The Law of Insurance Warranties: Flawed Reform?

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Abstract

This article reviews efforts to reform the law of insurance warranties in Australia, New Zealand and the UK. The approaches adopted in each jurisdiction are summarised and the respective advantages and shortcomings highlighted. Although each reform initiative had its own objectives and approach, the principal aim was to provide more balance between the interests of the insured and insurer. While practitioners in NZ and Australia are generally comfortable with the approach adopted in their respective jurisdictions, the article argues that, because of the flaws discussed, neither structure provides a rounded, comprehensive solution. Although the Insurance Act 2015 has been generally well received and does enact a number of well overdue reforms, the article identifies a number of shortcomings in the legislation insofar as it relates to the treatment of breaches of insurance warranties and other terms. The potential impact of these shortcomings is discussed and it is argued that the Act represents a missed opportunity, amounting in effect to two steps forward and one step back.

1. Introduction

The treatment of breaches of insurance warranties in England and Wales was for many years recognised as a source of injustice and a potentially damaging slight on the reputation of the London insurance market and the English legal system. For years the playing field had been tilted firmly in favour of the insurers to the detriment of insureds. While the need for reform had long been recognised, it was not until the Insurance Act 2015 that reform was introduced to the commercial arena in the UK. Prior to the Insurance Act reform had been implemented first in New Zealand (in 1977) and then Australia (in 1984). Prior to reform, the law in all three jurisdictions shared the same origin. The Law of insurance warranties in Australia and New Zealand was based on the British Marine Insurance Act 1906. The Marine Insurance Acts of 1908 (New Zealand) and 1909 (Australia) substantially replicated the 1906 Act. The latter in turn had codified the rules developed by Lord Mansfield during the second half of the eighteenth century. By and large all three reforms have been welcomed in their respective jurisdictions by both academics and practitioners. While each reform initiative had its own genesis, the overriding priority of all of them was to deliver regimes that provided a better balance between the interests of the insured and insurer. Inevitably, given the differing origins of reform, each regime pursued different

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solutions. The article seeks to evaluate whether any of the reforms produces a solution that strikes an equitable balance between the interests of the insured and the insurer, is comprehensive in its coverage and provides a sound basis for clear and predictable judicial decision-making. The objective is not to compare the regimes on a like for like basis, but the article will show that reforms in each jurisdiction have made considerable progress in providing a more balanced and equitable approach. Nevertheless, the article will demonstrate that none of the regimes provide a comprehensive and rounded package of measures and that each contains (different) significant shortcomings. In particular this article will argue that the Insurance Act, following as it did the considerable experience of reform in both Australia and New Zealand, represents a missed opportunity. The article argues that, contrary to the view of many commentators, the approach contained in the Insurance Act not only contains a number of flaws and uncertainties, but also some significant omissions.

2. Issues with the Historic Law of Insurance Warranties

In the UK prior to the Insurance Act 2015, the law relating to warranties was set out in the Marine Insurance Act 1906. Much of this remains valid today. Warranties are the only legal term to be defined and regulated by the Act. Section 33(1) provides a partial definition of a warranty which continues to have effect:

> 'A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.'

The courts have long been clear that the principles applicable to warranties under the Marine Insurance Act apply equally to non-marine as well as marine insurance.[1] Section 33(3) of the Marine Insurance Act states that a warranty 'must be exactly complied with, whether material to the risk or not,' Prior to the Insurance Act 2015, a breach of a continuing warranty also meant that the future possibility of recovery under the policy was (unless the breach was waived by the insurer) ended from the date of the breach: section 33(3) of the Marine Insurance Act 1906 previously stated that the 'insurer is discharged from liability from the date of the breach of warranty.' Under section 34(2), once a warranty was breached the policyholder could not 'avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.' Thus, if the assured had breached a warranty, even unknowingly, the insurer could avoid liability under the policy from the date of the breach, even if the assured had subsequently remedied the breach and even if the breach of warranty had no linkage with the loss the assured subsequently suffered.

As long ago as 1957 the Law Commission recommended the abolition of warranties.[2] The Commission returned to the subject on several occasions, but it was not until the recommendations in its 2014 report[3] that the Commission's proposals led to statutory reform. Historically the courts had attempted to ameliorate the worst

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[1] 'In my opinion, as regards the effect of breach of warranty, the same principles apply whether the insurance be marine or not.' Lord Blackburn *Thomas v Weems* (1884) 9 App Cas 671 at 684.

[2] Fifth Report of the Law Reform Committee (1957) Cmnd 62.

[3] Law Commission and Scottish Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers 'Remedies for Fraudulent Claims; and Late Payment Law Com No 353 / Scot Law Com No 238 Cm 8898 SG/2014/131 July 2014.

inequities in the law; by and large however this led to uncertainty and inconsistency. Indeed it could be said that inconsistency was the one constant in the courts' approach to interpreting warranties.[4]

In 2007 the Commission observed that the existing law on warranties 'defies logic and normal expectations, is inconsistent with good practice as recognised by the industry's own Statements of Practice and risks bringing the UK insurance industry into disrepute.'[5] The Commission summarised the four main problems with the law as follows:

(i) Under section 33(3) of the 1906 Act, a warranty 'must be exactly complied with whether it be material to the risk or not.' This meant that an insurer could refuse a claim as a result of a trivial mistake that had no bearing on the risk.

(ii) Under section 34(2), once a warranty had been broken, the policyholder could not use the defence that the breach had been remedied.

(iii) The breach of warranty discharged the insurer from all liability under the contract, not just for liability for the type of risk in question.

(iv) A statement could be converted into a warranty using obscure words that most policyholders did not understand.[6]

At various times in its consideration of Insurance Warranties, the Commission flirted with seeking to address the principal inequities of the current law with an approach based on whether a causal linkage existed between the breach of warranty and the loss incurred by the assured. As we will see, The Commission ultimately rejected such an approach, something this author regrets.

3. Reforms Adopted in New Zealand and Australia

The problems with the law on insurance warranties had also been acknowledged in both Australia and New Zealand. In *Deaves v CML Fire_& General Insurance Co Limited* Murphy J, describing the law as it stood in Australia prior to reform said:

> 'The existing state of insurance law is so favourable to insurers that any insurance company can easily frame its proposal forms and policy in such a way that only an extremely weary

[4] This inconsistency is starkly illustrated by comparing *GE Frankona Reinsurance Ltd v CMM Trust No 1400 (The Newfoundland Explorer),* [2006] EWHC 429 with *Pratt v Aigion Insurance (The Resolute),* [2008] EWCA Civ 1314. In the former case, the policyholder warranted the vessel would be 'fully crewed at all times, 'while in the latter the policy stated that the owner, or the skipper in charge and one crew member would be on board 'at all times. 'In *The Newfoundland Explorer*, the court interpreted the warranty literally, finding that the provision meant 'the whole time, not some of the time.' While in *The Resolute*, the Court of Appeal held that the warranty should be given a reasonable and businesslike interpretation in the light of its context and purpose. The provision was held to refer only to when the vessel was being navigated. In the words of the Law Commission such decisions made the law in the UK 'appear unfair and unprincipled in the international market.'

[5] Law Commission Consultation Paper No. 182 Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured, November 2007 para 8.22.

[6] Law Commission Consultation Paper No. 204.

proponent will be able to recover. This has been tolerable only because, in general, insurers have not taken advantage of their superior position.' [7]

This section will consider the reform of the law of warranties implemented in Australia and New Zealand and assess how successful those reforms have been in providing a better balance between the interests of insured and insurer. It is not sufficient to look only at the treatment of insurance warranties in isolation; the article will also consider the extent to which those reforms have been successful in providing a comprehensive and well-rounded solution that addresses not only warranties, but also other terms that, when breached, purport to give the insurer the right to avoid liability. A similar assessment will subsequently be made of the reforms in the Insurance Act 2015. The objective is to evaluate whether any of the three common law jurisdictions that have introduced reform to this area of the law have been successful in producing an effective all-round solution.

3.1. Australia

Australia maintains a dual track approach to insurance warranties. While the vast majority of commercial insurance is subject to the Insurance Contracts Act 1984, marine insurance continues to be covered by the provisions of the Australian Marine Insurance Act 1909. In its report ALRC 20, 'Insurance Contracts,' the Australian Law Reform Commission (ALRC) indicated that it felt there should be a fairer balance between the interests of the insurer and the insured. The ALRC expressed concern about cases where 'the insured is deprived of indemnity for conduct which is totally unrelated to the loss which has actually been suffered.'[8] The ALRC suggested that the parties' rights in the event of a breach of, or non-compliance with, a contractual term should depend on 'matters of substance,' emphasising the effect of terms, rather than whether a term was characterised as a warranty or a condition. The ALRC stressed its recommendations should be unaffected by the form in which policies were drafted. As a result of the ALRC's considerations, the law of insurance warranties for non-marine insurance is now covered by provisions of the Insurance Contracts Act (ICA) 1984.

Section 24 of the ICA essentially abolishes present warranties (and thus basis of contract clauses). Section 24 provides that any pre-contractual statement has to be treated as a representation, rather than a warranty so that it is subject to the usual materiality and inducement tests. Under these rules the insurer's remedy for breach is limited to that offered by s28. The focus is on compensating the insurer, not penalising the insured. If, for example, the insurer would have inserted a term that would have excluded his liability for the claim, the insurer's liability will be reduced to zero. If the insurer can show he would not have entered into the contract at all if there had been no misrepresentation, his liability will again be reduced to zero. The onus is on the insurer to establish his position on the balance of possibilities. These reforms are to be welcomed.

Once the contract has been entered into, s54 applies. Section 54 provides relief for non-compliance with contractual requirements (including warranties) of an insurance policy, where the non-compliance did not cause or contribute to the loss.[9] If the non-compliance did contribute, however, the section gives insurers the ability to

[7] (1979) 143 CLR 24.
[8] Australian Law Reform Commission Report No. 20 at page 220.
[9] s54 of the Insurance Contracts Act 1984 states:
(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

reduce the pay-out to the extent that their interests were adversely affected. One of the advantages of s54 is that it has the merit of being wide-ranging in its application, applying to any contractual obligation that has 'the effect' of entitling insurers to refuse to pay a claim. Most practitioners believe the provisions of s54 work well.[10] Merkin describes s54 as 'perhaps the most difficult section in the entire Insurance Contracts Act 1984,'[11] but nevertheless argues that with the s54 approach, most serious criticisms of the law on warranties disappear.[12] On the other hand, as pointed out by Sutton, the potential downside to the lack of definition in s54, the 'hollowness at its core,' is uncertainty about the precise ambit of the provision and the possibility that it may apply to provisions that define the risk accepted by the underwriter.[13] One of the principal problems with s54, which has seen so many judges 'struggling with issues of construction and application of the words adopted by parliament,'[14] is that if the section is given a large ambit, 'it might effectively permit courts to repair all kinds of "omissions" on the part of insured persons and third parties and effectively to rewrite insurance policies accordingly.'[15] Echoing Sutton's caution and while acknowledging that the approach in the Insurance Contracts Act offers a number of benefits over the law as it previously existed, this author does not believe the Act provides an optimal solution to the challenges inherent in seeking a balanced approach to breaches of insurance warranties and other provisions.

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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 the insurer's 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.

[10] For example Pynt has observed 'The Insurance Contracts Act has been very beneficial. It has almost rid us of those two unpleasant contractual terms, the "warranty" and the "condition precedent," that haunted insureds for hundreds of years, and it has replaced them with the attractive s54, which has so far given us no trouble that we couldn't handle.' G Pynt, *Australian Insurance Law: A First Reference*, 3rd Edition at page 382.

[11] R Merkin, Reforming Insurance Law: Is There a Case for Reverse Transportation?; A_Report for the English and Scottish Law Commissioners on the Australian Experience of Insurance Law Reform; available at http://www.lawcom.gov.uk/app/uploads/2015/03/ICL_Merkin_report.pdf or at https://eprints.soton.ac.uk/27860/.

[12] R Merkin, Australia: Still a Nation of Chalmers? (2011) 30(2) University of Queensland Law Journal, University of Queensland 189–224.

[13] *Sutton on Insurance Law*, eds Merkin, Kirby and Enright, 4th Edition, Lawbook Co., 2015, page 200.

[14] *Greentree v FAI General Insurance Co Ltd* [1998] NSWSC 544; (1998) 44 NSWLR 706 at 714 per Mason P.

[15] *FAI Insurance Limited v Aust Hospital Care Pty Ltd* [2001] HCA 38; 204 CLR 641; 75 ALJR 1236 (27 June_2001) Kirby J at 63.

Section 54(1) of the ICA denies the insurer the right to avoid liability by simply relying on a breach of warranty or some other condition: the insurer's redress is confined to a reduction in liability by an amount reflecting the extent to which his interests were prejudiced. S54(2) permits the insurer to refuse to pay a claim where the act or omission 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. However, this is subject to four qualifications: if the assured proves that no part of the loss was caused by the breach, the insurer may not refuse to pay the claim by reason only of that act (ICA, s54(3)): i.e. in such circumstances s54(1) applies; if the assured proves that some part of the loss was not caused by the breach, the insurers must pay that part (ICA, s54(4)); steps taken to preserve life or property are to be disregarded (ICA, s54(5)(a)); and an act which could not have been reasonably avoided is to be disregarded (ICA, s54(5)(b)). Under s54(1) the burden is on the insurer to demonstrate he has suffered prejudice. Generally the courts take the view that if the assured's breach is not one that would have produced any different result, then there is no prejudice. On the other hand if the insurer can show that he would have come off risk had he been aware of the insured's breach, or would have imposed a condition excluding liability in certain circumstances, the likelihood is that prejudice will be assessed at 100%. By virtue of s54(6) an 'act' in s54(1) includes an omission. Contracting out of s54 is prohibited. In interpreting s54 the courts have consistently adopted a 'substance over form' approach. Importantly whatever the nature of the insured's breach, the insurer has the right to cancel the policy under s60. [16]

Section 54's breadth of application is both an advantage and a potential problem. As Merkin has observed, a key advantage of s54 is that it 'removes all distinctions between classes of terms and is concerned only with the relationship between the operation of the provision and the loss suffered by the assured.'[17] Additionally, the ability to take account of prejudice suffered by the insurer and to accommodate proportionality when determining causation are excellent features. However, the Law Commission has observed that s54 'is a complex provision, which has proved difficult to interpret.'[18]

Certainly the courts have struggled to strike a balance between achieving the benefits offered by s54 on the one hand and ensuring that the sanctity of the scope of cover agreed by the parties is not eroded by s54 on the other. In *Maxwell v Highway Hauliers*[19] Highway Hauliers operated a fleet of freight trucks running across Australia. In the light of the assured's claim record, the insurance policy covering the fleet required all drivers to undertake a 'PAQS' test. The policy provided that there was no cover for drivers who did not achieve a certain PAQS score and excluded claims involving drivers in respect of whom the underwriters had not received a driver's declaration. Two trucks were damaged in two separate incidents. In neither case had the driver undertaken a PAQS test or been declared. The underwriters refused indemnity and argued that because the relevant endorsement was

[16] Section 24 of the ICA essentially abolishes present warranties (and thus basis of contract clauses) by treating every statement 'made in or in connection with a contract of insurance ... by or attributable to the insured' as a representation 'made to the insurer by the insured during the negotiations for the contract but before it was entered into,' rather than as a warranty. Accordingly a breach does not have automatic consequences, but rather triggers the ordinary rules governing misrepresentation as set out in s23 and s28 of the ICA.

[17] R Merkin, Reforming Insurance Law: Is There a Case for Reverse Transportation?; A Report for the English and Scottish Law Commissioners on the Australian Experience of Insurance Law Reform, para 7.20

[18] The Law Commission Consultation Paper No. 204, Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties, June 2012, para 13.14.

[19] [2014] HCA 33,10 September 2014.

expressed in terms of there being 'no indemnity' if the driver was not accredited, coverage never arose and s54 could not be permitted to allow the insured to circumvent deficiencies in a claim that resulted from it being outside the scope of cover. Stressing the importance of substance over form in interpreting s54, the High Court noted that the objectives of s54 as described by the ALRC included striking a fair balance between the interests of an insurer and an insured with regard to contractual terms designed to protect the insurer from an increase in risk. That balance was to be struck irrespective of the form of that contractual term. The High Court held: 'it is sufficient to engage s54(1) that the effect of the Policy is that the Insurers may refuse to pay those claims by reason only of acts which occurred after the contract was entered into. Precisely how the Policy produced that effect was not to the point.'[20] The court indicated that any clause– seemingly potentially even one which was intended to operate as a restriction on the scope of cover– can potentially attract the operation of s54. While the decision on the facts is supportable, the worry is that the decision, like that in *Hospital Care* (see below), could leave the law teetering on the edge of a slippery and dangerous slope to a world where insurers can no longer be certain that the risk they have bargained for and for which they have calculated the premium, is the risk they will end up being held liable for, unless they can establish either causation under s54(2), or prejudice under s54(1). While, given the wording of the statute, such an outcome may, to some, not be particularly surprising, it is surely undesirable for all parties, but particularly the insurer, that the scope of insurance agreed by the parties may come under post contract review and potential revision in this way.

In *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd.*[21] the insured owned a hospital and failed to notify the insurer of an inquiry by patient's solicitor during the period of insurance. The policy was a claims made and notified policy for professional indemnity cover for claims alleging negligence/malpractice by the hospital's staff. The insured was aware that the [subsequent] claimant's solicitor appeared satisfied that there was no indication of malpractice. However, the patient subsequently made a claim after the policy had expired. The court held that s54(1) 'does not operate to relieve the insured of restrictions or limitations that are inherent in the claim', but the court held that the insured's failure to notify the circumstances constituted an omission within terms of s54 because the effect of the contract was that the insurer could refuse to meet the claim by reason only of the fact that the insured did not give notice of the occurrence to the insurer. No distinction could be made, for the purposes of the section, 'between provisions of a contract which define the scope of cover, and those provisions which are conditions affecting an entitlement to claim.'[22] The decision appears to represent a significant extension of the law as it previously stood (as it appeared effectively to extend cover beyond that agreed by the parties) and as a result has been the subject of considerable criticism on the basis that it represents a step too far in the insured's favour.

Merkin argues that as a result of *Hospital Care* it is now clear that if the policy permits the assured to notify circumstances that may give rise to a loss during the currency of the policy, and the assured fails to do so, this is an omission falling within s54(1).[23] Mann argues that after *Hospital Care* , if a claims made and notified policy

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[20] *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33,10 September2014, P12/2014, at para 27.
[21] (2001) CLR 641.
[22] (2001) CLR 641 at 656.
[23] R Merkin, Reforming Insurance Law: Is There a Case for Reverse Transportation?; A Report for the English and Scottish Law Commissioners on the Australian Experience of Insurance Law Reform; available at http://www.lawcom.gov.uk/app/uploads/2015/03/ICL_Merkin_report.pdf or at https://eprints.soton.ac.uk/27860/.

contains a clause that provides for the notification of facts (circumstances) that might give rise to a claim (a deeming clause), then there could be a relevant 'effect of the contract of insurance' and an 'omission' for the purposes of s54 in the event of a failure to notify.[24] If however the policy did not include a 'deeming clause' he argues that, in the event of a failure by the insured to notify, there would then be no relevant 'effect of the contract of insurance' and no 'omission.' If the contract of insurance itself does not give the requisite 'effect' then the requirement within s54(1) is not satisfied and s54 does not come into play and there is thus no question of an 'omission'. As a result of the decision in *Hospital Care* insurers are increasingly omitting a 'deeming' clause in order to avoid a requisite 'effect' and therefore the possibility of an 'omission' under s54. In *Highway Hauliers* the court ruled that the reference in *FAI v Hospital Care* to section 54(1) being unable to remedy an inherent restriction or limitation in the insured's claim was intended to refer to how a claim was made having regard to the type of insurance contract involved. Following *Hospital* Care the Australian Treasury Department commissioned a review of the operation of s54. Although some changes to s54 were recommended by the review, none have yet been implemented.

In *Pantaenius Australia Pty Ltd v Watkins Syndicate 0457 at Lloyd's*[25] a policy on a yacht stated 'All cover provided by the policy will be automatically suspended when your boat clears Australian Customs and Immigration for the purpose of leaving Australian waters and will recommence when it clears Australian Customs and Immigration on return.' The yacht cleared customs on its departure but ran aground on its return from a race in Bali. Although in Australian waters, it had not yet cleared customs at the time it ran aground. The respondent argued that, because the vessel had not cleared Australian Customs, cover under its policy was suspended. The court held that the geographical limits on the policy constrained the scope of the policy. Foster J held that the geographic limits of the Policy were set out in the Certificate of Insurance, being 250 kilometres off mainland Australia and Tasmania.

The suspension provision was 'an exclusion and did not operate as one of the contractually prescribed elements of the geographic limits on the scope of cover itself.'[26] It was accordingly subject to the operation of s54. The relevant act for the purposes of s54 was the clearing of customs on departure with intent to leave Australian waters. The court rejected the argument that there was any causal (or contributory) link between the entering of Australian waters and the loss; nor had any prejudice been established.

On the basis of the court's geographical approach to scope, if the loss had occurred just outside Australian territorial waters presumably the court would have assessed such a loss to be outside the scope of the policy? But what if, without any intent to participate in an overseas race, the insured vessel had inadvertently sailed half a mile beyond Australian waters and was lost to fire? Ignoring for the moment whether the policy included a held cover provision dealing with such an eventuality, would s54 come to the insured's aid? Further it is surely at least arguable that on the facts, the act of clearing customs with the intention of racing in offshore waters *could* (under

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[24] Such that claims would be deemed to have been made during the relevant policy year if notification of an occurrence was given during that year. P Mann, *Mann's Annotated Insurance Contracts Act*, 7th Edition, Thompson Reuters, Sydney, 2016, at page 430.
[25] [2016] FCA 1.
[26] Foster J [2016] FCA 1 at 78 The court held the scope of the policy was geographically defined (being Australian territorial waters with the suspension clause operating as an exclusion clause, effectively providing additional, subsidiary, definition).

s54(2)) have contributed to the loss? As well as again illustrating the lack of clarity in relation to s54 on matters of scope, it is argued that the judgement comes close to asserting that an ‘intention’ (in this case an intention to leave Australian territorial waters) is sufficient to trigger the operation of s54.[27] Surely by definition, an ‘intention’ can never be an act or omission?

As noted earlier, insurance warranties in Australia are subject to two differing regimes depending on whether or not the policy is a marine policy. As a result ‘the problem of determining the applicable legal regime for a particular contract of insurance is unique to Australia.’[28] Following a review, the ALRC recommended the maintenance of two separate regimes, while also recommending that for marine insurance warranties should disappear and be replaced (if required by the insurers) by express contract terms under which insurers would be relieved from liability in the event of a breach which was the proximate cause of the loss, even if there were other proximate causes.[29] ALRC 91 proposed the abolition of the implied seaworthiness warranty, to be replaced, where appropriate, with express terms.[30] The majority of the ALRC’s recommendations in ALRC 91 have yet to be acted upon. While it is submitted that it is much better that all commercial insurance falls under one regime, in an ideal world the answer would not lie in a binary choice between the (amended as per ALRC 91) Marine Insurance Act and s54 of the Insurance Contracts Act, but rather in a more nuanced approach which also took the opportunity to amend some of the shortcomings of s54.

Although s54 is now generally well regarded in Australia, it is not without its critics. The Law Commission has observed that s54 ‘is a complex provision, which has proved difficult to interpret.’[31] In 2001 the Australian Law Reform Commission noted that the ‘question concerning categories of act or omission covered by Section 54 has been a matter of some legal controversy.’[32] The New Zealand Law Reform Commission regarded s54 as being, in general, ‘sweeping and unfocused, out of sympathy with the habits of insurers and insurance law practitioners, likely to provoke litigation and, ultimately, unlikely to prove judge-proof.’[33] Merkin has argued that the goal of reform in this area is to find a mechanism that distinguishes between terms that define the very risk that is covered by the policy and terms that remove liability in particular circumstances.[34] Merkin argues that the prime merit in the Australian approach is that it ‘removes all distinctions between classes of terms and is concerned only with the relationship between the operation of the provision and the loss suffered by the assured.’[35] Additionally, the ability to take account of prejudice suffered by the insurer and to accommodate proportionality when determining causation are excellent features. But the difficulty facing the courts as a result of s54 has been striking a balance

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[27] As indicated above, the court held that the relevant act for the purposes of s54 was the clearing of customs on departure with intent to leave Australian waters.

[28] ALRC 91 Lewins, Kate Marine Insurance Reform– Rocking the Boat?, (2001) 79 Australian Law Reform Commission Reform Journal 48.

[29] ALRC 91, Review of the Marine Insurance Act 1909, May 2001(recommendations 7–9).

[30] ALRC 91, recommendation 10.

[31] The Law Commission Consultation Paper No. 204, Insurance Contract Law: The Business Insured’s Duty of Disclosure and the Law of Warranties, June 2012, para 13.14.

[32] ALRC Report 91, 2001.

[33] NZLRC Report Some Insurance Law Problems, cited in Irish Law Reform Commission Consultation Paper Insurance Contracts, (LRC CP 65–2011), December 2011, para 5.74.

[34] R Merkin, Reforming Insurance Law: Is There a Case for Reverse Transportation? Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform, para 7.19.

[35] R Merkin, Reforming Insurance Law: Is There a Case for Reverse Transportation?; A Report for the English and Scottish Law Commissioners on the Australian Experience of Insurance Law Reform, para 7.20.

between achieving the benefits offered on the one hand and ensuring that the sanctity of the scope of cover agreed by the parties is not eroded on the other. It is argued that scope should be sacrosanct and not open to interference from the courts. Of course the courts will be required to interpret the definition of scope for individual contracts and this will sometimes result in controversy, however the structure of s54 means that the boundary between legitimate resort to s54 and the sanctity of scope will always be somewhat blurred and will often require judicial interpretation. Merkin acknowledges there is a possible need to modify the section so that it no longer condones notification of circumstances under a claims made policy where the policy has expired; but in the main is supportive of s54. However in 2001, the ALRC itself in its Review of the Marine Insurance Act, rejected s54 as a model for reform of the Marine Insurance Act in these terms: 'In important respects, the practical effect of the operation of s54 is to allow the insured to unilaterally alter the bargain made by the parties, arguably to the extent of fundamentally changing the scope of the insurance.'[36] s54 undoubtedly delivers improvements on the position prior to the Insurance Contracts Act, nevertheless the lack of clarity regarding matters of scope and the resultant uncertainty is a significant flaw. Do either of the different approaches adopted in New Zealand and the UK offer a more comprehensive, certain and equitable approach?

3.2. New Zealand

Sections 5 and 6 of the Insurance Law Reform Act 1977 remove the right of avoidance for a mis-statement which is not material and not substantially incorrect. This is to be welcomed. Merkin suggests that the clear intention behind ss5 and 6 is to prevent reliance upon present warranties and to treat them as representations that, as such, have to be judged for their effectiveness against the usual tests for misrepresentation at common law.[37] As we have seen this is similar to the approach adopted in Australia. Merkin has argued that, because a present warranty acts as a condition precedent to the attachment of risk, the provisions should not apply to such warranties. While this argument seems reasonable, the courts have disagreed.

The most relevant provision to the subject of this article is s11 of the Insurance Law Reform Act. In its report, Some Insurance Law Problems, the New Zealand Law Commission indicated that the purpose of s11 was to prevent exclusions being used to exclude liability where the circumstances, and so the increase in risk, existed, but the loss was not attributable to that increase.[38] Once again ensuring a more level playing field between the interests of insured and insurer was key. In summary, s11 applies when: (a) the policy excludes or limits the liability of the insurers to provide an indemnity; (b) the exclusion or limitation applies on the happening of certain events or on the existence of certain circumstances; (c) the clause was present because, in the view of the insurer, the events or circumstances were likely to increase the risk of loss; and (d) the assured proves on the balance of probabilities that the loss was not caused or contributed to by the happening of those events or the existence of such circumstances.[39] Importantly it is not possible to contract out of s11.

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[36] ALRC 91 Review of the Marine Insurance Act 1909, para 9.120.
[37] Merkin and Nicoll, *Colinvaux's Law of Insurance in New Zealand*, Thompson and Reuters NZ, Wellington, 2nd Edition, 2017, para 5.5.8 page 359.
[38] New Zealand Law Commission: Some Insurance Law Problems May1998 Report 46.
[39] Section 11 of the Insurance Law Reform Act reads as follows:
Where –

Several cases have considered the application of s11. In *Norwich Winterthur Insurance (New Zealand) Ltd v Hammond*,[40] Heron J held that the insurer had the burden of establishing that the facts fell within the exception and, if successful, the insured must then show that the breach has not caused or contributed to the accident. In *Hall v FP North Ltd.*[41] the court held that to fall within the ambit of s11, the clause or clauses in question must relate to circumstances or events likely to increase the risk of loss. S11 does not seek to excuse pre-contractual statements or failures to disclose.[42] Equally, it has been held not to apply to a statement made by the assured prior to the inception of the contract that has been warranted, because in such a case there is no risk at all.[43] The decision in *Womersley v Peacock*[44] suggests that s11 does not override statutory implied terms, specifically the warranties implied in the (NZ) Marine Insurance Act 1908. S11 applies to exclusions for perils that are otherwise covered by the policy, not to risks that are outside the scope of the policy: *Barnaby v South British Insurance Co Ltd,*[45] although on the facts the decision that the relevant event was in fact outside the scope is questionable. As the *Barnaby* case illustrates, while some narrow distinctions have been made (and will continue to be made) which are not without controversy, it is argued that issues of scope are always going to be something that will arise in cases involving insurance warranties, exclusion clauses and similar conditions. What is important is that the court retains sufficient discretion to enable it to interpret questions of scope on a case-by-case basis. Any effective approach to the issue of breaches of insurance warranties/other contractual provisions which enables the insurer to escape liability must contain adequate flexibility to enable interpretation by the courts: such flexibility should be welcomed as an essential ingredient in an effective solution. However, this article submits that neither courts nor statute should be able to adjust the boundaries of the scope agreed by the parties.

Section 11 would seemingly have no application in relation to conditions precedent to the contract/the attachment of risk. This is because s11 requires there to be a valid contract of insurance. It is submitted however that there is no reason why s11 should not apply to conditions precedent to liability for a specific risk and could accordingly

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(a) by the provisions of a contract of insurance the circumstances in which the insurer is bound to indemnify the insured against loss are so defined as to exclude or limit the liability of the insurer to indemnify the insured on the happening of certain events or on the existence of certain circumstances; and

(b) in the view of the court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring,

the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

[40] (1985) 3 ANZ Ins Cas 60–637(HC).

[41] (2009) 16 ANZ Ins Cas 61-831 (HC).

[42] *Sampson v Gold Star Insurance* [1980] 2 NZLR 742; *Kinred v State Insurance General Manager* (1989) 5 ANZ Ins Cas 75–924.

[43] *Gold Star Insurance Co Ltd v Tegas* Unreported, 30 September 1986, NZHC.

[44] (Unreported) High Court of NZ, Christchurch Registry CP 24/98, 8 September1999.

[45] (1980) 1 ANZ Ins Cas 60–401(HC). See also *Hall v FP North Ltd,* (2009) 16 ANZ Ins Cas 61–831(HC) and *Nelson Forests Ltd v Three Tuis Ltd* HC Nelson CIV-2010–442–84, 9 December 2010. In both cases the court distinguished between policy terms that defined the kind of risk which the insurer agreed to cover (issues of scope), and policy terms that defined circumstances in which an otherwise covered risk was excluded.

come to an assured's aid where the insured is able to demonstrate that the loss was not caused or contributed to by the failure to meet the relevant condition for the attachment of a specific risk. s11 would normally not apply to a condition precedent to the liability of the insurer where this is a non-risk clause and imposes, for example, a requirement for the provision of notice to the insurer: this would fail to meet the requirements of s11(b) that the provision had been 'so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring.' Contrast this to section 54 of the Australian Insurance Contracts Act which is capable of applying to non-risk as well as risk provisions. On the other hand, like section 11 of the Insurance Law Reform Act, sections 10 and 11of the Insurance Act 2015 have no application to non-risk provisions (see below).

Does s11 apply to warranties? Merkin suggests that the Contracts and Commercial Law Reform Committee in proposing the reform that subsequently became s11 of the Insurance Law Reform Act were focused on temporal exclusion clauses.[46] He further argues that examples used by the Committee to illustrate its points (mainly relating to consumer motor insurance, which have been interpreted as being suspensive in nature), suggests the Committee assumed that the policy would survive a breach and that accordingly the section was likely not intended to apply to warranties where the insurer's liability ceases automatically on breach without any prospect of reinstatement. However, contrary to Merkin's argument, there is nothing in s11 which indicates that it was not intended to apply to continuous warranties and this article respectfully argues that it would be perverse for them to be excluded without such indication, when, in all other respects, they meet the requirements of s11. It surely should not matter that upon a breach of a continuous warranty cover ceases automatically and is not restored. Whether the assured is able to obtain assistance from s11 will depend on his ability to prove, on a balance of probabilities, that the loss was 'not caused or contributed to by the happening of such events or the existence of such circumstances.' While it may be the case that it has not been categorically determined by the courts that s11 applies to continuous warranties, should the position be directly challenged in courts, it is suggested that the likelihood is that s11 would be held to apply to continuous warranties. Certainly this view is supported by several international commentators. In its Joint Consultation Paper 204 Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties, the Law Commission of England and Wales asserted that s11 of the Insurance Law Reform Act 'covers not just warranties, but also other terms which have a similar function.'[47] Similarly the Australian Department of Justice opined that in its view s11 applied to warranties: 'the section provides that the insured remains entitled to be indemnified if he or she proves on the balance of probabilities that the loss was not caused or contributed to by the breach of warranty.[48]

Section 11 has had a mixed reception overseas. The Australian Law Reform Commission rejected s11 as a model because of its failure to take into account the statistical likelihood factor. For its part, the Irish Law Commission

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[46] Merkin and Nicoll, *Colinvaux's Law of Insurance in New Zealand*, Thompson and Reuters NZ, Wellington, 2nd Edition, 2017.
[47] Law Commission of England and Wales Joint Consultation Paper 204 Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties, para 13.3; available at www.http.scotlaw.gov.uk.
[48] Australian Justice Dept Terms of Reference for a Review of the Marine Insurance Act 1909 by the ALRC, para 5.38.

preferred the New Zealand approach to s54 of the Australian Insurance Contracts Act, believing it to have 'considerable attractiveness ... that it is relatively easier to understand than the Australian provision.'[49]

While achieving a more equitable balance between the interests of the assured and insurer may not have been explicitly stated as an objective of the reform of the law in New Zealand, it was clearly a goal. Section 11 has even been interpreted in a way that prevented insurers from declining liability to indemnify for losses to equipment during commercial use when the cover, by its terms, was confined to private use.[50] This article argues that this represents an unjustifiable tilting of the playing field in favour of the insured, as in many cases an insurer would, reflecting the relevant risks inherent in each category of usage, charge a lesser premium for use confined to personal use, compared to a policy that also provides cover for commercial usage. The NZLRC suggested that the problem with s11 was that the way it had been interpreted took no account of the extent to which an exclusion might be framed with the statistical likelihood of a particular loss occurring. The Commission proposed a solution that sought to retain the substance of s11 (which the Commission believed in the main to be operating well), but with additional wording to address the particular issue identified.[51] However nothing came of this recommendation. A further review was commissioned in 2019 which recommended that it be provided that certain policy exclusions should not be subject to s11, with a Government minister given the power to make regulations on the advice of the Law Commission.[52] As yet no such regulations have been made.

Finally this article questions the rationale for the second element of the s11 conditions:

> 'in the view of the court or arbitrator determining the claim of the insured the liability of the insurer has been so defined because the happening of such events or the existence of such circumstances was in the view of the insurer likely to increase the risk of such loss occurring.'

Given that redressing the balance of the law to provide a more level playing field between the interests of insured and insurer was an underlying goal of reform, it is not clear why focussing on the genesis of a particular provision should serve to deliver a more equitable balance between those interests. Indeed, it can be argued that it is where conditions have been introduced without regard to the likelihood of increased risk that the insured is in most need of protection.

Nevertheless the simple causal linkage approach in s11 of the Insurance Law Reform Act has much to recommend it. The New Zealand approach is also easier to understand and interpret than its Australian equivalent and avoids some of the pitfalls relating to scope inherent in the latter. However, this article accepts that the interpretation of s11 by the courts has at times seemed harsh on insurers. For example we have seen that the section has been interpreted in a way that prevented insurers from declining liability to indemnify for losses to equipment during commercial use when the cover, by its terms, was confined to private use.[53] This is surely an unjustifiable tilting of the playing field. Further, (unlike s9 of the Insurance Law Reform Act), s11 makes no provision for any

[49] Law Reform Commission of Ireland, Consultation Paper LRC CP 65–2011, Insurance Contracts, December 2010, para 5.77. The Irish Law Commission believed the New Zealand approach 'struck a reasonable balance insofar as the insured is required to prove that the event did not cause or contribute to the event.'
[50] *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10.
[51] New Zealand Law Commission: Some Insurance Law Problems May1998 Report 4.
[52] www.mbie.govt.nz/business-and-employment/business/financial-markets-regulation/insurance-contractlaw-review/.
[53] *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10.

prejudice suffered by the insurer. Finally the causal linkage test is a modest one: it would appear that any contribution toward the loss, however small, may be sufficient to ensure that the insurer escapes liability. It is submitted that a causal approach that accommodates proportionality, and which thus enables the actual estimated contribution to be measured, would be preferable. In summary, in this author's view, the New Zealand solution, although having several positive features, leans too heavily in favour of the insured, is scarred by the absence of any account of prejudice or proportionality while also suffering (albeit to a lesser degree than its Australian counterpart) to some uncertainty in relation to matters of scope.

4. The Insurance Act 2015

The reform of the law of warranties introduced in the Insurance Act was aimed at addressing the worst shortcomings in the law as identified by the Law Commission over many years.[54] Sections 9, 10, 11, 16 and 17 of the Act are the relevant provisions in relation to warranties and similar terms.

Section 9 abolishes basis clauses in relation to commercial insurance: this is to be welcomed. In essence, the effect of s10 is that a breach of warranty cannot be relied upon by the insurer to escape liability, unless the assured was in breach at the time of the loss, or at least at the time of the happening of the event that gave rise to some future loss.[55] The risk is simply suspended during any period of breach. It seems clear as a result of s10(2) ('An insurer has no liability under a contract of insurance') that, when in place, the suspension (of the insurer's liability) applies to all areas of risk under the contract of insurance. The insurer will have no liability for anything which occurs, or which is 'attributable to something occurring,' during the period of suspension. This is intended to cater for the

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[54] See for example the Commission's summary of these shortcomings contained in its 2012 Consultation Paper No 204 referenced above.

[55] Section 10 reads as follows:

> (1) Any rule of law that a breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.
> (2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.
> (3) But subsection (2) does not apply if –
> (a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,
> (b) compliance with the warranty is rendered unlawful by any subsequent law, or
> (c) the insurer waives the breach of warranty.
> (4) Subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening –
> (a) before the breach of warranty, or
> (b) if the breach can be remedied, after it has been remedied.
> (5) For the purposes of this section, a breach of warranty is to be taken as remedied –
> (a) in a case falling within subsection (6), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,
> (b) in any other case, if the insured ceases to be in breach of the warranty.
> (6) A case falls within this subsection if –
> (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and
> (b) that requirement is not complied with.
> (7) In the Marine Insurance Act 1906 –
> (a) in section 33 (nature of warranty), in subsection (3), the second sentence is omitted,
> (b) section 34 (when breach of warranty excused) is omitted.

situation in which the loss arises as a result of an event which occurred during the period of suspension, but is not actually suffered until after the breach has been 'remedied' (for example where a vessel enters a prohibited zone briefly but damage incurred as a result of entering the zone is not discovered until after the vessel has left the zone.) It is likely that to avail himself of the benefit of this provision, an insurer will need to establish a causal linkage between an event occurring during the period of suspension and a loss that arises after cover has been re-instated.[56] It seems odd that a causal linkage approach should be judged acceptable to establish liability or otherwise of the insurer in s10(2) and 10(4), but is seemingly rejected as an appropriate mechanism elsewhere in the Act.[57] Section10(4)(b) provides that the insurer will be liable for losses occurring after a breach has been remedied (for example after specified manning levels have been met, having not been initially), but acknowledges that some breaches of warranty cannot be remedied. Section 10(5)(b) provides that a warranty will normally be remedied when the assured is no longer in breach.

Where a warranty requires something to be done by a specific time or date, but that deadline is missed, sections 10(5)(a) and 10(6)(a) and (b) provide that the breach of warranty will be treated as being remedied if the requirement of the warranty is met, albeit late, and provided the risk is essentially the same as that originally contemplated by the parties.[58] Whether the risk is held to be essentially the same will depend on the particular facts. As condition precedents are by definition time dependent, it is argued that a remedy of a breach of a condition precedent that is also a warranty *can* fall to be considered under ss10(5)(a) and 10(6), providing, post remedy, the risk is essentially as originally contemplated by the parties. This would mean that, somewhat perversely, where a warranty that is a condition precedent is initially not met, a contract may nevertheless subsequently come into effect if the condition precedent is subsequently met *and* the risk to which the warranty/condition precedent relates becomes essentially the same as that originally contemplated by the parties.[59] The Law Commissioners seem to agree with this analysis. They use the example of the *De Hahn* case[60] and argue that, when the additional seamen required in order to meet a warranty that the vessel 'sail with not less than 50 hands' came aboard, 'the risk was restored to the state in which the insurer was prepared to accept it'[61] and that accordingly the insurer should at that point come on risk: the Commission implicitly acknowledged that the insurer had, prior to that point, not come on risk because of the breach.[62]

Section 11 of the Insurance Act 2015 reads as follows:

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[56] B Soyer, *Warranties in Marine Insurance*, 3rd Edition, Routledge, London, 2017, page 180, para 5.54.
[57] Although as will be demonstrated, it appears to have inadvertently crept into s11(3).
[58] In Arnould *Law of Marine Insurance and Average*, 20th Edition, eds Jonathan Gilman, Claire Blanchard, Mark Templeman, Neil Hart, Philippa Hopkins, Sweet and Maxwell, July 2021, para 19-29 it is argued that breaches of statement of fact warranties can never be remedied, but surely there are situations where such breaches, once cured, can fall within the wording of s10(5) and (6).
[59] S10(5)(a) Insurance Act 2015.
[60] (1786) 1 TR 343.
[61] Para 17.45 Law Commission and Scottish Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment Law Com No 353 / Scot Law Com No 238 Cm 8898 SG/2014/131 July2014. Available at: http://lawcommission.justice.gov.uk/docs.
[62] Arnould *Law of Marine Insurance and Average*, 20th Edition, eds Jonathan Gilman, Claire Blanchard, Mark Templeman, Neil Hart, Philippa Hopkins, Sweet and Maxwell, July 2021, para 19.34, argues that the risk referenced in s10(5)(a) is the insured risk as a whole, not just particular risks to which a warranty is directed. This seems sensible.

Terms not relevant to the actual loss

(1): This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend toreduce the risk of one or more of the following –

(a) loss of a particular kind,

(b) loss at a particular location,

(c) loss at a particular time.

(2): If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3): The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

(4): This section may apply in addition to section 10.

The original clause 11 proposed by the Law Commission was not included in the draft Bill submitted to Parliament. The format that finally appeared in the Act was proposed during the Special Public Bill Committee consideration of the Bill and in reality received very little debate prior to being passed into law. As a result the revised provision was passed without a full analysis of its implications. The revised Bill contained two main changes, first the words 'other than a term defining the risk as a whole' was added to subsection (1). In the second change, under the original wording the insurer could not rely upon a kind, location or time exclusion where the loss was of a different kind, at a different location or at a different time. This was replaced by a more general provision referring to the risk of the loss which actually occurred. s11(3) now sets what amounts to a causation test: 'if it [the insured] shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.' Finally the original clause 10(2) was prefaced by the words 'subject to s11' but these words were specifically omitted from the version that formed s10 of the Insurance Act.

Despite some suggestions to the contrary and some resultant uncertainty,[63] it is submitted that s11 does apply to warranties. It is possible to envisage circumstances where the provisions in s11 are in conflict with s10, yet all the Act says is that s11 may apply 'in addition' to s10.[64] Notwithstanding these difficulties, this author is, on balance, of the view that a court would hold that in such circumstances s11 can act as a constraint on s10. As s11(4) indicates that s11 can apply in addition to s10, this article submits that where a breach (of warranty) falls within s11(1), then s11(2) and (3) will act to constrain the ability of the insurer to escape liability, notwithstanding the provisions of s10(2) and as such, when in play (and given s11 applies in addition to s10), these provisions act as

[63] R Merkin and O Gurses, Insurance Contracts after the Insurance Act 2015, (2016) 132(3) LQR 445–469.
[64] S11(4) Insurance Act 2015.

a constraint on s10(2). It seems clear from the wording of s11 that it was not intended to cover non-risk clauses, such as those relating to notice requirements in a claims procedure. While this a regrettable omission, this author would stop short of agreeing with Merkin and Gurses who view the failure of the Act to deal with non-risk clauses as one of its greatest weaknesses.

One of the key uncertainties in the interpretation of the Insurance Act is the meaning of the 'risk as a whole' as referenced in s11. The Explanatory Notes rather unhelpfully confirm that s11 is not intended to relate to provisions that define the risk as a whole, and in this context the Notes provide as an example clauses that impose a requirement that a property or vehicle is not to be used commercially. Was the intention that the 'risk as a whole' was intended to equate to terms which directly or indirectly defined the scope of cover?[65] Certainly this author agrees that a scope defining clause is one that defines the risk as a whole; however, this is surely not the same as confining the application of the s11 carve out to provisions that define the scope of contract? Arnould argues that terms relating to the use of the insured property (e.g. whether for commercial or private use) should be seen as terms that define the risk as a whole.[66] In the round this seems logical. Soyer suggests that it would be difficult to persuade a court that the requirement that an insured vessel should not deviate from its specified course (consistent with s46 of the Marine Insurance Act 1906) was a term that defined the risk as a whole.[67] While this may seem sensible, it would also be possible to mount an argument to the contrary.[68] How would a requirement that the driver of a vehicle hold a particular driving qualification be treated? Is there an argument for saying this should be regarded as defining the risk as a whole? Surely that would be a step too far. What of a requirement in a marine policy that a vessel should always utilise the services of a pilot to navigate into and out of port? It would be easier to make the case that this is a term that defined the risk as a whole, but there can be no certainty about this. The reality is that in many instances an insurer could argue that a particular clause is one that defines the risk as a whole, whereas the insured would argue that the same provision relates to a particular location, time or kind of loss. Does a clause that relates to the risk as a whole, but only for a particular time, fall outside the reach of s11? It is submitted that the concept of 'defining the risk as a whole' is a flawed one and the lack of clarity surrounding it will inevitably result in considerable uncertainty and litigation. Furthermore, given the potential for differing subjective interpretations, there is no guarantee that extensive litigation will provide any greater degree of clarity on the issue. While the lack of precision in s11 may encourage the industry to provide greater clarity in policy provisions, this is hardly grounds for a robust endorsement of the statutory wording.

Are exclusion clauses covered by s11? Exclusion clauses have been described as being intended 'to define the risk which the insurer is prepared to accept by way of the insurance contract.'[69] If this definition is to be taken at face value, it would seem that exclusion clauses are outside the reach of s11 of the Insurance Act. Certainly, an

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[65] O Gurses, Section11 of the Insurance Act 2015: When Does a Term Define the Risk as a Whole in an Insurance Contract? Balancing the Interest of the Assured and Insurer, (2020) 3 J.B.L. 184–201.

[66] Arnould *Law of Marine Insurance and Average*, 20th Edition, eds Jonathan Gilman, Claire Blanchard, Mark Templeman, Neil Hart, Philippa Hopkins, Sweet and Maxwell, July 2021, para 19.40. Arnould further argues (para 19.43) that even if a term may tend to reduce more than one kind of risk it may nevertheless be caught by s11 and (para 19.40) that terms that go to premium assessment and/or overall risk assessment will be outside the scope of s11 as terms that define the risk as a whole. Both interpretations seem sensible.

[67] B Soyer, *Warranties in Marine Insurance*, 3rd Edition, Routledge, London, 2017, page 231, para 7.27.

[68] As Soyer points out, the potential impact of the Insurance Act on implied voyage conditions should not be overstated given the effect of the conditions are often mitigated in standard Institute clauses.

[69] MacDonald Eggers QC, *Crowden v QBE Insurance (Europe) Ltd* [2018] Lloyd's Rep IR 83 at [60].

argument can be made that exclusion clauses assist the definition of the risk as a whole and, as such, should fall outside s11. [70] This author would support such an argument. The Law Commission however suggested that exclusion clauses should fall within the ambit of the original draft clause 11[71] and the Explanatory Notes to the Insurance Bill also suggested that exclusion clauses were covered by s11.[72] There is surely an argument that exclusion clauses that suspend liability across the policy (as a whole) are provisions which define the risk as a whole, but even if that is not the case, s11 specifically requires there to have been non-compliance with a term of the contract (s11(2)) and many exclusion clauses do not require any form of 'non-compliance' to trigger their operation. For example in *Pantaenius Australia Pty Ltd v Watkins Syndicate 0457 at Lloyd's*[73] a marine policy on a yacht contained the following clause: 'All cover provided by the policy will be automatically suspended when your boat clears Australian Customs and Immigration for the purpose of leaving Australian waters and will recommence when it clears Australian Customs and Immigration on return.' It is surely the case that clearance of Australian Customs by the boat would not constitute 'non-compliance' with a term of the policy, but would nevertheless trigger the exclusion clause.[74] As such the exclusion clause would surely lie outside s11. These are significant flaws in the coverage of s11. The fact that the wording of the Act may make it easy for insurers to use exclusion clauses to draft around s11 merely illustrates the flaws in the wording of s11.

If the relevant provision in question is a condition precedent to the attachment of risk across the contract as a whole then, by definition, it is submitted it is a term which defines the risk as a whole and as such will be outside the reach of s11.[75] If the condition precedent relates only to the attachment of a specific risk (or it is otherwise clear that the term does not define the risk as a whole), then it is submitted that a breach of the term would be caught by s11. [76] If the condition precedent is a non-risk provision it is again outside the reach of s11.

In line with the Law Commission's final position, the Explanatory Notes to the Insurance Bill indicate that a direct causal link between the breach and the ultimate loss is not required.[77] This article would argue that, contrary to the position stated in the Explanatory Notes, s11(3) in practice represents a causal linkage formulae inadvertently (as a result of it being incorporated into the draft Bill at a very late stage) admitted through the back door.[78] Accordingly it is submitted that the insured will satisfy s11(3) if he is able to establish the absence of a causal

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[70] Arnould *Law of Marine Insurance and Average*, 20th Edition, eds Jonathan Gilman, Claire Blanchard, Mark Templeman, Neil Hart, Philippa Hopkins, Sweet and Maxwell, July 2021, para 19.42 supports the contention that exclusion clauses likely fall out of the reach of s11.

[71] Law Commission and Scottish Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment Law Com No 353 / Scot Law Com No 238Cm 8898 SG/2014/131 July2014, para 18.41. Available at: http://lawcommission.justice.gov.uk/docs.

[72] Insurance Act 2015 Explanatory Notes, Commentary on Sections, para 95, available at http://www.legislation.gov.uk.

[73] [2016] FCA1.

[74] Equally the fact that on the return leg customs had not been cleared by the time of the loss is not a 'non compliance': the exclusion clause would simply continue to apply until customs are cleared.

[75] In any event if such a condition precedent has not been met it is at least arguable that there is no contract of insurance as required by s11(1).

[76] Arnould *Law of Marine Insurance and Average*, 20th Edition, eds Jonathan Gilman, Claire Blanchard, Mark Templeman, Neil Hart, Philippa Hopkins, Sweet and Maxwell, July 2021, para 19.42 agrees that whether a CP is caught by s11 will depend on whether or not it defines the risk as a whole.

[77] Explanatory Notes to the Insurance Bill para 96.

[78] s11(3) states 'The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.'

linkage between breach and the loss incurred.[79] As we have already seen, contrary to the position taken by the Law Commission, this author believes that a causal linkage approach to determining liability has much to commend it. However, while this author welcomes a causal linkage approach, its effectiveness in s11(3) of the Insurance Act is severely diluted by the other attendant flaws in the section.

In addition to the shortcomings already identified this author believes that the approach encompassed in sections 10 and 11 contain a number of further significant omissions. These include the following:

(i) The Insurance Act fails to provide for allowance to be taken of any prejudice suffered by the insurer as a result of the assured's breach. This as an unfortunate and significant omission notwithstanding an insurer's theoretical ability to seek recourse to damages. It is quite possible to envisage circumstances where, under s11, the insurer will be required to meet a liability, notwithstanding a breach by the insured in circumstances where the insurer would otherwise have been entitled to an additional premium. A simple provision to take account of any prejudice suffered by the insurer (such as included in s54 in Australia) would have provided balance.

(ii) Although it is possible to contract out of the provisions in the Insurance Act (see below), the Act contains no right of termination in the event of a breach of warranty or other term. This is regrettable: it is suggested that the Act would be improved if, subject to certain provisos, on breach of warranty or other provision giving the insurer the right to avoid liability, the insurer was granted a right to terminate on, say, 14 days' notice. As well as avoiding the risk that the insurer takes on risks he might not otherwise have been comfortable with, the right of termination also enables the assured to maintain cover (by seeking cover from another party) and avoids the risk of inadvertent loss of coverage.

(iii) Both sections 10 and 11 of the Insurance Act apply to implied warranties in addition to express ones.[80] Accordingly it appears clear that, as with express warranties, under s10(2) a breach of the implied warranty of seaworthiness suspends, rather than terminates, the insurer's liability under the policy. However in circumstance where the implied warranty has been breached and the vessel has commenced its journey in an unseaworthy state, is it in fact possible for the breach to be remedied? While it is arguable that it is not, a more likely interpretation might be that a breach of the implied warranty of seaworthiness would fall to be considered under ss10(5) and 10(6). The implied warranty requires the vessel to be seaworthy at the time the voyage is commenced and thus could be said to fall within s10(6); if the rectification undertaken was sufficient to restore the risk to the same as originally contemplated by the parties, this author would argue that s10(5) kicks in and the insurer's liability is restored. Can s11 apply to implied warranties? Surely it can be argued that the implied warranty of

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[79] The fact that s11(3) requires the insured to establish that the non-compliance *could* not have increased the risk of loss that occurred likely means he will have to meet a higher evidential burden than might otherwise be the case. Arnould *Law of Marine Insurance and Average*, 20th Edition, eds Jonathan Gilman, Claire Blanchard, Mark Templeman, Neil Hart, Philippa Hopkins, Sweet and Maxwell, July 2021, para 19.47 appears to agree with this assessment.

[80] In practice the impact of the implied warranties contained in the Marine Insurance Act is greatly diminished in the modern era and this author supports arguments that there is no longer a cogent case for their retention.

seaworthiness can often, if not ordinarily, be considered as applying to the risk as a whole, in which case s11 of the Insurance Act 2015 will not apply to any breach.[81] For s11 to apply, seaworthiness would presumably have to be seen as relating to a loss of a particular kind, a stretch for a marine policy in this author's view. In the majority of marine policies a combination of held covered clauses and/or contracting out provisions will likely ensure both clarity and a fair allocation of risk between insured and insurer independent of the wording of the Act, however it is surely sub-optimal if, absent such measures, the meaning of the statute is unclear.[82]

(iv) Insurers are at liberty to opt out of the provisions (save in relation to s9: the effective abolition of basis clauses) of the Act, provided they adhere to the transparency provisions of s17.[83] The danger is that this flexibility puts at risk the overarching intent of the Act, to achieve a better balance between the interests of the insurer and the insured. It remains to be seen to what extent insurers will seek to avail themselves of the contracting out provisions. The Government suggested there was 'no pent-up demand for widespread contracting out';[84] nevertheless it committed that a review be undertaken within five years to assess the situation. It is to be regretted that that there is not a little more precision in the contracting out provisions of the Insurance Act. The general approach of seeking to ensure that an insured is made aware of any erosion of the rights and protections he would otherwise have under the Insurance Act is welcomed, but too much has been left to interpretation by the courts. This will lead to uncertainty over how the provisions are to be interpreted, at least for a period. A better approach may have been to follow the lead of Australia and New Zealand where there is no provision for contracting out. However this would likely have resulted in opposition from the industry and may have, as a result, delayed or, even derailed, reform.

4.1. The Insurance Act: Some Conclusions

Provision in the Act to make a breach of warranty suspensory is welcomed, as is the abolition of basis clauses. This author also gives a guarded welcome to the provision in s11 to limit the insurer's ability to avoid liability where the insured is in breach of a clause that relates to a particular kind of loss, or loss at a particular location or place. Gurses asserts that the reference in s11 to the risk as a whole is a welcome reform that has rationalised the

[81] This assessment is shared by Arnould *Law of Marine Insurance and Average*, 20th Edition, eds Jonathan Gilman, Claire Blanchard, Mark Templeman, Neil Hart, Philippa Hopkins, Sweet and Maxwell, July 2021, para 19.42

[82] As far as the implied warranty of legality is concerned, if the requirement that the adventure insured be a legal one has been breached, s10 of the Insurance Act will have no bearing as the breach is not capable of remedy as envisaged in s10(2). This author would argue that the same logic applies to a breach of the second half of s41 that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner. As s41 of the Marine Insurance Act refers to the implied warranty of legality in the context of the 'adventure insured,' it is surely hard to argue that the implied warranty refers to anything other than the risk as a whole; as such s11 would have no application.

[83] See ss16 and 17 of the Insurance Act.

[84] House of Lords debate 29 July 2014, col GC 629.

relationship between the assured and the insurer.[85] Respectfully, this author is of a different view; rather it is suggested that s11 is loosely drafted and will yet prove to be a source of considerable uncertainty and litigation. While uncertainty of outcome is inherent in any case where the issue is one of contractual interpretation, it is submitted that the concept of the risk as a whole is flawed, as well as being vague and unclear. In addition it is argued any reform should, in addition to warranties, also address exclusion clauses, breaches of conditions precedent and other provisions, such as non-risk clauses, that seek, on breach, to release the insurer from liability under the policy. This article has demonstrated that it is far from clear to what extent, if at all, exclusion clauses are covered by s11. The ambit of s11 in relation to conditions precedent is also uncertain: it is argued that at least in some instances, s11 will not apply to conditions precedent. Again the relationship between sections 10 and 11, in terms of whether s10 is subject to s11, is also unclear. Despite the Law Commission's stated opposition to causal linkage, s11(3) would appear to deploy it.

While the merits of the arguments made in this article in relation to s11 can be debated, what is surely beyond doubt is that the interpretation of the section is fraught with uncertainty. This is clearly unhelpful. Prior to the Insurance Act there was a clear need to strike a better balance between the interests of the insured and insurer. In most instances this equates to providing greater protection for the assured, and the Act goes some way toward this; nevertheless there are two areas in which the Insurance Act has missed opportunities to offer reasonable protection to insurers. The absence of any ability to take account of any prejudice suffered by the insurer is unhelpful and difficult to justify. Finally the absence of any right on behalf of the insurer to terminate following a breach of a warranty (or other relevant provision) is, in this author's view, an omission that potentially impacts adversely on both the insured and insurer.

5. The Reforms to Date: Good, But Far From Great?

The need for reform of the law relating to the breach of insurance warranties (and other terms) has long been recognised. Reform was first introduced in New Zealand, followed by Australia. Despite several reviews by the Law Commission, it was not until the Insurance Act 2015 that the UK finally enacted change. Despite differing objectives and priorities at a detailed level, all three jurisdictions were focussed on addressing the shortcomings of the historic law of insurance warranties and in particular the imbalance in favour of the insurer that existed under the historic approaches. This article has demonstrated flaws in the reformed regimes in both Australia and New Zealand. In Australia it has been argued that, while s54 of the Insurance Contracts Act provides a well-respected solution, it has, in particular led to uncertainties and difficulties with regard to the interface between the legislation and the freedom of the contractual parties to define the scope of cover: it represents an unnecessarily complex, and ultimately flawed, approach. The New Zealand approach, set out in the Insurance Law Reform Act has, on the other hand, been criticised for tilting the balance too far in favour of the insured. Nevertheless, despite criticism and officially sanctioned reviews, practitioners in both jurisdictions have accepted the respective approaches and now view them as coping reasonably well with the challenges confronting them.

[85] O Gurses, Section11 of the Insurance Act 2015: When Does a Term Define the Risk as a Whole in an Insurance Contract? Balancing the Interest of the Assured and Insurer, (2020) 3 J.B.L. 184–201.

Given the concerns with the two antipodean models, it is however perhaps unsurprising that the Law Commission recommended that the approach to reform in the UK should plough its own furrow. Many of the reform measures contained in the Insurance Act are to be welcomed. This article applauds the proposal to make a breach of warranty suspensory, together with provisions to abolish basis clauses; it also gives a guarded welcome to the proposal to limit an insurer's ability to avoid liability where the where the clause that has been breached relates to a particular kind of loss, or loss at a particular location or place. Nevertheless, this article has demonstrated a number of failings and shortcomings in the provisions contained in the Act. It is submitted that, at best, these failings will lead to increased uncertainty and litigation.

This article has argued that the main flaw with the Insurance Act lies with s11. At best, s11 leaves the law facing an uncertain future. The issues with s11 are likely not unconnected with the way in which, despite the balance of the provisions being the product of careful evolution over a number of years, in its final form s11 was a last minute addition to the statute, and was therefore subjected to very little in the way of parliamentary scrutiny. This article has argued that the concept of 'the risk as a whole' is flawed and will result in uncertainty. The reach of s11, in terms of what provisions are subject to it, is far from plain. This article has argued that an effective reform of the law in this area must, in addition to warranties, also address exclusion clauses, conditions precedent and other provisions that seek to release the insurer from liability under the policy. This article has shown that it is unlikely, for example, that all exclusion clauses are subject to s11. Similarly, the relationship between s11 and conditions precedent is also uncertain. Although the Law Commission eventually positioned itself firmly against the concept of causal linkage, this article has argued that s11(3) effectively introduces it via the back door. Yet the Commission suggested that the consequences of breach should not be considered in light of what actually happened. The outcome is confused and uncertain: far better to embrace a clear causal linkage approach.

6. Stress-Testing and An Alternative Approach

This article's criticism of the reforms implemented to date has been supported by seeking to apply the differing approaches to the facts of a number of well-known historic cases.[86] Although beyond the scope of this article, this 'stress-testing' has demonstrated that each jurisdiction's approach has flaws and would fail to address some of the historic problems with the law of insurance warranties, whilst also creating new issues. It is accepted that there is no perfect solution and that any attempt at reform in this area will come with some degree of uncertainty and a risk of litigation. Nevertheless, it is argued that it is possible to frame an approach which improves on all three attempts implemented to date, without unduly favouring either insured or insurer.

[86] A detailed examination of all three sets of reforms against the facts of several historic cases can be found in Alastair Owen, *The Law of Insurance Warranties, Flawed Reform and a New Perspective*, Routledge, Abingdon, 2021.

This author has developed a set of proposals that seeks to achieve this goal.[87] While this article is not the place to set out details of such an alternate approach, it is argued that central pillars of any alternate structure should include at least the following components:

(i) the structure must not erode the sanctity of the scope of contract agreed by the parties.
(ii) contrary to the final position taken by the Law Commission on the issue, this author argues that causal linkage should lie at the heart of reform of the law of insurance warranties, such that it incorporates an evaluative approach based squarely on an assessment of whether or not there is a causal linkage between the breach and the loss incurred.
(iii) any alternate approach should include provision for proportionality and take account of any prejudice suffered by the insurer.
(iv) it should provide sufficient flexibility and discretion to the court to enable solutions to be tailored to the specific circumstances of the particular case.

The approach proposed would apply not only to breaches of warranties, but also to any non-compliance where the resultant sanction purports to give the insurer a right to avoid liability. Exclusion clauses would be specifically within the ambit of the proposals (regardless of whether or not they are triggered by a 'breach' of provision). As well as incorporating an assessment of any prejudice suffered by the insurer, it is suggested that the inclusion of a right of termination for the insurer offers advantages, not only to the insurer, but also to the insured. The proposals would give the court the flexibility to grant a measure of proportionality where it has been demonstrated that a breach *could* have contributed to the loss in a causal manner, even if, on the facts, it did not do so. This would ensure the court has the flexibility to avoid decisions that might otherwise be harsh on the insurer.

In order to test this alternate approach, the proposals have again been 'stress-tested' against the facts of a range of well-known historic cases, drawn from the three jurisdictions examined in this article. This analysis supports the contention that the proposals offer more comprehensive, equitable, and in some respects certain, outcomes than those delivered to date by the reforms in Australia or New Zealand, or those likely to be offered under the Insurance Act 2015.[88]

Nevertheless this author is realistic about the prospects for such proposals being utilised as the basis for further reform in any of the jurisdictions examined. There is little evidence of a current political appetite for further reform of the law in Australia. While in New Zealand there has recently been a further review of insurance contract law, the Review's proposals in this area are relatively modest and have yet to be implemented.[89] In the UK, not only has the Insurance Act only relatively recently reached the statute book, but the backcloth of Brexit and the

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[87] A detailed outline of this author's proposals for an alternate approach to the treatment of breaches of insurance warranties and other terms can be found in Alastair Owen, *The Law of Insurance Warranties, Flawed Reform and a New Perspective*, Routledge, Abingdon, 2021.
[88] Further details of this 'stress-testing' can be found in Alastair Owen, *The Law of Insurance Warranties, Flawed Reform and a New Perspective*, Routledge, Abingdon, 2021.
[89] www.mbie.govt.nz/business-and-employment/business/financial-markets-regulation/insurance-contract law-review/.

COVID-19 virus makes further examination of the law extremely unlikely in the foreseeable future. Nevertheless, the proposals could, post COVID, provide the basis for reform in common law jurisdictions that have yet to implement initiatives in this sphere of the law. It is argued that any jurisdiction implementing such reforms could benefit from a structure that offered significant advantages over the regimes introduced in Australia, New Zealand or the UK.