

RESOLVE

UNDERSTANDING NEW

DIGITAL TRENDS

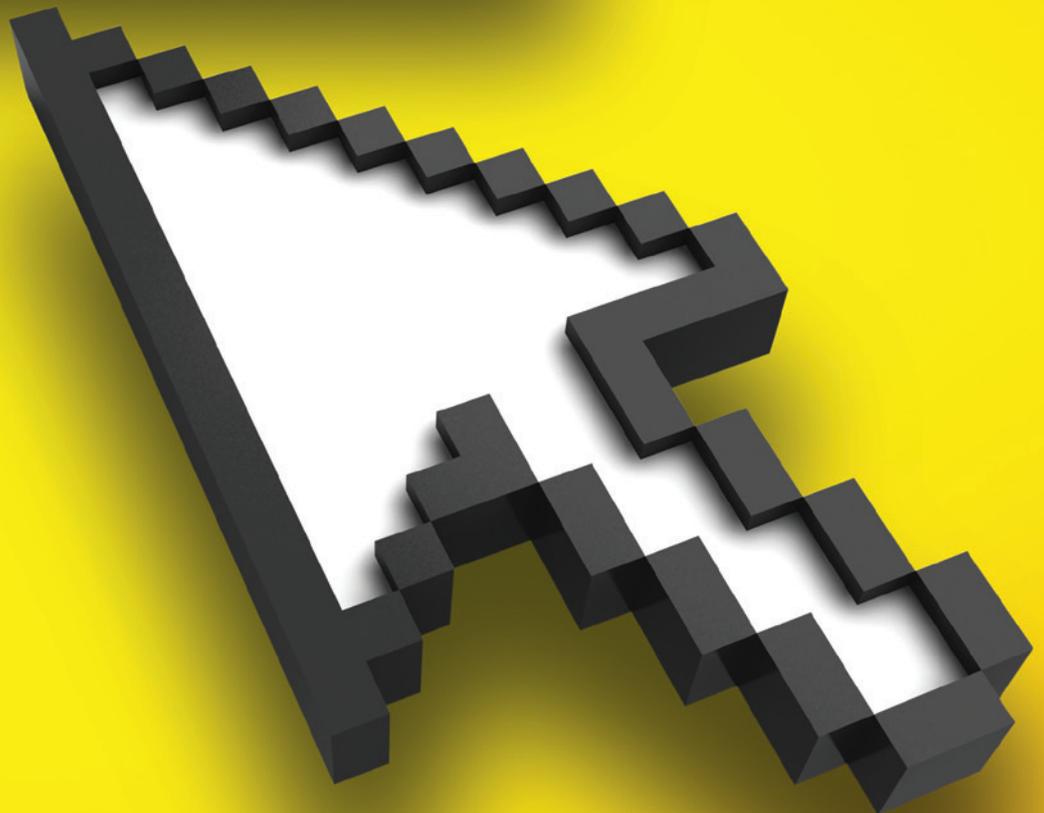
WELCOME
TO OUR
NEW LOOK

INTERVENTION
'SOMETIMES
JUSTIFIED'

DIRECTOR
LIABILITY
TEMPERATURE
RISING

DECEMBER 2012

THE OFFICIAL
PUBLICATION OF
AILA AND NZILA
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RESOLVE

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Craig Langstone

NZILA President's message

Quakes prompt speaker presentations

For me, it has been a hectic year and no doubt it will have been the same for many AILA and NZILA members.

I have spoken at three different London venues over the past eight months - including Lloyd's, which was a personal highlight. Last month I spoke at the excellent AILA annual conference in Hobart, Tasmania.

All my presentations related to the Canterbury earthquakes and the issues arising from them, both factually and legally. At the AILA conference the seriousness of the Canterbury earthquakes, particularly the February 22, 2011, earthquake, was brought home in a moving and somewhat chilling presentation by NZILA committee member and former NZILA president Richard Johnstone.

Lift plummeted

He told the conference of his experience, which began with him being thrown across a lift in his building as it plummeted four floors without stopping. Those at the session were moved by Mr Johnstone's presentation, particularly when, at one point, he came close to breaking down.

Discussions afterwards were all to the same effect - no one really realised quite how traumatic and "personal" the earthquakes were for Christchurch residents. Seeing the devastation on TV was nothing like being there and

living through the earthquakes and aftershocks. My own presentation seemed rather tame by comparison.

The 2012 NZILA annual conference in Auckland on August 16 and 17 was a great success. More than 250 people attended - a fantastic number from an insurance industry that must be less than one-tenth the size of Australia's.

Several papers were covered in the *AILA News* conference issue but, suffice to say, the quality and range of papers presented were superb, hence the number of attendees.

Insurance continues to be the world's saving grace while large-scale events, like New Zealand's earthquakes, Queensland's floods, Japan's tsunami and New York's super storm Sandy, continue to wreak havoc throughout the world.

The level of support insurers provide is often the difference between a life rebuilt and a hopeless situation. Under-insurance throughout the western world (and even more so in third world countries) remains a huge problem but, for most, at least in New Zealand, insurance cover is still available.

Insurers cannot pay claims that are not insured but, so often, despite the adverse publicity to the contrary, insurers do what they can to pay claims, rather than not pay them. I remain proud to be associated with the insurance industry in times of real need. No doubt, so do many other NZILA and AILA members.

Queenstown venue

Next year's NZILA annual conference will be in Queenstown. It would have been in Christchurch but, due to the lack of facilities there following the earthquakes, a fresh venue was sought. And what a venue.

Apart from the usual superb presentations, the conference will coincide with the ski season, but will not clash with the New Zealand and Australian school holidays. On behalf of NZILA, I invite and urge all Australian members to consider attending the New Zealand conference and mix with their Australian colleagues and the NZILA members. It will be a superb event.

One great thing I have realised through my association with NZILA, AILA and the British Insurance Law Association is the camaraderie that exists between insurers, lawyers, adjusters, brokers and everyone else associated with what is, in many ways, the world's most important industry - insurance. Join us in Queenstown and revel in what will be stimulating company.

In the meantime, try to have a restful time over Christmas and come back in the New Year refreshed for the challenges that will face us all in 2013.

Craig Langstone
NZILA President

David Lee

AILA President's message

AILA heralds a new publication



Welcome to the first issue of our new publication for AILA and NZILA members - *Resolve*.

Over the last 12 months, the AILA national board has been considering several key areas in which the association can modernise and improve membership services.

One area identified is the website and, after a long development process, as announced by immediate past president David McKenna at the AILA conference in Hobart, we will soon launch an exciting and improved site.

Another key area for update is *AILA News*. For a start, the name is changing to *Resolve*, which reflects the insurance industry's focus on solutions.

Resolve will continue to be produced in hard copy for two issues. After that, it will become HTML and be distributed to members electronically. That gives you almost six months to ensure your email contact information is current with AILA before the publication goes digital.

The board deliberated long and hard about moving to an electronic format but agreed that, for AILA to remain current and appeal to new members, technology was the logical step forward.

Kate Tilley and her team at KT Journalism, who have been writing and producing *AILA News* since the June 1994 issue, will continue to provide editorial content. Ben Gummow, of Gummow Design, who was responsible for AILA's updated logo and improved corporate identity in 2008, will take on the design role.

I look forward to member feedback on the new-look publication, *Resolve*.

Board changes

I welcome AILA's four new board members - Anthony Hillary, from Lawson Smith Lawyers, SA; Susan Vidler, from Assetinsure, NSW; Raj Kanhai, QBE, NSW; and Allison Grice, CGU, Victoria.

I am particularly pleased three of them are from the insurance industry. This brings a greater industry perspective to the board's deliberations and will assist in bringing AILA's educational and networking opportunities to a broader audience.

I am confident the increase in industry representatives will enable AILA to return to a situation where the national presidency can rotate between a lawyer and an industry representative.

The retiring board members are Chris Rodd, John Fountain and Kate Farrell, and I thank them for their service to AILA and its membership.

Hobart conference

I thank our newest life member, Steve Knight, and his conference organising team - Lionel Banks, Bill Callaway, David Farmer, Steven Smith and Rob Webster - for the sterling job they did in organising such a wonderful conference. The topics were of great relevance and the quality of the speakers a talking point.

The mix of delegates was one of the best in AILA's 29-year history and the board is keen to continue this diversification among the membership as we reach out to more potential members.

Steve and his team ensured great diversity in the program, too, with off-site breakout sessions, and the opportunity to view the extraordinary Museum of Old and New Art.

During the conference we sampled the culinary delights of Tasmania, including the spectacular degustation menu at the gala dinner. We also enjoyed seeing legendary Tasmanian axeman David Foster and his son, Stephen, in action again.

Regional committee

At the 2011 annual conference in Perth, AILA established a regional committee, chaired by Steve Knight. It aims to foster closer relationships between

AIDA's Asia-Pacific region chapters, share resources and co-ordinate schedules.

Committee members are Greg Pynt and David McKenna, from WA; myself; Will Harrison and Mei-wah Leung, from the Hong Kong Insurance Law Association; AIDA vice-president Professor Rob Merkin; NZILA president Craig Langstone; and Simon Goh, from the Singapore Insurance Law Association.

The committee is looking to host an inaugural regional conference in Singapore in 2016, marking the 250th anniversary of Lord Mansfield's judgement in *Carter v Boehm*, which heralded the start of the doctrine of good faith in insurance contracts (see page 12).

AILA has agreed, after a meeting I had with secretary-general Colin Croly in London in October, to develop a template for emerging and existing chapters to facilitate their development. It will highlight the steps AILA followed to advance and increase its membership. A board sub-committee is working on this project and will make a presentation to the Presidential Council next September. It will be a well-researched document chapters can share to assist in their growth without having to "reinvent the wheel".

Merry Christmas

Merry Christmas to all AILA members; I trust you will enjoy a relaxing festive season, with the opportunity to spend time with family and friends.

We look forward to a big year for AILA in 2013 - our 30th anniversary and we will host an AIDA Presidential Council meeting in Sydney, coinciding with the annual conference in September. It will be the first time the Presidential Congress has met in Australia since 1994, when Sydney was host city for the AIDA World Congress.

David Lee
AILA President

NEW SPIN ON OLD RISKS

CYBER LIABILITY

The insurance market for cyber, multimedia and information technology (IT) policies is growing but the industry is still reactive because it is one step behind the “bad guys”, a specialty insurer and risk manager says.

Axis Specialty Australia’s product development manager and risk management officer Quentin Dawson told AILA’s Queensland branch combating cyber risks involved companies assessing the risks; brokers managing the risks; and insurers treating the risks.

Cyber liability policies covered first and third-party liability associated with businesses’ electronic risks. Multimedia liability insurance covered third-party risks for multimedia companies, including auction sites, advertising agencies, broadcasters, publishers, and website developers. IT liability policies covered mainly third-party risks for IT companies.

Mr Dawson said the dictionary defined “cyber” as a prefix to form other words like cybercrime and cyberbullying. “If you remove ‘cyber’, you are left with risks that already exist.”

Cyber risks included viruses, crimes, extortion, privacy breaches, defamation, intellectual property breaches, and business interruption. He said a new risk was denial of service attacks, where companies bombarded competitors with emails and notifications trying to crash their systems.

When assessing cyber liabilities, Mr Dawson asked: Are they new or varied risks? Does property insurance cover any third-party risks? What are the risks? Are they insurable?

He said property policies usually excluded cyber risks, but in one US incident a property insurer “copped” a major claim.

Mr Dawson said, when assessing liability for cyber risks, underwriters considered an insured’s profile (for example, is it an iconic brand?); virus and security protections; and claims history. “What happens in the past is usually an indication of what will happen in the future,” he said.

However, underwriters faced multiple “conundrums” when assessing liability. Wordings were “static” when issued; there was limited industry expertise to underwrite the risks; and insurance protection was often only reactive. “The bad guys are one step in front,” Mr Dawson said. Other issues when

underwriting relatively unknown risks were policy limits and aggregation.

Catastrophe reinsurance was available, but difficult to price. It could be very costly for insurers covering a particular risk if the same virus hit all their insureds. “If Murphy’s law strikes, how [can insurers] provide cover?”

Mr Dawson said some US insurers responded by including exclusion clauses limiting or denying liability if more than a specified number of insureds was affected by an insured peril. “I wouldn’t like to advocate that to a broker,” he said. It was difficult to mitigate cyber risks, compared to more traditional risks.

Industry ‘grappling’

Specialist Underwriting Agencies’ marketing and development manager Kurt Nilsen told the AILA meeting there was a niche market in multimedia, social media and cyber risks. “It’s an emerging market and we want to be part of it.”

As with any emerging market, there was money to be made but also money to lose, especially because the industry was still grappling with how to cover the risks. Mr Nilsen advised lawyers and insurers to talk to clients about cyber risks, because the industry would soon realise it was “running behind”.

“Your Facebook wall is like a shopping centre noticeboard”

Brand participation

Dundas Lawyers legal practice director Malcolm Burrows said the key cyber risk was information security. Information got lost via internal risks, like rogue staff; external risks, caused by third parties; and inadvertent information loss. “Data breaches occur when personal information is lost or subjected to unauthorised access, use, modification or disclosure,” he said.

Employers were often unaware employees leaving a business walked out with company information on memory sticks.

“Are there policies in place to wipe the data?”

He said employers needed to monitor online conduct, including whether employees were making defamatory remarks; sexually harassing or bullying others on social media sites; or releasing proprietary information in the ‘cloud’ without employers’ knowledge.

Mr Burrows said “your ‘wall’ is your responsibility”, including on personal and corporate social media pages. For example, the 2011 *ACCC v Allergy Pathway Pty Ltd* Federal Court decision declared the company and its director guilty of contempt of court for failing to remove misleading testimonials clients wrote and posted on its Facebook wall.

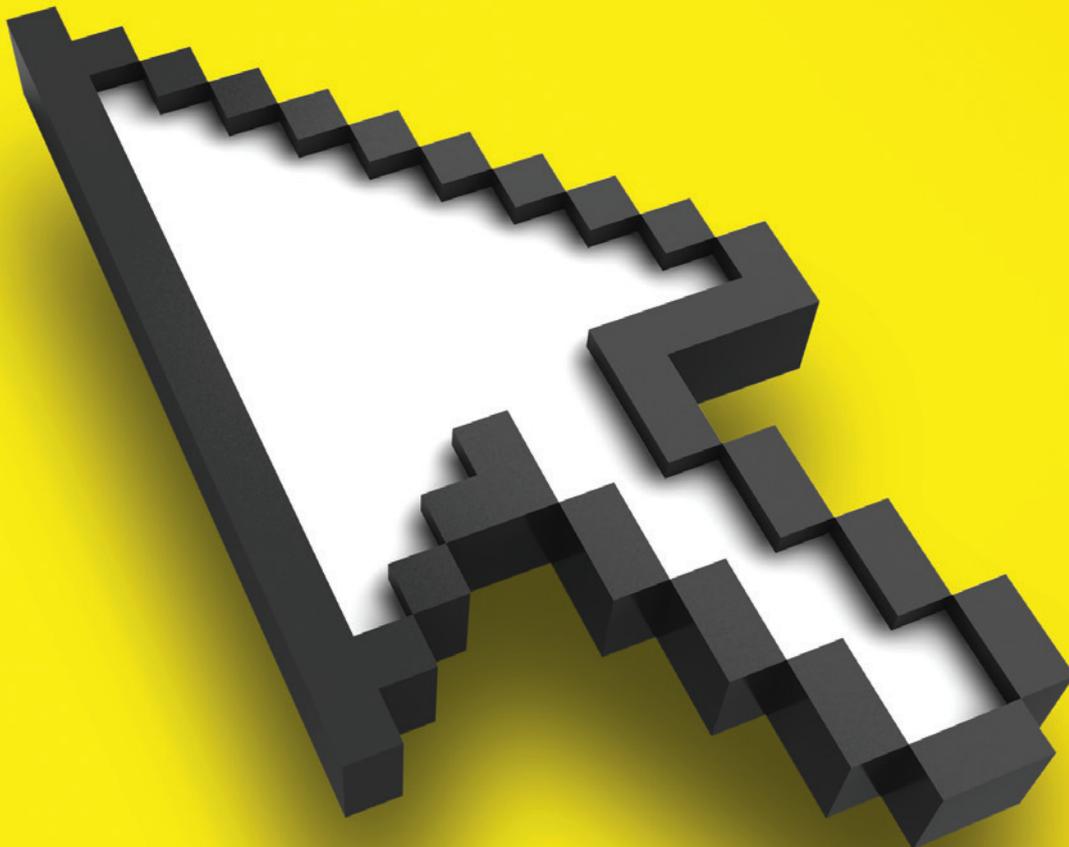
Mr Burrows said the decision likened a Facebook wall to a “shopping centre noticeboard”.

He said restrictions may “stifle” conversation, but businesses had to weigh brand “participation” versus the risks of allowing people to discuss brands. For example, last August the Advertising Standards Bureau found Fosters Australia breached advertising regulations by allowing followers’ “lewd and crude” comments to be posted on its Victoria Bitter Facebook page. “User posts on your wall are essentially advertisements,” he said.

To reduce risks, Mr Burrows recommended businesses implement well-developed policies. He said organisations had different risk matrixes, depending on their operations, stakeholders and industry regulations and “policies need to be developed accordingly”. Businesses must train authorised users in social media use; define boundaries for all employees and contractors; and integrate cyber risk policies with existing ones, like human resource or IT policies.

Mr Burrows recommended businesses engage social media monitoring systems; develop and implement crisis management plans; appoint privacy officers to conduct regular privacy audits; and buy cyber risk insurance. “Organisations need to know what information they hold, if it is protected and what their obligations are under the *Privacy Act* to protect it.”

The House of Representatives passed amendments to the Act in September, which are awaiting Senate debate.





TERRORISM MARKET COLLAPSE PUSHES 'POSITIVE INTERVENTION'

When done effectively, government intervention is necessary to combat insurance market failures, National Insurance Brokers Association CEO Dallas Booth told AILA's annual Geoff Masel memorial lecture series.

An example of market failure was when the terrorism reinsurance market collapsed after September 11, 2001. In that case, Australian Government intervention was vital. However, arguments about intervention must be heard on a "case-by-case" basis.

Mr Booth said the Federal Government currently regulated the insurance industry's prudential standards, via the Australian Prudential Regulation Authority (APRA); insurance contracts; mandatory covers, like CTP; underwriting some insurance classes; nature of cover; pricing; and market conduct.

He said Australia generally had a "reasonable balance" between mandated insurance and how it worked in practice. However, "moral hazard" issues arose when mandating insurance because it could decrease risk mitigation. For example, mandated bushfire or flood insurance could mean homeowners thought they did not need to fire or flood proof their homes.

Mr Booth said Queensland's "planning failure" led to homes being built in creek beds. It was "inevitable" those houses would flood. He said governments were starting to understand "insurance doesn't work for things that are inevitable".

The banking and finance sector managed risk differently to the insurance sector. Banking tried to eliminate risk, but insurance traded, transferred and financed risk. Insurance worked well when risk was likely to occur, but became ineffective if losses were assured to happen.

Mr Booth said there was a "regulatory gap" for self insurers, because the onus was on companies to meet their own liabilities. APRA took extensive action in ensuring insurers met their obligations, but he was unsure if the same measures applied to self insurers. That was a "live issue" in Queensland in its current workers' compensation scheme review.

Public policy

Mr said any government intervention should always be done in the "pursuit of public policy". Having decided what the public policy objectives were, governments needed to determine what form the intervention should take.

Regulators should identify market problems; consult on possible solutions; develop responses and public policies that match the problem; and monitor and regularly review the policies.

Mr Booth backed sound regulatory intervention principles promoted by the Organisation for Economic Co-operation and Development, the Productivity Commission and COAG. Under those key principles, intervention policies must: have clear policy goals and benefits that justify costs; be clear and practical; and not hinder investment, trade and competition.

However, Mr Booth said not all regulation applied those principles;

some added burdens like red tape, excessive reporting and overlapping or inconsistent reporting requirements. "They should ensure policy objectives are identified and achieved, without unnecessary costs."

FoFA a 'crazy intervention'

Mr Booth believes the Australian Reinsurance Pool Corporation (ARPC) is an example of good government intervention. When it was created, the issue was clear: absence of terrorism reinsurance.

He said there was extensive consultation before ARPC was introduced, and it was a solution that responded to the issue, with limited market impact. It was reviewed every three years to ensure it met its objectives and was only introduced as an interim measure.

But the future of financial advice (FoFA) reforms were a poor example of intervention. FoFA laws were developed after several high-profile investment groups collapsed, including Storm Financial and Opes Prime. Various inquiries found consumers received inadequate financial planning advice.

Mr Booth said FoFA laws, which were designed to improve advice, were widespread and applied to anyone who gave financial advice, including insurance brokers, bank tellers and stockbrokers.

He said the draft laws vaguely outlined the steps insurance brokers must take when acting in clients' best interests. He wished brokers "good luck" in understanding their obligations because the law was unclear.

Award honours Ron Shorter

by Penny Paterson

This year AILA NSW hosted the inaugural Ron Shorter Memorial Award.

Mr Shorter was an AILA liaison committee member and a luminary among insurance professionals. He conceptualised a competition to improve young professionals' public speaking skills. After his death, AILA NSW, with Colin Biggers & Paisley (CBP) sponsorship, set out to bring his vision to life.

The competition had three stages. In stage one, young professionals were asked to submit reasons why they would benefit from public speaking tuition and nominate an insurance-related topic for a presentation.

Twenty-one applicants were shortlisted for stage two, which saw Jennifer Beard and her team at Polaris Coaching deliver a training session focused on essential public speaking elements. It was followed by participants' presentations. Observers were stunned at their ability to apply their newly acquired skills and deliver well-articulated, clear, concise two-minute presentations.

Ms Beard and her team determined final three finalists, in an extremely close decision.

At the final stage on July 19, finalists



From left to right: Eden Winokur, Kennedys (winner); and runners up James Morse, DLA Piper; and Mayssem Elmaet, QBE.

delivered 20-minute presentations before 90 insurance professionals. NSW Supreme Court Justice David Hammerschlag and the court's CEO and principal registrar Linda Murphy joined Ms Beard on the judging panel.

Mayssem Elmaet, from QBE Insurance, spoke passionately on the need for interconnectedness in the insurance industry among key stakeholders. DLA Piper's James Morse spoke on insurance law reform. Eden Winokur, from Kennedys, spoke on social media's impact on insurance law.

All presentations were impressive. While the judges deliberated, AIDA president Michael Gill spoke about his pride in AILA and his happiness to have Ron Shorter honoured in this way.



From left to right: Martin Clark (Ron Shorter's partner); Linda Murphy, NSW Supreme Court CEO and principal registrar; Jennifer Beard, Polaris Coaching; and NSW Supreme Court Justice David Hammerschlag.

The panel awarded Mr Winokur the inaugural Ron Shorter Memorial Award. Ron's partner, Martin Clark, presented the winner's trophy and prize - an iPad.

On reflection, the award was exactly what Mr Shorter had in mind when conceptualising it. CBP senior partner Greg Skehan, who worked with Mr Shorter for many years, said: "It was almost as though you could sense Ron's presence in the room. He was such a humble man he would have hated the award being named after him."

But the award's objective, the conduct of the participants and the competition's overall success is testament to Ron and what he gave to the industry and its young professionals."

AIDA meets in London

by AIDA president Michael Gill



The Grange Tower Bridge Hotel in London's financial district was the venue for AIDA Presidential Council's second meeting in 2012.

AIDA Europe and the British Insurance Law Association hosted the various meetings. AIDA Europe had arranged an excellent conference program that featured, among other things, an excellent further investigation of several topics on the agenda for the 2014 World Congress in Rome and Florence.

Several Australians participated in the conference and AIDA working parties' meetings, including Christopher Rodd, David McKenna, Greg Pynt and Roger Sands.

The meetings were also attended by representatives of the US's Federation of Defense and Corporate Counsel (FDCC), led by its president Mike Neill. AIDA and FDCC continue to work constructively and professionally towards a much closer relationship which will aid both bodies to achieve their objectives.

In 2013 AIDA representatives will attend FDCC meetings in the US.

The Executive Committee and the Presidential Council received reports on progress with planning the 2014 World Congress and the 2018 World Congress in Rio de Janeiro. Australia's request to host the 2022 World Congress was received and considered. The venue will be decided in Rome in 2014, giving all chapters an opportunity to bid. Australia's bid was greatly appreciated.

Important appointments were made to two key working parties. Rafael Illescas Ortiz was appointed chair of the personal insurance & pensions working party and Professor Sara Landini was appointed chair of the motor insurance working party.

Professor Birgit Kuschke, of South Africa, who could not attend the meeting, reported South Africa was making good progress with engaging several African countries with a view to forming an African Regional National Chapter and ultimately more African national chapters of AIDA.

The meeting was overshadowed by news of Karoly Bard's death. He was one of AIDA's great strengths and for many years the face of AIDA Hungary. His eulogy is on the AIDA website.

BROKERS BEWARE - IS YOUR INFORMATION ACCURATE?

by Nicole Sosnowski, KT Journalism



A Queensland Supreme Court decision that found a broker liable for a client's loss shows brokers must have correct systems to ensure policies contain accurate information at renewal, a Queensland barrister says.

Anthony Collins, who represented Vero in the case, spoke at an AILA Queensland event.

Last April, Queensland-based 786 International (Aust) Pty Ltd, trading as Osman Insurance Brokers (OIB), was ordered to pay Kotku Bread Pty Ltd \$2.7 million plus interest, after Kotku's claim was denied.

A fire destroyed Kotku's Capalaba, Brisbane, premises on August 19, 2010. The company claimed indemnity for damage to fixtures, fittings, equipment and stock under a policy it held with Vero. The damage was assessed at \$2,716,300.

OIB had placed the cover on Kotku's behalf via Vero's online application form in February 2010. The policy covered the business for a year, from March 8, 2010.

Vero declined Kotku's claim, saying OIB had incorrectly completed the application by misrepresenting how much expanded polystyrene (EPS) was in the bakery's internal walls.

The court heard Vero's system asked OIB a trade specific question (TSQ) about what percentage of the internal premises contained EPS, or "sandwich panelling". OIB could choose from one of three responses: 0%, 1%-33%, or more than 33%. Vero said OIB selected 0%.

Justice Peter Applegarth said there was no dispute the bakery had a substantial amount of EPS in its walls. One expert said there was up to 67%. "On any view, 0% misrepresented the true amount," he said.

Vero argued the answer OIB gave was "untrue" and, had the true EPS level been disclosed, it would not have issued the policy or insured Kotku's premises. Vero said if OIB selected more than 33% for the TSQ, its computer system would have informed OIB the policy was declined.

Kotku and OIB both argued Vero was at fault because its online system did not ask OIB the TSQ about EPS as Vero alleged. Kotku said, alternatively, if Vero established a misrepresentation and was not liable, OIB was negligent by breaching its duty of care.

On April 26, Justice Applegarth ruled OIB's breach of contract and negligence meant Kotku could not obtain indemnity against the risk of fire. "In giving the answer to the TSQ, OIB failed to discharge its contractual duties to Kotku and breached the duty of care it owed Kotku under the general law."

He said OIB failed to discharge its contractual and general law duties by failing to take reasonable steps to consult Kotku about the bakery's internal construction and make proper inquiries or adequate inspection into the presence of EPS.

Justice Applegarth awarded Kotku \$2,706,300, plus interest. He deducted \$10,000 from the assessed damages to account for a higher premium Kotku would have paid if the policy was held with another insurer.

Mr Collins said the case reminded brokers of their obligations. If TSQs were asked, it meant they were high-risk items valuable to insurers, so brokers needed to take care when answering them. If brokers were unsure, they should ask the insurer to clarify the question, so the onus was on the insurer to accept the information or inquire further.

He said the case showed insurers needed to create clearly worded TSQs, so the onus was on insureds to answer them correctly. In the Kotku case, the TSQ was not framed perfectly, leaving the broker "wriggle room" during the trial. Mr Collins said it was likely the case would have settled outside court if the claim had been less than \$1 million.

(Kotku Bread Pty Ltd v Vero Insurance Ltd & Anor [2012], QSC 109, 26/04/2012)

Director liability temperature rising

Directors must “first and foremost” be sufficiently skilled and practised in the art of directorship to minimise the risk of breaching their duties, rather than merely holding indemnities against potential losses, a boardroom consultant says.

Board Matters managing director and principal consultant Elizabeth Jameson told the 2012 AILA-QLS insurance law intensive in Noosa, directors and officers needed a “critical triumvirate” of armoury to protect themselves against claims for breaching their statutory and fiduciary duties.

Several corporate dramas playing out in courtrooms over recent years had done nothing to quench the heat or quell directors’ rising anxiety. As “the dust settled” on ASIC’s case against Centro directors, Ms Jameson said attention was now on the shareholders’ \$200 million class action, and the “equally predictable” legal dispute that would follow over associated D&O claims.

The most important protection in directors’ “three-piece” armour was a strong practical, ethical and legal understanding of society’s expectations of directors. “Director[s] must be sufficiently knowledgeable, skilled and practised in the art of directorship to minimise the chance of breaching their legal duties,” Ms Jameson said.

“Directors and officers have a heightened awareness it is essential to have heatproof armoury against claims for breach of their statutory and fiduciary duties as directors,” she said.

Directors were protected by coverage provided by legal documents, such as deeds of indemnity, and access. “It is preferable never to have to fall back on the coverage afforded by legal documents, which are inherently always open to a range of legal challenges,” she said.

The third piece of armour was D&O insurance. “[It] should only be a ‘last gasp’ option to assist the director to meet his or her liabilities and the inevitably extensive costs associated with defending, even successfully, legal claims.”

Ms Jameson said it was “surprising” how many directors were oblivious to D&O insurance’s common deficiencies. Sections 199B and 199C of the *Corporations Act 2001* prohibit insurers paying directors’ insurance against liability (other than for legal costs) arising from conduct involving wilful breach of duty, or breach of duty to not misuse their position or information they gain.

Some standard D&O policy exclusions, such as prospectus liability exclusions, could limit coverage. Insurers could refuse cover under s21 of the *Insurance Contracts Act 1984* for inadequate disclosure or misrepresentation.

Ms Jameson said the past decade’s D&O cases illustrated various limitations for directors accessing defence costs, particularly before a claim’s substantive hearing.

“Several cases highlight the uncontroversial and somewhat self-evident truism that policy wording is all-important when it comes to the availability of any form of insurance. In D&O, there is a critical difference between policy wordings [that] give the insurer some discretion to pay defence costs in advance of the substantive hearing, and those which do not.”

“Directors need heatproof armour to protect against claims”



INSURANCE LAW EXPERT MOVES ON

After working as a partner at Perth-based Pynt + Partners since 1996, insurance law stalwart Greg Pynt is seeking new career opportunities.

He told *Resolve* he planned to take a few months off and enjoy the “lazy Perth summer” after leaving the firm in October. However, he wanted to return to the industry “sooner rather than later” and would put on his “thinking cap” in January if no interesting opportunities in or out of Perth had arisen.

Mr Pynt has been an AILA member for about 25 years, enjoying stints as a national board member and Western Australian branch chair. He initially joined to learn about important insurance law cases and issues, and socialise with industry peers. The *Insurance Contracts Act 1984* was introduced at about the time he joined, and AILA was a good forum to discuss the changes and their impacts.

He is currently an AILA regional committee member, alongside representatives from AIDA chapters in Australia, Hong Kong, Singapore and New Zealand. “The committee was established to create a unity of chapters in the Asia-Pacific region,” Mr Pynt said.

Mr Pynt is also an AILA sub-committee member, organising a 2016 conference in Asia. He said the one-off event would celebrate the 250th anniversary of the 1766 *Carter v Boehm* decision. In the landmark English case, Lord Mansfield established the duty of utmost good faith in insurance contracts.

Mr Carter was governor of Fort Marlborough, a British colony at Bengkulu, in Sumatra, Indonesia. He took out a policy with Mr Boehm against a foreign enemy taking the fort. A witness testified Mr Carter knew the fort was built to resist attacks from natives but not European enemies, and the French were likely to attack, which they did.

Mr Boehm refused to pay the claim for breach of the duty of good faith (non-disclosure). Lord Mansfield found Mr Carter owed Mr Boehm a duty of good faith, but did not fail in that duty



Greg and Julie Pynt at their son's “pop up” restaurant in London.

because Mr Boehm knew as much, if not more, than Mr Carter about the risk of a French attack.

Mr Pynt said conference delegates could fly to Fort Marlborough, which Indonesia has restored. “I am very excited because Bengkulu is very interesting. There are nearby active volcanic craters and the area boasts the world’s tallest and largest flower.” Conference details are yet to be confirmed.

Mr Pynt studied law at the University of Western Australia (UWA) and did his articles of clerkship at Perth-based Downing & Downing from 1978 to 1980.

He moved to London for three years, working in Willis Faber & Dumas’s construction department in 1981, and Clifford-Turner’s (now Clifford Chance) commercial litigation department from 1981 to 1983.

Mr Pynt moved back to Perth in 1983 when his wife, Julie, was pregnant with their second child. “She didn’t want to stay in London for a third winter,” he said.

He worked in Mallesons Stephen Jaques’s (now King & Wood Mallesons) commercial litigation department from 1983 to 1996, and became a partner in 1987. It was there he moved into insurance law. “I found [insurance

law] interesting; loved the clients and enjoyed working with people on the other side.” He established Pynt + Partners in April 1996.

He has three adult children, Sarah, David and Ben. Sarah is a Perth insurance broker; Ben has completed his law degree and intends to work in humanitarian law; and David is a chef currently travelling in South America. This year David established a “pop up” wood barbeque restaurant in London from May to September, called *Burnt Enz*. Some delegates at the September AIDA conference sampled his food.

Mr Pynt enjoys travelling and spent five months in Istanbul last year with Mrs Pynt. He enjoys watching footy and cricket, and jogging and swimming. “I can only do things in straight lines.” He also enjoys cooking and family time.

Mrs Pynt works full time establishing a market for Easywrapper, a cling wrap dispenser her husband invented with the help of product engineers.

Mr Pynt is general editor of the *Insurance Law Journal*, and has co-ordinated courses and lectured in undergraduate and postgraduate insurance law at UWA since 1991. He authored Lexis Nexis’s 2011 second edition of *Australian Insurance Law: A First Reference*.

Circumstances determine privilege

When determining if documents attract legal professional privilege, courts will examine the circumstances in which the communication was made, Federal Court Justice Bruce Lander said.

He told an AILA SA meeting a “contentious” area of privilege was whether third party reports were protected.

Justice Lander said communications were not necessarily protected simply by parties claiming they were or by engaging solicitors early. Instead, courts assessed the circumstances in which documents were commissioned.

Communications between insureds, insurers, their agents and third parties, like adjusters, enjoyed privilege if they satisfied litigation or advice privilege requirements.

Litigation privilege applied if proceedings existed and adjusters’ reports were made for the dominant purpose of being used in the proceedings. If litigation was reasonably anticipated, the court investigated the circumstances when the report was commissioned. “The court will inquire not into the mind of the loss assessor, but into the mind of the party commissioning the report,” Justice Lander said.

Historically, if proceedings neither existed nor were anticipated, so only advice privilege arose, protection applied to adjusters’ reports only if the adjuster was an insurer’s agent or lawyer, not a third party.

But Justice Lander said more recently advice privilege was applied to documentary communications authored by third parties.

Regardless of the form of legal professional privilege, the onus was always on the party seeking privilege to show it was warranted.

Justice Lander said if insurers used adjusters, they must record why they were retained and the report’s purpose. Adjusters and solicitors must keep “contemporaneous file notes” that



showed, if necessary, when litigation was first anticipated or when there was a reasonable prospect of litigation.

The 2012 Federal Court case *Ensham Resources Pty Ltd v Aioi Insurance Co Ltd* addressed legal professional privilege in loss adjusters’ reports. In January 2008, heavy rain flooded Ensham Resources Pty Ltd’s coal pits in Queensland’s Bowen Basin. Ensham notified its insurer, Aioi Insurance Co Ltd, of a potential claim on January 22, 2008.

Aioi declined the claim in September 2010, on grounds of material non-disclosure. Ensham launched proceedings to recover \$535 million, plus interest and costs.

After the floods, Aioi contacted an adjuster and later engaged a solicitor. The solicitor spoke to the adjuster about Ensham’s claim and made a file note, including a conversation about whether a levee bank was an insured asset under the policy.

Aioi withdrew its retainer with the adjuster so the solicitor could directly retain him. The solicitor told the adjuster his report must be prepared on a “privileged and confidential basis” and in anticipation of future litigation.

Ensham sought access to several adjuster reports. It was allowed to inspect some, but Aioi claimed others were protected. Ensham argued Aioi failed to show the reports were created with the dominant purpose of contemplated litigation, but were merely part of its normal investigation.

Justice Dennis Cowdroy found the reports were protected by legal professional privilege because Aioi’s solicitors foresaw a real prospect of litigation.

He was persuaded litigation was anticipated because a contemporaneous file note, written when the reports were commissioned, said there was an issue about whether the levee bank was insurable.

But Justice Lander said the solicitor’s letter to the adjuster, saying the reports were privileged and confidential, did not mean privilege existed. “The court found that letter was a self-serving but ineffectual attempt to attract privilege. Claiming future communications will be privileged will not persuade a court to find [they] are.”

(Ensham Resources Pty Ltd v Aioi Insurance Co Ltd [2012], FCA 710, 6/7/2012)

Editorial submissions

AILA encourages members to submit editorial contributions for consideration for publication in *Resolve*.

Contributions will be included at the editor's discretion. They should be supplied as a Word document by email to ktj@ktjournalism.com well in advance of the final deadline (see p2).

Articles should cover topics of interest in furthering insurance law education, for example, case notes and commentary on topical issues. Articles should be non-technical, written in plain English, and a maximum of 500 words.

Letters to the editor are also welcome, as are suggestions for leads the *Resolve* journalists can pursue. For all editorial inquiries, please email the editor Kate Tilley, ktj@ktjournalism.com, phone (07) 3831 7500. We look forward to receiving your contributions – this is your publication, have your say.

Queensland

by **Tim Hancock**

The Queensland branch held a successful breakfast seminar on October 16 on insurance risks for cyberspace (see page 6). It was enthusiastically attended.

Plans are well advanced for the annual 2013 Insurance Intensive on the Gold Coast on May 23-24. The program is nearing completion and promises to maintain this premier Queensland insurance event's reputation. Details to come in forthcoming *Resolve* issues.

The Queensland branch held its AGM on December 5. Nominations from new and existing committee members have been received and interest in AILA remains high. More details next issue.

Tasmania

by **Steve Knight**

The 2012 national conference organising committee was thrilled with registration numbers and the outcome of this year's event.

There were 288 registrations, including some half-day and one-day registrants, making it one of the largest conferences in many years.

Particularly encouraging was the significant number of insurers, brokers, reinsurers and government department representatives who attended. There was an array of great speakers and the practical breakout sessions were particularly well received, despite the inclement weather.

Friday morning's concurrent streams were popular, with the greatest number registering for the Asia Pacific session. There was so much animated discussion afterwards it may be repeated at future conferences.

The two papers dealing with the NZ earthquakes and the insurance law ramifications were compelling. Wynn Williams partner Richard Johnstone courageously spoke of his own harrowing experience – he was in a lift when the earthquake struck Christchurch. His presentation was outlined in the *AILA News* conference issue. The packed auditorium was silent throughout and thoroughly appreciated his presentation.

The social events were also outstanding

successes. A highlight was the conference dinner at the City Hall, featuring a seven-course Tasmanian degustation with matching Tasmanian wine. The quirky entertainment also impressed and everyone had a great night.

Many partners attended optional tours. A significant number visited MONA on Friday afternoon, followed by a wonderful gathering in The Void, three storeys underground. Another 40 delegates took the Bruny Island trip on Saturday, and the scenery and wildlife amazed everyone. Following the cruise, those present enjoyed a BBQ near the beach at Adventure Bay, tasting Tasmanian single malt whiskey, wines and beers.

Thanks to all the delegates who made the conference so successful, the sponsors, the AILA Tasmania committee and the conference secretariat.



Steve Knight toasts the success of the Tassie conference.

Western Australia

by **Stephen Williams**

The WA branch has been very busy. In July, orthopaedic surgeon Michael Alexeeff presented a seminar entitled *Orthopaedic surgery in the new millennium – what works, what doesn't*.

In August, WorkCover WA registrar Shane Melville and conciliation director Wendy Attenborough presented an information and feedback session on changes to WA's workers' compensation scheme, with the introduction of the Conciliation and Arbitration Service.

In September, Francis Burt Chambers barrister Bettina Mangan presented a popular seminar on ethics in settlement negotiations. The seminar was billed as "a must for those involved in negotiating claims and issues that arise in the context of claims". It lived up

to the must-see billing, with attendee numbers at near record levels.

In October, Jackson McDonald senior associate JC van der Walt, and partner Stefan Sudweeks spoke on third party access to access to policies and joinder of insurers. Their presentation covered plaintiffs' attempts to join insurers as defendants to litigation between plaintiffs and insureds.

The WA branch was busy socially, holding its annual dinner dance at the Burswood Convention Centre in August. It recognised Australian athletes' performances at the London Olympics with a green and gold theme. Thanks to all WA committee members who helped make the night a success, and to all members and guests who danced the night away.

New South Wales

by Penny Paterson

The Geoff Masel memorial lecture was well attended in Sydney and Canberra and thanks go to National Insurance Brokers' Association CEO Dallas Booth for his presentation.

The insurance fundamentals seminar, aimed at the younger generation, was also well attended.

The Young Professionals were extremely busy with a Meet the Maestros dinner at the Bennelong. It was a great venue, allowing 50 insurance industry luminaries to mix with 50 YPs. It gave the YPs an opportunity to meet some of the top people in insurance and everyone had a fabulous evening.

Another YP event, *Speakeasy @ the GPO*, is growing each year. This year 650 people registered and it sold out a week prior. Everyone got into the swing of things with many arriving in great 1920s outfits.

Congratulations to the YPs sub-committee: Siobhan Newton, Zurich (chair); Chris Ehlers, MDD Forensic

Accountants; Eric Lowenstein, Aon; Glyn Lloyd, Cerno; and Gregory Greer, Graincorp. It takes a lot to arrange these events and they did a fantastic job.

Thanks also to the sponsors: Cerno, Crawford & Co, Cunningham Lindsey, Curwoods Lawyers, Liberty International Underwriters, MDD Forensic Accountants, Hunt & Hunt, Gallagher Bassett and Holman Webb.

2013 will be a big year for the NSW branch, which is already planning for the September national conference in Sydney. The AIDA Presidential Council will also meet in Sydney before the conference.

The twilight seminar series is in the planning stages and the Ron Shorter Memorial Award, aimed at YPs, will be held again next year. Another three YP events are also planned.

If members have topics they would like covered and/or speakers they would like to hear, please contact the NSW branch.

On behalf of AILA NSW, Merry Christmas and Happy New Year.



Attendees at the NSW Young Professionals event, *Speakeasy @ the GPO*.

Victoria

by Cameron Roberts

QBE general counsel and company secretary Duncan Ramsay and Herbert Geer partner Andrew Bristow presented Victoria's annual D&O update to a large and diverse audience on August 29.

Given the High Court's recent activity in D&O, there was much to talk about and many thought provoking questions. Thank you to the speakers, who answered so many questions they almost missed their plane.

On September 13, the Victorian chapter held the second annual Young Professionals event. Ticket sales met venue capacity and attendees got valuable networking insights from Triple M's Duncan McKenzie-McHag. The caricature artist was kept busy, and the caricatures made a great historical record of the effect of the complimentary "sports" cocktails.

Congratulations to all door prize winners, especially Herbert Geer's Hannah Sowdon, who took home an iPad. Thanks to the sponsors, Hunt & Hunt, Colin Biggers & Paisley, Quantum Cost Assessors, FMG Engineering and LKA Group.

On September 26, Clayton Utz hosted *The land of FOS*, where CGU's Chris Rodd and the Financial Ombudsman Service's John Price provided a lively debate on the advantages and disadvantages of the scheme to an enthusiastic audience. Congratulations to Richard Adamczyk, of Chartis, who chaired what threatened to be a vigorous exchange of views.

On October 25, barrister John Simpson chaired a joint AILA-National Product Liability Association seminar on damages in asbestos litigation. Industry, judiciary and legal representatives advised a large audience that awards of general damages in personal injury actions were "on the march".

A November 20 seminar on proportionate liability, held at Minter Ellison, rounded a very busy year of seminars and events. The Victorian AILA committee wishes all members a happy and safe festive season as we look forward to an even busier 2013.

PEOPLE

Axis Specialty Australia has made several appointments to spearhead its market advancement. It has appointed four national product managers.

Quenten Dawson will continue to head Axis's business development and lead its MGA strategy while **Tony Hynes** takes on the new role of national manager financial lines.

He will continue to lead the Victorian team and have leadership responsibility for all states' financial lines. **Jason Mann** has been appointed national manager professional lines and **Brendan Walsh** has become national manager property. Axis Australia CEO **David Smith** said national professional lines manager **Michael Prickett's** decision to retire, after more than 13 years with the company, partly fuelled the restructure.

Mary-Catherine McGrath is NSW's new professional and financial lines manager and **Tom Kent** is Victoria's. **David Jones** continues as Queensland professional and financial lines manager.

.....
Brisbane insurance law firm Barry Nilsson has appointed **Stewart Boland** as a senior associate in its insurance and health team. He has relocating from the Northern Territory where he worked at Hunt & Hunt.

.....
Specialist lines underwriting agency CFC has appointed **Gary Norman** to its newly created casualty practice leader role. He was previously QBE London head of technical underwriting for its property, casualty and motor division.

Niran Peiris has been appointed Allianz Australia Ltd's next managing director/CEO, taking over from **Terry Towell** in January. **Mr Peiris** is currently Allianz Australia's life insurance CEO and chief general manager, retail distribution.

.....
William Lewis is property and casualty insurer Ironsure's new underwriter and solicitor. He reports to executive director **Katherine Simmonds**.

.....
Travel insurer Cover-More has appointed emergency medicine specialist Professor **Steve Rashford** chief medical officer, responsible for its emergency medical assistance division in Australia, New Zealand, China and Malaysia.

.....
International insurance IT specialist Target Harlosh has appointed **David Conway** as head of Australia and New Zealand delivery services.

DIARY

For more information on AILA events, go to www.aila.com.au

May 23 - May 24, 2013
AILA-Queensland Law Society
Insurance Law Intensive
Gold Coast

September 5 - September 6, 2013
NZILA 2013 conference
Queenstown

September 18 - September 20, 2013
AILA 2013 National Conference
AIDA Presidential Council meeting
Sydney
Wide exposure safe harbour

October 12 - October 15, 2013
National Insurance Brokers Association
Annual Convention
New Frontiers - Building Better Worlds
Melbourne

September 29 - October 2, 2014
AIDA World Congress
Rome and Florence

