

Bill for an Act to amend the *Marine Insurance Act 1909* and for related purposes

The Parliament of Australia enacts:

1. Short title

This Act may be cited as the *Marine Insurance Amendment Act 2016*.

2. Commencement

This Act commences on a date to be proclaimed.

3. Application

This Act applies to all contracts of marine insurance concluded or reviewed on or after the day which this Act commences.

4. Schedule

The Marine Insurance Act is amended as set out in the applicable items in the Schedule.

Schedule - Amendment of the *Marine Insurance Act 1909*

1. Subsection 8(1)

Omit "on inland waters or";

Note: The heading to section 8 is replaced by the heading "Scope of marine insurance".

2. Subsection 8(1)

After "land" insert "or air".

3. Subsection 8(2)

Repeal the subsection, substitute:

"(2) Unless the contract otherwise provides, a ship in course of building or repairs, the launch of a ship, or any adventure analogous to a marine adventure is covered by the provisions of this Act, in so far as applicable; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined."

4. At the end of section 8 add:

"(3) Unless it expressly provides otherwise, a contract of marine insurance protects the assured against losses on all inland waters;

(4) Unless the contract expressly provides otherwise or the context requires otherwise, all references in this Act and in a contract of marine insurance to the "sea" and the "seas" include references to inland waters.

5. Duty of utmost good faith - Section 23

Repeal the section, substitute:

(1) A contract of marine insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards to the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

- (2) If reliance by a party to a contract of marine insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.
- (3) Subsection (2) does not limit the operation of subsection (1).
- (4) In deciding whether reliance by an insurer on a provision of a contract of marine insurance would be to fail to act with the utmost good faith, the court shall have regard to any notification of the provision that was given to the assured, whether a notification of a kind mentioned in this Act or otherwise.
- (5) The requirement that each party act toward the other party with the utmost good faith extends for the duration of the relationship between the parties set out in the contract of marine insurance except in relation to any claim or other aspect of the relationship which becomes the subject of litigation between the parties, in which case the requirement ceases when the litigation is commenced but only in relation to the claim or other aspect that is the subject of that litigation.

Note: The heading to section 23 is replaced by the heading “Duty of utmost good faith”

6. Subsection 24(1)

Repeal the subsection, substitute:

- (1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every circumstance which is known to the assured, or which a reasonable person in the circumstances could be expected to know, to be material.

Repeal subsection 3(d), substitute:

- 3(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty or any express term of the contract.

7. Subsection 25(a)

Omit the subsection, substitute:

- (a) every material circumstance which is known to the agent or which a reasonable person in the circumstances could be expected to know, to be material; and

8. Subsection 26(1)

Omit the second sentence.

9. After section 26

Insert:

S.26A No other duty of disclosure

- (1) Without otherwise limiting or restricting section 23 of this Act, this Act does not, and a contract of marine insurance may not, impose on an assured a duty of disclosure before the contract is concluded greater than that provided for by this Act.
- (2) A contract of marine insurance may include an express term providing for a duty of disclosure by the assured after the contract has been concluded.

S.26B Remedies for non-disclosure and misrepresentation

- (1) Subject to any contrary term in the contract, if there is a breach by the assured or its agent of the obligations in sections 24, 25 or 26, the following subsections apply.
- (2) If the breach is fraudulent the insurer is entitled to avoid the contract.
- (3) If the breach is not fraudulent and the insurer proves that the non-disclosure or misrepresentation induced it to enter into the contract:
 - (a) if the insurer proves that it would not have entered into the contract if there had been no breach - the insurer is entitled to avoid the contract but must return the premium to the assured;
 - (b) if the insurer proves that it would have entered into the contract but on different terms - the insurer:
 - (i) is not entitled to avoid the contract; and
 - (ii) is not liable to indemnify the insured for any loss proximately caused by the undisclosed or misrepresented circumstance; and
 - (iii) is entitled to reduce any liability that it may have to the assured to reflect any variation in premium, deductible or excess that the insurer would have required if there had been no breach; and
 - (iv) is entitled to cancel the policy in accordance with Section 37A.

S.26C No greater remedies

A contract of marine insurance may not provide for any remedies for a breach by the assured or its agent of the obligations in sections 24, 25 or 26 more favourable to the insurer than those provided for by section 26B.

S.26D Following insurers

- (1) This section applies if there is a breach by the assured or its agent of the obligations in sections 24, 25 or 26 and it is proved that an insurer (in this section called the "following insurer") underwrote a proportion of a risk on a contract of marine insurance only because one or more other insurers (in this section called the "leading insurers") had already underwritten a proportion of the risk.
- (2) The following insurer is deemed to have been induced to enter into the contract by the breach only if all of the leading insurers were induced by the breach to enter into the contract.

10. Subsection 31(2)

Repeal the sub-section.

11. Subsection 35(1)

After "floating" insert ", open or annual".

Note: The heading to section 35 is replaced by the heading "Floating, open and annual policies".

12. Subsection 35(1)

After "ships" insert "or other insurable property".

13. Subsection 35(3)

Omit "shipment. They", substitute "shipment and they".

14. Subsection 35(3)

Omit "policy and the", substitute "policy. The".

15. After section 37

Insert:

S.37A Cancellation of contracts of marine insurance.

- (1) Subject to any express term in a contract of marine insurance, where:
- (a) the assured has failed to comply with a provision of the contract; or
 - (b) the assured did not comply with the duty of utmost good faith; or
 - (c) the assured has made a fraudulent claim under the contract; or
 - (d) this Act otherwise permits:

the insurer may cancel the contract in accordance with this section.

- (2) An insurer who wishes to exercise a right to cancel a contract of marine insurance, whether under this section or pursuant to an express term of the contract, shall give notice in writing of the proposed cancellation to the assured.
- (3) Any notice of an insurer's intention to cancel a contract of marine insurance has effect to cancel the contract at any time specified in the notice after the earlier of the following times:
- (a) the time when another contract of marine insurance between the assured and the insurer or some other insurer, being a contract that is intended by the assured to replace the first-mentioned contract, is entered into;
 - (b) 4pm on the third business day after the day on which the notice was given to the assured.

16. Section 39(3)

Repeal the sub-section, substitute

- (3) Subject to this Act no warranty and no express or implied term in a contract of marine insurance is a warranty or otherwise has the effect that any breach of it by the assured entitles the insurer to be discharged from any liability under the contract.
- (4) Subject to this Act, a warranty or an express term in a contract of marine insurance may provide that, if there is a breach by the assured of a warranty or an express term in the contract, the insurer is discharged from all liability to indemnify the assured for any loss proximately caused by the breach.
- (5) Without prejudice to any other burden of proof provided for by statute or common law, the insurer bears the burden of proving that there was a breach of a warranty or express term of the contract and the assured bears the burden of proving that the loss for which it seeks to be indemnified was not proximately caused by or attributable to, as the case requires, the breach.

Note: The heading to section 39 is replaced by the heading "Warranties and breach of contractual terms"

17. Section 40(1)

After "warranty" insert "or a term of a contract of marine insurance", in each place that the word "warranty" appears.

18. Section 40(2)

Repeal the subsection.

19. Section 40(3) re-number 40(2)

After "A breach" delete "of warranty" and insert "by the assured of any warranty or any term of a contract of marine insurance by the insured".

Note: The heading to section 40 is replaced by the heading "When breach of warranty and contractual term excused"

20. Section 42(2)

Omit the last sentence.

21. After section 85

Insert:

Section 85A Contracts affecting rights of subrogation

85A (1) Where a contract of marine insurance includes a provision that has the effect of excluding or limiting the insurer's liability in respect of a loss by reason that the assured is a party to an agreement that excludes or limits a right of the assured to recover damages from a person other than the insurer in respect of the loss, the insurer may not rely on the provision unless the insurer clearly informed the assured in writing, before the contract of marine insurance was entered into, of the effect of the provision.

(2) The duty of disclosure does not require the assured to disclose the existence of a contract that so limits the assured's rights.

22. After section 87

Insert:

Section 87A Rights with respect to monies recovered from third parties

87A(1) Where money is recovered from a third party in respect to a loss that is wholly or partly the subject of a contract of marine insurance, that money shall, subject to any contrary agreement between the insurer and the assured, be distributed in the following manner and order.

(2) The party or parties funding the recovery action shall be reimbursed for its or their administrative and legal costs incurred in connection with that action. If there is insufficient money recovered for full reimbursement, the parties shall be reimbursed pro rata.

(3) If;

(a) The insurer has funded the action under its rights of subrogation it is entitled to retain an amount equal to the amount that it has paid to the assured under the contract of marine insurance. The assured is then

entitled to be paid an amount that together with any amount that it has received from the insurer under the contract of marine insurance, will indemnify it in full for its loss.

- (b) The assured has funded the action, it is entitled to retain an amount that, together with any amount that it has received from the insurer under the contract of marine insurance, would indemnify it in full for its loss. The insurer is then entitled to be paid an amount equal to the amount that it has paid to the assured under the contract of marine insurance.
 - (c) The insurer and the insured have funded the action jointly, they are entitled to the amounts referred to in paragraphs (a) and (b). If there is insufficient money recovered for full reimbursement, the parties shall be reimbursed pro rata.
- (4) Any further amount recovered from the third party is to be paid to the parties to the contract of marine insurance pro rata in accordance with the ratio in which they contributed to the administrative and legal costs of the recovery action.
 - (5) Notwithstanding anything else in this section, any separate or identifiable components in respect of interest are to be paid to the insurer and the assured in such proportions as fairly reflect the amounts that each has recovered from the third party and the periods of time for which each lost the use of its money.

23. After section 95

Insert:

96 Interest on claims

- (1) Where an insurer is liable to pay to a person an amount under a contract of marine insurance or under this Act in relation to a contract of marine insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section except in respect of any period during which interest has already been calculated under any salvage award or general average claim to which the amount relates.
- (2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is the earlier of the following days:
 - (a) the day on which the payment is made;
 - (b) the day on which the payment is sent by post to the person to whom it is payable.
- (3) The rate at which interest is payable in respect of a day included in the period referred to in subsection (2) is the rate applicable in respect of that day that is prescribed by, or worked out in a manner prescribed by, the regulations under the Insurance Contracts Act 1984.
- (4) This section applies to the exclusion of any other law that would otherwise apply.
- (5) In subsection (4):

"law" means:

- (a) a statutory law of the Commonwealth, a State or Territory; or
 - (b) a rule of common law or equity.
- (6) The Governor General may make regulations not inconsistent with this Act to prescribe the applicable rate of interest referred to in subsections (2) and (3).