

Masterclass presented by the Australian
Insurance Law Association and the
University of Western Australia



SIR NINIAN STEPHEN INSURANCE LAW MASTERCLASS

Insurance Gangnam Style (unique to Perth)

Date: All day, Friday, 22 May 2020

Place: The Melbourne Hotel, 33 Milligan Street,
Perth, Western Australia

Masterclass commences
at 8.30am for a 9.00am start,
finishing at 4:30pm.

Online registration: www.aila.com.au

Contact: Greg Pynt

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PRESENTED BY

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SIR NINIAN STEPHEN INSURANCE LAW MASTERCLASS

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8:30AM

Registration, coffee and tea

11:20AM

Coffee and tea

9:00AM

Opening address: The Hon. Justice Ken Martin

11:35AM

Employers' indemnity insurance

Chairperson: Andrew Lillico, Commercial Claims Section Manager, Insurance Commission of Western Australia

9:10AM

Remedies available to an insured

Part I – Available remedies for breach of the duty of utmost good faith; damages for repudiation; damages and the impact of Globe Church

Chairperson: Prof. Rob Merkin QC, Lloyd's Professor of Commercial Law, University of Exeter

1. The weaponization of utmost good faith, what and whose remedy? Peter Mann, Barrister, Ground Floor, Wentworth Chambers, Sydney (20 min)

2. Repudiation of an insurance contract; acceptance of repudiation; damages.

Samantha Traves, Member of the Queensland Civil and Administrative Tribunal (25 min)

3. Cause of action for indemnity under a first party insurance policy: Remedy: Damages - the impact of *Globe Church Incorporated v Allianz Australia Insurance Ltd* [2019] NSWCA 27.

Felicity Maher, Barrister, Quayside Chambers, Perth (20 min)

CPD points – CA4: Substantive Law (Legal Knowledge) 1

10:15AM

Remedies available to an insured

Part II – Debt; declarations and injunctions; Specific performance

Chairperson: His Honour Judge John Staude

4. When should an insured consider making a claim against an insurer in debt? Fred Hawke, Consultant, Clayton Utz, Melbourne (20 min)

5. Declaratory relief against insurers.

Dr Brenda McGivern, Member of the State Administrative Tribunal (25 min)

6. What remedies are available to an insured in the face of an insurer's or an insurer's lawyer's conflict of interest?

Peter Rashleigh, Consultant, DLA Piper, Melbourne (20) minutes

CPD points – CA3: Ethics and Professional Responsibility 1

First part of the problem:

The insured, an electrical contractor, does electrical maintenance work for a mining company at its gold mine in Western Australia pursuant to a 3 year contract made between the contractor and the mining company.

The contract includes a wide ranging indemnity clause in favour of the mining company (**contractual indemnity**).

One of the insured's electricians is injured at the gold mine due to the negligence of the contractor and of the mining company.

The insured holds an Employers' indemnity insurance policy (**EI policy**).

7. To what extent, if any, does the EI policy cover the insured for its liability to the mining company pursuant to the contractual indemnity?

Theo Lampropoulos SC, Barrister, Central Law Chambers, Perth (20 minutes)

Second part of the problem:

A Principal Indemnity extension to the EI policy covers a 'Principal' of the insured for its workers' compensation and common law liability to the insured's workers.

8. To what extent, if any, is the mining company covered for its common law liability to the electrician if the extension "only applies if you [the insured] are entitled to indemnity under the policy in respect of a legal liability to pay damages" and on any view, the electrician's degree of whole person impairment is:

a) less than 15%?

b) between 15% and 25%?

Chris Rimmer, Partner, Sparke Helmore, Perth (25 min)

11:35AM**Continued**

9. Does the extension cover the mining company for its common law liability to the electrician if it defines 'Principal' as "a party for whom you perform work", and the insured:

- a) is a labour hire company (not an electrical contractor); and
- b) only supplies electricians to the mining company?

Alex Lustig, Partner, Jackson McDonald, Perth (20 min)

CPD points – CA4: Substantive Law (Legal Knowledge) 1

12:40PM**Lunch****1:40PM**

Client legal (legal professional) privilege; insurance broker's duty of care; insurance procurement clauses

Chairperson: Stephen Davies SC, Francis Burt Chambers

10. An insured starts a controlled burn-off on her farming property in the Nannup area. The fire escapes onto a neighbouring property. The insured immediately notifies her liability insurer of the possibility of a claim against her by the neighbouring farmer. The insurer immediately engages a loss adjuster to investigate the circumstances of the fire and the damage done by it.

In due course, the neighbour sues the insured over the escape of the fire. The insurer appoints a lawyer to conduct the insured's defence of the action. Liability is denied. The insurer provides the lawyer with a copy of the loss adjuster's report.

Is the insured obliged to discover the report? If so, can the insured claim privilege for it? If the insured is not obliged to discover the report, can the insurer claim privilege over it in response to a subpoena for its production?

Dr Ozlem Gurses, Reader of Insurance & Commercial Law, King's College, London (25 minutes)

11. What does an insurance broker need to do to discharge the duty of care it owes its client the insured when arranging insurance?

Prof. Rob Merkin QC, Lloyd's Professor of Commercial Law, University of Exeter (20 minutes)

12. Insurance procurement clauses: Are they worth the trouble?
Deborah Templeman, Principal, Gilchrist Connell, Perth (20 minutes)

CPD points – CA4: Substantive Law (Legal Knowledge) 1

2:45PM

Technology, innovation and the insurance industry

Algorithmic contracts, Artificial intelligence, Big data – capture, storage, analytics and use, Biometrics, Blockchain, Chatbots, Fembots, Cyber risk, Insuretech (Fintech, Regtech), parametric insurance, Phishing, Phreaking, smart contracts, The Internet of Things

Chairperson: Justine Siavelis, Principal, Gilchrist Connell, Perth

13. Drones - regulation and insurance issues:

Dr Tony Tarr, Managing Director, Robyn Ashton Consulting Pty Ltd and Prof. Julie-Anne Tarr, Queensland University of Technology (15 min)

14. Insurance contracts by algorithm and the equitable doctrine of undue influence.

Prof. Natalie Skead, Dean and Head of School, UWA Law School and Dr Marco Rizzi (15 min)

15. Application of smart (self-executing) contracts to property and casualty insurance: risks, rewards and legal issues.

Dr Ozlem Gurses, Reader of Insurance & Commercial Law, King's College, London (15 min)

16. 'Big data': Ethical use issues.

Dr Ian Enright, Adjunct Professor, University of Technology, Sydney (20 min)

CPD points – CA4: Substantive Law (Legal Knowledge) 1

3:50PM**Closing address****4:00PM****Drinks and nibbles**

Also accredited for 5 NIBA CPD points.

The Rt Hon Sir Ninian Stephen

This annual Masterclass is named after the Rt Hon Sir Ninian Stephen (1923-2017) PC, KG, AK, GCMG, GCVO, KBE, QC, former Justice of the High Court of Australia and of the Supreme Court of Victoria, Judge of the International Court of Justice, Governor-General of Australia and Australian Ambassador for the Environment.

Sir Ninian made significant contributions to the development of insurance law. His judgment in the matter of *The Distillers Company Biochemical (Australia) Pty Ltd v Ajax Insurance Company Ltd* [1974] HCA 3; (1974) 130 CLR 1, is still regularly referred to more than 40 years later as the starting point for any discussion in relation to the post-contractual duty of utmost good faith and aggregation clauses.

There was a great deal of publicity about Sir Ninian's appointment as Governor-General of Australia. Apparently, during his flight from Melbourne to Canberra to take up that position an air hostess approached him and said: "I know you from somewhere. What do you do?" Sir Ninian replied that he was "between jobs". The air hostess responded: "Never mind dear, something will turn up."

Dr Ian Enright

Ian is a lawyer, academic, author, insurance executive and company director. He is an Adjunct Professor of Law at University of Technology, Sydney and formerly the International and Australian Counsel for the Reinsurance Group of America. His book *Professional Indemnity Insurance Law* was described when he was awarded the British Insurance Law Association Book Prize as "the most notable contribution to literature in the field of law as it affects insurance". Ian was the independent reviewer of the General Insurance Code of Practice. With Professor Rob Merkin QC, he is the author of the latest edition of Sutton on Insurance Law, Australia's leading insurance text book. Ian was also the Geoff Masel lecturer in 2015: *The Insurance Social Contract*. He was awarded the AILA Insurance Law Prize in 2015 in recognition of his contribution to Insurance Law and Insurance Law Education. Ian was awarded the degree of Doctor of Philosophy in Law by the University of Exeter. Ian advises government, regulators and insurance industry bodies on regulation and policy matters.

Ian is the Founding Chairman, Australian College of Insurance Studies (ACIS), a not-for-profit entity in development, comprising leading academics, lawyers and insurance practitioners. The aim is to produce academically and practically educated insurance practitioners for the insurance and financial services industries.

Dr Ozlem Gurses, Reader of Insurance Commercial Law, Kings College London

Ozlem is Reader of Insurance and Commercial Law. Prior to joining King's College London, Dr Gurses taught a number of different commercial law subjects at the Norwich and Southampton Law Schools.

Ozlem has undergraduate and postgraduate degrees in law from the University of Istanbul. She also studied LLM in Maritime Law (graduated with distinction) at the University of Southampton who, following her masters' degree, provided full funding for her PhD degree in reinsurance law.

Ozlem is the author of *The Law of Compulsory Motor Vehicle Insurance* (Informa, 2019), *Marine Insurance Law* (Routledge, 2016, 2nd ed) and *Reinsuring Clauses* (Informa, 2010). She updated *Insurance of Commercial Risks* (Sweet and Maxwell, 2016) in its preparation for the 5th edition.

Ozlem regularly presents her research at home and abroad. Most recently she organised a conference on the law of compulsory motor vehicle insurance at King's College in April 2019. She sits in the Presidential Council of International Insurance Law Association/Association Internationale de Droit des Assurances (AIDA), is the Vice-chair of the Reinsurance Working Party of AIDA, and also a Committee member of the British Insurance Law Association.

Ozlem has taught insurance and marine insurance law on several different short courses as a visiting lecturer in Greece, Italy, Germany and Singapore.

Fred Hawke

Fred has extensive legal and practical experience in insurance law, claims management and insurance company operations. Before joining Clayton Utz, he was directly employed in the insurance industry for more than 20 years and was responsible for negotiating and settling insurance and reinsurance disputes involving some of Australia's largest liability losses.

Since joining Clayton Utz twenty years ago, Fred has practised extensively in the field of insurance and reinsurance law, with special emphasis on regulatory and compliance issues, captive insurer arrangements, Bankers Bonds, crime and financial liability insurances, facultative and treaty reinsurance and retrocession arrangements. Trade credit and insolvency and political risk insurance are also areas in which he has had considerable experience, both in the insurance industry and in legal practice.

He is a well recognised and prolific writer and presenter on insurance law and insurance industry related legal matters and regularly teaches Insurance in the Graduate Studies Program at Melbourne University.

Fred is a member of the Editorial Board and former General Editor of the *Insurance Law Journal* published by Lexis Nexis and Former Chair of the Journal Advisory Council of the Australian Insurance Institute. He is also the Australian Reporter for the Center for International Legal Studies, and the author of the Chapter on Australia in Oceana Publications Inc's loose-leaf publication *International Insurance Law and Regulation*, as well as a number of other papers and articles on topics of insurance law and claims management.

**Theo Lampropoulos SC,
Barrister, Central Law
Chambers, Perth**

After working for the State Crown (undertaking both civil work and criminal prosecutions) and then in private practice, Theo joined the independent Bar in 1988, and took silk in 2007.

Theo is a past vice president, and president of the WA Bar Association. He has also been a WA representative on the Australian Bar Association, and has served on the Legal Profession Complaints Committee. Theo has delivered papers involving various areas of professional practice, and has been a regular speaker at Bar Readers' courses. Theo has extensive litigation experience, and practices predominantly in the areas of personal injuries litigation (representing plaintiffs and defendants in cases involving medical and other professional negligence, civil aviation law, workplace and motor vehicle accidents, asbestos exposure, and public liability), substantial property damage claims, insurance law (including policy interpretation, professional indemnity and disability policy disputes), and wills and estate disputes (involving testamentary capacity and claims under the *Family Provision Act*).

**Alex Lustig,
Partner, Jackson
McDonald**

Alex practises insurance law in the areas of employers' indemnity, public and product liability and general insurance.

Alex and his team act for some of the world's largest insurers, Lloyd's Syndicates, Australia's largest retail insurers, some of the largest oil and gas companies, mining principals and contractors. He has a particular interest in insurance claims arising from mining activities, construction projects and the oil and gas industry. He provides advice on litigation, policy interpretation, contractual indemnities and dispute resolution, and has appeared as counsel in the Magistrate's, District and Supreme Courts.

As an experienced practitioner, Alex evaluates an appropriate strategy for any matter at the earliest opportunity. This ensures that his clients are informed of the manner in which their matters will be managed. His approach results in an exceptional rate of resolution of matters in a cost-effective manner and meets the client's key performance indicators.

In addition, Alex delivers presentations on civil liability, workers' compensation laws and occupational safety and health.

**Felicity Maher,
Barrister, Quayside
Chambers, Perth**

Felicity has experience in large-scale banking litigation, insolvency and bankruptcy disputes, and general commercial litigation. She has acted for banks and other financial institutions, insolvency practitioners, large and small corporations across a broad spectrum of industries, and individuals.

Before joining Quayside Chambers, Felicity was a solicitor at King & Wood Mallesons, a Judicial Assistant to the then Master of the Rolls, Lord Phillips, in the English Court of Appeal, and an Assistant Parliamentary Counsel in the English Parliamentary Counsel Office in London.

Felicity also practiced as a barrister in London for five years and in Sydney for two years.

Felicity holds a Senior Lectureship at the Law School of the University of Western Australia, where she teaches and researches in various private law subjects.

Felicity holds a Doctor of Philosophy (Law), Master of Philosophy (Law) and Bachelor of Civil Law from Oxford University, and a Bachelor of Laws and Bachelor of Arts from the University of Western Australia.

**Peter Mann,
Barrister, Ground Floor
Wentworth Chambers,
Sydney**

Peter is a Barrister specialising in insurance law. His specialisation covers the field of insurance and reinsurance both general and life.

Peter is an author of major insurance publications including Mann's *Annotated Insurance Contracts Act*, published by Thomson Reuters and currently in its 7th edition. He is an Adjunct Lecturer of the Faculty of Law at the University of Sydney. Peter was the recipient of the prestigious AILA Annual Law Prize in 2012. He was awarded Life Membership of AILA in 2018.

**Dr Brenda McGivern,
State Administrative
Tribunal**

Brenda is a Member of the State Administrative Tribunal.

She was formerly the Deputy Executive Dean and Associate Dean (Community and Engagement) of the Faculty of Arts, Business, Law and Education at the University of Western Australia, and Consultant with Moray & Agnew Lawyers in Perth.

Brenda is Chair of the WA Reproductive Technology Council, and is a longstanding member of the Clinical Ethics Service for the WA Child and Adolescent Health Service. She is a member of the Council of the Australasian Institute of Judicial Administration.

Brenda's qualifications include a PhD; LLB (Hons); B.Com

**Prof. Rob Merkin QC,
Lloyd's Professor
of Commercial Law,
University of Exeter,
Honorary Professor,
University of Auckland
and Special Counsel to
DLA Piper**

Rob is widely published in the areas of insurance, reinsurance and arbitration, for example, the fourth edition of Sutton's Law of Insurance (2014). Rob's works have been cited in over 150 judgments in a number of jurisdictions. Rob speaks regularly at AILA events, and in 2009 he was the Geoff Masel Memorial lecturer. In 2010 Rob was awarded the AILA Insurance prize. Rob is past President of the British Insurance Law Association, Vice-President of the International Association of Insurance Law (AIDA), a consultant to the English and Scottish Law Commissions and editor of the BILA Journal. In December 2014 he was Expert Adviser to the House of Lords Special Public Bills Committee on the Insurance Bill 2014. In January 2015, Rob was appointed an Honorary Queens Counsel in England and Wales for his major contribution to the law of England & Wales outside practice in the courts.

**Chris Rimmer,
Partner, Sparke
Helmore, Perth**

Chris is an experienced insurance litigation practitioner with expertise in public and product liability, workers' compensation, professional indemnity and motor vehicle and personal injury claims. Chris provides advice to clients on the management of insurance claims across all classes of insurance and regularly appears as counsel in the District Court, the Court of Appeal and in the Conciliation and Arbitration Service. Chris acts for a number of Australian insurers and London-based syndicates and underwriters as well as large corporate entities who carry significant deductibles on their liability policies. Chris also provides advice to the local insurance broking market on their clients' indemnity and insurance obligations in contracts and the extent to which the insurance program in place complies with the contractual obligations.

**Dr Marco Rizzi,
Senior Lecturer, UWA**

Marco joined UWA Law School in 2018 where he teaches in the JD and Masters programs. He obtained an LLB and a Master of Laws in Civil Law at the University of Pisa (Italy) and an Honours Diploma in Legal Sciences at the Sant'Anna School of Advanced Studies of Pisa. In 2010 he obtained an LLM in European, Comparative and International Law from the European University Institute in Florence (Italy), where he went on to undertake research for his PhD, awarded in 2015. Prior to joining UWA he has been Senior Lecturer and Head of the Department of Law at the University of Seychelles.

Marco researches the law as a tool for the protection of individual and collective health and safety. He has two overarching interests. First, the public private/divide and the public functions of private law, with a specific focus on the interplay between torts and regulation in its modern hybrid and transnational form. Secondly, the evolving relationship between risk, uncertainty and law, exploring both the extent to which legal tools can effectively address emerging risks, but also how complex multi-layered systems of rules can be liable themselves to create uncertainty.

**Prof. Natalie Skead,
Dean and Head of the
UWA Law School**

Natalie joined the UWA Law School in 2002 and was appointed Dean in 2017. Natalie's principal research and teaching areas are Property, Land Law and Equity and Trusts. She completed her doctorate on the proprietary implications of Australian proceeds of crime legislation. She is a prolific researcher with an extensive publication record in Land Law, Equity, Trusts, Remedies, Confiscation of Proceeds of Crime, Natural Resources and Legal Education, and has received a number of government and industry research grants. Natalie has been the recipient of several School, Faculty and University teaching awards and in 2017 was the recipient of the national award for teaching excellence in law from the federal Minister of Education and Training. She is the Associate Editor of the Legal Education Review, a member of the editorial committee of the International Journal of Teaching and Learning in Higher Education and Deputy Chair of the Australasian Legal Academics Association. Prior to joining the academy, Natalie practiced as a solicitor specialising in Corporate Finance, Commercial Litigation, Property and Securities.

Peter Rashleigh

For over 45 years, Peter has enjoyed a diverse insurance and commercial litigation practice. This has covered all aspects of liability and insurance law and a broad range of commercial litigation. His practice has a particular focus on professional liability and professional indemnity insurance, claims handling under professional indemnity schemes and advising local and international underwriters on major cases.

His current practice mainly involves handling professional indemnity claims against lawyers on the instructions of the LPLC. He is recognised as a leader in general insurance and professional liability law in Australia and has been listed since 2010 as one of Australia's leading insurance, alternative dispute resolution and litigation lawyers in the annual "Best Lawyers" reports published by the Australian Financial Review.

In 2016 Peter was awarded the AILA insurance law prize.

**Prof. Julie-Anne Tarr,
Professor of Commercial
Law, QUT**

Julie-Anne specialises in complex contracts, insurance and risk and has authored six books, and treatises, 70+ articles and numerous law reform reports in the insurance law field. She has held senior administrative and professorial roles in Australia, the US and the South Pacific, including as director of a law reform body, Chief Operating Officer of a medical research institute and senior legal consultant. She holds, or has held, board positions with commercial, government and non-profit boards.

PhD (UQ), LLM (Monash), JD (Cornell), BA (Wisconsin)

**Tony Tarr, Managing
Director, Robyn Ashton
Consulting Pty Ltd,
Brisbane**

Tony has worked extensively in the insurance area over the last three decades as a practitioner, law reform consultant, arbitrator and researcher. His consulting company provides advice on risk management, commercial partnering and joint venturing structures, particularly within the energy and insurance/reinsurance sectors. Prior to this he held executive roles across a number of commercial and academic institutions in Australia and the US, including Foundation Dean and Professor of Law, Bond University, Dean and Professor of Law Indiana University School of Law, Sir Gerard Brennan Professor of Law and Dean, School of Law, University of Queensland and President and Vice Chancellor of the University of the South Pacific.

Tony's qualifications include a BA and LLB (Natal), LLM (Cambridge), PhD (Canterbury), PhD (Cambridge) ACI Arb, and he is a Fellow of the Australian Institute of Management.

Tony is the author of several books and titles in the insurance law area including *Insurance Law in New Zealand*, *Australian Insurance Law* and *Insurance: The Laws of Australia*.

**Deborah Templeman,
Partner, Gilchrist
Connell, Perth**

Deborah has practiced for 27 years in insurance, 20 of them as partner and principal. She founded Gilchrist Connell's Perth office – leading it from a small WA start-up to a thriving office catering to some of the world's largest insurers and a host of specialist underwriters. Her leadership and successes saw her win the prestigious Lawyer's Weekly Partner of the Year award for Insurance 2017 and the Best Lawyers Lawyer of the Year 2020 in Perth for professional malpractice litigation. Deborah is trusted by major, global insurer clients on their financial lines, liability, property, and recoveries claims.

Deborah has extensive experience in policy advice on indemnity issues, including notification issues, fraud, non-disclosure, waiver of subrogation and cross liability, illegality and partial coverage. She has advised insurers on new and updated personal lines and financial lines policy wordings and operational matters.

Deborah provides coverage advice and resolves claims in various courts and tribunals, appearing as Counsel in interlocutory applications, mediations, settlement conferences and instructing Counsel at trial.

Deborah is a qualified mediator and has presented to major industry forums. She is on the editorial board of the Australian Civil Liability newsletter for Lexis Nexis, and served in a similar role for the Health Law Bulletin for many years.

Her clients value her well thought out and clear advice, her effective negotiating skills and her accessibility. Her approach is to focus on the key issues separating the parties' positions, then address them whether through investigation, communication or litigation. Collaboration is Deborah's default approach, to achieve the best outcomes for the client in a cost-effective way.

**Samantha Traves,
Queensland Civil and
Administrative Tribunal**

Samantha is a Member of the Queensland Civil and Administrative Tribunal. She was formerly a senior academic at the Faculty of Law, Queensland University of Technology and is a visiting lecturer at the TC Beirne School of Law, University of Queensland and at the College of Law, Australian National University.

Samantha specialises in the areas of Insurance Law and Commercial Law. Samantha was consultant to Barry Nilsson, a position she held from 2007 to 2019. Samantha is the author of *Commercial Law* (Lexis Nexis), now in its 5th edition and co-author of *Due Diligence* (Law Book Company). She has published widely in the area of insurance law. Samantha is a recipient of the Australian Insurance Law Association (AILA) Insurance Law Prize and an Australian and New Zealand Institute of Insurance and Finance (ANZIIF) award in recognition of her contribution to excellence in the provision of insurance education. Samantha serves on the Scientific Council of the Association International de Droit des Assurances (AIDA).