

Maritime Law Association of Australia and New Zealand

Explanatory Memorandum for a Bill to amend the *Commonwealth Marine Insurance Act 1909* (“MIA”)

1. This Explanatory Memorandum is to be read in conjunction with the draft Bill for an Act to amend the MIA prepared by a sub-committee of MLAANZ (“the MLAANZ draft Bill”).
2. The MIA is based on the UK Marine Insurance Act 1906 (UK MIA) and is almost identical to the UK MIA in substance. When enacted the MIAs in both countries represented a codification of the existing marine insurance law and practice. The practices of the Australian marine insurance market have long reflected practices in the UK marine insurance market which is the most important marine insurance market globally. Generally there has been a consistency in judicial interpretation of the MIAs in both countries.
3. In 1986 the *Commonwealth Insurance Contracts Act 1984* (“the ICA”) came into effect. There is no equivalent to the ICA in the UK. The UK insurance market and English common law has always treated the MIA as applying to all contracts of commercial insurance and reinsurance even those contracts having nothing to do with the insurance of maritime risks and which would be governed by the ICA in Australia.
4. In 2001 the Australian Law Reform Commission (“ALRC”) issued a comprehensive review of the MIA following extensive consultations with stakeholders (“the ALRC report”). The ALRC report recommended significant changes to the MIA especially in the areas of utmost good faith, disclosure, remedies for breach of contract and warranties as well as many others. The ALRC report included a draft Bill to amend the MIA to give effect to its recommendations (“the ALRC draft Bill”). Some of these recommendations especially in relation to non-disclosure, remedies and warranties were similar to corresponding provisions in the ICA. However to all intents and purposes none of the recommendations have been enacted and there is currently no legislative proposal to amend the MIA whether by adoption of the ALRC recommendations or otherwise.
5. In February 2015 the UK enacted the *Insurance Act 2015* (“the UKIA”) which came into effect in August 2016. The UKIA makes fundamental amendments to the UK MIA in relation to the key areas of utmost good faith, disclosure, remedies for breach of contract and warranties. The substance of many of these amendments resembles to some extent the corresponding recommendations of the ALRC in its draft Bill and to some extent the corresponding provisions in the ICA, albeit the actual language of the UKIA is for the most part quite different to the ALRC draft Bill and the ICA.
6. With the UKIA now in force since August 2016 the Australian MIA is in the invidious position of retaining provisions over a century old which have now been discarded in the “mother” legislation in the UK. As the UKIA (like the ALRC draft Bill) adopts a more pro-insured approach it would seem probable that this will place the Australian marine insurance market at a competitive disadvantage and at real risk of losing business. It will also mean that Australian marine insurance law will become obsolete in relation to the changes to English marine insurance law under the UKIA. In reality the UK has seized the opportunity for reform presented

by the ALRC in 2001, although the UKIA reforms are confined to utmost good faith, non-disclosure, breach of contract, remedies for breach of duty and contract, and warranty provisions and do not touch the bulk of the MIA dealing with various peculiarities of marine insurance compared to non-marine insurance and particularly in relation to the handling of marine insurance claims such as the different measures of indemnity, actual and constructive loss, salvage, general average, valued and unvalued policies and many others.

7. With a view to maintaining the Australian marine insurance market in a competitive position, maintaining legal harmony with the UK marine insurance law and implementing key recommendations of the ALRC report the MLAANZ draft Bill amends the MIA in respect of the duty of utmost good faith (section 23), the duties of disclosure (sections 24, 25 and 26) and introducing new sections (26A, 26B, 26C and 26D), and provisions relating to warranties (sections 39, 40 and 42). Unlike the recommendations of the ALRC report the MLAANZ draft Bill retains the concept of warranty but consistent with the ALRC report greatly reduces the insurer's ability to cancel contracts of marine insurance for breach of warranty thereby aligning itself with the UKIA. A new section 37A is introduced regulating the rights of insurers to cancel contracts of marine insurance (this was recommended by the ALRC). A new section 96 is introduced reflecting section 57 of the ICA to give the insured an entitlement to interest on late payment of claims, with an exception relating to claims for interest arising under salvage awards and general average claims. Interestingly the UKIA introduces a provision for an insured to claim damages for late payments of claims. Section 96 of the amended MIA will, like section 57 of the ICA, provide an entitlement to a prescribed rate of interest but not to damages.
8. The MLAANZ draft Bill also includes amendments to several provisions adopting ALRC recommendations which will assist the MIA to reflect current market practice by extending its operation to cover inland waters and incidental air risks (section 8(1)), ship repair previously confined to ship building (section 8(2)), repealing the 12 month limit on time policies (section 31(2)), expanding section 35 to apply to cargo open or annual policies, and introducing sections dealing with contracts affecting rights of subrogation (s.85A) and rights with respect to monies recovered by third parties (s.87A). Again the wording of these proposed amendments is drawn from the ALRC draft Bill, and are not considered controversial.
9. Apart from the new section 96 giving a right to interest on late payments of claims all of the amendments proposed in the draft Bill adopt the wording in the ALRC draft Bill in 2001. The ALRC wording has been preferred to the wording in the UKIA because it more closely aligns the MIA to the ICA which was the approach adopted by the ALRC in 2001, and where there is already a well established body of common law interpreting the provisions of the ICA whereas interpretation of the UKIA will involve entering uncharted waters as far as English common law is concerned.
10. The UKIA contains several "opt out" provisions including in relation to warranties. MLAANZ does not consider these provisions are appropriate for the MIA and there are no opt-out provisions in the MLAANZ draft Bill.
11. In the opinion of MLAANZ the coming into effect of the UKIA in August 2016 makes the case for corresponding amendments to the MIA contained in the MLAANZ draft Bill compelling.