**INSURANCE IN A CHANGE OF ERA**

**AUSTRALIAN INSURANCE LAW ASSOCIATION**

**GEOFF MASEL LECTURE 2019**

**PRESENTED BY MICHAEL GILL[[1]](#footnote-1)**

**S1 & S2**

# A BIT OF GEOFF MASEL

## It is a great honour for me to be invited by AILA to present the Geoff Masel Memorial Lecture for 2019.

## S3

## Geoff was a friend, professional partner, counsel, adviser, mentor and, sometimes, professional opponent. I met him in my first year of legal practice in 1970. Phillips, Fox and Masel was the Melbourne agent of my Sydney firm on most of our insurance law needs south of the Yarra. It was during his messy, paper laden, ash infested time. But never disorganised or confused in work habitat or mind.

## We came together on many claims, especially on policy coverage and professional indemnity. I learnt much from him and my senior partner in those early years - John Francis Mant, or Mr Mant as he was invariably addressed. Masel and Mant collaborated on many of the big insurance issues of the 70's.

## S4

## **My Published Paper has a couple of Geoff Masel stories you may like to read**.

## By the early 80’s, the firms were close enough to contemplate a national merger. Phillips Fox and Masel in Melbourne and Smithers Warren Davenport Mant in Sydney. There were many issues of course, but one big problem. Geoff and I were seriously opposed on one of the biggest insurance disputes of the time. Latent damage in the Santos Cooper Basin Liquification Project. I for Santos (a referral from Frank Hoffmann) and Geoff for AIG.

## With the understanding and agreement of both clients, we were relieved of our obligations and the first step towards DLA Piper in Australia was taken.

## Geoff was just concluding a major role with Michael Kirby and others on the Australian Law Reform Commission reference on Insurance Law. This gave rise to both the Insurance Contracts Act and the Insurance (Agents and Brokers) Act.

## Thereafter until his untimely death we were partners in, or employed by, Phillips Fox.

## Can I share with you just one story of Geoff Masel, the lawyer and the man. A major insurance client, a producer for the firm of more than one hundred claims a year, was the plaintiff in a tenancy dispute with one of Geoff's commercial clients. When offered the instructions by the commercial client, Geoff was concerned about a possible conflict of interest. He consulted the CEO of the insurer and was reassured that he could act against the insurer in the matter. The CEO explained that the case was a waste of time for Geoff's client and that sadly, Geoff was bound to lose. Perhaps you can see what's coming.

## Two years later and a week or two before the hearing, Geoff had a call from the CEO demanding he withdraw from the matter immediately. Geoff explained that he could not do so. The response was that if he did not, there would be no more insurance instructions for the firm. In fact, shortly thereafter, the firm was directed to deliver all current matters to other firms. We were sent to Coventry for many years. It was tough at the time especially for our mates in Melbourne but there was never any doubt about the correctness of the decision and Geoff's integrity and leadership. The legend lives on. My thanks and the thanks of all his friends and colleagues in the law and beyond for this AILA memorial to Geoff.

## S5

# A BIT MORE ABOUT AILA

## AILA was created in very pleasant circumstances. Back in the day known as 'Pre BC' (pre-bean-counters) when the Work/Life balance was more accurately described as the more Life/less Work balance, good lunches were seen as a critical part of relationship building, aiding the achievement of serious professional outcomes and the discovery of solutions to difficult problems. It could be argued that a long lunch, especially on Friday, was an early manifestation of ADR.

## Lunches at my firm attended by eight or nine mates over eight or nine months birthed AILA. We thought we found some unique space for it within the multiple and clustered organisations of Insurance and Law.

## Robert Owen ultimately articulated the two reasons to press the button:

### a meeting place for all with an interest in Insurance Law and all that is relevant to it; and

### an organisation that will provide in depth consideration, analysis and education of the major insurance law issues of the day.

## AILA's success speaks for itself; and one should not quickly move to change a winning formula.

## Of course, AILA has changed with the needs of the times and offers an amazing set of opportunities to its members today.

## It is implicit in the paper that I am about to present that I would encourage the leadership and membership to clearly and confidently adopt a third raison d'etre, Thought Leadership.

## S6

# A CHANGE OF ERA: the externals

## So I thought I might try to kick start this move by speaking about a number of existing issues that present challenges for the Insurance Industry and those who work with it. Most of these challenges have been around for some time, at least in part, or have entered discussion and speculation about impact and possible solutions. I have seen them emerge over my practising lifetime, often in the context of matters of concern to my clients, regulators and consumers.

## Not surprisingly, these issues or challenges are interrelated or interconnected. So there will be overlap in my discussion and perhaps some repetition.

## Many of these issues have particular relevance within the interest of ordinary citizens of Australia (I will call them consumers); some extend more broadly.

## It is not part of my intention to attempt to provide answers, certainly not complete answers. I am not sure at this time that there are any clear answers in this space. My aim is to ask the questions, feed the speculation and fuel serious discussion. This is the kick-off, the commencement of the discussion.

## And the context is simply this; we are moving from an era of change to a change of era. And my focus is consumer insurance.

## So let's start with a very brief historical sojourn into insurance nicely summarised for my purpose by the Financial Services Royal Commission:

## *"The precise origins of insurance law are uncertain, and there are plausible arguments to be made for ancient civilisations, including Roman, Greek, Phoenician and Chinese, as the inventors of marine insurance. As far as Europe is concerned, marine insurance appears to have originated with the Lombards. For our purposes it suffices to say that by the seventeenth century there was a thriving marine insurance market in London, important enough for a specialised court for the resolution of marine insurance disputes, to be established in 1600. The eighteenth century was the turning point. Marine insurance remained the most important form, although life insurance existed in embryonic form and a small market for buildings insurance developed after the Great Fire of London in 1666."[[2]](#footnote-2)*

### *"The fundamental and honourable purpose of insurance is to spread risk. Michael Kirby said, "The sharing of risk is the essential brilliant idea of insurance"."[[3]](#footnote-3)*

### *"The Elizabethan marine statute captures this concept: "upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few"."[[4]](#footnote-4)*

### *"Insurers absorbing financial loss that would otherwise be randomly distributed throughout the community."[[5]](#footnote-5)*

## S7

## Over the past 300 years, insurance has come to cover many different risks. Its customers are no longer restricted to wealthy merchants with business risks who often knew those who were sharing the risk with them.

## Today, much of the role of insurance is to protect ordinary people from the risks of everyday life. Fire insurance may have started with the houses of the wealthy after the Great Fire of London in 1666, however, today it replaces property losses of ordinary Australians following the occurrence of many perils.

## A brief observance of the introduction of compulsory classes of insurance indicates the reliance which society and its modern developments places on reliable insurance. Time does not permit a detailed analysis of the obvious reasons behind Workers Compensation Insurance, CTP Insurance and various occupational insurances.

## Needless to say, our society has come to rely (indeed, it is dependent) on insurance. Society generally and consumers individually need more certainty and less risk. The lives of ordinary consumers can be irreparably damaged by the failure to insure or the failure of insurance to respond to a personal calamity. They may never recover.

## S8

## Although risk was at the core of the insurance concept, it was not so much the risk of whether a claim, when made, would be paid.

## We have over recent decades explored:

### financial literacy;

### plain language policies;

### disclosure documents of various types (ASIC has recently conceded the complete failure of these things);

### much statutory intervention in the insured's duty of disclosure;

### standard covers;

### less formal and more consumer-friendly claims dispute processes;

### codes of practice; and

### other techniques,

* 1. largely with the purpose of achieving a more certain and anticipated claims outcome for the insured.

## Some of these "reforms" may have worked in some sense. We can’t be certain. We aren’t good at measuring such things. I guess we have a feeling (largely anecdotal) that things have improved, although this can be patchy. Too bad if you are the exception to the rule that the overwhelming majority of claims are paid in full and promptly.

## S9

## What seems to be (unsurprisingly) incontrovertible is that the average insured consumer just wants their claims paid. They don't want:

### to be experts in insurance, or insurance law;

### to spend a lot of time on the purchase decision;

### surprises; or

### to spend more money than is necessary.

## However, the reality is that insurance is complex, especially for consumers, and the English language, even before the torture of legal interpretation, is not always precise.

## I was told a few years ago that insureds really look to their insurers to take them from zero to hero; zero being the time required to arrange the correct policy and, of course, to be a hero for the insured at the time of the claim.

## For consumers in 21st century Australia, insurance has moved a long way from Mr Lloyd's Coffee shop opened in Tower Street London in 1686. When the Richard Rogers designed Lloyds building opened in 1986, a few wags suggested that Lloyds had moved from a coffee shop to a coffee percolator.

## Consumers, for most of their needs, do not have the benefit of knowledge or experience; nor do they have the benefit of personal advice from an expert. In this era of artificial intelligence and widely accessible databases of most relevant information, insurers are often better informed than the insureds regarding the facts relevant to the risk. In perhaps the most important area of household insurance, insurers can easily identify (and more so in the future) the perils and the most appropriate terms, including the sum insured for proper compensation.

## We must never forget that it is the Australian parliament on behalf of the people of Australia that gives each insurer the right to transact insurance business. The authorisation is not granted to enable investors to maximise a profit; it is to provide insurance protection as reasonably needed by, in the case of consumers, their major risks. Insurers thus play a unique role in the life of our nation and its people.

## The consumer contracts of insurance have long since passed from being tough commercial agreements, *caveat emptor*, to being part of the social support network, designed to protect the community.

## S10

## Reverting to Lloyds for another moment, Cuthbert Heath (often called the father of the modern Lloyds of London) has been quoted in the context of the San Francisco Earthquake in 1906 as instructing his claims representatives to pay all claims in full "irrespective of the terms of their policies". A less well known quote attributed to him is his response a few years later to an employee who, having just joined his claims department, asked what’s my job. The reply was "Son, your job is to get our clients out of their troubles. That’s what they pay us for".

## I won’t suggest you ponder whether Royal Commissioner Kenneth Hayne discovered such motivations and behaviours.

## So let's consider these and other issues in the context of a few major future challenges.

# S11

# CORPORATE CONFLICT

## **Shareholder versus policyholder:**

### Historically, insurance has been provided by a variety of different legal structures. Apart from the unique characteristics of Lloyds membership, as it was, mutuals and share companies have been used most frequently. In a mutual, the policyholder was also the company owner; it could be said that as a result, there was an alignment of interest. In a share company, the two roles are distinct, as are the respective interests. Policyholders want policies at minimum cost and their claims paid. Shareholders want the best return on their investment. A benefit to one group can be seen as a detriment to the other, at least in the short term.

### Directors have statutory duties to exercise their powers in the best interests of the corporation and for a proper purpose. They are also bound by the 'business judgment rule', which depends, among other things, on the director rationally believing that the judgment made "is in the best interests of the corporation"[[6]](#footnote-6). In short, the existing legislative framework, as well as the pressure of the market, shareholders, lawyers and financial analysts focus directors' obligations and attention overwhelmingly upon the corporation and its shareholders, and not the customers.

### Of course, a private insurer and its insureds' interests will not always be incompatible. Commissioner Hayne expressed a view that "[t]he longer the period of reference, the more likely it is that the interests of shareholders, customers, employees and all associated with any corporation will be seen as converging on the corporation's continued long-term financial advantage."[[7]](#footnote-7) But where is our patience for the longer term?

### If the strongest argument in favour of share companies is their ability to raise capital, what alterations (law reform) should be explored for other structures?

### What do you think?

### So who is winning this battle? In share companies, where is the time, energy and enthusiasm of senior management and boards focused? Whose interests get the most attention from senior management and at the board level?

### Is there substance to the suspicion that the share company is principally focused on attracting capital, meeting profit forecasts, placating financial analysts, outperforming the competition in financial returns and generally presenting itself as an attractive investment?

### How do these aims and activities compare with Cuthbert Heath's objective of getting clients out of their troubles? How does this commitment to insureds play out in the core values of the company, the language of training programs, claims handling manuals and how employee performance is rewarded?

### Is there reliable evidence that mutuals give their insureds a better and fairer claims experience? If so, why?

## **Demutualisation:**

### In 1990’s Australia, the financial services sector (including a number of general insurers) underwent a significant movement away from mutual structures. Money was returned to owners; shares were issued; much capital was raised. The overall impact of this movement is not for this paper.

### What we don’t know, because the data was not collected, is whether policy holders benefited from this development. If mutuals had been seen historically as a desirable legal structure for the delivery of general insurance, were appropriate steps taken to protect the insureds' interests in this new structure where they no longer owned the company?

### **S12**

## **Microinsurance; lessons for consumer insurance.**

## **MY WRITTEN PAPER PROVIDES MORE INFORMATION ABOUT MICROINSURANCE**

### So a quick explanation of microinsurance. As the name suggests, microinsurance is essentially insurance on a "micro" scale. It caters to individuals who lack other basic social protections due to their limited incomes and abilities to access the levels of insurance which are otherwise typically available on the market. The main aim of microinsurance is to protect the socioeconomic living conditions of the low-income population against specific risks faced by disadvantaged individuals, which might otherwise critically disrupt their lives - for example, life, health, invalidity, cattle, crop, weather and natural disasters. Microinsurance is provided in exchange for regular, reduced premium payments (for instance, as low as 0.10 euro per month) which are proportionate to the likelihood and cost of the risk involved. Microinsurance is characterised by low coverage limits and the terms on which it is provided are necessarily simplified and easy to understand.

### Among the current debates in the space are:

#### What role if any should private insurers have?

As we have just considered, private insurers' principal function is to act in the best interests of their shareholders by delivering the maximum return on their investment. This function may be viewed as opposed to the interests of insureds whose claims are a burden on profitability.

#### Does the mutual structure engender more confidence and trust?

#### There are other operational models which warrant consideration - particularly in the context of microinsurance. Mutual and cooperative insurers are member-owned. They are governed by and operated in the interests of their members and profits are re-invested back as benefits to members. In this way, members are more intrinsically involved in decision-making processes and any conflict between owners' and customers' competing interests is alleviated. In mitigating this divergence, the mutual structure is arguably more complementary and philosophically consistent with the inherent social function of microinsurance.

#### Is "insurance" such a dirty word that some other term should be selected?

### The success of microinsurance is dependent on its trustworthiness and simplicity and there are lessons in this regard which can be applied more widely across traditional lines of consumer insurance. Because of the relatively small premiums and claims involved, transaction costs have to be low for both the insurers and the insured. This demands highly efficient products, policies and claims handling processes that avoid misunderstandings. Policies have simple language, easy to understand outcomes and few, if any, exclusions. Microinsurance products are therefore effective even in markets with little experience of insurance.

### I suggest that the favour shown to simplicity and understandability in microinsurance can be applied to other types of consumer insurance, where an 'expectation gap' between what is covered by the policy and what the policyholder thinks they are covered for, is all too common.

### Other possible approaches could involve standardisation of some policy terms.

### The rise of the concept of 'reasonable community expectations' as a benchmark by which the financial services industry is judged, reinforces the need for steps to be taken to eliminate 'expectation gaps' in relation to insurance products.

# s13

# A NEW STARTING POINT

## If we as a society recognise the importance of certainty for consumers, I suggest that going forward, we must have a new starting point for consideration and determination of all the relevant issues. The fundamental question must be "what is in the best interest of the policy holder; how can society and the law achieve the optimum outcome every time?"

## That, alone, is a great place to take up the discussion.

# S14

# COMMERCIAL CONTRACT OR SOCIAL PROMISE FOR CONSUMERS?

## **The changing risk appetite:**

### What does this mean? Simply, that consumers expect their claims to be paid promptly and in full. The closing of the expectation gap has long been recognised as perhaps the most important intended outcome of compulsory pre contract notices, compliance legislation, voluntary codes, IDR and EDR.

### For consumers, the intrinsic value of an insurance product is in the ability to make a successful claim when an insured event occurs. For most consumers, a rejected claim or seriously reduced insurance payment can destroy a lifetime of material achievements, be it a destroyed house, a serious legal liability, a catastrophic injury or illness. Having paid for the relevant class of insurance, often over decades, there is an unsurprising expectation that if such a claim does occur, the insurer "will do the right thing". My insurer will be my hero in the spirit of a Cuthbert Heath.

### And much of the time, that is what happens.

### S15

### But for those occasions where it does not go smoothly from the beginning, uncertainty, anxiety and fear can compound the stress which is invariably caused by the insured event.

### For example, ASIC in its 2016 review of claims handling in the life insurance industry, observed that:

"*although the considerable majority of claims are paid … in some cases, claims are being declined on technical or contractual grounds that are not in accordance with the "spirit" or "intent" of the policy" and "an issue arises when a policyholder’s reasonable expectations about policy coverage do not align with the technical wording in the policy.*"[[8]](#footnote-8)

### It’s bad enough to suffer the consequences of the insurance peril. That’s the risk against which the insurance is taken out. But does any insured have at mind’s centre, the risk that their insurer will run for cover at the time of the claim. Or, perhaps that is precisely what many do have at mind’s centre.

### So what can be done to reduce this second risk to the point of eliminating it. Compulsory classes like CTP and Workers Compensation have largely achieved this, driven by the social imperative that created them in the first place. Other compulsory classes have since been created with similar intent.

### Standard cover in the Insurance Contracts was an attempt in the same direction which failed because of the language used and the inclusion of opt out provisions that were too easy to invoke.

### Consumer friendly interpretation provisions, firstly enunciated in the courts and more recently in the ADR terms of reference have also closed the gap. Government intervention for risks like flood and terrorism have also helped. We will explore some possible solutions later.

## **Personal Advice**

### What is now largely absent from the policy selection and claims transactions for consumers is the element of personal advice. Most of the consumer policies are arranged without the benefit of advice from an insurance expert; they are purchased direct from an insurer or its agent.

### Many consumers, perhaps most, see the selection process as a grudge purchase, an unwelcome intrusion on their time and basically an assessment of who has the lowest price.

### Insurance policies and terminology are complex. Financial literacy has not worked in this space. There seems to be little interest or skill for a careful time-consuming examination of "which policy and terms are the best for me".

### Some recent work in which I was involved alerted me to the value of behavioural science in this area. Indeed, to me it now seems almost naive to conclude that these important issues are essentially legal in nature.

### So before speculating about what may be a better solution, let's consider a few related issues.

## **Who’s best placed to assess the risk?**

### Historically, the law of disclosure proceeded from the correct assumption that an insurer was at the mercy of an insured who knew all there was to know about the risk being presented whilst the underwriter knew little or nothing.

### As the law developed, disclosure became an unfair, often draconian excuse for the rejection of claims. The history was well researched and reported on the ALRC in the lead up to the *Insurance Contracts Act*, which provided much needed law reform and fairness for insureds.

### In the subsequent 40 years, more reforms have been enacted in the *Insurance Contracts Act*. In addition, and perhaps of greater relevance, the pendulum has swung dramatically.

### An outbreak of publicly available, computer searchable and easily digestible information enables insurers to learn much about many risks such as household policies. They may be better placed than the insured in many respects, including, for example, when determining appropriate replacement costs. Indeed, the construct and content of most consumer policies authored by insurers appropriately demonstrates their familiarity with what consumers need. And as artificial intelligence, data gathering and smart hyper-fast analysis grows apace, this function may be removed from insurers and brokers entirely by law and/or market disruption. Should we explore what’s necessary for that to happen?

## **A Compulsory Core for each Consumer Policy**

### This seems sensible and growing in attraction.

### No contracting out?

### Add-ons permitted?

### All risks covered?

### A government pool for the risks that are too costly or said to be uninsurable.

* 1. This discussion can now occur in a far more constructive environment.

## We have found a way to insure terrorism and flood. For most of my life in the law, the latter was said by the industry to be "uninsurable". Whether some major event is or is not insurable is really not the point. Australian social values generally support the restitution of the injury and damage. The only question is the mechanism for doing so.

## **S16**

## **Managing the dispute risk**

### We have been moving in the direction of interpreting disputes favouring the insured for a long time. Should we simply complete the process?

### Should the major focus of interpretation be the needs of the consumer?

### Should the process have regard to what more the insurer could have done to assist the consumer to avoid the problem?

### Should learnings from all failed claims be applied to policy and system modification?

# S17

# ARTIFICIAL INTELLIGENCE AND THE "INFORMATION AGE"

## In 1766, Lord Mansfield delivered his landmark judgment in *Carter v Boehm[[9]](#footnote-9)* , determining that insurance policies were contracts requiring the parties to act towards one another in accordance with the duty of utmost good faith. Central to Lord Mansfield's formulation of utmost good faith was the concept of disclosure - particularly, disclosure by the insured party.

## I am sure you are all aware of the facts which are set out in my published paper

## It is useful to briefly recite the facts underlying this decision. In 1759, George Carter, the governor of Fort Marlborough, a British settlement in Sumatra, had taken out a policy of insurance underwritten by Charles Boehm. The policy responded to a particular potential event, being loss of the Fort due to it being taken by a foreign enemy.

## The covered risk came to pass when Fort Marlborough was attacked and taken by French forces during the term of the policy.

## Boehm declined to indemnify Carter on the basis, prior to inception of the policy, Carter knew (but did not disclose to Boehm) that:

### Fort Marlborough was "*a factory or settlement, but no military fort or fortress … [and] … it was not established for a place of arms or defence against the attacks of an European enemy; but merely for the purpose of trade*" and was "*only calculated for defence against the natives of the island of Sumatra*"; and

### "*the French had the preceding year, a design on foot, to attempt taking that settlement by surprize; and that it was very probable that they might revive that design*".

## Lord Mansfield described Insurance as a “contract upon speculation”:

* 1. " *The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only … [and] … [g]ood faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.*"

## Although the non-disclosure aspect of the duty of utmost good faith has now been separated and exists independently within Australian statute, the spirit of Lord Mansfield's formulation has endured the passage of time. However, one wonders whether his Lordship would have reasoned differently had he known what the future of would hold - 'InsurTech', artificial intelligence, robotics and the 'internet of things'.

## S18

## Technological advancement has given rise to the 'information age', where data is king and connections are everywhere. Sensor-equipped motor vehicles, smart phones, smart watches, fit bits and home systems - Google Assistant and Amazon Alexis - are constantly recording and transmitting vast quantities of data in relation to how we behave, our locations, daily activities, driving habits and health at any point in time. All the while, satellites and drones capture detailed real-time images of every corner of the planet from every angle. Data can be stored at relatively low cost and these information platforms are open for mining by insurers. More than ever, underwriters are intimately familiar with their customers' particular circumstances and are in a position to manage risk with heightened sensitivity and precision. Globally, technological progress is driving insurers toward improvements in underwriting decision-making, product pricing, and, eventually, policyholder experience.

## Hand in hand with this explosion of available data goes the ability to efficiently understand and apply it - hence, the rise of artificial intelligence and machine learning. With the assistance of automation and machine 'deep-learning', vast swathes of consumer data can be quickly processed to detect patterns, assess hypotheticals and transform findings into increasingly precise risk profiles and finely-tuned insurance products.

## The speed and ease with which information can be digested will continue to fuel the development of new InsurTech products focused on 'event-based', 'real-time' and 'just-in-time' offerings. Insurers will be in a position to quickly grasp the full spectrum of a risk at any point in time, including risks arising from an insured's changing patterns of behaviour, together with the probability and severity of potential events. Equipped with this information, insurers will be able to make 'real-time' underwriting decisions and pricing adjustments which reflect the fluidity of risk.

## One wonders, if the circumstances in *Carter v Boehm* had arisen in the not-too-distant future rather than in 1760, how would the consequent insurance claim have unfolded?

## **MORE OF THIS IN THE PUBLISHED PAPER**

## One possible result might have looked something like this:

### thanks to the network of connected sensors attached to Fort Marlborough, together with the various smart devices used by each individual stationed there, prior to inception of the insurance policy, an abundance of raw data would have been available to Boehm;

### Boehm, with the assistance of his sophisticated, artificially-intelligent underwriting systems, would have been able to analyse and understand this data to construct a fully-formed and precise risk model, which accurately accounted for the (questionable) defensive capabilities of Fort Marlborough;

### the prospects of an attack by a hostile force would have been predicted with precision and a premium would have been automatically applied which reflected the calculated risk - indeed, perhaps, the premium would have even been adjusted in real-time as footage of the impending French attack was captured and broadcast by the network of drones and satellites covering the area;

### as the French man o' war unleashed its initial barrage of fire upon the Fort, Governor Carter would have already lodged a claim with Boehm using his smart phone and an automated claims assessment would have resulted in cover being instantaneously confirmed; and

### a "ding" on Governor Carter's smart-phone would have signalled the arrival of a blockchain-enabled payment of the settlement funds into his bank account as he drove off into the Sumatran sunset in his Tesla Model-X.

## This is a futuristic, perhaps slightly ambitious illustration, but it highlights the question - as the internet-of-things continues to produce data on an exponentially increasing volume and insurers are able to interpret and usefully apply that data to know their insureds better than ever before, are the principles of non-disclosure as relevant today as they were to Lord Mansfield?

## S19 & S20

## It seems inevitable that there will come a time ( closer than we think) where it is no longer correct to say, as Lord Mansfield did, that the facts which inform an insurer's risk "*lie most commonly in the knowledge of the insured only*". Indeed, it is possible that insurers will be in a superior position to their insureds when it comes to assessing and appreciating risk and policyholders may no longer have an obligation to ask themselves what a reasonable person might know "*to be a matter relevant to the decision of the insurer whether to accept the risk*"[[10]](#footnote-10). In this way, technological advancement may be capable of bringing about simplification of the relationships between insurers and their customers.

## And it may not just be insurance carriers who are well-placed to benefit from advancements in artificial intelligence. Customers may also be better off as a result of the introduction of machine learning into insurance distribution, enjoying unprecedented access to immediate, personalised advice in relation to their insurance needs and options.

## Advances in machine learning present an opportunity for insurance providers to replicate advice traditionally provided by insurance agents, offering a more streamlined process where a customer's digital, social and behavioural information is immediately available and able to be quickly and usefully interpreted for the purpose of insurance decision-making. Whilst these developments are poised to disrupt traditional models of insurance distribution, they present a significant opportunity for insurers to differentiate themselves and find new ways to earn customers' trust. Indeed, research has indicated that 74% of consumers are either very or somewhat willing to receive computer-generated advice about the type of insurance coverage they should buy[[11]](#footnote-11).

## S21

## The full disclosure obligation could be replaced by a secure and comprehensive information portal which is the only source of information for insurers to rely upon, including all matters relevant to moral risk. An application for insurance could be an automatic authorisation for insurers to access this information efficiently and with minimal cost and delay.

## Artificial intelligence is now used to a degree by insurers to resolve less-complex claims and answer simple questions and it will continue to play an increasingly important role in the handling of claims. This is reflected in Lloyd's 'The Future at Lloyd's - Blueprint One'[[12]](#footnote-12), released this year, which emphasised "[a]rtificial intelligence-powered triaging and segmentation, routing claims to the right place throughout the claim cycle"[[13]](#footnote-13), "[f]ull straight-through processing for certain non-complex claims"[[14]](#footnote-14) and a "one-stop shop"[[15]](#footnote-15) market claims service that handles non-complex claims on behalf of the market, using leading technology, analytics and centrally procured services"[[16]](#footnote-16).

## As the underlying cognitive technology improves, however, artificially intelligent chatbots will develop increasingly complex advice capabilities. Their abilities to process natural language will increase and they will become able to identify a particular customer's needs with precision and sensitivity and ultimately produce useful, personalised advice regarding the insurance cover a customer requires and the products available to meet the customer's requirements.

## The tension in corporate insurers between the interests of policy holders (who seek payment of their claims at minimum premium cost) and shareholders (who want maximum return on their investments) may be alleviated by machine learning. The ready availability of personalised, objective advice in relation to a customer's insurance needs and options will allow customers to more easily obtain policies which are best-suited to their needs and, perhaps, intercept insurance carriers' inherent temptation to prefer products which deliver the better profit outcome for shareholders.

## S22

# DOES LAW/REGULATION ACHIEVE ITS OBJECTIVES?

## This of course is a question of much broader application than consumer insurance. However, for the best part of 50 years we have been introducing legislation and regulation often to plug holes in the dyke and sometimes to effect significant reform.

## How effective has all this change been? Has it been effective at all? Who benefited and who paid? Was it cost effective? In hindsight were there better ways to solve the relevant problem?

## Who knows? Where is the proof? Is it anecdotal or more reliable? How is success measured?

## Although I had given thought to such issues over a long period, my attention was seriously focused in the work of a Taskforce established by the Insurance Council of Australia to advise on improving the effectiveness of disclosure documents.

## What was the evidence of the effectiveness of the then existing disclosure regime? In short, there was none. This experience is reflected in the results of enquiries recently undertaken jointly by ASIC and the Dutch Authority for the Financial Markets, who found that the utility of disclosure was undermined by:

### its inability to "*solve complexity that is inherent in products and processes*";

### the inherent problems associated with supplying "one size fits all" notices of information when "*[i]t is hard to predict the individual and context-specific differences in how we will behave, make decisions and engage with and process information*"; and

### the fact that consumers are "*constantly saturated with competing attempts to capture our attention and influence our decisions*".

## And how do we test the success of all the other laws and regulations that are supposed to improve the lot of consumers of insurance services and products? We know for certain that regulation and compliance costs are significant and presumably impact the price of insurance products. Hardly good for consumers unless there are demonstrable benefits that clearly outweigh the addition to the price.

## Take one example - the notices relevant to a consumer's decision about policy renewal. They are well intentioned. Lawyers can draft them legally accurately. Some consumers might be able to understand them, especially if they can read English. Some consumers may retain them for the renewal and be able to find them at the time. And some consumers, not many, may be inclined to use these notices and others for the renewal process. That is the learning which comes from behavioural science.

## Consumers need/want outcomes, not expertise. For most, understanding insurance in its detail is simply unattractive partially because it is too difficult, too uncertain.

## The big challenge for this Change of Era is to close the expectation gap. How? What needs to change in the fundamentals? How do these changes fit or not with the other issues raised in this paper?

## And to be more certain that law and regulation is beneficial for consumers, why not a compulsory and robust testing regime to measure the success of all such laws on the basis of what they were intended to achieve. A regime which requires objectives to be clear, precise and measurable.

## Otherwise, we will continue with costly punts that hold lots of hope and little promise. Going forward, we will need to be much better than that.

## S23

# WHAT’S LEGAL V WHAT’S RIGHT

## This topic has been emerging for some time. Concern has been growing about the practice of a legal sign off replacing proper behaviour, especially where the doctrine of utmost good faith has a role to play.

## The Financial Services Royal Commission Report has turned on the spotlight. Unfortunately, immediate regulatory reaction suggests a residue of thinking that more law is the answer to everything.

## The Royal Commissioner has suggested a formula for proper behaviour. It is to be assessed through the prism of 'community standards and expectations'.

## AFCA is working on a definition of Fairness and a Tool for its application. Perhaps the essence of Fairness isn’t found in the place rules are made. Perhaps it is more about decisions of the conscience and the exercise of individual discretion. What do you think?

## It may be that this issue needs less input from regulators, bureaucrats and lawyers and more contribution from behavioural scientists, psychologists and ethicists.

## This is one area where a change of era looms large. Are we seeing an emerging new era where law has a lesser role to play? Or is this a relegation of law to a more appropriate role?

## Law reform is always playing catch up. But correct behaviour needs to be applied and adjusted in real time and for a plethora of individual and different circumstances. Correct behaviour will be delivered by genuine professionalism, honesty and a sense of fiduciary obligation to customers, or not at all. What do you think? Am I too harsh?

## S24

# A CHANGE OF ERA: THE INTERNALS

## Well, if you're comfortable with all that, ponder the interior side of things. What’s happening to your brain, your mind - and that of your generations and those following? What’s changing? How fast? And what is its relevance to Insurance and the Law?

## This is no more than an alert from me (if one was needed). It is part of my challenge to you and AILA to think well outside the historical and current square; to be willing to consider that the answers of today don’t mostly reside (indeed may not principally reside) within the knowledge and expertise of the traditional experts in Insurance and the Law. And if that’s a fair question today, how much more accurate may it be in the near and emerging future?

## I am not one of the world’s leading neuroscientists. Although I have been known to remark that the one thing that non-lawyers do not appreciate is that a law degree is the only degree that can make you an expert in absolutely everything.

## Baroness Susan Greenfield CBE is one of the world’s best neuroscientists and writes well for a wide audience.

## S25

## Earlier this year, I read her book, Mind Change. There are other books on the same theme. This one connected with me in a special way.

* 1. "*The argument underlying Mind Change goes like this: the human brain will adapt to whatever environment in which it is placed; the cyber world of the 21st century is offering a new type of environment: the brain could therefore be changing on parallel, in corresponding new ways. To the extent that we can begin to understand and anticipate these changes, positive or negative, we will be better able to navigate this new world. So let’s probe further into how Mind Change, just like Climate Change, is not only global, … but also unprecedented, controversial and multifaceted."[[17]](#footnote-17)*

## Within the publication, I was confronted or captured by many statements which bear relevance to Insurance and the Law. I share just a few with you. In particular, I was drawn to what she said and reported about research into social media and web use, and it’s connection with empathy, trust, creativity and mental illness. The impact it can have or is having on the remaking of our brains. Just a few references to start the thinking;

## S26

### " … *the majority of Facebook, if you haven’t rehearsed the basic non-verbal communication skills of eye contact, voice modulation, body language perception and, above all, physical contact, you’ll not be particularly good at them. And, if so, it will be harder for you to empathise with others* … *overall levels of empathy may be declining with an especially steep drop in the last ten years – a time frame that corresponds well with the advent of social networking among Digital Natives*"[[18]](#footnote-18);

### "[w]*hile this survey, like all surveys, cannot provide a causal link, the somewhat eerie correlation between the soaring popularity of social networking sites and the decline in empathy is undoubtedly worth considering*"[[19]](#footnote-19);

### "… *these observations indicate that excessive internet users have deficits in the early stage of face perception processing* …"[[20]](#footnote-20);

### S27

### "[t]*he lack of rehearsal of social skills might well foretell a decline in deep and meaningful relationships. An important consideration is that a preference for online rather than face-to-face communication could result in greater distrust of people. After all, trust grows from empathy, which in turn is best established through face-to-face communication and body language*"[[21]](#footnote-21);

### "*'Internet Use Disorder' has been included in the fifth edition of Diagnostic and Statistical Manual of Mental Disorders* …"[[22]](#footnote-22);

### S28

### "[t]*he critical issue facing us is how we negotiate a transition from the old question-rich, answer-poor environment of the twentieth century to make sense of, indeed survive in, the current question-poor, answer-rich environment delivered by fast paced technology. In my view there are three essential factors often overlooked in current education and certainly not necessarily inspired by the current cyber lifestyle. firstly, to have a strong sense of one’s own individual identity (and to respect it in others); secondly, to have a sense of individual fulfilment; and thirdly, to be useful to society. How might these somewhat abstract goals be realised?*"[[23]](#footnote-23);

### "[t]*here is something that ticks all three boxes: creativity … the essence of creativity is simply seeing something in a new way* …"[[24]](#footnote-24);

### S29

### "[t]*he challenge is to produce an environment which encourages “individuals to have confidence to question and deconstruct dogma and traditional views, to possess the courage to make new associations without fear of the opinions or cynicism of others*"[[25]](#footnote-25); and

### "[s]*till we cannot ignore the real world. However much digital technologies draw us into their pixelated, frenetic hall of mirrors, this world still serves as a parallel to the ever present, bulky, three dimensional environment in which even the geekiest technophiles still have to exist*"[[26]](#footnote-26).

## In 2019, we, in Insurance and the Law, are increasingly looking for faster and cheaper solutions, via social media and the web and what goes with them. We are deliberately spending less time in physical community and conversation. It is often discouraged. It is seen as costly and slow and less desirable than the application of artificial intelligence

## At the same time, we have identified at the top of our challenges, a loss of trust with our consumers and the need to replace the strict application of the law and regulation with a human application of fairness.

## Perhaps our new brains will be better able to deal with these issues and the many more not yet identified. Perhaps we will have new skills to replace those that may disappear. What do you think? What does AILA think?

## Are you up for the challenge? Is AILA up for the challenge?

## Take confidence from others:

## S30

### From Albert Einstein:

### "*Imagination is more important than knowledge. Knowledge is limited. Imagination encircles the World.*"[[27]](#footnote-27)

### S31

### From Senator Robert Kennedy:

### "*Some men see things as they are and say why*. *I dream things that never were and say why not*."

### S32

## Thank you for listening and good luck

# MICHAEL GILL - NOVEMBER 2019

1. This paper was presented by Michael Gill, Consultant - DLA Piper and one of the founders of AILA. It was jointly written by Michael Gill and Clancy O'Donovan, Senior Associate - DLA Piper. [↑](#footnote-ref-1)
2. Enright, Mann et al, General Insurance - Background Paper 14, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Part 4, 1.1, p 20 [↑](#footnote-ref-2)
3. Ibid., Part 2, 1.1, p 2 [↑](#footnote-ref-3)
4. Ibid., Part 2, 1.3, p 2 [↑](#footnote-ref-4)
5. Ibid., Part 2, 1.4, p 2 [↑](#footnote-ref-5)
6. Section 180(2)(d), *Corporations Act 2001* (Cth) [↑](#footnote-ref-6)
7. Financial Services Royal Commission Final Report - p403 [↑](#footnote-ref-7)
8. ASIC, Report 498, *Life insurance claims: An industry review* (REP 498), 12 October 2016, p. 6. [↑](#footnote-ref-8)
9. [1766] 3 Burr 1905 [↑](#footnote-ref-9)
10. Section 21(1)(a), *Insurance Contracts Act 1984* (Cth) [↑](#footnote-ref-10)
11. Accenture, *The Voice of the Customer: Identifying Disruptive Opportunities in Insurance Distribution* (2017) [↑](#footnote-ref-11)
12. Lloyd's, *The Future at Lloyd's - Blueprint One: Sharing risk to create a braver world*, (2019) [↑](#footnote-ref-12)
13. Ibid., p. 46 [↑](#footnote-ref-13)
14. Ibid., p. 46 [↑](#footnote-ref-14)
15. Ibid., p. 46 [↑](#footnote-ref-15)
16. Ibid., p. 46 [↑](#footnote-ref-16)
17. Greenfield, S., *Mind Change - How digital technologies are leaving their mark on our brains*, (2015), p. 14 [↑](#footnote-ref-17)
18. Ibid., p. 36 [↑](#footnote-ref-18)
19. Ibid., p. 140 [↑](#footnote-ref-19)
20. Ibid., p. 142 [↑](#footnote-ref-20)
21. Ibid., p. 146 [↑](#footnote-ref-21)
22. Ibid., p. 163 [↑](#footnote-ref-22)
23. Ibid., p. 257 [↑](#footnote-ref-23)
24. Ibid., p. 257 [↑](#footnote-ref-24)
25. Ibid., p. 259 [↑](#footnote-ref-25)
26. Ibid., p. 260 [↑](#footnote-ref-26)
27. Isaacson, W., *Einstein - His Life and Universe*, (2008), p. 387 [↑](#footnote-ref-27)