MARINE INSURANCE - PROPOSALS FOR REFORM

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> *It is necessary to accept that the achievement of uniformity must be a long term project resisted in many quarters, but in the end commonsense must prevail if only for the reason that a duty lies upon insurers to meet the legitimate requirements of the insured. Surely from the point of view of the latter a greater degree of certainty would be preferable to the uncertainties with which they are faced by reason of the varying laws, practices and customs of the different countries in regard to a business which is perhaps in character the most international of all.* V.Dover (1963)

1. Domestic Reform Proposals

Proposals for the reform of the Marine Insurance Act 1909 (Cwlth) (MIA) have been mooted seriously since 1996 when the Attorney General's Department released its Issues Paper[1]. The areas for reform which were identified in the Issues Paper were:

A. Warranties
B. Application of the MIA to pleasure craft
C. Disclosure and representations
D. Other provisions in need of reform
   (i) Twelve month limitation on time policies
   (ii) The requirement for an insurable interest

1.1 Application of the MIA to pleasure craft

The only area which has already received legislative attention is the application of the MIA to pleasure craft. Section 9A of the *Insurance Contracts Act 1984* (ICA) commenced on 30 April 1998 and provides:

> (1) The *Marine Insurance Act 1909* does not apply to a contract of marine insurance made in respect of a pleasure craft unless the contract is made in connection with the pleasure craft's capacity as cargo.
> (2) For the purposes of this section, a "pleasure craft" is a ship that is:
> (a) used or intended to be used:
> (i) wholly for recreational activities, sporting activities, or both; and
> (ii) otherwise than for reward; and

[1] The *Marine Insurance Act 1909*: Issues Paper (http://law.gov.au/publications/pubs.htm)

(b) legally and beneficially owned by one or more individuals; and
(c) not declared by the regulations to be exempt from this subsection.

(3) For the purposes of paragraph (2)(a), any minor, infrequent and irregular use of a ship for activities other than:
(a) recreational activities; or
(b) sporting activities;
is to be ignored.

(4) In this section:
"contract of marine insurance" has the same meaning as in the *Marine Insurance Act 1909*.

1.2 Warranties

The Issues Paper refers to the potential for inequity in the operation of the MIA whereby an insurer may, subject to any express contrary provision in the policy, avoid all liability under the contract or contained in the policy from the date of the breach of warranty regardless of the materiality of the warranty, the state of mind of the insured or whether there was any causative connection between the breach and the loss. The Paper asks[2]:-

(1) Is there any justification for imposing different rights and liabilities on the insured in a marine insurance context than exists in general insurance?
(2) Should the MIA be altered so that an insurer may only seek a remedy if a breach of any warranty or other representation

- was material, in that it induced the insurer to enter the contract or fix the premium
- was not remedied before the loss occurred
- could reasonably be assumed to have caused or contributed to the loss with the insured having a right to rebut this
- that the insurer otherwise be limited to a remedy of damages that would place the insured in the position he or she would have been in had there been no breach of warranty.

The approach which was taken in Australia in relation to the reform of the law of warranties in general insurance is to be found in the ICA. The ICA provides that any "statement made in or in connection with a contract of insurance, being a statement made by or attributable to the insured" does not take effect as a warranty but only as a pre-contractual representation[3].

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[2] *Id.*16.

[3] *Insurance Contracts Act* 1984 (Cwlth) s.24.

The insurer's remedies are also strictly circumscribed in the ICA such that the insurer is only entitled to avoid liability if the insured has acted fraudulently[4]. In the absence of fraud, the insurer may only seek a remedy if the breach induced the insurer to enter the contract[5]. In such circumstances however the insurer is limited to the remedy of damages[6]. Thus the ICA essentially deals with what is not a warranty, rather that providing a definition of a warranty. At the heart of the reform of the law relating to warranties in Australian law is s.54 of the ICA[7]. Essentially s.54(1) denies the insurer a right to avoid liability simply by relying on a breach of a warranty or some other condition of the contract of insurance. Instead, the section provides that the insurer is limited to a reduction in liability to the insured by an amount representing the extent to which the insurer's interests were prejudiced. The provision was included in the ICA in recognition of the fact that, to allow all insurers 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[8]. Termination is

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[4] *Insurance Contracts Act* 1984 (Cwlth) s.28(2).

[5] *Insurance Contracts Act* 1984 (Cwlth) s.28(1).

[6] *Insurance Contracts Act* 1984 (Cwlth) s.28(3).

[7] (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 his 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.

[8] The Law Reform Commission, Report on Insurance Contracts (ALRC 20), 1982, para 194

available to the insurer but only where the breach could reasonably be regarded as being capable of causing or contributing to the loss. The insured has the opportunity of showing that the loss was either in part or wholly not caused by the act. In this way, if an act can reasonably be regarded as capable of causing or contributing to a loss the insurer may refuse to pay the claim. However, this presumption may be rebutted by the insured.

1.3 Disclosure and Representations

The Issues Paper raises four questions relating to the law of non-disclosure and misrepresentation[9]:-

(a) Should the definition of materiality of a fact, currently based on the "prudent insurer" be modified to expressly require that it would reasonably influence the judgment of a prudent insurer?
(b) Should the MIA be amended to expressly require that an insurer seeking a remedy under the MIA for non-disclosure be required to show actual inducement to enter into the contract because of the non-disclosure or misrepresentation?
(c) Should an insurer's remedy in the event that the disclosure provisions are breached be limited to damages unless there has been a fraud in which case the insurer should be entitled to rescind?
(d) Should the MIA be amended to impose a duty on the insurer to inform the insured of the general nature and effect of the duty to disclose and not to make false representations?

Reform of the law of disclosure and representations in general insurance is found, essentially, in ss.21, 21A , 26, 27 and 28 of the ICA. Section 21 contains the insured's duty of disclosure[10]. The most significant difference between this provision and the

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[9] The *Marine Insurance Act 1909*: Issues Paper, 25.

[10] 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.
(2) The duty of disclosure does not require the disclosure of a matter-
(a) that diminishes the risk;
(b) that is of common knowledge;
(c) that the insurer knows or in the ordinary course of his business as an insurer ought to know; or
(d) as to which compliance with the duty of disclosure is waived by the insurer.
(3) Where a person-
(a) failed to answer; or

MIA is the replacement of the "prudent insurer" with the "reasonable person in the circumstances".

On the second of April 1998 the *Insurance Laws Amendment Act 1998* was passed which introduced s.21A into the ICA[11]. It came into force on 3 October 1998. The

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(b) gave an obviously incomplete or irrelevant answer to a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter.

[11] (1) This section applies to an eligible contract of insurance unless it is entered into by way of renewal.

Position of the insurer

(2) The insurer is taken to have waived compliance with duty of disclosure in relation to the contract unless the insurer complies with either subsection (3) or (4).

(3) Before the contract is entered into, the insurer requests the insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and, if so, on what terms.

(4) Before the contract is entered into, both:
(a) the insurer requests the insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; and
(b) the insurer expressly requests the insured to disclose each exceptional circumstance that:
(i) is known to the insured; and
(ii) the insured knows, or a reasonable person in the circumstances could be expected to know, is a matter relevant to the decision of the insurer whether to accept the risk and, if so on what terms; and
(iii) is not a matter that the insurer could reasonably be expected to make the subject of a question under paragraph (a); and
(iv) it not a matter covered by subsection 21(2).

(5) If:
(a) the insurer complies with subsection (3) or (4); and
(b) the insurer asks the insured to disclose to the insurer any other matters that would be covered by the duty of disclosure in relation to the contract;

the insurer is taken to have waived compliance with the duty of disclosure in relation to those matters.

Position of the insured

(6) If:
(a) the insurer complies with subsection (3); and
(b) in answer to each question referred to in subsection (3), the insured discloses each matter that:
(i) is known to the insured; and
(ii) a reasonable person in the circumstances could be expected to have disclosed in answer to that question;

the insured is taken to have complied with the duty of disclosure in relation to the contract.

(7) If:
(a) the insurer complies with subsection (4); and
(b) in answer to each question referred to in paragraph (4)(a), the insured discloses each matter that:
(i) is known to the insured; and

new section is the result of the 1995 Report of Insurance Enquiries & Complaints Ltd (IEC) which concluded that s.21 placed too onerous a burden on an insured in requiring an insured to assess what matters are relevant to an insurer's decision whether to accept the risk. The new section requires an insurer to pose specific questions to an insured on matters that are relevant to the risk and to request expressly that the insured disclose each "exceptional circumstance" which is known to the insured, and the insured knows or a reasonable person in the circumstances could be expected to know, is a matter relevant to the decision of the insurer whether to accept the risk and on what terms. If the insurer fails to do so, the insurer is deemed to have waived compliance with the duty of disclosure in relation to the contract, except in relation to fraudulent non-disclosure. If an insurer asks the insured in general terms to disclose any matter which would be covered by the duty of disclosure, the insurer is deemed to have waived compliance with the duty in respect of those matters.

It can now be said that in the Australian law of general insurance, since 3 October 1998, there is no longer a positive duty of disclosure. Rather, the duty has been reversed casting the obligation on the insurer to pose appropriate questions, failing which the insurer is deemed to waive any requirement of disclosure.

If an insured is requested by an insurer to disclose matters about which the insurer has not formed a precise question, the test is a hybrid objective/subjective test. An insured is required to disclose matters about which he himself knows or which a reasonable person in the circumstances of the insured would know to be relevant to

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(ii) a reasonable person in the circumstances could be expected to have disclosed in answer to that question; and

(c) the insured complies with the request referred to in paragraph (4)(b);

the insured is taken to have complied with the duty of disclosure in relation to the contract.

Onus of proof - exceptional circumstance

(8) In any proceedings relating to this section, the onus of proving that a matter is an exceptional circumstance covered by subparagraph (4)(b)(iii) lies on the insurer.

Definition

(9) In this section:

eligible contract of insurance means a contract of insurance that is specified in the regulations.

the insurer's decision. This is the same for renewals where the general duty of disclosure remains.

Misrepresentation is dealt with separately from non-disclosure. An insurer is not able to escape liability on the basis of an untrue statement if the insured did not know and a reasonable person in the circumstances of the insured could not be expected to have known that it was relevant to the insurer's decision to accept the risk.

In terms of the remedy available in general insurance for a breach of the duty of disclosure, an insurer can only avoid the contract where the non-disclosure is fraudulent, but not where the insurer would have entered into the contract upon the same terms and conditions had there been full disclosure. Where the non-disclosure is not fraudulent the insurer's liability is limited to an amount that would place him in the same position in which it would have been had there been full disclosure.

The purpose of looking at the reforms which have been made in the area of general insurance law in Australia is to appreciate the impact of a purely domestic reform process in an international area of law. The Issues Paper draws heavily on the reforms which have been made to the area of general insurance and appears to adopt those reforms as the benchmark for reforms in the marine insurance area rather than international principles and regimes.

1.4 Other provisions in need of reform

(i) Twelve month limitation on time policies

The Issues Paper points out that the basis for this restriction was the *Stamp Act* 1891(UK) which has now been repealed. There does not appear to be any controversy about also removing the requirement from the MIA.

(ii) The requirement that there be an "insurable interest"

The question raised in the Issues Paper is whether provisions equivalent to ss16 &17 of the ICA ought be enacted which provide 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. Section 17 provides that it is not necessary that, at the time of the loss, the insured have an interest in law or in equity in the property.

A joint submission by MLAANZ and the Law Council of Australia's International Trade & Business Committee[12]supported the deletion of the requirement for an insurable interest from the MIA on the basis that:

> Cases such as NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd[13] have resulted in an increasingly common practice of inserting a C&F and FOB Preshipment clause in policies which effectively exclude the requirement of an insurable interest at the time of the loss. The fact that underwriters are prepared to provide cover on this basis suggests to us that the insurable interest is not regarded as being as critical as the Insurance Council of Australia suggests.

1.5 Progress of domestic reform proposals

The reform proposals for the MIA have gone "Missing in Action". The Attorney-General's Department says that this is because "most legislation is required to be reviewed under the Commonwealth/State/Territory Competition Principles Agreement, and this agreement has various modalities for conducting reviews, and in this case, an independent committee will be required. What has happened since then is that the AG has decided to canvass with various other Ministers that the policy & competition reviews might be carried out in tandem by the Law Reform Commission - the Commission had expressed an interest in looking at the MIA"!!

2. Proposals for International Reform

The possibility of pursuing international reform of marine insurance law was considered at a symposium organised jointly by the Comité Internationale Maritime (CMI), the Norwegian Maritime Law Association and the Scandinavian Institute of Maritime Law[14]. In a paper summing up the symposium, Dr Patrick Griggs identified three options for the international harmonisation of marine insurance conditions:-

1. An International Convention (mandatory);
2. Model Clauses/Rules (non-mandatory);

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[12] Marine Insurance Act 1909 Review, July 1997,6.
[13] (1991) 25 NSWLR 699.
[14] Marine Insurance Symposium: Oslo, June 4-6, 1998.

3. That nothing be done.

Dr Griggs observed that codification is no longer "fashionable" and thus a convention is inappropriate and would receive minimal support. He was not confident that any other instrument of harmonisation would succeed either but the symposium did support the further comparative study of those aspects of marine insurance which are important in most jurisdictions. The list postulated read as follows:-

1. Insurable Interest – need for
2. Insured value – time at which subject of insurance is to be valued
3. Ordinary wear and tear (inherent vice)
4. Inadequate maintenance, fault in design, construction or material
5. Duty of disclosure before and during currency of cover – nature and extent of duty
6. Consequences of loss of class, unseaworthiness and breach of safety regulations
7. Warranties; express and implied, consequences of breach – alteration of risk
8. Change of flag, ownership/management
9. Misconduct of insured during period of cover
10. Responsibility for conduct of others/"identification"
11. The duty of good faith – scope
12. Management issues - ISM

An examination of the French and Norwegian law, solely on the issues of disclosure and warranties (including seaworthiness and breach of safety regulations), reveals that the Anglo/Australian law of marine insurance and the law of those two significant marine insurance jurisdictions are essentially *ad idem* as to the foundations of the relevant principles which underpin the laws relating to disclosure and warranties. A synthesis of the law in the three jurisdictions, which also makes allowance for the concerns expressed by numerous commentators about the inequity of the Anglo/Australian law[15], could read as follows:-

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[15] FJJ Cadwallader, 'Instant Death (Breach of an Underwriter's Warranty)' (Paper delivered at Second International Maritime Law Seminar 31 October 1984); BJ Davenport, 'The Duty of Disclosure – La Banque Financière v Westgate' (1989) LCMLQ 251; Anthony Diamond QC, 'The Law of Marine Insurance – Has it a Future?' (1986) LMCLQ 25; Justice MD Kirby AC, CMG, 'Marine Insurance: Is the Doctrine of Utmost Good Faith Out of Date?' (1995) *Australian Bar Review* 1; Sir Anthony Mason

2.1 The principles relating to the duty of disclosure

1. For reasons of international comity, it is acceptable for the principles of marine insurance law to differ from the principles which relate to general, and in particular, consumer insurance. The position in Australian general insurance law highlights the fact that a domestic legislature's approach to reform may be quite radical, thus alienating a particular country from internationally understood and applied principles. If a country chooses to undertake such reform in relation to its own citizens or consumers that is one thing. If however the same is attempted in relation to international commercial business, it is likely the market will suffer.

2. The distinction between non-disclosure and misrepresentation which arose out of the pre- *Judicature Acts* development of the law should be abolished in order to overcome any discrepancies in the content of the relevant duty and the available remedy. This accords with both the French and Norwegian systems of marine insurance law which make no distinction between non-disclosure and misrepresentation.

3. There should be no separate requirement that contracts are *uberrimae fidei*. It is preferable that obligations and duties owed by each party are enunciated and the specific remedies stated.

4. An insured should be under a duty to give complete and correct information to the insurer regarding all the circumstances pertaining to the risk about which the actual insurer acting reasonably would wish to know in determining whether to accept the risk and if so on what terms. The formulation of the materiality of the circumstances in this way accords with the current Anglo/Australian interpretation of materiality and the similar Norwegian approach. The more stringent test which obtains in French marine insurance law is not necessary in light of the objectivity of the proposed duty. The duty should continue post-formulation of the contract to the extent of requiring an

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AC, KBE, 'The Future of the Law of Marine Insurance', The 1995 Ebsworth & Ebsworth Maritime Law Lecture; Donald O'May, 'Some Current Controversies in Connection with Marine Insurance' (Lloyd's Marine Insurance Seminar 17-18 April 1978).

insured to inform the insurer if the insured becomes aware that any of the information given is incorrect. The duty is objective and thus accords with the Norwegian position. It does not incorporate any subjective element on the insured's behalf such as appears in the French system of marine insurance law or in the *Insurance Contracts Act* 1984 (Cwlth)[16] and such protection is not necessary in the commercial context of marine insurance.

5. Similarly, in the commercial context, it is unnecessary to oblige insurers to provide formal information to an insured about the nature and extent of the duty of disclosure beyond what is contained in the relevant policy which will also identify the relevant law of the contract.

6. An insurer should be under a corresponding duty to give complete and correct information to an insured regarding all the circumstances pertaining to the risk insured or the recoverability of a claim under the policy about which the insured acting reasonably would wish to know in determining whether to place the risk for which cover is sought with the insurer.

2.2 The scope of the remedies for breach of the duty of disclosure

1. The "all or nothing" approach of Angle/Australian law should be abolished but the proportionality approach of the French system should not be adopted. A balance needs to be struck to deal with the changing commercial realities of the marine insurance industry and to protect both insurer and insured from uncertainties in the law and from unjust solutions to legal problems.

2. If an insured fraudulently gives to the insurer incomplete or incorrect information, the insurer should be entitled to avoid the contract ab initio. It is appropriate in such circumstances that the premium be forfeited to the insurer for two reasons:-

   (i) as a deterrent to other potential fraudsters; and

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16 "a reasonable person in the circumstances [of the insured]", s.21(1)(b).

(ii) to assist an insurer in offsetting the administrative and legal costs associated with the fraudulent claim.

All legal systems examined are agreed as to this approach to fraud.

3. If an insured negligently or innocently gives to the insurer incomplete or incorrect information or negligently or innocently fails to correct information given on becoming aware of the error then, on becoming aware of the information, there are two possibilities:-

(i) that the insurer would never have entered into the contract had he known of the information; or

(ii) that the insurer would have entered into the contract but on different terms.

In the first scenario, the insurer should not be bound by the contract. Norwegian and French marine insurance law is essentially agreed on such an outcome at least in relation to a negligent breach of the duty. In Norwegian law however an innocent breach of the duty only gives an insurer the right to terminate on fourteen days' notice but the insurer is otherwise liable for the loss.

In the second scenario, the remedy for the insurer should depend upon whether there is any causal connection between the incorrect or incomplete information and the loss incurred. If there is a causal connection, the insurer should not be liable for the loss and should be entitled to terminate the contract. If there is no causal connection it is just that the insurer remain liable for the loss but be entitled to terminate the contract *a futuro*, having knowledge now of all the circumstances concerning the risk. 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 insured from loss of cover for irrelevant breaches of the duty of disclosure.

4. If an insurer fails to give complete and correct information to an insured, the insured should be entitled to avoid the contract *ab initio*, recover the premium, and claim damages.

2.3 The principles relating to alteration of the risk.

1. The concept of a warranty as it exists in Anglo/Australian marine insurance law should be abolished.

   The use of warranties in Anglo/Australian law as a means of delimiting the risk or dealing with alterations to the risk is clumsy, uncertain and, in some respects, unfair. Despite the nine provisions in the *Marine Insurance Act*[17] 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[18] 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 as is done in the French policies and in the NSPL. If and when other matters arise which would traditionally be classed as warranties, they can be incorporated as conditions of the policy or, alternatively, as exclusions from the cover. This is, after all, what a warranty is in marine insurance law and it would seem sensible to abolish the concept of warranties and, where necessary, properly describe such terms as conditions.

2. An insured should be under a duty to notify the insurer as soon as is practicable of any change in the circumstances which form the basis of the contract of insurance and which alter the risk. This obligation incorporates the requirement that the circumstances be material by providing that the circumstance is one which forms the basis of the contract and which alters the risk. This approach essentially accords with both the French and Norwegian positions, however the provision is more akin to the Norwegian provision, incorporating, as it does, a tighter and more precise definition of the materiality of the relevant change in the circumstances.

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[17] *Marine Insurance Act* 1906 (UK) ss.33-41; *Marine Insurance Act* 1909 (Cwlth) ss.39-47.

[18] *Marine Insurance Act* 1906 (UK) s.39(1); *Marine Insurance Act* 1909 (Cwlth) s.45(1).

3. Matters which have had specific provision made for them in Anglo/Australian law as warranties or in Norwegian law as part of the NSPL and which are of overriding importance should be the subject of specific general provisions. In particular, specific provisions should be included which relate to seaworthiness, and illegality. Any other matter can be more adequately dealt with in individual policies as either a condition or an exclusion.

2.4 The scope of the remedies for alteration of the risk.

1. In the case of an alteration of the risk, the insurer can escape liability in circumstances where the alteration of risk bears no relation to the loss BUT only where the alteration of risk was such that he insurer would not have entered into the contract on any terms had he known of the alteration at the time when the contract was concluded AND the insured either intentionally caused or agreed to the alteration or failed to timeously notify the insurer of the alteration.

   A degree of positive culpability on the part of the insured is required. The French and Norwegian systems are essentially agreed on this approach to alteration of the risk.

2. If the insurer would have entered into the contract, albeit on other terms, he is unable to avoid liability unless he proves that the loss was caused by the alteration of risk. So if there was an alteration of the risk, which was remedied before any loss was sustained, the insurer would be unable to prove the loss was caused by the alteration and so would remain liable.

   The approach is similar to the remedy proposed for breach of the duty of disclosure and thus accords with the Norwegian approach which incorporates a requirement of causation, rather than the proportionality principle of French marine insurance law. French law does not include any requirement of causation in order for an insurer to escape liability.

3. The insurer will be able, in any case, to terminate the contract on 14 days' notice as the foundation or "basis" of the contract will have changed.

   The French systems provides for three days' notice, the Norwegian system for 14 days' and of course in the Anglo/Australian system, termination for breach of warranty is automatic. It is commercially unrealistic to expect major cover to be placed in three days. Fourteen days is a reasonable commercial time-frame in which parties can adequately arrange their affairs.

2.5 The principles relating to illegality.

1. The use of the ship in the furtherance of illegal activities should not entitle the insured to recover, at least where the illegality occurs with the knowledge of the insured. If the insured demonstrates good faith by intervening as soon as practicable, however, the insurance continues.

   The French and Norwegian systems refuse an insured indemnity where illegality is the cause of the loss and entitle the insurer to terminate the insurance regardless of the cause if the insured consents to the use of the ship for illegal purposes. Anglo/Australian law requires no causal connection.

2. The use of the ship in an unlawful manner, which encompasses breaches of regulatory provisions, should only disentitle cover if the breach is causative of the loss but the insurer should be entitled to require the breach to be remedied immediately failing which the insurer may terminate the contract on 14 days' notice.

2.6 The principles relating to seaworthiness.

1. The distinction in Anglo/Australian marine insurance law between time and voyage policies should be abolished.

2. The "seaworthiness by stages doctrine" in Anglo/Australian marine insurance law should be abolished.

3. 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 insured 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.

4. An insurer should not be liable where the insured knew or ought to have known of the defects in the ship, with the exception of nautical fault of the insured.

5. The insurer should be required to prove that the vessel was unseaworthy.

6. The insured should be required to prove:-
   (a) that he did not know of the defects; and
   (b) that there is no causal connection between the unseaworthiness and the casualty.

3. Conclusion

In the light of the status of the domestic reform proposals, it would seem sensible for Australia to desist from unilateral reform of its MIA. The matters postulated by Dr Griggs as potential areas of reform include matters which form the substance of the concerns raised in the Issues Paper as well as matters which were not considered in 1996, such as the impact of the ISM code on insurance. These matters will be discussed at an international conference on marine insurance in Antwerp in November and it is hoped that the CMI will then make progress in the suggested comparative study which may, ultimately, result in some degree of unification of the laws in this very international area of law.