THE MARINE INSURANCE ACT: CHRONOLOGICALLY CHALLENGED LEGISLATION?

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Maritime Law Association of Australia & New Zealand
Annual Conference
Wellington New Zealand

November 1995

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IF IT AIN'T BROKE DON'T FIX IT

ANY POLITICIAN SEEKING RE-ELECTION

THE REPORTS OF MY DEATH ARE GREATLY EXAGGERATED

MARK TWAIN AND KERRY PACKER

ANYTHING 90 YEARS OLD SHOULD BE DISCARDED

OUT OF WORK LAW REFORMER LOOKING FOR A CRUSADE

This paper commences with an assertion. The assertion is that it is very difficult to find a piece of legislation which has stood the test of time as well as the Marine Insurance Act ("MIA"). Originally enacted in 1906 in the United Kingdom, almost identical versions were enacted very shortly afterwards in New Zealand (1908) and Australia (1909). For the purpose of this paper all references to provisions of the MIA are to the provisions of the Australian MIA Other common law jurisdictions have similar legislation, although the United States has resisted the temptation. The MIA has been very little amended in the intervening 90 years and indeed the Australian and New Zealand versions hardly amended at all. Certainly none of the amendments to the MIA in Australia and New Zealand has been of any substance. One of the few substantial amendments to the English MIA was not followed in Australia and New Zealand. This was the amendment made in 1959 to finally do away with the requirement that a time policy for a period in excess of 12 months was invalid. This provision is still found in Section 31 (2). The origins of this anomalous provision were to be found in English stamp duties legislation which also, curiously, at one stage impacted upon the effectiveness of a slip as evidence of the contract of marine insurance. The importance of the slip in the practice of the marine insurance market is dealt with later.

However, you may respond to my opening assertion, so what!! Isn't it time for a change after 90 years? The challenge for us in 1995 and at this MLAANZ conference in particular is to identify whether the MIA's time really is up. The excellent paper delivered to this Association as the corresponding conference in Hong Kong in 1992 by the late Murray Thompson concluded that there was a strong case for review of the MIA. I shall leave you to read Murray's paper, if you were not fortunate enough to be in Hong Kong where Murray delivered his paper.

The Marine Insurance Act in Context

Before looking more closely at those provisions of the MIA which might need to be reviewed and perhaps reviewed urgently, the following observations should be made:-

1. The MIA cannot be considered in isolation. It is not lawyers' law. Some of you may be a little surprised to hear me say that but I suggest you ask yourselves how often in practice the non lawyers amongst you who are involved regularly with marine insurance have to resort to lawyers and the Courts to make sense of your marine insurance policies. Developing the question a little further what proportion of the risks which marine insurers underwrite ever result in a serious dispute which can not be resolved by looking at the MIA without having to be resolved by the Court? I suspect the answer to these questions is very few. Taking this line of inquiry one step further for those who have found themselves facing litigation in relation to the MIA or marine insurance contracts written pursuant to it, in how many of those disputes can it be said that the decision of the Courts have produced uncertainty? Again I suspect that the answer is very few. In recent years a slightly different question in Australia might produce a slightly different answer. That question might be is it clear that the MIA applies in the first place to the relevant contract of insurance which is giving you problems? In some cases, due to the advent of the Australian Insurance Contracts Act 1984 ("ICA") the answer might well be, that it is not clear which regime (that is either MIA or ICA) applies and so

we have potentially a very big problem. I will be addressing this problem later in this paper. Indeed it is this area where Australian insurance jurisprudence has added an element of uncertainty which was not there previously and which to some extent has introduced criteria into the debate without providing any clear cut answers. To that extent the debate in Australia is no longer necessarily always on the same playing field as the debate in United Kingdom or New Zealand. Neither England nor New Zealand has an equivalent of the ICA. In England in particular there is very little legislation governing an insurance contract, apart from the MIA. The English courts treat the MIA and the common law as co-existing. It has not been possible to adopt such an attitude in Australia since the ICA came into force in 1986. It some areas of non marine insurance the legislature was chipping away at the common law for some years before the ICA hastened the demise of the common law. For instance the New South Wales Insurance Act 1902 (which did not apply to contracts governed by the MIA) introduced some ad hoc reforms which were later developed in Section 54 of the ICA.

2. The MIA cannot be considered in isolation from the underlying marine insurance contract. The MIA is concerned with contracts of insurance and codifies to a large extent the legal relationships between the insured and the underwriter. The MIA uses the term "assured" where perhaps in this day and age "insured" is more widespread. I shall use the term "Insured" in this paper. The MIA does not set out to define exhaustively what should appear in a marine insurance contract although to some extent it does do so in Sections 28 through 30. More accurately these provisions set out what should be contained in a policy of marine insurance. For the purposes of the MIA, a policy is not necessarily the same thing as a contract. A policy is a particular type of marine insurance contract. It is the best evidence of the contract. If a contract of marine insurance is not embodied in the policy it can not be sued upon. The Second Schedule to the MIA sets out the old Lloyd's S.G. policy form. This form was optional (Section 36). Since the early 1980's it has become obsolete. However the form and substance of any modern marine insurance policy is a function of the marine insurance

market. The substantial documentary revisions of the early 1980's which saw the introduction of the MAR form and the revised Institute Clauses, means that there is now little resemblance between modern policies and the wording and format used in the Second Schedule of the MIA. However the provisions of the MIA are not confined to any particular form of policy or wording and that is one of its beauties. 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. Of course this has not always been the case and that has given rise to some well known problems, some of which will be considered below. In other words the extent to which the law has kept up with commercial practice raises its head in the context of marine insurance as it does in every other field of human endeavour. Whether market practice reflects expectations of the broader sections of the community is a different matter and that also is discussed below. Many other marine insurance markets say in Europe and Asia as well as the USA use different forms and terms of cover quite happily.

3. Marine insurance is an integral part of international trade. Contracts of marine insurance are caught up in the movement of goods and vessels and the transactions which are associated with them. Hence the MIA, much more than many pieces of domestic legislation (by domestic I mean national law as opposed to international conventions which may be given force as domestic law such as the Hague Visby Rules) can not be considered in isolation nor simply from a local perspective. Hence marine insurance and the documentation which evidences the contract (whether it be a policy, a slip, a certificate or something else) plays an important role in international trade and is recognised through such universally accepted provisions as say Incoterms 1990 and UCP 500. The movement of goods and vessels as well as money in the form of finance, freight and other earnings riding on their backs, is inherently risky perhaps less so now than it was earlier in the century but none the less the need for the international trading community to arrange the proper allocation of risks for the loss or damage to their commercial interests goes without saying. It is a brave

"adventurer" (to use the language of the MIA) who decides against insuring the adventure against maritime perils (again to use the language of the MIA). The adventurer may chose to do so through a captive insurer or through some other form of laying off the risk or part of it, but essentially the legal and commercial infrastructure for the movement of goods and vessels pre-supposes that the various interested parties have or may have insurers behind them.

4. The MIA underpins a commercial infrastructure which has seen the substance and often the form of marine insurance extended to areas seemingly far removed from marine insurance such as the insurance of goods carried by air, insurance of goods carried in over-land transport and, in some markets especially the London Market, the insurance of whole classes of commodities such as oil and gas, specie and bullion and perhaps others which may seem to have nothing to do with the subject matter of marine insurance as set out in Section 7 and 8 of the MIA. Again this is a matter which is now of considerable concern to the market and to the Courts in Australia especially since the advent of the ICA.

5. The MIA is largely mandatory law in that its provisions apply automatically to contracts of marine insurance although parts of the MIA are residual, that is to say the parties to the contract can elect to vary the provisions of the MIA to suit their own purpose. A good example of an elective provision is the provision in relation to exclusions of cover dealt with in Section 61 (2) of the MIA. The parties can add or subtract from those exclusions. This of course is done in vary considerable detail in the various Institute Clauses for instance the Institute Cargo Clauses A or the Institute Hull Clauses. However many of the more crucial provisions of the MIA cannot be contracted out of. This includes the provisions relating to the duty of utmost good faith (Section 23), the duties of material disclosure and material misrepresentation (Sections 24, 25 and 26) the provisions relating to warranties (Section 39 et seq) and the provisions relating to insurable interest (Section 11). Interestingly all these key provisions tend to be the areas where the critics of the MIA concentrate

their fire. This is principally because the remedies for breaches of those provisions can be onerous and sometimes draconian, usually enabling the insurer to avoid the contract for breach of duty by the insured. Usually the party to feel the full effect is the insured rather than the insurer. To that extent it is probably fair to say that the MIA is designed to protect insurers rather than insureds no doubt reflecting thinking of those who drafted the MIA in the light of the then common law that insureds were often in a better position to know the nature of the risks they wanted insured then the unsuspecting insurer. Although it is to digress a little the history of the enactment of the provisions relating to material non-disclosure and misrepresentation (Sections 24 and 26 of the MIA) was examined with great detail and scholarship by Mustill L J in the recent landmark House of Lords decision in Pan-Atlantic -v- Pine Top [(1994[5LLR 2 427. I am sure many of you will be familiar with that decision and I shall deal with it below. The ICA has abandoned the insurers rights to rely on such remedies or greatly modified them. (Sections 21 to 28, 31, 48 and 54).

6. The marine insurance market and particularly the marine insurance market in London which the Australian and New Zealand markets tend to be based upon, has changed a great deal since the early 20th century in some respects. The extent of variety of insurance cover is probably the best example. The way in which goods are moved internationally by sea has changed so that tackle to tackle carriage a given way in many cases to containerised carriage and multi-modal transport. Of course the carriage of goods by air was altogether unknown at the time. The insurance market has responded accordingly and there is now a plethora of different insurance cover available in the market and almost all covers can be varied at will to suit the needs of the parties at an appropriate premium. However the legal regime has not changed much and, I suggest, nor has market practice changed a great deal. There may be some who will disagree with me here, but as an observer of the market rather than a participator, I am often amazed at the longevity of many forms of wording in the market. Obviously the changes to the Institute Clauses mentioned above were significant and the impending changes will be significant, but they are after

all only a variation of a theme. The basic perils insured against are set out in the MIA. They existed prior to 1906 and they exist today. Even piracy. There are a lot of newer perils as well but that is another story. Moreover business is still placed in much the same way it was placed 100 years ago at least when a broker is involved. At least in the commercial world that is. The broker still prepares a slip and physically takes it around (or perhaps electronically sends it around in some cases) to the prospective insurers who accept the risk by signing their line on the slip after the broker presents the risk embodied in the slip. Sometimes there are healthy discussions between prospective insurer and broker. Sometimes little is said. Sometimes the respective insurers and brokers have one believe many years after the event that there were healthy discussions when in fact there were not. Sometimes the broker prepares the ensuing policy documentation, and sometimes the insurer does. Sometimes, particularly with cargo insurance, but also in hull insurance and marine reinsurance, the slip seems to be the end of the matter. No subsequent policy is issued. In the London market it is most unusual for the insurer (whether in the companies market or in the Lloyd's market) to prepare the policy documentation at all. The broker's cover note may be the only "policy" the insured sees. Despite the advent of electronic data I can see little sign of marine insurance policies being placed electronically let alone recorded electronically. My experiences of endeavouring to find evidence of electronic placings in a number of marine insurance cases suggests that more work needs to be done on this form of data recording and retrieval before it can be regarded as an accurate system for recording the agreement of the parties to a marine insurance contract in a convenient form for everybody, including assignees. The MIA assumes the contract will be recorded on paper. Many slips look much the same now as they did 50 years ago. Recently I had occasion to litigate a cargo claim where almost identical wording had been used for some 30 years in the London market. In many markets particularly with the bigger and more sophisticated risks the practice of the leading/following underwriter applies. Each underwriter subscribes to a separate contract of insurance (Section 39 (2)). Concepts such as the duty of utmost good faith and material disclosure

assume a new significance in the leading/following market. Interestingly this topic has received very little judicial attention (the attention of the English Courts in the Zephyr litigation in the mid 1980's is perhaps the exception to the rule)[1] and the ramifications for this market practice have yet to be thought through fully. Indeed the ramifications of the decision in the Pan-Atlantic case (which in many respects followed some earlier decisions in the Australian Courts including Pegler[2] and Barclays Holdings[3]) may pose significant problems for the following market now that the relevant test in material non-disclosure cases is the inducement of the actual underwriter. Does that extend to the inducement of the following underwriters? In Pan-Atlantic the court did not have to decide. In many respects it is impossible to give a clear answer because the very definition of a following underwriter is one who is induced at least in part by the identity of the leader to subscribe to the risk. It seems there is a clear case for amendment of the MIA to specifically clarify how its provisions are to apply in contracts of co-insurance and in the leader/follower category.

7. Much mercantile legislation enacted in the late 19th and 20th century in England and followed in Australia is still with us in one form or other. The MIA is not unique. This category includes the Sale of Goods Act (although in recent years there have been substantial changes at least at the consume end), the Partnership Act, the Bills of Exchange Act, the Bills of Lading Act (substantially amended in the United Kingdom in 1992 and under review in Australia). Interestingly significant reforms were made to the law of Real Property at much the same time in Australia, with the introduction of Torrens Title for instance in New South Wales by the Real Property Act 1900. The United Kingdom was much slower to reform its land law. In addition legislation pertaining to compensation to relatives, wills and estates were all enacted or codified during this period. Plainly it was a time for codifying the common law as Britain and its former colonies emerged as modern commercial economies where certainty and sanctity in property and contract were vital. Until recently most of that legislation has undergone little change. Perhaps this should be contrasted with other vital

modern commercial legislation such as company law where various forms of legislation pertaining to limited liability have been constantly amended at decreasing intervals and with increasing complexity. Amendments to the Income Tax Act and various other revenue legislation have created a legal and commercial nightmare. Even the more recent Trade Practices Act (1974) has had its fair share of amendments and has given rise to enormous litigation. Whether those pieces of legislation are any better for their frequent reviews is a matter of opinion. Probably they are, but I doubt that anybody would say that they have served the community with as little fuss as the MIA.

8. The age of consumerism is upon us in insurance in Australia and New Zealand. Australia has the ICA as well as the Insurance (Agents and Brokers) Act 1984 ("the ABA"). New Zealand has the Law Reform Act 1977 and the Insurance Intermediaries Act 1994. The uniqueness to the MIA is recognised by the ICA legislation in excluding contracts governed by the MIA from the provisions of the ICA (Section 9). The MIA always stood beyond the reach of State legislation such as the New South Wales Insurance Act 1902 which towards the end of its life softened the common law in the area of onerous conditions in policies. There is no equivalent legislation in England or New Zealand to the ICA although Section 11 of the New Zealand Insurance Law Reform 1977 has the effect of impinging upon warranties in contracts of marine insurance. This legislation does **not** exclude the MIA from its operations.

Aging Gracefully or Disgracefully?

Let us now turn to the specific challenges confronting the MIA as it approaches four score and ten. The MIA does not on its face refer to international trade or transactions nor does it draw any distinction between say commercial or business activities on the one hand and consumer activities on the other hand. If the MIA applies then it applies to all contracts of marine insurance whether they involve risks to the QE2 or to a small pleasure craft bobbing in and out of Sydney Harbour. It has been argued by some commentators and by at least one New South Wales

Judge that this apparent anomaly should be rectified by legislation. It hasn't been although the insurance industry has recently taken matters into its own hand by including pleasure craft as one of the classes of insurance which is subject to the new Code of Practice. Whether they should have done it quite this way is another matter particularly when it seems to have been done on an assumption which seems to be quite flawed, namely that the ICA applies to pleasure crafts. In my view it does not necessarily do so and in many cases it could not possibly do so. It might apply in some cases but only if the MIA does not apply. This point would not arise in the ordinary course in England, and, as I understand, it in New Zealand. In England the common law is still regarded as being reflected in the MIA a matter which was made very clear and without any argument in the decision of all the courts in the Pan-Atlantic case. That decision did not involve a contract of marine insurance. It involved a contract or reinsurance of a non-marine nature. Nevertheless the courts had no trouble at all in equating the rights and obligations in relation to pre-contractual disclosure and representation as being identical under the common laws under the MIA. In Australia this has not been able to happen since 1986 where the ICA applies to all classes of insurance other than those specifically excluded under Section 9 including contracts to or in relation to which the MIA applies. It is even more important now to identify the appropriate legal regime straight away. The challenge in Australia is that with certain classes of business there may appear to be two competing regimes, either the MIA or the ICA or the other way around depending which way you look at it. As an example recently I was involved in some major litigation arising out of an open cargo cover involving exports of cotton from Australia to anywhere else in the world which was insured in the London marine market but subject to Australian law. I will deal with this type of cover below but I took the view that on balance this was marine insurance albeit the actual loss in question was a land side storage loss but was sufficiently "incidental" or "mixed" within the meaning of Sections 7 and 8 of the MIA and the decided case to be marine insurance. Our opponents who were not insurance lawyers let alone marine insurance lawyers adopted the contrary position and indeed it did not even seem to occur to them for a very long time that there was an argument the other way around. This is not withstanding the fact that it had been broked in the London marine market by specialist marine brokers and that

all the subscribing underwriters were marine underwriters. Possibly it had something to do with the fact that the ultimate parent company of the insured and the ultimate producing brokers were American.

The language of the MIA and the underlying contract of marine Insurance tends to set it aside from other types of insurance. For instance the language of the risk (see Section 7 and 8) is different. The MIA talks about "perils". It does not talk about "accident", "event" or "occurrence" as do many other forms of insurance. However the fact that the MIA and the underlying commercial and legal environment (for instance the many Institute Clauses) is unique is no reason alone why the MIA as a legal regime should stand still. Nor has it. This paper is not the time or the place to identify how the courts have changed with the times and interpreted provisions perhaps differently over 90 years. In addition the MIA has little to say about the burden of proof. This has been left to the courts[4]. In this respect it is different to ICA provisions such as Sections 28 and Section 54. Ironically these sections have already given rise to considerable litigation in less than 10 years. One of the beauties of the MIA is the generality of its language. There is much to be said for simplicity as the industry of "plain english" exponents have us believe. The draftsman of the MIA has to be congratulated for that.

However time has changed. If we accept the statement at the head of this paper that "she ain't broke" it does not necessarily follow that it shouldn't be fixed. However how should the MIA be "fixed" or should it be abandoned altogether? Would a fresh start be better? It will come as no surprise to you when I say that I can see no case for abandoning the MIA and starting again. There is nowhere near the case to be made for completely refashioning the MIA as say there was for the hopelessly obsolete admiralty jurisdiction and the shipping registration law prior to the enactment of the Admiralty Act 1988 and the Shipping Registration Act 1981. However it seems to me that there is a clear case for amendment of the MIA to deal with the following areas:-

1. TRANSPORT AND TRANSIT RISKS: CLEARER DEFINITION OR ALL AT SEA?

Increasingly the insurance market talks about transport or transit insurance rather than simply marine insurance. I suspect this is more the case in Australia and New Zealand than in the United Kingdom where the term "Marine Insurance" is still loosely used to describe any form of insurance underwritten by the marine departments of the relevant companies or syndicates. However there is in London the general consensus that by and large "pure" marine insurance should involve the insurance of goods or conveyances exposed to risks that principally have something to do with the sea. At least at some stage during the risk. As one cargo underwriter put it to me: "If a seagull can [expletive] on it, it's marine". This is the narrow view. The broad view is that the underwriter insures anything that moves or might move. Strictly speaking such a broad extension of the concept of "marine" risk cannot be justified under the MIA. Nevertheless the MIA still goes a long way towards encompassing "mixed" risks far more so than many of its critics would have us believe.

Just how far does the MIA go in encompassing risks which extend beyond the fascinating list of perils described in Section 9 of the MIA? However before we get to Section 9 let us put it in context.

Section 7 of the MIA provides as follows:-

> "7. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the insured in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

Section 9 of the MIA provides that ships, goods, movables, freight,

passage money, profits, loans and liabilities to third parties can all be the subject of a contract of marine insurance. In other words a contract of marine insurance covers exposure of insurable property (defined in Section 9 (2)) to maritime perils or liabilities arising from or exposure by reason of maritime perils. Maritime perils are defined as meaning:-

> ".....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."

The last phrase surely provides considerable scope to the parties of a contract of marine insurance to cover pretty much any perils under the sun as long as the policy covers the basic maritime perils.

But that is not the end of the matter. Section 8 of the MIA seems often to be forgotten by those critics who argue that the MIA is only applicable to the insurance of international carriage of goods or operating vessels in the deep blue yonder rather than say in Sydney Harbour, let alone on more protected waters. The critics need to read Section 8 (1) which provides as follows:-

> "A contract of marine insurance may, by its expressed terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or in any land risk which may be incidental to any sea voyage."

Plainly two types of risk are contemplated in this sub-section namely losses on inland waters on the one hand and land risks incidental to sea voyages on the other hand. Yet in Australia it would seem that

there is a considerable body of opinion including some in the insurance market who argue that a vessel insured to operate in inland waters should be subject to the ICA and not the MIA. The argument does not stand scrutiny. Of course cover of inland water risks or land risks must be an extension of existing marine cover. It is therefore interesting that the insurance industry has elected to put all pleasure under the Code of Practice on the flawed assumption that the ICA will apply. Section 9 (1) of the ICA states:-

> ".....this Act does not apply **to or in relation to** contracts and proposed contracts -
>
> .....(d) **to or in relation to which the Marine Insurance Act 1909 applies**....."

These are the words of the widest import. For the sake of being controversial it strikes me that the statement in the Code of Practice that the ICA applies to contracts of insurance of pleasure craft is misleading. If the industry wants the Code to apply to pleasure craft then there is nothing stopping them from doing it but they shouldn't refer to the provision of the ICA for authority. Plainly if the insurance industry and the community generally takes the view that the insurance of pleasure craft should not be governed by the MIA but the ICA then the MIA should be amended. Perhaps it should. Mr Justice Hunt certainly thought so in relation to pleasure craft generally in his oft quoted decision in Knezevic -v- Sanderson in 1985 in the context of a claim for damages as a result of an injury sustained by a swimmer struck by a pleasure boat. An unscrupulous insurer had sought to plead breach of the warranty of legality against the boat owner in that it alleged that the pleasure boat was exceeding a certain regulatory maximum speed. In fact the Court struck down this defence but his Honour observed in relation to the warranty provisions of the MIA as follows:-

> "It is difficult to see how any justification remains three quarters of a century later - they are surely wholly inappropriate for "pleasure craft insurance" policies which relate to small runabout boats which are used in enclosed waters such as Sydney Harbour. There seems to me to be little if any difference in the insurance requirements of the owners and drivers of such boats and those that the owners and drivers of motor vehicles on the public roads. Anyone with any experience of boating on Sydney Harbour at most times during the weekend would be hard put to tell the difference. This is a matter to which urgent legislative attention should be given by both State and Federal Parliament".

The legislative hasn't given any attention to it, although in the Code of Practice industry has. The problem as I see it with what the industry has done has been done on a flawed basis. There are of course interesting debates as to what constitutes pleasure boats and I have seen some vessels described as pleasure boats which have a value well in excess of many commercial fishing vessels or cruise operators. They are often owned through a corporate structure. They can and do operate well out to sea. Prima facie their insurers are on risk for the traditional maritime perils. However the insurance industry should be able to assess and delineate what it considers to be "pleasure craft".

Plainly there is adequate provision in the MIA for extending policies for contracts of marine insurance way beyond goods or vessels actually on the high seas, tidal waters or indeed anywhere within the geographic area where a sea gull might do its business. The London market sometimes uses the terms "marine" and "cargo" synonymously but other times it distinguishes them because in the "cargo" portfolios of many insurers are risks such as bullion, specie and land transit generally even when it is not

incidental to a sea voyage and as such not a mixed risk of the kind contemplated by Section 8(1). Nevertheless they are all regarded as governed by the MIA in the United Kingdom either directly or indirectly in the sense there is no competing legislation as with the ICA in Australia or to a limited extent perhaps the Insurance Law Reform Act 1977 of New Zealand. Section 11 of that legislation incidentally limits the effect of warranties something along the lines of Section 54 of the ICA but whereas the ICA does not apply to contracts of marine insurance, the New Zealand legislation does (Section 14). However, it might be arguable that Section 11 does not apply to promissory warranties as opposed to warranties of fact. Promissory warranties of course are the stuff of the warranties to be found in Section 39 et seq of the MIA.

Let us now turn to "mixed" risks. They reflect what is now called multi-modal transport. Cargo owners want their marine or transit insurance to cover their product from the moment they acquire it to the moment they dispose of it. This is not necessarily from the ship's rail at the load port to the ships rail at the disport. Especially with containerised cargoes. It is also important where commodities are bought and sold on the water frequently many times and where the need for marine insurance to secure finance and security for their transaction is paramount. This is where the beauty of the assignability of the marine insurance policy comes into play often evidenced by a marine insurance certificate issued pursuant to the basic contract sometimes called an open cover. It is common place in the marine market for a commodity to be insured on what is now called "warehouse to warehouse" cover (see paragraph 8 of the Institute Cargo Clause A). However with some commodities the duration of cover is for a longer period, say wool from the sheeps back to the destination or cotton from the gin to mill. This involves not only an element of land transit, inland storage (sometimes quite a long way inland and not necessarily just in a warehouse next to a wharf or a container

terminal), the actual sea carriage, and subsequent inland storage and transit. Critics of the MIA argue that this insurance cannot be marine insurance. They lose sight of the clear words in Sections 7, 8 and 9 which I have set out above. These worlds reflect industry practice as much now as they did in 1906. As long as there is some element of maritime peril in the context of the extended definitions in those Sections (including specific policy extensions) then it seems to me to be strongly arguable that the MIA applies even if the "maritime" or sea leg of the "adventure" is geographically or temporarily not even the most substantial leg. The English courts recognised this was the case over 60 years ago in the decision in Leon -v- Casey. I shall set out the head note of the case:-

> "By a policy in the form of a Lloyd's policy of marine insurance underwriters insured certain goods and merchandise upon the steam ship L, or other steamers or conveyances from Cairo to Jaffa. The risks insured against them included damage by fire, and the policy contained a warehouse to warehouse clause. The adventure consisted of the journey by land from Cairo to Alexandria and then by sea on the Steam Ship L to Jaffa. In an action upon the policy the assured alleged that the goods had been damaged by fire in the course of transit by lorry from Cairo to Alexandria".

The court held that the policy was substantially one of marine insurance. The court reviewed mixed cargo policies and had no difficulty in coming to this conclusion.

In my view the Court should come to exactly the same conclusion today. Interestingly many of the wordings in open covers haven't changed a great deal since then. The Australian High Court approved the "substantial" connection test in the Con-Stan case[5],

although the court's application of the test to the facts of the case might be regarded as suspect.

It is sometimes said that with such risks part of the contract could be subject to the MIA and parts subject to the ICA. In my view this is a fallacy. Commercially it would be unworkable to have a single contract of insurance governed by several legal regimes particularly when those regimes had potentially very different provisions in crucial areas which could lead to vastly different results. However more importantly the legislation simply does not allow such an interpretation. The Courts will construe the contract to find what it substantially covers in terms of risks. That does not mean that they undertake an exhaustive inquiry into ascertain some statistical basis that geographically more or less is exposed to sea risk than land risk or something like that. It should not mean that one would have to demonstrate in some sort of statistical way that more than 50% of the risks (however ascertained) were pure marine and whatever that might mean because even the definitions of "maritime perils" in Section 8 and 9 allow for the policy to deliberately add to the category of perils. Nor should it matter at all where the actual loss occurred. What matters is what the policy covers not where the loss occurred. The fact that the loss occurred on the land side in Leon's case was irrelevant. Underwriters are at risk throughout and the insured is protected throughout the duration of the policy. It should not even matter, in my view, that from an underwriting point of view perhaps the greatest risk is on the land side say for storage or fire risks. I believe many cargo underwriters will take that view in today's market where those are statistically the main risks to cargo apart from the risk of a total loss of the cargo if the vessel goes down or is consumed by fire at sea. The potential is there for the pure maritime peril to damage the cargo. That the cargo is lost or damaged before hand should not matter. What matters is the policy or contract as a whole.

If industry considers that such interpretation is unfair or inappropriate then plainly the relevant provisions of the MIA should be amended. One liability regime or legal regime for one contract has got to be a rule just like one person one vote. Once one starts dividing up contracts into different possible liability regimes then the game is lost. Courts will be inundated with claims, experts will be called to testify on every conceivable aspect, there will be no certainty and nobody will be happy. Where would such uncertainty leave the assignee of the policy? Nor should be forgotten the very real benefits which assignability of the marine insurance policy produce to the buyer of the goods and the financier. They are looking for security. If too narrow a restriction is imposed on the concept of "incidental" or "mixed" risks they might find they do not have the benefit of the marine insurance policy if the loss to the goods occurred say prior to shipment. Enough said on this point. The industry has accepted the invitation in the MIA to expand upon the scope of maritime perils by adoption of the relevant Institute Clauses and by the expansion of open cargo covers largely rendering obsolete the older concept of "floating" policies mentioned in Section 35 of the MIA. Plainly there is a case to amend the MIA to embrace open covers. For instance open cover should be mentioned specifically as one of the categories of cover along with time and voyage policies.

Conversely one should not pretend that the MIA is designed to cover pure land transit risks. On its proper construction it does not do that and the Australian market is correct in underwriting inland transit risks on the basis that they are not governed by the MIA. In England the problem does not arise because the common law is no different to the MIA as far as the courts and the market are concerned. Once again the question does not make much sense to an underwriter in England. There are proposals coming out of the EU which might make the London market re-think in

certain areas of consumer insurance and even consumer transit insurance.

The insurance of goods carried by air is often regarded as a matter of marine insurance by the markets. They tend to be insured in the marine or cargo markets. The Institute Cargo Clauses (Air) closely follow the traditional (marine) cargo clauses. Obviously any resemblance to maritime perils is next to non-existent and it seems to me that it is stretching credibility too far to draw an analogy with the provisions of (Section 8) dealing with inland waterways or land risks. The carriage of goods by air was not contemplated in 1906. Plainly the MIA could be amended to specifically extend to the air carriage of goods and any other similar extensions or class of "insurable property" if that is what the industry wants. It is interesting that aviation hulls are not insured in the marine market. There is a distinct aviation market in relation to hull and liability with their own well established insurance wording which, whilst it has many similarities to the traditional marine wording, is distinct. That of course is a matter for the market but there is no reason why the MIA could not be amended to cover the insurance of all aviation risks or just aviation cargo risks. As it is aviation hulls are excluded from the operation of the ICA. Hence they are governed by the common law. In England that may not matter but in Australia it produces an odd situation because the common law is essentially pre-1986 law and incorporates significant areas of what would be regarded as law influence by the MIA which might still be the law in England but is no longer the law in Australia. In other words there is a complete lacuna. There is no greater area where insurance law can be said to be chronologically challenged than those areas of insurance which are governed by neither ICA nor the MIA. They have a common law of their own. The insurance of commercial aircraft hulls and reinsurance are the two best examples.

Perhaps the simple answer to the challenges posed by open covers, transit risks, and aviation risks generally is to amend the MIA to specifically cover those risks and rename the legislation the Marine and Transit Insurance Act.

2. REMEDIES

The remedies available to the insurer pursuant to beaches of duties of utmost good faith, material disclosure, breach of warranty and so forth have been canvassed in voluminous learned articles and in the judgements of the Courts themselves. This is not the place to repeat them. The arguments are well known. The recent decision of the House of Lords in Pan-Atlantic has probably brought the law of material non-disclosure in England much closer to what it was (so many of us thought) in Australia or at least in New South Wales after Barclays Holdings which itself is more in line with the provisions of Sections 28 and 54 of the ICA. There is a genuine case for lessening the effect of the draconian remedies particularly in the areas of avoidance of the policy ab anitio which occurs in relation to material non-disclosure and avoiding it from the date of the breach in the case of a breach of warranty (Sections 24 and 39). There is a case for requiring the underwriter to prove a causal connection between the breach and the damage before he can invoke the remedy. The market has gone part of the way to soften the blow by offering "held covered" options where there is a breach of warranty as in many of the Institute Clauses. The market has not always helped its case by inserting contractual warranties (as opposed to the statutory warranties implied by the MIA) in poorly drafted language which may be impossible to comply with, for instance because where a warranty requires the vessel to be kept in survey, there is no relevant statutory requirement for a survey or something to that effect. This only results in parties trying to get

around well concepts by arguing as to whether a warranty really is a warranty as occurred in the "Northern L" fishing vessel case in the Victorian Supreme Court in 1994 (unreported). If underwriters want to rely on warranties they should draft them clearly and concisely. They should also ensure they are consistent with the rest of the policy. If they don't they have only themselves to complain if insureds try to get around them by arguing they are not warranties and this only leads to the courts coming up with questionable decisions which tend to deprive the underwriter of the benefit of the wording in standard policy wordings. That is an undesirable result for everybody. It is not the fault of the MIA. It is the fault of the draftsman.

If the non-disclosure/warranty regime should be amended to be more even handed towards the insured in cases of breach then that can easily be done. As far as warranties are concerned Section 39 contemplates that possibility. Or at least it can be done by amendment to the MIA without having a throw out the baby with the bath water. Whether the industry would wish to go as far as Sections 28, 31 and 54 of the ICA is doubtful. Those provisions have given rise to considerable litigation in less than 10 years. In some respect they seem to go too far; for instance the underwriter is exposed to having to pay fraudulent claims in some cases. This is entirely at odds with the scheme of the MIA in relation to wilful misconduct (Section 61(2) (a)). It also is entirely at odds with the duty of utmost good faith (Section 23) which applies to claims as much as to precontractural conduct by the Insured.

In relation to contracts of co-insurance or leading/following contracts there are potential problems. Pan-Atlantic has done nothing to solve these. They did not arise in the Australian cases such as Pegler , Barclays Holdings and The Icebird[6]. Should it be that each underwriter including the following underwriter has to

give evidence that he was induced to write the risk by virtue of the misrepresentation or non-disclosure? Anybody who has tried to get evidence in material non-disclosure case from the following underwriters knows that it gets increasingly difficult the further down the slip one goes that is because historically the market follows the leader. That has long been acceptable though interestingly in the Zephr7 the Judge at first instance had reservations as to whether it was appropriate albeit this was not a material non-disclosure case but rather a misrepresentation case concerning alleged warranties about writing down the subscribed lines. Students of Pan-Atlantic will know how close the appellants (the insured) in that case came to persuading the House of Lords that not only did the underwriter have to show that he was induced to write the risk but that the only way he could avoid liability was to demonstrate that the misrepresentation was the decisive influence in is decision to accept that risk. This was rejected by the House of Lords. The minority view was preferred in a trenchant criticism of the decision and the law of marine insurance in the area of utmost good faith generally by the President of the New South Wales Court of Appeal in giving an address on this topic at the CMI conference in Sydney in October 1994. It was perhaps ironical that Pan-Atlantic was not a marine insurance case at all although Kirby P's criticisms were directed more against the general principles enshrined in the MIA in these areas than against marine insurance concepts themselves. It is not easy to suggest a workable amendment to the duty to disclose material matters in the context of "the prudent insurer" enshrined in Section 24 of the MIA[8]. The ICA of course has done away with this altogether and imposed the test of the reasonable insured (Section 21). One wonders whether such a test is appropriate in marine insurance where it is still true to some extent that the insured should have a much better knowledge of the risk than the insured. After all he should know his goods or vessel first hand whereas the underwriter can only be expected to

know the general nature of the goods and vessel (The Icebird). Interestingly the effect of the Pan-Atlantic decision has been whittled down a little by the Court of Appeal in England in the recent decision in St Paul Fire & Marine Insurance Co -v- McConnell Dowell Constructors 1995 2LLR 2 116 where the court held that there is no reason why the relevant "material" non-disclosure should be limited to a fact which increases the risk and that "material" like "relevant" denoted a relationship with the subject matter rather than a prediction of its effect. Of course the court conceded that an insured didn't have to disclose the diminishing fact but none the less it could still be material. Such a fact does not have to be disclosed if it diminishes the risk pursuant to Section 24 (3) (a) of the MIA (section 21 (2)(a) of the ICA). Also of interest the Court of Appeal took the view that the test of "inducement" was not unique to the MIA and was the same as that established by many authorities in the general law of contracts. The House of Lords in Pan-Atlantic had taken a similar view. In the Australian context where the courts generally have leant much more towards consumers in finding inducements, misrepresentations, misleading and deceptive conduct, undue influence, estoppels and waivers by parties perceived to have the deeper pocket, this could have the unintended fact of greatly widening the possibilities of an insurer proving he was "induced". However it is unlikely that the Australian Courts would go that way and they are much more likely to adopt a narrower meaning of "inducement". The ultimate irony would be if a particularly inept insurer proved he was "induced" by the seemingly innocuous. But probably the insurer would still fail if he could not find a "prudent" insurer to corroborate that evidence. However we shall have to see.

As far as the remedy of avoidance of a policy is concerned for breach of the duty of utmost good faith (Section 23) two comments can be made:-

1. In practice invariably it only works in favour of the insurer. As a matter of common sense the insured would probably want the insurer to stay on risk other than to let the bounder out of the risk for which the premium has been paid and in respect of which the insured might now find it difficult to obtain comparable cover quickly.

2. By the same token there does not seem to be any other remedy such as damages for an insured who has been wronged. Ordinarily with a breach of contract the innocent party has the right of either terminating the contract or keeping it on foot and in either case suing for damages. However the remedy for breach of duty of utmost good faith is not a contractual duty but it is one imposed by Section 23 of the MIA. This is quite different to the position now prevailing under Section 13 of the ICA which provides that " a contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to act towards the other party in respect of any matter arising under or in relation to it, with the utmost good faith". This means that under the ICA if an insurer is in breach of the duty of utmost good faith, an insured is entitled to all the normal contractual remedies. However the insurer's remedies are similar and he may cancel the contract but he also has the remedy of paying a reduced claim. The English courts had specifically ruled out the implied term or contractual basis in the Banque Financiere case[9] in the 1980's.

3. FORMALITIES OF POLICIES

The MIA has a little to say about what is required to be shown in a policy (Sections 28 and 29)[10]. In point of fact in practice many

marine insurance contracts are not evidenced by a policy but rather by a slip. Sometimes this is simply because the parties (whether it be the insurer or the broker) never got around to producing a policy. I have seen cargo open cover slips with a life of 20 or 30 years which have never been turned into a policy as far as the insurer is aware, although the brokers will produce a detailed cover note which they will then send to the insured. The actual underwriter will rarely see this document although it may go through the company if the underwriter is a company or through the Lloyd's Policy Signing Office if it is underwritten by Lloyd's. Historically it was important to produce a policy as an insured could only bring an action on a policy for stamp duty reasons. This put something of a restriction on the admissibility of slips of evidence although in the 1870's the English courts recognised that strictly speaking slip was admissible in evidence[11]. The slip of course is given specific recognition in Section 95 of the MIA which provides as follows:-

> "95. Where a policy in accordance with this Act has been issued nothing of this Act shall prevent reference being made in legal proceedings to the slip or covering note or other classical memorandum of a contract of marine insurance".

However you will note that a pre-condition to using the slip in this way for evidentiary purposes is that the policy be issued. In practice courts frown on insurers who try to take the technical point that because they haven't issued a policy therefore they don't have to pay. Section 58 of the MIA provides that if the insurer has received premium he must issue the policy. However the slip can be very useful evidence if the ultimate policy as issued does not correspond with the slip. A rectification suit can be bought on the basis of the slip. In the well known Super Hulls case the court did not actually have to decide this point because it found that the slip was not helpful, but it

recognised this possibility[12]. Given changes to the law of evidence such as the abandonment of any nexus between revenue raising and the existence of documents (regrettably in Australia the taxation of transactions by virtue of their being recorded in document is still prominent although marine insurance policies recently escaped from it), the relaxation of the law of parol evidence, and the tendency of courts to take a broader view when construing a document to have regard to extrinsic circumstances, the slip can now play a much more prominent role than used to be the case. Therefore there seems a clear case to amend the provisions of Section 27, 28 and 95 to give full recognition to a slip or any other document recording or evidencing the contract of marine insurance and to treat them as the policy or at least to be prima facie evidence of the contract in the absence of any other document. Perhaps the time has come to abandon the requirement for a policy at all. This is consistent with market practice. As long as there is certainty as to where the contract is recorded. And as long as the contract or policy can be easily assigned. Assignment of policies is dealt with later.

In cargo open covers there is often the situation that the slip only contains a short reference to standard wording existing elsewhere. That standard wording will incorporate, usually, numerous references to relevant Institute Clauses but sometimes also other wording which may have been in existence for decades where sometimes only the summary appears on the slip. This can create evidentiary difficulties and indeed in some cases it begs the question about whether the original wording is part of the policy or contract of insurance at all. This is particularly a problem with cargo open covers which or with hull fleet covers which often will exist for years. Cargo open covers are not specifically referred to as a class of policy dealt in the MIA although they have some similarities to floating policies which are dealt with in Section 35. However floating policies are now largely obsolete and have been replaced with open covers. Open covers are very flexible because they contain the basic wording but may not technically

constitute a policy as such. However they invariable provide that certificates can be issued pursuant to them and this is usually done often by the broker with a supply of certificates provided to them by the insurer. The certificates are given to the cargo exporter as and when he needs them, usually when he declares his shipment. CIF sales of goods, and the underlying assignability of marine policies pursuant to the MIA requires that the system operates without any hinderance by virtue of somebody trying to argue that the underlying wording of the open cover is not part of the insurance contract. Interestingly the MIA specifically permits the assignment of policies, but there is no mention of contracts being assigned. In this context it is the document called the policy that is vital (Section 56). Again the MIA should be amended to specifically deal with the existence of open covers and the way they operate and to give them the full recognition they deserve as evidencing the contract of insurance. They should be capable of being treated as the policy. By the same token this should not mean that an interested party such as a CIF buyer or assignee (say a bank) cannot sue on the certificate because it is only likely to be the certificate which it will ever receive, from its seller or assignor but it still should be entitled to rely upon the full terms and effect of the wording which will be found in the underlying slip. Such an approach obviates the need to raise an artificial argument that the certificate is the policy or the contract for the purposes of the MIA, or that the slip with all the underlying wording is not a policy or otherwise a contract of insurance under the MIA and hence should be governed by the ICA. Such artificiality would produce a commercial and legal nightmare, and yet I find it argued in some circles. It fails to recognise the role played by the slip, the policy, the certificate and basically fails to grasp how marine cargo insurance works. This is one area where changes in commercial practices in the last 90 years demand that the MIA be updated to protect all those interested in contracts of marine insurance and the underlying commercial transactions.

4. WARRANTIES AND EXCLUSIONS

The passage of time and the greater complexities and sophistication of marine and commercial life mean that what were probably fairly straight forward and uncontroversial warranties in the early 20th century are no longer so straight forward or uncontroversial. For instance the warranty of seaworthiness in a time policy falls within that category. What does one make of the proviso of "privity of the insured" in Section 45 (5) of the MIA in an age when most provisions dealing with corporate liability including transport conventions such as the Hague Rules, the Limitation of shipowners Liabilities Conventions, the Warsaw Convention and so forth extend provisions to not just the insured but employees, agents, contractors and in some cases managers? Is this appropriate in the context of the warranty of seaworthiness for a voyage policy? At least there should be a casual link between the loss and the unseaworthiness from the warranty to apply. There is now a case for spelling it out to clearly define the extent to which that warranty can be imposed upon an insured.

Equally the warranty of legality has been taken to extremes in some cases with the most piddly breaches of regulation being deemed to constitute an "unlawful adventure". With a plethora of legislation and regulation in a globalized world an insured can easily find itself doing something illegal which arguably taints the entire adventure. There is an urgent need to restrict this warranty so that the underwriter has to demonstrate that the insured (or its servants and agents etc). knowingly engaged in an illegal activity. Perhaps avoidance of the contract is too drastic a remedy. Declining the claim but otherwise leaving the contract on foot might be a fairer remedy, for breaches of warranty. This would be consistent with the insurers' usual remedies in relation to policy breaches or when any exclusion applies. In other words breach disentitles the insured to claim as would breach of Section 61 of the MIA.

5. AGENTS AND BROKERS

Part IV of the MIA clearly envisages the policy being arranged by brokers. These provisions have tended to work very well in practice. There is considerable scope for the parties to make specific arrangements for payment of premium in the policy itself, as the MIA is silent on the point. However in the light of the fairly extensive provisions in the Insurance (Agents and Brokers) Act 1984 ("the ABA") in Australia and very similar provision in the Insurance Intermediaries Act 1994 in New Zealand, there may be a case for bringing the provisions of Sections 58 through Section 60 in the MIA into line with the ABA because at the moment some of these general provisions do not sit easily with the very specific provisions of the ABA. Yet Sections 58 to 60 are not inconsistent with the ABA and do not deal with the mechanics of payment of premium. Perhaps that sort of detail is best kept out of the MIA. Interestingly reinsurance is excluded from the operation of the ABA but not marine insurance. However Section 14 of the ABA dealing with the effect of payments to intermediaries could be in some circumstances be inconsistent with the provisions of the MIA, especially the brokers' right to a lien on the policy (Section 59(2)), which could be critical.

6. INSURABLE INTEREST AND ASSIGNMENT

Another area where changes in the general law and under the ICA have impacted heavily on insurance contracts in Australia is that of insurable interest. For all intents and purposes in the area of general insurance the concept has been greatly modified if not abolished under Sections 16 and 48 of the ICA. However the concept of indemnity remains in that whoever it is who has a right to claim under a policy still needs to have shown they have suffered a loss in respect of which they can claim indemnity whether it be in their name or suing through somebody else. I am of course not talking about cases where an insured is simply omitted or incorrectly described on a policy. That is a case for

rectification. However a contract or policy under the MIA is quite different. Pursuant to Sections 11, 12 and 13 of the MIA one can only claim under a policy of marine insurance if one has an insurable interest at the time of the loss, although it is not necessary to have such an interest at the time that the contract is concluded. It is also necessary for an assignor to have an "interest" in the insured subject matter to be able to assign his policy (Section 57). Just as marine adventure is widely defined in an inclusive way so is the concept of insurable interest. That is to say the category of insurable interests is not closed. It includes buyers and sellers of goods, owners of vessels and goods, mortgagees, various lenders, those interested in the freight, those having a third party liability risk (particularly important for the P&I Clubs and other liability insurers), reinsurers (Section 15) master and crew (Section 17). All these interests can be assigned with the consent of the assignee (Section 21). As mentioned above the assignability of a marine insurance policy itself is an essential attribute given the role it plays in international trade and finance. Sensibly the MIA does not seek to set out how the assignment should take place. It is usually done by endorsement in cargo policies or by appropriate notices and loss payable clauses in hull policies. Before anybody can sue for a loss or damage to an insurable interest under marine insurance policy they have to have suffered a loss. I can see no call or benefit to abandon the principle of indemnity but I can see a clear case for a more sensible and practical way of treating the time at which insurable interest is determined. Section 11 requires there to be an insurable interest at the time of the loss. However I do not think that this calls for an overhaul of the law of insurable interest in the way carried out under the ICA. Indeed I think that would be counter productive. Sometimes the absence of insurable interest as a particular time might create difficulties in that the seller of goods who has parted with risk (and possibly ownership) will no longer be in a position to sue the insurer, but the buyer will if he has taken an assignment of the policy. But it might be in some cases that the buyer is not in a position to sue the insurer and it would be helpful if the seller could sue on the buyer's

behalf. Sometimes the converse can be the case. The reforms in the non marine area allow a wide class of persons to claim under an insurance contract (Section 48 of the ICA). Just as there is an old saying in equity that equity will not allow a trust to fail for want of a beneficiary perhaps it could be said that the law of marine insurance should not allow a claim to fail for want of an insurable interest as long as somebody has it. At the moment this is not the law, and a good claim can fail from want of an insurable interest. Thus in New South Wales Leather Sellers case[13] there was the risk that as between buyer and seller, the FOB, buyer can be hard done by if the loss occurs prior to transfer of the risk to him and he cannot sue because of Section 11, although in that case the court found a way around the problem by invoking the rarely used "lost or not lost" provisions of Section 12 of the MIA. The language of the "lost or not lost" provision might be updated to express a contractual expectation or right to acquire an insurable interest.

7. MEASURE OF INDEMNITY

I dare say there is a case for updating the language of those parts of the MIA dealing with the measure of damages, salvage, average and so forth. Of course the law of general average is subject to its own rules (the York Antwerp Rules) which were substantially modified during the CMI conference in Sydney in October 1994. The MIA does not refer to the York Antwerp Rules although it defines general average in similar terms (Section 72). In practice I have not found a great deal of difficulty in these matters although it might well be that like many lawyers I leave these matters to the real experts in the field namely the average adjusters, the surveyors and of course the claims handlers. Some of the language of these provisions of the MIA (essentially from Section 70 through to Section 84) show some signs of age but I am not aware that there is a major call for their repeal or any substantial replacement. Rather simply they could be updated. The language of "particular average" can probably be abandoned without doing any

grave injustice to anybody and without altering what goes on in practice when a claim has to be assessed. The beauty of these provisions of the MIA is that they lay down the general ground rules and leave it to the practitioners to get on with the job. I doubt that the marine insurance industry will benefit if the practices of average adjusters and others are specifically incorporated into the MIA. The market has not helped itself in some respects with the language of some of the wording it has issued over the years such as the Liner Negligence Clause in hull and machinery policies. However that is not the fault of the MIA. There is certainly a case to revamp such wordings, but that is essentially a problem for the market. It may well be addressed and indeed is being addressed by the market at the moment with the controversial new Institute Hull Clauses. It is often the underlying documentation or valuations behind claims which can create problems rather than the provisions of the MIA which are generally expressed broadly. For instances this comment would seem to be fairly applicable to the provisions dealing with partial loss of goods and with apportionment of valuations covering various species of property pursuant to Section 77 and 78 the MIA respectively. I find this language is fairly meaningless out of context and although I often have difficulty with it, the adjusters and surveyors do not seem to. There is little evidence that problems involving these provisions of the MIA ever come before the courts for decision. Indeed the current penchant for courts to send technical matters out to arbitration or mediations would probably result in them being resolved in that way. Whether the industry considers these provisions need updating depends, I think, on to whom one speaks in the industry.

Some provisions of the MIA have of course become obsolete. There is not a lot of interest these days in bottomry (Section 16), warranty of good safety (Section 44) insurance of goods warranted free from particular average (Section 82) or rats and vermin (Section 61 (2)(c). I doubt anybody loses much sleep by those provisions remaining in the MIA.

We have dealt with warranties but by and large the MIA is silent as to the breach of conditions in policies. Policies will often contain an express provision that an insurer might be discharged from paying a claim if there is a breach of particular condition. Sometimes such conditions are expressed as pre-conditions but other times they are not. However whether the MIA ought to deal with these matters or they ought to be left to specific wording is debatable. The ICA of course in Section 54 has dealt with these matters specifically in curtailing the insurers' rights dramatically. It seems to me that having regard to decision such as the Nangalloc Farms decision of Mr Justice Rogers in 1990 (unreported) (where an insured was unable to claim under the policy because it had been some 24 hours late in notifying underwriter's agent of a loss where indeed the loss was due to inherent vice and was not immediately apparent to the insured or in this case to the insured's buyer who was the one who defaulted in giving notification), there is probably a case for a specific provision preventing the insurer from declining a claim unless the particular condition is stated as being a pre-condition to recovery and, perhaps, requiring there to be a causal connection between the breach of condition and the loss. However the provision should not go as far as Section 54 of the ICA. There is probably a need for this sort of amendment because no longer does the common law deal with questions of breaches of conditions of insurance contracts day in and day out given that the ICA now covers a great deal of the field and it has its own particular regime.

The comments I have made above are based upon what I perceive to be the common characteristics and tendencies of marine insurance in Australia, New Zealand and England. Many other markets in other jurisdictions frequently incorporate contractual provisions in marine insurance policies which are very similar to provisions in the MIA and as used by the London market (and also the Australian and New Zealand market). Of course the Institute Clauses which are designed to be interpreted under the MIA might be used in a market which is not governed by the MIA or its equivalent and the courts there might

interpret the provisions quite differently. To some extent this happens in the United States.

In looking at whether or not the MIA has reached the end of the road one has to look at its use internationally. To try to modernise the MIA purely from an Australian or New Zealand point of view might be counter productive. Clearly some minor cosmetic changes could be made which would affect nobody (for instance such as the repeal of the 12 month proviso for a time policy). Some minor tinkering with issues of insurable interest and other matters mentioned in this paper would have little effect on anybody. Such changes would reflect market practice. However the insurance market (if perhaps not is users) would have to be concerned if there was any significant amendments to the MIA which took it out of kilter with the general scheme of the MIA as long as the London market and other markets adopting MIA practices remain significant for marine insurance for Australasian interests. Of course whether this will continue to be the case remains to be seen. Equally the Australasian markets will want to make themselves internationally competitive and attractive. So far they seem to have the benefit of being able to offer an internationally understood system of marine insurance and an internationally understood legal regime. That should not be departed from lightly. However many of the amendments explored above seem to be well overdue and would be attractive to insureds looking to Australia to provide their insurance needs. There is no alternative marine insurance regime on the horizon. If so would it be any better? For instance in the area of international sale of goods the Vienna Convention came into force in Australia in 1989 but I would be very surprised if there were any international traders who said they had derived any significant advantages from that Convention. Indeed most of them don't know anything about it. Equally one must remember just because a piece of legislation almost 100 years old has made a lot of sense and worked very well for the last century does not mean it will continue to do so. Increasingly the United Kingdom is

drawn into the European legal system through EU directives. Its law and practice must follow. So far marine and shipping matters have largely remained exempt from them but this will not stay the case always. Already the United Kingdom has legislated to harmonise non marine insurance. Marine insurance may follow. Should Australia and New Zealand follow those changes if they are substantial changes? Should Australia adopt some other regime? The market will find an answer. There may be a case for the Australasian marine insurance industry developing something which is uniquely Australasian. These of course are big picture issues. What we should avoid is being so insular that we forget that we are as a nation part of the global trading community more so today than ever before. The benefit we have today is that increasingly we are calling the shots rather than simply using systems and regimes established for the benefits of others. The MIA appears to have a role to play.

To return to the assertions made at the start of this paper, there are some signs of wear and tear and some breakage in the MIA and they should be fixed. However the mere fact that the legislation is coming on for its century does not mean it should be abandoned. It might well have another 100 years in it. After all Magna Carta and the Bill of Rights has been around a long time. It seems to me that one of the great advertisements for the MIA is that the marine insurance market which by and large does not consist of lawyers have a pretty good working understanding of what is in it and how it operates. There does not seem to be great difficulty in understanding it and in applying it. There can be little doubt that in some areas particularly those often regarded as "consumer areas" that insureds have sometimes been disadvantaged sometimes quite significantly by the unfair applications of fairly technical defences and remedies by insurers who don't want to pay claims or who are trying to cover up underwriting goofs. From my experience that happens very little and for as many insurers as there are trying to get our claims without good reason there are insureds trying to make claims which are not claims. It can also be said that

insurers generally have a far better knowledge of their insurance document that their insureds which is not surprising given it is their life blood. However, that is a matter which insureds can easily put to write by investing in a little bit of risk management and bit of education. Their brokers would be more than willing to assist them. The broker evens up the bargaining power. The market has shown itself remarkably capable of evolution. One only has to witness the variety of insurance cover available and the capacity of the market to tailor a cover for individual risks and insureds. Commercial reality to has a way of making itself felt. Insurers who may be entitled to avoid policies or decline claims may not do so. Perhaps the threat of an avoidance of a policy in many cases makes for a more accurate claim being presented than would be the case if it wasn't possible for that threat to be made. This is not of course a very sound argument intellectually or legally, but one has only to experience examples of where tried and trusted remedies are abandoned by legislation only to find that the people who have lost the benefit of that remedy find some other way of getting to the same result and that other way is often even less acceptable.

In my assessment the MIA needs some reform and modernisation but it does not need a great overhaul. What should be remembered is that it is only a legal regime. It should provide a framework for marine insurance contracts, not a detailed code of conduct. It should be clear and concise. It should not need to be tested in Court in order for its users to understand it. The solution to many problems identified in the cases is to anticipate the problem in advance, to negotiate the contract from a position of knowledge rather than to put your name to any piece of paper and then when something goes wrong to run for the piece of paper for the first time and the MIA as a last resort. The MIA should be the first resort and if it is found wanting in particular cases when a contract is being negotiated appropriate contractual provisions can usually be found to overcome the problem. There is of course the underlying consideration that in some areas there may be a case for

clarifying the existing cover provided by the MIA for instance in relation to cargo open covers and land and air transits, energy and gas and probably removing some altogether such as pleasure craft. In some cases the road for reform has been shown by the ICA but one has to adopt a very cautious approach as to whether many of its provisions can be usefully grafted onto the MIA, and its centuries of case law without creating more problems than it solves. Neither piece of legislation deals at all with the complexities introduced by policies of co-insurance, leading and following underwriters, and so forth. The MIA should be amended to cover these market developments which have been with us now for decades. The industry should not have allowed the 12 month proviso for time policies to have stayed on the statute books when it never had any real relevance to Australia and was abandoned in England almost 40 years ago where at least it had an historical connection to stamp duty legislation. However that is the least of the problems with the MIA. The major areas for reform seem to be as follows:-

1. Utmost good faith (Section 23);

2. Material disclosure and misrepresentation (Section 24, 25 and 26);

3. Breach of warranty and condition in the context of causation (Section 39 to 47);

4. Insurable interest (Sections 11 to 14);

5. Mixed risks and non marine transit risks (Section 7, 8 and 9);

6. Open cargo covers (Sections 7, 8 and 35);

7. Policies, slips and evidence of contract (Sections 27 to 30, 36, 93 and 95); and

8. Pleasure craft.

I now return to the rhetorical question at the head of this paper. Is the MIA under challenge by virtue of its age? I will give you a typical lawyers' answer. Yes and No. Challenge there is, but is it a serious challenge? I think not. However it is a little bit like a sporting team that has got a little bit tired and needs an infusion of some new blood in crucial positions on the field. There is no need to sack the entire team or even most of it. Indeed the existing players in many cases just need a bit of new strategy and a bit of new enthusiasm. However a few new players in a few crucial positions would help.

If somebody says to me you haven't dealt with the issue of why have a separate piece of legislation for marine insurance at all, I would say:-

1. If you say this after having heard my paper I can't have explained myself very well;

2. There is no evidence that there is any likelihood of any different legislation doing a better job. In particular the application of the ICA scheme to contracts of marine insurance would not on the whole be an improvement and on the whole would be counter productive.

3. Improve what has been shown to work.

Finally to the extent that revision and amendment of the MIA is required, and plainly it is required in the areas I have identified above, when should this revision commence? There is no time like the present. Appropriate amendment could even give the local market a competitive edge internationally. The amendments need to be guided by the hands of who are knowledgeable and experienced. I suggest that appropriate amendments could be proposed and agreed in a short period of time with a minimum of disagreement amongst those

involved in the exercise providing they come to the job with knowledge, experience and vision. The courts, academics and the commentators have all had their say and it is now a matter of doing something about it to modify the legal regime which has to be one of the outstanding achievements of modern law making and interpretation by the commercial community and the judiciary in Australia, New Zealand and England.

CHRONOLOGICALLY CHALLENGED LEGISLATION: REFERENCES

1. 1985 2 LLR 529

2. 1974 1 NSWLR 220

3. 1987 8 NSWLR 514

4. For instance see the way the courts have developed the burden of proving that a loss is proximately caused by an insured peril under a hull policy where a vessel sinks in uncertain circumstances e.g. Popi M (House of Lords) 1985 2 LLR 1, the Ikarian Reefer (Court of Appeal) 1995 5LLR 1 455, and Skandia Insurance Co -v- Skoljarev (Australian High Court) 1979 142 CLR375

5. 1986 160 CLR 226

6. 1991 unreported decision of the Victorian Supreme Court

7. 1985 2 LLR 529

8. "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 a 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.

(3) In the absence of enquiry 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 know to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, 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 superfluous to disclose by reason of any express or implied warranty;

(e) whether any particular circumstance, which is not disclosed, be mater or not is, in each case, a question of fact;

(f) the term "circumstance" includes any communication made to, or information received by, the assured."

9. 1988 2 LLR 513

10. "28. Subject to the provisions of Act, a contract of marine insurance is inadmissable in evidence in an action for the recovery of loss under the contract unless it is embodied in a marine policy in accordance with this Act with the Act. The policy may be executed and issued either at the time when the contract is concluded or afterwards.

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; and

(e) the name or names of the insurers."

11. Ionides -v- Pender 1874 LR 9 QB 531

12. Youell -v- Bland Welch 1990 2 LLR 423

13. 1990 6 ANZ INS. cases 76, 382

FIRST SCHEDULE
COMPARATIVE SECTIONS OF THE MARINE INSURANCE ACTS OF AUSTRALIA, NEW ZEALAND AND UNITED KINGDOM

AUST SECTIONS	NZ SECTIONS	UK SECTIONS	TOPIC
			Part I Preliminary
1.			Short title and commencement
2.			(Part repealed)
3.	2	90	Interpretation
4.	89	91	Saving of rules of common law
5.			Application of certain Imperial and State acts
6.			Application of Acts
			Part II Marine Insurance
			Division 1 - Limits of Marine Insurance
7.	3(1)	1	Marine insurance defined
8.	3(2) & (3)	2	Mixed Sea & Land risks
9.	4	3	Marine Adventure and Maritime perils defined
			Division 2 - Insurable Interest
10.	5	4	Avoidance of wagering or gaming contracts
11.	6	5	Insurable interest defined
12.	7	6	When interest much attach
13.	8	7	Defeasible or contingent interest
14.	9	8	Partial interest
15.	10.	9	Reinsurance
16.	11	10	Bottomry
17.	12	11	Master's and Seamen's wages
18.	13	12	Advance freight
19.	14	13	Charges of insurance

20.	15	14	Quantum of interest
21.	16	15	Assignment of interest
			Division 3 - Insurable Value
22.	17	16	Measure of insurable value
			Division 4 - Disclosure and representations
23.	-	17	Insurance is utmost good faith
24.	18	18	Disclosure by assured
25.	19	19	Disclosure by agent effecting insurance
26.	20	20	Representations pending negotiation of contract
27.	21	21	When contract is deemed to be concluded
			Division 5 - The Policy
28.	22(repealed)	22	Contract must be embodied in policy
29.	23	23 (Part repealed)	What policy must specify
30.	24	24	Signature of insurer
	25		(Designation of subject matter)
	26		(Failure to execute policy)
31.	27	25 (Part repealed)	Voyage and time policies
32.	25	26	Designation of subject matter
33.	28	27	Valued policy
34.	29	28	Unvalued policy
35.	30	29	Floating policy by ship or ships
36.	32	30	Construction of terms in policy
37.	31	31	Premium to be arranged
			Division 6 - Double Insurance
38.	33	32	Double insurance
			Division 7 - Warranties
39.	34	33	Nature of warranty

40.	35	34	When breach of warranty excused
41.	36	35	Express warranties
42.	37	36	Warranty of neutrality
43.	38	37	No implied warranty of nationality
44.	39	38	Warranty of goods safety
45.	40	39	Warranty of seaworthiness
46.	41	40	No implied warranty that goods area seaworthy
47.	42	41	Warranty of illegality
			Division 8 - The Voyage
48.	43	42	Implied condition as to commencement of risk
49.	44	43	Alteration of port of departure
50.	45	44	Sailing for different destination
51.	46	45	Change of voyage
52.	47	46	Deviation
53.	48	47	Several ports of discharge
54.	49	48	Delay in voyage
55.	50	49	Excuses for deviation or delay
			Part III - Assignment of Policy
56.	51	50	When and how the policy is assignable
57.	52	51	Assured who has no interest cannot assign
			Part IV - The Premium
58.	-	52	When premium payable
59.	53	53	Policy effected through broker
60.	54	54	Effect of receipt on policy
			Part V - Loss and Abandonment
			Division 1 - General
61.	55	55	Included and excluded losses
62.	56	56	Partial and total loss

63.	57	57	Actual total loss
64.	58	58	Missing ship
65.	59	59	Effect of trans-shipment
66.	60	60	Constructive total loss defined
67.	61	61	Effective construction total loss
68.	62	62	Notice of abandonment
69.	63	63	Effect of abandonment
			Division 2 - Partial Losses (including salvage, general average and particular charges)
70.	64	64	Particular average loss
71.	65	65	Salvage charges
72.	66	66	General average loss
			Part VI - Measure of Indemnity
			Division 1 - Liability of Insurer for loss
73.	67	67	Extent of liability of insurer for loss
74.	68	68	Total loss
75.	69	69	Partial loss of ship
76.	70	70	Partial loss of freight
77.	71	71	Partial loss of goods merchandise
78.	72	72	Apportionment of valuation
79.	73	73	General average contributions and salvage charges
80.	74	74	Liabilities to third parties
81.	75	75	General provisions as to measure of indemnity
82.	76	76	Particular average warranties
83.	77	77	Successive losses
84.	78	78	Suing and labouring clause
			Division 2 - Rights of Insurer on payment of loss
85.	79	79	Right of subrogation
86.	80	80	Right of contribution

87.	81	81	Effect of under insurance
			Part VII Return of Premium
88.	82	82	Enforcement of return
89.	83	83	Return by agreement
90.	84	84	Return for failure of consideration
			Part VIII Mutual Insurance
91.	85	85	Mutual insurance
			Part IX Supplemental
92.	86	86	Ratification by assured
93.	87	87	Implied obligations varied by agreement or usage
94.	88	88	Reasonable time etc a question of fact
95.		89	Reference to slip or cover note

SECOND SCHEDULE
PROVISIONS OF THE MARINE INSURANCE ACT AFFECTED BY THE INSURANCE CONTRACTS ACT

(AUST.) MIA	ICA	TOPIC
7,8 & 9	7, 8 & 9	Exclusions from operation of ICA
10, 11, 12 & 13	16, 17 & 48	Insurable interest and entitlement to claim
23	13 & 14	Duty of utmost good faith
24, 25 & 26	21-28, 31	Duty of precontractual disclosure and precontractual representation
38, 76 & 86	45	Double insurance and rights of contribution
39-47	54 & 55	Warranties and remedies for breach
61	31 & 56	Excluded claims, wilful misconduct, fraudulent claims
85	65-68	Subrogation
87	44	Under insurance