

# RESOLVE

**BLACK  
SATURDAY  
SPARKS FIERY  
LITIGATION**

**BREAK OUT IN  
QUEENSTOWN**



**INSURERS  
COP FLAK  
IN  
FLOODS'  
WAKE**

**SYDNEY  
HOSTS AIDA  
PRESIDENTIAL  
COUNCIL**

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## Craig Langstone

### NZILA President's message Early Christmas present for insurers

#### Insurers in New Zealand and Australia received what might be viewed as an early Christmas present.

On December 20 the NZ Court of Appeal overturned the High Court's contentious *Steigrad v BFSL 2007 Ltd* decision from 2010. The decision reinstated the conventionally understood position under the *Law Reform Act 1936* - third party claimants are not entitled to priority over insurance proceeds from a D&O policy with a single aggregated limit of indemnity, in priority to directors' defence costs.

The high-profile case derived from the 2007 Bridgecorp Group of finance companies' collapse. Bridgecorp directors were charged with criminal and civil offences relating to the collapse. Investors were owed nearly NZ\$500 million. QBE Insurance (International) Ltd insured Bridgecorp, providing D&O cover of NZ\$20 million. The policy provided cover for liabilities to third parties (in this case, creditors) and for defence costs.

The case turned on the interpretation of s9(1) of NZ's *Law Reform Act 1936*, which provides that if the insured has "entered into a contract of insurance by which he is indemnified against liability to pay any damages or compensation, the amount of his liability shall ... be a charge on all insurance money that is or may become payable in respect of that liability".

The High Court considered the purpose of s9 and found it created a charge over the whole amount available under the policy. That meant the insurance proceeds could be paid out to the

limit of the insured indemnity, leaving nothing for directors' defence costs.

The High Court admitted the result was harsh for directors, but said it was necessary to fulfil the purpose of the statutory charge. The court found that, in part, the outcome was a consequence of Bridgecorp's decision to take out a policy covering both third party liability and defence costs, leaving the directors vulnerable once they faced claims beyond the sum insured.

But if advance payments of defence costs cannot be made where third party claimants assert a statutory charge over the insurance proceeds allegedly greater than the limit of indemnity under the policy, how can directors be guaranteed adequate legal representation?

Consequently the High Court decision had trans-Tasman consequences and led to the re-thinking of D&O policies, in NZ and Australia, to clarify and protect directors' entitlements to defence costs. Policies providing stand-alone defence costs cover became popular.

Unsurprisingly, the directors appealed, and were successful in the Court of Appeal. It found there were two separate losses: losses owed to creditors and those suffered by directors in defending claims. The court found they were distinct, even if they arose from the same wrongful act originally. The insurance contract provisions regarding defence costs were intended by insurer and insured to precede the third party liability. If the defence was successful, the insurer would not become liable to the creditor.

The court found it irrelevant paying defence costs would reduce the sum payable to creditors, as the defence costs payment was a "necessary consequence of the policy's structure". The policy's contractual mechanism obliged the insurer to pay defence costs before third party liability. The fact of a single, aggregated limit did not deprive directors of their right to be reimbursed for defence costs.

So, for the moment, directors again have guaranteed access to defence funds under their D&O insurance. For insurers, however, the importance lies in the clarification the decision provides: the wording of D&O policies is again suitable to cover directors' defence costs, even in a policy with an aggregate sum insured.

The decision slipped through the cracks due to its release date. But, for insurers and directors, it was a welcome Christmas bonus. Unfortunately though, an application for leave to appeal to the Supreme Court has now been filed, so the issue may not yet be at an end.

#### NZILA Queenstown Annual Conference

This year's NZILA Annual Conference in Queenstown has been arranged to suit both NZ and Australian insurance people. It is on September 4-6, which happily coincides with the ski season. Preparation is in progress for another successful and worthwhile conference. I hope to see you there.

**Craig Langstone**  
NZILA President

# David Lee

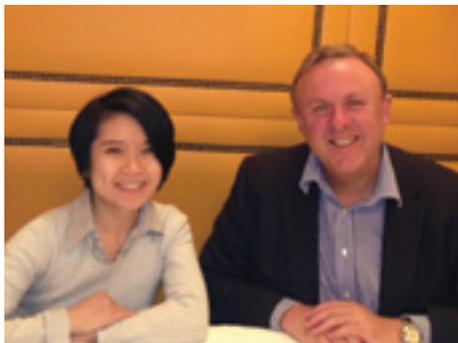
## AILA President's message Floods, fires ravage the nation



### Welcome to the second issue of AILA's new magazine, *Resolve*.

We hope you like it – please email your comments (see p2) as I'd love to hear your feedback – positive or negative.

During January, while I was in Hong Kong, I again met Mei Wah Leung, who is the immediate past chair of the Hong Kong Insurance Law Association. She also represents Hong Kong on AILA's AsiaPac regional committee. It was a productive meeting that further strengthened the ties between AILA and our Asian AIDA colleagues.



HKILA's Mei Wah Leung with David Lee.

### National conference

I urge all members to mark your diaries now - September 18-20 is the 2013 National Conference in Sydney, which coincides with an AIDA Presidential Council meeting. Australia is honoured to host the Presidential Council and I look forward to seeing a huge number of attendees at the conference.

### Disasters mar 2013

The start of 2013 has been marred by floods and bushfires. We have seen Tasmania devastated by major fires with more than 65 properties lost in the Dunalley area alone. Victoria, too, had further property losses.

Much of Queensland and parts of northern New South Wales have been flooded, with the Queensland regional cities of Rockhampton and Bundaberg particularly hard hit.

These disasters, yet again, highlight the twin problems of under-insurance and non-insurance. Too few domestic policyholders understand the principle of co-insurance if they are underinsured. Perhaps it is time for a publicity campaign to explain the average clause and what its impact means if an underinsured property is damaged.

There have been calls for insurers to "be benevolent" and pay partial loss claimants the full sum insured, regardless of their property's actual value. I have deep sympathy for those who have lost their homes and possessions in floods or fires. But I also understand commercial reality.

Directors of insurance companies, like all other companies, are responsible to their shareholders and have obligations under the *Corporations Law*. It makes no sense for well-meaning politicians to call for benevolence by insurers. It would be far better to invest their energies in lobbying for less tax on insurance – a factor that has been clearly demonstrated to contribute to under and non-insurance – and assisting their constituents to understand precisely how insurance operates and thus the importance of insuring to the full replacement value of their properties.

### Bridgecorp ramifications

NZILA President Craig Langstone's column opposite gives an excellent summary of the *Bridgecorp* case. The NZ High Court's December decision will have ramifications here in Australia.

Three Australian laws - NSW's *Law Reform (Miscellaneous Provisions) Act 1946*; the ACT's *Civil Law (Wrongs)*

*Act 2002*; and the NT's *Law Reform (Miscellaneous Provisions) Act* – have similar provisions to the NZ law that was debated in the *Bridgecorp* case.

If Australian courts follow the latest NZ decision, it means a return to the status quo, with no option for third parties to get priority ahead of directors' claims for defence costs. That gives directors comfort that the insurance policies they have bought will provide adequate protection. However, the receiver has now sought leave to appeal in the NZ Supreme Court.

The Australian market, to its credit, responded quickly to the initial *Bridgecorp* decision, refining D&O policies to assist directors to retain coverage for defence costs.

The NSW Appeal Court was to have heard a similar case, with proceedings by Great Southern's D&O insurer initially listed for hearing on January 29. The matter is now fixed for hearing in the NSW Court of Appeal on March 19, 2013.

### Good year ahead?

Premium rates are expected to rise in 2013, according to predictions in the latest JP Morgan-Taylor Fry General Insurance Barometer, which replaces the annual JP Morgan Deloitte General Insurance Survey.

The survey found combined ratios in commercial and domestic insurance lines, particularly property classes, improved overall in 2012. But the survey was conducted before the most recent floods and bushfires.

*Resolve* provides an in-depth analysis of key elements of the JP Morgan report on page 11. Enjoy your reading.

**David Lee**  
AILA President

# MITIGATION

## A HOT TOPIC FOR INDUSTRY

by Nicole Sosnowski, KT Journalism

### The latest flood catastrophes declared in Queensland and NSW have again sparked debate about whether insurers should contribute to community mitigation.

Following the storms, floods and cyclones that battered Australia in late 2010 and early 2011, numerous inquiries were launched, seeking to determine how to make communities more resilient.

Two years later, the same questions remain.

In an opinion piece in the *Australian Financial Review* following January's disasters, Insurance Council of Australia (ICA) CEO Rob Whelan said all government levels must urgently invest in infrastructure, like levees and flood barrages, if flood damage was to be reduced.

"The contrast between the way floods affected Queensland and NSW is stark. Many towns in northern NSW were protected by permanent levees, which prevented flooding and potentially a huge recovery bill. Unprotected towns in Queensland suffered widespread damage, with the recovery and restoration bill for governments likely to run into billions of dollars," Mr Whelan said.

### Protecting communities

An ICA spokesperson told *Resolve* insurers were happy to contribute to mitigation discussions, but protecting communities was ultimately a government role. "The cost of mitigation should be met in full by governments; not passed on to the insurance sector."

But Queensland community recovery and resilience minister David Crisafulli

wants insurers to help. "When it comes to levee banks, I don't think we as a state government are trying to bow out of our responsibilities, because we're not. But I believe the Federal Government should share the responsibility, as should councils, and the insurance industry could play an important role as well," he said.

Mr Crisafulli said companies chose different ways to promote their services. "Some put their names on football jerseys; others may consider making a contribution to the wellbeing of the community."

He agreed all governments must stop the "pointless exercise" of rebuilding infrastructure that was washed away in every flood. "You can't expect to keep going through the motions, doing the same thing and expect a different result."

Event	Date declared a catastrophe	Number of claims (as at February 28)	Insured losses (as at February 28)
Tasmanian bushfires	January 5, 2013	1,785 claims	\$87.1 million
NSW bushfires (Coonabarabran region)	January 16, 2013	1,500 claims	\$12 million
Queensland flood and storm damage	January 27, 2013	70,693 claims	\$742 million
NSW flood and storm damage	January 29, 2013	17,150 claims	\$101 million



Queensland Premier Campbell Newman announced in January the government had committed \$5 million to start work on Emerald's Nogoa River Rail Bridge flood mitigation project.

The move was welcomed by insurer Suncorp, which withdrew flood cover in Emerald, and another flood-prone western Queensland town, Roma, last year until the government conducted mitigation works.

Suncorp personal insurance executive general manager Natasha Fenech said the funding was "a major step" in reducing flood risk and premiums in Emerald. A Suncorp spokesperson told *Resolve* the government's decision had put Emerald's flood cover back "on the radar". He said it was something Suncorp would consider after company executives met the town's mayor to discuss a construction timeline.

### Maps developed

A key issue following the 2011 floods was whether sufficient flood information was available to effectively map risk areas. In response, multiple flood portals and maps were launched last year.

An ICA-commissioned flood risk database, called the national flood exclusion zones (FEZ), was released last December. It uses various factors, including elevation, water course proximity, land gradient and historical records, to identify whether an

address is at risk of riverine flooding. It was developed by Risk Frontiers, an independent risk research centre that studies natural hazards.

Mr Whelan said the database should be used in conjunction with the industry's National Flood Information Database, which is based on available local government flood maps. "The [FEZ] database is no substitute for accurate flood mapping, but provides insurers with a way to determine flood probability in areas where no local digital flood mapping has been made available."

Last November, the Federal Government launched an online flood risk portal for communities, planners and insurers. The portal, developed by Geoscience Australia, uses satellite imagery to map floods. It will be fully developed over four years and updated every November before the summer storm season.

### Insurers approached

A potential class action, to be launched by plaintiff law firm Maurice Blackburn (MB) and litigation funder IMF (Australia) Ltd on behalf of Queensland property owners affected by the January 2011 floods, has progressed.

MB and IMF released a flood map in January, showing areas of Brisbane and Ipswich below Wivenhoe Dam that allegedly would not have flooded had the dam been properly operated in 2011.

IMF executive director John Walker said IMF and MB were talking to insurers about the potential action, which could be lodged in April. Options included insurers joining the action; or ensuring their insureds joined, claimed for their losses, then reimbursed insurers if the case succeeded.

"Although IMF is not prepared to confirm the level of support it has from the insurance industry, let alone names, it will, over the next two or three months, prove to be material as the class action is likely to be the only viable process to recover any of the \$1 billion paid out by the industry."

So far, more than 2,000 property owners have signed and more than 2,000 have expressed interest. "The State of Queensland is the jurisdiction of choice, although the state currently does not have a class action regime. The only reason the claim may not proceed is if it doesn't receive sufficient support from flood victims to justify the risks, costs and time involved," Mr Walker said. He said IMF would consider settling out of court.

Queensland Treasurer Tim Nicholls told *Resolve* any government compensation paid to flood victims "comes at a cost to taxpayers". He said the Queensland Government Insurance Fund, worth about \$900 million, would meet claims against the government. "We'll look at the claim, if it is made, and assess it on the basis of the legal principles that apply."



# Black Saturday actions continue to settle

## January 2013 saw horrific bushfires scar the nation.

The Insurance Council of Australia declared bushfire damage in south-east Tasmania's Forcett and Dunalley region a catastrophe on January 5 and damage around Coonabarabran and the Warrumbungle National Park, in northern NSW, a catastrophe on January 16.

By February 8, insurers had received 1,900 claims for the Tasmanian fires, totalling about \$89 million in insured losses, and 1,500 claims for NSW fires, totalling about \$12 million.

The fires revived memories of the devastating February 7, 2009, Victorian bushfires, which left 173 people dead and more than 2,000 homes destroyed or damaged.

Bushfire-affected property and business owners in six regions launched actions against various parties, including power suppliers and Victorian Government departments.

Four of the seven Black Saturday bushfire actions launched in the Victorian Supreme Court have reached court-approved settlements.

### Weerite-Pomborneit action:

On February 1, 2013, Justice David Beach approved a settlement between electricity network owner Powercor Australia Ltd and Weerite-Pomborneit property and business owners. Under

the agreement, Powercor must pay victims 100% of losses they incurred because of the fire, plus interest. Maddens Lawyers principal Brendan Pendergast, acting for the claimants, said the settlement was estimated to be worth \$10 million.

### Beechworth-Mudgegonga action:

Justice Karin Emerton approved a settlement in the Beechworth class action on May 16, 2012. The defendants were electricity provider SPI Electricity Pty Ltd, trading as SP AusNet; SP AusNet's vegetation clearance contractor, Eagle Travel Tower Services Pty Ltd; the secretary of the Department of Sustainability & Environment (DSE); and Parks Victoria. They agreed to collectively pay 45% of each claimant's assessed losses, up to a \$32.85 million cap. Mr Pendergast told *Resolve* about 300 claimants had joined the action.

**Coleraine action:** On March 29, 2012, Justice Beach approved a settlement between Powercor and Coleraine property and business owners. Powercor agreed to pay 55% of each claimant's losses, penalty interest and costs. The compensation figure was not capped. Mr Pendergast said more than 30 claimants had joined the action.

**Horsham action:** Justice Beach approved a settlement in the Horsham class action on December 5, 2011. Powercor agreed to the same settlement terms as the Coleraine action. Mr Pendergast said 219 residents

and a golf club had registered to be included. The club's damages assessment will be heard in court in May.

### Murrindindi-Marysville class action:

Plaintiff law firm Maurice Blackburn (MB) launched a class action on behalf of Murrindindi-Marysville residents on August 7, 2012, against SP AusNet and maintenance contractor ACN 060 674 580 Pty Ltd, formerly Utility Services Corporation Ltd (USC), which is a subsidiary of UXC Ltd. Other defendants include DSE, the Country Fire Authority (CFA) and the State of Victoria. An MB spokesperson told *Resolve* the action had attracted more than 550 registrants. No trial date has been set.

### Kilmore East-Kinglake action:

The class action by Kilmore East-Kinglake property owners and businesses against SP AusNet and USC was set for trial on January 29, 2013, but then pushed back to March. DSE, CFA and the State of Victoria are listed as co-defendants. The MB spokesperson said more than 7,500 claimants had registered.

**Victorian Government action:** The State of Victoria, DSE, Parks Victoria and the Roads Corporation launched action against SP AusNet and USC last year, seeking \$22 million for infrastructure damage from the Kilmore East bushfire. The claim is separate to the action by property owners and businesses.



# Ace to seek High Court appeal

by Nicole Sosnowski, KT Journalism

## Ace Insurance Ltd wants to take an employment dispute to the High Court, seeking leave to appeal against a January Full Federal Court decision.

An Ace spokesperson told *Resolve* the insurer was seeking leave because it “believes the case raises legal questions that are of public importance”.

The long-running case involves five former agents who sold products for Combined Insurance Co of Australia in the 1980s to 2000s. Combined was transferred to Ace on October 1, 2010, and, with it, all Combined’s liabilities.

The central issue was whether the five were employees or not. The agents’ claims, covering 25 years, included annual leave and long service leave entitlements. They alleged a civil penalty should be imposed on Ace for its conduct.

Ace argued the agents were paid commission on premiums they collected; used their own vehicles; did not have income tax deducted from earnings; and issued tax invoices for services provided. Ace argued some of their claims were time barred and the right to annual and long service leave did not apply to agents, even if they were employees.

Ace also argued the agents were estopped from asserting they were employees because of a common assumption shared with the insurer that they were not or, alternatively, by their own conduct when executing contracts

under which they acted as independent contractors.

On October 25, 2011, Federal Court Justice Nye Perram found the five were employees, not independent contractors, so were entitled to leave benefits.

Ace tried to appeal against that decision before a scheduled April 17, 2012, hearing when Justice Perram was to determine quantum, interest and penalties. But Federal Court Justice Geoffrey Flick dismissed the insurer’s application for leave to appeal on March 14, telling it to wait for Justice Perram’s ruling.

On July 31, Justice Perram ordered Ace to pay the five almost \$500,000 in compensation, plus a \$10,000 penalty for two civil breaches. He said the penalties were “largely for general deterrence”.

On August 13, 2012, Justice Perram agreed he had miscalculated one employee’s accrued annual leave entitlement, reducing it from \$325,671.38 to \$69,766.44. After deductions for tax, the agents were entitled to about \$200,000 between them.

Ace appealed against both the liability and re-calculated quantum rulings. On August 28, the Federal Court ruled it did not have to pay the five until the outcome of its appeal.

On January 25, Full Federal Court Justices Robert Buchanan, Alan Robertson and Bruce Lander dismissed Ace’s appeal, but made no costs

order. Justice Lander said: “[Justice Perram] was right in concluding that, absent [Ace’s] own belief they were not employees and the structuring of their financial affairs to that effect, there were no other indicia to support [its] contention they were independent employees.”

In commentary, Bartier Perry executive lawyer James Mattson said the law does not provide a simple, satisfactory test to determine if workers were employees or independent contractors. “The status of a worker is dependent on a range of factors and the vibe of the situation.”

He said the Full Federal Court decision explained various approaches in determining worker status. The court approached the issue by adopting a range of considerations and tests, followed by a judgement call based on persuasion and feel.

Mr Mattson said businesses could control the levers that determined whether a worker was, at law, an employee or contractor. Contractual descriptions of the relationship were relevant, but contractual terms dealing with delegation, the obligation to work, provision of tools, and payment and result, were more decisive.

Equally important was how the relationship operated in practice. “Day-to-day dealings must reflect the contract. Having workers establish companies, submit invoices or use ABNs did not guarantee they were contractors,” Mr Mattson said.

*(Ace Insurance Ltd v Trifunovski [2013], FCAFC 3, 25/1/2013)*

# COURT HAS 'LAST SAY' IN RELATIONSHIPS



Peter Rashleigh

## Disclosure and clear, unambiguous agreements help overcome ethical difficulties in dual client relationships, where lawyers act for the insurer and the insured, says DLA Piper consultant Peter Rashleigh.

But he warned courts ultimately had the last say. "If a court perceives the lawyer is acting unfairly or unconscionably, or the insured is unfairly compromised, it is probable the court will intervene."

He told the AILA Victoria branch although insurers were the paying clients, lawyers who also represented insureds still owed them the usual fiduciary duties. "The Australian position is a lawyer in that position has two clients and owes all the duties and obligations to each of them."

He said all lawyers had two essential duties:

- the duty of confidentiality; and
- the duty not to act against the interests of former clients, including not using confidential information acquired against them.

Mr Rashleigh said under common law and professional conduct and practice rules, lawyers must avoid conflicts between two or more current clients.

The rules usually involved signing up each party on the basis they consented to the lawyer acting for both, even though the lawyer may be unable to:

- disclose to each client all information they gain; or
- give advice to one client that is contrary to the interests of the other.

He said the sign up must provide that, if a real conflict emerged, the lawyer would stop acting for both parties.

Lawyers often obtained reservation of rights letters from insureds to avoid any implications of a lawyer-client relationship.

The letters allow insureds to specifically consent to various terms, including:

- any information the firm receives while it investigates, defends or settles a matter can be given to the insurer and be relied upon;
- the firm may advise the insurer about its liability to indemnity, but can continue to investigate, defend or settle the claim on behalf of the insurer and the insured. All communications between the firm and the insurer on indemnity are privileged; and
- if a conflict arises between the insured's and the insurer's interests, the firm may stop acting for the insured and continue to act for the insurer.

## Act promptly to deny

However, Mr Rashleigh said there was a question as to whether reservation of rights letters, where indemnity was not determined, met the rules' requirements. He warned the letter may not be effective where an insurer received information and formed a view the insured was not entitled to indemnity, yet continued to conduct a defence.

"In those circumstances, the insurer should act promptly to deny indemnity and the lawyer should withdraw."

He said it was important lawyers maintained clear communication so insureds understood their position and agreed in writing. "Anticipation of problems is vital, including when it is appropriate to tell the insured to seek independent advice."

Mr Rashleigh said it was vital issues were dealt with immediately so a matter did not proceed on any false assumptions.

He discussed ethical conundrums that may arise in various scenarios, including:

- where an insurer takes over the conduct of proceedings before indemnity is granted;
- where granting indemnity is based on known circumstances and a lawyer continues to act for both parties on the basis the facts may emerge, which may entitle the insurer to withdraw indemnity;
- where indemnity is granted to some but not all parts or causes of actions included in a claim;
- where an insured is underinsured;
- where an insured carries a significant excess and the insurer wishes to settle the claim; and
- where an insurer exercises subrogation rights or the insured exercises recovery rights.

# Improved industry outlook for 2013

## The 2012 JP Morgan Taylor Fry General Insurance Barometer says all insurance lines are expected to improve in 2013, but analysts warn those predictions were made before the four declared catastrophes in 2013.

It is the first edition of the barometer, a joint survey between JP Morgan and Taylor Fry. The publication continues from the annual JP Morgan Deloitte General Insurance Survey. Results are based on responses from 15 underwriters, nine brokers and three reinsurers.

The barometer found combined ratios (CR) in commercial and domestic lines, particularly property classes, improved overall in 2012. The CR was 98% in commercial classes, compared to 2011 when the industry made underwriting losses. For domestic lines, the CR was 89%, improving from 98% in 2011.

Taylor Fry actuary Evelyn Chow said the industry was forecasting CRs to drop to 94% for commercial lines and 87% for domestic lines in 2013. However, she warned the estimates were made before flooding in Queensland and northern NSW, and bushfires in south-eastern Tasmania and northern NSW, in early 2013.

JP Morgan senior insurance analyst Siddharth Parameswaran said 2012 was better for the industry, primarily because of lower catastrophe activity than 2011. The Australian economy's 2013 outlook was more robust than international markets, which should mean greater growth prospects for Australian insurers, he said.

But the outlook was not all positive. "The big concern for insurers comes from low yields on fixed interest investments that [insurers] in Australia typically hold backing their liabilities. For long-tail products, where claims generally take longer to settle, this can

make substantial differences to returns in the absence of adequate premium rate increases," Mr Parameswaran said.

Two classes of concern for 2013 were NSW CTP, where regulatory and government pressures have constrained premium rate increases, and public liability.

Rates for personal lines increased 9% in 2012, driven by householders and increased deductibles in many classes. Some premium increases were driven by increased flood insurance coverage that was previously unavailable.

### Premiums increase

Within commercial classes, increases were in property (9%) and workers' compensation (Northern Territory, Tasmania and the Australian Capital Territory, 8%). Other commercial classes remained soft. Overall, rates in commercial classes increased 5% in 2012.

"For 2013, the industry is forecasting similar increases in domestic classes, driven by home insurance again. In commercial classes, the industry is expecting an increase in premium rates," Mr Parameswaran said.

Ms Chow said the biggest concern in commercial insurance centred on longer-tail products. "Substantial capacity, particularly from overseas, appears to be stalling prospects for insurers to make up for sharply declining profitability in those lines," she said.

### Claims decrease

Globally, catastrophe claims were below trend in 2012, and Australia's gross insured losses fell significantly compared to 2011. "Overall, 2012 estimates for catastrophes were less than what the industry forecasted at

the start of the year," Mr Parameswaran said. "That seems set to reverse in 2013, based on the experience to date.

"Claims trends in property and short-tail products, where claims are generally paid shortly after the incident or loss occurs, improved significantly in 2012, driven by lower catastrophe activity," he said.

### Regulatory changes

The barometer found 67% of underwriters believed regulatory changes and compliance would be a major concern in 2013, followed by the impact of low interest rates on profit trends (58%) and competition concerns (50%).

All brokers cited staff retention and a lack of new blood as key concerns.

Reinsurers identified regulation and regulatory changes as the most important issue for the industry. Most participants said the abundance of reinsurance capacity in the market, from existing and new entrants, was an over-arching issue.

**'Regulatory change a major concern for 2013'**

# Sydney to host AIDA Presidential Council

by AIDA President Michael Gill



## As busy as 2012 was for AIDA on the world stage, 2013 promises to be more so.

The Sydney-based planning committee for the September 2013 AILA National Conference is well advanced in its preparations for another great conference in AILA's foundation city.

It will be held in conjunction with a meeting of the AIDA Presidential Council. Apart from the Presidential Council and Executive Committee's normal working meetings, several AIDA working parties (WPs) will meet in Sydney at the same time. The WPs (and their Australian liaison person) include:

- Distribution of insurance
- Civil liability
- Consumer protection - Greg Pynt
- Reinsurance - Ray Giblett
- Climate change - Chris Rodd
- Motor insurance (possibly a joint session with the climate change WP)
- New technologies, prevention and insurance (to be confirmed)
- Personal Insurance and pensions

AILA members are welcome to attend all AIDA meetings, including the WP meetings in Sydney. An AILA representative is being appointed to liaise with each WP. If you are interested in participating in the meetings, I suggest you contact them.

AIDA's first meeting for 2013 is on May 7-10 in Lisbon, Portugal, at the time of the XIII CILA Congress. CILA is the acronym for the regional grouping of 21 Spanish/Portuguese-speaking AIDA national chapters, mostly from Central and South America. The CILA program high points are:

- Insurance consumer: trends, parameters and protection

- Microinsurance and globalisation of insurance cover
- Life insurance: cover limitation, pre-existence, previous medical exam
- New technologies and insurance
- Arbitration: jurisdiction clauses and the law applicable to a reinsurance contract
- Insurance supervision: rules of investment, bankruptcy's parameters, reference of regulation, rating agencies' role
- Climate change and its effects in insurance and reinsurance
- Harmonisation of insurance contract law in Europe

AIDA WPs meeting in Lisbon at the same time include:

- Accumulation of claims and subrogation
- Civil liability
- Climate change
- Consumer protection and dispute resolution
- Motor insurance
- State supervision of insurance
- New technologies, prevention and insurance
- Distribution of insurance products
- Marine insurance
- Reinsurance
- Personal insurance and pensions

A major part of the Presidential Council and Executive's current work is preparing for the next World Congress in 2014. It will be hosted by the Italian Chapter and is partially intended to celebrate the 50th anniversary of AIDA's first World Congress in Rome in 1962.

Initially our Italian colleagues were keen to split the congress between Rome and Florence. Some aspects of the proposal were very attractive, but the Executive and Presidential Council were concerned about logistical challenges.

Having reflected on that, the Italian Organising Committee will now hold the congress in Rome. There will be opportunities for attendees to travel to Florence and other Italian destinations before or after the congress.

The five major World Congress themes and key reporters for each are:

- Arbitration (Paolo Bernadini)
- Discrimination in insurance (Dr Birgit Kuschke)
- On-line insurance (Samim Unan)
- Preventative measures (Samantha Traves)
- Transparency, conflicts of interest and intermediary remuneration (Giovanna Volpe Putzolu)

My personal congratulations to Samantha Traves, who has been a great contributor to AILA over many years and now, as a member of AIDA's Scientific Council, receives due recognition by her appointment to have responsibility for one of the major topics.

AILA's national board has allocated an Australian representative to answer a questionnaire and be involved in preparing the Australian response on each topic. They are:

- Arbitration - Peter Mann
- Discrimination - To be confirmed
- Online insurance - David Lee
- Preventative measures - Greg Pynt
- Transparency - Mark Radford

# NZILA conference shifts south to the snow

by Kate Tilley, *Resolve* Editor



## The New Zealand Insurance Law Association traditionally rotates its annual conference between the three major cities – Wellington, Auckland and Christchurch.

But, with 2013 allocated to earthquake-stricken Christchurch, NZILA committee member and past president Richard Johnstone had a problem. “With so much damage in the city, venue options were very limited,” he told *Resolve*.

“We had mixed feelings about going outside the city, but have opted for Queenstown.”

Queenstown is six hours drive south of Christchurch; two hours by air from Auckland; and three hours from Sydney. Surrounded by mountains and nestled on the shores of Lake Wakatipu, its scenery is stunning.

The September 5-6 date means ample snow, so Richard is encouraging NZILA and AILA members to combine the conference with a ski and adventure holiday. He is also keen to get new NZILA delegates from Dunedin and Invercargill to attend.

The program is currently being prepared, but one thing Richard is certain about – it won't be dominated by earthquake commentary. He says conference delegates have already heard much about the devastation wreaked by the quakes that have struck the Canterbury region since September

2010, so the focus will be on technical and practical insurance and liability issues.

The conference starts with a Wednesday night welcome, followed by 1-1/2 days of sessions, finishing on Friday with a choice of “a long lunch” or skiing. The Heritage Hotel is the conference venue, with the conference dinner offsite.

Richard grew up on a mid-Canterbury farm and attended the University of Canterbury. He joined Wynn Williams as a law clerk, his first law job, in 1985.

The 162-year-old firm has traditionally had a strong litigation practice, including personal injury work before NZ established the Accident Compensation Corporation. Richard has built on that to have a dedicated insurance law practice, with nine personnel.

Since September 2010, there's been major change, and not just because Wynn Williams's offices were so badly damaged they had to move and rebuild – an experience Richard outlined in detail to AILA National Conference delegates in Tasmania last November.

Wynn Williams has expanded, opening an Auckland office since the quakes, but home base remains Christchurch.

With the demise of Christchurch-based insurer AMI, Wynn Williams lost a major client. Richard's primary work is now policyholder sourced, but the firm still has a major advice and

dispute resolution role with the claims management company, Southern Response Earthquake Services Ltd, established after AMI's policyholder book was sold to IAG New Zealand.

Wynn Williams has worked for insurers and policyholders, which is essential now underwriters are based in Auckland, Sydney or London. “It's a battle to keep work local. Claims managers seem to like their lawyers opposite them at the desk, not at the scene of the event,” Richard said.

Richard, his wife Karen, and their son Thomas, 10, never really contemplated leaving the city after the quakes. They decided it was still the right place for Thomas to grow up, and they like the vibe of a city undergoing revitalisation and rebuilding.

Karen, a local government consultant, is completing a PhD in a related field, so it made sense on many levels to stay. “This is a great place and time to be an insurance specialist,” Richard said. “Every day I deal with challenging policy interpretation and claim response issues.”

In Queenstown this year, share a Central Otago pinot noir with Richard. He attests to its terroir but acknowledges he's no wine expert. “I collect only for consumption,” he told *Resolve*.

But he was smart enough to build a timber-rack wine cellar in the family home. Not one bottle broke during the quakes and aftershocks.

## ‘Break out’

(Noun) bursting from confinement; an escape

(Adjective) denoting or relating to groups which breakaway from a conference or gathering for discussion



## Queenstown awaits!

For more information about the conference program or ski field and adventure options, visit [www.conference.co.nz/nzilaqueenstown](http://www.conference.co.nz/nzilaqueenstown)

## 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.

## Western Australia

by Stephen Williams

The year was off to a good start in WA with the breakfast seminar program featuring two experienced insurance practitioners giving their insights into some interesting problems.

On February 20, Greg Pynt, Visiting Fellow at the University of Western Australia, was scheduled to re-present a paper he originally gave at the national conference in Tasmania, *Doing the right thing is sometimes the right thing to do (mitigation in the insurance law context)*.

On March 20, Sean Mullins, special counsel at Downings Legal, is scheduled to present a paper on the ethical problem of acting for both an insured and an insurer.

The WA branch is excited to be involved, together with the University of WA and the UK universities of Southampton and Exeter, in an initiative on May 17, entitled *Insurance Gangnam Style* or, in plain English, an insurance masterclass. The CPD-accredited day-long seminar has been put together by Greg Pynt and will definitely be worth attending.

Place:  
Parmelia Hilton Perth Hotel,  
Mill Street, Perth

Date:  
Friday, May 17

Time:  
8.30am for 9am.  
Finishing at 4pm

Co-ordinator:  
Greg Pynt  
(email: waca36@gmail.com)

### THE PROGRAM

8.30am:  
Registration, coffee and tea

9am:  
Opening address: Justice Ken Martin

9.10-10.10am:  
**Post-contractual utmost good faith**

Dr Ozlem Gurses, University of  
Southampton - At common law

Associate Professor/Deputy Dean Dr  
Brenda McGivern, University of WA -  
Under the *Insurance Contracts Act*

10.15-11.15am:  
**Section 54 of the *Insurance Contracts Act 1984 (Cth)***

Peter Mann, Clayton Utz - How to identify an insurer's core promise and the scope of s54(5)(b)

Dr Ozlem Gurses - Some observations from Southampton

11.20-11.35am:  
Coffee and tea

11.35-12.35pm:  
**How to determine whether there is double insurance and how to calculate contribution if there is**

Aysegul Bugra, University of  
Southampton - How it is done in  
New Zealand

Professor Rob Merkin, University of  
Exeter - Some observations from Exeter

Chris Rimmer, Jarman McKenna -  
Some observations from Australia

12.40-1.15pm:  
Lunch

1.20-2.20pm:  
**Aggregation clauses**

Professor Rob Merkin - The English approach

Peter Mann - Observations from  
Australia

Aysegul Bugra - The New Zealand experience

2.25-3.25pm:  
**Who bears mitigation costs?**

Professor Rob Merkin - I say the insured

Greg Pynt - I say the insurer

Dr Ozlem Gurses - It depends

3.30pm: Closing address

3.40pm: Coffee and tea

I welcome two new faces to the WA committee for 2013, Tara Gregory, from QBE, and Justine Siavelis, from Gilchrist Connell, and thank departing member Maree Ferguson, of Jarman McKenna, for her hard work over the past few years.

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## New South Wales

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by Penny Paterson

Welcome to 2013 – a huge year for NSW with the National Conference in Sydney on September 18-20.

Planning is now in progress and the AILA website will be updated regularly to keep you informed.

Twilight Seminars start on April 10. Topics include:

- Everything you need to know about ISR policies and were too afraid to ask
- Reinsurance unmasked
- Merchant banks, rating agencies and liability for complex financial instruments
- Civil liability update
- Is the worst over for the banking and financial services sectors?
- Directors' personal liability

The Young Professionals up and running for 2013 with planning in progress for the first event, a casino evening at the Ivy Ballroom.

Planning has started for the annual luminaries dinner and an event at the GPO later in the year. Any suggestions for themes or venues that would appeal to Young Professionals would be appreciated.

The Ron Shorter Award is in the early stages of planning. The award is specifically for younger members of the insurance industry and provides professional coaching to assist with presentation skills. Finalists get the opportunity to present in a seminar format to members.

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## South Australia

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by Julie Kinnear

The SA committee has been hard at work setting the 2013 program, holding a planning meeting on February 5.

The first event, the annual AILA-ANZIIF half-day joint seminar *General Insurance Law - An Annual Review* was scheduled for February 27 at the Crown Plaza Adelaide. The first breakfast briefing was scheduled for March 25.

Thanks to thank immediate past president Anthony Hillary for his hard work and his continued contribution to AILA not only at state level but as a member of the national board. We welcome Carlee Smyth onto the committee and farewell Fiona Raschella and Patrick Coyle. Their contribution will be missed.

I look forward to working with the 2013 committee, comprising Craig Lind (secretary), Vernon Sawers (treasurer), Anthony Hillary, John Homburg, Barrie Datson, Scott Duel, David Farrugia, Michael Fotheringham, Mark Keam, Maria Rossi, Carlee Smyth, Lucille Stewart and Michael Tilley and, of course, the amazing and tireless secretariat Margaret Cloy.

The SA committee looks forward to a busy year.

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## Queensland

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by Tim Hancock

AILA Queensland has a new committee for 2013:

President:  
Rebecca Stevens, Carter Newell

Secretary:  
Tim Hancock, Quinlan Miller & Treston

Treasurer:  
Joanne Wilson, Calabro SV Consulting

Committee:  
Nick Burkett, Lexon Insurance; Chrissy Cheesman, Woolworths Ltd; Robert Cooper, Cooper Professional Risks Pty Ltd; Peter Diskin, Gallagher Bassett; Michael Donnan, Suncorp Insurance; David French, Willis Australia; Berren Hamilton, Moray & Agnew; Lana Head, Cooper Grace Ward; David Jesser, McInnes Wilson; Regina Michaletos, Shand Taylor Lawyers; Melanie Quixley, Barry Nilsson Lawyers; Nina Shofay and Brett Solomon, Dibbs Barker; Sophie Vidakovic, Minter Ellison; Dee Wood, Carter Newell; and Kate Farrell, Proclaim (immediate past president).

AILA Queensland and ANZIIF will host *General Insurance Law - An Annual Review* on a date to be determined. The seminar aims to give participants a snapshot of recent court decisions, legislation and commentary on selected legal issues affecting the general insurance industry.

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## Tasmania

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At the annual general meeting in November the following office-bearers were elected for 2013.

President – David Farmer, Loss Adjuster

Treasurer – Paul Driessen, Willis

Committee – Robert Webster, Steve Knight and Audrey Mills (M&K Dobson, Mitchell & Allport); Peter Forbes-Smith and Steven Smith (Hunt & Hunt); William Callaway (RACT Insurance); Sally Kendall (Zurich); Lionel Banks (Willis); and Luke Taylor (Page Seager).

The committee is currently putting together an interesting program of guest speakers and topics for the year ahead.

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## Victoria

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by Cameron Roberts

AILA Victoria hosted a seminar, titled *Proportionate liability a decade on*, on November 20.

The event was well attended and resulted in an interesting panel discussion and great feedback. Thanks to committee members Raff Pisano and Nieva Connell for organising the event and to Minter Ellison for providing the venue.

AILA Victoria has started 2013 where it finished in 2012 with a sold-out seminar on *Ethical issues for insurance professionals*. Thanks to Peter Rashleigh, of DLA Piper, for agreeing to present the seminar and CGU Insurance for providing the venue.

The Victorian branch annual general meeting was scheduled for February 27 in the Plaza Ballroom at the Regent Theatre. Ross Gillies QC is guest speaker for what is traditionally a marquee event.

# PEOPLE

Insurance law specialist and AILA member **David Gerber** has joined the Clayton Utz insurance and risk team as a partner.

Brisbane insurance law firm Barry. Nilsson has promoted **Melanie Quixley** to partner in its insurance and health team. **Kylie Powell** has been promoted to senior associate.

Moray & Agnew has appointed **Shayne Thompson** a partner in its Sydney insurance division. He was previously an insurance partner at Middletons (now K&L Gates). He conducts commercial litigation and provides coverage and policy drafting advice to insurers.

The Underwriting Agencies Council has welcomed new board directors following the AGM. The two new directors are **Peter Bailey** (Dual) and **Steve Boucher** (Sportscover). Three retiring directors, **Heath Amber**

(Millennium), **Linda King** (Sterling) and **Jo Lindsay-Eschbank** (Creative Insurance), were re-elected. Chairman **John Iles** (SUA) and directors **Lyndon Turner** (Nautilus) and **Peter Fryer** (Catlin) were not required to stand for re-election.

Wesfarmers Insurance managing director **Rob Scott** will become Coles' finance director, effective from February. Wesfarmers Insurance finance director **Anthony Gianotti** will temporarily act as managing director while a permanent replacement is sought.

RAC Insurance CEO **Mike McCarthy** and former Allianz Australia managing director **Terry Towell** resigned from the Insurance Council of Australia board in December. **Daniel Fogarty**, CEO, General Insurance, Zurich Financial Services Australia, and **Niran Peiris**, managing director of Allianz Australia, have joined the board to replace them.

Calliden Group has appointed **Mike Hooten** executive responsible for Calliden Agency Services and **Stephen Fay** executive responsible for Calliden Insurance Ltd.

Whitbread Insurance Brokers has appointed **John MacGregor** NSW and Queensland general manager to spearhead expansion into those states' strata and commercial insurance markets.

Deloitte has appointed former Suncorp executive general manager **John Debenham** to lead its financial services practice in Queensland.

QBE has appointed **David Fried** as Asia Pacific CEO from April 8.

# DIARY

For more information on AILA events, go to [www.aila.com.au](http://www.aila.com.au)

## March 19 - March 21

2nd Annual General Insurance Exchange  
Sofitel Wentworth Sydney  
Go to [www.aceevents.com.au/insurance](http://www.aceevents.com.au/insurance)

## May 17

Insurance Gangnam Style  
Parmelia Hilton Perth Hotel, Mill Street,  
Perth  
Co-ordinator:  
Greg Pynt E: [waca36@gmail.com](mailto:waca36@gmail.com)

## May 23 - May 24

AILA-Queensland Law Society  
Insurance Law Intensive  
Gold Coast

## August 1 - August 2

Claims Convention  
Sheraton Hotel, Sydney

## August 15 - August 18

Council of Queensland Insurance  
Brokers 2013 convention  
Novotel Twin Waters Resort, Sunshine  
Coast, Qld

## September 5 - September 6

NZILA 2013 conference  
Queenstown  
*Break out*

## September 18 - September 20

AILA 2013 National Conference  
AIDA Presidential Council meeting  
Sydney  
*Wide exposure safe harbour*

## October 12 - October 15

National Insurance Brokers Association  
Annual Convention  
*New Frontiers - Building Better Worlds*  
Melbourne

## September 29 - October 2, 2014

AIDA World Congress  
Rome, Italy

