from any choice of law in the contract), the law of an Australian State or Territory.[134] Where the parties have expressly nominated another law to govern the contract then, notwithstanding that contractual term, the ICA will apply if the objective proper law is that of a State or Territory.[135] Similar provisions are found in the *Insurance (Agents and Brokers) Act 1984* (Cth).[136]

2.71 The High Court considered the operation of these provisions in *Akai Pty Ltd v The People's Insurance Co Ltd.*[137] Akai was incorporated in New South Wales and had taken out a credit insurance policy with an insurance company incorporated in Singapore. The insurance contract contained a clause that selected English law as the proper law and also provided that all disputes arising out of the contract should be resolved by arbitration in London. When a dispute arose under the policy Akai commenced proceedings in Australia and in England, although by the time the matter reached the High Court of Australia no further steps had been taken in the English proceedings.

2.72 The High Court held by a 3–2 majority that the choice of law and forum clauses of the contract were 'express provisions to the contrary' in terms of the ICA and should be wholly disregarded when ascertaining the objective proper law of the contract. The objective proper law of the contract was that of New South Wales[138] with the result that the ICA applied to the parties' dispute. The High Court set aside orders of the NSW Supreme Court staying the proceedings.

2.73 However, the practical effect of the High Court ruling was thrown into doubt by the result of subsequent litigation before a single judge in England in which the insurance company sought summary judgment and obtained an anti-suit injunction against Akai proceeding further in Australia.[139] In general, in a conflict of laws one

---

133 *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 141 ALR 374, 384.
134 ICA s 8(1).
135 ICA s 8(2).
136 IABA s 6.
137 (1996) 141 ALR 374.
138 Taking into account that while the policy was the product of negotiations conducted by communications between Sydney and Singapore, the policy had no practical connection with Singapore except that the insurer happened to be a Singaporean company. The policy had no factual connection with England. The risk was very substantially situated in New South Wales, the only countries covered by the policy were Australia and New Zealand and the maximum liability was stated in Australian currency: (1996) 141 ALR 374, 387.
139 *Akai Pty Ltd v The People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

country does not give effect to the policy of another unless the law of that other is the governing law for the particular issue under the laws of the first country. In *Akai* the English judge, Justice Thomas, was urged to disregard this general principle and, as a matter of comity, to give effect to Australian law and policy and stay the action. In support of this position it was argued, among other things, that the Australian High Court's conclusion that the choice of law and forum clauses were void was reached by legal reasoning, which would have been used in an analogous situation in England, and that the contract had many connections with Australia and none with England. Nonetheless, Justice Thomas refused to apply the ICA provisions, which the High Court had found invalidated the contractual choice of English law as the governing law, and granted an injunction against the proceedings continuing in New South Wales.[140]

Carriage of Goods by Sea Act 1991

2.74 Other provisions that seek to prevent choice of law or forum circumventing the effect of domestic Australian legislation are found in COGSA, which enacted into Australian law new rules governing the conditions upon which goods are to be carried in international shipping.[141]

2.75 To ensure that these rules are applied to all contracts for the shipment of goods out of Australia, s 11(1) provides that all parties to a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia are taken to have intended to contract according to the laws in force at the place of shipment (that is, the relevant Australian jurisdiction).[142] Section 11(2) provides that an agreement to preclude or limit the effect of s 11(1) or the jurisdiction of Australian courts has no effect.[143] This means, for example, that an Australian court, when faced with a bill of lading for the shipment of goods from Sydney to France in which it is stipulated that French law shall govern the contract, must nevertheless apply the law of New South Wales, including the terms and conditions laid down in COGSA, as the proper law of the bill of lading.[144]

2.76 The restrictions on choice of law in COGSA go further than those in the ICA. Section 11 of COGSA displaces the choice of law itself whereas the ICA provides that the ICA's provisions are to apply to contracts the proper law of the forum

---

140 See F Reynolds 'Overriding policy of the forum: The other side of the coin' (1998) *Lloyd's Maritime and Commercial Law Quarterly* 1.

141 Replacing the Hague Rules implemented in the *Sea-Carriage of Goods Act 1924* (Cth).

142 COGSA s 11, which is similar in effect to its predecessor: *Sea-Carriage of Goods Act 1924* (Cth) s 9.

143 Section 11(3) provides that an agreement for the resolution of a dispute by arbitration is not made ineffective by s 11(2) if the agreement provides for that arbitration to be conducted in Australia.

144 See P Nygh *Conflict of laws* 6th ed Butterworths Sydney 1995, 35.

objectively ascertained, notwithstanding the express choice of a foreign legal system.[145]

Implications for reform of the MIA

2.77 The international workings of the marine insurance market and the fact that most contracts are made between well informed commercial interests suggest that the parties' freedom to contract should be preserved.

2.78 On the other hand, the benefit of reforms to the MIA may be lost, especially to those insured parties who may have most need of such reforms, if contracts of marine insurance written in Australia come to be routinely governed by English or other foreign law.

2.79 There may be a national interest in maintaining and promoting Australian courts and arbitration as dispute resolution forums in marine insurance and other international commercial matters.[146] It is the policy of the Maritime Law Association of Australia and New Zealand (MLAANZ) that Australasian marine disputes should be resolved in Australasian forums.[147] The Department of Transport and Regional Services has submitted that consideration should be given to enacting provisions in the MIA similar to those in the COGSA.

> 'A clause that ensured Australian courts had jurisdiction to hear matters arising out of marine insurance contracts would make it easier for Australian shippers to recover under marine insurance policies.'[148]

2.80 Some insured parties prefer English law to apply to the contracts of insurance they enter and for marine insurance disputes to be resolved by English courts or arbitration. In particular, multinational corporations with global interests in ships or cargo may prefer English law and courts or arbitration because, among other reasons, London is an important centre for international marine insurance and dispute resolution, the English law of marine insurance is relatively certain and well developed, and the English court system is seen to be reliable and impartial.[149] It also provides a measure of consistency across a corporation's international dealings.

2.81 Consultations suggest that some parties, particularly in a specialised area of law such as marine insurance, value the expertise built up among lawyers and judges in particular countries and courts, which makes those forums desirable venues for

---

145 id 297. The *Trade Practices Act 1974* (Cth) s 67 uses a mechanism similar to the ICA s 8.
146 The Commission's recent report *Managing justice* (ALRC 89) highlighted the pivotal role of the federal civil justice system to the working economy: See ALRC 89 para 1.105–1.107.
147 M White *Correspondence* 13 June 2000.
148 Department of Transport and Regional Services *Submission 2*.
149 Insurers and brokers *Consultation* Sydney 27 March 2000.

dispute resolution.[150] Many marine insurance policies, including some issued by Australian insurers, provide for the application of English law or for the jurisdiction of the English courts or arbitration in London.[151] This has obvious attraction where disputes might otherwise have to be resolved in countries where judicial and legal expertise and expert witnesses are not readily available.

2.82 Restricting the scope for parties to exercise choice of law may adversely affect the availability and competitiveness of insurance in Australia. Some Australian insured parties choose to insure partly with both Australian insurers and co-insurers in London or other overseas markets. By maintaining contact with more than one market, the insured may be able to obtain more competitive rates. If party choice of law is constrained, this may have some adverse effect on the availability of overseas insurance for Australian risks if some overseas insurers prefer that English law, for example, governs their contract.

2.83 Australian insurers may be commercially disadvantaged in the international marine insurance market if they are not able to offer insurance subject to English law (or Dutch or Norwegian or other law, if that is the preference of a prospective insured). In addition, if marine insurance contracts were subject to s 8 of the ICA or an equivalent provision, where Australian insurers are co-insurers of insurance contracts entered into by leading underwriters overseas, there may be uncertainty as to the proper law of the contract entered by the Australian company.[152] Such uncertainty might also disadvantage Australian insurers.

2.84 It is difficult to predict whether or to what extent insurers might choose foreign law to circumvent changes to the MIA. Brokers would be likely to argue against contractual choice of law clauses that might work against the interest of the insured parties they act for. In practice, the level of premiums and terms of the cover, rather than the choice of law, are of more concern to insureds and their brokers at the time of entering into the contract.

2.85 At present, the Commission proposes that the MIA not restrict the right of parties to choose some other body of law as the governing law of the contract or to agree that disputes are to be resolved by a foreign court or arbitration. However, the Commission is interested in comments on alternative approaches that might provide a 'middle road' between the provisions found in the ICA or COGSA and full

---

150 Singapore judges and practitioners *Consultation* Singapore 13 April 2000.

151 National Bulk Commodities Group *Correspondence to AG's Dept* 6 May 1997. As noted above, when the intention of the parties as to the governing law is not expressed and cannot be inferred, the contract is governed by the system of law with the closest and most real connection. Arbitration provisions in contracts of insurance have been held to be the most important factor in this determination: *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Aust) Pty Ltd* (1989) 18 NSWLR 172.

152 Co-insurance gives rise to separate and distinct contracts, although in practice each underwriter will generally enter on the terms agreed between the insurer and the leading underwriter (see para 8.21).

freedom of contract in choice of law and jurisdiction. For example, should the MIA provide that where both parties to the contract are domiciled in Australia, the application of Australian law and the jurisdiction of Australian courts may not be circumvented?

Draft proposal 1. The law of marine insurance in Australia should not restrict the right of parties to choose some other body of law as the governing law of the contract or to decide that disputes be resolved by a foreign court or other forum.

Question 9. Should the MIA provide that, where both parties to a contract of marine insurance are domiciled in Australia, the application of Australian law and the jurisdiction of Australian courts may not be circumvented contractually?

Federal Court jurisdiction

2.86 Section 39B(1A) of the *Judiciary Act 1903* (Cth) confers on the Federal Court jurisdiction in any matter arising under any laws made by the federal parliament. The MIA is federal legislation. However, it is possible that litigation relating to the interpretation or effect of contracts of marine insurance may not arise under the MIA.[153]

2.87 In view of this uncertainty about the Federal Court's jurisdiction in marine insurance matters it has been suggested that the MIA should expressly confer jurisdiction to determine matters arising or relating to the MIA on the Federal Court[154] to be exercised concurrently with State and Territory courts, as is the case with the *Admiralty Act 1988* (Cth).[155]

Draft proposal 2. The MIA should expressly invest the Federal Court with jurisdiction in marine insurance matters, to be exercised concurrently with State and Territory courts.

153 Advisory Committee members *Advisory Committee meeting* Sydney 25 May 2000. This would presumably occur where the dispute involved construing contractual terms on which the MIA offers no guidance.

154 ibid.

155 See *Admiralty Act 1988* (Cth) s 9.

3. Competition and the marine insurance market

The marine insurance market

3.1 Marine insurance is distinctly international. A shipowner or importer or exporter of goods to or from Australia can choose to insure with an Australian, United Kingdom, USA or other overseas-owned insurer. Contracts of co-insurance may be entered where, for example, 40% of the risk is insured in Australia, 40% in New Zealand and 20% in Singapore, each contract being subject to the laws and practices of the country in which the insurance is placed.[156]

3.2 While there is an inclination for insureds to use insurers in their country of domicile, Australian insurers insure risks from all over the world. Shipowners may choose to insure here because their ships are Australian flagged, they commonly use Australian ports, or the head office of the company is located in Australia. Cargo owners importing goods may buy on CFR or FOB terms and choose to 'import' insurance or buy insurance from an Australian company. Exporters may sell CIF, additionally 'exporting' the insurance, or sell CFR or FOB with the cargo insured overseas.

3.3 Australian involvement in the transport of cargo, for example, because a ship carries the Australian flag or because goods are being exported or imported into Australia, does not mean that insurance will be purchased here or even that the business is notionally 'Australian'. Insureds generally place insurance with a particular underwriter because the price is competitive. The market is price sensitive and competitive within Australia and with overseas insurers. Other factors that influence the choice of insurance include whether the insured is the exporter or importer of goods (importers or buyers generally have the most say about where cargo will be insured) as well as national laws and customs. Some nations, for example, Nigeria and the Solomon Islands, impose legal restrictions that require insureds to use their own insurance companies.[157] Japanese customs and market practices favour their own insurance industry and it is difficult for exporters to Japan to use non-Japanese insurers.[158]

---

156 Insurers *Consultation* Melbourne 6 June 2000.

157 Insurers and legal practitioner *Consultation* Brisbane 11 May 2000; Insurers and legal practitioners *Consultation* Sydney 15 May 2000; Associated Marine Insurers Agents Pty Ltd *Correspondence* 15 June 2000.

158 Insurers and brokers *Consultation* Sydney 27 March 2000; Insurers and legal practitioner *Consultation* Brisbane 11 May 2000; Insurers and legal practitioners *Consultation* Sydney 15 May 2000; Insurers

3.4 Essentially, the Australian marine insurance market is marine insurance business written by insurance companies located in Australia. Most Australian insurers are divisions of, or are writing insurance for, foreign-owned insurance companies.[159] Australia's share of the international market in insurance is measured by the insurance written by companies located in Australia and the figures for other countries also represent a mix of local and international business.

Premium revenue

3.5 The most recent information available to the Commission concerning the international market in marine insurance relates to the 1997 accounting year and was published by the International Union of Marine Insurance (IUMI).

3.6 In 1997 the gross premium income for all countries for direct marine insurance was around US$14 billion. This comprised hull insurance (27%), transport and cargo insurance (60%), marine liability insurance (7%) and offshore energy insurance (6%).[160] The following table shows the proportion of premium revenue received by marine insurers in 1997 for all countries where figures are collected. The figures below show the top 10 countries in terms of premium revenue for all markets.

Table 3.1. Proportion of premium revenue — 1997[161]

	% hull market	% cargo market	% marine liability market	% offshore, energy market	% total market
Japan	14.4	22.1	2.8	2.3	17.4
UK	18.1	7.9	23.1	57.6	14.9
USA	7.6	9.1	31.5	12.0	10.5
Germany	3.1	13.9	0	0	9.1
France	10.4	8.4	2.0	8.0	8.5
Italy	6.4	6.9	2.4	2.8	6.2
Norway	9.0	0.7	27.4	12.5	5.6
Netherlands	3.5	2.9	0	0	2.7

Consultation Melbourne 6 June 2000. It is less difficult for importers bringing goods from Japan to arrange Australian insurance.

159 For example, the parent companies of Associated Marine Insurers Agents Pty Ltd are Swiss (Zurich) and British (CGU). National Marine is owned by Royal and Sun Alliance, a UK company. QBE, HIH and Suncorp are Australian-owned but QBE's associate company, Mercantile Mutual, is Dutch. ACE, Chubb and St Paul's Fire and Marine Insurance are all US companies, and Gerling and MMI are German: Insurers *Consultation* Melbourne 6 June 2000.

160 International Union of Marine Insurance *Report on marine insurance premiums 1997* IUMI and CEFOR http://www.cefor.no (16 June 2000). The figures do not include UK-based P & I clubs or reinsurance (facultative or treaty).

161 ibid.

Spain	4.0	2.5	0	0	2.6
Australia	2.6	2.2	1.3	0.9	2.2

3.7 While the overall lead by Japan is possibly unexpected in a market historically associated with London, Japan is a large shipowning and trading nation. While the amounts written in Australia are modest compared to the insurance written in the major jurisdictions, it earned a greater proportion of international marine insurance premium revenue than insurers in Hong Kong (1.6%), Canada (0.9%) and Singapore (0.7%), which are the 13th, 18th and 24th ranking countries respectively.[162]

Australia's position

3.8 Australia's 1997 position as 10th in the world in terms of marine insurance indicates a significant industry, particularly considering the relative sizes of the economies of the other major insuring nations. However, despite Australia being fifth in the world in terms of the frequency and volume of shipping,[163] 95% of trade volume is carried by foreign shipping services. The Australian-flagged fleet is small.[164] This is reflected in the cargo/hull break-up of the Australian insurance market.

3.9 In Australia in 1997, marine cargo insurance was predominant with total premium revenue of US$171 million, followed by hull insurance with premium revenue of US$92 million. The hull figure would include a significant proportion of pleasure craft insurance, which is categorised as marine by insurers even though it no longer comes under the MIA. The following table shows the break-up of this premium revenue and the percentage of Australia's revenue compared with the global market.

Table 3.2. Australia — Premium revenue 1997[165]

	Cargo	**Hull**	**Marine liability**	**Offshore energy**	**Total**
Premium revenue (US$ '000)	171 000	92 000	12 000	7 000	282 000
% of Australian premium revenue	60.6	32.6	4.3	2.5	100
% of world premium	2.2	2.6	1.3	0.9	2.2

162 ibid.

163 P Leary 'The "maritimeness" of Australia — But how maritime is Australia?' (Jan/Feb 2000) 140 *Australian Defence Force Journal* 41, 41 citing the government's *State of the marine environment report*.

164 Commonwealth of Australia *Australia's oceans policy — Specific sectoral measures* Environment Australia 1998, 16.

165 International Union of Marine Insurance *Report on marine insurance premiums 1997* IUMI and CEFOR http://www.cefor.no (16 June 2000).

revenue					

3.10 In 1998, the Australian marine insurance market received annual premium revenue of around $413 million[166] and claims expenses were around $302 million.[167] Premium revenue by State was highest in New South Wales ($197 million) followed by Victoria ($108 million).[168]

3.11 Marine insurance in Australia comprises less than 3% of the total general insurance market.[169] This is a relative figure, however, reflecting the size and expansion of other areas of general insurance rather than a contraction of marine insurance.[170]

Market expansion or contraction?

3.12 Whether the marine insurance market is expanding is uncertain. The Australian market is considered by some to be contracting[171] with companies increasingly using overseas or captive insurers.[172] Globally the marine insurance market has sustained trading losses for several years. In London, Lloyd's reported in 1998 that there has been deterioration in trading conditions in the market for marine insurance.[173] In Norway, the Norwegian Central Union of Marine Underwriters (CEFOR) warned in 1998 that severe losses were a reality for all marine insurance markets.[174] It predicted that, as a consequence, insurers would have to pull out or increase premiums to reflect accurately the risks underwritten.[175] In its 1998 annual report, CEFOR attributed these losses to the positive drive by the shipping industry to improve safety and reduce claims, which had been overcompensated for by insurers in reducing the premiums charged.[176] The predicted losses were reported as

166 APRA 'General insurance market statistics' http://www.isc.gov.au/iands/Marketstats/gen_stats.htm (9 March 2000); APRA *Selected statistics on the general insurance industry — Year ending December 1998* APRA 1999, table 6. More detailed statistics are not collected.

167 id, table 8.

168 id, table 10.

169 General insurance is all insurance apart from life and health. This figure is for the marine and aviation markets for the 12 months ending 31 December 1998: APRA 'General insurance market statistics' http://www.isc.gov.au/iands/Marketstats/gen_stats.htm (9 March 2000).

170 As pointed out by one insurer, marine insurance would have been close to 100% of general insurance in Australia at the time of colonisation and has been decreasing ever since due to expansion in other markets, particularly liability and motor insurance: Insurers *Consultation* Melbourne 6 June 2000.

171 Insurers and legal practitioners *Consultation* Sydney 15 May 2000.

172 Insurers and brokers *Consultation* Sydney 27 March 2000. A captive insurer is a company within a group of related companies performing the function of insurer to that group: APRA *Selected statistics on the general insurance industry — Year ending December 1998* APRA 1999, 49.

173 Lloyd's of London *Global results 1998* Lloyd's of London 1998, 12.

174 CEFOR 'Marine underwriters on their way to the Wizard of Oz?' *News release* CEFOR 11 November 1998 http://www.cefor.no/nyheter/nyheter_index.htm (17 February 2000).

175 ibid.

176 CEFOR *Annual report 1998* CEFOR 1998, 13 http://www.storebrand.no (28 March 2000).

a reality in 2000 for the Norwegian hull markets with projected global industry losses of $US3 billion recorded.[177]

3.13 However, the world fleet is expanding and has steadily increased from 423 million gt in 1990 to 532 million gt in 1998.[178] In Australia, IUMI figures show that premium revenues have increased from 1996 to 1997,[179] indicating that the Australian market is also expanding. Global losses have also been declining.[180] In the competitive Australian market the response to this has been to push premiums to a level below profitability[181] and this is the experience in other countries, including the American and London markets.[182] With this in mind, an increase in premium revenue at a time when there is downward pressure on premiums reflects an expansion of the Australian market.

Economic importance

3.14 The Department of Transport and Regional Services has suggested that, consistently with Australia's position as primarily a shipper (not a shipping) nation, any amendments to the MIA should be made with the interests of Australian shippers, including exporters, importers and coastal cargo interests, foremost in mind.

> 'It is important that Australian shippers can access adequate marine cargo insurance cover at internationally competitive rates. It is especially important in the case of shippers whose goods fall into the category of hazardous or noxious cargoes.
> …
> Economic studies of supply and demand elasticities suggest that on average around about two-thirds of the costs of transporting Australian export and import is borne finally by Australian exporters and importers rather than by the overseas exporters and importers. The costs borne by the insurance industry in meeting claims in the event of

---

177 CEFOR 'Global marine insurance markets loses US$3 billion in 1999' *News release* CEFOR 30 March 2000 http://www.cefor.no (16 June 2000).

178 For ships over 100 gt: The world fleet 1990–98 by ship type, IUA *Marine and casualty statistics* IUMI Conference Berlin 1999.

179 Australian hull premiums: 1996 US$88 million; 1997 US$92 million. Australian cargo premiums: 1996 US$158 million; 1997 US$171 million. The figures for all countries had declined, however — hull: 1996 US$4 375 million; 1997 US$3 581 million; cargo: 1996 US$8 205 million; 1997 US$7 746 million: International Union of Marine Insurance *Report on marine insurance premiums 1997* IUMI and CEFOR http://www.cefor.no (16 June 2000).

180 Figures from the International Underwriters Association (IUA) and IUMI show that global losses have been declining: 0.56% of the tonnage afloat for vessels over 500 gt was totally lost in 1979, steadily declining to 0.2% in 1988. The figure has remained low, down to 0.16% in 1998: World loss ratios 1977-1989, IUA *Hull casualty statistics* IUMI Conference London 1990; Total losses in proportion to shipping afloat, IUA *Marine and casualty statistics* IUMI Conference Berlin 1999.

181 Insurers and brokers *Consultation* Sydney 27 March 2000.

182 CEFOR 'Marine underwriters on their way to the Wizard of Oz?' *News release* CEFOR 11 November 1998 http://www.cefor.no/nyheter/nyheter_index.htm (17 February 2000), although Norway claims that its losses are primarily due to an increase in claims, as well as insufficient premium revenue. Germany has also recorded a decline in premium revenues and a decline in claims: H Fromme 'German marine insurers suffer' *Lloyd's List* 26 June 2000.

> loss or damage to sea cargoes are, for the main part, likely to be passed forward to Australian shippers as a component of subsequent insurance charges.'[183]

3.15 There are important economic reasons to encourage Australian importers and exporters to arrange insurance with Australian insurers.

3.16 Although most insurers located in Australia are not Australian owned, insurance placed with these businesses is beneficial in providing Australians with jobs in the insurance industry and has positive economic benefits for associated businesses such as ship repairers, lawyers and surveyors, and for Australia's terms of trade. Where Australian importers import on CIF terms they are in effect importing the marine insurance as well as the goods. Importing goods on CFR or FOB terms reduces the foreign currency cost of imports and helps to improve the national balance of trade. Similarly, exporters who sell goods on CIF terms help Australia's balance of trade by exporting insurance services as well as goods. The exporter usually recovers the full cost of the insurance from the overseas buyer in the CIF invoice price.[184]

International marine insurance law

3.17 The terms of reference require the Commission to consider

> 'the desirability of having a regime consistent with international practice in the marine insurance industry, noting in particular that the Act is based very closely on the *Marine Insurance Act 1906* (UK) and whether any change to the Act might result in a competitive disadvantage for the Australian insurance industry.'[185]

3.18 As stated in chapter 2, the marine insurance market, long dominated by Lloyd's and London, is still strongly influenced by UK law and practice.[186] While there are other important insurance law regimes, such as the French and Scandinavian regimes,[187] the London market and United Kingdom law have been the leading influence in the global marine insurance market. Australia has a close association with marine insurance law and practice in the United Kingdom and many other common law jurisdictions, including New Zealand, Canada, Singapore, Malaysia, Hong Kong and India, have legislation derived from the MIA (UK).[188]

---

183 Department of Transport and Regional Services *Submission 2*.

184 M Hill 'The implications for marine insurers of the carriage of goods by sea in the 1980's' *Paper* MLAANZ Annual Conference Wellington 13–15 September 1979, 5; M Hill 'How to profit from Australian marine insurance' (July–August 1993) *Maritime Studies* 21.

185 Terms of reference — Review of the Marine Insurance Act 1909 (Cth), see p 3.

186 'London's maritime services make US$1,450 million' (June 2000) *Asia Insurance Review* 48.

187 A recent survey of European civil code jurisdictions concluded that, except for the Scandinavian countries, they do not share any 'common marine insurance system', their laws differing significantly both in material solutions and in approach: T-L Wilhelmsen 'The marine insurance system in civil law countries — Status and problems' *Paper* Marine Insurance Symposium Oslo 4–6 June 1998.

188 See para 2.7–2.8.

3.19 The prices set by an insurer in London are influential on competing insurers in other countries and, through the IUA and the Institute Clauses, London sets the terms and conditions for policies that are used all around the world. These clauses form the basis of most marine insurance policies underwritten in Australia,[189] and are widely used, not only in common law countries whose legislation is based on the MIA (UK), but also in the USA, Japan and China. Other model cargo clauses, are rarely, if ever, used. The Institute clauses are, in the words of the Maritime Law Association of Australia and New Zealand (MLAANZ), 'built on the foundation stone of the MIA — or its UK equivalent'.[190]

3.20 Any significant divergence in Australia from English law and practice may create a real or perceived risk of uncertainty for insureds, and proposals for change to the MIA will have to take account of possible flow-on effects on existing clauses and their interpretation. The Insurance Council of Australia and others have emphasised that if insurers are to compete in the international marine insurance market Australian law and practice should be consistent with English law and the international practices based on it.[191]

3.21 England itself has decided against recommending changes to the existing law of marine insurance.[192] In 1980, the UK Law Commission stated that the MIA (UK) provided certainty of law and practice and that, in view of London's position as a leading centre for marine and transport insurance in a competitive international market, it would be undesirable to disturb this certainty. These concerns may be less significant now. Some commentators doubt that reform of the MIA (UK) would necessarily affect the international competitiveness of the London market.

> 'There seems to be little market advantage in the English approach to the non-causative and immaterial warranty, nor does the approach in fact and effect make it any more attractive to be a marine insurer in London than say in Antwerp or Oslo … underwriting risks on a Norwegian Marine Insurance Plan policy, for instance, is done at rates comparable to those risks being underwritten on Institute Clauses in terms of the Marine Insurance Act in London … were English law to be amended to the effect that a warranty, as with any other breach, would have to be causally connected and material in order to allow an insurer to walk away from the contract altogether, no appreciable increase in premiums would be expected.'[193]

---

189 The Institute of London Underwriters has been subsumed by the International Underwriters Association (IUA), although the clauses discussed here are still known as the 'Institute clauses'.

190 Law Council of Australia and Maritime Law Association of Australia and New Zealand *Submission to AG's Dept* 1997.

191 Insurance Council of Australia *Submission to AG's Dept* 29 May 1997; Judge *Consultation* Brisbane 11 May 2000; Insurers and legal practitioners *Consultation* Sydney 15 May 2000.

192 UK Law Commission *Insurance law — Non-disclosure and breach of warranty* Law Comm No 104 (1980).

193 J Hare 'The omnipotent warranty: England v The world' *Paper* International Marine Insurance Conference University of Antwerp November 1999.

3.22 While the common law countries have broadly similar marine insurance law and practice, the public and private legislation relating to marine insurance in civil code countries produce distinct regimes. Some of these regimes are discussed briefly below. This survey is not intended to be comprehensive, but is presented simply to illustrate some of the differences both between civil code and common law jurisdictions and among the laws in European civil code countries.[194]

3.23 The marine insurance legislation in civil code countries is usually contained in general insurance contracts legislation or in commercial codes rather than in legislation applying specifically to marine insurance. Any specific marine insurance legislation tends to be directory only and to preserve freedom to contract, subject to general contract principles relating to illegal and unfair contracts.

3.24 For example, Germany,[195] France, Norway, Sweden, Denmark and Finland all have general insurance contracts legislation, but marine insurance is either excluded from its ambit or, where the legislation does apply to marine insurance, the provisions are directory.[196]

3.25 The practice of marine insurance in civil code jurisdictions is best understood by reference to standard contractual terms used rather than relevant legislation. These standard terms include those provided in the German General Rules of Marine Insurance (known as the 'ADS')[197] and the Norwegian Marine Insurance Plan. Such terms are generally agreed by associations of insurers in consultation with representatives of interested groups and organisations.

3.26 An important difference between civil and common law jurisdictions is that civil code countries do not recognise the special status of marine insurance warranties. For example, under Scandinavian laws, a breach by an insured of a term

---

194 This summary is drawn in large part from T-L Wilhelmsen 'The marine insurance system in civil law countries — Status and problems' *Paper* Marine Insurance Symposium Oslo 4–6 June 1998.

195 Germany has a general insurance law which deals with non-marine insurance, including land transport insurance. One of the main aims of that legislation was 'to protect the individual insured' — but marine insurance is subject only to the general laws of contract: T Remé 'Duty of Disclosure: Scope of the Duty and Sanctions for Breach' *Paper* Marine Insurance Symposium: Oslo 4–6 June 1998.

196 The legislation in Sweden and Denmark, while mainly directory, does contain some mandatory provisions dealing with, for example, the insured's duties, the concepts of insurable interest and premium payment conditions. In Norway, the Insurance Contract Act of 1989 regulates contracts of insurance generally but is mandatory with respect to certain types of marine insurance only — eg it applies to all vessels under 15 m in length: See S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 69.

197 *Allgemeine Deutsche See-versicherungsbedingungen*.

of a contract of marine insurance entitles the insurer to avoid liability if and only to the extent that the breach is both material and causative of the loss.[198]

3.27 The standard terms of marine insurance contracts differ significantly between jurisdictions including, for example, terms that define the scope of the duty of disclosure. The duty is widest in Norway, Denmark and Germany, where the insured must give full and correct disclosure of all circumstances that are material to the insurer. In France, the insured must disclose all circumstances of which the insured is aware that would influence the insurers in assessing the risk. In Sweden, the scope is limited to circumstances that the insurer asks about, or which the insured is aware would influence the insurer's risk assessment.[199] The remedies available for breach of the duty of disclosure also differ between civil code jurisdictions.[200]

Reform and international competitiveness

3.28 The Commission's consultations have revealed different perceptions of the impact major changes to the MIA might have on the international competitiveness of the marine insurance industry in Australia. The Commission hopes to learn from the experience of Australian insurers after the commencement of the ICA in 1986.

3.29 Some marine insurance practitioners have stated that at the time of the enactment of the ICA there was apprehension overseas about its possible effects and practitioners actively worked to inform the London market about the new regime.[201] Insurers have indicated to the Commission that premiums rose at the time in anticipation of higher claims but since have stabilised.

3.30 The Commission also has been told that when pleasure craft were bought under the ICA the insurance market in Australia and London adjusted quickly and with little fluctuation.[202] Similarly, while the immediate effect of changes to the MIA may be to increase premiums in the short term, competitive pressures should prevent a long term rise.[203]

3.31 The experience of the New Zealand market after passage of the Insurance Law Reform Act 1977 is also relevant to this question. This legislation reformed the law

198 J Hare 'The omnipotent warranty: England v The world' *Paper* International Marine Insurance Conference University of Antwerp November 1999.

199 T-L Wilhelmsen 'The marine insurance system in civil law countries — Status and problems' *Paper* Marine Insurance Symposium Oslo 4–6 June 1998.

200 However, in none of these jurisdictions is rescission invariably available as a remedy as in the common law jurisdictions.

201 Legal practitioners *Consultation* Sydney 1 May 2000.

202 Although it was further noted that the insurance of pleasure craft, for example a $200 000 boat, may not be comparable with the greater exposure of, for example, a $50 million cargo or hull risk: Insurers and legal practitioners *Consultation* Sydney 15 May 2000.

203 Insurers, brokers and legal practitioners *Consultation* Perth 29 March 2000.

relating to misrepresentation and warranties, including in relation to contracts of marine insurance.[204] Information about the New Zealand experience could assist the Commission to assess the potential impact of any recommended changes to the MIA.

3.32 However Existing uncertainties in Australian law, notably those concerning the respective coverage of the MIA and ICA in relation to multimodal transport, are not an issue for insurers in other jurisdictions. These may already place Australian marine insurers at a competitive disadvantage and create inequity between consumers of marine and other forms of insurance. Changes to the substantive law of marine insurance that favour the insured could bring more business to Australian brokers and insurers.

Reinsurance

3.33 Changes to Australian marine insurance law may also impact on the ability of Australian insurers to reinsure in other markets. As the Commission noted in ALRC 20,[205] recommendations concerning the relationship between the insurer and insured may have indirect effects on reinsurance. Consideration must be given to the effects of changes on the availability or cost of reinsurance.

3.34 Insurers often reinsure appropriate proportions of certain risks, either with other 'direct' insurers or with professional reinsurers, to reduce their exposure in the event of a claim by the insured. Reinsurance contracts are commonly subject to the same terms as the primary insurance.[206] In the absence of an express term to the contrary, a contract of reinsurance is interpreted as one under which the obligation of the reinsurer is to cover the primary insurer in respect of the liability to which the primary insurer is subject.[207]

3.35 It is custom and practice in the insurance and reinsurance industry that a reinsurer will 'follow the fortunes' of the primary insurer. That is, where an insurer becomes liable under a policy that is the subject of reinsurance, even through some error or lack of expertise on the insurer's part, the reinsurer will nevertheless pay under the reinsurance contract. This obligation is subject to precise terms and conditions. In non-marine insurance, reinsurers impose conditions on Australian insurers to ensure that they are not unduly exposed to claims because the insurers

204 Insurance Law Reform Act 1977 (NZ) s 5, 6, 11,14.
205 ALRC 20 para 10.
206 Note, however, that the ICA does not apply to contracts of reinsurance: ICA s 9(1)(a). General common law principles, such as those relating to the doctrine of utmost good faith, the duty of disclosure and insurable interest, which have been modified by the ICA, still apply to contracts of reinsurance.
207 *Forsakringsaktiebolaget Vesta v Butcher* [1989] AC 880.

have failed to comply with provisions of the ICA. An insurer may jeopardise its reinsurance rights if it has failed to comply with the Act.[208]

3.36 As Australian marine insurers reinsure in the London and other overseas markets, reinsurers of Australian risks might be hesitant to devise special rates or accept additional risks if, for example, the MIA was amended to limit existing rights of insurers to avoid contracts of insurance for breach of warranty or non-disclosure. Australian insurers might find themselves unable to reinsure on overseas markets, or required to reinsure on adverse terms.

3.37 However, there is some reason to doubt the validity of these concerns. As discussed in this paper, the law of marine insurance, notably those parts concerning warranties and duties of disclosure, differs substantially between national jurisdictions. The London market reinsures risks from many parts of the world, including risks underwritten in and subject to the laws of civil code jurisdictions which have different arrangements in relation to warranties and the duty of disclosure. Market practices appear to be sufficiently flexible to adapt rates and terms to take account of an amended Australian MIA.

Question 10. What, if any, changes to the MIA have the potential to place Australian insurers at a competitive disadvantage internationally, and why? Conversely, are there any possible changes to the MIA that might improve the international competitiveness of Australian insurers? Give details of these changes.

Question 11. The Commission seeks further information about the size, composition, practices and trends of the Australian and overseas marine insurance markets and comparisons between the Australian and overseas marine insurance markets. The commercial sensitivity of any information received by the Commission will be respected.

Question 12. What, if anything, can be learned from the experience of the markets following the commencement of the ICA in 1986 and the transfer of pleasure craft to the ICA in 1998 relevant to possible reform of the MIA?

Question 13. How would overseas and Australian markets adjust to changes to the MIA provisions concerning warranties, the duty of disclosure or

208 F Marks and A Balla *Guidebook to insurance law in Australia* (3rd ed) CCH Sydney 1998 ¶2006, 555. Marks and Balla suggest that, while the matter has not been litigated in Australia or the United Kingdom, the requirements of reinsurers that insurers in Australia comply with the provisions of the ICA will displace the 'follow the fortunes' custom and practice.

insurable interest (as discussed in chapters 5-7)? What effects would such changes have on the availability or cost of reinsurance on overseas markets?

International harmonisation of national laws

3.38 Changes to Australian marine insurance laws may be presaged by international initiatives to harmonise marine insurance laws and practices.

3.39 In 1978 the United Nations Conference on Trade and Development (UNCTAD) reported on the legal and documentary aspects of the marine insurance contract. Revision of the Institute clauses followed in 1982 and 1983, and London market representatives participated in the preparation of UNCTAD model clauses on marine hull and cargo insurance in 1989.

3.40 However, the formation of model contract clauses is no longer the focus of harmonisation efforts. Neither is a convention or treaty initiative imminent.[209] The focus of harmonisation is now on national laws which affect the interpretation of contracts of insurance relating, for example, to the consequences of breach of contractual terms and duties of disclosure.

3.41 At present, the Comité Maritime International (CMI) is the most important forum through which the harmonisation of marine insurance law is being examined. The CMI is a non-governmental international organisation, the object of which is to contribute to the 'unification of maritime law in all its aspects'.[210] Its members include the maritime law associations of over 50 countries, such as the Maritime Law Association of Australia and New Zealand (MLAANZ).

3.42 At the centenary conference of the CMI held in Antwerp in 1997, it was suggested by Lord Mustill that the CMI take up the subject of marine insurance.[211] In consequence, a symposium on marine insurance law was held in Oslo in June 1998, convened by the CMI, the Norwegian Maritime Law Association and the Scandinavian Institute of Maritime Law. The Oslo symposium considered whether the CMI should support the development of an international convention or a model law on the subject of marine insurance. In his summary of the conference proceedings, the President of the CMI, Mr Patrick Griggs, concluded that neither an

209 Maritime law, as opposed to the law of marine insurance specifically, has been harmonised in various areas through international conventions, such as the Hague Rules in relation to contracts for the carriage of goods by sea.

210 http://www.comitemaritime.org (4 May 2000).

211 R Salter *Correspondence* 9 March 2000.

international convention nor a model law was achievable or desirable.[212] The conference resolved instead that the CMI's contribution to harmonisation would be to undertake a detailed survey of various aspects of marine insurance law so that the results of this study could or should be taken into account by countries reviewing marine insurance law.[213] The aspects of marine insurance law to be examined include

- insurable interest
- insured value — the time at which the subject of insurance is to be valued
- ordinary wear and tear (inherent vice)
- inadequate maintenance, fault in design, construction or material
- duty of disclosure before and during the currency of cover
- consequences of loss of class, unseaworthiness and breach of safety regulations
- warranties: express and implied, consequences of breach and alteration of risk
- change of flag, ownership or management
- misconduct of assured during the period of cover
- responsibility of the insured for the conduct of others
- the scope of the duty of good faith
- management issues, including the International Ship Management Code.[214]

3.43 An international working group on harmonisation of marine insurance was established, chaired by Dr Thomas Remé of Germany. The working group prepared a questionnaire to obtain input from national maritime law associations. An important focus of the questionnaire was to establish, in relation to each jurisdiction, what, if any, mandatory or directory rules constrain freedom to contract to allow consideration of whether public or private legislation would be needed to promote harmonisation.[215]

3.44 A synopsis of the questionnaire replies is to be prepared by Professor Trine-Lise Wilhelmsen of the Scandinavian Institute of Maritime Law. It is understood that the working group will prepare a report on the major issues, with suggested solutions, to be presented at a CMI colloquium to be held in Toledo, Spain in September 2000. In February 2001, the CMI is expected to adopt recommendations to guide reform of national laws.

---

212 P Griggs 'Summing up: Towards harmonisation of marine insurance conditions' *Paper* Marine Insurance Symposium Oslo June 1998.

213 R Salter *Correspondence* 9 March 2000.

214 P Griggs 'Summing up: Towards harmonisation of marine insurance conditions' *Paper* Marine Insurance Symposium Oslo June 1998.

215 T Remé 'The CMI Working Group on Marine Insurance/Challenges for the future' in M Huybrechts (ed) *Marine insurance at the turn of the millennium* Intersentia Antwerp 1999, 399.

3.45 While preliminary consultations and research have served to emphasise the importance of Australian legislation and practice broadly conforming to international law and practice, the international marine insurance market operates in an environment of multiple marine insurance legal regimes. In that context, the CMI initiative has important implications for the conduct of the Commission's review of the MIA. The outcome of these deliberations needs to be taken into account in formulating recommendations for reform of Australian marine insurance law. As the CMI is not due to report until February 2001, the Commission has requested the Attorney-General to extend the deadline for reporting to 30 April 2001.

Question 14. What is the significance of the international harmonisation initiative of the Comité Maritime International for the Commission's review?

Question 15. What is the probable direction of international marine insurance law and practice?

4. National competition policy

Introduction

4.1 The terms of reference direct the Commission to consider the competition policy implications of the MIA as part of this review. Issues concerning reform of the MIA and international competitiveness have been discussed in detail above. The terms of reference also expressly require the Commission to take national competition policy into account.

4.2 Australia's national competition policy is based on an agreement between the Commonwealth, State and Territory governments, and complementary legislation, which adopt a national co-ordinated approach to reform.[216] The policy aims to increase economic efficiency through the effective allocation of resources.[217] As well as improving national trade, improved competition has an impact on international trade in Australian goods and services.[218]

Legislative review

4.3 Under the national competition policy, all Australian governments established a legislation review and reform program.[219] The implementation of this policy involves the review of legislation and reform of laws that restrict competition. The Competition Principles Agreement states that legislation

> 'should not restrict competition unless it can be demonstrated that:
> (a) the benefits of the restriction to the community as a whole outweigh the costs; and

---

216 The government agreements were signed in April 1995 as a response to the Hilmer report (F Hilmer *National Competition Policy* AGPS Canberra 1993), which addressed the problems of the fragmented state and territory approach to reform. See National Competition Council *Compendium of National Competition Policy Agreements* 2nd ed NCC June 1998 http://www.ncc.gov.au/nationalcompet/agreements/index.htm (20 April 2000).

217 A Fels 'Decision making at the centre' ACCC 19 April 1996 http://www.accc.gov.au/docs/speeches/sp1of96.htm (26 April 2000).

218 H Spier 'The interaction between trade and competition policy: the perspective of the Australian Competition and Consumer Commission' *Paper* Seminar on International Trade Policies Taipei 2 May 1997 http://www.accc.gov.au/docs/speeches/sp14of 97.htm (26 April 2000): 'The crux of the relationship between trade and competition policies is that, in an environment where firms are increasingly organising their operations on a global scale and where trade barriers between nations are falling, firms are more exposed to the regulatory systems and business practices that exist in different countries.'

219 National Competition Council *National competition policy: Some impacts on society and the economy* National Competition Council January 1999, 23. See also F Hilmer *National competition policy* AGPS Canberra 1993 (Hilmer report).

(b) the objectives of the legislation can only be achieved by restricting competition.'[220]

4.4 In addition

'(9) Without limiting the terms of reference of a review, a review should:
(a) clarify the objectives of the legislation;
(b) identify the nature of the restriction on competition;
(c) analyse the likely effect of the restriction on competition and on the economy generally;
(d) assess and balance the costs and benefits of the restriction; and
(e) consider alternative means of achieving the same result including non-legislative approaches.'[221]

4.5 This requires an examination of the relationship between the overall interest of the community, competition and desirable economic and social outcomes. In addition, the following matters, where relevant, are to be taken into account in consideration of competition policy in relation to the MIA.

'(d) government legislation and policies relating to ecologically sustainable development;
(e) social welfare and equity considerations, including community service obligations;
(f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
(g) economic growth and regional development, including employment and investment growth;
(h) the interests of consumers generally or of a class of consumers;
(i) the competitiveness of Australian businesses; and
(j) the efficient allocation of resources.'[222]

Objectives of the Marine Insurance Act

4.6 The objectives of the MIA are not stated in the legislation. The debates accompanying the passage of the legislation reveal that the intention and effect of the MIA was to codify the existing common law and create a national law of marine insurance.[223] That continues to be a desirable objective.

---

220 Competition Principles Agreement 11 April 1995, cl 5(1) in National Competition Council *Compendium of National Competition Policy Agreements* 2nd ed NCC June 1998 http://www.ncc.gov.au/nationalcompet/agreements/index.htm (20 April 2000). See also National Competition Council *National competition policy: Some impacts on society and the economy* NCC January 1999, 37 http://www.ncc.gov.au: 'The guiding principle for reviews is that legislation should not restrict competition unless it confers an overall community benefit and its objectives cannot be obtained in other ways.'

221 id, cl 5(9).

222 id, cl 1(3).

223 House of Representatives *Hansard* 6 October 1908, 765.

Restrictions on competition

4.7 It has been stated in consultations with the Commission that the MIA does not restrict competition. Indeed, marine insurers have described the industry to the Commission as very competitive.[224]

4.8 The question whether there are restrictions on competition in the marine insurance industry due to the MIA involves consideration of the barriers to entering the industry, constraints on the decision making of businesses, compliance requirements of the legislation and the benefits that may accrue to one type of business or consumer over another.

Barriers to entry

4.9 Insurance companies are regulated under the Corporations Law and the *Insurance Act 1973* (Cth). Insurance intermediaries (agents and brokers) are regulated under the *Insurance (Agents and Brokers) Act 1984* (Cth) (IABA). These Acts apply to all insurers and intermediaries including those dealing with marine insurance. Where these requirements constitute a barrier to entering the marine insurance market, they do not discriminate between marine and non-marine insurers.

4.10 One issue raised by some commentators is whether the provisions of the MIA constitute a barrier to new entrants into the Australian marine underwriting market who may seek to offer cover on terms similar to insurance contracts in areas of insurance subject to the ICA. However, as the prior discussion of the law of marine insurance shows, such terms would be likely to be more favourable to insureds and, rather than providing a barrier, may give such an operator a market advantage.

Constraints on business activities

4.11 Rather than constraining the practice of marine insurance by imposing requirements on insurers or insureds, most of the provisions of the MIA may be varied by the parties to the contract.[225] Most disputes are concerned with the 'interpretation of the contract contained in the common form of marine policy'.[226] Also, the insurer may waive the application of certain provisions.[227]

Legislative compliance

---

224 Insurers and legal practitioner *Consultation* Brisbane 11 May 2000; Advisory Committee members *Advisory Committee meeting* 25 May 2000; Insurers *Consultation* Melbourne 6 June 2000.

225 See also para 2.46–2.53.

226 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1981 para 61.

227 MIA s 24, 48, 68. See para 2.49.

4.12 The MIA is not regulatory legislation. As stated above, there are no legislative requirements placed on insurers of marine risks beyond those required of insurers of other types of general insurance. Some provisions of the MIA, however, deal with payments to insurance brokers and disclosure by them.[228] This may be unfair if the MIA imposes greater requirements in practice on brokers of marine insurance than on non-marine brokers.

Benefits to particular operators or consumers

4.13 Justice Richard Cooper has observed

> 'It is contended by some that the Australian marine insurance market is such that consumers of marine insurance services lack the bargaining power to obtain contractual terms they desire and to exclude warranties required by underwriters at the present time. It is further contended that the provisions of the [MIA] perpetuate an historical inequality of bargaining power and incorporate, as statutory contractual warranties, promises which are no longer relevant to the conduct of maritime commerce and insurance.'[229]

4.14 However, for insureds who utilise the services of brokers this inequality is reduced. The Australian Bankers' Association has observed that insurance brokers often exercise superior bargaining power over insurers.[230] A more relevant issue may be whether individual brokers exercise sufficient knowledge and diligence to protect the interests of the insured. These concerns highlight inequalities within the market that are not necessarily perpetuated by the MIA, although fairer legislative provisions would help remedy the problems where insureds fail to negotiate out of inappropriate warranty provisions proposed by insurers.

Question 16. Does the MIA restrict competition in the Australian marine insurance industry in any way? Do provisions of the MIA constitute a barrier to new entrants into the Australian marine underwriting market?

Question 17. Does the operation of the MIA affect competition in other Australian industries, such as shipping and fishing, or for importers or exporters?

Effects in other areas

228 See para 8.55.
229 R Cooper 'Australian perspectives in marine insurance' *Paper* Federal Court Brisbane 19 March 1999.
230 Australian Bankers' Association *Submission to AG's Dept* 11 June 1997.

4.15 Specifically, the Commission is required by its terms of reference to take into account the effects on the environment, welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business, including small business, and efficient resource allocation with the aim of reducing compliance costs and the paperwork burden on small business.[231]

Safety and environmental concerns

4.16 The federal government has conducted four major inquiries into ship safety in the past decade.[232] The reports discuss the risks that substandard ships create for the marine environment and the seafarers who work on them. The principal sources of substandard ships are flag states which ignore their responsibilities under the maritime conventions they have ratified.[233]

4.17 The most recent report observed that improvements appear to have been made in four focus areas — quality of ships, operational issues, port state control, and crew training and competency.[234] However, standards of crew welfare appeared to have declined.

4.18 Each nation has a right to exercise control over foreign flag ships within its territorial jurisdiction. Port state control inspections are conducted to ensure that foreign ships are seaworthy, do not pose a pollution risk, provide a healthy and safe working environment and comply with relevant international conventions. They are seen as an effective tool in combating unseaworthy and substandard shipping. Port state control inspections are carried out in Australia by the Australian Maritime Safety Authority.[235] The International Maritime Organization (IMO) has

---

231 Terms of reference — Review of the Marine Insurance Act 1909 (Cth), see p 3.

232 House of Representatives Standing Committee on Transport, Communications and Infrastructure *Ships of shame: Inquiry into ship safety* AGPS Canberra 1992; House of Representatives Standing Committee on Transport, Communications and Infrastructure *Review inquiry into standards and safety: Progress report* AGPS Canberra 1994; House of Representatives Standing Committee on Transport, Communications and Infrastructure *Ships of shame —A sequel: Inquiry into ship safety* AGPS Canberra 1995; House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform *Ship safe: An inquiry into Australian Maritime Safety Authority Annual Report 1996–97* AGPS 1998.

233 A flag state is the country in which a ship is registered and which undertakes the responsibility of implementing international conventions, governing, among other matters, the maintenance and operation of ships registered in that state. Many flag states allow ships without any nationality links to register under their flag. These arrangements are referred to as 'flags of convenience'. In the highly competitive shipping market significant cost reductions can be made by transferring substandard vessels to a flag of convenience. Many flag states either do not have the resources or the intent to enforce standards.

234 House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform *Ship safe: An inquiry into Australian Maritime Safety Authority Annual Report 1996–97* AGPS 1998.

235 Australian Maritime Safety Authority *Port state control report 1999*.

promulgated a resolution which encourages the establishment of regional arrangements for performing port state control.[236]

4.19 In addition to flag state control and port state control, there have been other international initiatives adopted to enhance safe shipping, including the International Safety Management Code (ISM Code). It has been argued that the retention of the strict remedies available to insurers for breaches of warranties of seaworthiness and legality have the effect of providing insureds with a strong incentive to observe regulations concerning safety and pollution control. This issue is also discussed below in relation to warranties.[237]

4.20 The Commission seeks information on the impact of the MIA on the environmental and safety concerns and any potentially adverse effects changes to the MIA could have in the other areas identified by the terms of reference.

Question 18. The terms of reference direct the Commission to consider the implications of reform of the MIA for the environment, welfare and equity, occupational health and safety, economic and regional development, and business and consumer interests. What effects, if any, does the MIA have in these areas and what effects might changes to the MIA have?

236 Resolution A.682(17) – 'Regional cooperation in the control of ships and discharges' referred to in Australian Maritime Safety Authority *Port state control report 1999*, 2. The report lists the seven regional port state control agreements in operation and two agreements which are currently under development.

237 See para 5.87–5.97.

5. Warranties (s 39–47)

Introduction

5.1 Maritime risks are covered or excluded by the terms of the contract as stated in the policy document or implied by statute. Certain terms material to the insurance contract are known as warranties. Warranties are dealt with in Division 7 of the MIA and are defined as follows.

> '39(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some conditions shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
> (2) A warranty may be express or implied.'

5.2 The MIA implies certain warranties, such as warranties of seaworthiness (s 45) and legality (s 47), into contracts of marine insurance. Express warranties may be created by the parties, and, consistently with the discretionary nature of this legislation, can override implied warranties.[238] Express warranties may address, for example, geographical restrictions, sailing dates, crew skills certification and numbers, towage restrictions and loss minimisation. Express warranties must be written and incorporated into the policy.[239] An early English case found that

> '[p]rima facie, words qualifying the subject-matter of the insurance will be words of warranty, which in a policy of marine insurance operate as conditions.'[240]

5.3 Warranties can be created by the use of the word 'warranty' or 'warranted'. However, whether a term constitutes a promissory warranty depends upon the intention of the parties as revealed by the contract as a whole. No particular form of words is required.[241]

Strict compliance

5.4 All warranties must be exactly complied with; otherwise the insurer is discharged from liability.

---

238 MIA s 41(3): 'An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.'
239 MIA s 41(2).
240 *Yorkshire Insurance Company v Campbell* [1917] AC 218.
241 MIA s 41(1).

> '39(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.'

5.5 General contract law distinguishes between conditions and warranties. Conditions go to the heart of the contract and a breach may lead to rescission; warranties are terms whose breach may give rise to damages, but not rescission.[242] A series of judgments in the 1770s by Lord Mansfield held that warranties in insurance were equivalent to conditions, requiring strict compliance.[243] These principles were subsequently codified in marine insurance legislation in England, Australia and other countries.

5.6 In *The Good Luck* the English Court of Appeal stated that a warranty in marine insurance is equivalent to a condition precedent in general contract law.[244] Following *The Good Luck* Malcolm Clarke stated

> 'The place of the insurance warranty in the ranks of contractual terms is now clearer than before. As regards contracts in general, it is distinguished from the general warranty, in that the latter, if broken, gives rise to damages but not to discharge, whether automatically or by election. The insurance warranty is distinguished from the general condition, in that the latter, if broken, gives rise to both damages and discharge, but the discharge occurs only on the election of the party not in breach. As regards insurance contracts in particular, the insurance warranty is distinguished from the exception, in that the effect of the latter is to suspend the insurer's undertaking to pay, whereas a breach of warranty discharges the liability of the insurer altogether.'[245]

5.7 If a warranty is breached, even if the subject matter of the warranty is irrelevant to the loss, the insurer is discharged from all future liability.[246] Any liability that has already arisen remains on foot. There is no requirement that the breach be connected in any way with any subsequent claim. Trivial or inadvertent breaches are sufficient to trigger the insurer's discharge of liability. The breach

---

242 *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 69–70; T Schoenbaum 'Warranties in the law of marine insurance: Some suggestions for reform of English and American law' (1999) 23 *Tulane Maritime Law Journal* 267, 276; *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322; N Seddon and M Ellinghaus *Cheshire and Fifoot's law of contract* 7th Australian ed Butterworths 1997, para 21.8.

243 T Schoenbaum 'Warranties in the law of marine insurance: Some suggestions for reform of English and American law' (1999) 23 *Tulane Maritime Law Journal* 267, 278; W Vance 'The history of the development of the warranty in insurance law' (1911) 20 (7) *Yale Law Journal* 521, 525–32.

244 *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233, 263.

245 M Clarke 'Breach of warranty in the law of insurance' (1991) *Lloyd's Maritime and Commercial Law Quarterly* 437, 441.

246 MIA s 39(3).

cannot be remedied.[247] This rule of strict compliance applies to both express and implied warranties. The Act provides several situations where a breach of warranty will be excused.

> '40(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.'

Waiver of breach of warranty

5.8 An insurer may waive a breach of warranty.[248] However, this concept of waiver has been the subject of legal controversy. One difficulty is that, as the remedy of avoidance of the contract is automatic,[249] 'there would appear to be nothing for the insurer to waive'.[250] However, in *The Good Luck* Lord Goff held that the effect of a waiver was simply that 'to the extent of the waiver, the insurer cannot rely upon the breach as having discharged him from liability'.[251]

> 'The insurer may, therefore, be held to the contract through either an election to waive his right to rely on the automatic discharge or an equitable estoppel barring him from so relying.'[252]

5.9 Waiver was discussed by the Federal Court in *Mowie Fisheries*.[253] The applicant argued that waiver was imputed by the conduct of the insurer in its delay in denying the claim. The Court found, following *Commonwealth v Verwayen*,[254] that there is no independent doctrine of waiver as distinct from election, variation of contract or estoppel.[255]

5.10 'Held covered' clauses allow the insured to renegotiate the contract where a breach of warranty would otherwise have occurred. While such provisions are included in the Institute clauses, they do not appear to be in common use in Australia.[256]

---

247 MIA s 40(2): 'Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.'

248 MIA s 40(3): 'A breach of warranty may be waived by the insurer.'

249 That is, without the need for any election by the insurer.

250 See H Bennett *The law of marine insurance* Clarendon Press Oxford 1996, 283.

251 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233, 263.

252 H Bennett *The law of marine insurance* Clarendon Press Oxford 1996, 284.

253 *Mowie Fisheries Pty Ltd v Switzerland Insurance Australia Ltd* (1996) 140 ALR 57.

254 (1990) 170 CLR 394; (1990) 95 ALR 321.

255 *Mowie Fisheries Pty Ltd v Switzerland Insurance Australia Ltd* (1996) 140 ALR 57, 80. See also *Switzerland Insurance Australia Ltd v Mowie Fisheries Pty Ltd* (1997) 144 ALR 234, 268 (Beaumont J).

256 ITC Hulls cl 3; Legal practitioner *Consultation* Brisbane 11 May 2000.

Reforming strict compliance

5.11 There is considerable support for reform of the law on warranties.[257] However, as Justice Richard Cooper of the Federal Court has observed

> '[t]he market response as to why cover is not offered on the terms and conditions being pressed by those seeking pragmatic change, is that no prudent underwriter will write insurance and go on risk on the basis sought.'[258]

5.12 Much criticism has focused on the operation of the warranty provisions under which the insurer may, subject to any express contrary provisions in the policy, avoid all liability from the date of the breach of a warranty regardless of whether the breach was material to the loss, the state of mind of the insured or whether there was any causal connection between the breach and the loss.

> 'I think it a mean and contemptible policy on the part of an insurance company that it should take the premiums and then refuse to pay upon a ground which no one says was really material.[259]
>
> (a) It seems quite wrong that an insurer should be entitled to demand strict compliance with the warranty which is not material to the risk and to repudiate the policy for a breach of it.
> (b) Similarly, it seems unjust that an insurer should be entitled to reject a claim for *any* breach of even a material warranty, no matter how irrelevant the breach may be to the loss.[260]
>
> While respecting the need for the law to ensure that promises are upheld, in today's modern society the approach taken in marine insurance law unfairly distributes the rights and obligations of the insured and the insurer. It also appears to disregard the commercial needs of the parties involved.'[261]

---

257 In consultations and in much of the case law and commentary: Legal practitioner *Consultation* Sydney 17 March 2000; Insurers and brokers *Consultation* Sydney 27 March 2000; Insurers, brokers and legal practitioners *Consultation* Perth 29 March 2000; Insurers *Consultation* Melbourne 7 April 2000; Legal practitioners *Consultation* Sydney 13 April 2000; Legal practitioners *Consultation* Sydney 1 May 2000. Submissions to the Attorney-General's initial review of the MIA also supported this reform: Insurance Council of Australia *Submission to AG's Dept* 29 May 1997; Law Council of Australia and Maritime Law Association of Australia and New Zealand *Submission to AG's Dept* 1997; QCFO *Submission to AG's Dept — Reform of the law of marine insurance Marine Insurance Act 1909* 1997; Australian Bankers' Association *Submission to AG's Dept* 11 June 1997.

258 R Cooper 'Australian perspectives in marine insurance' *Paper* Shipping in the new millennium conference MLAANZ Brisbane 19 March 1999.

259 *Glicksman v Lancaster and General Assurance Company Ltd* [1927] AC 139 (Lord Renbury).

260 UK Law Commission *Insurance law — Non-disclosure and breach of warranty* HMSO 1980, Cmnd 8064, Law Com No 104, 82.

261 A Mason 'The future of marine insurance' *Paper* Ebsworth & Ebsworth Maritime Law Lecture Sydney November 1995.

5.13 Marine insurance case law provides examples of situations where insurers seek to avoid liability on the basis of a breach of a warranty that was immaterial to the loss.[262] Some of these cases are discussed later in relation to specific warranties.

5.14 An example is the *Mowie Fisheries* case,[263] where the insurer sought to avoid liability for the sinking of a fishing vessel on the basis of breach by the insured of express warranties and the implied warranty of legality. An issue was whether there had been any breach of State marine safety laws or other regulations, necessitating an exhaustive examination of a plethora of regulations, notwithstanding that there was no indication that any such breach contributed to the sinking. The operation of warranties in such a way was the main concern of the Queensland Commercial Fisherman's Organisation (QCFO) that prompted this review.[264] The QCFO remains concerned that reform address cases where warranties are relied upon to avoid a claim where the loss is not related to a technical breach.[265]

Developments in other common law countries

5.15 Canada's Marine Insurance Act 1993 is also based on the MIA (UK). However, a review of recent Canadian cases by Christopher Giaschi illustrates how Canadian courts may be increasingly disinclined to hold that terms of the contract of marine insurance are promissory warranties, even when the language of the contract expresses them to be warranties.

> 'Recent developments in the law in relation to warranties in policies of marine insurance indicate that there has been a judicial amendment of, if not complete revocation of the Marine Insurance Acts. It is only in very rare circumstances that a Canadian court will find a policy to contain a true warranty. These circumstances will essentially be limited to situations where the warranty is material to the risk and the breach has a bearing on the loss.'[266]

5.16 For example, in *Century Insurance Company of Canada v Case Existo-logical Laboratories Ltd (The Bamcell II)*[267] the contract contained the following clause: 'Warranted that a watchman is stationed on board the Bamcell II each night from 2200 hours to 0600 hours.' In fact, from the time the insurance commenced, no watchman had been stationed on the ship. The fact that there was no watchman on

---

262 eg *Pawson v Watson* (1778) 2 Cowp 785; *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546.

263 *Mowie Fisheries Pty Ltd v Switzerland Insurance Australia Ltd* (1996) 140 ALR 57; *Switzerland Insurance Australia Ltd v Mowie Fisheries Pty Ltd* (1997) 144 ALR 234.

264 QCFO *Submission to AG's Dept — Reform of the law of marine insurance Marine Insurance Act 1909* 1997; QCFO *Consultation* Brisbane 12 May 2000. A submission by the QCFO instigated the initial review of the MIA by the Attorney-General's Department in 1997. The QCFO will soon be replaced by the Queensland Seafood Industry Association Inc (QSIA).

265 QCFO *Consultation* Brisbane 12 May 2000.

266 C Giaschi 'Warranties in marine insurance' *Paper* Association of Marine Underwriters of British Columbia Vancouver 10 April 1997.

267 [1984] 1 WWR 97.

board during the prescribed hours had no bearing on the loss of the vessel, which occurred in mid-afternoon.[268] The Supreme Court of Canada found that the provision was not a warranty. Giaschi states that the Court 'disregarded the plain words of the policy of insurance and the statute to do what it perceived as fair'.[269]

5.17 *The Bamcell II* was applied by the British Columbia Supreme Court in *Federal Business Development Bank v Commonwealth Insurance*,[270] where it found that the clause 'Warranted vessel to be laid up at the north foot of Columbia Street' was not a warranty because the parties did not intend it to be strictly complied with. In *Federal Business Development Bank v Reinsurance and Excess Managers Ltd*[271] the Court held that the clause 'warranted that the vessel shall not otherwise tow or be towed' was not a true warranty because vessels of the same type as that insured were commonly used for towing. The insured tugboat had sunk while towing a jetboat.

5.18 In *Shearwater Marine Ltd v Guardian Insurance Co*[272] a warranty that the vessel be inspected daily and pumped as necessary was found to be a suspensive condition; that is, one that suspends the policy following a breach until the breach is rectified. This approach is similar to that in some courts in the USA which have held that a breach of warranty in a marine insurance contract is suspensive. According to American case law, an insurer cannot avoid the policy if the breach is rectified prior to a loss.[273]

5.19 This reasoning is also used in some cases in United Kingdom courts. In *Kler Knitwear Ltd v Lombard General Insurance Co Ltd*[274] the English High Court found a warranty to be a 'suspensory condition' which, rather than cancelling the policy automatically on its breach, suspended the policy until the breach was rectified. This case is the latest in a line of cases where courts have been 'reluctant to construe a clause as a warranty, even when so described, unless breach of the clause has serious consequences for the insurer'.[275] The court relied on the decision of the English Court of Appeal in *Hussain v Brown*[276] in which Saville LJ said

---

268 [1984] 1 WWR 97, 104.

269 C Giaschi 'Warranties in marine insurance' *Paper* Association of Marine Underwriters of British Columbia Vancouver 10 April 1997.

270 (1983) 2 CCLI 200.

271 (1979) 13 BCLR 376.

272 (1997) 29 BCLR (3d) 13.

273 *Employer's Ins v Trotter Towing Co* 834 F 2d 1206, 1212 (5th Cir 1988); *Graham v Milky Way Bargo Inc* 824 F 2d 276, 383 (5th Cir 1987); P Griggs 'Coverage, warranties, concealment, disclosure, exclusions, misrepresentations, and bad faith' (1991) 66 *Tulane Law Review* 423, 343; T Schoenbaum 'Warranties in the law of marine insurance: Some suggestions for reform of English and American Law' (1999) 23 *Tulane Maritime Law Journal* 267, 289.

274 [2000] 1 Lloyd's Law Reports Insurance and Reinsurance 47, discussed in J Miller 'Continuing warranties — Court reviews nature of contract terms' 18 May 2000 *Insurance Day* 6.

275 J Miller 'Continuing warranties — Court reviews nature of contract terms' 18 May 2000 *Insurance Day* 6.

276 [1996] 1 Lloyd's Rep 627.

> 'It must be remembered that a continuing warranty is a draconian term. The breach of such a warranty produces an automatic cancellation of cover, and the fact that a loss may have no connection with that breach is irrelevant. If underwriters want such protection, it is up to them to stipulate for it in clear terms.'[277]

5.20 As noted below, repealing s 40(2) of the MIA, which prevents an insured using the defence that the breach has been remedied and the warranty complied with before loss, would leave it more open for insureds to argue that warranties should be treated as suspensory in nature.

Civil law countries

5.21 Marine insurance law in civil law countries does not elevate contractual terms to the status of promissory warranties. The effect of a breach is determined solely on the basis of the terms of the contract and, in general, breach of a term does not entitle an insurer to avoid liability unless the breach was material to, or caused, the loss.[278]

5.22 Under the Norwegian Marine Insurance Plan, a breach of a term of the contract amounts to an alteration of the risk.[279] Where this occurs the issue becomes

> 'whether the insurer should be bound to maintain the cover without an additional premium in the new situation which has arisen, or whether it would be reasonable to give the insurer the opportunity to employ the sanctions provided in the Plan.'[280]

5.23 The insurer cannot invoke alteration of the risk to avoid the contract where 'the risk has ceased to be material to him' or where the risk is altered to save human life or by attempts to salvage ships or goods during the voyage.[281] In all cases the insured must notify the insurer of an alteration of the risk; failure to do so allows the insurer to terminate the insurance on 14 days' notice.[282] These general rules on

---

277 id 630.

278 In Germany, the ability of an insurer to avoid liability under a marine policy is determined by the clauses themselves under the general principle of law that a party to a contract who does not comply with a contractual obligation is liable in damages to the other party. Under Belgian law a contract can only be terminated in the event of a causative, and accordingly material, breach of an essential term of the contract: See J Hare 'The omnipotent warranty: England v The world' *Paper* International Marine Insurance Conference Antwerp November 1999.

279 Norwegian Marine Insurance Plan cl 3–8 http://exchange.dnv.com/nmip/books/plan/cch3s2.htm (28 March 2000): 'An alteration of the risk occurs when there is a change in the circumstances which, according to the contract, are to form the basis of the insurance, and which alter the risk contrary to the implied conditions of the contract.' The Commentary to Norwegian Marine Insurance Plan cl 3–8 http://exchange.dnv.com/nmip/books/comm/cch3s2.htm (28 March 2000) states that two general conditions must be met: 'there must have been a change in the factual circumstances which affect the nature of the risk and this must amount to a breach of the implied conditions upon which the contract was based.'

280 Commentary to Norwegian Marine Insurance Plan cl 3–8 http://exchange.dnv.com/nmip/books/comm/cch3s2.htm (28 March 2000).

281 Norwegian Marine Insurance Plan cl 3–12 http://exchange.dnv.com/nmip/books/plan/pch3s2.htm (28 March 2000).

282 id cl 3–11.

alteration of the risk are not frequently invoked as specific provisions deal with specific types of breaches, such as seaworthiness and safety regulations.[283] Dr Sarah Derrington has explained the Norwegian approach as follows.

> 'From the insurer's point of view, it makes little difference whether the information as to factors relevant to the risk is inaccurate before the risk attaches or after the risk attaches. The insurer is prejudiced nonetheless. Norwegian law thus uses the same type of rule to deal with both the problems of disclosure and misrepresentation and the problems relating to change of risk. The general rule is that there must be a causal link between the breach and the loss for the insurer to escape paying compensation, the exceptions are the duty of disclosure and seaworthiness.'[284]

Arguments against change

5.24 Although there is a wide consensus that the provisions of the MIA dealing with warranties are capable of operating in an unfair manner, relying on insurers to 'do the right thing' even where they may have no legal obligation to honour a claim, there are some who favour their retention.

Market practice

5.25 Some insurers favour the retention of strict compliance so they can rely on it where necessary to refuse a claim.[285] Those defending the status quo argue that a requirement that causation be proved before an insurer is entitled to avoid liability for breach of warranty would result in more and longer trials in an attempt to find fault or privity on the part of the insured.[286] Some insurers note that market disincentives restrain insurers from relying unfairly on a breach of warranty.

5.26 The QCFO, lawyers and judges have all confirmed that, in practice, while insurers may be legally entitled to avoid a claim on the basis of breaches of the myriad of shipping regulations, they generally do not do so, particularly where insured parties, their brokers, and insurers have an ongoing relationship.[287]

---

283 Further discussion of the Norwegian Marine Insurance Plan appears below at para 5.74–5.76 and 5.84–5.85.

284 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 274–5.

285 Insurers and brokers *Consultation* Sydney 27 March 2000; Insurers, brokers and legal practitioners *Consultation* Perth 29 March 2000; J Hare 'The omnipotent warranty: England v The world' *Paper* International Marine Insurance Conference Antwerp November 1999 http://www.uct.ac.za/depts/shiplaw/imic99.htm (24 February 2000).

286 R Cooper 'Australian perspectives in marine insurance' *Paper* Shipping in the new millennium conference MLAANZ Brisbane 19 March 1999.

287 Insurers and brokers *Consultation* Sydney 27 March 2000; Insurers, brokers and legal practitioners *Consultation* Perth 29 March 2000; Legal practitioners *Consultation* 1 May 2000; Insurers and legal practitioner *Consultation* Brisbane 11 May 2000; Judge *Consultation* Brisbane 11 May 2000; QCFO *Consultation* Brisbane 12 May 2000; Insurers and legal practitioners *Consultation* Sydney 15 May 2000.

5.27 One role of the broker in the formation of marine insurance contracts is to negotiate appropriate warranty provisions on behalf of the insured. Brokers may cease to facilitate insurance contracts with insurers who act unfairly in relation to minor or non-causative breaches of warranty. It has been said that an insurer's decision not to rely on a technical breach may be influenced by reasons unconnected to the circumstance of the loss, such as whether or not the insured has renewed its policy with that insurer.[288]

> 'A warranty has been described as the 'trump card' in the hand of the insurer. And whether or not the insurer decides to play its trump card, all too often depends upon the extent to which the insurer is prepared to rely on a non-causative and often irrelevant technicality.'[289]

5.28 The severity of the consequences of a breach of warranty may be tempered by the terms of the contract. For example, the Institute Time Clause Hulls contract terms contain a 'held covered' clause that holds the insured covered for a breach of warranty as to cargo locality, towage, salvage services or date of sailing if notice is given to the insurer and any amended terms of cover and additional premiums are agreed.[290] Such clauses allow the contract to be renegotiated following a breach by the insured; insurance coverage continues even where a breach has occurred, provided that the insurer is informed of the breach and further contractual arrangements, if required, are made.[291] In this context, Professor John Hare has stated

> 'In the marine context, London cover is often extended specifically for breach of warranty upon payment of an additional premium. This … is an attempt by a hopefully somewhat embarrassed industry to take the edge off the otherwise draconian effects of the Marine Insurance Act. But self-regulation should not relieve the legislature of its responsibility to ensure that its laws are fair.'[292]

5.29 However, the fact that insurers rarely use unfair provisions is not a convincing argument for their retention. In fact, reforming the law relating to warranties by requiring that breaches of warranties be causative of loss in order for the insurer to avoid liability may in some respects simply reflect what has already become common industry practice.[293]

Industry dispute resolution

---

288 F Hunt *Correspondence* 24 May 2000.

289 J Hare 'Maritime law in an international setting' *Paper* BMLA/Tulane Conference London May 2000.

290 ITC Hulls cl 3. Similar provisions are contained in the ITC Freight contract, cl 4.

291 Legal practitioner *Consultation* Brisbane 11 May 2000.

292 J Hare 'The omnipotent warranty: England v The world' *Paper* International Marine Insurance Conference Antwerp November 1999 http://www.uct.ac.za/depts/shiplaw/imic99.htm (24 February 2000).

293 In a similar way, it has been said that the inclusion of pleasure craft within the ICA in 1998 reflected the pre-change market practice of treating contracts of insurance for pleasure craft as they if they came under the ICA rather than as under the MIA: Legal practitioners *Consultation* Sydney 1 May 2000.

5.30 Some insurers have suggested that any harsh operation of the existing law of marine insurance can best be addressed through the introduction of an industry dispute resolution scheme rather than by amending the MIA itself.[294]

5.31 The insurance industry already operates such a scheme in relation to most domestic insurance and some small business insurance. The Insurance Enquiries and Complaints Scheme is a national scheme aimed at resolving disputes between insurance companies and insureds. The scheme covers disputes about general insurance claims, including those in relation to home building and contents, motor vehicles, travel, residential strata titles, sickness and accident, pleasure craft, consumer credit, valuables and personal property.[295] Claims review panels determine most disputes. When fraud is alleged matters are determined by referees. An adjudicator determines disputes of $3 000 or less. Decisions of the panel or adjudicator are binding on all participating insurers where amounts do not exceed $120 000. The scheme can also recommend settlements involving amounts up to $290 000.[296]

Safety

5.32 Strict compliance with warranties is considered important by some as the warranties ensure compliance with safety, anti-pollution and other standards. The importance of safety of life at sea cannot be overemphasised. This is reflected in the many international conventions and national and state laws relating to shipping. The imposition of warranties addressing seaworthiness and the legality of operations provide financial incentives for compliance with these legal regimes. There is concern that this inducement will be removed if strict compliance with warranties is relaxed, and personal safety and the environment may be more at risk.[297]

Options for reform

5.33 The Commission considers that marine insurance law should be altered to constrain the ability of insurers to avoid liability for loss on the ground of breach of warranty. Rather than allowing the insurer to avoid liability entirely the remedies for breach of warranty should reflect the extent to which the insurer was actually prejudiced by the breach.

---

294 Insurers, brokers and legal practitioners *Consultation* Perth 29 March 2000; Insurers and legal practitioner *Consultation* Brisbane 11 May 2000; Insurers and legal practitioners *Consultation* Sydney 15 May 2000.

295 In 1998–99 the most frequent subject matters of complaint were motor vehicle insurance (36%); home building insurance (23%) and home contents insurance (19%). Insurance of pleasure craft accounted for 1% of the complaints received by the Scheme: http://www.iecltd.com.au/review/table3.html.

296 See http://www.iecltd.com.au (19 June 2000).

297 See para 5.15–5.20.

5.34 There are many options for reform of the law relating to marine insurance warranties. Generally, these approaches provide for the introduction of elements of causation or materiality so that, for example, an insurer may avoid liability for breach of warranty where the warranty was not remedied before the loss occurred or where the breach caused or contributed to the loss. Some of these options for reform are discussed below.

Breach of warranty remedied prior to loss

5.35 The effect of s 40(2) of the MIA is that once a warranty is breached the insurer is discharged from all future liability and the fact that the insured remedied the breach before any loss occurred is not relevant. A minimal reform of the law could alter this position so that a breach of warranty suspends the contract, but the contract resumes force and effect once the breach is remedied.[298]

5.36 The following reform options also would address the current law in this respect, but by introducing requirements of causation or actual prejudice to the insured. A breach of warranty which is remedied before loss is not likely to have caused or contributed to the loss.

Insurance Law Reform Act 1977 (NZ)

5.37 In New Zealand, the Insurance Law Reform Act 1977 s 11 provides as follows.

> '11. Where —
>
> (a) By the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and
>
> (b) In the view of the Court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring, —
>
> the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.'

5.38 In the event of a breach of a warranty (including a warranty in a contract of marine insurance),[299] the section provides that the insured remains entitled to be

---

298 This is the approach to breach of warranty taken in some US and Canadian cases: see para 5.15–5.18.

299 Insurance Law Reform Act 1977 (NZ) s 14 states that nothing in the Marine Insurance Act 1908 (NZ) shall limit any provision of the Insurance Law Reform Act.

indemnified if he or she proves on the balance of probabilities that the loss was not caused or contributed to by the breach of warranty.

5.39 There have been suggestions that the section was intended to deal with exclusions from cover, not warranties, but the section has been taken to apply more widely.[300] There is some doubt about whether the section operates to protect an insured in the case of breach of an implied warranty.[301]

5.40 The Insurance Council has suggested that this section may be a suitable starting point for reform.[302] One advantage would be that it would also harmonise the law in the Trans-Tasman shipping market.

Insurance Act 1902 (NSW)

5.41 Section 18 of the *Insurance Act 1902* (NSW) permits a court to excuse a breach of a term or condition of the contract of insurance by an insured which does not prejudice the insurer.[303] Section 18 states

> '18(1) In any proceedings taken in a court in respect of a difference or dispute arising out of a contract of insurance, if it appears to the court that a failure by the insured to observe or perform a term or condition of the contract of insurance may reasonably be excused on the ground that the insurer was not prejudiced by the failure, the court may order that the failure be excused.
> (2) Where an order of the nature referred to in subsection (1) has been made, the rights and liabilities of all persons in respect of the contract of insurance concerned shall be determined as if the failure the subject of the order had not occurred.'

5.42 The section applies to policy terms which impose a positive obligation on the insured, such as a requirement to give notice of a loss,[304] and to policy terms which exclude the insurer's liability.[305] The effect is to provide relief where insurers rely on

---

300 ALRC 20 para 223; *Sampson v Goldstar Insurance Company Ltd* [1980] 2 NZLR 742, 745. On introducing this legislation, the New Zealand Minister of Justice stated 'Clause 11 deals with what are called non-causative exemptions. Insurance policies commonly exclude liability in certain instances. For example, a motor vehicle policy may exclude liability while the vehicle is being driven in an unsafe condition. If the vehicle is hit while stopped at traffic lights the insurer would be able to avoid liability even though the unsafe condition had nothing to do with the accident. The clause confines the right to avoid the policy to those instances where the circumstances specified in the exemption contributed to the accident': *Parliamentary debates* House of Representatives 6 July 1977, 1207.

301 The Commission's research has not revealed any cases in which this provision has been applied in the context of marine insurance.

302 Insurance Council of Australia *Submission to AG's Dept* 29 May 1997.

303 The section was based on provisions contained in State and Territory legislation dealing with the purchase of goods on credit: See ALRC 20 para 221. As inconsistent State law under s 109 of the Constitution, these provisions of the NSW legislation do not apply to contracts subject to the ICA or the MIA.

304 F Marks and A Balla *Guidebook to insurance law in Australia* 3rd ed CCH 1998, ¶1503.

305 *Accident Insurance Mutual Ltd v Sullivan* (1986) 4 ANZ Ins Cases ¶60–748.

non-compliance with a term of the contract, even though the insurer was not prejudiced by that non-compliance.[306]

5.43 In consultations, some have expressed a preference for the form of the New South Wales provision over that of s 54 of the ICA for its simplicity and apparent flexibility, features more in keeping with the style of the MIA.[307]

5.44 The New South Wales provision is narrower than s 54 of the ICA in that it is limited to providing relief in the event of a failure by the insured to 'observe or perform a term or condition' of the contract. By way of contrast, the ICA provisions operate whenever some act of the insured or some other person could lead the insurer to refuse to pay a claim.[308]

Insurance Contracts Act 1984

5.45 The law of general insurance also recognised warranties as conditions requiring strict compliance. Reform of the law relating to warranties in contracts of insurance was one of the aims of the ICA. It was recognised that the law, which still applies in relation to contracts of marine insurance, could operate inequitably in that a breach of a term may lead to the termination of the contract regardless of whether the insurer was prejudiced by the breach.[309]

5.46 One aim of the reform in this area was to introduce the equitable principle of proportionality into cases of breach of conditions subsequent by the insured, and to strike a fair balance between insurer and insured.[310] In particular, s 54 of the ICA was enacted

> 'in recognition that to allow an insurer the right to avoid liability where there is only a minor or immaterial breach of a warranty by the insured cannot be justified by reference to the doctrine of utmost good faith on which all insurance contracts are based.'[311]

---

306 ibid.

307 Judges *Consultation* Sydney 15 May 2000.

308 *East End Real Estate Pty Ltd v CE Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400, 403. The effect of s 18 of the *Insurance Act 1902* (NSW) was considered by the New South Wales Law Reform Commission in its 1983 report on insurance contracts. The NSWLRC referred to cases which had the effect of 'exposing possible areas where liability might be avoided by insurers upon technical grounds that are beyond the reach of s 18', notably because s 18 did not apply to breaches of the common law duty of disclosure: New South Wales Law Reform Commission *Community Law Reform Program – First report insurance contracts — Non-disclosure and misrepresentation* (LRC 3) 1983. *Kolokythas v The Federation Insurance Ltd* [1980] 2 NSWLR 663; *Bazouni v Sun Alliance Insurance Ltd* (Unreported) 17 March 1981 Supreme Court of New South Wales.

309 Explanatory memorandum to the ICA; *East End Real Estate Pty Ltd v CE Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400, 404.

310 ALRC 20 para 228.

311 Attorney-General's Dept *The Marine Insurance Act 1909: Issues paper* Attorney-General's Dept 1997.

5.47 Section 54 reads as follows.

> '54(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.
> (3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.
> (4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.
> (5) Where:
>
> (a) the act was necessary to protect the safety of a person or to preserve property; or
> (b) it was not reasonably possible for the insured or other person not to do the act;
>
> the insurer may not refuse to pay the claim by reason only of the act.
> …
> (6) A reference in this section to an act includes a reference to:
>
> (a) an omission; and
> (b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.'

5.48 An insurer cannot rely simply on a breach of a warranty or some other term of a contract of insurance to avoid the liability. Section 54 allows an insurer to refuse to pay where the conduct caused or contributed to the loss, but an insurer cannot refuse to pay a claim where the insured proves that the loss was not caused by the breach. Furthermore, the insurer may not refuse the claim where the insured's conduct was necessary to protect a person's safety, preserve property or it was not reasonably possible for the insured to not act in that way.[312]

The ambit of s 54

5.49 Since the introduction of the ICA, there has been some confusion over the ambit of the protection provided to the insured party by s 54. In some respects it has been suggested that this confusion has resulted from judicial reluctance to give effect to the full ambit of this protection.[313] Other commentators have suggested that the

---

312 ICA s 54(5) cf MIA s 40.

313 J Mannolini 'The uncertain ambit of section 54 of the Insurance Contracts Act' (1996) 24 *Australian Business Law Review* 271.

interpretation of s 54 by the courts provides broader protection than was intended by the drafters.

5.50 In the High Court case *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd*[314] a mobile crane was insured against physical loss, destruction or damage. At the time of issue of the policy the crane was not registered to be driven on public roads. However, it was registered some months later. Notification of this change in circumstance was not passed on to the insurer by the broker, contrary to a clause in the policy which made the insurer's liability conditional on the insured notifying the insurer of any material change in circumstances. When an accident occurred, the insurer denied liability on the basis of this clause. The High Court held that under s 54(1) the insurer had a prima facie liability to pay under the policy but this was reduced by the extent to which the insurer's interests were prejudiced by loss of the opportunity to cancel the policy on notification of the increased risk. The prejudice to the insurer was found to be equivalent to the entire liability of the insurer, that is, the insured was not entitled to make any claim.

5.51 In *Ferrcom* three possible tests of the extent of prejudice to the insurer were discussed: a subjective test based on the position of the actual insurer; an objective test based on the position of the reasonable insurer; and an equitable test based on principles of fairness between the insured and the insurer.[315] The High Court found in favour of the subjective test and determined, based on the evidence, that, had the insurer received notification of the public road registration, it would have exercised the right to cancel the policy.

5.52 The meaning of 'omission' in s 54 was considered by the NSW Court of Appeal in *East End Real Estate Pty Ltd v C E Heath Casualty & General Insurance Ltd*.[316] This case concerned a claim under a professional indemnity policy. One of the grounds on which the insurer attempted to deny indemnity to the insured was that the insurer had not been notified of the claim during the period of cover, as required by the policy. At first instance it was decided that s 54 did not apply to this situation; however, on appeal it was held that the case fell within the meaning of s 54. It was stated, obiter, that the word 'omission' includes a mere failure to do something, but a distinction was made between an 'omission' and a mere 'non-event'.

5.53 This point was raised in *FAI General Insurance Co Ltd v Perry*,[317] in *Kelly v New Zealand Insurance Co*,[318]and considered by the High Court in *Antico v Heath*

---

314 (1993) 176 CLR 332.

315 *Ferrcom Pty Ltd v Commercial Union Assurance Co (Aust) Ltd* (1993) 176 CLR 332 and see J Mannolini 'The uncertain ambit of section 54 of the Insurance Contracts Act' (1996) 24 *Australian Business Law Review* 260, 263.

316 (1991) 25 NSWLR 400.

317 (1993) 30 NSWLR 89.

318 (1996) 130 FLR 97.

Fielding Australia Pty Ltd.[319] *Antico* involved a legal expenses directors' and officers' policy which required the insurer's consent to defend any claim or proceedings brought against the insured before the insurer was liable to indemnify the insured. In the majority judgment it was stated that

> '[t]he legislation is expressed in broad terms and, on its face, there is no reason why the omission of the insured may not be a failure to exercise a right, choice or liberty which the insured enjoys under the contract of insurance.'[320]

5.54 The distinction between inaction and an omission that was created in *Perry* and *Kelly* was rejected in *Antico*. It has been argued that, in this regard, s 54 now has a much wider application than envisaged by the framers of the legislation and that an amendment is required to the section to exclude notification of claims from its operation.[321]

Abolition of express warranties

5.55 Dr Derrington has suggested that the concept of a warranty as it exists in Anglo-Australian marine insurance law should be abolished.

> 'The use of warranties … as a means of delimiting the risks or dealing with alterations to the risk is clumsy, uncertain and, in some respects, unfair. Despite the nine provisions in the *Marine Insurance Act* which deal with warranties only two warranties are in fact provided for in the *Marine Insurance Act*, the implied warranty of seaworthiness in a voyage policy and the implied warranty that the adventure is lawful. Most warranties in Anglo/Australian law are express, and the ones which are contained in policies most frequently relate to classification, trading limits, disbursements, towage and salvage. These matters can quite simply be incorporated into a standard policy form.'[322]

5.56 Dr Derrington has suggested replacing the concept of express warranties with an obligation on the insured to notify the insurer of any change in the circumstances which forms the basis of the contract of insurance and which alters the risk. Under her proposal, in the case of an alteration of risk, the insurer would escape liability in circumstances where the loss is attributable to the alteration of risk but only where the insurer would not have entered into the contract on any terms had the insured known of the alteration at the time when the contract was concluded and the insured either intentionally caused or agreed to the alteration of risk, or failed to promptly notify the insurer of the alteration.[323]

---

319 (1997) 188 CLR 652.

320 *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652, 669.

321 P Mead 'The effect of section 54 of the Insurance Contracts Act 1984 and proposals for reform' (1997) 9 *Insurance Law Journal* 1, 27.

322 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 336–7.

323 id 338, Draft provision A4.

Conclusion

5.57 There is considerable support for reform of the law on warranties. The Commission agrees that the MIA should be amended to restrict the circumstances in which the insurer is entitled to deny liability under the contract for breach of a warranty. Most suggestions for reform focus on introducing requirements that the breach be material to, or causative of, the loss before an insurer may avoid or reduce its liability.

5.58 The Commission's 1982 report on insurance contracts considered a range of possibilities for reform of the law of general insurance relating to breaches of warranties and conditions in insurance contracts.[324] The options canvassed by the Commission included two approaches which preserved the insurer's right to terminate the contract but restricted the circumstances in which that right might be exercised, and two others that involved abolition of the right to terminate, the insurer being left with a right to damages.[325] The options in the first category were the following.[326]

- The right to termination might be limited to cases where the insured's conduct caused or contributed to the relevant loss. This approach is adopted by the Insurance Law Reform Act 1977 (NZ) s 11, discussed above.

- An insurer could prima facie be entitled to reject a claim for breach of warranty, but the insured is entitled to recover the loss on proof either (i) that the warranty was intended to reduce the risk of a particular type of loss, different from the type of loss that actually occurred, or (ii) that the insured's breach could not have increased the risk that the loss would occur in the way in which it did occur. This approach was recommended by the UK Law Commission in its 1980 report.[327]

5.59 The second category involved abolishing the right to terminate and substituting a right to damages, assessed in accordance either with the principle of proportionality or by reference to whether the insured's breach caused or contributed to the loss. The Commission concluded that a test based on causation, whether formulated as a limitation on the right to termination or as the criterion for the award of damages, is clearly preferable where the insured's conduct is of a type that may

---

324 ALRC 20 ch 8.
325 id para 224.
326 id para 225.
327 UK Law Commission *Insurance law — Non-disclosure and breach of warranty* Law Comm No 104 1980, para 10.36.

cause or contribute to a loss.[328] However, the Commission noted that such an approach would deprive the insurer of all remedy where there is merely a statistical correlation between the conduct and an increase in the risk. In such circumstances, therefore, acceptable underwriting practices would be seriously inhibited.[329] In this context, the Commission referred to warranties concerning unlicensed motor vehicle drivers, named drivers, and drivers under a particular age. This observation equally could be applied to marine insurance warranties relating to, for example, manning or other requirements. While the UK Law Commission's test would overcome the problem, the Commission concluded that it would do so at the price of doing serious injustice to some insureds where the remedy of termination would be seriously disproportionate to the harm caused by the insured's breach.

5.60 The Commission concluded that the only satisfactory solution was a combination of two tests: a test based on potential causation (to determine whether the insurer may terminate the contract) and, where termination is not available, an insurer's right to damages, exercisable by way of reduction of a claim, based on principles of proportionality. This position was reflected in s 54 of the ICA.

> 'Where the conduct of the insured might, in principle, have caused or contributed to the loss, a causal connection test should be adopted. As between termination and damages in these cases, there may not be a great deal to choose. But damages provide a more flexible remedy in those rare cases where the insured's conduct caused or contributed to only a part of the loss. Given the insured's superior knowledge concerning the circumstances of most losses, he should bear the burden of proof. Where the insured's conduct could not, in principle, have caused or contributed to the loss, the insurer should also be limited to a right to damages. Those damages should be assessed by reference to ordinary contractual principles … The actual test should be stated in terms of prejudice to the insurer.'[330]

5.61 Many of those who are prepared to contemplate reform do not want the reforms to have the complexities of the ICA approach. The Commission accepts that the ICA reforms do not necessarily provide a suitable model for MIA reform. As discussed above, there is uncertainty over the ambit of the protection provided to the insured party by s 54. The ICA provisions may be broader than necessary to address the deficiencies of the present law of marine insurance.

5.62 The consensus among lawyers, insurers and brokers consulted by the Commission is that the warranties of seaworthiness and legality require separate consideration because of their importance to the risk covered by insurers and their role in promoting maritime safety. The Commission agrees with this position. While the starting point for reform should be a requirement that a breach of warranty be

328 ALRC 20 para 228.
329 ibid.
330 id para 228.

causative of loss in order for an insurer to avoid a marine insurance contract, the Commission proposes additional and separate reform in relation to the warranties of seaworthiness and legality.

Draft proposal 3. The MIA should be amended to provide that an insurer may not avoid a contract of marine insurance by reason of a breach of warranty by the insured if the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the breach of warranty.

Question 19. Having regard to the available models, how should such an amendment to the MIA relating to warranties be drafted?

Question 20. Should an amended MIA specify which party has the burden of proving whether loss was caused or contributed to by a breach of warranty, or should this be left to the courts to develop? (See also Questions 21, 22 and 27.)

Implied warranties

5.63 The MIA implies certain warranties into contracts of marine insurance where the contract is otherwise silent. These relate to seaworthiness and the legality of the insured adventure.

Warranty of seaworthiness of ship (s 45)

5.64 Section 45 implies a warranty of seaworthiness in voyage policies. The relevant provisions read as follows.

> '45(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
> (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
> (3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.
> (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
> (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea

in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.'

5.65 The aim of the warranty of seaworthiness is to ensure that those with an insurable interest do not grow careless of the condition of the vessel and the safety of the crew because they have insurance cover.[331]

5.66 Whether a vessel is seaworthy is relative. It is related to the vessel insured and varies with changes in knowledge of, and standards for, ship construction and with the adventure to be undertaken.[332] Section 45(4) states that the test is one of reasonable fitness. Establishing seaworthiness may involve a consideration of the steps that would be taken by an ordinary, careful and prudent shipowner as well as objective standards, which may include the International Safety Management (ISM) Code.[333] Examples of unseaworthiness include a defective hull,[334] sailing with an open sea valve,[335] defects in fire-fighting equipment,[336] overloading,[337] incompetence of crew, insufficient numbers of crew[338] and an unskilled master.[339]

5.67 There is no implied warranty that cargo is seaworthy.[340] However, in practice policies for cargo insurance contain provisions relating to the seaworthiness of the vessel. The Institute Cargo Clauses (A) provide that the underwriters waive any breach of the implied warranty of seaworthiness of the ship unless the insured or its servants are privy to the defect. A Cargo ISM Endorsement developed by the London market places the onus on the cargo owner to ensure the cargo is carried with a vessel that is ISM Code certified or whose owners or operators hold an ISM Code Document of Compliance.[341]

Time and voyage policies

5.68 One question concerns whether the distinction between voyage and time policies should be retained.

---

331 *Wilkie v Geddes* (1815) 3 Dow 57; *Douglus v Scougall* (1816) 4 Dow 269; H Bennett *The law of marine insurance* Clarendon Press Oxford 1996, 293.

332 *Burges v Wickham* (1863) 122 ER 251; T Schoenbaum 'Warranties in the law of marine insurance: Some suggestions for reform of English and American law' (1999) 23 *Tulane Maritime Law Journal* 267, 303; H Bennett *The law of marine insurance* Clarendon Press Oxford 1996, 294.

333 T Schoenbaum 'Warranties in the law of marine insurance: Some suggestions for reform of English and American law' (1999) 23 *Tulane Maritime Law Journal* 267, 303.

334 *Tropical Marine Products Inc v Birmingham Fire Insurance Co (The Sea Pak)* 247 F 2d 116, 1957 AMC 1946 (5th Cir 1957).

335 *Commercial Union Insurance Co v Daniels* 343 F Supp 674, 1973 AMC 452 (SD Tex 1972).

336 *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1977] 1 Lloyd's Rep 360.

337 *Laing v Boreal Pacific* (1999) 163 FTR 226 (FCTD) (Canada).

338 *Forshaw v Chabert* (1821) 3 Brod & B 158.

339 *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1977] 1 Lloyd's Rep 360.

340 MIA s 46.

341 Cargo ISM Endorsement (JC 98/019, 1 May 1998).

5.69 The distinction between time and voyage policies in relation to the warranty of seaworthiness[342] arose due to the physical difficulties of inspecting a ship under a time policy that attaches while the vessel is at sea, the ship's condition being beyond the knowledge of the owner. With voyage policies, the policy attaches while the ship is in port or at the time of sailing.[343]

5.70 In *Gibson v Small*[344] the House of Lords confirmed that there was no evidence of custom or usage implying a warranty of seaworthiness in a time policy. A time policy may cover many voyages and it would be impossible to determine to which voyages the warranty applied. If it applied to each separate voyage, 'seaworthiness' would become a guarantee of ability to encounter every possible peril. In addition

> 'both the contracting parties contemplated the state of the ship when the risk is to begin, that this state must be supposed to be known to the shipowner, that he has it in his power to put the ship into good repair before the voyage begins.'[345]

5.71 However, in a time policy

> 'both parties must be assumed to be in the same state of knowledge or ignorance as to the circumstances or condition of the ship.'[346]

5.72 Under time policies the insurer must show that the insured was privy to the unseaworthiness.[347] This involves knowledge of the facts constituting the unseaworthiness, knowledge that those facts rendered the ship unseaworthy,[348] and identifying whose knowledge was required.[349]

5.73 Derek Luxford has noted that the concept of 'privity of the insured' is out of date given that most provisions dealing with corporate liability in shipping law extend provisions not only to the insured but also to employees, agents, contractors and, in some cases, managers.[350] In seeking to establish privity in this context, the English Court of Appeal in *The Star Sea* looked towards the persons 'involved in the decision making processes required for sending the Star Sea to sea'.[351]

---

342 Compare MIA s 45(1) and s 45(5). For discussion of the definitions of time and voyage policies see para 8.38–8.40.

343 C Anderson 'The evolution of the implied warranty of seaworthiness in comparative perspective' (1986) 17(1) *Journal of Maritime Law and Commerce* 1, 3.

344 (1853) 10 ER 500.

345 id 507.

346 id 525.

347 MIA s 45(5).

348 *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) (The Eurysthenes)* [1976] 2 Lloyd's Rep 171 (Lord Denning).

349 M Clarke 'Good faith and good seamanship: The Star Sea' (1988) 4 *Lloyd's Maritime and Commercial Law Quarterly* 465, 466.

350 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' MLAANZ Annual Conference Wellington 5–8 November 1995, 29.

351 *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1997] 1 Lloyd's Rep 360, 375.

Seaworthiness and the Norwegian Marine Insurance Plan

5.74 The provisions of the Norwegian Marine Insurance Plan provide a useful comparison with the MIA. The Norwegian Plan does not differentiate between time and voyage polices. Under the Norwegian Plan

> '[t]he insurer is not liable for loss that is a consequence of the ship not being in a seaworthy condition, provided that the assured knew or ought to have known of the ship's defects at such a time that it would have been possible for him to intervene.'[352]

5.75 Unseaworthiness is not defined in the Norwegian Plan.[353] The commentary acknowledges that unseaworthiness varies according to the age of the ship. A ship found to be seaworthy by inspection authorities will indicate a presumption of seaworthiness, although it is not determinative for the purposes of insurance.[354] In addition,

> '[i]t does not matter whether the unseaworthiness arose before or after the ship left port. With the communication systems now available, it is easy to report defects which have arisen at sea.'[355]

5.76 The burden of proving that the ship is unseaworthy rests with the insurer.[356] However, the insured may still be able to recover for the loss if the insured can prove that he or she did not know, nor ought to have known, of the defects and that there was no causal connection between the unseaworthiness and the loss.[357] Under the Norwegian Plan the outcome of unseaworthiness depends on when the insured acquired knowledge of the unseaworthiness.

> 'Thus there is an emphasis on fault; a causal connection between the knowledge and the loss. This, it is suggested, is a much fairer position than the Anglo/Australian system. The Norwegian position reflects what is seen as the lack of need in modern times for such draconian rules. The vast improvements made in preventing loss at sea,

---

352 Norwegian Marine Insurance Plan cl 3–22 http://exchange.dnv.com/nmip/books/plan/pch3s3.htm (28 March 2000).

353 The provision serves more as a rule of evidence than as a definition of seaworthiness. Seaworthiness is defined in the Seaworthiness Act of 1903: S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 284.

354 Commentary to Norwegian Marine Insurance Plan cl 3–22 http://exchange.dnv.com/nmip/books/comm/cch3s3.htm (28 March 2000).

355 id cl 3–22.

356 Where a ship is unseaworthy, the insurer may terminate the insurance with 14 days' notice if the ship, by reason of defects, unsuitable construction or similar circumstances, cannot be considered seaworthy, the ship has become unseaworthy due to a casualty or other similar circumstances, and the assured fails to have this rectified without undue delay: id cl 3–27.

357 Norwegian Marine Insurance Plan cl 3–22 http://exchange.dnv.com/nmip/books/plan/pch3s3.htm (28 March 2000). This burden was directed to the insured in the latest version of the Plan in consideration of the increasing age of shipping fleets and the reduction of skill of deck and machine officers.

> particularly through the agency of official control and classification societies, have led to the introduction of wider rules where the question of the assured's fault is dominant.'[358]

5.77 Dr Derrington has proposed that the MIA's distinction between time and voyage policies be abolished, along with the 'seaworthiness by stages' doctrine.[359]

> 'The vessel should be seaworthy when leaving port but an insurer should not be liable if the vessel becomes unseaworthy after leaving port and the assured fails to take remedial steps which were available to him. This accords with the stricter Norwegian approach rather than the Anglo/Australian approach and is appropriate in light of modern concerns with respect to ship safety and marine pollution.'[360]

5.78 In her opinion, the insurer should not be liable where the insured knows or ought to have known of the defects in the ship. The insurer should be required to prove that the vessel was unseaworthy and the insured should be required to prove that the insured did not know of the defects and that there was no causal connection between the unseaworthiness and the casualty.[361]

Draft proposal 4. The MIA should be amended to provide that an insurer may not avoid a contract of marine insurance by reason of a breach of the implied warranty of seaworthiness if (i) the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the breach of warranty *and* (ii) the insured neither knew nor ought to have known about the defects at such a time that it would have been possible for the insured to intervene.

Draft proposal 5. The distinction between time and voyage policies with regard to the warranty of seaworthiness should be abolished.

Burden of proof

5.79 In marine insurance disputes involving the operation of the warranty of seaworthiness, the question at issue is often whether the loss in question was caused by the unseaworthiness of the vessel or by a peril of the sea. Resolution of this question may involve a shifting burden of proof. Perils of the sea and questions

---

358 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 287.

359 That is, MIA s 45(3).

360 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 340, Draft provision S1-S3.

361 id 340–1.

relating to the burden of proof in marine insurance cases are discussed below (see paragraphs 5.105–5.121 below.

Question 21. Subject to the answer to Question 20, should an amended MIA specify which party has the burden of proving whether loss was caused or contributed to by a breach of the implied warranty of seaworthiness and the extent of the insured's knowledge of the breach, or should this be left to the courts to develop? (See also Question 27.)

Warranty of legality (s 47)

5.80 The MIA implies a warranty of legality in all contracts of marine insurance. Section 47 provides

> '47. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.'

5.81 In an era of comprehensive statutory regulation of shipping, environmental and safety matters, particular concerns have been expressed about this warranty.

> 'A question which arises in the context of the warranty of legality is whether a breach of one of the plethora of regulations which now apply in ports worldwide is sufficient to constitute a breach of the warranty. The ever increasing concern with marine pollution will mean that this question will need to be addressed constantly.'[362]

5.82 Section 47 is very broad in that it refers not only to the adventure being a lawful adventure (that is, having a lawful purpose) but also to the adventure being carried out in a lawful manner. It appears, therefore, that any breach of a regulation may be interpreted as a breach of warranty.[363]

5.83 Given the plethora of regulations, a warranty may be easily and unknowingly breached by the insured[364] and the insurer may avoid liability even where the breach did not contribute to loss. Concerns have been expressed that this position is inappropriate and unfair, not only to the insured, but also to third parties, such as mortgagees who may be interested in vessels. The options for reform of the warranty of legality include

---

362 id 245.

363 In *Switzerland Insurance Australia Ltd* v *Mowie Fisheries Pty Ltd* (1997) 144 ALR 234, 262–3, Beaumont J was clearly of the opinion that a breach of statutory manning requirements would be a breach of the implied warranty of legality. See also *Doak v Weekes* (1986) 82 FLR 334.

364 Insurers and brokers *Consultation* Sydney 27 March 2000.

- Amending the MIA (as proposed above) to provide that an insurer may not avoid a contract of marine insurance by reason of a breach of a warranty if the insured proves the loss was not caused or contributed to by the breach of warranty.

- Redrafting the MIA to distinguish between technical, non-material breaches of regulations and other illegality which substantially affects the risks involved in the adventure.[365] As noted above, the wording of s 47 of the MIA appears to distinguish between adventures having a lawful purpose and being carried out in a lawful manner, but the consequences of a breach are the same in each case.

- Restricting the circumstances in which the insurer is entitled to deny liability under the contract for breach of the warranty of legality to situations where the insured knew or should have known of the illegality.[366]

5.84 Under the Norwegian Marine Insurance Plan the requirements on the insured are less onerous than under the MIA and distinguish between illegal *purposes* and breaches of safety regulations. Clause 3-16 of the Plan, which deals with illegal activities, states that

> 'The insurer is not liable for loss which results from the ship being used for illegal purposes,[367] unless the assured neither knew nor ought to have known of the facts at such a time that it would have been possible for him to intervene. If the assured fails to intervene without undue delay after becoming aware of the facts, the insurer may terminate the insurance by giving fourteen days' notice.
>
> The insurance terminates if the ship, with the consent of the assured, is used primarily for the furtherance of illegal purposes.'[368]

5.85 An illegal activity under this provision of the Norwegian Plan would not include breaches of regulations. Clause 3–16 corresponds to the first part of the implied warranty in s 47 of the MIA. The requirement that the adventure shall be

---

365 Legal practitioners *Consultation* Sydney 1 May 2000

366 Derek Luxford has stated that there is an urgent need to restrict the operation of this warranty by requiring the insurer to show that the insured knowingly engaged in the illegal activity: D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington 5–8 November 1995.

367 The commentary to the Plan acknowledges that '[j]udging the causation issue may give rise to difficulty. It is not sufficient that the ship runs aground on a voyage with an illegal purpose about which the assured knew. The damage must, to a certain extent, be a foreseeable consequence of the illegal undertaking, eg, where the vessel must venture into hazardous waters in connection with a smuggling operation and runs aground': Commentary to Norwegian Marine Insurance Plan cl 3–16 http://exchange.dnv.com/nmip/books/comm/cch3s2.htm (28 March 2000).

368 Norwegian Marine Insurance Plan cl 3–16 http://exchange.dnv.com/nmip/books/plan/pch3s2.htm (28 March 2000).

carried out in a lawful *manner* finds its equivalent in cl 3–24 and 3–25, which deal with breaches of safety regulations.[369] Under these provisions, if the insured is in breach of a safety regulation, the insurer is liable only to the extent that it is proven that the loss is not a consequence of the breach, or that the insured was not responsible for the breach.

5.86 It has been proposed that where a ship is used for the furtherance of illegal *purposes* (such as drug or gun-running) with the knowledge or consent of the insured, the insurer should not be liable for any loss which results from the ship being so used and should be able to terminate the insurance immediately.[370] Dr Derrington has also proposed that the use of an insured ship in an unlawful *manner* (which encompasses breaches of safety regulations) should only result in loss of cover if the illegality is causative of the loss.[371]

Draft proposal 6. The MIA should be amended to distinguish between an implied warranty that the adventure insured has a lawful purpose and an implied warranty that, so far as the insured can control the matter, the adventure shall be carried out in a lawful manner.

Draft proposal 7. The MIA should continue to provide that an insurer may avoid a contract of marine insurance by reason of a breach of the implied warranty that the adventure have a lawful purpose.

Draft proposal 8. The MIA should be amended to provide that an insurer may not avoid a contract of marine insurance by reason of a breach of the implied warranty that the adventure be carried out in a lawful manner if (i) the loss in respect of which the insurer seeks to be indemnified was not caused or contributed to by the breach of warranty *and* (ii) the insured neither knew nor ought to have known about the illegality at any time that it would have been possible for the insured to intervene.

Question 22. Subject to the answer to Question 20, should an amended MIA specify which party has the burden of proving whether loss was caused or

369 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 289.

370 Advisory Committee members *Advisory Committee meeting* Sydney 25 May 2000; S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 339–40.

371 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 339–40, Draft provision I1–I4.

contributed to by a breach of the implied warranty of legality and the extent of the insured's knowledge of the breach, or should this be left to the courts to develop?

Warranties, safety and environmental concerns

5.87 The Commission's consultations revealed concerns that changes to the requirement of strict compliance with the implied warranties of seaworthiness and legality may have deleterious effects on compliance with safety and other regulations.[372]

5.88 It is argued that the present law acts as a deterrent against unsafe practices. The Commission agrees that the present law encourages compliance with maritime regulation, but only by providing a disproportionate deterrent.

5.89 Justice Cooper has made the following observation about the role of warranties in contracts of insurance.

> 'If non-compliance with safety standards does not put at risk marine insurance cover, there may be powerful economic incentives not to comply. This would leave with the underwriter any attendant risk of loss or injury being sustained in the course of maritime operations and require that it establish that non-compliance amounted to unseaworthiness and that unseaworthiness caused the loss. It would also leave enforcement of safety standards to the regulatory agencies requiring them to take positive steps to uncover non-compliance. The risk of losing insurance cover for breach of warranty imposes strictures of self-compliance which do not need active regulatory supervision.'[373]

The ISM Code

5.90 An important international development in the regulation of safety at sea is the adoption of the International Safety Management Code (ISM Code). The ISM Code has been adopted by 128 countries, including Australia, binds more than 97% of world merchant shipping tonnage,[374] and is intended to provide an international

---

372 Lawyers *Consultation* Sydney 1 May 2000; Insurers and legal practitioners *Consultation* Brisbane 11 May 2000; Advisory Committee members *Advisory Committee meeting* Sydney 25 May 2000.

373 R Cooper 'Australian perspectives in marine insurance' *Paper* Shipping in the new millennium conference MLAANZ Brisbane 19 March 1999.

374 The International Safety Management Code was mandated in ch IX of the SOLAS Convention (International Convention for the Safety of Life at Sea). It entered into force on 1 July 1998 for passenger ships, high speed passenger craft, oil, chemical and gas carriers, bulk carriers and high speed cargo craft. From 1 July 2002 it will apply to cargo ships over 500 tons, and mobile offshore drilling units of 500 gt or more: House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform *Ship safe: An inquiry into Australian Maritime Safety Authority Annual Report 1996–97* AGPS 1998, 21. See also R Shaw 'The ISM code and STCW convention — their impact on marine insurance

standard for the safe management and operation of ships and for the prevention of pollution.[375]

5.91 Under the ISM Code shipowners will be required to possess certificates granted by independent authorities, normally classification societies, that state that systems for safety and environmental management are in place and are fully operative. The Commission understands that it is likely that in future standard hull insurance terms will require vessels to be certified in accordance with the ISM Code and the vessel's owners or operators to hold current documents of ISM compliance.

5.92 In cargo insurance, the Joint Cargo Committee has produced a 'Cargo ISM endorsement'. This clause may be inserted in contracts to exclude cover where cargo is shipped on vessels not complying with the ISM Code. In the United Kingdom, the ISM Code may now have force of law under marine orders and non-compliance may constitute a breach of the implied warranty of legality.[376]

5.93 There are questions about how non-compliance with the ISM will be defined and the consequences of non-compliance. If the implied warranty of legality encompasses continuing compliance with detailed technical requirements and standards, such as those in the ISM Code, this is more onerous than compliance with a simple obligation that vessels carry a current certificate of compliance.[377]

5.94 Under the Commission's proposals for reform of the law of marine insurance warranties, a breach of the ISM Code, whether as an express warranty provision or as a breach of the implied warranty of legality, will lead to avoidance of the contract only if the breach causes or contributes to loss.

5.95 Justice Cooper has observed that reform of the law relating to warranties may raise pressure to expand the definition of seaworthiness to include compliance with the ISM Code or some other regulatory system, or to bring a duty to comply with such codes within the concept of utmost good faith.[378]

5.96 There may be scope for the MIA to be amended to place express requirements on shipowners and operators to comply with safety and environmental codes or regulations. The Norwegian Plan includes such requirements. Where the insured breaches a safety regulation

---

coverage and claims' in M Huybrechts et al (eds) *Marine Insurance at the turn of the millennium* Volume 1, Intersentia Antwerp 1999.

375 See J Donaldson '"Safer ships; cleaner seas" — full speed ahead or dead slow?' (1998) 2 *Lloyd's Maritime and Commercial Law Quarterly* 170, 173.

376 Advisory Committee member *Advisory Committee meeting* Sydney 25 May 2000.

377 ibid.

378 R Cooper 'Australian perspectives in marine insurance' *Paper* Shipping in the new millennium conference MLAANZ Brisbane 19 March 1999.

> 'the insurer shall only be liable to the extent that it is proved that the loss is not a consequence of the breach, or that the assured was not responsible for the breach.'[379]

5.97 The Norwegian Plan defines safety regulations as including relevant government regulations and the ISM Code.[380]

Question 23. In practice, what role, if any, does the MIA play in promoting safe shipping practices by requiring strict compliance with warranties?

Question 24. Are amendments to the MIA required to encourage compliance with regulations and codes relating to safety, pollution avoidance and other regulatory concerns?

Implying terms into express warranties

5.98 Other provisions of the MIA imply terms into certain express warranties present in the contract. These provisions relate to the warranties of neutrality and good safety.

Warranty of neutrality (s 42)

5.99 The MIA refers to a warranty of neutrality, that is, a warranty in time of war that the ship or goods insured are not the property of the nationals of any belligerent country and, therefore, vulnerable to seizure and disposal by a belligerent, for example, in accordance with the law of prize.[381] Section 42 of the MIA states

> '42(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the

379 Norwegian Marine Insurance Plan cl 3–25 http://exchange.dnv.com/nmip/books/plan/pch3s3.htm (28 March 2000). See also cl 2–24: 'A safety regulation is a rule concerning measures for the prevention of loss issued by public authorities, stipulated in the insurance contract, prescribed by the insurer pursuant to the insurance contract, or issued by the classification society.' Breach of safety regulations, as with other conditions in the Norwegian Plan, does not automatically void the contract. The insurer may terminate the insurance with 14 days' notice where 'a safety regulation of material significance has been violated, intentionally or through gross negligence, by the assured, or by someone whose duty it is on his behalf to comply with the regulation or ensure that it is complied with': Norwegian Marine Insurance Plan cl 3–27(c) http://exchange.dnv.com/nmip/books/plan/pch3s3.htm (28 March 2000). The Plan is silent on what regulations are of 'material significance'. However, it is apparent that breaches with minor consequences, or where the insured is not intentionally or grossly negligent, will not allow the insurer to avoid liability.

380 Commentary to Norwegian Marine Insurance Plan cl 3–24 http://exchange.dnv.com/nmip/books/comm/cch3s3.htm (28 March 2000).

381 See ALRC *Criminal admiralty jurisdiction and prize* ALRC Sydney 1990 (ALRC 48), ch 6.

> commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.
>
> (2) Where a ship is expressly warranted 'neutral' there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.'

5.100 Section 42 applies only where there is an express warranty of neutrality in the marine insurance contract, and defines and delimits the express warranty.[382]

5.101 This section was developed in, and reflects the circumstances of, shipping during periods of naval warfare and may have limited relevance to modern shipping conditions. A breach of this warranty is unlikely to be related to the cause of loss.

Question 25. Are express warranties of neutrality incorporated into modern contracts of marine insurance? Is there a need for the MIA provisions relating to warranties of neutrality to be retained and, if so, why?

Warranty of good safety (s 44)

5.102 Section 44 relates to the interpretation of warranties of good safety. As with the warranty of neutrality, this provision has the effect of assisting the interpretation of an express warranty. The provision states

> '44. Where the subject-matter insured is warranted 'well' or 'in good safety' on a particular day, it is sufficient if it be safe at any time during that day.'

5.103 The operation of this section is illustrated by *Blackhurst v Cockell*[383] where a vessel was 'warranted well December 9th'. It was lost at 8 am on 9 December. The court found that the vessel had been safe at some time that day and the insurer was liable for the loss.

5.104 It is unclear how often express warranties of good safety are incorporated into modern contracts of marine insurance and whether there is a continuing need for this provision of the MIA. A warranty of this nature is not the subject of much modern case law and it is unclear whether it is relevant to modern marine insurance practice.

---

382 C Giaschi 'Warranties in marine insurance' *Paper* Association of Marine Underwriters of British Columbia Vancouver 10 April 1997.

383 (1789) 3 TR 360.

Question 26. Are express warranties of good safety incorporated into modern contracts of marine insurance? Is there a need for the MIA provisions relating to warranties of good safety to be retained and, if so, why?

Claiming loss

Burdens of proof

5.105 To make a claim under a marine insurance contract, an insured has the burden to prove, on the balance of probabilities, that

- the loss was caused by a peril which was insured against in the contract, and
- that the alleged cause of loss was the proximate cause.

5.106 The issue is often complicated because the implied warranty of seaworthiness is involved. The High Court in *Skandia Insurance Company Ltd v Skoljarev* stated that it is universally accepted that the onus of proof of unseaworthiness lies with the insurer.[384] However, the Court acknowledged that

> '[t]he co-existence of this onus with the burden of proof which is cast upon the insured on the issue of causation creates some complexity, because unseaworthiness is not only an element in the defences under s 45(1) and (5) of the Act, but it is also a cause of loss which falls outside the concept of perils of the sea.' [385]

5.107 Under a voyage policy, there is an implied warranty of seaworthiness which means that the vessel is warranted to be fit to face all the hazards that a vessel of its particular kind may fairly be expected to encounter. Under a time policy there is no such implied warranty. If the vessel is sent to sea in an unseaworthy state with the knowledge of the assured, the insurer will not be liable for any resulting loss.

5.108 If a vessel is lost due to multiple causes, with one cause its unseaworthiness, the insurer normally will carry the burden of proving that the ship was unseaworthy. If a ship sinks in calm seas without apparent cause there is a presumption that the ship was unseaworthy. If the insured rebuts this presumption by producing evidence that the ship was seaworthy at the time of loss, then a presumption arises that the loss was caused by a peril of the seas even if the peril cannot be found.

384 *Skandia Insurance Company Ltd v Skoljarev* (1979) 142 CLR 375, 387.
385 ibid.

5.109 The issue is complicated further if the insurer introduces evidence of scuttling. The presumption that perils of the sea caused the loss when a seaworthy ship sinks in calm seas has no application if there is evidence of scuttling. In theory all an insurer has to do is to put forward enough evidence of scuttling to raise a doubt and the burden of proof will shift back to the insured to establish that the loss was due to a peril of the sea.[386]

Proximate cause

5.110 Section 61(1) of the MIA states

> '61(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.'

5.111 As most losses occur because of a combination of factors, the liability of the insurer may depend on fine distinctions being drawn between proximate, immediate and remote causes. The proximate cause is not determined simply by the timing of the various factors contributing to a loss.

> 'Causation is not a chain but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause … The cause which is truly proximate is that which is proximate in efficiency.'[387]

5.112 A comprehensive and complex case law has developed in relation to principles of causation[388] dealing with the following.

- Successive losses affecting the same property. It is established that once the property has been totally lost by reason of an insured peril, subsequent causes are irrelevant to the insurer's liability.[389] However, where a partial loss has been occasioned by an insured peril and then total loss occurs due to an excluded peril, the insured may not recover.[390]

---

386 See G Thompson 'Perils of the seas — Burden of proof and causation' (August 1991) 4(2) *Insurance Law Journal* 113; A Mason 'The future of marine insurance law' *Paper* Ebsworth & Ebsworth Maritime Law Lecture Sydney 8 November 1995; *Rhesa Shipping Co SA v Fenton Insurance Co Ltd (The Popi M)* [1984] 2 Lloyd's Rep 555 (CA); [1985] 2 Lloyd's Rep 1 (HL).

387 *Leyland Shipping Co v Norwich Union Fire Ins Society* [1918] AC 350 (Shaw LJ)

388 See H Bennett *The law of marine insurance* Clarendon Oxford 1996, ch 6.

389 *Hahn v Corbett* (1824) 2 Bing 205; *Anderson v Marten* [1908] AC 334.

390 *Livie v Janson* (1810) 12 East 648; *British & Foreign Insurance Co Ltd v Wilson Shipping Co Ltd* [1921] 1 AC 188. This so-called 'doctrine of merger of loss' is codified in MIA s 83(2).

- The effect of loss caused by the apprehension of an insured peril. Where an insured peril is anticipated and a loss is caused by action taken to avert the peril, the insured may not recover because the insured peril is not the proximate cause.[391]

- The effect of a response to a peril. Once an insured peril occurs, actions taken to prevent loss occurring or to minimise loss do not break the chain of causation, and losses caused by these actions are recoverable as if proximately caused by the peril.[392]

- Competing proximate causes. Where one of the proximate causes is an insured peril and none are expressly excluded, the insured may recover.[393] However, where one of the proximate causes is specifically excluded, the exclusion prevails and the insurer is not liable.[394]

5.113 Competing proximate causes were in issue before the New South Wales Court of Appeal in *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc* (*The Alpha Kilimanjaro*).[395] This case involved the sinking of a fishing vessel at its berth. The competing proximate causes were the negligence of the master or crew in failing to close sea suction valves and corrosion of the wall of the sea suction strainer box. Negligence was covered by the policy but ordinary wear and tear, such as corrosion, was neither covered by the policy nor expressly excluded.

5.114 The New South Wales Court of Appeal found that the trial judge had not erred in finding that negligence was the proximate cause. However, that Court also confirmed that, where there are competing proximate causes and loss from one is insured against while none of the others is expressly excluded, the insured is entitled to recover. The Court stated that s 61(2)(c) of the MIA, which provides that, unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, did not operate to 'exclude' wear and tear. Rather, wear and tear was simply 'outside the cover' provided by the policy.[396]

Perils of the seas

5.115 Only losses incident to marine adventures are covered in marine insurance contracts. There is a marine adventure where loss, damage or liability may be

---

391 *Hadkinson v Robinson* (1803) 3 Bos & Pul 388; *Nickels & Co v London and Provincial Marine & General Insurance Co Ltd* (1900) 6 Com Cas 15.
392 *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd* [1941] AC 55.
393 (1998) 43 NSWLR 601.
394 *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57.
395 (1998) 43 NSWLR 601.
396 id 613.

incurred by reason of maritime perils.[397] Section 9 of the MIA defines maritime perils as follows.[398]

> ''Maritime perils' means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy.'

5.116 Clause 7 of the second schedule provides

> '7. The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.'

5.117 The definition of 'perils of the seas' has been the subject of much case law.[399] In *Skandia Insurance Company Ltd v Skoljarev*[400] Justice Mason stated

> 'The rule draws a distinction between fortuitous accidents or casualties of the sea and the ordinary action of the wind and waves. Consequently, not every loss caused by the entry of sea water into a vessel is a loss due to a peril of the sea. Losses caused by the natural and inevitable action of the wind and waves are not due to perils of the sea because they are foreseen and expected.
>
> Thus it has been uniformly held that losses occasioned by the incursion of water into a vessel's hull owing to the defective, deteriorated or decayed condition of the hull or ordinary wear and tear are not losses caused by 'perils of the seas'.
> …
> On the other hand, losses due to fortuitous incursions of sea water are attributable to perils of the seas. Such losses comprehend loss or damage caused by foundering in violent weather or by collision with another vessel or with submerged rocks or other obstructions in calm weather.'[401]

5.118 The term is also relevant in the context of the Hague Rules. These rules state that

> '[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from … perils, dangers and accidents of the sea or other navigable waters.'[402]

5.119 In Australia, the High Court in *Great China Metal Industries Co Limited v Malaysian International Shipping Corporation Berhad* (*The Bunga Seroja)*[403] held

---

397 MIA s 9(2).

398 'Perils of the sea' are also mentioned in other sections of the MIA: s 55 (deviation and delay), s 61 (included and excluded losses), s 65 (effect of transhipment), s 66 (constructive total loss), s 70 (particular average loss), s 71 (salvage charges), s 72 (general average loss) and sch 2.

399 H Bennett *The law of marine insurance* Clarendon Oxford 1996, 136–43.

400 (1979) 142 CLR 375.

401 id 384.

402 Hague Rules Art IV r 2(c). Amended Hague Rules were incorporated into Australian law COGSA.

403 (1998) 196 CLR 161, following its earlier decision in *Shipping Corp of India v Gamlen Chemical Co (A'asia) Pty Ltd* (1980) 32 ALR 609.

that it is not necessary for weather conditions to be extraordinary — they may be reasonably foreseeable or even foreseen. This is contrary to the view adopted in USA and Canadian case law that a peril of the sea involves an event of an extreme nature or some irresistible force.

5.120 *The Bunga Seroja* is not authority on what constitute perils of the seas in marine insurance law as the decision was based on the meaning of the phrase derived from its historical context in the Hague Rules, a set of rules devised by international agreement for use in contracts for the carriage of goods by sea that can be governed by many different legal systems.[404]

5.121 The Commission is interested to learn whether there may be some benefit in codifying the law relating to evidence and burdens of proof, proximate cause and perils of the seas. The Commission's preliminary view is that to do so would be difficult and risk complicating, rather than clarifying, the law in these areas.

Question 27. In marine insurance disputes involving the operation of the warranty of seaworthiness, the question at issue is often whether the loss in question was caused by the unseaworthiness of the vessel or by a 'peril of the sea'. Subject to the answers to Questions 20 and 21, should the law relating to evidence and burdens of proof relevant to establishing that a loss was caused by an insured peril be codified?

Question 28. Should the law relating to proximate cause and other principles of causation in marine insurance law be codified?

Question 29. Should the law governing what constitutes 'perils of the seas' be codified?

404 See eg *Great China Metal Industries Co Limited v Malaysian International Shipping Corporation Berhad* (1998) 158 ALR 1, 4, 7 (per Gaudron, Gummow, Hayne JJ), 29 (per Kirby J).

6. The duty of utmost good faith (s 23)

Introduction

6.1 Marine insurance contracts, like insurance contracts at common law, are based upon the utmost good faith of the parties. Section 23 of the MIA states

> '23. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.'

6.2 The effect of s 23 is that if the utmost good faith is not observed, the contract may be rescinded (retrospectively avoided) by the non-breaching party. There is no other remedy.

6.3 Pre-contractual non-disclosure and misrepresentation by the insured, dealt with by s 24–26 of the MIA, are the most significant manifestations of breach of utmost good faith and are discussed in detail below.[405]

6.4 While it is customary to refer to the 'duty' of utmost good faith, the MIA does not use this expression and s 23 of the MIA simply states that the contract is 'based upon' utmost good faith.[406] The requirement of utmost good faith gives rise to a range of duties, some of which apply before formation of the contract and others which apply post-formation. For these reasons some legal commentators prefer to refer to the 'doctrine' of utmost good faith.[407]

6.5 This doctrine is one of the principal distinctions between insurance law and general contract law. The doctrine commences before the policy is made, manifests as the duty of disclosure, and continues as long as the parties remain in a contractual or continuing relationship.[408] The doctrine applies equally to the insurer and the insured.

The insurer's duty of utmost good faith

---

405 See para 6.8–6.39.

406 In contrast, the ICA also states that there is implied in insurance contracts a provision requiring each party to act with utmost good faith: ICA s 13.

407 See H Bennett 'Mapping the doctrine of utmost good faith in insurance contract law' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 165, 166. See also Y Baatz 'Utmost good faith in marine insurance contracts' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1, Intersentia Antwerp 1999.

408 *Boulton v Holder Bros* (1904) 1 KB 784, 791. See C Larkin 'Uberrima fides: quo vadis? Where to from here?' (1995) 7 (2) *Bond Law Review* 18.

6.6 The insurer's duty of disclosure covers disclosure of all facts material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk with that insurer.[409] This obligation is the 'flip side' of the insured's duty of disclosure.[410]

6.7 The insurer's duties of utmost good faith apply where it has made representations about the effect of clauses restricting the ambit of the policy; where there are unusual clauses which have not been brought to the attention of the insured; in making determinations about particular matters under the contract of insurance;[411] and in dealing with and settling claims.[412] The nature of the parties' post-formation duties is discussed in more detail below.[413]

The duty of disclosure (s 24–26)

6.8 The duty of utmost good faith requires parties to disclose every material circumstance regarding the particular contract of insurance. The classical statement of the duty and the reason for its imposition was stated by Lord Mansfield in *Carter v Boehm.*

> 'The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence, that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance did not exist, and to induce him to estimate the risque, as if it did not exist.'[414]

6.9 The duty of disclosure is codified in s 24 of the MIA as follows.

> '24(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
> (2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.'

---

409 *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, 772.

410 Although, as discussed below, since *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, a material non-disclosure will only be grounds for avoidance by an insured who is subjectively induced into the contract.

411 See N Rein 'Utmost good faith in marine insurance' (1999) 10 *Insurance Law Journal* 145, 160–1.

412 See authorities cited in Y Baatz 'Utmost good faith in marine insurance contracts' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1, Intersentia Antwerp 1999, 15, 18–19.

413 See paras 6.84–6.96.

414 (1799) 3 Burr 1905, 1909.

6.10 Duties relating to pre-contractual representations are dealt with in s 26, which contains a requirement of materiality framed in similar terms.

> '26(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.
> (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.
> (3) A representation may be either as to a matter of fact, or as to a matter of expectation or belief.
> (4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.'

6.11 It is a question of fact whether or not a particular circumstance or representation is material or not.[415] The insurer may avoid the contract if it is determined that a material circumstance was not disclosed or that a material misrepresentation was made, even if the non-disclosure or misrepresentation had nothing to do with the losses sustained. Again, this is the only remedy provided by the Act — an all-or-nothing position.

6.12 There is a deal of jurisprudence[416] but little consensus among courts in the United Kingdom or Australia as to the interpretation of the MIA's definition of a material circumstance or representation.[417] The Commission takes the decision of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd,*[418] the leading English decision on what constitutes a material circumstance, as its starting point in understanding the present law in this area.

6.13 In relevant respects the approach to materiality taken in *Pan Atlantic* was applied by the Supreme Court of Victoria in *Akedian Co Ltd v Royal Insurance Australia Ltd, Sun Alliance Australia Ltd*.[419] Justice Byrne considered that, at least since *Pan Atlantic,* the question of materiality should be addressed in two stages.

---

415 MIA s 24(4); s 26(7).

416 See eg *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1981] 1 Lloyd's Rep 476; *St Paul Fire & Marine Insurance Co (UK) v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501. In Australia *Mayne Nickless v Pegler* [1974] 1 NSWLR 228; *Barclay Holdings v British National Insurance Co Limited* (1987) 8 NSWLR 514; *Visscher Enterprises Pty Ltd v Southern Pacific Insurance Co Ltd* [1981] Qd R 561; *Akedian Co Ltd v Royal Insurance Australia Ltd, Sun Alliance Australia Ltd* (1997) 148 ALR 480.

417 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 96–108.

418 [1995] 1 AC 501. Although the issues in this case arose under a policy of non-marine insurance, the House of Lords considered that it was convenient to state them by reference to the Marine Insurance Act 1906 (UK) since it was accepted in argument that in relevant respects the common law relating to general and marine insurance was the same: 518.

419 (1997) 148 ALR 480.

The first stage requires an assessment of the impact of the non-disclosure or the misrepresentation upon the mind of a hypothetical prudent insurer. The second is anchored in the facts of the case and requires the court to determine whether the misrepresentation or non-disclosure in fact induced the underwriter to issue the policy.[420] The discussion below deals with each of these aspects of materiality in turn.

The 'prudent insurer'

6.14 As noted above, the MIA states that a material circumstance or representation is one which 'would influence the judgment of a prudent insurer'. This raises questions about whether, for example, influence means 'mere influence', as in a simple effect on the thought process of the prudent insurer, or 'decisive influence', where full disclosure of the material circumstance would have led a prudent insurer to a different decision on accepting or rating the risk.

6.15 The case law indicates that English and Australian courts have adopted differing views of what this part of the test of the materiality involves. In *Pan Atlantic* the House of Lords clearly rejected a 'decisive influence' test. However, their Lordships' speeches do not make clear precisely what lesser standard the courts are to apply. The majority appears to have found in favour of a definition requiring merely that the circumstance would have an effect, but not necessarily a decisive effect, on the insurer. That is, an insured must disclose all circumstances which would tend to increase the risk in the mind of a prudent insurer, even though a prudent insurer might not have increased the premium.[421]

6.16 Lord Goff required no more than that the circumstance would have 'an effect on the mind of the insurer in weighing up the risk'[422] and Lord Mustill spoke of the relevant circumstance having 'an effect on the thought processes of the insurer in weighing up the risk' and extending to 'all matters which would have been taken into account by the underwriter when assessing the risk'.[423]

6.17 *Arnould's law of marine insurance and average* concludes that the test laid down by the majority in *Pan Atlantic* is 'whether the matter would have been taken into account by the hypothetical prudent insurer when assessing the risk'.[424] One commentator has observed that

---

420 As summarised by Byrne J in *Akedian Co Ltd v Royal Insurance Australia Ltd, Sun Alliance Australia Ltd* (1997) 148 ALR 480, 487.

421 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, 517, 531, 538.

422 id 517.

423 id 531, 538.

424 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol III Stevens & Sons London 1997 para 610.

> '[t]he degree of dissent between the judges in the House of Lords on this issue is illustrated by the fact that Lord Lloyd regarded the "decisive influence" test, which he favoured, as "precise and clear-cut", giving "certainty and practicality", whereas Lord Mustill considered that the "decisive influence" test "presented great difficulties".'[425]

6.18 A slightly broader test of materiality was later applied by the English Court of Appeal in *St Paul Fire & Marine Insurance Co (UK) v McConnell Dowell Constructors Ltd*[426] — that a non-disclosed fact is material where, had it been disclosed, the prudent underwriter would have appreciated that it was a different risk.

6.19 This alternative formulation was rejected by Justice Byrne of the Victorian Supreme Court in *Akedian Co Ltd v Royal Insurance Australia Ltd, Sun Alliance Australia Ltd*[427] as inconsistent with *Pan Atlantic* and with New Zealand and earlier Australian authorities.[428] In New Zealand, the High Court held in *Quinby Enterprises (in liq) v General Accident Fire & Life Assurance Corporation Public Ltd* that the test since *Pan Atlantic* is 'whether the relevant information would have had an effect on the mind of a prudent insurer in weighing up the risk'.[429] In *Mayne Nickless v Pegler* Justice Samuels in the New South Wales Supreme Court found that a fact is material 'if it would have reasonably affected the mind of the prudent insurer in determining whether he will accept the insurance, and if so, at what premium and on what conditions' [430]. This test was later followed by the New South Wales Court of Appeal in *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd*,[431] and was adopted by Justice Byrne in the *Akedian* decision.[432]

Criticism of the prudent insurer test

6.20 It is not enough to fulfil the duty of disclosure that the insured disclose all facts which a prudent or reasonable insured would believe it necessary to disclose. The test assumes that the insured has the business knowledge of a prudent insurer and requires the insured to disclose those facts that would influence the insurer's judgment. An insured who does not know what circumstances would be influential to the prudent insurer may inadvertently breach the duty of disclosure. This aspect of

---

425 P Griggs 'Is the doctrine of utmost good faith out of date?' *Paper* Marine Insurance Seminar CMI 35th International Conference, Sydney October 1994 referring to *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, 531 (Mustill LJ), 558 (Lloyd LJ).

426 [1995] 2 Lloyd's Rep 116, 122–4.

427 (1997) 148 ALR 480.

428 *Quinby Enterprises (in liq) v General Accident Fire & Life Assurance Corporation Public Ltd Co* [1995] 1 NZLR 736; *Mayne Nickless v Pegler* [1974] 1 NSWLR 228, 239; *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514. However, some of these earlier authorities do not require inducement of the actual insurer, as required by *Pan Atlantic*.

429 [1995] 1 NZLR 736, 740.

430 [1974] 1 NSWLR 228, 239.

431 (1987) 8 NSWLR 514.

432 (1997) 148 ALR 480, 490.

the duty of disclosure has been widely criticised as imposing an unrealistic and unfair burden on the insured.

6.21 The prudent insurer is, like other 'objective' standards, such as that of the 'reasonable person', a malleable concept. As Anthony Diamond QC has observed

> 'Suppose that you or I, as reasonable prospective assureds, were to go in search of the prudent insurer. He is to be found, if anywhere at all, in the Room at Lloyd's. So let us suppose that you or I were to go to Lime Street … to interrogate the working underwriters, or least those of them that write marine business and are thus subject to the Act of 1906. What would we find if we began to ask a few questions? Surely we would find a few prudent underwriters. But also, in all probability, even in that ancient institution, we would find some who are not prudent at all. And even the great majority who are without question prudent underwriters, would tell us, if we persisted in our questioning, that there are occasions when they simply cannot afford to be prudent. For example, one might say that he cannot afford not to write a fixed line on every risk presented by a certain broker; otherwise he would never see that broker again. Or another might tell us that he has on occasion to write "loss leaders" knowing that the business will be unprofitable and in the hope of getting an entrée into a particular line of business in the future.'[433]

6.22 Diamond suggested that consideration should be given to replacing the MIA test of the 'prudent insurer' with a duty to disclose what a reasonable insured would disclose,[434] along the lines of the ICA (see paragraphs 6.48–6.51). However, a problem may be that

> 'Such a formulation ... whilst still apparently objective, in fact would result in greater difficulty in assessing the standard by which to judge the information which ought to be disclosed to the insurer and would result in a greater degree of uncertainty. This is because the benchmark of a "prudent insurer" is relatively easy to fix as compared with the myriad of "reasonable assureds" who could vary as widely as minor exporter/ importer to multibillion dollar ship owning company. Generally, an insurer is a more certain beast than an assured.'[435]

6.23 The MIA does place some limits on the scope of the duty of disclosure. Section 24(3) states

> '24(3) In the absence of inquiry the following circumstances need not be disclosed, namely:
>
> (a) Any circumstance which diminishes the risk;
>
> (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge,

---

433 A Diamond 'The law of marine insurance: Has it a future?' (1986) *Lloyd's Maritime and Commercial Law Quarterly* 25, 30–1.

434 id 34.

435 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 82.

and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.'

6.24 There are difficulties in defining the scope of the information which, under s 24(3), need not be disclosed to an insurer. For example, fertilizer has a tendency to 'cake' on exposure to moisture — a relevant factor in the level of risk involved in its carriage by sea. This fact would be well known to insurers who specialise in the insurance of this commodity but perhaps not to others.[436]

6.25 Dr Malcolm Clarke has suggested that in practice s 24(3) has been narrowly interpreted.[437] He observed that while the insurer can be expected to know less about the particular risk than the insured whose risk it is, the insurer could be expected to have considerable general knowledge of the kind of risk and of the social, commercial and political context.[438] For example, an insurer of pleasure boats is taken to know that, if they are laid up for the winter in Spain, a certain level of theft and vandalism is to be expected.[439]

6.26 However, an insurer is not expected to recall events reported in the past, however prominent, which later turn out to be relevant to a risk proposed later. Clarke cites the leading case of *Bates v Hewitt*,[440] in which a former Confederate warship of some notoriety was converted into a merchant vessel. This material fact (material since it rendered the vessel liable to capture by the USA navy) was not disclosed by the insured. Even though the insurer admitted that he knew a vessel of the same name in Confederate service had been sold and was found to have had 'abundant means of identifying the ship', the duty of disclosure was found to have been breached by the insured.

The role of brokers

6.27 An insured is protected to some extent from the consequences of a breach of the duty of disclosure by the use of specialist brokers as intermediaries between the insurer and the insured in the traditional United Kingdom and related markets, including in Australia.

---

436 Judges *Consultation* Sydney 15 May 2000.

437 M Clarke 'The marine insurance system in common law countries — Status and problems' *Paper* Marine Insurance Symposium Oslo 4–6 June 1998.

438 ibid.

439 *Sharp and Roarer Investments Ltd v Sphere Drake Insurance plc, Minster Insurance Co Ltd and EC Parker and Co Ltd (The Moonacre)* [1992] 2 Lloyd's Rep 501.

440 (1867) LR 2 QB 595.

6.28 Section 25 of the MIA provides that, subject to the provisions of s 24 as to circumstances which need not be disclosed

> 'where an insurance is effected for the assured by an agent, the agent must disclose to the insurer:
>
> (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and
>
> (b) every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.'

6.29 Similarly, duties relating to pre-contractual representations are placed on both the insured and the insured's broker or other agents.[441]

6.30 In many situations of non-disclosure or misrepresentation, the insured will have an action available against its broker. For example, *Helicopter Resources Pty Ltd v Sun Alliance Insurance Ltd* [442] involved a policy of marine insurance over four helicopters to be carried on a ship from Hobart to the Antarctic. In the Supreme Court of Victoria, Justice Ormiston found that the underwriters were entitled to avoid the policy due to the failure of the insured party to disclose, among other things, the nature of arrangements relating to the securing and lashing of the helicopters on board the ship. The judge went on to consider whether the broker was liable to the insured for having failed to disclose those matters which had been successfully relied upon by the underwriters as not having been disclosed. While the judge found that the broker had no direct knowledge of the method of stowing the helicopter, he found that the broker's duty to a client was not limited to disclosing that information of which he is directly aware.

> 'A reasonable broker … must do more for his client. If his client may be at risk of having his insurance cover avoided for non-disclosure, the broker must have a duty to inform himself of sufficient of the business activities of his client to carry out his duties adequately and in particular to prevent the avoidance of liability under any policy written … The broker cannot, of course, discover everything, but he must attempt to discover those elements in the activities of the client which might put its cover in jeopardy.'[443]

6.31 Stuart Hetherington has observed that the obligation imposed on brokers to understand the business of the client places an onus on the broker which may be unrealistic in many circumstances.

---

441 MIA s 26(1).

442 (Unreported) Supreme Court of Victoria 26 March 1991 (Ormiston J). See S Hetherington 'Marine insurance: non-disclosure — Helicopter Resources Pty Ltd v Sun Alliance Australia Ltd' (1992) 5 *Insurance Law Journal* 86.

443 *Helicopter Resources Pty Ltd v Sun Alliance Insurance Ltd* (Unreported) Supreme Court of Victoria 26 March 1991 (Ormiston J) as cited in S Hetherington 'Marine insurance: non-disclosure — Helicopter Resources Pty Ltd v Sun Alliance Australia Ltd' (1992) 5 *Insurance Law Journal* 86, 89.

> 'There must be many risks which a broker is asked to place only hours before expiry when renewal terms have not been accepted by the client and another broker has been unable to place the business elsewhere. The new broker, anxious to obtain this new business, is theoretically required to obtain all possible information concerning the potential new client's business and at the same time approach a number of underwriters to obtain the best possible quotation. It is easy to understand why a broker could fail to obtain one piece of information which might then be used successfully by an underwriter to avoid payment of a claim when circumstances occur which give rise to that claim but which in the absence of the claim would never have come to light.'[444]

Inducement of the actual insurer

6.32 In reaching its decision in the *Pan Atlantic* case,[445] the House of Lords overruled, in part, the decision of the English Court of Appeal in *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* (the *CTI* case).[446]

6.33 In the *CTI* case, the Court of Appeal held, essentially, that so long as an undisclosed fact was something a hypothetical prudent insurer would have liked to have known about, the actual insurer could avoid the contract, regardless of whether the undisclosed fact had any bearing on the actual insurer's decision to accept the risk on the terms the insurer did.[447]

6.34 In *Pan Atlantic*,[448] the Court unanimously held that in order to avoid the contract the actual insurer had to be induced to enter the contract on the agreed terms by the material misrepresentation or non-disclosure. That is, an insured has a duty to disclose all circumstances which would tend to increase the risk in the mind of the prudent insurer; however, if the actual insurer was not induced by the non-disclosure or misrepresentation the insurer could not avoid the contract.

Problems with actual inducement

---

444 S Hetherington 'Marine insurance: non-disclosure — Helicopter Resources Pty Ltd v Sun Alliance Australia Ltd' (1992) 5 *Insurance Law Journal* 86, 90–1.

445 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501.

446 [1984] 1 Lloyd's Rep 476.

447 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 83. See *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, 492, 529, 507, 510, 511.

448 In *Visscher Enterprises Pty Ltd v Southern Pacific Insurance Co Ltd* [1981] Qd R 561, the Full Court of the Supreme Court of Queensland distinguished between cases in which the undisclosed fact was 'obviously' material and those cases in which the undisclosed fact was 'not obviously material'. In the latter situation the Court held that the actual inducement of the underwriter is necessary to find a breach of the duty of disclosure, but not in the former.

6.35 There remains some doubt about which party bears the burden of proof in relation to inducement. In *Pan Atlantic*, Lord Mustill referred to a presumption of inducement, which would go against the general law of inducement in other contexts.[449] If there is a presumption of inducement in marine insurance cases, the insured would have the difficult task of producing evidence to prove that the insurers were not actually induced into making the contract.[450]

6.36 There can also be evidentiary problems associated with proof of what the actual underwriter would have done if he or she had been aware of the circumstances not disclosed or misrepresented and the terms on which the underwriter would have accepted the risk.[451] In *Akedian*, Justice Byrne referred to the difficulty of the court evaluating the evidence of insurers that they were induced.

> 'Whether one calls it a presumption of fact or a matter of inference, there is a very short step between a conclusion that the mind of a prudent underwriter would be affected by a matter and the further conclusion that this underwriter before the court was so induced. This is more difficult in the case of a non-disclosure because the question cannot be that these insurers were induced to issue the policy in question by something of which they were ignorant; it must be that they would not have issued that policy if they had been aware of the non-disclosed fact.'[452]

6.37 Similar evidentiary problems can occur in disputes concerning contracts under the ICA. For example, s 28(1) of the ICA provides that the insurer's remedies for non-fraudulent non-disclosure or misrepresentation are not available where 'the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into'.

6.38 There also may be problems in establishing actual inducement of the underwriter where market practice involves the placement of insurance through the use of slips. This results in a series of separate contracts with the terms negotiated between the broker and the leading underwriters. Following underwriters generally rely on the line initialled by the leaders. The question arises as to how the inducement of the following underwriters can be established. Howard Bennett

---

449 [1995] 1 AC 501, 551.

450 In *St Paul Fire & Marine Insurance Co (UK) v McConnell Dowell Constructors Ltd*, [1995] 2 Lloyd's Rep 116, 127, the English Court of Appeal presumed the inducement of one of the four underwriters who had not given evidence at the trial. However, it has been observed that the facts in this case were exceptional enough to warrant such a presumption — the three other underwriters had given evidence tending to show inducement, but at a time when inducement of the actual underwriter was not a legal necessity (as the trial took place before the House of Lords' decision in *Pan Atlantic)*: Y Baatz 'Utmost good faith in marine insurance contracts' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1, Intersentia Antwerp 1999, 15, 18.

451 G Staring and G Waddell 'Marine insurance' (1999) 73 *Tulane Law Review* 1619, 1656–7.

452 *Akedian Co Ltd v Royal Insurance Australia Ltd, Sun Alliance Australia Ltd* (1997) 148 ALR 480, 494.

suggests that for the requirement for actual inducement[453] to be reconciled with the practice of the London market, non-disclosure or misrepresentation made to a leading underwriter would have to be considered to have been made to following underwriters as well.[454]

6.39 The Commission's consultations have revealed strong support for an actual inducement requirement.[455] One view expressed was that fairness demands that the insurer be required give evidence — otherwise the whole onus of proving whether the insurer would still have insured the risk is placed on the insured. Before the actual inducement requirement was developed by the case law, an insurer defending a claim only needed to lead the evidence of a expert witness, whose evidence is more easily tailored to the needs of the defence. This 'kept the spotlight' off the underwriters and their practices.[456]

Reforming the duty of disclosure

The purpose of the duty

6.40 The common law duty of disclosure, which was codified in the MIA and reformed by the ICA, developed around the idea that because of the subject matter of insurance, the facts that might materially affect the risk were usually within the knowledge of the insured rather than the insurer. Therefore, the insured was required to provide full and complete disclosure.

6.41 The question arises whether this assumption is as valid in modern market practice. Certainly insurers possess ever more sophisticated statistical data to assist in determining and managing risk. In its 1982 report on insurance contracts, the Commission stated

> 'The origin of the duty of disclosure lay in the superior knowledge of factors relevant to the risk which the insured possessed in early marine insurance, when underwriting expertise was in its infancy. It is often said that position has, in most cases of insurance, now been reversed: insurers have available to them sophisticated statistical data and obtain information on many aspects of the risk which they undertake.'[457]

---

453 As required by the test for material non-disclosure established by *Pan Atlantic*.

454 H Bennett *The law of marine insurance* Clarendon Oxford 1996, 59 citing *Pawson v Watson* (1778) 2 Cowp 785.

455 Advisory Committee members *Advisory Committee meeting* Sydney 25 May 2000.

456 Advisory Committee members *Advisory Committee meeting* Sydney 25 May 2000. However, it will continue to be necessary to call expert evidence directed to the question whether the facts in issue would have an effect on the thought processes of the (prudent) insurer in weighing up the risks: See P Griggs 'Is the doctrine of utmost good faith out of date?' *Paper* Marine Insurance Seminar CMI 35th International Conference, Sydney October 1994 referring to *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, 531 (Mustill LJ).

457 ALRC 20 para 175.

6.42 Dr Malcolm Clarke has observed that exceptions to the duty of disclosure have not developed to recognise changes in the means of collating, collecting and recalling information. In particular, the duty allows the insurer to plead ignorance of information which the insurer has on file. Clarke has questioned whether insurers need this level of protection and noted, in respect of Canada, that general insurance law provides that, if the insurer fails to look in the insurer's files, the insurer is deemed to have waived disclosure of the information which they contain.[458]

6.43 In this context Clarke noted his preference for a disclosure rule that minimises the joint costs of a potential mistake by assigning the risk of its occurrence to the party who is the better (cheaper) information-gatherer. For example, in Canada aviation insurers must scan the public records of accidents that might have a bearing on the risk.[459] In contrast, he suggests that the traditional interpretation of the duty of disclosure in marine insurance law is not efficient because it does nothing to encourage the insurer to acquire available information by investigation. The insurer knows that if the risk turns out to be greater than appears on a superficial presentation the insurer can fall back on rules to avoid the contract.

6.44 In relation to such criticisms, commentators, including the Commission in its report on insurance contracts, have noted the distinction between general information and information on the particular risk. The Commission noted

> 'It is true that the insurer has superior, even exclusive knowledge of statistical matters relevant to numerous categories and subcategories of risk. But it does not have superior knowledge of the particular risk.'[460]

6.45 Further, other commentators consider that the rule of utmost good faith remains grounded in economic efficiency.

> 'It is a rule designed to minimise cost to both insurers and assureds. Investigation of risks costs money. In marine insurance cases the particulars of the risk are peculiarly within the knowledge of the assured … Some have disputed the necessity for the rule based upon modern social and economic conditions. In some areas of insurance, risks may no longer be individually evaluated and the rule may be less compelling. But marine insurance remains an industry where individualized risk calculation and negotiation still play a key role. Thus, the doctrine of utmost good faith is of continuing importance, particularly in marine insurance.'[461]

---

458 M Clarke 'The marine insurance system in common law countries — Status and problems' *Paper* Marine Insurance Symposium Oslo 4–6 June 1998 citing *Coronation Insurance Company v Taku Air Transport Ltd* (1991) 85 DLR (4th) 609, 623.

459 *Coronation Insurance Company v Taku Air Transport Ltd* (1991) 85 DLR (4th) 609.

460 ALRC 20 para 175.

461 T Schoenbaum 'The duty of utmost good faith in marine insurance law: A comparative analysis of American and English law' (1998) 29(1) *Journal of Maritime Law and Commerce* 1, 3–4.

6.46 The onerous duty of disclosure in marine insurance has been justified by reference to the speed with which marine insurance is sometimes effected and the potential range of inquiry.[462] Insurers have expressed the view that the timing of going on risk means that insurers have to be able to rely absolutely on the information disclosed by the insured or their broker.[463] Even with technological advances, the insured in many situations still has access to information not available to the insurers. The difficulty of inspecting ships, as opposed to most other insured property, may be seen to justify more onerous disclosure obligations than are applicable to other insurance.

6.47 In addition, reforming the scope of the duty of disclosure may have implications for the costs of insurance premiums.

> 'Marine insurance may be negotiated over a considerable period of time and given only on condition that a survey is carried out. In those circumstances where the insurer has had the time and opportunity to carry out its own investigations there may not be such a great need for the duty of utmost good faith. However, this is not the norm and furthermore where the insurer has to carry out its own investigations this would no doubt increase the level of insurance premiums.'[464]

Options for reform

Insurance Contracts Act

6.48 One alternative formulation of the duty of disclosure is provided by s 21 of the ICA

> '21(1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:
>
> (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
>
> (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.'

6.49 This test has been labelled a 'compromise objective and subjective test'. The objective standard of the existing 'prudent insurer' test was abandoned and a 'reasonable person in the circumstances' test was introduced.[465]

---

462 Y Baatz 'Utmost good faith in marine insurance contracts' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1, Intersentia Antwerp 1999, 15, 31.

463 Advisory Committee member *Advisory Committee meeting* Sydney 25 May 2000.

464 Y Baatz 'Utmost good faith in marine insurance contracts' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1, Intersentia Antwerp 1999, 15, 31–32.

465 See ALRC 20 para 182–183. It has been suggested that the 'prudent insurer' test may still have some relevance as the insured should expect to encounter the prudent insurer. S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for

6.50 The ICA also provides that where a person has failed to answer or given an obviously incomplete or irrelevant answer to a question included in a proposal form, the insurer is deemed to have waived compliance with the duty of disclosure in relation to the matter.[466] Similarly, in relation to representations s 26(2) of the ICA provides that

> '26(2) A statement that was made by a person in connection with a proposed contract of insurance shall not be taken to be a misrepresentation unless the person who made the statement knew, or a reasonable person in the circumstances could be expected to have known, that the statement would have been relevant to the decision of the insurer whether to accept the risk and, if so, on what terms.'

6.51 In 1998 the ICA was amended by the introduction of a new s 21A,[467] partly in response to a report by the operators of the General Insurance Enquiries and Complaints Scheme, which concluded that s 21 placed too onerous a burden on an insured in requiring the insured to assess what matters are relevant to an insurer's decision to accept the risk.[468] Section 21A requires an insurer to pose specific questions to an insured that are relevant to the risk and to request expressly that the insured disclose each 'exceptional circumstance' which is known to the insured, and which the insured knows, or could be expected to know, is a matter relevant to the insurer. Where the insured properly answers these questions the insured is deemed to have complied with the duty of disclosure.[469]

Insurance Act 1902 (NSW)

6.52 In 1983 the *Insurance Act 1902* (NSW) was amended to reform the law relating to misrepresentations and non-disclosure in relation to general insurance contracts.[470] Section 18A of the Act provides that

> '18A. A contract of insurance … is not void, voidable or otherwise rendered unenforceable:
>
> (a) by reason only of a false of misleading statement … unless the statement was material to the insurer in relation to the contract of insurance and:
>
> (i) the statement was fraudulent; or

---

reform' *Ph D thesis* University of Queensland November 1998, 164 citing *Toikan International Insurance Broking v Plasteel Windows Australia Pty Ltd* (1989) 94 ALR 435; *Ayoub v Lombard Insurance Co (Aust) Pty Ltd* (1989) 5 ANZ Ins Cases 60–933; *Kelan Pty Ltd v General Accident Insurance Co Australia Ltd* (1995) 8 ANZ Ins Cases 61-285.

466 ICA s 21(3).

467 *Insurance Laws Amendment Act 1998* (Cth). The new provision came into effect on 1 September 1999.

468 General Insurance Enquiries and Complaints Scheme Ltd *1995 Annual report* 4–5.

469 Section 21A applies only to new contracts of insurance and not to renewals: ICA s 21A(1).

470 As inconsistent state law under s 109 of the Constitution, these provisions of the NSW legislation do not apply to contracts subject to the ICA.

(ii) the insured knew or a reasonable person in the insured's circumstances ought to have known that the statement was material to the insurer in relation to the contract of insurance; or

(b) by reason only of an omission of matter from the contract or a proposal, offer or document that led to the entering … of the contract unless the matter omitted was material to the insurer in relation to the contract of insurance and:

(i) the omission was deliberate; or

(ii) the insured knew or a reasonable person in the insured's circumstances ought to have known that matter material to the insurer in relation to the contract of insurance had been omitted.'

6.53 This provision, like s 21 of the ICA, relies on the putative knowledge of a reasonable person in the insured's position, and may be criticised on similar grounds.

New Zealand reform proposals

6.54 The New Zealand Law Commission (NZLC) considered reform of the duty of disclosure in 1998.[471] The NZLC did not recommend that provisions similar to s 21 of the ICA be adopted because

- the ICA formulation still results in avoidable uncertainty about the precise extent of an insured's duty of disclosure and
- while the ICA provisions modify the unfairness to an insured of an insurer's current all or nothing remedy they also introduce the need to make and prove difficult hypothetical and retrospective assessments of an insurer's likely response to an insured having disclosed a matter.[472]

6.55 The NZLC also considered whether the duty of disclosure should be abolished and substituted with an obligation to answer questions correctly.

> 'Does not the insurer's duty of good faith … require an insurer — by asking appropriate questions of an insured — to notify the insured of the information required to assess accurately a risk to be accepted? Equally, does not an insured's reciprocal duty of good faith require the insured to answer correctly an insurer's questions? If these limits to the duty of good faith are accepted then the law could more simply provide an insurer with a remedy only for any incorrect responses which could constitute misrepresentations.'[473]

6.56 However, the NZLC concluded that in effect substituting an obligation to answer questions for the duty to disclose was an inappropriate response to reform because it would interfere unduly with existing commercial practices which make it

---

471 Law Commission (NZ) *Some insurance law problems* (Report 46) Law Commission, Wellington, 1998, 11.
472 id 10–11.
473 id 11.

impractical for insurers to always obtain answers to questions before they take on risk.[474]

Conclusion

6.57 In relation to calls for reform of the duty of disclosure in marine insurance law Justice Kirby has observed

> 'It is imperative that an element of causality be introduced into the doctrine. In that respect, the decision of the House of Lords in *Pan Atlantic Insurance* may offer a desirable judicial reform of the pre-existing understanding of the law. It is similarly desirable that the test of materiality should be modified so as to control somewhat the onerous burden which it now presents to the assured who seeks faithfully and honestly to comply with it. However, that modification should not go so far as to encourage an unduly restrictive flow of information between the parties.'[475]

6.58 Clearly, some insurers continue to see strict disclosure requirements as necessary given the high stakes in marine claims. In this context, the ICA provisions may not be an appropriate model for reform. As Dr Sarah Derrington has observed

> 'The Australian general insurance law provisions shift the onus to disclose from the assured and place an onus on the insurer to, in effect, collect the information it considers relevant. The provisions are designed to protect consumers. They are inappropriate in the context of commercial marine insurance. Further, the fact that they no longer incorporate internationally used principles relating to disclosure and misrepresentation make them unlikely to gain international acceptance.'[476]

6.59 These comments beg the question as to why the stakes are peculiarly high in marine insurance, or why the shift of onus is inappropriate in commercial marine insurance but not commercial non-marine insurance.

6.60 Nevertheless, consultations have confirmed that the duty of disclosure is one area in which reform of the MIA should be considered and might be welcomed by insurers and brokers as creating additional certainty — particularly as the High Court has yet to confirm that the scope of the duty of disclosure established by the majority in *Pan Atlantic* is the law in Australia.[477]

---

474 ibid. The NZLC's recommendations on reform of the duty of disclosure included a provision that the limits on the right of an insurer to cancel a contract of insurance retrospectively for non-disclosure do not apply where 'the insured answers a specific question expressly put by the insurer in a way which is substantially incorrect because of the failure to disclose a fact': Law Commission (NZ) *Some insurance law problems* (Report 46) Law Commission, Wellington, 1998, 16–17, draft Insurance Law Reform Amendment Act s 7A(2)(c).

475 M Kirby 'Marine insurance: Is the doctrine of 'utmost good faith' out of date?' (1995) 13(1) *Australian Bar Review* 1, 20.

476 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 182.

477 Legal practitioners *Consultation* Sydney 1 May 2000.

The implications of Pan Atlantic

6.61 There has been much comment on the implications of the *Pan Atlantic* case and whether it has clarified sufficiently the law on non-disclosure. Yvonne Baatz has stated that the case illustrates that the MIA is not a comprehensive statement of marine insurance law and that there are gaps in the law that have to be filled.[478]

6.62 Some commentary suggests that *Pan Atlantic* may be an undesirable and uncertain basis for restatement of the duty of disclosure. Some commentators continue to favour a decisive influence test. Patrick Griggs has stated

> 'Although the House of Lords is to be applauded for having re-established a casual link between the non-disclosure or misrepresentation and the actual insurer's underwriting of the risk, I feel the majority, by rejecting the "decisive influence on the prudent underwriter" argument have missed an opportunity to impose a minimum standard of prudence on the insurance industry…'[479]

6.63 The central criticism of the decisive influence test has been summarised by Justice Kirby as follows.

> 'A risk of the decisive influence test was that assureds would disclose only circumstances which they were advised would be of decisive influence to the prudent insurer. Aware of that fact, a truly careful insurer would have to inquire for itself, specifically, as to all those circumstances which, while not decisive, would collectively influence the assessment and acceptance of the risk. Of course, the insurer's gathering of such information would have a price. It is not unreasonable to suppose that, ultimately, the consumers of goods which had been the subject of some form of marine insurance would pay that price.'[480]

6.64 Professor Thomas Schoenbaum has observed that a serious divergence has developed between American and English marine insurance law over the issue of disclosure. American law on this issue requires a decisive influence test for materiality and inducement.[481] In effect, the underwriter does not have to show that

---

478 That is, by introducing the subjective element of actual inducement to the test for materiality. Y Baatz 'Utmost good faith in marine insurance contracts' in M Huybrechts (ed) *Marine insurance at the turn of the millennium* Intersentia Antwerp 1999, 15, 17.

479 P Griggs 'Is the doctrine of utmost good faith out of date?' *Paper* Marine Insurance Seminar CMI 35th International Conference, Sydney October 1994.

480 M Kirby 'Marine insurance: Is the doctrine of "utmost good faith" out of date?' (1995) 13(1) *Australian Bar Review* 1, 12.

481 US courts applying federal admiralty law apply a 'decisive influence' test — at a minimum 'the risk must be increased so as to enhance the premium': *M'Lanahan v Universal Insurance Company* 26 US (1 Pet) 170 (1828). A fact, in order to be material, must be something which would have 'controlled the underwriter's decision'. The test of materiality is an objective test — whether a reasonable person in the insured's position would know that the fact was material. In addition, virtually all American admiralty cases require inducement of the actual insurer although materiality and inducement are not always distinguished. The rules of materiality under American law also provide that facts that are the subject of a

the reasonable or prudent underwriter would have been induced by the non-disclosure or misrepresentation, but does have to prove that he or she was in fact actually induced. He has stated that this divergence is a strong indication that basic reforms are needed in English and American law since the marine insurance industry is international in scope, and disharmony on such a key issue is undesirable.[482]

6.65 Dr Schoenbaum has suggested that two factors essential to the early cases on utmost good faith have been ignored in English jurisprudence, with the result that the standard for disclosure has become overly strict.

- There is no need for the duty of disclosure with regard to facts and circumstances not within the special knowledge of the insured. That is, there should be no obligation to disclose matters which can be investigated and discovered independently.

- The duty of disclosure should be subject to a 'due diligence standard' so that only negligent misrepresentations or omissions should breach the duty.[483]

6.66 He concluded that the MIA (UK) is flawed in producing an unworkable and ambiguous test of materiality and by omitting an inducement requirement.

> 'Overhaul of the 1906 Act is in order on these points, which should also be kept in mind in connection with the drafting of any future American Marine Insurance Act or similar statute in other jurisdictions.'[484]

6.67 Dr Derrington considers that *Pan Atlantic* has failed to clarify the law on non-disclosure.

> 'The marine insurance industry will continue to be troubled by the concept of the 'prudent insurer', the presumption of inducement and the apparent risk that further qualifications might be implied into the legislation at a later date.'[485]

6.68 Dr Derrington has stated that what is needed is a precise definition of a material circumstance or representation and clarification of the necessity for the actual insurer to be induced by the non-disclosure or misrepresentation, so that an

---

specific inquiry by the insurer are deemed to be material: T Schoenbaum 'The duty of utmost good faith in marine insurance law: A comparative analysis of American and English law' (1998) 29(1) *Journal of Maritime Law and Commerce* 1, 25.

482 T Schoenbaum 'The duty of utmost good faith in marine insurance law: A comparative analysis of American and English law' (1998) 29(1) *Journal of Maritime Law and Commerce* 1, 13–14.

483 id 14.

484 id 28–9.

485 S Derrington 'Does the Marine Insurance Act 1909 (Cth) still serve the needs of the business community?' (1995) 7(1) *Insurance Law Journal* 31.

insured can be as certain as possible about the scope of the duty. She has suggested a formulation of the duty of disclosure in which the central element is that

> 'the person effecting the insurance, must disclose to the insurer, before the contract is concluded, all circumstances about which the insurer, acting reasonably, would wish to know in deciding whether and on what terms he is prepared to accept the insurance.'[486]

Draft proposal 9. Section 24 and s 26 of the MIA should be amended to clarify the scope of the duty of disclosure. In particular, s 24(2) and s 26(2) of the MIA should reflect the requirement for the actual underwriter to be induced by a non-disclosure or misrepresentation. Section 24 and s 26 should also operate so that a material non-disclosure or misrepresentation made to a leading underwriter is impliedly made to following underwriters.

or

Draft proposal 10. Section s 24 and s 26 of the MIA should be amended to be consistent with s 21 and s 26 of the ICA. That is, an insured should have a duty to disclose to the insurer every matter that is known to the insured, being a matter that (i) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or (ii) a reasonable person in the circumstances could be expected to know a matter to be so relevant.

Remedies for breach of the duty

6.69 The present law is that if an insurer is induced to enter a contract by an insured's non-disclosure of material information or material misrepresentation, the insurer may completely avoid or rescind the contract.

6.70 A trivial non-disclosure may result in the insurer avoiding liability and a substantial loss for the insured. The consequence of an innocent non-disclosure is

---

486 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 341, Draft provision D1. Her formulation does not refer directly to the necessity for the actual insurer to be induced by a non-disclosure or misrepresentation. Derrington argues that while it is necessary that the actual insurer be induced by a misrepresentation, there is no requirement of inducement in the doctrine of non-disclosure.

> '[I]t is apparent that the recent incorporation by the House of Lords and the Victorian Supreme Court of a requirement of inducement of the actual insurer in the context of non-disclosure cannot be sustained, at least on the basis of legal principle and established precedent.'

Her formulation of the duties of the insured amalgamates the principles of non-disclosure and misrepresentation into a new 'duty of disclosure': 135–6, 137.

the same as for a wilful misrepresentation since rescission is the only remedy (although if the misrepresentation is fraudulent the premium is not returnable).[487]

6.71 Reform of the law concerning disclosure could introduce more flexible remedies appropriate to the measure of fault of the party in breach.[488]

> 'The right to avoid the contract is an extremely draconian remedy. It does not, in any way, depend on fault of the party in breach of the duty … Thus the marine insurance contract differs from the commercial contract in that first there is an obligation to disclose material facts prior to the conclusion of the contract. Secondly, unlike the law in relation to misrepresentation, where the misrepresentee's remedies will depend on whether the misrepresentation was made fraudulently, negligently, or innocently, the remedy for non-disclosure is always rescission.'[489]

6.72 Rescission of the contract may be an appropriate remedy for insurers but is not likely to be a practical remedy for an insured who has suffered loss because of non-disclosure (or misrepresentation) on the part of the insurer.[490] For example, in *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd*,[491] prior to the formation of the contract the insurer knew of a circumstance which would prevent the insured from recovering under the terms of the policy, but failed to disclose this fact. In such a situation the insured may rescind and recover the premium but will not be indemnified for a loss which would have been avoided or covered if the insurer had disclosed the information. Damages are available only if there is a contractual or tortious obligation that has been breached.[492]

Options for reform

6.73 Justice Kirby has stated that

> 'consideration needs to be given to the evolution of a system of remedies for non-disclosure whereby certain types of non-disclosure will not automatically entitle the insurer to avoid the contract entirely. This has been achieved in Australia in the field of general insurance. A like reform should be considered in the international business of marine insurance but the lead will have to come from those countries which are most heavily involved in writing marine insurance.'[493]

---

487 MIA s 90(3) provides that 'where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured'.

488 Y Baatz 'Utmost good faith in marine insurance contracts' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1, Intersentia Antwerp 1999, 15, 32.

489 id 25.

490 Except perhaps where an insurer agrees to cover a ship for a voyage which the insurer knows already has been safely completed, allowing the insured to recover the premium. In other situations the remedy of rescission is wholly inadequate.

491 [1991] 2 AC 249.

492 The case rejected the idea that the obligation of utmost good faith was an implied term of the contract.

493 M Kirby 'Marine insurance: Is the doctrine of "utmost good faith" out of date?' (1995) 13(1) *Australian Bar Review* 1, 20.

6.74 The ICA has significantly reformed the law relating to remedies for non-disclosure or misrepresentation in the context of non-marine and pleasure craft insurance. Under s 28 of the ICA, the insurer may avoid the contract from its inception only where the non-disclosure or misrepresentation was fraudulent. If the insurer is not entitled to avoid the contract, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made. Under s 56, the insurer may refuse payment of a fraudulent claim but may not avoid the policy, and the court has the power to order part-payment of the claim if only a minimal or insignificant amount of the claim is made fraudulently.

6.75 Sections 59 and 60 of the ICA provide procedures for the cancellation of contracts of general insurance. The insurer may cancel a contract for, among other reasons, the insured's failure to comply with the duty of utmost good faith or the duty of disclosure or made a pre-contractual misrepresentation.[494] Notice of the proposed cancellation must be given in writing and is effective only from the time of cancellation so that any rights which have arisen before the time of cancellation are preserved.[495]

6.76 The New Zealand Law Commission has recommended placing time limits on the rights of insurers, including marine insurers, to cancel a contract of insurance retrospectively. The limits do not apply where the failure to disclose a fact is 'blameworthy'. A failure to disclose a fact would not be blameworthy unless the insured knew, or in the circumstances a reasonable person could have been expected to know, both the undisclosed fact and that disclosure of the undisclosed fact would have influenced the judgment of a prudent insurer in accepting the risk or the terms of such acceptance.[496]

Civil code countries

6.77 Marine insurance law and practice in civil code countries also may provide alternative approaches to remedies for non-disclosure.

6.78 In France, if the insured has acted in bad faith or is guilty of an intentional non-disclosure or misrepresentation the Code des Assurances provides for

---

494 ICA s 60(1).

495 ICA s 59(1); F Marks and A Balla *Guidebook to insurance law in Australia* (3rd ed) CCH Sydney 1998 ¶1401, 372.

496 Law Commission (NZ) *Some insurance law problems* (Report 46) Law Commission Wellington 1998, 16–17, draft Insurance Law Reform Amendment Act s 7A(2)(c). Any right an insurer might have to cancel a contract prospectively is unaffected by the recommendation. New Zealand has already reformed the law with respect to remedies for breach of warranty and misstatements including in relation to contracts of marine insurance. See Insurance Law Reform Act 1977 (NZ) s 5–7, s 11.

avoidance of the contract when that non-disclosure or misrepresentation has changed the object of the risk or has diminished the insurer's opinion of the risk, whether or not the non-disclosure is causative of the loss. Where the insured demonstrates good faith and where the insurer would have accepted the insurance but asked for a higher premium, the insurer remains liable but a 'proportionality' approach is used to assess the extent of that liability.[497] Using this method the insurer is liable to pay a proportion of the claim calculated according to the difference between the premium that would have been charged if all the facts had been known and the premium actually charged.

6.79 The proportionality approach is not favoured by commentators from common law countries.[498] The first criticism of the proportionality approach is that there is no real deterrent to providing incomplete or inaccurate information. Risks could become harder to determine and insurers would probably be forced to charge higher premiums for all risks. Secondly, it is a difficult and time-consuming task to determine the figure to be used.

> 'Proportioning the recovery to the insurance that could have been bought for the premium paid with full disclosure has a splendid equitable ring to it, but presents serious practical problems that give it limited appeal. It would be workable where risks are rated according to manuals or settled company practices and where the undisclosed fact moves the risk into another rated category. Companies selling many yacht policies probably have rating schemes that would lend themselves to this practice, if, for instance, the undisclosed fact were that the yacht was sometimes raced or used commercially or beyond the stated waters.'[499]

6.80 Finally, litigation may increase under this system as there would be incentives to sue to determine the proportional amount due.[500]

---

497 Code des Assurances Article L.172–2(1) cited in S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 199–200; See also T-L Wilhelmsen 'The marine insurance system in civil law countries — Status and problems' *Paper* Marine Insurance Symposium Oslo June 1998; J-S Rohart 'The doctrine of "utmost good faith" in the marine insurance law of some civil law countries' *Paper* Marine Insurance Seminar CMI 35th International Conference, Sydney October 1994.

498 Including the Commission: see ALRC 20: para 189–90. Derrington has observed that despite 'professing denunciation of the proportionality principle' in ALRC 20, elements of the principle were incorporated by the Commission in draft provisions that became s 28 of the ICA. S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 196–7.

499 G Staring and G Waddell 'Marine insurance' (1999) 73 *Tulane Law Review* 1619, 1661. In Australia, pleasure craft are covered by the ICA: ICA s 9A.

500 See T Schoenbaum 'The duty of utmost good faith in marine insurance law: A comparative analysis of American and English law' (1998) 29(1) *Journal of Maritime Law and Commerce* 1, 35–6. However, it has been noted that Anglo-Australian law may also contribute to litigation.

> 'The consequences of non-disclosure can often be out of all proportion to the offence. For obvious reasons this "all or nothing" consequence of non-disclosure has resulted in numerous court cases over the years — the stakes can be high and there is no obvious middle course available to avoid the need for trial':

6.81 Under Norwegian law, the insurer's rights in the event of non-disclosure or misrepresentation vary according to the gravity of the fault of the insured. For example, if the non-disclosure or misrepresentation is fraudulent the insurer is relieved of liability regardless of whether the non-disclosure or misrepresentation was relevant to acceptance of the risk. Where fraud is not involved, the proposition is that the insurer should be put in the same position as it would have been were the insurer given the correct information before entering the contract. If the insurer would not have accepted the risk the contract is not binding and liability may be avoided. If the insurer would have accepted the risk but on different conditions, the insurer may avoid liability where there is a causal connection between the loss and the matter that should have been disclosed. If no causal connection is established the insurer is liable for the loss but may terminate the contract on 14 days' notice.[501]

6.82 Dr Derrington has suggested that an insurer's remedies where an insured has failed negligently or innocently to fulfil the duty of disclosure should differentiate between situations where the insurer

- would not have entered into the contract had it known of the matter which was not disclosed and
- would have entered into the contract but only on other conditions.

6.83 In the first situation, Dr Derrington states that the contract should not be binding on the insurer and the premium should be forfeited to the insurer. In the latter situation, the insurer should be liable only to the extent that it is proved that the loss is not attributable to the undisclosed circumstance, should be able to demand an additional premium for the time that the insurer has borne the increased risk, and should be able to terminate the contract on giving the insured 14 days notice in writing.[502]

> 'This approach accords with the Norwegian approach and introduces the requirement of causation. It avoids the difficulties with the application of the "proportionality principle" as provided for in the French system and protects an assured from loss of cover for irrelevant breaches of the duty of disclosure.'[503]

P Griggs 'Is the doctrine of utmost good faith out of date?' *Paper* Marine Insurance Seminar CMI 35th International Conference, Sydney October 1994.

501 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 202–15 citing §3-2–§3-6 *Norwegian Marine Insurance Plan 1996*, version 1997.

502 id 335–6, Draft provision D3.

503 id 335–6.

Draft proposal 11. The MIA should be amended to restrict the right of an insurer to avoid contracts of insurance retrospectively where there has been any breach of the insured's duty of disclosure or any misrepresentation made by the insured.

Question 30. Should the MIA provide, in a manner consistent with the ICA, that the insurer may avoid the contract only where the non-disclosure or misrepresentation was fraudulent and that otherwise the liability of the insurer is reduced to the amount that would place the insurer in the position the insurer would have been if the non-disclosure or misrepresentation had not occurred?

Question 31. What other formulations of the available remedies for breach of the duty of disclosure should be examined? What are the advantages and disadvantages of these alternative formulations?

Post-formation duties

6.84 Section 23 casts the doctrine of utmost good faith in sufficiently general terms to support continuation of the duty of disclosure beyond formation of the contract. The obligations in s 24 and s 26 do not extend after the contract of insurance is concluded.

6.85 Once an insured has complied with the requirements of the duty of disclosure, and paid the premium, the insured's major exposure to a breach of the duty of utmost good faith involves the presentation of claims and conduct in negotiating alterations of the risks covered by the contract.

6.86 There has been debate over the legal nature of the doctrine of utmost good faith and in particular whether post-formation duties should be treated as implied terms of the contract of insurance or as derived solely from s 23 of the MIA and the common law doctrine behind it.

6.87 The point is important because breach of s 23 may permit the insurer to rescind the contract, retrospectively avoiding all liability, including liability for all outstanding claims on the policy, whether such claims arose before or after the breach. If s 23 does not cover post-formation breach of utmost good faith the insurer's remedies are limited.

6.88 Section 13 of the ICA provides that there is implied in a contract of non-marine insurance a provision requiring each party to act towards the other party with utmost good faith.[504] It is quite clear that utmost good faith is an implied term of contracts of insurance covered by the ICA and, therefore, damages are available for breach. The MIA does not specify that the duty is an implied term and there is debate over how it is to be categorised.[505]

6.89 While it seems clear that rescission is currently the only remedy for breach of the pre-contractual duty of disclosure in marine insurance there remains doubt whether it is also the only remedy for breach of utmost good faith generally.

> '… utmost good faith extends into the life of the contract and includes matters pertinent to claims in respect of which avoidance as a remedy fits awkwardly. If utmost good faith is an implied term of the contract, then damages for breach is an appropriate remedy. If rescission is the only remedy because the duty is not an implied term of the contract, then it is both too narrow and too wide. It is too wide because the breach, if by an insured, may relate to only one claim and the insured would then be deprived of all other entitlements under the policy. If the breach is that of the insurer the remedy is too narrow because avoidance of the policy and loss of its benefits is of no use to the insured if it has already incurred a loss.'[506]

6.90 The English case *Black King Shipping Corp v Massie (The Litsion Pride)*[507] is considered by some to represent the 'high watermark'[508] of a theory of a general post-formation duty of utmost good faith based on the English equivalent to s 23 of the MIA.[509] The view of the doctrine of utmost good faith that emerges from *The Litsion Pride* is of 'a doctrine that arises out of the contract and is unitary in the sense that all aspects fall within [the MIA (UK)]'.[510]

6.91 In contrast, Howard Bennett has argued that post-formation duties of utmost good faith fall outside s 23. Instead,

> 'each duty within the post-formation doctrine may be the subject of a separate contractual term implied by law, the precise properties of which may be moulded by the courts as appropriate to the duty in question.'[511]

---

504 The ICA also prohibits parties from relying on a provision of the contract if to do so would breach the duty of utmost good faith: ICA s 14.

505 N Rein 'Utmost good faith in marine insurance' (1999) 10 *Insurance Law Journal* 145, 165.

506 id 164–5.

507 [1985] 1 Lloyd's Rep 437.

508 H Bennett 'Mapping the doctrine of utmost good faith in insurance contract law' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 165, 167.

509 MIA (UK) s 17.

510 H Bennett 'Mapping the doctrine of utmost good faith in insurance contract law' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 165, 170–1.

511 id 221–2.

6.92 Cases involving breach of the post-formation duty of utmost good faith often arise where the insured is making a claim or has sought to alter or vary the contract of insurance; for example, pursuant to a 'held covered' clause.[512] The question then arises whether the breach avoids only the additional cover or the claim or avoids the whole policy. The consequences for the parties are of critical importance.

6.93 For example, in *The Star Sea*[513] the underwriters argued that, if there had been a breach of the duty of utmost good faith, not only was the claim avoided but also the whole policy covering some 32 other ships in the same beneficial ownership or management, and many otherwise valid claims.[514] The Court of Appeal intimated that, since inducement of the actual underwriter is necessary, the insurer's remedy for non-disclosure of facts material to the variation in cover is avoidance of the amended cover, not of the entire contract. Commentators tend to agree with the view that avoidance of the amendment to the contract is all that should be permitted.[515] The judgment of the House of Lords in *The Star Sea* may help clarify the law in this area.[516]

6.94 Scott Henchcliffe has argued that, notwithstanding the decision in *The Litsion Pride*,[517] there is no reason in policy or principle for the view that a breach of the post-formation duty of utmost good faith should permit retrospective avoidance of the contract. He concludes that 'a re-examination by the courts of the common law remedies in this area is clearly overdue'.[518]

---

512 A 'held covered' clause typically provides that in the event of an alteration of specified risks the insurer's liability is not prospectively discharged. Instead, the insured remains ('is held') covered provided that there is notification of the event to the insurer and agreement on additional premium or changes of terms: H Bennett *The law of marine insurance* Clarendon Oxford 1996, 309.

513 *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd & La Reunion Europeene (The Star Sea)* [1997] 1 Lloyd's Rep 360 UK CA.

514 The forthcoming judgment by the House of Lords in this case may help clarify the position with respect to remedies for breach of the post-formation duty of utmost good faith.

515 H Bennett 'Mapping the doctrine of utmost good faith in insurance contract law' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 165, 205. See also Y Baatz 'Utmost good faith in marine insurance contracts' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1, Intersentia Antwerp 1999, 15, 27–8 citing N Legh-Jones *MacGillivray on Insurance Law* 1997 9th ed 398.

516 The case has been listed for hearing on 9–12 October 2000: Judicial Office *Correspondence* 11 May 2000.

517 [1985] 1 Lloyd's Rep 437.

518 S Henchcliffe 'Insurance claims: Fraud and the duty of good faith' (1997) 8 *Insurance Law Journal* 210, 228. Henchcliffe notes that there is an absence of Australian case law on the point and argues that this strongly suggests that the draconian remedy of avoidance *ab initio* is unavailable and unnecessary, and that authorities which suggest that the making of a fraudulent claim, or a breach of the post-formation duty of good faith, should allow an insurer to avoid the insurance contract *ab initio* are wrong, and cannot be legally or rationally justified: 221. The strongest dictum supporting the view that avoidance *ab initio* is available as a remedy appears in a case where that right was a term of the policy: *Moraitis v Harvey Trinder (Queensland) Pty Ltd* [1969] Qd R 226. Other cases generally refer only to 'avoiding' the policy and are therefore equivocal as to whether the avoidance remedy is retrospective or prospective only: ibid. See also ALRC 20 para 243. There is some Australian authority suggesting that post-formation duties of utmost good faith have a different basis from pre-contractual duties. For example, in *NSW Medical Defence Union v Transport Industries Insurance* (1985) 4 NSWLR 107, 112 Rogers J considered that while pre-contractual utmost good faith (disclosure and absence of misrepresentation) should be treated as an 'incident of the relationship', post-formation utmost good faith is an implied term of the contract, provided

6.95 Another question relating to the post-formation duty of utmost good faith is when the duty ceases to operate. It is not clear under the MIA (or the ICA) whether or not the duty of good faith continues after the insurer rejects a claim.[519] In *Horbelt v SGIC,*[520] in the Supreme Court of South Australia, Justice Bollen held that

> '[t]he obligation of good faith on the part of the insured towards the insurer continues, if there be litigation, until judgment. Perhaps it continues longer.'

6.96 In contrast, in *The Star Sea*[521] Justice Tuckey, the judge at first instance, held that the duty of good faith ends once an insurer rejects a claim.[522] In the Court of Appeal, Leggatt LJ speaking for the court did not agree that the duty ended with rejection of the claim but held that after the writ was issued the rules of court supplanted the duty.[523]

Draft proposal 12. The MIA should be amended to clarify the position in relation to remedies for post-formation breach of the obligations of utmost good faith.

Question 32. Should the MIA be amended to provide that there is implied in a contract of marine insurance a provision requiring each party to act towards the other party with utmost good faith, making damages available for a breach?

Question 33. Should the MIA clarify how long the obligations of utmost good faith continue?

---

that there is a contractual duty 'to which the duty of good faith can attach': See N Rein 'Utmost good faith in marine insurance' (1999) 10 *Insurance Law Journal* 145, 151–2.

519 N Rein 'Utmost good faith in marine insurance' (1999) 10 *Insurance Law Journal* 145, 165.

520 Unreported Supreme Court of South Australia 26 June 1992 (Bollen J).

521 *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1995]1 Lloyd's Rep 651.

522 id 667.

523 *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd & La Reunion Europeene (The Star Sea)* [1997] 1 Lloyd's Rep 360, 372. See N Rein 'Utmost good faith in marine insurance' (1999) 10 *Insurance Law Journal* 145, 156.

7. Insurable interest (s 10–12)

Introduction

7.1 The concept of insurable interest evolved from the statutory avoidance of wagering contracts. Until the Marine Insurance Act 1745 (UK) there was no legal requirement that an insured have any connection to the insured adventure.

> 'Insurance polices were amenable to abuse as wagers on the continued safety of the insured property and, since the assured won the bet if the vessel sank, they provided a financial disincentive to the exercise of due care for the safety of the crew.'[524]

7.2 Contracts of marine insurance for speculative purposes (such as gaming and wagering) are declared to be void by the MIA.[525] A contract is deemed to be a gaming or wagering contract where the insured does not have an insurable interest as defined by the MIA and the contract is entered into with no expectation of acquiring such an interest.[526]

> '10(1) Every contract of marine insurance by way of gaming or wagering is void.
> (2) A contract of marine insurance is deemed to be a gaming or wagering contract:
> (a) where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or
> (b) where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any other like term:
> Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.'

7.3 The principle of insurable interest is also derived from the fundamental principle of indemnity[527] — the insurer is under an obligation to reimburse the insured for the actual loss from the covered risk and an insured is entitled to be restored, subject to the terms and conditions of the policy, to the financial position enjoyed immediately before the loss. To show that the insured suffered an actual loss, it must show that it had an insurable interest in the subject matter insured.

Parties with an insurable interest

7.4 Persons who have an insurable interest are defined in s 11 of the MIA.

---

524 H Bennett *The law of marine insurance* Clarendon Oxford 1996, 13.
525 MIA s 10(1).
526 MIA s 10(2)(a).
527 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1997 para 32.

> '11(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.
> (2) In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.'

7.5 The MIA does not define an insurable interest exhaustively. In order to have an insurable interest it is not necessary to have ownership or property in that which is insured. For example, mortgagees[528] and lessees of insured property have an insurable interest. An insurable interest may be defeasible or contingent.

> 'It is sufficient to have a right in the thing insured, or to have a right or be under a liability arising out of some contract relating to the thing insured, of such a nature that the party insuring may have benefit from its preservation, or prejudice from its destruction.'[529]

7.6 The MIA also refers specifically to certain other interests as being insurable interests, such as that of a lender of money on bottomry or respondentia,[530] the master or crew members in respect of their wages,[531] a person advancing freight[532] and a mortgagor or mortgagee of insured property.[533]

7.7 Insurers and courts may take a technical approach to the requirement for an insurable interest which unduly inhibits recovery for loss.[534] For example, in *Macaura v Northern Assurance Co Ltd*,[535] a non-marine case relevant in this context, timber was sold to a company by the owner of the timber in return for shares in the company. The timber was destroyed by fire and the owner claimed under his policy of insurance. The House of Lords held that the insured had no insurable interest either as a sole shareholder or as a creditor of the timber company.

7.8 A strict approach was also taken in the South Australian Supreme Court case *Truran Earthmovers Pty Ltd v Norwich Union Fire Insurance Society Ltd*,[536] which involved the purchase of a bulldozer. The purchaser was held to have no insurable

---

528 eg *Kin Yuen Co Pte Ltd v Lombard Insurance Co Ltd* [1994] 2 SLR 887.
529 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1981 para 332, citing *Lucena v Craufurd* (1806) 2 B & PNR 269, 302 (Lawrence J), 321 (Eldon LJ); *Crowley v Cohen* (1832) 3 B & Ad 478.
530 MIA s 16. See para 9.4–9.5.
531 MIA s 17.
532 MIA s 18. See also para 7.46.
533 MIA s 20.
534 See ALRC 20 para 118–19.
535 [1925] AC 619.
536 (1976) 17 SASR 1.

interest in the bulldozer even though he had lent the owner money which was to be deducted from the purchase price.[537]

7.9 More recent English case law is said to have seen a 'push' on the 'frontiers of insurable interest'.[538] For example, in *The Moonacre*[539] the issue of insurable interest arose in a hull insurance case where the insured was not the registered owner of the vessel which had been acquired for his benefit. The vessel was registered for tax purposes in the name of a Gibraltar company. The individual had powers of attorney from the company to sail and manage the vessel and the vessel was insured in his name. A fire on board the vessel resulted in a constructive total loss and the insured claimed under the policy. The judge found that the insured had an insurable interest and stated

> '… the essential question to be investigated in those cases which, since 1745, have been concerned to test the existence of an insurable interest, has been whether the relationship between the assured and the subject matter of the insurance was sufficiently close to justify his being paid in the event of its loss or damage, having regard to the fact that, if there were no or no sufficiently close relationship, the contract would be a wagering contract.'[540]

7.10 In Canada, the restrictive approach taken by the House of Lords in *Macaura* was rejected in the non-marine case *Constitution Insurance Co of Canada v Kosmopoulos*.[541] The Supreme Court of Canada stated that commentators in the USA and Canada seemed to be uniformly in favour of the adoption of a test for insurable interest based on whether the insured has a 'factual expectancy' of loss rather than following the stricter approach of *Macaura*.[542]

Insurable interest at the time of loss

7.11 Even if it did not possess an insurable interest when the contract was made, the insured must possess an insurable interest at the time of the loss, unless the subject matter is insured 'lost or not lost'. The MIA states

> '12(1) The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected:
> Provided that where the subject-matter is insured 'lost or not lost,' the assured may recover although he may not have acquired his interest until after the loss, unless at the

---

537 See discussion in ALRC 20 para 119 and LBC *The laws of Australia* vol 22 Insurance and Income Security '22.1 Insurance' para 33.

538 S Hodges *Cases and materials on marine insurance law* Cavendish London 1999, 70.

539 *Sharp and Roarer Investments Ltd v Sphere Drake Insurance plc, Minster Insurance Co Ltd and EC Parker and Co Ltd (The Moonacre)* [1992] 2 Lloyd's Rep 501.

540 id 510.

541 (1987) 34 DLR (4th) 208 as discussed in S Hodges *Cases and materials on marine insurance law* Cavendish London 1999, 70–2.

542 (1987) 34 DLR (4th) 208, 226–7, Supreme Court of Canada. See also ALRC 20 para 120.

time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.
(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.'

7.12 *Arnould's law of marine insurance and average* states

> 'The "lost or not lost" clause is technically an infringement of the principle requiring that the insured should have an insurable interest in the subject-matter of the insurance at the time of the loss, but it is one well warranted by the requirements of business, and does not offend against the evil which this principle is designed to prevent, *viz*., that the agreement should not be a mere wager. Indeed, just as the principle of insurable interest is derived from the fundamental principle of indemnity the "lost or not lost" clause is necessary in order that this principle may not be sacrificed to a narrow interpretation of insurable interest.'[543]

7.13 A further exception to the rule that the insured must possess an insurable interest at the time of loss is that an assignee of a policy can acquire an interest in the subject matter insured even if the policy was assigned after the loss.[544]

A need for reform?

7.14 Even prior to the enactment of the MIA, the strict insurable interest requirement was not unanimously endorsed. Case law established a principle that a court should favour finding an insurable interest where possible. Pleading 'insurable interest' as the sole defence to avoid a claim is considered by many to be a mere technicality and an unmeritorious defence, particularly where the underwriters have accepted the premium from the claimant.[545]

7.15 In practice the requirement that the insured must possess an insurable interest *at the time of loss* appears to have occasioned the most controversy. This issue arises most frequently in connection with cargo insurance and often requires careful examination of the terms of contracts for the sale of goods to ascertain exactly when property or risk in the insured cargo passed to an insured.

---

543 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1981 para 32, fn 89.

544 Where the assured has parted with or lost its interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative: Provided that nothing in this section affects the assignment of a policy after loss: MIA s 57.

545 D Galbraith 'An unmeritorious defence — The requirement of insurable interest in the law of marine insurance and related matters' (April 1993) 5(3) *Insurance Law Journal* 177; *Stock v Inglis* (1884) 12 QBD 564.

7.16 For example, in *Anderson v Morice*[546] a cargo of rice was loaded but before loading was complete the vessel sank. One of the issues raised was whether or not risk had passed to the buyer. The House of Lords held that under the terms of the contract risk only passed to the buyer when a complete cargo had been shipped and, therefore, the buyer did not have an insurable interest in the goods. Similarly, in *Colonial Insurance Company of New Zealand v Adelaide Marine Insurance Company*[547] the vessel and cargo were lost after loading had begun but before completion of loading. However, in this instance, the insurance policy provided cover for cargo 'now on board or to be shipped' and the Privy Council held that risk passed to the buyer as and when any portion of the cargo was loaded on board the vessel. Therefore, the buyer did have an insurable interest in the goods on board the vessel.

7.17 The passing of property in goods and attachment of risk usually occur together, but this is not always the case. For example in *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd*[548] the substitution of a cargo of scented oil with water took place before shipment. Since the insured could not prove that the cargo that they agreed to buy had ever been shipped, risk under the policy never attached and therefore the insured had no insurable interest.[549]

7.18 Issues concerning whether the insured had an insurable interest at the time of loss may also arise in connection with hull insurance. For example, in the case of *Piper v Royal Exchange Assurance*,[550] the buyer claimed under his insurance policy for damage that occurred to the vessel on the voyage to the buyer but before its delivery to the buyer. In that case it was held that since the risk was on the seller during the voyage, the buyer had no insurable interest at the time of loss and could not recover.

Cargo insurance

7.19 One reason for reforming this aspect of the law of insurable interest is said to be the advent of containerisation.[551] There continues to be a steady increase in global

---

546 (1876) 1 App Cas 713.

547 (1886) 12 App Cas 128.

548 [1980] 1 Lloyd's Rep 656.

549 See discussion in S Hodges *Cases and materials on marine insurance law* Cavendish London 1999, 55–6. Note that the cargo was insured 'lost or not lost' cf *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699 discussed at length below, where the NSW Court of Appeal held that an insured in similar circumstances was able to recover relying on the 'lost or not lost' clause in the policy.

550 (1932) 44 Lloyd's Rep 103.

551 D Galbraith 'An unmeritorious defence — The requirement of insurable interest in the law of marine insurance and related matters' (1993) 5(3) *Insurance Law Journal* 177; A Mason 'The future of marine insurance law' 1995 Ebsworth & Ebsworth Maritime Law Lecture; *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699, 701 (Kirby J).

container traffic, which grew from 55.8 million TEU[552] in 1985 to 85.6 million in 1990 and to 147.3 million in 1996.[553] With containerisation it can be more difficult to establish precisely when and where damage to, or loss of, goods took place and, therefore, whether the insured had an insurable interest at the time of loss. However, this problem is not new.

> 'It is true that the advent of containerisation has created problems in that at the time the container crosses the ship's rail its contents cannot be seen. This is in a context where pilfering is a worldwide problem. It is a far cry from the nineteenth century days when the purchaser personally inspected goods at the time of loading onto "his ship". On the other hand, the packaging of dry cargo in wooden crates and the carriage of liquids in casks and the like, have, I imagine, always created problems, in so far as inspection at the time of loading is concerned.'[554]

7.20 Nevertheless, the problems in inspecting cargo have, it has been suggested, multiplied significantly with containerisation. With containerisation

> 'there are now more individuals involved in the handling process after goods leave their supplier's hands for the last time prior to export, and there are probably greater time gaps between the time when goods leave their supplier's hands and when they pass the ship's rail than was the case when cargo was shipped break bulk.'[555]

7.21 In 1980 the Incoterm 'Free Carrier' (FCA) was introduced to cater for the situation frequently arising with containerisation where the reception point for goods is no longer at the ship's rail but the point at which the goods are stowed into a container, on land, prior to transport by sea or other means. However, parties to contracts for sales of goods still continue to use FOB terms in situations where the goods are handed over to the carrier before loading on board ship.[556] This may result in problems where parties do not intend delivery at the ship's rail but at the point of loading into the container.

The NSW Leather case

7.22 *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd*[557] is often referred to as illustrating a need for reform of the requirement for an insurable interest in marine

---

552 TEU = twenty foot equivalent unit. This is the measure of one 8 foot by 8 foot by 20 foot container.

553 *Containerisation international yearbook* in Maritime Division, Department of Transport and Regional Services *Submission to the review of Part X of the Trade Practices Act* Canberra 3 May 1999 http://www.pc.gov.au/inquiry/shipping/subs/sub003.pdf (26 April 2000).

554 *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1990) 103 FLR 70, 82 (Carruthers J).

555 D Galbraith 'An unmeritorious defence — The requirement of insurable interest in the law of marine insurance and related matters' (1993) 5(3) *Insurance Law Journal* 177, 181.

556 International Chamber of Commerce *Incoterms 2000* ICC Publishing SA Paris 1999, 24.

557 (1990) 103 FLR 70; (1991) 25 NSWLR 699.

insurance law.[558] In *NSW Leather* the insured had an insurance policy, stated to be insurance 'lost or not lost',[559] for consignments of leather that it had purchased 'FOB Rio Grande' from various Brazilian suppliers. The insurance policy contained a 'warehouse to warehouse' or 'transit' clause in the terms of the Institute Cargo Clauses (A).

> 'This insurance attaches from the time the goods leave the warehouse or place of storage at the place named in the policy for the commencement of transit, continues during the ordinary course of transit and terminates [on delivery].'[560]

7.23 In *NSW Leather* the goods were loaded in containers but were stolen before the containers were loaded on board the ship. The insurers denied the claim on the grounds that the insured did not have an insurable interest at the time of loss.

7.24 Under a standard FOB contract, the risk in respect of goods loaded in a sealed container does not pass to the buyer until the container has passed the ship's rail. In the Supreme Court of New South Wales, Justice Carruthers confirmed the rule that an insured purchaser FOB does not have an insurable interest in goods during transit from the seller's warehouse to crossing the ship's rail. The judge held that the transit clause could not operate to extend the cover to an earlier point in time in the absence of an insurable interest.

> 'Although the clause by its wording covers transit from a pre-shipment warehouse to the carrying vessel, it cannot, in my opinion, impose any obligation upon the defendants to indemnify the plaintiff, where the risk in the goods never passed to the plaintiff — as occurred in this case. The clause would provide cover for the plaintiff if a particular sales contract imposed upon it the risks for damage to or loss of the goods from the warehouse [to the ship's rail]. However, that is not the case here.'[561]

7.25 Justice Carruthers also stated the proposition that, consistently with the fundamental principle that a contract of insurance is a contract of indemnity, an insured cannot rely on a 'lost or not lost' clause unless the loss falls on him or her. He held that the loss in question had clearly not fallen on the insured, who was entitled to recover the purchase price from the sellers.[562]

7.26 On appeal, the New South Wales Court of Appeal referred to US cases which have characterised containers, for some purposes, as functionally part of a ship but

---

558 D Galbraith 'An unmeritorious defence — The requirement of insurable interest in the law of marine insurance and related matters' (1993) 5(3) *Insurance Law Journal* 177; A Mason 'The future of marine insurance law' 1995 Ebsworth & Ebsworth Maritime Law Lecture.

559 *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1990) 103 FLR 70, 77.

560 The transit clause is reproduced in id 79.

561 *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1990) 103 FLR 70, 89.

562 id 88. The judge went on to note that it was 'not difficult to discern reasons why that course was not followed in this case bearing in mind the difficulties of its conducting litigation in Brazil and doubts about the financial viability of the sellers'.

declined to imply from this analysis that the parties to the contract of sale should be held to have agreed that risk passed when the goods were effectively shipped by being sealed in the container.[563] The Court agreed with the trial judge that the insured did not have an insurable interest in the goods at the time of loss, and therefore could derive no assistance from the transit clause.[564]

7.27 However, the Court held that the insured was able to recover, relying on the 'lost or not lost' clause in the policy. In contrast to the trial judge, the Court found that the insured had suffered a loss even though the insured was not at risk when the goods were stolen. It was sufficient that the 'insured suffered financial loss because of the prior loss of the goods'. The fact that it had contractual remedies against its sellers was no barrier to a claim on the insurance.[565] This interpretation may be criticised as inconsistent with the common understanding and usage of 'lost or not lost' clauses — which is generally in relation to the purchase of cargo in transit at sea.[566]

FOB or C & F pre-shipment clauses

7.28 Cases such as *NSW Leather* have contributed to the common practice of inserting a 'FOB or C & F pre-shipment clause' in policies.[567] Such clauses provide that, notwithstanding the provisions of the contract of sale, the insurance attaches from the beginning of the transit, or that loss or damage to the goods discovered at destination is deemed to have occurred during the transit insured.[568]

7.29 The insured is able to recover for loss or damage which occurs before risk in the property passes but is placed under an obligation to pursue any claim against the seller or assist the insurer to do so. The reasons for including FOB or C & F pre-shipment clauses are to avoid the following difficulties.

- Establishing precisely when and where loss or damage took place — this can leave the insured in the position of not knowing, without extensive

---

563 *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699, 701, 704.

564 However, it did have an insurable interest prior to loading in the profits it expected to derive from the safe arrival of the goods and in the risk that it would pay in good faith for shipping documents relating to goods which had been stolen before loading, or would otherwise suffer loss because the shipping documents were forged or fraudulent: id 707.

565 id 711.

566 Associated Marine Insurers Agents Pty Ltd *Correspondence* 17 April 2000.

567 That is, in policies covering goods sold on 'Free on Board' (FOB) or 'Cost and Freight' (C & F) terms under which the risk (but not necessarily the property) in the goods passes to the purchaser at the ship's rail. The term C & F has been replaced with CFR in the Incoterms 1990 and Incoterms 2000.

568 Example clauses provided by Associated Marine Insurers Agents Pty Ltd *Consultation* Melbourne 7 April 2000. Part of the 'problem' in cases such as *NSW Leather* is that brokers and their clients have not appreciated that the Institute transit clause (ICC(A) cl 8.1) is subject to ICC(A) cl 11.1, which states that 'In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of loss', reiterating s 12(1).

investigation, whether the loss or damage is covered by its insurance or whether recovery against the seller and the seller's insurance will be necessary.

- Having the seller acknowledge, when goods have arrived some weeks after the seller's risk in the goods has passed, that the seller or their insurer have any responsibility for loss or damage capable of being demonstrated as having occurred prior to shipment.[569]

7.30 A FOB or C & F pre-shipment clause is said to provide the insured with 'seamless cover' allowing them to obtain payment for losses — either immediately from their own insurer or later, after first attempting to recover from the seller. However, such pre-shipment clauses are said to be 'commercially' rather than legally enforceable against the insurer because they are in breach of the insurable interest requirements of the MIA.[570]

7.31 In 1997, the Law Council of Australia and the Maritime Law Association of Australia and New Zealand (MLAANZ) submitted to the Attorney-General's Department that the willingness of insurers to provide cover including FOB and C & F pre-shipment clauses, at no additional premium, indicated that an insurable interest is not as critical to the business of marine insurance as had been suggested by others.[571] MLAANZ has stated that an amendment to dispense with the need for an insurable interest would not have an adverse effect on the Australian marine insurance market.[572]

7.32 However, some insurers have indicated that the idea of eliminating the requirement for an insurable interest at the time of loss, based on the fact that insurers already provide contracts with FOB and C & F pre-shipment clauses, is unsound and that such a reform would work to the detriment of both insurers and insureds.[573] Insurers have suggested that if the requirement for an insurable interest was discarded, FOB and C & F pre-shipment clauses would no longer be needed because the insured could rely on the Institute 'warehouse to warehouse' clause. This would, it is said, lead to the following results.

- In many situations it would create overlapping insurance, as both the exporter's and importer's policies would be effective for the pre-FOB transit. This would make overseas suppliers more likely to resist claims made against

---

569 Materials provided by Associated Marine Insurers Agents Pty Ltd: *Consultation* Melbourne 7 April 2000.
570 Associated Marine Insurers Agents Pty Ltd *Correspondence* 17 April 2000.
571 Including the Insurance Council of Australia: Insurance Council of Australia *Submission to AG's Dept* 29 May 1997.
572 ibid.
573 Materials provided by Associated Marine Insurers Agents Pty Ltd: *Consultation* Melbourne 7 April 2000.

them and Australian importers less likely to cooperate in claims against suppliers.[574] The pre-shipment cover would, in effect, become primary rather than subsidiary cover. Premiums for Australian importers would have to increase because of the reduced prospects of recovery against suppliers.

- Australian exporters might more often claim on their own insurance to protect the insurance cover of major overseas clients, or overseas buyers could use commercial leverage to make the Australian exporter's insurance pay, forcing exporters FOB or C & F to obtain full cover rather than seller's interest cover only.[575]

7.33 The Commission has been advised that FOB and C & F pre-shipment clauses are predicated on the fact that full recovery options should exist in virtually every case. These clauses 'effectively seek only to provide a bridging payment pending recovery from the suppliers or their insurance'.[576] However, recovery prospects depend upon the jurisdiction in which recovery is sought and whether the supplier has assets. It may be unrealistic, therefore, to suggest that FOB and C & F pre-shipment clauses are predicated on the basis of a likely successful recovery rather than made available because of market demands.[577]

7.34 It appears that insurers commonly enter contracts of insurance — using either FOB and C & F pre-shipment clauses or, more rarely, a 'lost or not lost' clause — which purport to indemnify an insured for loss even though the insured may not have an insurable interest at the time of loss. This brings into question the continued utility of the MIA's requirements in relation to insurable interest.

7.35 Reform of the MIA's insurable interest requirement could leave it open for the parties to agree to terms which make it clear, notwithstanding that the policy covers risks also covered by the seller's insurance, that the cover is subsidiary or contingent on the seller's insurance being either inadequate or non-existent,[578] or that the insured is covered only where the insured has a legal or equitable interest in the goods at the time of loss — in effect imposing an insurable interest requirement under the terms of the contract.

---

574 However, it has been suggested that it is unrealistic to expect that claims would in fact be handled differently if the requirement for an insurable interest was reformed: F Hunt *Correspondence* 24 May 2000.

575 Materials provided by Associated Marine Insurers Agents Pty Ltd *Consultation* Melbourne 7 April 2000.

576 ibid. However, when claims are paid under policies with FOB and C & F pre-shipment clauses, subrogation rights may not be able to be legally enforced by insurers against the seller or their insurer: Associated Marine Insurers Agents Pty Ltd *Correspondence* 17 April 2000.

577 F Hunt *Correspondence* 24 May 2000.

578 Provided that the relevant legislation does not contain a provision similar to ICA s 45(1) which renders void any provision in a contract of general insurance which has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance.

> 'It appears preferable to live with the potential problems of double insurance rather than deprive a purchaser of a legal right to recover a claim for a contingent loss he is not readily able to recover from the supplier or the supplier's insurer. The insurer would then have a legal right to subrogation action or double insurance recovery as appropriate.'[579]

7.36 In its submission to the Attorney-General's Department, the Insurance Council strongly opposed reform of insurable interest and stated that the reason insurable interest must apply at the time of loss is that this is dictated by the special nature of marine cargo insurance where the marine insurance contract follows moving goods through many changes of ownership,[580] as compared to general insurance contracts, which are deemed cancelled when the insured disposes of the insured property.[581]

> 'The [marine] insurance contract follows the terms of sale. To do otherwise is to insure the consequences of poor commercial practices. This, inevitably, would be at the cost of increased premiums falling as a burden on all policy holders.'[582]

7.37 As discussed above, under a reformed MIA, cover provided by contracts of marine insurance could still generally follow the passing of the legal or equitable interest under the contract of sale, although the assignment of the contract of insurance will be inoperative if assignment takes place after the assured has parted with or lost his interest in the subject matter insured.[583] Reforming the insurable interest requirement need not affect the general rule of the marine insurance contract following the contract of sale.

Options for reform

7.38 In general insurance law the concept of insurable interest has been modified. The Commission concluded in ALRC 20 that insurable interest requirements were the result of a combination of imprecise drafting and historical accident rather than the coherent implementation of clear legislative policy.[584]

7.39 he Commission concluded that the test of insurable interest at common law[585] in some cases unduly inhibited recovery for loss and recommended the introduction

---

579 Associated Marine Insurers Agents Pty Ltd *Correspondence* 17 April 2000.
580 A marine policy is assignable unless it contains terms expressly prohibiting assignment.
581 Insurance Council of Australia *Submission to AG's Dept* 29 May 1997.
582 ibid.
583 See MIA s 57.
584 ALRC 20 para 107–149.
585 The common law required that there be an insurable interest both at the time of entering the contract and when the loss occurred. That is, the insured must show a strict proprietary interest, or some legal or equitable interest, in the subject matter of the insurance, although the interest need not be continuous: F Marks and A Balla *Guidebook to insurance law in Australia* 3rd ed CCH Sydney 1998 ¶417, 91–2 citing

of an economic interest test so that where an insured is economically disadvantaged by loss, the insurer should not be relieved of liability by reason only that the insured did not have a legal or equitable interest in the property.[586]

7.40 The Commission's recommendations were implemented in the ICA.[587] Section 16 of the ICA states that a 'contract of general insurance is not void by reason only that the insured did not have, at the time when the contract was entered into, an interest in the subject matter of the contract'.

7.41 ICA uses an economic loss test to determine whether the insured has a sufficient interest to claim under the policy. Section 17 states where the insured has suffered a pecuniary or economic loss the insurer is not relieved of liability by reason only that, at the time of loss, the insured did not have an interest in law or in equity in the property. In practice, a person who suffers a pecuniary or economic loss in terms of s 17 would often have an insurable interest under the common law. However, as parties can agree that risk pass at many different stages, as the *NSW Leather* case shows, there remain situations where the requirement for an insurable interest may operate to preclude an insured who has suffered loss from recovering under the contract.[588]

7.42 Some commentators have argued that the MIA should be reformed to make the insurable interest provisions consistent with those of the ICA.[589] The Commission seeks comment on how the insurable interest provisions of the ICA are operating in practice, whether any significant problems have arisen and, in particular, further comment on the nature and extent of the problems that might occur if similar provisions were to apply to contracts of marine insurance.[590]

7.43 The discussion above has focussed on international cargo insurance contracts. However, there may be other situations in which reform of the insurable interest requirement may have unforeseen effects on the marine insurance industry. For example, the requirement for an insurable interest may need to be maintained for

---

Macaura v Northern Assurance Co Ltd [1925] AC 619; *FAI Insurances Ltd v Custom Credit Corp Ltd* (1980) 29 ALR 505.

586 ALRC 20 para 119–20, Appendix A Draft Insurance Contracts Bill 1982 cl 17.

587 ICA s 16–17. In addition, s 48 of the ICA implemented the Commission's recommendation that third parties who are specified or referred to in a contract of insurance should be entitled to recover under the contract, notwithstanding that the person is not a party to the contract: ALRC 20 para 124; Draft Insurance Contracts Bill s 48; ICA s 48.

588 cf MIA s 11(2) and *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699.

589 eg A Mason 'The future of marine insurance law' *Paper* Ebsworth & Ebsworth Maritime Law Lecture Canberra 1995.

590 Kelly and Ball have suggested that s 17 of the ICA contains a drafting error, as it only applies if property is damaged or destroyed, not lost. Furthermore, the section is silent on the means for ascertaining the amount the insured is entitled to recover: D Kelly and M Ball *Principles of insurance law in Australia and New Zealand* Butterworths 1991, para 255.

hull insurance where any change of owner changes the risk contemplated and assignment of rights under the policy are generally prohibited.[591]

7.44 Even if the insurable interest requirement is not reformed along the lines of the ICA, redrafting the present MIA provisions may be desirable. Derek Luxford suggests that, while adopting the ICA provisions completely would be 'counter productive', the law should be flexible enough to permit, for example, a seller (who parted with risk and did not have an insurable interest at the time of loss) to sue on the buyer's behalf where the buyer is not in a position to sue the insurer.[592]

7.45 In *NSW Leather* the risk encountered by the appellant was the risk that it would be deceived into paying for goods that had been stolen although it was not liable to do so, a risk not covered by the policy.[593] One option for reform may be to amend the MIA to provide expressly that there exists an insurable interest where an insured bears the risk of goods noted on an invoice or bill of lading not actually being loaded.[594]

7.46 Other provisions relating to insurable interest may also benefit from updating. Sections 13–21, which provide guidance on various categories of insurable interest, may be inadequate for modern use and benefit from redrafting. For example, apart from a reference to advance freight in s 18, the MIA provides little guidance on when there is an insurable interest in freight — a problematic issue which appears to have generated much case law and comment.[595]

Question 34. How are the insurable interest provisions of the ICA operating in practice? Have any significant problems arisen, particularly in relation to contracts of insurance that are related to contracts for the sale of goods?

Question 35. Should the MIA be consistent with the ICA in relation to the requirements for an insurable interest? What problems, if any, might be caused by the application of an economic loss test to marine insurance?

Question 36. Should the insurable interest provisions of the MIA be amended or repealed in any other way and, if so, why and in what way?

---

591 Associated Marine Insurers Agents Pty Ltd *Correspondence* 17 April 2000.

592 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington 5–8 November 1995.

593 *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699, 708–9 (Handley JA).

594 Associated Marine Insurers Agents Pty Ltd *Correspondence* 17 April 2000.

595 See M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1981 para 347–363. MIA s 18 specifically refers to advance freight and states that 'the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss'. Other categories of freight, such as ordinary and charter party freight, are not referred to.

8. Other reform issues

Mixed risks (s 7–8)

8.1 Section 7 of the MIA states

> '7. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against *marine* losses, that is to say, the losses incident to *marine* adventure.' [Emphasis added]

8.2 Section 8 of the MIA provides for mixed sea and land risks to be covered in contracts of marine insurance. It states as follows

> '8(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.
> (2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.'

8.3 In some cases it may be difficult to distinguish whether a non-marine peril is incidental to a maritime peril or whether it is a substantial risk. This may cause uncertainty, for example in relation to the insurance of cargo, ship repair and marina operations.

8.4 A more radical solution to questions relating to the coverage of mixed risks by the MIA would be to create a comprehensive transport insurance regime outside the ICA, that covers marine, aviation and other transport insurance (an MAT Act).[596]

Cargo insurance

8.5 More than one form of carriage is often involved in the transit of goods. Carriage on inland waterways and mixed land and sea risks are contemplated by the MIA. However, the use of containerisation and travel by air have increased the prominence of transporting cargo by several different modes of transport. Many cargo insurance contracts cover risks relating to several forms of transport.

---

596 See para 2.37–2.45.

8.6 In Australia this can create uncertainty about which legislative regime applies to the contract of insurance. Depending on its construction, the contract may be subject to either the MIA or the ICA. Only one regime will apply to the contract of insurance but different regimes could apply (with different claims outcomes) if separate policies were taken out. This complication does not arise in other jurisdictions that do not have legislation equivalent to the ICA.

8.7 The decisive question in determining whether a policy covering mixed sea and land risks is a contract of marine insurance is whether the subject matter insured is 'substantially' a marine adventure.[597] For example, in *Leon v Casey*[598] the insurance of cargo, warehouse to warehouse, carried by land from Cairo to Alexandria and then by sea to Jaffa was held to be a marine policy. Francis Marks and Audrey Balla state that 'the permitted extension to land risks incidental to a sea voyage will only apply where the sea voyage is the dominant activity'.[599]

8.8 The question has not arisen frequently in the courts. One reported Australian case in which mixed risks were at issue was *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Australia) Ltd.*[600] This case involved the insurance of stock in trade from a variety of risks including 'transit risk — road, rail, sea, air, parcel, post'. No evidence had been led to illustrate the importance of carriage of goods by sea in the context of the whole policy and the terms of the policy indicated that it was but one small part of one section of the cover afforded. The High Court held that it could not be said that the policy, viewed in its entirety, indemnified the insured against losses that were substantially incidental to marine adventure.

Other insurance

8.9 Marks and Balla have noted that it is not clear what is intended by the reference in s 8(2) of the MIA to a policy 'in the form of a marine policy' — is it sufficient that the policy take the format of a policy which by custom and practice is used for marine insurance?[601]

8.10 A further difficulty arises in determining what is an 'adventure analogous to a marine adventure'.[602] This wording might be sufficiently broad to allow the MIA to

---

597 H Bennett *The law of marine insurance* Clarendon Oxford 1996, 323.

598 [1932] 2 KB 576. In England, where there is no equivalent of the ICA, cases dealing with whether polices involving mixed land and sea transit are policies of marine insurance tend to arise where an order for 'ship's papers' is being sought. An order for ship's papers is an exceptional discovery procedure available only in actions on marine insurance policies: See id 320.

599 F Marks and A Balla *Guidebook to insurance law in Australia* (3rd ed) CCH Sydney 1998 ¶2102, 561

600 (1986) 160 CLR 226.

601 F Marks and A Balla *Guidebook to insurance law in Australia* (3rd ed) CCH Sydney 1998 ¶2102, 561.

602 ibid.

apply to hull insurance covering inland waters only.[603] Even the movement of goods by air might be analogous to a marine adventure since many 'maritime perils', such as fire, war and pirates (hijacking), also could be characterised as perils of air navigation.

8.11 It has been suggested that uncertainty about the respective coverage of the MIA and the ICA may cause problems in relation to insurance for ship repairers, marina operators, port authorities and offshore energy projects.[604] In each of these areas the insured party is seeking to cover risks which involve both maritime perils and land-based risks — for example, liabilities related to the operation of marina car parks.

Changing the definition of marine insurance

8.12 While potential problems relating to the respective coverage of the MIA and ICA can be avoided in appropriate cases because of the expansive definition of marine insurance in the MIA, Derek Luxford has suggested that consideration should be given to amending the MIA to expand its operation to recognise that, in practice, the relevant marine insurance markets treat all forms of transit insurance as marine insurance.

> 'Certainly this has been the case in the London and Australian markets in the past [pre-ICA] and by and largely still is the practice in the London market and to a large extent in the Australian market. This is particularly the case in the area of cargo insurance where it is generally the practice of these marine insurance markets to treat the insurance of all cargo in transit as marine insurance whether the cargo is carried by sea, air or land.'[605]

8.13 Luxford suggests adopting the broadened definition of marine insurance contained in s 6(1) of the Marine Insurance Act 1993 (Can), which states

> '6(1) A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the insured, in the manner and to the extent agreed in the contract, against
>
> (a) losses that are incidental to a marine adventure or an adventure analogous to a marine adventure, including losses arising from a land or air peril incidental to such an adventure if they are provided for in the contract or by usage of the trade; or
>
> (b) losses that are incidental to the building, repair or launch of a ship.
>
> (2) Subject to this Act, any lawful marine adventure may be the subject of a contract.'

8.14 Apart from greater clarity, the significant differences between s 6(1) of the Canadian legislation and s 8(1) of the MIA appear to be that

---

603 ibid.

604 Insurers and legal practitioner *Consultation* Brisbane 11 May 2000.

605 D Luxford *Correspondence to AG's Dept* 4 September 1997.

- the Canadian provision states that a contract of marine insurance *is* a contract which covers losses incidental or analogous to a marine adventure, rather than begging the question of what a contract of marine insurance may cover
- the section expressly refers to an 'air peril' as an incidental risk able to be insured against in a contract of marine insurance.

8.15 While it seems to be established law that a contract of insurance may be subject to the MIA even though the transit covered includes a significant non-marine component, in practice it has been suggested that problems arise with non-marine policies with marine 'extensions' of cover.[606] Such policies are not subject to the MIA, following *Con-Stan Industries*.[607]

Draft proposal 13. The MIA and the ICA should be amended to address uncertainties about their respective coverage in relation to insurance of mixed marine and non-marine transit risks, for example multimodal cargo transport, and ship repair and marina operations.

Question 37. What form should such amendments take? What are the advantages and disadvantages of alternative formulations?

State insurance (s 6)

8.16 Section 51(xiv) of the Constitution grants the Commonwealth parliament power to make laws with respect to 'Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned'. Consequently the MIA cannot cover State marine insurance covering intrastate risks, which is excluded from the jurisdiction of the Act in s 6.

> '6(1) This Act shall apply to marine insurance other than State marine insurance and to State marine insurance extending beyond the limits of the State concerned.'

8.17 The phrase 'State marine insurance' is not defined in the MIA, but it appears to mean marine insurance business conducted by a State or State agency, rather than

606 Legal practitioners *Consultation* Sydney 1 May 2000.
607 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Australia) Ltd* (1986) 160 CLR 226.

intrastate marine insurance or insurance of State insurance risks.[608] Similarly, the ICA does not apply to contracts entered into in the course of State (or Northern Territory) insurance.[609] In Victoria, Western Australia and Tasmania the State legislation requires compliance with Commonwealth legislation.[610]

8.18 While some literature identifies State insurance as an issue for reform because of potential anomalies in the governing law depending on the identity of the insurer,[611] the issue seems to be of limited practical relevance due to privatisation of government insurance offices, State legislation that requires State insurance offices to comply with Commonwealth insurance law, and the fact that much marine insurance covers marine adventures that extend beyond the borders of individual States (and is therefore covered by the MIA).

Question 38. What problems, if any, result from the exclusion of intrastate state insurance from the MIA? How might these concerns be addressed?

Marine insurance contracts and policies

Contract formation

8.19 The formation of a contract of insurance is governed by the general law of contract. However, some difficulties can arise when applying these principles to the particular practices which have developed in the marine insurance market.

8.20 A number of issues relating to the formation of the contract are unresolved by the MIA. These are said to include whether the risk placed through subscription to a slip is ultimately covered by one contract of insurance or whether each subscription gives rise to a separate contract.[612] Section 31(2) of the MIA states

608 *Norsworthy & Encel v SGIC* [1999] SASC 496, [35] (30 November 1999); M Davies and A Dickey *Shipping law* The Law Book Company Sydney 1990, 311; ALRC *Insurance agents and brokers* Sydney 1980 (ALRC 16) ALRC 1980, para 5; See also P Lane *Lane's Commentary on the Australian Constitution* 2nd ed (1997), 215–16.

609 ICA s 9(2).

610 *State Insurance Office Act 1984* (Vic) s 20 (5) and (6); *State Government Insurance Commission Act 1986* (WA) s 33(6) and (7) and *Tasmanian Government Insurance Act 1919* s 22(2): S Derrington 'Does the Marine Insurance Act 1909 (Cth) still serve the needs of the business community?' (1995) 7 *Insurance Law Journal* 31, 36.

611 S Derrington 'Does the Marine Insurance Act 1909 (Cth) still serve the needs of the business community?' (1995) 7 *Insurance Law Journal* 31, 36; Attorney-General's Department *The Marine Insurance Act 1909: Issues paper* (1997).

612 H Bennett 'The role of the slip in marine insurance law' [1994] *Lloyd's Maritime and Commercial Law Quarterly* 94, 105–6. The slip is described in more detail in para 8.26.

> '31(2) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.'

8.21 The MIA draws a distinction between a slip and a policy, so the position is not clarified by this provision. Nevertheless, Howard Bennett considers that the law is clear that each signature on a slip gives rise to a distinct, binding contract and each underwriter is bound by the terms as agreed at the time of the underwriter's subscription.[613]

8.22 While the law allows following underwriters ample scope to vary or amend the terms of the insurance contract, 'the expertise of the leading underwriter and the market dislike of policies embodying contracts on different terms are powerful constraints on its practical operation'.[614]

Question 39. Are there issues relating to the formation of contracts of marine insurance that should be clarified by amendments to the MIA? If so, what are these issues and how should the position be clarified?

Evidence of marine insurance contracts (s 27–30, 95)

8.23 The MIA provides that a marine insurance contract is inadmissible as evidence unless it is embodied in a marine policy.

> '28. Subject to the provisions of any Act, a contract of marine insurance is inadmissible in evidence in an action for the recovery of a loss under the contract unless it is embodied in a marine policy in accordance with this Act.'

8.24 The policy may be executed and issued either when the contract is concluded or afterwards.[615]

8.25 The requirement for a marine insurance policy dates back to the Stamp Act 1795 (UK), which introduced a special stamp duty regime for marine insurance contracts and stipulated certain matters that were to be contained in the marine insurance policy. The Finance Act 1959 (UK) repealed certain stamp duty provisions relating to marine insurance and the Finance Act 1970 (UK) abolished

613 id 103–7.
614 id 106.
615 MIA s 27 adds 'A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract.'

stamp duty on marine insurance contracts. Stamp duty on marine insurance contracts also has been abolished in Australia.

8.26 As discussed above, in practice, marine insurance contracts may be based on the use of a slip.[616] This is a memorandum of agreement prepared by the broker acting as the agent of the insured, who approaches underwriters seeking subscriptions to the cover. Underwriters initial the slip with the percentage of the risk underwritten. All the negotiations about the terms of the insurance and the rate of premium are carried on between the broker and the leading underwriter alone. It is understood that the initialling of the slip by an underwriter creates a binding contract with that underwriter and that a formal policy may not be prepared until some months after the slip is closed.

8.27 The market understanding has always been that the underwriter is bound from the moment the slip is initialled, even in the absence of a policy,[617] and the insurer is obliged to issue a policy on the request of the insured.

8.28 In practice, Australian courts are reluctant to allow insurers to escape liability on the technical point that no policy has been issued and s 58 of the MIA provides that if the insurer has received premium the insurer must issue the policy.[618] The slip can also be used as evidence in an action for rectification if there is a discrepancy between the wording of the slip and the policy.[619] The parol evidence rule, which prevented extrinsic evidence from being allowed to vary the written contract, is no longer strictly adhered to and the slip may constitute useful evidence of the terms of the contract.[620]

8.29 In the early 1800s, the status of the slip in English common law was that of a mere proposal, not amounting to a contract of marine insurance. Since the 1871 case of *Ionides*,[621]however, the slip has been recognised as amounting to a contract and is admissible as evidence of that. In this context, s 95 of the MIA states

> '95. Where a policy in accordance with this Act has been issued nothing in this Act shall prevent reference being made in legal proceedings to the slip or covering note or other customary memorandum of a contract of marine insurance.'

---

616 Slips are commonly used in the London market where coinsurance is widespread. The use of slips in the Australian market is limited and reducing as more business is placed with one underwriter and is submitted and agreed by fax or email: Associated Marine Insurers Agents Pty Ltd *Correspondence* 17 April 2000.

617 H Bennett 'The role of the slip in marine insurance law' [1994] *Lloyd's Maritime and Commercial Law Quarterly* 94.

618 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Pape*r MLAANZ Annual Conference Wellington New Zealand 5–8 November 1995, 26.

619 *Symington & Co v Union Insurance Society of Canton Ltd (No 2*) (1928) 34 CC 189.

620 *Youell v Bland Welch* [1992] 2 Lloyd's Rep 127. It was acknowledged that extrinsic evidence could be admissible as an aid to interpretation of wording not possessed on its face of a clear and unequivocal meaning.

621 *Ionides v Pacific & Marine Insurance Co* (1871) LR 6 QB 674.

8.30 A distinction remains, however, between the marine insurance contract and the marine insurance policy. Section 29 of the MIA states

> '29. A marine policy must specify:
>
> (a) the name of the assured, or of some person who effects the insurance on his behalf:
> (b) the subject-matter insured and the risk insured against:
> (c) the voyage, or period of time, or both, as the case may be, covered by the insurance:
> (d) the sum or sums insured:
> (e) the name or names of the insurers.'

8.31 Section 32(1) of the MIA states

> '32(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.'

8.32 *Arnould's law of marine insurance and average* notes that, in the United Kingdom, the repeal of the relevant provisions of the Stamp Acts means that an ordinary slip for a voyage or time policy contains an adequate specification of the necessary particulars and that an action can now be brought on an ordinary marine slip if necessary.[622] However, in Australia, technically the slip does not amount to a policy in the terms of the MIA.[623]

8.33 As market practice no longer coincides with the legal position stated in the MIA, it has been suggested that the provisions of s 27, 28 and 95 of the MIA should be amended to recognise a slip, or other document recording or evidencing the contract of marine insurance, as the policy, or at least to provide prima facie evidence of the policy in the absence of any other document.[624]

8.34 Section 29 of the MIA also could be amended to bring the MIA in line with the MIA (UK), which has had less stringent requirements for the contents of a marine insurance policy since changes made by the Finance Act 1959 (UK).[625]

---

622 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1981 para 17.

623 In the MIA(UK) s 23(2) to (5), equivalent to s 29(b) to (e) of the MIA, were repealed by the Finance Act (UK) 1959.

624 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington New Zealand 5–8 November 1995, 27; Associated Marine Insurers Agents Pty Ltd *Correspondence* 17 April 2000. However, it has also been submitted that the slip should not come to be relied upon as against the policy: Insurers *Consultation* Melbourne 6 June 2000.

625 In the MIA(UK) s 23(2) to (5), equivalent to s 29(b) to (e) of the MIA, were repealed by the Finance Act (UK) 1959.

8.35 Another option is for the MIA to contain a provision along the lines of s 74 of the ICA, which states that, upon a written request from the insured, the insurer must supply a written document setting out the provisions of the contract, that is, the policy document.

8.36 A further area where the MIA may no longer reflect market practice is s 30(1), which requires a marine policy to be signed by or on behalf of the insurer. In practice, policies often may be processed electronically and no written signature will be given.

8.37 The *Electronic Transactions Act 1999* (Cth) (ETA) and the Electronic Transactions Regulations 2000 (Cth) came into effect on 15 March 2000.[626] Under s 10 of the ETA a requirement for a person's signature is taken to have been met if certain conditions relating to electronic signatures are satisfied.[627] At present, the ETA applies only to particular legislation listed under the regulations, but after 1 July 2001 the ETA will apply to all Commonwealth laws except those that are specifically excluded from its application. This reform will presumably apply to the MIA and allow a policy of marine insurance to be signed electronically. There is certainly no reason the MIA should be excluded from the ETA reforms.

Draft proposal 14. Given the longstanding industry practice, the MIA should be amended to allow the slip, or any other document recording or evidencing the contract of marine insurance, to be treated as prima facie evidence of the contract in the absence of any other document.

Draft proposal 15. The requirement in s 28 of the MIA for a marine insurance contract to be evidenced in a policy should be repealed.

Draft proposal 16. Sections 29(b) to 29(e) of the MIA should be repealed to reduce the number of particulars required to be specified in a marine insurance policy, consistently with s 23 of the MIA (UK).

Draft proposal 17. The MIA should be amended to allow a marine insurance policy to be issued by an insurer electronically without the requirement for a signature.

626 D Williams Attorney-General 'Australia at the forefront of the information economy' *News release* 14 March 2000. http://law.gov.au/aghome/agnews/2000newsag/711_00.htm (11 May 2000).

627 *Electronic Transactions Act 1999* (Cth) s 9.

Question 40. Should the MIA expressly require the insurer to supply a policy document on the request of the insured?

Types of marine insurance policies

8.38 In Australia, marine insurance policies generally provide either cargo or hull insurance. The types of policies referred to in the MIA are voyage,[628] time[629] and floating policies[630] and policies that are valued or unvalued.[631] Some policies may combine both voyage and time[632] and these are known as 'mixed policies'.

8.39 Voyage policies relate to a specific voyage and are generally used to insure cargo rather than hull and machinery. The duration of the period of insurance is governed by the relevant policy clauses. Historically, cargo voyage cover related to the period from lifting of cargo to unloading from the ship.[633] Modern voyage policies cover the goods on a 'warehouse to warehouse' basis, for example, as defined in the Institute Cargo Clauses transit clause[634] or by reference to the passing of risk under the terms of international contracts for sale of goods.[635]

8.40 Most hull and freight insurance is placed under time policies — policies for a fixed period of time. Time policies are usually annual and may be renewable. They may be restricted in the type of adventure insured or by geography.[636] The MIA states that a time policy made for a period over 12 months is invalid, except that an extension of up to 30 days may be made for a ship to reach its destination or complete a voyage.[637] This provision, a legacy of UK stamp duty legislation, has been criticised for being unnecessarily restrictive and for no longer serving any real purpose. The equivalent provision of the MIA (UK), s 25(2), was repealed by the Finance Act (UK) 1959.[638] Section 29(3) of the Marine Insurance Act 1993 (Can)

628 A voyage policy is a contract to insure the subject matter from one specific place to another specific place or places: MIA s 31(1).

629 A time policy is a contract to insure the subject matter for a definite period of time: MIA s 31(2).

630 Floating policies describe the insurance and general terms and leave the name of ships and other particulars to be defined by subsequent declaration: MIA s 35.

631 MIA s 33, 34.

632 Section 31(1) of the MIA states that a contract for both time and voyage may be included in the same policy.

633 R Thomas 'Cargo insurance: issues arising from the standard cover provided by the London Institute Cargo Clauses' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1 Intersentia Antwerp 1999, 325, 328.

634 See Institute Cargo Clauses (A) cl 8.1.

635 eg see International Chamber of Commerce *Incoterms 2000* ICC Publishing SA Paris 1999.

636 H Bennett *The law of marine insurance* Clarendon Press Oxford 1996, 260.

637 MIA s 31(2).

638 The equivalent provision of the Marine Insurance Act 1908 (NZ), s 27(2), was repealed by s 4(1) of the Marine Insurance Amendment Act 1975 (NZ).

states that a marine policy is a time policy if the contract insures the subject matter for a definite period. No restriction is placed on the duration of a time policy.

8.41 Section 35 of the MIA refers to 'floating policies' which 'describe the insurance and general terms, and leave the name of the ship or ships and other particulars to be defined by subsequent declaration'.[639] This form of policy has largely become obsolete.[640] In practice, cargo is generally insured under open or annual cover, which, unlike floating policies, does not require the maximum amount of insurance to be stated.

8.42 Cargo open cover involves an agreement to provide insurance for all shipments of goods as agreed, subject to declaration by the insured at or about the time of shipment. Premium is payable per shipment or series of shipments and premiums are only paid when cargo is transported. Open cover is not usually restricted by time, continuing until cancelled by either party. Monthly declarations are made and debits for premiums are made monthly in arrears.[641]

8.43 Annual cargo cover is more common than open cover. An annual policy provides cover for all shipments of goods, as agreed, which commence during the annual period specified in the policy. Premium is payable by deposit based on the estimated value of shipments at the beginning of the period and adjusted later based on the actual value of the shipments. Debits for premiums are taken twice a year.[642]

8.44 Open and annual policies offer more flexibility than floating policies as they are not restricted to any sum insured although the value of any one shipment, or of cargo stored at any one place, may be limited. However, while floating policies are 'policies' in terms of s 29 and s 32 of the MIA, open and annual cover, because of the lack of certainty of their subject matter, are not.[643] Therefore, such cover does not technically amount to a contract of marine insurance. In practice, parties using such cover may agree that a certificate of insurance, sometimes issued electronically by the insurer, will represent a sufficient insurance document.[644] A further issue is that

---

639 M Thompson 'Reform of the law of marine insurance' (1993) 5(3) *Insurance Law Journal* 195. Thompson notes that floating policies that are arranged on an annual turnover basis do not seem to be caught by the wording of this section and there is no obligation on the insured to 'honestly state' the value for adjustment purposes.

640 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Pape*r MLAANZ Annual Conference Wellington New Zealand 5–8 November 1995, 27.

641 Insurers *Consultation* Melbourne 6 June 2000.

642 ibid.

643 R Thomas 'Cargo insurance: issues arising from the standard cover provided by the London Institute Cargo Clauses' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1 Intersentia Antwerp 1999, 325, 334.

644 id 335.

the MIA only deals with the assignment of policies,[645] not contracts. Therefore the status of open and annual cover, if assigned, is unclear in this regard as well.

8.45 It has been suggested that the MIA could be amended to deal specifically with the existence and operation of open and annual covers to give them full recognition as evidencing the contract of insurance and to allow them to be treated as a 'policy'.[646] Alternatively, the MIA could be amended to remove definitions of types of cover, as in the ICA. This would avoid future difficulties of new insurance products possibly not coming within the MIA definitions of cover.

Draft proposal 18. Section 31(2) of the MIA, which restricts time policies to 12 months in duration, should be repealed.

Draft proposal 19. The MIA should be amended to remove specific definitions of types of policies. One effect of such a reform should be to give open and annual cover full recognition as evidence of the contract of insurance and to be treated as a marine insurance policy.

Double insurance (s 38, s 86)

8.46 Any number of policies can be taken out by an insured on the same adventure or interest. It is not unusual for risks to be divided among multiple insurers. Double insurance occurs when the same interest in the same marine adventure is insured against the same risks for the benefit of the same person under more than one policy.[647] The insured can recover under any of the policies but is not entitled to receive any sum in excess of the indemnity allowed by the MIA.[648]

8.47 There are several reasons an insured may have double insurance. An insured may intentionally carry multiple coverage to bridge any gaps in insurance coverage or may have 'layers' of insurance to cover primary and excess insurance. An insured also may inadvertently cover the same risk under two or more policies.[649]

8.48 Where the insured is over-insured by double insurance, the MIA obliges each insurer 'to contribute rateably to the loss in proportion to the amount for which he is

645 MIA s 56.
646 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington New Zealand 5–8 November 1995, 28.
647 H Bennett *The law of marine insurance* Clarendon Press Oxford 1996, 425.
648 MIA s 38.
649 R Force 'Overlapping insurance coverages' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1 Intersentia Antwerp 1999, 227.

liable under his contract'.[650] Under this mode of calculating contribution payable, known as the 'maximum liability' approach, the loss is apportioned according to the degree that each cover bears to the total aggregate cover.[651] Any insurer who is obliged by the insured to pay more than its portion can claim contribution from the other insurers.[652]

8.49 Most insurance policies contain rateable proportion clauses ('other insurance' clauses).[653] These clauses seek to exclude, limit or qualify the extent to which an insurer is liable when the insured carries another policy or policies relating to the same loss. Typically they may seek to absolve the insurer from liability altogether if the insurer has not been notified in writing of the existence of other insurance covering the same risk. Alternatively, the other insurance clause may attempt to limit the insurer's liability to the loss in excess of that covered by other insurance, or restrict the insurer's liability to a rateable proportion of any sum payable in the event of any loss.[654]

8.50 In the USA most cases involving other insurance clauses deal not with loss sharing but with loss avoidance. Many insurers use the other insurance clauses to attempt to avoid liability altogether, rather than using them merely to allocate loss proportionally among insurers.[655] A further difficulty in the USA is that these are matters of state law and conflicting approaches in different states have resulted in a lack of uniformity in this area.

8.51 English courts have considered differing methods of apportionment under rateable proportion clauses. Under current English law, contribution in cases of double liability insurance is calculated in accordance with the 'independent liability' basis.[656] This means the liability of each insurer is first ascertained as if each had been the only insurer, and the total liability to the insured is divided in proportion to the insurers' respective liabilities. This independent liability basis has been the favoured approach in liability and fire insurance cases in Australia.[657] The

---

650 MIA s 86(1).

651 LBC *The laws of Australia* vol 22 Insurance and Income Security '22.1 Insurance' para 257.

652 MIA s 86(2).

653 Additional specified insurance is allowed under ITC Hulls, cl 22.1 and IVC Hulls, cl 20.1. Clause 14.2 of the ITC Freight provides that, where there is other insurance on freight current at the time of the loss, such insurance is to be taken into consideration in calculating liability under the policy. Similarly, double insurance cannot arise as between primary and increased value cargo insurers: Institute Cargo Clauses (A), (B), (C), cl14; Institute War Clauses (Cargo), Strikes Clauses (Cargo), cl 9. See H Bennett *The law of marine insurance* Clarendon Press Oxford 1996, 426.

654 LBC *The laws of Australia* vol 22 Insurance and Income Security '22.1 Insurance' para 260.

655 R Force 'Overlapping insurance coverages' in M Huybrechts et al (eds) *Marine insurance at the turn of the millennium* vol 1 Intersentia Antwerp 1999, 232.

656 See *Commercial Union Assurance Co Lt v Hayden* [1977] QB 804 for discussion of different bases of computing the amount of contribution.

657 *Government Insurance Office (NSW) v Crowley* [1975] 2 NSWLR 78; *QBE Insurance Ltd v GRE Insurance Ltd* (1983) 2 ANZ Ins Cases 60–533 (Supreme Court of Victoria).

'maximum liability' approach referred to above is seen to be disadvantageous as the obvious purpose of limiting liability is to protect an insurer from the effect of an exceptionally large claim.[658]

8.52 In Australia, under contracts of general insurance, the insured is entitled to recover from any one or more insurers an amount or amounts which in aggregate will indemnify the insured in respect of the loss.[659] It is no longer permissible for insurers to rely on a rateable proportion clause to limit the payment to which the insured is entitled. The ICA[660] renders void any provision in a contract of general insurance which has the effect of limiting or excluding the liability of the insurer under the contract because the insured has entered into some other contract of insurance.

8.53 It has been suggested that some discussion and clarification of the appropriate method of apportionment under the MIA would ease the confusion that presently exists.[661]

Question 41. Should the provisions of the MIA dealing with double insurance be amended or repealed? If so, why and in what way? For example, should the provisions of the MIA dealing with double insurance be amended to provide more certainty in relation to the method for apportioning loss between insurers and, if so, in what way?

Agents and brokers (s 58–60)

8.54 The *Insurance (Agents and Brokers) Act 1984* (Cth) (IABA) applies to all contracts of insurance governed by Australian law, including those covered by the MIA.[662] It deals with issues such as the registration of insurance brokers and, of particular relevance, with payments to and disclosure by agents and brokers. The MIA also contains provisions dealing with insurance agents and brokers. There is potential for these provisions to overlap with those of the IABA. The IABA is not intended to override other legislation unless this is expressly stated[663] and any other inconsistency is presumably to be resolved in favour of the MIA where the construction of the IABA does not require the contrary.

---

658 LBC *The laws of Australia* vol 22 Insurance and Income Security '22.1 Insurance' para 257.
659 ICA s 76(1).
660 ICA s 45(1).
661 M Thompson 'Reform of the law of marine insurance' (1993) 5(3) *Insurance Law Journal* 195; *Commercial Union Insurance v Hayden* [1977] All ER 441.
662 IABA s 6.
663 IABA s 5

Payments

8.55 Both the IABA and the MIA contain provisions relating to payments. Sections 58–60 of the MIA deal with payments of premiums in general terms. The IABA contains more specific provisions. Under the IABA, payment by an insured[664] to an insurance intermediary discharges the insured's liability to the insurer.[665] However, payment by an insurer to an insurance intermediary (for example, in payment of a claim settlement), does not discharge the insurer's obligations to the insured.[666] Similarly, s 59(1) of the MIA states that a broker is directly responsible to the insurer for the premium and the insurer is directly responsible to the insured for any amounts owing to him or her.[667] Under s 58 of the MIA, an insurer does not have to issue a policy until the premium is paid or tendered. If the policy acknowledges the receipt of premium, this is conclusive as between the insured and insurer (in the absence of fraud) but not as between the insurer and broker.[668]

8.56 In some circumstances s 59(2) of the MIA could be inconsistent with the IABA as, unless otherwise agreed, it gives the broker a lien on the policy for the amount of the premium and other charges,[669] which the IABA does not.

Disclosure and representations

8.57 Both the MIA and the IABA contain provisions relating to disclosure and representations by agents and brokers. Sections 24–26 of the MIA set out the duties of insureds and their brokers in relation to disclosure and representations.[670] Brokers must disclose every material circumstance known, and that should be known, to them and the insured, and every material circumstance that ought, in the ordinary course of business, to have been communicated to them by the insured. The statutory requirements for truth in representations by insureds in s 26 of the MIA are extended by that section to representations by the insured's agents.

8.58 Section 13 of the IABA contains specific provisions making misrepresentations by intermediaries an offence where there is an intention to deceive the insurer. Intermediaries are not to make or induce the intending insured to

---

664 Or an intending insured: IABA s 14(2).
665 IABA s 14(1).
666 IABA s 14(3).
667 See also *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226.
668 MIA s 60.
669 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington 5–8 November 1995, 30.
670 A marine insurance broker acts on behalf of the insured; an agent acts on behalf of the insurer: IABA s 12; M Davies '"Stuck in the middle with you" Agents and brokers in marine insurance' http://ww.anu.edu.au/law/pub/icl/marincon/AgentsandBrokersinMarineIn.html (9 February 2000).

make false or misleading statements, or omit to disclose material matter. Intermediaries are defined in the IABA as being an agent for one or more insurers or an agent for intending insureds, and includes an insurance broker.

Proposed changes under CLERP 6

8.59 The federal government is currently undertaking reform of financial services regulation.[671] A regulatory framework is proposed for the licensing of financial product markets and service providers, conduct and disclosure of service providers and financial product disclosure. A single licensing regime is proposed, which will apply common standards and procedures to licences.

8.60 In February 2000, the government released an exposure draft Financial Services Reform Bill (FSRB) intended to implement these changes.[672] The introduction of the Bill into the parliament has been deferred, but the government has stated that it remains committed to enactment of the legislation by 1 January 2001.[673]

8.61 The exposure draft Bill proposes to repeal the IABA. It defines a contract of insurance generally as a financial product. However, it specifically excludes insurance in relation to which the MIA applies.[674] Although the new licensing regulations will apply to brokers who deal in marine insurance, the implementation of the FSRB will have the effect of removing the impact of the IABA from marine insurance contracts so that only the MIA would apply to these contracts.

8.62 The Insurance Council of Australia has noted that the repeal of the IABA creates uncertainty as to what, if any, regulatory regime will apply to the conduct of agents and brokers with regard to marine insurance written under the MIA.[675] This raises the question whether the provisions of the MIA are adequate for this purpose, or whether they should be amended to take into account changes under the FSRB.

Payments

---

671 Known as CLERP 6, the Corporate Law Economic Reform Program: Financial Services Project Team — Treasury *Financial markets and investment products: Promoting competition, financial innovation and investment* Paper No 6 AGPS 1997; Financial Services Project Team — Treasury *Financial products, service providers, and markets — An integrated framework* AGPS 1999.

672 Financial Services Reform Bill *Commentary on the draft provisions* Introduction http://www.treasury.gov.au/publication/Bills,actsandlegislation/ (11 April 2000).

673 J Hockey 'Financial Services Reform Bill Update' *Press Release* 27 June 2000.

674 Financial Services Reform Bill s 965A(h).

675 Insurance Council of Australia Limited *Financial Services Reform Bill, a submission in response to the draft provisions* May 2000.

8.63 Proposed s 945A–945C of the FSRB carry across the effect of s 14 of IABA, under which the insurer rather than the insured bears the risk of funds held by an insolvent insurance broker. The duties of insurance brokers in relation to premiums currently contained in s 27 of IABA will be carried across to the new regime by way of regulations.[676] Section 27 of the IABA sets out in detail brokers' duties in relation to premiums. These duties include payments of premiums to the insurer within set times, notifying the insurer of non-payment of premium by the insured, and the return of premiums to the insured within set times where the risk has not been accepted.

8.64 Sections 58–60 of the MIA, while not inconsistent with the IABA, do not deal with the detail of the payments of premium. This raises the question whether it is necessary to amend the MIA to detail the mechanics of payment of premium, as is presently done by the IABA. It has been suggested by one commentator that that sort of detail is perhaps best kept out of the MIA.[677] However, that observation was made in the light of the extensive provisions of the IABA. If the IABA is repealed it may be appropriate to amend the MIA to include the detail which presently exists in the IABA.

Disclosure and representations

8.65 Under the MIA s 24–26, a material non-disclosure or misrepresentation allows an insurer to avoid the contract. Section 13 of the IABA provides for the imprisonment of intermediaries who make false or misleading statements with intent to deceive an insurer. When the IABA is repealed this provision may no longer apply to marine insurance brokers.

Question 42. Are the provisions of the MIA dealing with brokers consistent with provisions of the IABA? Do the provisions of the MIA dealing with payments to brokers continue to be necessary, in view of the IABA? If so, why?

Question 43. If the IABA is repealed under CLERP 6, should the MIA be amended to incorporate the existing provisions of the IABA in respect of payments and disclosure? Are there other deficiencies in the MIA that might need to be remedied on repeal of the IABA?

676 Financial Services Reform Bill Commentary on the Draft Provisions, ch 7 para 7.15 http://www.treasury.gov.au/publication/Bills,actsandlegislation/ (11 April 2000).

677 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington 5–8 November 1995, 30.

Subrogation (s 85)

8.66 On payment of a loss, the insurer is subrogated to the rights and remedies of the insured in respect of the subject matter insured.[678] In particular, the insurer may bring an action in the insured's name against any third party who has caused the loss.

Control of subrogated proceedings

8.67 Levingstons Solicitors have submitted that the law and practice in marine insurance proceeds on the assumption that, after the insured is paid by the insurer, the insured has no further involvement (other than to provide evidence and witnesses) or interest in the proceedings.[679] In consequence, it has been submitted that

- there is no one to look after the interests of the insured after it has signed a letter of subrogation giving recovery rights to the insurer — recovery proceedings may be undertaken or compromised by the insurer on a basis which is prejudicial to the insured[680]
- a conflict of interest issue arises in subrogated claims where the marine insurer appoints its lawyers to effect recovery against the party causing the loss.

Levingstons have stated that the MIA should expressly provide for the appointment and involvement of a lawyer appointed by the insured in proceedings for recovery.[681]

8.68 The Commission notes that it appears to be an established rule of law that an insurer should take into account the insured's interests, even when the insurer is in control of the proceedings. This rule is said to be both an aspect of the doctrine of subrogation and may also have a basis in the duty of utmost good faith.[682] An insurer must not act in such a way as to prejudice the insured — for example if the insurer were to settle a claim against a third party on unfavourable terms in a case where the third party was liable for an amount greater than the measure of indemnity under the policy, the insured would have a claim for damages against the insurers.[683]

---

678 MIA s 85.

679 Levingstons Solicitors *Submission 1*.

680 eg the insured may not properly account to the insured for the amounts recovered; the claim may have a negative impact on the insured's claims history; the conduct of the insurer or the insurer's lawyers may damage the commercial relations between the insured and the party being sued for recovery: ibid.

681 There is no similar provision in the ICA. One model for such a provision is California Civil Code s 2860: ibid.

682 D Kelly and M Ball *Principles of insurance law in Australia and New Zealand* Butterworths 1991, para 11.99.

683 M Mustill and J Gilman *Arnould's law of marine insurance and average* 16th ed vol I Stevens & Sons London 1981 para 1320.

Recovery of surplus money

8.69 Another issue relates to the recovery by an insured of surplus money obtained by the insurer exercising rights of subrogation. At common law the general principle is that where recovery is made from a third party, the insured is entitled to the money recovered only until fully indemnified for its loss.[684] Where the insured has not been fully indemnified

- if the insurer takes proceedings against the third party, money recovered by the insurer over and above the amount it paid to the insured belongs to the insured, and the insurer cannot even claim any amount on account of its costs
- if the insured takes proceedings against the third party, the insured is entitled to deduct any reasonable costs from the sum recovered before accounting to the insurer for any amounts in excess of full indemnity
- the insured is entitled to any windfall profit resulting from the proceedings (for example, as a result of exchange rate fluctuations between the time of loss and recovery against the third party).[685]

8.70 Section 67 of the ICA contains substantial reforms to the common law position applicable to marine insurance. The basic principle stated in s 67(1) is that where the insurer exercises a right of subrogation and recovers an amount, the insured may recover that amount from the insurer, less the insurer's administrative and legal costs connected with the recovery of that amount. However, unless the contract expressly provides otherwise

- if the insured is fully indemnified, the insurer retains all money recovered (a reiteration of the common law position except that s 67(4) provides that the amount recovered is to be construed as the amount recovered less administrative and legal costs incurred in connection with recovery of the amount)
- if the insured is not fully indemnified and the amount paid to it under the insurance contract and the amount recovered[686] together do not exceed the insured's loss, the insured is entitled to the amount recovered less the insurer's administrative and legal costs and the amount already paid by the insurer
- if the insured is not fully indemnified, and the amount paid under the contract and the amount recovered[687] exceeds the insured's loss, the insured is entitled to an amount that will fully indemnify it and the insurer keeps the rest.[688]

---

684 D Kelly and M Ball *Principles of insurance law in Australia and New Zealand* Butterworths 1991, para 11.110.

685 F Marks and A Balla *Guidebook to insurance law in Australia* (3rd ed) CCH Sydney 1998 ¶1813, 524.

686 After deducting the insurer's administrative and legal costs.

687 After deducting the insurer's administrative and legal costs.

8.71 One view is that the provisions of ICA s 67 'inject certainty' into an area that has been 'devoid of specific authority'.[689] Section 67 has been criticised for not referring to the situation where the insured brings the action against the third party and, because the working of s 67(2) is such to give the insurer the benefit of a recovery in excess of the insured's actual loss, allowing the insurer to make a profit, reversing the position at common law.[690]

8.72 Kelly and Ball state that a particular problem in relation to recovery arises in marine insurance where the MIA provides that in cases of under-insurance the insured is presumed to be 'his own insurer with respect to the uninsured balance'.[691] It is generally accepted that in such a case the insured must share with the insurer, in proportion to the respective risk covered by them, any amount recovered from a third party. The way in which this provision operates is illustrated by the following.

> 'Suppose certain property is worth $100,000, but is insured for $50,000. The insurer pays out the full sum insured and the insured then recovers $50,000 from the third party for destruction of the property. The insurer is entitled to $25,000 from that recovery.'[692]

8.73 Kelly and Ball state that this result is wrong in principle, given that rights of subrogation are justified on the basis that they prevent the insured from making a profit from the insurance, and there is no question of the insured making a profit in the example above. A contractual provision which deems the insured to be its own insurer for the uninsured amount should apply only in relation to the insured's rights against the insurer, not the insured's rights against third parties.[693]

8.74 There may be other issues related to subrogation which should be examined in the context of the review of the MIA.[694] The Commission would appreciate comment on the possible reform of the doctrine of subrogation as it relates specifically to the MIA.

---

688 F Marks and A Balla *Guidebook to insurance law in Australia* (3rd ed) CCH Sydney 1998 ¶1814, 526.

689 id ¶1814, 528.

690 D Kelly and M Ball *Principles of insurance law in Australia and New Zealand* Butterworths 1991, para 11.115.

691 MIA s 87. The same problem arises at common law in non-marine insurance where there is an 'average clause'.

692 D Kelly and M Ball *Principles of insurance law in Australia and New Zealand* Butterworths 1991, para 11.112.

693 id para 11.113.

694 ALRC 20 noted a range of criticisms about the doctrine of subrogation including claims that it is expensive and unfair, has no value in curbing negligent behaviour and that subrogation recoveries do not affect premium rates. In response to these criticisms, the Commission suggested in its discussion paper on insurance contracts that subrogation should not be available in respect of rights arising from third party conduct which was neither reckless nor intentional. However, in the final report, while the Commission agreed that these criticisms carried great weight, it concluded an alteration of the doctrine of subrogation in this manner was not justified because of its potentially wide-reaching effects, including on premium rates and reinsurance: ALRC DP 7 para 82; ALRC 20 para 309–313.

Question 44. Should the provisions of the MIA dealing with subrogation be amended by including provisions dealing with the recovery by an insured of surplus money obtained by the insurer exercising rights of subrogation? For example, is there a need for provisions similar to those in s 67 of the ICA?

9. Modernising the MIA

Introduction

9.1 The MIA has been virtually unchanged since it codified the common law in 1909. Since that time some of its provisions have become obsolete or outdated due to changes in shipping, technology and insurance industry practice. Some of these provisions are discussed in this chapter.

9.2 It should be appreciated that some provisions, while appearing outdated, may still be relevant today or have a precise and appropriate meaning as interpreted by the courts. 'Modernisation' of such settled terminology could result in unnecessary litigation or lead to uncertainty.

9.3 The Department of Transport and Regional Services has noted that

> 'the experience of this Department in recent changes to the Carriage of Goods by Sea legislation, suggests a cautious approach to changing legislation only for the purpose of modernising language … the modernisation of language can introduce significant change in the meaning the legislation and significant uncertainty in the community most directly affected by such changes. Such changes require extensive community consultation to ensure that, in modernising, we do not effect any fundamental changes in the rights that are intended to be conferred by the legislation.
>
> Such changes also have the effect of reducing the value of existing case law in settling claims, which can lead to increased litigation costs in the short-to-medium term.'[695]

Bottomry and respondentia (s 16)

9.4 Section 16 of the MIA provides

> '16. The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.'

9.5 Bottomry is a charge over a ship (that is, its hull or bottom) given by the aster to secure money for necessaries so that the voyage can continue. The charge is created by a master who is unable to make contact with the shipowner by virtue of an agency of necessity. Respondentia is a similar charge over the ship's cargo.[696]

---

695 Department of Transport and Regional Services *Submission 2*.
696 M Davies and A Dickey *Shipping law* The Law Book Company (1990) 112–15.

9.6 These concepts were important when global communications were poor. With modern communications and international funds transfer it is generally accepted that these arrangements are obsolete and reference to them should be removed from the MIA. However, before removing this provision there is a need to ensure that any current holders of a bottomry, respondentia or similar bond are not disadvantaged by losing their insurable interests, and that they would still have an insurable interest under s 11(2). The answer may lie in the borrower being prejudiced by the loss of or damage to hull or cargo and thus having an insurable interest in them in any event. Consultations have not disclosed any reason for retaining these concepts in the MIA.

Question 45. Is there a need to retain s 16 to ensure that a current holder of a bottomry or respondentia bond retains an insurable interest in the ship or cargo? Would such an interest be covered by s 11(2)?

Form of policy (s 36; second schedule)

9.7 Section 36 of the MIA states that a policy may be in the form in the second schedule, which incorporates the Lloyd's Ships and Goods Policy. The second schedule contains archaic terms and concepts and has long been subject to criticism. The form has been described as

> 'a strange, very peculiar, absurd, incoherent, clumsy, imperfect, obscure, incomprehensible, tortuous document, drawn up with much laxity, by a lunatic with a very private sense of humour, in a form which is past praying for.'[697]

9.8 In practice, this form of policy is no longer used.[698] Although the second schedule resonates with legal history, it is generally agreed that it should be deleted. However, the second schedule contains 17 rules of interpretation not appearing elsewhere in the Act and which may remain of importance.

> 'To the extent that the defined terms remain in current usage, the rules of interpretation retain their value as expressions of the market's understanding and are given statutory force by [section 36(2) of the MIA].'[699]

9.9 The Canadian Marine Insurance Act 1993 and a South African draft Marine Insurance Act written in 1997, both based on the United Kingdom Act, contain more

---

697 D O'May *Marine insurance — law and policy* Sweet & Maxwell London 1993, 8 amalgamating epithets drawn from English case law.

698 Although it is conceivable that the Lloyd's Ships and Goods Policy might be used where an insurer is using the superseded pre-1983 Institute cargo clauses.

699 S Derrington 'The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance: A case for reform' *Ph D thesis* University of Queensland November 1998, 59.

extensive definition and interpretation sections than the Australian and United Kingdom Acts.[700] This is a feature of modern legislative drafting that assists in statutory interpretation.

Draft proposal 20. Section 36 and the second schedule of the MIA should be repealed. Definitions contained in the second schedule of the MIA worthy of retention should be moved into the body of the MIA.

Question 46. Should the MIA contain a more extensive definitions section, such as those found in the Canadian Marine Insurance Act 1993 and the South African draft Marine Insurance Act?

Measure of indemnity (s 70-84)

9.10 It has been suggested that there is a case for updating the language in those parts of the MIA which deal with the measure of average, salvage, and other liability of insurers for loss.[701] In particular, the provisions on general average[702] may need to be updated to take into account the fact that the law of general average is now subject to its own international regime, the York-Antwerp Rules.

Question 47. Should the language be updated in those parts of the MIA which deal with the measure of average, salvage, and other liability of insurers for loss. Should any of the provisions in the MIA dealing with these matters be amended or repealed and, if so, why and in what way?

Mutual insurance (s 91)

9.11 Section 91(1) of the MIA provides

700 The Canadian Act includes definitions of action, contract, freight, goods, insurable property, marine adventure, marine policy, maritime perils, movable, ship, as well as other definitions contained throughout the Act. The draft South African Act includes definitions of craft, insurable adventure, insurable property, insurable risk, property, and relevant risk.

701 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington 5–8 November 1995.

702 General average is the principle that losses sustained or expenditure incurred in time of peril and for the common good should be shared among those interested in the adventure according to their shares in the adventure. For example, if a ship is threatened with total loss by being dashed on a reef, the master might jettison part of the cargo to save the ship and the remainder of the cargo. The loss is not borne solely by those whose cargo is jettisoned but shared among all parties involved.

> '91(1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.
> (2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.
> (3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.
> (4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.'

9.12 As discussed in chapter 1, P & I clubs provide mutual insurance.[703] Historically, shipowners formed together in unincorporated associations in which they each entered their ships for a certain sum and each undertook to contribute to any loss that their fellow members might incur. However, following the enactment of the Companies Act 1862 (UK) and the decision in *Re Padstow Total Loss and Collision Assurance Association*,[704] those associations were registered under the Companies Act. As a result it is the association that is the insurer — the members do not directly provide insurance for each other.[705]

9.13 It has been suggested that, in the light of this, the definition of mutual insurance in s 91(1) of the MIA is not strictly accurate as its wording implies that the member is insured by other individual members rather than by an incorporated association.[706]

9.14 Sections 91(2) and 91(3) provide for modification of the MIA in the case of mutual insurance. The Commission is interested in comments on how often these provisions are used and whether any amendment to them is required.

Question 48. How often are the provisions in the MIA relating to mutual insurance relied on? Is any modification required?

Question 49. Should the definition of mutual insurance in s 91(1) be amended to remove any implication that the member is insured by other individual members, rather than by an incorporated association?

Other obsolete or outdated provisions

703 See para 1.23–1.26.
704 (1882) LR 20 Ch. 137.
705 M Tilley 'The origin and development of the mutual shipowners' protection & indemnity associations' (1986) *Journal of Maritime Law and Commerce* 261, 267.
706 id 269–70.

9.15 Derek Luxford has suggested that particular average warranties (s 82) and provisions relating to rats and vermin (s 61(2)(c)) may have no modern application.[707] There may also be other provisions that no longer apply in practice or could be amended to reflect current practice but this has not been discussed elsewhere in the available literature. For example, s 5 (Application of certain Imperial and State Acts) is no longer applicable.

Question 50. Should s 5, s 61(2)(c) and s 82 of the MIA be amended or repealed and, if so, in what way?

Question 51. Are there any other provisions of the MIA which should be amended or repealed?

707 D Luxford 'The Marine Insurance Act: Chronologically challenged legislation?' *Paper* MLAANZ Annual Conference Wellington 5–8 November 1995, 33.