



UK newsletter

May 2009

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About CBP

CBP was founded over 100 years ago and is today a firm with 27 partners and over 200 staff.

CBP has a national and international presence providing a range of legal services:

- insurance
- construction and engineering
- commercial dispute resolution
- commercial and corporate
- property and development

The insurance group, with over 30 professional staff members, including nine partners, was awarded the ALB Mettle Insurance Specialist Law Firm of the Year Award in 2008.

London visit

CBP partners Gavin Creighton and Linda Murphy, together with Keith Bethlehem, Special Counsel, will be in London between 18—22 May 2009.

Gavin Creighton and Keith Bethlehem were previously in London in October 2008. During their current visit they will be meeting with clients, acquainting themselves with the latest UK market developments and providing insights into the major issues currently confronting those operating in the Australian jurisdiction.

Tough times ahead for D&O underwriters

Underwriters of directors and officers insurance are likely to be very uneasy about the changing claims environment as the instances of litigation funding increase and assist in buoying up the law suits of hundreds of shareholders seeking millions of dollars as a result of failed companies.

In Australia, the claims environment has yet to mirror events in the US where last year more than 250 securities class actions were filed as a result of the credit crisis.

"While I don't expect the same number of lawsuits to occur here because of the size of the market,

I do expect a significant upward trend because the issues are essentially the same," said Linda Murphy, a partner with legal firm Colin Biggers & Paisley.

Ms Murphy stressed that the background for litigation had altered dramatically in the past decade, fuelled by the spectacular corporate collapses which have resulted from the current recession.

"The result of the fallout has been to energise the regulator and encourage the growth of securities class actions which will contribute to a more active litigation setting for the foreseeable future," predicted Ms Murphy.

Tough times ahead for D&O underwriters (continued)

In Australia, directors and officers insurance has become increasingly targeted as a potential source of recovery for devastating losses suffered by shareholders who seek to make the boards of companies responsible for their losses. The recent settlement reached with some of the former directors of the Sons of Gwalia is an example of directors and officers insurance being a prime source of recovery for losses of shareholders.

Another trend that will indirectly impact on underwriters is the intense focus by ASIC on entities' and directors' compliance with the continuous disclosure obligations.

"In the prevailing economic climate it would seem that ASIC's enforcement efforts with regard to compliance with continuous disclosure obligations will intensify," Ms Murphy said.

As an example of such efforts, she pointed to the proceedings commenced by ASIC which are currently before the Federal Court in Western Australia in relation to Fortescue Metals Groups Limited and its CEO, which ASIC says will examine the responsibility of listed companies and their executives to keep the market properly informed in relation to disclosable agreements. The regulators are particularly concerned about the financing arrangements of entities when disclosing material information, and the existence and terms of any finance arrangements that may be in place in relation to directors' shareholdings.

Besides the additional regulatory pressures on directors, plaintiffs'

law firms and litigation funders are clearly commencing securities class actions.

In the current economic environment, it's expected there will be greater use of this legislative tool to ensure that the burden of continuous disclosure breaches falls on a range of persons who may be responsible for the failure – not merely on the company's shareholders who may already have been penalised.

"In this market we can only expect class actions to increase rapidly as companies fail and angry shareholders look for people to sue. And they will," Ms Murphy said.

"As directors will be in the firing line, insurers will wish to be satisfied that directors understand their corporate responsibilities in this constantly shifting economic environment."

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This release from Linda Murphy has been run by various business media in Australia.

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Australia's asbestos litigation environment remains vibrant

In late April 2009 it was announced that the Asbestos Injury Compensation Fund (AICF - the special purpose vehicle established by agreement between James Hardie Industries NV and the New South Wales State Government for the funding of James Hardie asbestos liabilities) may have a medium-to-long-term funding shortfall. That potential shortfall may arise if James Hardie Industries NV is unable to make cash contributions to the AICF sufficient to meet the AICF's future obligation to asbestos claimants. James Hardie Industries NV has, like many other companies, experienced weaker cashflows as a result of the current global economic climate.

If the AICF is unable to meet ongoing asbestos liabilities we anticipate that plaintiffs' lawyers will, like their US counterparts after the failure of companies such as Johns-Manville and Turner and Newall, turn to other potential sources of recovery including occupiers of industrial sites where asbestos was used.

On the same day that the potential shortfall in funding for the AICF was announced, the Supreme Court of New South Wales handed down a judgment in the Macdonald action in relation to certain allegations made against former directors and executives of James Hardie Industries Limited (JHIL). Amongst other claims it

was alleged by ASIC (Australia's corporate regulator) that the terms of an announcement on the establishment by JHIL of the Medical Research Compensation Foundation (Foundation) were approved at a 15 February 2001 JHIL Board meeting. The announcement made to the Australian Stock Exchange contained a number of statements to the effect that the Foundation would have sufficient funds to meet all future legitimate asbestos claims, that it was fully funded and provided certainty for people with legitimate asbestos claims. ASIC alleged that those statements were false and misleading and that the directors of JHIL were in breach of their obligation of reasonable care and diligence. Justice Gzell found that ASIC had made out its case in respect of the allegation against all directors.

There is no radical change in law in Macdonald; Justice Gzell applied the previous Australian authorities finding that "in accordance with their responsibilities, directors were required to take reasonable steps to place themselves in a position to guide and monitor the management of the company". The findings in Macdonald revolved around what was reasonable for directors where James Hardie Industries Limited was making a "key statement in relation to a highly significant restructure of the James Hardie Group". That restructure was fundamentally

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Australia's asbestos litigation environment remains vibrant (continued)

driven by concerns regarding asbestos liability and focused attention on the handling and disclosure of such liabilities.

The decision in Macdonald represents a cogent reminder of the sensitivities associated with asbestos claims and the need for a proper analysis by insureds and insurers on several bases - legal, commercial, political and social.

On 1 May 2009 the High Court of Australia granted Special Leave to Appeal to a number of parties in relation to a lung cancer claim (Ellis). The plaintiff alleged that, despite a smoking history, the lung cancer was materially contributed to by a relatively small asbestos exposure. The Supreme Court of Western Australia had found in favour of the plaintiff at trial and on appeal.

Ellis presents an important question on issues of causation for determination by the High Court. The question was expressed during argument as follows:

- Does a claimant need to prove more than an act or omission increases the risk of injury occurring? Can proving an increase in risk be enough, even though the increase of risk did not cause the injury?

The question raises issues similar to those litigated before the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32. *Fairchild* has not been accepted as a proper statement of law either in Australia in general or in the specific asbestos context *Omica Ltd v CGU Insurance Ltd* [2003] 59 NSWLR 14.

The appeal in *Ellis* has been listed before the High Court for two days (a reasonably long appeal). The outcome will have ramifications in relation to asbestos litigation and other areas including product liability and medical malpractice.

In another interesting development Special Leave to Appeal to the High Court has also been sought in relation to a claim involving an employee's liability insurance policy. In *QBE Insurance (Australia) Limited v Stewart* [2009] NSWCA 66 the New South Wales Court of Appeal overturned a decision of the Dust Diseases Tribunal which had found that an employer's indemnity insurance policy in statutory form was unlimited in the absence of any documents in the hands of the insurer demonstrating that that statutory limit was applicable. Reversing the trial judge, the Court of Appeal held that the insured had the onus in showing the availability of cover above the statutory minimum.

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Additions to our team

CBP is pleased to announce recent additions to its insurance team.

Linda Murphy Partner

Linda Murphy has 24 years' experience in directors' and officers' liability, professional indemnity, and litigation for insurers.

Between 2005 and 2008 Linda acted as in-house counsel for a large US commercial insurance carrier, assisting claims staff and reporting to senior management with regard to risks associated with that carrier's financial institutions, accountants and large law firm books of business.

Her practice focuses on directors' and officers' liability, professional indemnity, commercial litigation, risk management, policy interpretation and dispute resolution.

Mark Radford Partner

Mark Radford has 19 years' experience including a widely-recognised expertise in the field of FSR. He represents, among others, the National Insurance Brokers Association (NIBA) and also works closely with government and regulators such as Treasury, ASIC, ACCC and APRA.

His practice focuses on regulatory compliance with specific general and life insurance related legislation, policy drafting, product creation

and policy review, acquisition, sale and consolidation of business, documentation of distribution agreements, reinsurance, alternative risk management arrangements and corporate insurance reviews.

Susannah Maclaren Senior Associate

Susannah Maclaren has 10 years' experience specialising in professional indemnity, directors' and officers' liability and indemnity advice generally. Susannah has also been involved in actions commenced by ASIC.

She has recently returned from London where she was employed for two years by Clyde & Co. LLP. During her time in London Susannah gained experience in the Lloyds' and companies' insurance markets, general commercial litigation and also acting on behalf of clients in appeals to the Privy Council.

Alexandra Bartlett Solicitor

Alexandra has 4 years' post-admission experience initially in private practice specialising in shareholder transactions and agreements, Corporations Act advice, intellectual property and energy law.

Prior to joining CBP Alexandra practised at the Bar. One of the many cases in which she was instructed as junior counsel was Campbells Cash & Carry Limited v Fostif Pty Limited [2006] HCA 41, Australia's leading authority on litigation funding.

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