



# SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



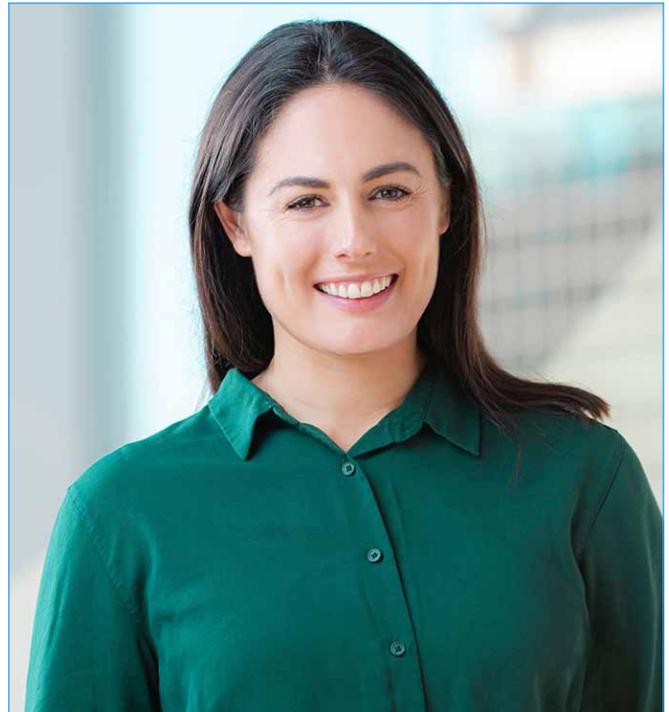
## “Young MLAANZ” Comment – Anna Brookman

### ***Comment on the Insurance Contracts Bill from a Marine Insurance Perspective***

McElroys solicitor Anna Brookman has observed in the following commentary that the regulation of insurance contracts in New Zealand is “overdue for reform”.

In 2019, the Ministry of Business, Innovation and Employment (MBIE) identified that the legislation that regulates insurance in New Zealand may no longer be fit for purpose and undertook a review with industry-wide submissions. The outcome of the review is the exposure draft of the Insurance Contracts Bill. The draft Bill combines six acts that are currently in force and codifies common law principles in order to provide clarity and confidence in insurance law.

The draft Bill seeks to reform and modernise the law relating to insurance contracts. The Bill’s purpose is to ensure that insureds and insurers are adequately informed of their obligations. The Bill aims to regulate the fairness and transparency of insurance policies.



*Anna Brookman*

### ***Plain English***

The draft Bill at cl 47A(1) states that the insurer “must ensure that the policy is worded and presented in a clear, concise and effective manner”. This means that insurance policies will need to be written in plain English and presented in an accessible way. In a marine insurance contract, there are often phrases such as “sue and labour” and other technical terms that are widely used in the industry but may need to be changed or clearly defined in plain English to align with the proposed requirements.

### ***Consumer and Non-Consumer Contracts***

The draft Bill introduces two defined categories of policy: consumer and non-consumer.

A consumer contract is defined as “a contract of insurance entered into by a policyholder wholly or predominately for personal, domestic, or household purposes”; and includes a proposed contract and mixed-use contracts. The key words here are *wholly or predominately for personal or domestic purposes*. So, anything not predominately business-related would fall within this definition. In a marine context, this might cover for example, pleasure craft and household goods in transit policies.

A non-consumer contract is anything that is not a consumer contract, meaning anything that is not predominately personal or domestic, such as a charter vessel policy.

**Biography**

Anna Brookman is described as a keen member of the marine team at McElroys. She has experience with a range of civil and disciplinary matters with a particular focus on professional indemnity, marine, employment and statutory liability issues.

Anna has also spent time on secondment in the claims team at a global insurer. In this role she predominantly managed complex professional indemnity claims and enjoyed solving indemnity issues.

Anna holds a Bachelor of Law (Honours) from the University of Auckland and a Bachelor of Dance from the University of Melbourne (Victorian College of the Arts).

Outside of work, Anna is a passionate surfer who can often be found in the waves at Muriwai or Raglan.

Consumer and non-consumer contracts have different disclosure obligations under the proposed Bill. There would be a presumption that the contract of insurance is a consumer contract, unless proven otherwise. The outcome of this is to allow consumers to default to the benefit of the lesser disclosure obligations.

**Non-Disclosure**

The current position for all insurance contracts is a policyholder must disclose everything that would influence the judgment of a prudent underwriter in fixing the premium or determining it will take the risk.

The proposed reform would create different disclosure obligations based on whether the contract is consumer or non-consumer. The purpose of this is to ensure that insureds understand what needs to be disclosed to limit unduly harsh outcomes for inadvertent misrepresentation. The proposed reform also introduces proportionate remedies for non-disclosure or misrepresentation.

**Consumer Contracts**

The proposed solution for consumer contracts is that policy holders must take reasonable care to not make a misrepresentation to the insurer before the contract is entered into or varied – having regard to all the relevant circumstances. The proposed reform would require insurers to ask specific questions to the insured. The draft Bill lists certain factors that are to be taken into account, which include the type of policy and its target market and the insurer's communications with the policy holder.

**Non-Consumer Contracts**

For consumer contracts the revised disclosure obligation is policyholders to make a "fair presentation of the risk". The relevant sections of the draft Bill mirrors those in the United Kingdom's Insurance Act 2015 and are unlikely to represent a significant change from the currently legal position.

**Marine Insurance Act 1908**

The sole surviving piece of current insurance legislation is the Marine Insurance Act 1908 (MIA). To bring the MIA in line with the proposed Bill there will be amendments to the sections relating to disclosure and warranties.

### ***Warranties***

Although at first glance it might appear the proposed reform will make some fundamental changes to the MIA, the reality is this is unlikely.

Warranties as understood by the drafters of the MIA differ somewhat from the type of warranty used in modern policies. In 1908, a warranty typically related to a voyage from A to B, rather than 12-month policy periods in today's insurance policies.

### ***Seaworthiness***

The proposed reform would repeal most of the provisions in the MIA relating to warranties, and the only remaining warranty is s 40 MIA, the warranty of seaworthiness. Section 40 MIA would be amended to be consistent with proposed Bill that will only allow an insurer to rely on a warranty if the breach caused the loss. The result of this will be that the implied warranty of seaworthiness will no longer be a "catch all" provision that discharges the insurer from all liability due to the vessel being unseaworthy, even if it did not cause or contribute to the loss or damage.

As a result of the proposed changes, it is likely that insurers may need to be cautious in their use of the term "warranty" in policies.

### ***Non-Disclosure***

Sections 18-20 MIA relate to non-disclosure and are a codification of the common law test. The draft Bill is centered around reforming the disclosure requirements of consumers and non-consumers, so it naturally follows that the non-disclosure provisions of the MIA would be repealed and are replaced with the disclosure obligations under the proposed Bill.

### ***Conclusion***

The proposed reform offers some interesting solutions to issues that commonly arise in the insurance industry. A more user-friendly approach will ultimately allow insureds to better understand their obligations and terms and conditions of their policy. Updating and modernising legislation from 1908, such as the MIA, should have a positive impact in the marine insurance industry. However, it seems unlikely to result in significant changes to non-consumer policies, which make up a big majority of the risks underwritten by marine insurers.

September 2022

