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Tort reform “has gone too far”

Justice David Ipp, head of the Ipp panel that reported to the Federal Government in 2002 on the need for tort reform, says the pendulum has swung too far.

“The law is not treating all citizens equally,” he told the AILA Queensland insurance law intensive at Noosa. He said Australia needed “a fair, reasonably harmonious set of laws of negligence”. Reforms implemented since 2002 went “substantially further” than his panel had recommended.

For example, the *NSW Civil Liabilities Act (CLA)* gave greater protection to public authorities than was recommended and was “substantially inconsistent with the notion that govt authorities should be treated before the law in the same way as an ordinary citizen”.

He said protection for volunteers for negligent acts and protection from personal liability for good Samaritans went beyond the panel’s recommendations. Justice Ipp said the current debate was directed against unfairness created by different negligence-related laws, like the CLA, the *NSW Workers’ Compensation Act* (for common law claims) and the *NSW Motor Accidents Compensation Act*. Thresholds varied, as did the definition of permanent impairment.

Three victims with like injuries could receive “vastly different damages awards”, depending whether the injury occurred at work, in a car accident, or in some other way. State laws differed in damages awards and that “probably results in higher

premiums”, as it was more difficult for insurers to reliably predict the extent of liability. Justice Ipp said insurers and lawyers needed to unite to approach state and federal governments to achieve “a greater degree of harmonisation”.

Inconsistencies between the laws were “the bane of the law of negligence” and have been fuelled by the political influences of different groups, for example, insurers, lawyers and victims’ groups. Justice Ipp said while it was to insurers’ advantage for the potential liability of insureds and damages awards to be reduced, “this should not be taken too

far. Too great a reduction in risk results in reduced demand for insurance”.

Insurers could cope with any risks capable of reasonable assessment, all that was required was for insurers to calculate and charge premiums appropriate to the risk. While lawyers claimed altruism as their reason for seeking tort reform roll back, they had difficulty persuading the media and the public because maintaining and increasing litigation was “in their financial interest”.

Continued page 5.

SAVOUR CHRISTCHURCH’S PLEASURES



Punting on the Avon River at Christchurch is one of the pleasures of the city that awaits delegates to the joint AILA-NZILA conference in September. The registration brochure is available at www.aila.com.au or www.nzila.org. For more information, see page 4.



Tasmania

By *Brian Aherne*

The first seminar for 2007 was an outstanding success with an attendance of 70 people. Ian Ritchard, registrar of the Supreme Court of Tasmania, spoke on mediation and settlement conferences.

National president Steve Knight addressed attendees on national issues.

Organisation for the July seminar is well under way. The guest speaker is Philip Rowell, a partner in Monahan + Rowell, who will speak on asbestos claims and asbestos-related diseases.

The committee is actively engaged in pursuing new members and contact is ongoing with law firms and insurers.

Western Australia

by *Craig Hollett*

By the time members read this article, the WA branch will have held its flagship event for 2007 - a dinner-dance at the Royal Freshwater Bay Yacht Club.

The theme this year was Bollywood and guests were encouraged to dress as their favourite Bollywood stars. The event promised to be a star-studded night and guests, including AILA national president Steve Knight, enjoyed a superb meal and live entertainment by the band Ruby Tuesday. During the evening there were raffles and a silent auction to raise much-needed funds for the Princess Margaret Hospital for Children Foundation. The social committee, Sue Taylor, John Charouhas, Mark Birbeck and Craig Hollett, put a lot of work into making the night a success.

The WA Branch presented a seminar on June 13 with a difference. The title was Finding something - risk management and high performance sport, with guest speaker Cameron

Schwab, CEO of the Fremantle Dockers. Mr Schwab, who has completed an intensive management course at Harvard University, spoke on leadership and decision making in a volatile, high-profile environment. He spoke openly and frankly about his life experiences working for football clubs and about the many challenges faced by the Fremantle Dockers since he has been CEO.

The July seminar considered three different but related insurance topics. Libby Swift, from Aon Risk Services, spoke on what an insured can and cannot do while acting as a prudent uninsured. Barrister Michael Hawkins spoke on aggregation clauses and what happens in cases where there is under-insurance. Garry Nutt, a partner at Jarman McKenna, spoke on the duty of good faith and what conduct by insurers or their advisers could potentially lead to an insurer being de-registered.

The remaining seminars for 2007 are:

August 15 - Vicarious liability. Speaker is Chris Rimmer, Jarman McKenna.

September 12 - Workers' compensation appeals to the commissioner and questions of law. Speaker is Judge Philip McCann.

October 17 - Geoff Masel Memorial Lecture. Speaker is Prof Greg Rinehart.

November 21 - AGM and The year that was. Speaker yet to be finalised.

Australian Capital Territory

By *Doug Galbraith*

The ACT branch hosts the Geoff Masel Memorial Lecture on Wednesday, August 29, at lunchtime at the Teatro Vivaldi restaurant, Canberra. The speaker is Prof Greg Rinehardt; the topic is Can courts ignore the reality of insurance in litigation? Invites will be emailed soon.

AILA members are welcome to attend the Insurance Council of Australia's Canberra conference at Old Parliament House, on August 15. The topic is Adaptive responses to climate change. For details, go to www.insurancecouncil.com.au.

New South Wales

by *Penny Paterson*

The Twilight Seminar series is now over for another year.

As usual, a very successful series thanks to the quality of the speakers and presenters and all the members who attended. Thank you to Minter Ellison for providing a wonderful venue and drinks and nibbles after the seminar.

The next seminar is the Geoff Masel Memorial Lecture, presented by Prof Greg Reinhardt on August 22 and hosted at DLA Phillips Fox. Go to the website, www.aila.com.au, for more information.

The branch is in the planning stage for seminars looking at statutory schemes and reinsurance. Details will be available soon.

To purchase papers presented at the seminars or if you have ideas for topics you would like to see presented, please contact me (*see p12*).

Victoria

By *Peter Chapman*

Activities in Victoria continue during winter with a return to "normal" weather.

The state has cold fronts coming in from the west and the east coast lows dropping flooding rain.

The proposed subject of KPMG's Andries Terblanché on the financial health of the Australian and world insurance markets was changed and members and guests were treated to a dissertation on global risk management.

Dr Terblanché covered the possibilities from global epidemics

to local conflict and placed them in a matrix to demonstrate likely impacts not only for business but personally. It was a well-prepared, thought-provoking presentation.

Friday, July 20, was the annual joint AILA-ANZIIF General Insurance Law half-day workshop. Chair Raff Pisano (Minter Ellison) presented speakers Fred Hawke (Clayton Utz) on the *Insurance Contracts Act*; Robert Minc (Phillips Fox) on liability law and Mark Attard (Monahan + Rowell) on other developments.

With the speakers covering such a range of topics and case law, they were expected to take what sometimes seem esoteric matters and emphasise their relevance to daily claims. RACV Bourke St was the venue.

The mid-August presentation is a panel style interactive presenting a practical problem and analysing the approach taken from the workplace through the insurer and legal analysis.

The year continues with the Geoff Masel Memorial Lecture on Wednesday, September 12, and further events are scheduled for November and December.

Queensland

by *Rebecca Stevens*

The Queensland branch has had a busy first half of 2007 and is very pleased to have had such positive feedback from the annual insurance law intensive at the Noosa Sheraton on May 17-18.

Delegates came from all over the country and were impressed with the quality of speakers and the program content. The intensive has provided a good platform for the committee to start planning the national conference in 2008.

Following the intensive, the committee was very pleased to have had an opportunity to invite Peter Nash, from Sportscover, to share his experiences in starting a Lloyd's syndicate (*see page 11*).

Peter O'Leary, senior underwriter, casualty, from Liberty International Underwriters, will present over lunch on August 1 on "Impact of tort law reform from an

underwriter's perspective".

Qld hosts the annual Geoff Masel Memorial Lecture on August 23, with guest speaker Prof Greg Reinhardt.

In September, Anthony Collins, of counsel, will conduct a workshop considering policy wording issues that commonly arise for consideration. It will include appropriate advices and responses in dealing with insurer clients and other insurers.

South Australia

by *John Homburg*

On May 16, John White addressed members and guests at a breakfast briefing.

Mr White is a barrister at Mitchell Chambers. In his presentation, "Recreation and risks - accidents while having fun", he reviewed developments in the law on tortious liability for personal injury arising from recreational and other activities. His presentation was well received by a near-capacity audience.

SA's next professional development session is a much-anticipated, half-day seminar, titled "The changing workplace - employers' liabilities, duties & risks symposium".

It is on August 1 at 2pm at the Lyrics Room, Adelaide Festival Centre, followed by refreshments from 5pm. The organising committee has worked extraordinarily hard to assemble a cast of eminent speakers to address employer issues in the current and ever-changing work environment.

The symposium will look at questions including: To what extent is an employer liable for the conduct of an employee? What is the current state of non-delegable and statutory duties? What will the workplace of the future look like and what is the insurance industry's response to likely risks?

Registration forms will be forwarded to members soon. For non-AILA members, please contact the secretariat on mackdog@bigpond.com.au for further details and to register.

AILA has launched a new website.

David McKenna, chairman of a board subcommittee responsible for the website, said: "The board is cognisant of the enormous amount of information now gleaned from the internet for work, social, sporting or education purposes and wants to ensure members and browsers continue to have a superior web service that informs, educates and assists them."

One objective was that www.aila.com.au was always available and running at peak performance, he said.

The new home page has a large rotating panel that markets national events (for example, conferences, the Geoff Masel memorial lectures, and AIDA events) major state events and items of interest.

The website was last updated in 2001 and technology has accelerated rapidly since then. The subcommittee is committed to ensuring members have access to a market standard web service, irrespective of the information they require.

National president Steve Knight said: "This latest model reinforces the board's belief that all services for members, event details, national conference and speakers' papers be constantly displayed and maintained live on the web to ensure members or browsers receive instant access to insurance law educational information.

"The board is aware of the cost efficiencies of electronic event management and recommends event advices are sent electronically. If you are not receiving event advice electronically, please click on the Contact AILA button and advise your secretariat of your email details."

NZILA President's message

Unique law restricts injury payouts

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New Zealand has few idiosyncratic pieces of legislation but one that is unique in common law jurisdictions is the *Injury Prevention Rehabilitation & Compensation Act 2001*, which is the foundation of New Zealand's accident compensation regime.

New Zealand effectively did away with personal injury litigation and implemented a state-funded system of compensation in 1972. Although the original scheme has been significantly modified, the central plank of the legislation remains. That is, the bar it creates to claims for compensatory damages for personal injury by an accident suffered in New Zealand. It applies to New Zealand residents and overseas visitors.

Put simply, in New Zealand you cannot sue for compensation for personal injury by accident. Limited claims for exemplary

damages and nervous shock damages, such as those claimed in *Queenstown Lakes District Council v Palmer [1999] 1 NZLR 549*, remain, but the prudent tourist should ensure he or she is well covered for all eventualities.

Delegates at the joint AILA-NZILA conference in Christchurch on September 19-21 will not be called on to engage in any death-defying activities during the course of the program. Those planning to enjoy the challenges that lie beyond Christchurch, such as Queenstown's bungee jumping, mountain biking and river rafting, would be well advised to check their travel and income protection cover.

I look forward to seeing delegates from both sides of the Tasman in Christchurch in September.

Christine Meechan
NZILA President



Christine Meechan

Impressive array of speakers

The AILA-NZILA joint conference organising committee has assembled an impressive array of speakers for The Ties that Bind.

The conference is in Christchurch on September 19-21. Registration brochures have been mailed to members or can be downloaded at www.aila.com.au.

The Christchurch Convention Centre is the venue for a welcome reception on Wednesday, September 19. The conference begins the next morning, with opening remarks from NZILA president Christine Meechan and AILA president Steve Knight.

The keynote addresses start with Justice Bruce Robertson, NZ Court of Appeal. He'll talk about the connections between the NZ and Australian insurance law industries and the impact on reform in NZ.

Munich Re's Heinrich Eder will follow, speaking on emerging risks.

The program continues with presentations from Colin Croly, Barlow Lyde & Gilbert, London, Prof Greg Reinhardt, Monash University, Auckland QC Michael Ring, and Prof Robert Merkin, University of Southampton.

There are practical workshops in the afternoon, covering expert evidence, fire investigations and the AIDA reinsurance working party.

The afternoon is rounded off with a session on computer forensics and presentations on driver impairment through alcohol and other substances.

The conference dinner that evening is under the aircraft wings at the Wigram Air Force Museum.

Climate change is the theme for Friday morning, September 21, with presentations from IAG chief risk officer Tony Coleman, Finity Consulting's Colin Brigstock,

and Professor Duncan Webb, University of Canterbury.

After morning tea, there are concurrent sessions on insurance law issues for Australia and New Zealand.

Michael Gill, from DLA Phillips Fox, will provide the conference summary.

Then it's time for delegates to head to Christchurch's restaurant strip along the Avon River for "the long lunch".

The 2007 AILA-NZILA conference is an event not to be missed. To register, go to www.aila.com.au or www.nzila.org.



AILA President's message

Feedback sought on member services

At the AILA Queensland Insurance Law Intensive at Noosa, I appealed to members to tell me what they think of AILA - good or bad.

I'd like to get feedback on the member services we provide, including events, the website and *AILA-NZILA News*. If you have comments or suggestions, please email me at stephen.knight@doma.com.au.

I also took the opportunity to thank the many volunteers in the branches who contribute to AILA being such a marvellous association. AILA is the largest chapter in AIDA, the international insurance law association, with more than 1,500 members.

However, there are many more people participating in the field who are not members. I encourage all members to try and introduce new members, particularly younger ones. AILA offers great friendships and collegiality with fellow members.

Since the last issue of *AILA-NZILA News*, it has been a busy time in the insurance industry. The massive storms that hit northern NSW have seen an influx of claims that the Insurance Council is now estimating will cost the industry about \$350 million. My sympathies are with those who lost family and friends and whose properties were damaged.

The NSW storms were followed closely by floods in Victoria. Both events have highlighted the major problem of under or noninsurance. It is vital that all homeowners appreciate the need for insurance cover so they are not left destitute when tragedies like this occur.

These events are shaping up to be more costly to the insurance industry than Cyclone Larry, which hit far north Queensland in March

2006. That event, too, saw many homeowners suffer through a lack of insurance cover.

The Federal Government has released its proposed Bill to regulate direct offshore foreign insurers (DOFIs).



Steve Knight

Assistant treasurer Peter Dutton has said the reforms are designed to address the risk to Australian businesses and consumers from unauthorised DOFIs that are unscrupulous or fail. He has said "tailored prudential standards" will be implemented so categories of DOFIs that pose a lower risk would face a reduced regulatory burden.

The government is now going through a consultation period to determine how to frame the regulations that would dovetail with the Bill and spell out what exemptions would be available.

Access to foreign insurers that are well capitalised and well regulated is an important element of the Australian insurance market, so it is vital that the final result does not reduce competition and capacity in the market by reducing access to legitimate DOFIs.

The WA District Court is set to test the validity of indemnities sought by insurers against claims on builders' warranty policies. On June 19, WA District Court Judge Philip Eaton ruled that an argument that indemnities were an illegal form of reinsurance should be tested at trial. Judge Eaton was hearing an appeal by a Perth couple against an earlier judgement upholding an indemnity claim made against them by Vero Insurance Ltd, after their building company collapsed. Judge Eaton said the central issue was whether the indemnities were reinsurance. The couple had argued they were and that Vero was breaching the *Insurance Act* by entering into

Damages awards differ vastly

From page 1.

Justice Ipp said the medical profession had been a "powerful, influential body" in the 2002 debate on tort reform but, because its position had been "ameliorated", it was not active in the current debate.

Justice Ipp was critical of the use of approved medical specialists (AMSs) to assess the threshold of permanent impairment under the NSW Workplace Injury Management and Workers' Compensation Act 1998.

Under the NSW CLA, courts determined damages thresholds "in the traditional and normal way".

An AMS assessment was critical to the success of a plaintiff's common law claim, but an AMS had no security of tenure. "A disinterested observer may think this power of continuing appointment is capable of influencing the decisions of [the AMSs] who wish to have their contracts renewed." That allowed a perception of bias "even if the adjudicator is a person of the highest integrity".

Justice Ipp said the AMSs could practise privately as medico-legal advisers and therefore receive income from solicitors or a party to a threshold dispute. "Who would feel secure knowing that the person deciding their case is being paid for doing other work for the opposition?"

reinsurance contracts without APRA approval. While disputing the argument, Vero said even if the indemnities were reinsurance, lack of APRA approval in itself did not make them unenforceable. Judge Eaton said there was "a triable issue as to the illegality and enforceability of the general deeds of indemnity" required by builders' warranty insurers. It will be an interesting argument and I look forward to reading the outcome. (*WADC, Vero Insurance Ltd v Harden-Jones & Anor, 98/2007*)

Steve Knight
AILA President

Future forecast frightening

Delegates to the AILA Qld insurance law intensive could be forgiven for going home very scared, after two keynote speakers finished their addresses.

The theme was “Insurance climate change: What’s the forecast?”

Once KPMG chair of financial services Dr Andres Terblanché and Queensland University of Technology assistant director, development, Wayne Delaforce, had spoken, it looked somewhat bleak.

Dr Terblanché detailed the global picture of big risks on the horizon, but tempered his views with the comment that they were “ambient, blindside risks. Collectively, we can make a difference and make the world a safer place”.

The big risks included nanotechnology, failed and falling states, a proliferation of weapons of mass destruction, wars, international terrorism, chronic disease, weather-related catastrophes, climate change, liability regimes, fiscal crises... the list went on.

Dr Terblanché predicted the price of oil would “go through the roof”, making international travel cost-prohibitive.

If a pandemic occurred, hospitals would overflow. “They are like fast-food shops, not designed for long-term occupation,” Dr Terblanché said. A totally different social order would eventuate because schools and communities would close and people would not use public transport or go shopping.

There was a four in five chance a pandemic would not occur, but it was “something to keep an eye on”.

Mr Delaforce focused on the smaller picture, narrowing his focus to south-east Queensland. But much of the message was the same.

The planning process was out of kilter with the projected growth and the region was “significantly under-resourced for growth”.

Congestion on the roads would continue and “the slower you go, the more you pollute”.

AILA Qld Insurance Law Warning on ‘tweaking’ at general

Governments must “be careful with tweaking legislation relating to general insurance”, because of the potential impact on the economy, Kerrie Kelly, Insurance Council (ICA) chief executive officer, told the intensive.

She said statistics showed the industry paid \$70 million in claims each working day and the figure was now pushing \$75 million. Direct premium revenue was \$27.9 billion a year and the industry employed 58,000 people.

The ICA was an important lobby group, which conducted a cost-benefit analysis on every submission it put to government. It was being asked for input to government planning for pandemics, natural disasters, and other issues.

The ICA had implemented 36 committees with independent experts to assist the council to develop policy and drive debate.

ICA’s current priorities were non-insurance, flood insurance, catastrophe co-ordination arrangements, public liability reforms, tax reform (including fire services levies and stamp duty), and climate change.

Until the ICA released its research in March, there had been “no analysis of non-insurance”, Ms Kelly said. The research found a close correlation between financial position and insurance; low-income earners were less likely to be insured. Non-insureds were more likely to be young, live in cities, be born in non-western countries and be low-income earners.

That suggested people insured only when they had the disposable income to do so. Tax of up to 40% in some jurisdictions on home

insurance was a disincentive. General insurance was taxed higher than gambling in some states.

AILA-NZILA News editor Kate Tilley attended the 2007 AILA Queensland Insurance Law Intensive at Noosa. This is a summary of some of the key presentations.

Ms Kelly said the ICA would continue to pursue non-insurance and work with governments to develop policies to tackle it.

On flood insurance, Ms

Kelly said consumers did not understand insurers’ different definitions and the industry was therefore looking at a minimum standard definition. While the ACCC may fear the move was anticompetitive, the ICA argued it was a minimum and policyholders could negotiate for additional coverage.

On tort reforms, Ms Kelly said debate was not helped by inconsistency in the arguments. “Some want every case in court, regardless of whether it’s a broken fingernail or a broken neck.” Any windback would result in insurance being less available and less affordable, she said.

Tort reform windback needed

Governments’ willingness to adopt “special compensation regimes” for specific issues was evidence that compensation under tort reforms was inadequate, Gerry Murphy, senior partner at Murphy Schmidt, Brisbane, told the intensive.

He cited the Queensland Government’s scheme to compensate victims of former Bundaberg Hospital surgeon Dr Jayant Patel, and the NSW Government’s compensation scheme for Waterfall train disaster victims as examples.

He said the view that the pendulum had swung too far was gaining acceptance in the community, but he could not say when rollback was likely to occur.

Intensive insurance legislation

“Fairness and justice will eventually prevail; but I don’t know when.” There would be no immediate rollback but, in Queensland, lobbying focused on trying to stop the injury scale value system being applied to CTP claims.

He said the Queensland workers’ compensation scheme, which allowed access to common law, was a success. Premium rates were the nation’s lowest and 99.7% of claims were resolved within nine months, compared with 45.1% under Comcare. The Queensland scheme’s dispute rate was 4.1% of claims, compared with 8.8% for Comcare, Mr Murphy said.

“Comcare is an administrative, bureaucratic nightmare.” Abolishing common law access was “a quick fix, but it eventually catches up with you”, he said.

The Victorian workers’ compensation scheme had reinstated common law access and was now fully funded, Mr Murphy said. All schemes needed consistency, a ban on advertising by personal injury lawyers, and harmonisation with the social welfare system.

Airport liability goes offshore

There is insufficient capacity in the Australian liability market for the Brisbane Airport Corporation (BAC). BAC company secretary Brad Bowes told the intensive he had just returned from the annual “beauty parade to liability underwriters in London”.

BAC needed more than \$1 billion in coverage and “we must go to the London market to get it”. While BAC was not responsible for “a lot of the risky stuff, like refuelling”, passenger security was its responsibility. The potential for slip and falls was heightened at airports because passengers who had been on long flights “don’t always have the attentiveness of someone walking down the road”.

Dr Bowes said BAC’s risk management program was

comprehensive. “We drill, train and exercise for all possible scenarios.”

BAC had 3½ times the land mass of Sydney airport, which was advantageous if “the worst thing happens”. “Mangroves and migratory birds would suffer before people and houses.”

The airport had seen a massive increase in aviation and non-aviation business since its privatisation 10 years ago. It was becoming an “aerotropolis”, or airport city. Firms were clustering around airports because they provided fast access to global supply chains. The trend followed the first four waves of urban development, which clustered around seaports, rivers, railways and roads.

BAC’s annual passenger figures were 17.5 million, compared with 29 million at Sydney. In 20 years, 40 million passengers a year would use the BAC facilities, it would eclipse Melbourne as the nation’s second largest airport, and 40,000 people would work on the BAC site, Dr Bowes predicted.

ICA reforms fail to define claim

Proposed reforms to the *Insurance Contracts Act* do not define “claim”, despite some submissions calling for a definition, Samantha Traves, Queensland University of Technology law lecturer, told the intensive.

That meant the meaning of “claim”, as opposed to “facts that might give rise to a claim” under s54A, was unresolved. Ms Traves said whether an insured had notice of a claim, or only of facts giving rise to a claim, should be construed independently of any contractual definition of the terms.

She suggested “claim” involved a legal proceeding and extended to “a letter of demand that identified an amount and demanded payment under threat of legal proceedings”. A letter saying a client may suffer loss as

a consequence of the insured’s negligence would probably be facts that might give rise to a claim.

Increased claims for agri-insurers

Agri-insurers can expect increased claims as climate change impacts on the rural industry, says Carter Newell partner Daniel Best.

He told the intensive that underwriters needed to be aware of claimants’ financial stresses and categorise them to understand their claim motivation. Professional farmers were diversified, sophisticated, business-oriented and low risk.

Traditionalists were lifestyle farmers and family businesses and more likely to litigate. The “battlers” were high risk, but would exit the industry.

Mr Best predicted an increase in fraudulent and spurious claims and claims being used to offset losses from climate change. He said causation was important to investigate. For example, many spray drift claims were actually pest infestations or poor management practices.

He advised underwriters to educate insureds for early notification of claims. Intervention by professional agronomists could reduce claims dramatically.

Mr Best predicted an increase in exclusions, for example, wind cover was no longer available in north Queensland. Agribusiness losses post-Cyclone Larry were \$475 million.

Resources sector seeks alternatives

The insurance market has a conservative view of the resources sector, says Aon divisional manager, corporate insurance services, Robert Evans. “The resources industry has not seen the same rate reductions as the market generally.”

A lack of insurance capacity meant the industry was looking

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at non-insurance solutions, including finite risk transfers, higher retentions and access to reinsurance markets. It was also considering employee benefits to get workers to remote areas.

The resources industry needed “analytical analysis to determine risk tolerance and retention levels”.

Mr Evans acknowledged 2005-06 had been “a difficult year” for mining underwriters globally. Cyclone losses totalled \$330 million, including claims for mines in Western Australia’s Pilbara region.

However, the industry was highly regulated and understood that good risk management was essential.

Brokers had to emphasise the high levels of embedded risk management required by mining operations when marketing risks to insurers. Mr Evans told the intensive the mining boom meant business interruption claims were likely to be higher. The mining industry had little spare capacity to increase production if a loss occurred and lead times for replacement equipment were likely to be longer.

Mr Evans said the resources sector wanted contract certainty, with policies being issued at or before placement. “The market has not been good at this in the past.”

Alliance contracts’ response positive

The insurance industry has responded to new alliance contracting, now common in construction projects, with three insurers offering products with coverage up to \$20 million.

Minter Ellison partner Ian Briggs said alliance contracting had developed because the industry was “riddled with post-construction disputes” and the enormous demand for infrastructure meant the industry needed a better way to deliver projects.

Alliances were non-adversarial with all parties sharing the wins and losses. Risks were shared and a no-blame concept adopted for errors, mistakes, poor performance or negligence.

The “carve outs” were wilful default and indemnities for third-party claims. That allowed access to other insurance policies, for example, public liability and professional indemnity.

The new alliance professional indemnity products allowed first-party cover for internal losses incurred by an alliance participant, insured all participants against third-party claims, and offered project-specific cover, with run-off cover available for a defect rectification period.

The products were residual, that is, they operated only if no other policy responded.

Use experts with caution

Experts should be used with caution in litigation, says Queensland barrister Richard Douglas, SC.

He told the intensive that lawyers “too often” ran for experts when laypersons’ evidence would be acceptable. He said half the reports he saw were inadmissible, but that was the fault of lawyers not experts.

Experts were required only as “a source of relevant, probative facts, outside common experience”. He was not in favour of sole experts, because there was an unconscious risk of experts not “engaging the same rigour if they know no one else may give contradictory evidence”.

Briefing experts was important. Too many went “beyond their expertise bailiwick, because they think they can”. They needed to use layman’s terms.

“I’m suspicious of experts speaking in technical language,” Mr Douglas said. Experts had to eschew the temptation to be judgemental, “or even subconsciously subjective”.

Optimise cover, says Aon

Insurance buyers should optimise policy coverage now, while the market is competitive and rates soft, says Scott Willmot, Aon’s national manager, sales & services.

Elements of cover that had been withdrawn should be revisited. He told the intensive the continued competition in 2006 and 2007 was caused by new capacity from existing insurers, new entrants and more underwriting agencies, which were predominantly backed by overseas capital.

The claims environment was benign. The US hurricanes had no effect on the Australian market.

Private equity capital was investing in the industry and insurers’ 24% return on equity was a record level.

Rate reductions differed according to whether business was new or renewing. Some insureds had received 50% reductions for the third consecutive year in financial lines. Was there room for more movement? “Probably yes”, Mr Willmot said, describing it as the correction of “a hard market that went too far”. All insurers were chasing SME business, so 50% reductions were not uncommon.

Capacity was now available for hard-to-place risks, like environmental risks, financial planners and financial institutions. The Westpoint collapse had “made no difference” to professional indemnity for financial planners.

For professional indemnity overall, Mr Willmot predicted continuing aggressive pricing, broader coverage, and a shift to an emphasis on terms and conditions rather than just pricing.

Underwriting disciplines had been relaxed, he said. Historical claims data was not always required by insurers. Brokers wanted the “eroded” discipline to “re-emerge”.

For directors & officers’ liability, litigation funding would increase the risk of shareholder class actions, but “do not expect a turn in the market in 2007”.

Evidence Act heralds privilege changes?

by Emily Walton

Associate, Wynn Williams, Auckland

Indemnity insurers have traditionally had limited recourse to litigation privilege to protect initial loss assessment and investigation reports from production.

Does “privilege for preparatory material in proceedings”, enacted at section 56 of the much anticipated, but not as yet in force *Evidence Act 2006*, herald a new day for insurers?

Litigation privilege protects from production communications (oral or documentary) between a party or its legal advisers and third parties, created for the dominant purpose of assisting in actual or contemplated litigation.

It is the dominant purpose that frequently precludes litigation privilege from attaching to loss assessment and investigation reports commissioned by indemnity insurers into policy claims. Such reports may have many purposes, including:

- to assist in deciding whether to accept or decline a claim,
- adjustment of the value of the claim, and/or
- gathering evidence for use in defending an insured’s litigated claim for breach of contract arising out of a declinature.

The dominant purpose test for multipurpose documents was imposed by *Guardian Royal Exchange Assurance Ltd v Stuart [1985] 1 NZLR 596*. Litigation privilege did not attach to the loss assessor’s report on the fire giving rise to Mr Stuart’s claim under his house & contents policy because the dominant purpose of the report was to provide Guardian with a basis on which to decide whether or not to decline the claim.

That is consistent with the primary obligation of an insurer to meet the insured loss, and arguably also with the insurer’s duty of utmost good faith. But, for the last 20 years, it has frequently compelled insurers to produce initial investigation and assessment

reports when defending a breach of contract claim consequent to declinature.

The dominant purpose of a document is a matter of fact, judged on the purpose of the person creating the document and the intention of the person requesting it. But, in reality, Guardian left insurers with little room to move.

When litigation is reasonably contemplated is also a question of fact. Vague apprehension of litigation will not suffice. Despite arson causing 30% of fire claims worth more than \$10,000, the court has declined to accept that most assessors are employed for the sole purpose of determining whether a fire claim is genuine. No exception has been made for fire claims.

Litigation can be said to be in contemplation once an insurer is advised that a policy claim should be denied and in response engages solicitors and counsel.

The practice of insurers engaging solicitors to draft instructions to loss adjusters or investigators does not guarantee protection of the resultant report. If challenged, courts will still objectively assess whether litigation was reasonably contemplated.

Section 56 extends privilege to “communications and information made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding”. Specifically, privilege attaches to:

- (a) a communication between the party and any other person,
- (b) a communication between the party’s legal adviser and any other person,
- (c) information compiled or prepared by the party or its legal adviser, and
- (d) information compiled or prepared at the request of the party, or its legal adviser, by any other person.

For insurers, the Achilles heel of litigation privilege, the dominant purpose test, has been retained

but substantially diluted through its extension to the receipt, compilation and preparation of communications and information.

The act of compilation of information for the dominant purpose will now cause privilege to attach to otherwise unprivileged documents, presumably including loss adjustment and investigation reports, which would have failed the dominant purpose test at creation.

This is a significant deviation from existing jurisprudence. Currently, non-privileged documents do not, without more, acquire privilege simply because they are copied by a solicitor for purposes of an action. When documents exist in circumstances that do not give rise to privilege, the mere fact they are handed to a solicitor for the purposes of litigation does not create a privilege.

Now, conceivably every document compiled in a solicitor’s brief for the dominant purpose of preparing for proceedings will be protected. One doubts this was the legislature’s intention. It certainly contradicts “the public interest” which is “best served by rigidly confining within narrow limits the cases where material relevant to litigation may lawfully be withheld”.

There is authority in England for privilege attaching to documents where the selection of documents a solicitor has copied or assembled betrays the trend of the advice he is giving the client.

Whether NZ’s judiciary will impose a “trend of advice” or equivalent local test to the acts of receipt, compilation and preparation or any one of them alone remains to be seen.

Edwards & Ors v Lewis Unreported 30 June 1986 HC Napier

Carlton Cranes Ltd v Consolidated Hotels Ltd [1988] 2 NZLR 555

Harrison v Attorney General (1989) 4 PRNZ 122.

Dinsdale v Commissioner of Inland Revenue (1997) 10 PRNZ

General Accident Fire and Life Assurance Corporation v Elite Apparel [1987] 1 NZLR 129 (CA).

Profile

Doug loves life in the top end

Doug Webb is AILA's inaugural Northern Territory chairman and board member.

General manager of TIO Motor Accidents Compensation, Mr Webb joined the AILA board after the NT branch was established three years ago. He was already a regular at AILA conferences, having flown to his first, in Melbourne in 1989, at the height of the pilots' dispute. He has also been a regular attendee at the AILA Queensland insurance law intensive. The 2007 event was his fifth.

After graduating in law from Monash University in 1978, Mr Webb worked as a loss adjuster for several years, including a 12-month posting to Darwin. Back in Victoria, he worked in a Ringwood legal practice for three years and was then a partner in a country law firm.

It was a chance call to a former work colleague in Darwin that saw him back in the top end in 1987. His colleague had since joined the TIO and told him the state government-run insurer needed an in-house counsel.

Mr Webb got the job and had that role until 1996, when he was promoted to a senior management position with the TIO-run motor accidents compensation scheme.

In 2000, he moved to general insurance as assistant general manager, claims & legal, and in 2004 went back into Motor Accidents Compensation as general manager.

With a dedicated committee and membership that fluctuates around 20 people, Mr Webb has been instrumental in

establishing AILA in the NT. The branch hosts three or four seminars a year, capitalising on opportunities when interstate speakers are available.

Mr Webb enjoys life in Darwin - "it's like a big country town, but with capital city infrastructure and facilities". Although the hot weather can be stifling in the wet season (November to April), and forced him to abandon a love of golf.



Doug Webb

Other sports are still on the agenda, though. Mr Webb is a dedicated Collingwood AFL Club supporter, spent a long, but enjoyable day at the Darwin round of the V8 SuperCars and is relishing the forthcoming

Darwin Cup Carnival.

He loves to travel, and that's an advantage of living in Darwin - "it's four hours to anywhere". Mr Webb and his family have holidayed in Bali, Singapore and Hong Kong, and he'll travel almost anywhere to indulge his passion for live music. For example, he saw Phantom of the Opera in Singapore, Robbie Williams in Perth, the Eagles in Melbourne, and John Farnham in Brisbane.

Mr Webb and his wife, Sandra, have two daughters, Sarah, 22, and Kristie, 25. They're proud grandparents to Kristie's daughters, Tali, 4, and Bonnie, nine months.

In fact, his family, and a cold glass of sauvignon blanc at the end of a hard day in the office, are the things Doug Webb will never give up.

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PEOPLE

Sam Mauriello, a paralegal and business development manager with Adelaide law firms for the past 17 years, has joined Insurserv Australia as manager, SA/WA/NT, based in Insurserv's new Adelaide office. He has significant experience in insurance recoveries with law firms and an insurer. Managing director Scott Hallowell said Mr Mauriello's extensive background in the Adelaide insurance industry would be valuable in building business for the new Adelaide office. Insurserv assists insurers and self insurers to recover claims owed by third parties efficiently and effectively.

Michelle Frosh (right) and **Jane Thomas** have joined the professional indemnity insurance team at Downings



Michelle Frosh

Legal, Perth, WA. Mark Birkbeck, a workers' compensation and commercial law specialist, has been appointed a partner at Downings Legal.

Wesfarmers Insurance Divisionn has appointed **Stephen McConnell** as CFO. He will be based in Sydney and report to Rob Scott, who takes over from Bob Buckley when he retires in July. Mr McConnell joins Wesfarmers from Ace Insurance, where he had been CFO for Australia and new Zealand since 2002.

Liberty International Underwriters has appointed **Suzanne Ross** as senior underwriter, specialty casualty, in its Brisbane office. Ms Ross joined LIU in Melbourne in 2005.

Carter Newell Lawyers has appointed **Andrew Persijn** as a solicitor with its insurance team in the firm's Brisbane office. He previously worked for Brisbane firm Richardson & Lyons Solicitors.

Estelle Pearson has been appointed

managing director of Finity Consulting. She takes over from founding managing director Colin Brigstock, who will spend more time with clients.

Ace Asia Pacific has made the following appointments. **Stephen Crouch** is now CEO and country manager for Australia and New Zealand. He was most recently CEO of Ace Hong Kong; **John French** is now CEO and country manager of Ace Hong Kong. He was Ace Australia's general manager before taking over the helm in Singapore in November 2003.

National Transport Insurance (NTI) has appointed Stephen Smith as SA/NT manager. Mr Smith previously had the same role with Swann Insurance. NTI's former SA/NT manager, Paul Craig, has taken on national underwriting responsibilities, based in the company's Adelaide office.

Tony Thrift has joined Australis Group Underwriting as broker liaison manager. Mr Thrift will work with brokers to develop mutual business opportunities.

Sportscover first with Lloyd's syndicate

Establishing a Lloyd's syndicate is not for the faint-hearted, but the rewards are there.

Peter Nash, managing director of Sportscover Syndicate 3334, took the plunge. Sportscover is the first syndicate writing business for amateur sports at Lloyd's and the first established by an Australian privately owned company. Mr Nash is the first active Lloyd's underwriter to live outside the United Kingdom.

He told an AILA Qld meeting that the cost was \$1 million in establishment costs and three people fulltime for two years. It required "a healthy attitude", as there was much frustration, confusion and misunderstandings.

He began the process in January 2005, hiring a senior Lloyd's person with 23 years' experience, researching "what we thought we needed", preparing a business plan, and selecting a managing agent. It

was December 2005 before he even met Lloyd's to get the green light to proceed with an application.

It was almost another year, August 14, 2006, before the syndicate was born. During that time, there were 192 meetings, 5,000 pages of text generated, and £15 million of capital invested.

The syndicate was the first new one for 2½ years, and the only one of 22 applications to be successful in that time.

Mr Nash said Sportscover, a \$50 million Australian company writing sports insurance for 20 years, decided to become a Lloyd's syndicate because of the access it offered to the worldwide stage in a short time.

"Every business needs an international content. Lloyd's is licensed in 76 countries and has a good security rating. The cost of achieving that alone would have

been prohibitive," he said.

"The strongest thing about Lloyd's is its brand image. It has a prestige we don't get as Sportscover alone."

Mr Nash said the franchise system meant there was an obligation on syndicates to protect and defend the brand.

He said Lloyd's had a long history of changing to meet customer demands and being a first mover in new, big, unusual, complex risks. The market had £16.4 billion in capital, the majority corporate capital. "There are very few unlimited Names still in the system."

Since last August, Sportscover has increased premium income by 101% and is predicting a 125%-130% increase by August 2007. The company currently writes \$30 million of premium income in Australia a year, but plans to increase revenue to \$400 million in five years.

To join AILA, please download an application form at www.aila.com.au

DIARY 2007

August 13 - August 14

Australian Risk Summit 2007, Navigating through the maze of risk challenges, Sydney Convention & Exhibition Centre.
Go to www.acevents.com.au/risk2007

August 20 - August 21

D&O Liability Symposium,
The Westin, Sydney, Professional Risks Pty Ltd,
ph (03) 5989 7582.

August 22

Geoff Masel Memorial Lecture Series, Sydney, 4.30pm-6.30pm. Venue TBA. Speaker Prof Greg Rinehardt, Can courts ignore the reality of insurance in litigation? Ph Penny Paterson, (02) 9975 7198.

August 23

Geoff Masel Memorial Lecture Series, Brisbane.
The Polo Club, Naldham House, 1 Eagle Street, Brisbane,
12.30pm-2.30pm. Speaker Greg Rinehardt.
Ph Kim Logan, (07) 3886 5861.

August 29

SA branch breakfast seminar, Hilton International Hotel, Adelaide. Go to www.aila.com.au.

August 29

Geoff Masel Memorial Lecture Series, Canberra, noon to 2pm, venue TBA. Speaker Greg Rinehardt.
Ph Doug Galbraith, (02) 6279 4065.

August 30 - September 1

ANZIIF, 14th annual Sunshine Seminar: A World of Change, Sheraton Noosa. Go to www.theinstitute.com.au.

Wednesday, September 12

Geoff Masel Memorial Lecture Series, Melbourne, Venue TBA, 4.30pm-6.30pm. Speaker Greg Rinehardt.
Ph Brian McPhail (03) 9899 5382.

September 19 - September 21

AILA-NZILA annual conference, The ties that bind. Christchurch, New Zealand. Go to www.aila.com.au

This newsletter is compiled by Kate Tilley Journalism Pty Ltd on behalf of the Australian Insurance Law Association and the New Zealand Insurance Law Association.
Editor: Kate Tilley

Please forward contributions to KT Journalism: PO Box 165, Spring Hill, Qld, 4004; phone (07) 3831-7500, fax (07) 3831-7541 or email ktj@bigpond.com.

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