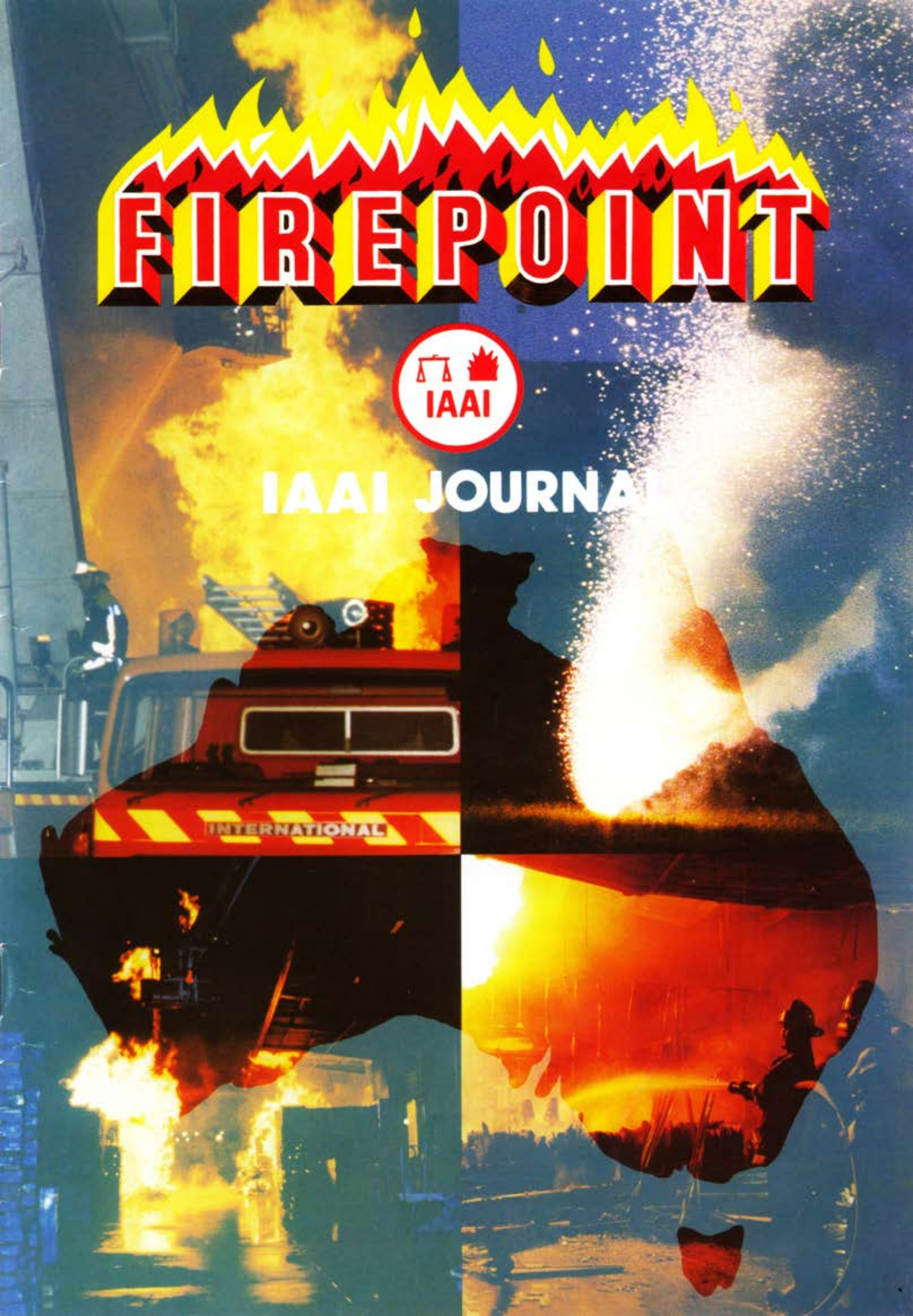
FIREPOINT

IAAI

IAAI JOURNA



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Firepoint

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EDITORIAL

A prominent solicitor told me that the article in the September issue on misrepresentation and concealment was interesting, but of no relevance in Australia, since the Australian law was quite different to that in the U.S., as described. I am delighted therefore to present the article by David Muir, from Brisbane, covering a similar topic, in the Australian context. Interestingly, it was first published in the U.S.

This month's NSW section includes reports written by spokespersons from the Fire Brigade, and the Police Service. I am hoping they will be regular contributors.

I hope to get more feedback to this issue. Letters and commentary are always welcomed. Merry Xmas, and a Happy New Year to you all.

Wal Stern

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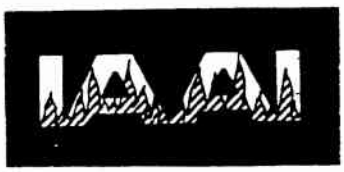
QUEENSLAND SECTION



THE PRESIDENT AND COMMITTEE OF THE QUEENSLAND ASSOCIATION WISHES ALL MEMBERS THE COMPLIMENTS OF THE SEASON. AND A PROSPEROUS NEW YEAR.

WA PRESIDENT'S REPORT.

(From Bill Mansas, Western Australian Branch President.)

I would like to take this opportunity of wishing all members of the Western Australian Branch of IAAI a very merry Xmas and a happy and prosperous New Year for 1996. The best wishes are also extended to members throughout Australia.

The WA Branch has been a little remiss in the planning of Seminars for 1995, however we plan on making up for this in 1996. It is obvious to all members that 1995 was a very hectic year with many changes coming about to the work place and Government policies which have affected many of us. Although this may be an excuse, I believe it is up to every one of us, myself included, to overcome these things and apply ourselves to the IAAI of WA.

I believe we owe it to ourselves, the Branch and indeed the community to make a more conscious, and serious effort to support and project the Branch in this state.

It is up to each one of us to promote and increase the membership of our Branch.

As President I will be making an extra effort in the New Year, to get the support of the Police Arson Squad and the Police Service for our organisation.

The success of this Branch can only be dependent upon the support of it's members, because the majority of the Executive Committee is enthusiastic and hard working, but needs member support.

Early in the year the IAAI of WA was invited on to the Committee of the Arson Council of Western Australia. This council is an autonomous body made up by the WA Fire Brigade, WA Police, Ministry of Education, Bush Fires Board, Insurance Council of WA, Australian Fire Protectors Association, IAAI WA Branch, Building Management Authority of WA and loss adjusters.

The Arson Council has just completed a review of all current and relevant Acts of Parliament with a view to recommending changes.

These changes would ensure parents and/or guardians are held legally responsible and financially accountable for the actions of juveniles who deliberately light fires. The completed review has been forwarded to the Minister. It now awaits his assessment of its recommendations.

The IAAI WA Branch looks forward to participating with the Arson Council in the coming year. Members are asked to support the council.

Once again Merry Xmas and a safe and prosperous New Year to all members and their families. Remember, we need you, so don't drink and drive.

##########

An article by Gordon Damant in the Journal of Fire Sciences (September/October 1995) examines cigarette ignition of upholstered furniture. Upholstered furniture sold in California, USA, has been required to be fire retardant since 1975. A total of 1200 upholstered items were tested for resistance to cigarette ignition. Each article was tested by placing lighted cigarettes at multiple locations on the item being tested. Furniture covered by fabrics consisting of cellulosic fibres showed a much greater propensity to smoulder, than those covered mainly with thermoplastic materials. Furniture covered with thermoplastic materials was found to be highly resistant to cigarette ignition.

NEW SOUTH WALES NEWSLETTER

NSW PRESIDENT'S REPORT

(The final report for 1996 from Roger Bucholtz).

As we approach the end of another year, it is time to reflect on our achievements for the year. I am pleased to be able to report the success of our seminar, both educationally and financially, enabling us to retain financial stability. The efforts of Clair Wivell, Treasurer, in formalising our accounting procedures has proved to be very beneficial.

The production of "Firepoint" magazine was reviewed and we have been able to maintain the quality of the magazine with some fine tuning of our outgoings. We have had an increase in membership.

The election of a new Committee will occur on Thursday, 7 December, 1995 at the Annual General Meeting. Whilst it is appreciated that many members do not wish to stand for office, there are other means by which you can participate in the functioning of our Association.

An objective of the Association is to provide an exchange of technical information and developments in the field of fire investigation. The committee endeavours to provide on-going education for all members, and we seek suggestions as to topics for the discussion nights and seminars. The Committee will approach persons nominated as possible speakers. Another method of education is from the submission of articles to "Firepoint". The magazine is now distributed nationally, so readers in all states can gain benefit from published articles. Remember, the more varied the topics, the more understanding people have of the disciplines associated with fire investigation.

On behalf of the outgoing Committee I wish to thank everyone for their assistance during the past 12 months and I look forward to meeting many of you at our functions in 1996. Finally, I wish all members and their families a very happy festive season and a prosperous 1996.

NSW PERSONAL NOTICES

This section is designed to notify members of staff transfers and movements. Please send notices to the Editor of any relevant staff moves.

Stuart Ritchie is now with Commercial & Criminal Forensic Pty Ltd, undertaking Fire and Explosion Investigation, Product and Public Liability Investigation, Security, Fraud, and Accident Investigation, and Post Mortem Photography.

Ross Blowers is now with Ross Blowers & Associates, operating Specialist Insurance Consulting Services, including Fire Origin & Cause, Factual Investigation, Education & Training, and Claims Leakage Assessment.

POLICE REPORT AN INTRODUCTION

by Wayne Parkes

(Detective Sergeant Wayne Parkes is a member of the Training and Research Branch (Physical Evidence), Forensic Services Group, NSW Police Service. This article provides background information. Future submissions are intended to provide information of interest on Fire Investigation from a Police perspective).

This article focuses on current trends in the training of Fire Investigators within the New South Wales Police Service.

Origin and cause of fires are determined by Crime Scene Investigators attached to respective Crime Scene Units from within the Forensic Services Group of the New South Wales Police Service. There are twenty eight (28) decentralised Crime Scene Sections in New South Wales. Crime Scene Investigators from these units are available on 24 hour call-out and should be called at the first opportunity to any scene where physical evidence may be found.

Fire scene examination is one of many specialisations that Crime Scene Investigators perform - by gathering and interpreting physical evidence and providing expert technical support service to Detectives, other investigators and Courts. Crime Scene Section members are highly trained with approximately 75% of staff presently undertaking a Diploma of Applied Science in Forensic Investigation.

This course teaches (in part) general Science, Chemistry, Physics, Combustion of materials and Fire behaviour in buildings, vehicles and bushfires.

Training involves both theoretical and practical applications. Theory includes Fire Science, and the practical component involves carrying out experiments at the CSIRO Fire Testing Laboratory, the burning of actual buildings which have been lit to simulate deliberate and accidental scenarios.

Crime Scene Investigators play a significant role in the investigation of fire scenes by providing the technical interpretation as to the cause and origin of fires.

A thorough investigation into a fire, which includes both the technical and general investigation, can achieve the following:

- determine if the fire was accidental or involved criminal action;
- can help prevent further cases of fire involving faulty electrical equipment or improper building construction and materials (for instance the Coroner may be able to make suitable recommendations that can prevent similar fires occurring as a result of the investigation and inquiry); and
- provide basis for civil proceedings to commence.

Current Training

The Diploma of Applied Science in Forensic Investigation which our investigators currently undertake involves thorough and intense training in Fire Examination 1 and Fire Examination 2.

Fire Examination 1

A pre-requisite for this subject is Forensic Chemistry which covers atoms and their structures, chemical bonds, chemical formulas and equations, gases and gas laws, chemical reactions and organic compounds.

Topics studied by Crime Scene Investigators in this subject include combustion, properties of heat, fire hazardous materials and development of fire.

At the end of each semester Crime Scene Investigators attend a residential phase were they have to demonstrate their competency in the subject by both practical and theoretical applications.

Fire Examination 2

Pre-requisite for this subject is successful completion of Fire Examination 1.

Topics studied in this subject are:

- Building / structure fires
- Vehicle Fires
- Bush Fire (Wildfire) Investigations.

As in Fire Examination 1, students have to demonstrate their competencies in both theoretical and practical applications. In residential phase of Fire Examination 2 students are required to examine and determine the cause and origin of fires in structures by paying meticulous attention to details and interpreting burn patterns, fire language and other factors.

Students are also required at the residential phase to investigate vehicle fires.

Training for bush fire (Wildfires) investigations are carried out as a separate residential phase due to their complexity. Competency in Wildfire Investigations is determined by practical and theoretical applications. Topic studied include:

- determining fire origin and cause
- fire law and evidence
- practises and procedures (Fire Investigators and Fire Officers)

Assessment of competency is by a written exam and investigation of actual bush fires (wildfires).

Final Comment

The delivery and assessment of these subjects is provided by the Training and Research Branch, Forensic Services Group, New South Wales Police Service and the Department of Forensic Studies, Canberra Institute of Technology.

Proficiency testing for competency standards of Crime Scene Investigators is carried out through the National Institute of Forensic Science (NIFS).

FIRE INVESTIGATION UNIT NEWS

(Compiled by Alan Easy, Head of the NSWFB FIU)

HOSPITAL OPERATING THEATRE FIRES

Fires of this nature are fortunately infrequent, but the true incidence may not be known, as Fire Brigades may not be called due to the relative small size of the fire and probable extinguishment by the hospital staff. Any fire in an operating theatre poses a serious threat to the patient and the operating team, particularly the patient.

Part of the problem arises because of new technology being introduced..

To have a fire, three elements must be present. Combustibles are present in the operating theatre in the form of sheets, blankets, drapes, swabs, sponges, plastic piping and components and body of computers and other monitoring equipment and the gowns worn by theatre staff.

In respect of oxygen, there is potential in an operating theatre for an oxygen enriched atmosphere. This may occur locally around the patient, if the supply of oxygen exceeds the patient demand. Under these conditions, combustibles will ignite more easily and burn vigorously. The same can be said of nitrous oxide, also used in anaesthetic procedures, and also a strong oxidising gas.

Ignition sources within the operating theatre are numerous and include fibre-optic light supplies, electro-surgical units and lasers. Also present are computer monitors and other electrical devices, all of which have the potential for a malfunction or fire.

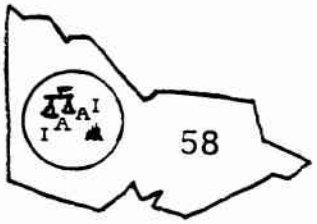
In the last few years, Los Angeles Fire Department has had two fatal fires in operating theatres, both of which were attributed to the misuse of high energy electro-surgical units. In Sydney, the Fire Investigation Unit of the Fire Brigade is aware of three fires in operating theatres, none of them attended by the Fire Brigade, in which three patients undergoing surgery received burns. The Health Care Complaints Commission was set up to give members of the community a means of effectively making a complaint about heath services and individual health practitioners.

This body is one avenue for a patient to follow. The other is direct litigation against the doctor or hospital, which has implications for the insurer providing the liability cover.

RECALLS

A list of product recall notices is held from Fire Investigation Unit data and that generously supplied by Mr. Mitch Parrish, Zurich Insurance. The list also covers current safety issues being monitored, and as such remains in-house. However, information can be obtained by telephone (742-3795).

VICTORIAN NEWSLETTER



MEMBERSHIP

The committee welcomes the following new members to the Victorian Chapter :
Mark Patrick
Allan Small
Robert Court
Paul Millett
Stephen Soden
Neil White
Peter Drake
Robert Mitchelmore
Andrew Bona
John Bradbury
Ian Munro
Gregory Cahill
Michael Corridan
Peter Hiscock
Philip Hubbard
Brian Turner

Subscription fees for 95/96 are due, and members concerned should forward the fees as soon as possible. At this time, only half of the membership of 185 is financial. The Treasurer has extended the final payment to 31st December 1995 when those not financial will be withdrawn from membership. The costs of running the Chapter does not allow for unfinancial members.

Any member who changes address please notify the Secretary in writing so that your copy of "Firepoint" doesn't end up lost.

PROGRAM OF EVENTS 1995

Golf Day December 12, 1995
Yarra Bend Club. Golf & BBQ
For non golfers, come and enjoy the BBQ.

SEMINAR 1995

The seminar for 1995 entitled "Win or Lose - Preparation for Court" was held at the MFB Training College Theatre in Victoria Street, Abbotsford on Thursday 12th October, 1995. The feature of this seminar was that after a brief introduction it was followed by four workshops that complimented the theme. The workshops were on Interviewing, Court Preparation, Statements and Tape Recording. Feedback from the 80 attendees was positive in the fact that participation in the workshops intergrated ideas from the different areas within the industry. Mr Nick Pappas, Chief Magistrate of Victoria, apart from his presentation, opened the seminar. The success of the seminar was attributed to him and our other presenters. The committee is also grateful for the continuing support from the sponsors of the seminar.

COMMITTEE NEWS

The committee has been mainly involved over the last months with preparation and finalising the Seminar. Other items the committee has been dealing with have been donating $1000 to a school video package on fire safety issues, membership sub committee dissolved, and now full committee handles all membership matters, investigating membership from Tasmania, report to International body on Chapter activities and other house keeping items. Future directions for the Chapter have been discussed and one part is that seminars need to be a major event type. While in the USA Fred McCoach will be investigating the possiblity and suitability of such an event. The committee had some casual vacancies for committee members and Terry McCabe and Gerry Nealon have been appointed onto the committee. Welcome to Terry and Gerry. Current Secretary Phil Harris has resigned from the MFB. We wish Phil all the best.

PROGRAM OF EVENTS 1996

Any member who has any special subject or idea for next year and wishes it to be included please notify the committee in writing. Although the committee has a basic plan for next year any new ideas would be welcome and remember that these events are for you the membership.

EDITOR'S NOTE

Time to review another year. The Victorian Committee has undergone many changes and has many challenges for the forthcoming year. To all members and their families in all States, best wishes for the festive season and a prosperous new year on behalf of the Victorian Committee.

TIME-LINE
An **Investigative** Technique

(An article from the March 1995 issue of the Pennsylvania Association of Arson Investigators)

In any investigation, your goal is to prove the subject of the investigation either had or didn't have the **means, motive** and **opportunity** to commit the crime. The first stages of your investigation will reveal who had the means and motive. Once you have some subjects with means and motive, you have to decide if they had the time (opportunity) to commit the crime. The rest of this article will concentrate on the opportunity aspect. I would like to share a technique with you that will help you easily recognize those with opportunity.

The technique is a "time-line". A time-line can easily place or remove a suspect from the incident. A time-line is a string of known and verified dates, times and events. The time-line is put in chronological order, and gives a **case-at-a-glance.**

Example:
Incident: Joe Doe fire, May 26, 1995
Place: 234 Sample St., Anywhere

25/5/95
11:OOAM 4:30AM 5:30AM 5:45AM
#1 #2 #3 #4 #5 #6 #7 #8

Joe left Baltim. | Joe's car seen near house | Joe left 2nd store | Joe's neig. calls 000

26/5/95
3:30AM 4:35AM 5:40AM 5:51AM

Joe left Wash. Ist store | Paperboy sees Joe's car near hse.

Joe arrived 2nd store | Fire Co. is Dispatched

You can see how easy the above time-line is to understand. This time-line gives verified sightings of Joe Doe. Depending on the conditions at the fire scene, this time-line may easily convey if Joe had any involvement in the fire. In the event you remove all your obvious suspects from the incident, you will have to start working your case backwards. Again, the time-line comes in handy. The time-line will help to identify everyone with opportunity. You then must research your new list of suspects. There may be someone with a hidden motive.

If need be, create a time-line for every suspect. Use a time-line to track fire progression from witness statements, evidence gathered, etc. The O.J. Simpson defense team used a time-line to track chain-of-custody for a sock that contained blood.

The time-line helps uncomplicate the case for the jury. In most cases the jury can easily remember why and how something happened. But remembering and associating dates and times is difficult. Give them something to take into the jury room they can't forget. Even if they can't later recall the exact times, they'll remember the time- line and how clearly your side used it to either place or remove the defendant from the scene of the crime.

About the author - Douglas Knisely is a licensed private investigator in Pennsylvania who has been conducting fire investigations for 4 years.

Non-disclosure and Misrepresentation in the Context of Suspicious Fire Claims.

by David Muir

(David Muir, a solicitor, is a partner of the law firm Dunhill Madden Butler, Brisbane. He is a founding member of the Queensland Chapter, and its Honorary Solicitor. Currently Chairman of the Board of Crime Stoppers Queensland and a member of the Anti-Fraud Task Force of the ICA. David is also Deputy Chairman of the Human Rights Committee of the Australian Law Council).

Recent cases in Australia and New Zealand indicate the potential for non-disclosure and misrepresentation in suspicious fire claims. It follows that any investigation of a suspicious fire claim should take these matters into account. In order to do so, it is necessary to be acquainted with the relevant provisions of the Insurance Contracts Act 1984 (ICA) and to be otherwise familiar with the law.

WHAT IS REQUIRED BY THE INSURED?

Under Section 21 (1) of the ICA, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every- matter that is known to the insured being a matter that

(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or

(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.

Under Section 21(2) of the ICA, an insured is not required to disclose a matter:

(a) that diminishes the risk; or

(b) that is common knowledge; or

(c) that the insurer knows or in the ordinary course of his business as an insurer ought to know; or

(d) as to which compliance with the duty of disclosure is waived by the insurer.

QUESTIONS NOT NECESSARY

The duty of disclosure arises independently of the questions that may be asked by an insurer of an insured. In other words, the failure to ask a question of an insured in a proposal form does not free an insured from his duty of disclosure. See the case of Misiriakis -v- New Zealand Insurance Co. Ltd.[1] In this case, no proposal form was produced in evidence although the trial Judge was satisfied that a written proposal had been made. The insurance inspector who had been responsible for obtaining the relevant information gave evidence that in 30 years, no prospective insured had ever disclosed to him the existence of previous convictions, although he had no personal recollection of having interviewed Mr. Misiriakis when the proposal had been completed. The claim arose out of the destruction by fire of the Karantze Restaurant in Wellington in June 1978. The insurer denied liability on the ground of non-disclosure of the following facts:

(i) The cancellation of six policies by the State Insurance Office in September 1975 because of the insured's previous claims history and reservations about a claim in respect of spoiled food under a frozen food policy, although the insured alleged that they had themselves terminated the insurance;

(ii) Conviction and $400.00 fine in April 1972 on four charges of false pretenses, involving the passing of checks totaling $470.00 over a period of about one month, purporting to be drawn by a fictitious person.

The court held that notwithstanding the questions in the proposal, material facts not covered by the questions must be disclosed. The court held that whether the criminal convictions are material to the particular risk can only be determined in the light of all

the circumstances existing at the time the insurance is sought, including the nature of the offense; the penalty; the offender's age and circumstances at the time of the offense and the time elapsed since then. The court found that the convictions were material facts that should have been disclosed.

FAILURE TO ANSWER QUESTIONS

A difficulty may arise for an insurer in cases where a question is asked in a proposal form and the insured has failed to answer the question. Under Section 21(3) of the ICA, where an insured fails to answer a question or gives an obviously incomplete or irrelevant answer to a question, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to that matter.

TIMING OF DISCLOSURE

As indicated in Section 21(l) of the ICA, the duty to disclose arises before the relevant contract of insurance is entered into. This does not mean the date on which the policy is delivered. In the case of Prie Forme Cutting Pty Ltd & Ors -v- Baltica General Insurance Company Ltd & Anor [2], the insurer argued that the insured should have disclosed, at the time of making the contract of insurance, that there was a substantial volume of a highly flammable liquid, Ethanol, at the Balmain Street premises. This fact was not disclosed by the insured. The insured argued that the contract of insurance was not made until the delivery of the policy, and, by that time, the insurer had full knowledge of all matters relating to the risk.

The policy was not delivered until after a fire had occurred which was the subject of the claim. The court held that the contract was made when the written closing instructions were collected from the broker. Therefore, at the time the contract was made, the storing of the flammable liquid on the premises should have been disclosed by the insured.

Another feature of this case is that it illustrates the importance of non-disclosure in the context of investigation of suspicious fires where arson fraud is not proven. It was common ground in Baltica's case that the fire was deliberately lit. One of the defenses of the insurer was that the insured had caused the fire. Tadgell J found that the arson fraud defense was not proven. The question at the end of the day was the extent to which the liability of the insurer could be reduced as a result of the non-disclosure.

It is important to note that the duty of disclosure arises on each renewal, extension or variance of the contract of insurance. See Section 11 (9) of the ICA.

NOTICE REQUIREMENT ON INSURER

In cases where the insurer is relying on innocent non-disclosure, then the insurer must prove that before the contract of insurance is entered into, that it clearly informed the insured in writing of the general nature and effect of the duty of disclosure. See Section 22(1) of the ICA. This requirement does not apply to fraudulent non-disclosure.

In the case of Delphin -v- Lumley General Insurance Ltd[3] Keall J was not prepared to infer that the insured received a renewal notice containing notification of his duty of disclosure. The fact that the insurer had a system whereby notices were printed and dispatched to policy holders fell short of establishing that a particular notice was in fact posted and received. Had the court been able to find that the provisions of Section 22 of the ICA had been complied with, the insurer would have won. The court found that there was a breach of duty of disclosure by the insured with respect to a conviction of cultivating cannabis plants with intent to sell or supply cannabis to another. The use of the premises for the cultivation of the cannabis could involve some risk to the premises themselves and the fact of the conviction itself was material to the honesty and integrity of the insured. The court held that disclosure should have been made before the renewal of the contract of insurance so that the insurer could make a decision whether to accept the risk and, if so, on what terms.

Similarly, Kitchen J in the unreported South Australian case of Devision -v- AMP Motor found that the insurer had not complied with Section 22 of the Act in circumstances where, but for this failure, the insurer would have succeeded.

Importantly, in that case, the court pointed out that even though the insured did not read the proposal before signing it, he may still have breached his duty of disclosure if he knew or, a reasonable person in the circumstances could be expected to know, that his past convictions of breaking and entering, and larceny, were a matter relevant to the insurer's decision whether to accept the risk and, if so, on what terms. The court accepted that the prior convictions were relevant to the insurer in deciding whether or not to accept the risk but that the insured did not know this. The court found that a reasonable person in the circumstances could be expected to know that the matter was relevant and accordingly, disclosure should have been made. In the circumstances there was no finding of fraudulent non-disclosure.

REMEDIES FOR INSURER IN NON-DISCLOSURE

The remedies for non-disclosure are found in Section 28(2) and (3) of the ICA. Where the non-disclosure was fraudulent, then the insurer may avoid the contract. This means that the contract of insurance is avoided ab inito, that is, from the beginning. In cases where the insurer chooses not to avoid the contract of insurance or where the non-disclosure is not fraudulent, the liability of the insurer in respect of the claim is reduced to the amount that would place it in a position in which it would have been if the non-disclosure had not occurred.

The case of Twenty-first Maylus Pty Ltd -v- Mercantile Mutual Insurance (Australia) Ltd[4] illustrates what is required with respect to fraudulent non-disclosure. The facts were that the directors of the insured company were a married couple. Mr. Komomick had a criminal record for being knowingly involved in importing and possessing a large quantity of hashish. In a previous contract of insurance, in answer to a question in a proposal about prior convictions, Mr. Komomick answered "conviction for possession of marijuana." He admitted that the statement on this proposal was misleading.

In the following year, a contract was taken out with another insurer. There were no questions about prior convictions in this proposal. There was a fire at the premises and the insured claimed under the policy. Brooking J held that the convictions were a matter relevant to the insurer and that if the convictions had been disclosed, the insurer would not have been accepted the proposal. Further, the court found that the non-disclosure was "fraudulent" within the meaning of Section 28(2) of the ICA. Brooking J said that the meaning of "fraudulent" was not clear. It is not defined in the ICA. Although not deciding the meaning of "fraudulent," the court cited the meaning attributed by Dr. Tar in his text "Australian Insurance Law" page 87, where he described "fraudulent non-disclosure" as involving "the deliberate withholding of information in informed circumstances." Further, Brooking J said that a possible view is that fraud would be established if the case falls within sub-section 2 1 (1)(a) of the ICA and in addition, the insured failed to make the disclosure because he believed that if he did make it, the insurer might either decline the risk or accept it only on special terms. This means that it would be necessary to establish that the insured knew of the matter, knew or ought to have known that the matter was relevant to the decision of the insurer and in addition, failed to make the disclosure as previously indicated.

In the case of Ayoub & Anor -v- Lombard Insurance Co (Aust) Pty Ltd[5], the insurer succeeded on arson fraud and non-disclosure defenses. The insurer claimed that it was entitled to reduce the insured's entitlement to indemnity to nil on the basis on nondisclosure of the fact that in late July or early August 1986, the previous insurer, National & General Co Ltd, after inspecting the premises, had declined to issue a cover note. The premises was a milk bar, fast food and take away business. The insurer issued a cover note and then obtained a very adverse loss control report. The insurer agreed to an extension of the cover note for one further day. A fire occurred the next day.

Rogers CJ found that a reasonable person in the circumstances of the insured would have regarded as relevant the fact that an application for cover had been rejected by another insurer on

the basis that the condition of the premises had made them an inappropriate risk. Rogers CJ found that if the insurer would not have entered into the contract at all, it would be entitled to pay nothing in respect of the claim except the premium paid by the insured.

In the case of Lindsay & Ors -v- Insurance Ltd[6], the insurer succeeded on a non-disclosure defense. The premises were destroyed by fire. The court found that the premises were being used as a brothel and had passed this information on to the insured. The court found that even if the insured had not been informed by his agent of the use of the premises, then the knowledge of the agent would be imputed to the insured in any case. The court also found that a reasonable person in the circumstances of the insured would be expected to know that the nature of the use of the premises was relevant. The reason for this is that such use of the premises could put the safety of the premises in danger. Rogers CJ found that the insurer would not have entered into the policy had there been a disclosure of the use to which the premises had been put. Accordingly, the liability of the insurer was reduced to nil.

DISCLOSURE OF THREATS

The recent case of Hunter -v- General Accident Fire & Life Assurance Corporation Ltd[7] instances a situation where previous threats to burn the insured's home were not disclosed and enabled the insurer to refuse to pay the claim. A claim arose out of destruction of the insured's business premises by fire.

The particulars of the material facts were that over a period of 12 months immediately prior to taking up the insurance, the insured had received at different times, threatening telephone calls saying words to the effect, "You are dead, Hunter" and "We're going to start at one end and burn you out."

The insurer argued that these facts were material and that had they been known, they would not have accepted the risk. It was found that none of the threats were ever directed to burning the business. The insured gave evidence that he believed that threats were made by different people and that they were always anonymous. He said that nothing ever came of the threats and he regarded them, though frequent, as crank calls. In fact, it transpired that the insured had been getting calls of this nature for about 10 years. Seaman J said that the threats to the life of the insured and threats to burn his home occurring recently before the taking out of the insurance, were matters that would have reasonably affected the mind of a prudent insurer in determining whether or not it would accept the insurance. The writer is of the view that the appropriate test under the ICA is now the particular insurer rather than the "prudent insurer" test. Section 21 of the ICA refers to "the insurer."

In the final analysis, Seaman J found that the threats were material and ought to have been disclosed by the insured, no matter how casually the insured viewed them and on that ground alone, the insurer was entitled to refuse to pay the claim.

COURT DISCRETION TO DISREGARD AVOIDANCE

The courts have power to disregard avoidance of a contract of insurance in cases of fraudulent non-disclosure in certain circumstances. Under Section 31 (1) of the ICA, a court may, if it would be harsh and unfair not to do so, disregard the avoidance and shall allow the insured to recover the whole, or such part as the court thinks just and equitable in the circumstances, of the amount that would have been payable if the contract had not been avoided.

The restriction on the exercise of this discretion by the court is such that it may be exercised only where the court is of the opinion that the insurer has not been prejudiced by the failure to disclose or, if the insurer has been so prejudiced, that the prejudice is minimal or insignificant. In regard to exercising its discretion, the court is obliged to have regard to the need to deter fraudulent conduct in relation to insurance and shall weigh the extent of the culpability of the insured in fraudulent conduct against the magnitude of the loss that would be suffered by the insured if the avoidance was not disregarded.

Section 31 of the ICA was considered in the case of Evans -v- Sirius Insurance Co Ltd[8].

Even though it was not necessary in reaching his decision, Beach J held that even if the cancellation by another insurer had been material in the circumstances of that case, he would have disregarded avoidance by the subject insurer under Section 31. Factors which Beach J considered to be relevant were the re-insurance of the semi-trailer by the canceling insurer on the same terms; the premium calculated by that officer was less than the premium calculated by another officer who issued the policy who did not know of the cancellation; and that the insurer did not question the insured's financial position even though he sought to pay his premiums by installments.

In his explanatory memorandum to the Legislation, the Attorney-General gave, as an example of where the Section could operate, the case of a fraudulent failure to disclose a speeding fine in circumstances where a claim was made for damage caused to a vehicle while parked. Even though this example illustrates the nature of what was intended, it was probably not an accurate example in that it is doubtful whether a speeding fine would need to be disclosed in any event.

MISREPRESENTATION

If an insured gives a false answer in a proposal for insurance, then the remedies under Section 28 of the ICA also apply. That is, where the misrepresentation is fraudulent, the insurer may avoid the contract. Alternatively, the liability of the insurer in respect of the claim is reduced to the amount that it would be placed in had the misrepresentation not been made.

However, there are some constraints upon these remedies under Sections 26 and 27 of the ICA. Under Section 26 of the ICA where a person makes a statement in connection with the proposed contract of insurance that was in fact untrue, but the statement was made on the basis of a belief that a reasonable person in the circumstances would have held, the statement shall be taken not to be a misrepresentation. Another part of Section 26 incorporates similar requirements with respect to knowledge of relevance of the matter as is contained in Section 21 of the ICA. Under Section 27 of the ICA, a person shall not be taken to have made a representation by reason only that he failed to answer a question included in the proposal form or gave an obviously incomplete or irrelevant answer to a question.

MEANING OF WORDS IN A QUESTION

The case of Gaiform Pty Ltd & Ors -v- Suncorp Insurance & Finance[9] illustrates that even the judiciary cannot agree on the meaning of relevantly mundane terminology in connection with a claim of mis-representation. The relevant question in the proposal form was: "Has anyone comprising the insured either alone or jointly with other... ever been refused insurance or had any special terms imposed?"

THE QUESTION WAS ANSWERED "NO"

The insured had previously held a policy of insurance that was canceled in circumstances that the insurer submitted should have been found to be a refusal of insurance. McPherson JA said that the word "refuse" means "deny, decline, reject". He said that putting an end to an existing contract of insurance is rejecting insurance. It involves refusing insurance if someone has already insured, and so is directly within the scope of the question in the proposal form. However, Pincus JA and Davies JA construed the term "refused" in context as the rejection of an offer; that is, as requiring as a prerequisite and application for insurance or renewal thereof. They would not extend the meaning to include a unilateral cancellation, during the term, of a policy by the insurer. It is notable that this case was decided with respect to a policy of insurance that was subsisting prior to the ICA. There was no argument about whether the cancellation should have been disclosed apart from any question with respect to misrepresentation.

MISREPRESENTATION OF BUILDING MATERIALS

Misrepresentation with respect to the description of the building materials in a premises was dealt with by the Court of Appeal of the Supreme, Court of Queensland recently. See

the case of Lombard Insurance Company (Australia) Limited -v- Orb Holdings Pty Ltd[10]. A shopping arcade was destroyed by fire during the currency of the policy of insurance. In the proposal form, provision was made for, among other things, the description of the construction of the walls, roof and floors of the building. The representative of the insured did not complete this part of the proposal but wrote across it, "As per schedule attached." The attached schedule described the building as "building of shops" and the construction thereof as "brick/iron."

The court said that it was plain that the description of the construction of the building in the proposal was a material misrepresentation. In fact, two of the walls of the building were brick and two were wood. The total length of the wooden walls exceeded the brick ones. The roof trusses were also wood and there was a wooden floor. Evidence was given that the presence of wooden walls, instead of wholly brick ones, a wooden instead of concrete floor and wooden instead of iron roof trusses, materially increased risk of damage by fire.

The insurer argued that had it known that two of the walls were wooden construction, it would not have accepted the risk. The manager of the insurer gave evidence that had the building been described as "brick/wood/iron," an employee of the insurer would have made some inquiries to ascertain the extent of the timber. Further, he said that if the building had been inspected it would have been found to have not been within the insurer's classification and declined because that was what the manual stipulated. That evidence was based on the existence of a re-insurance agreement and a practice which the insurer said that it followed because of its existence.
The court found that the concealment of the fact, by describing the building as of brick/iron construction, though it had wooden walls, was a misrepresentation of such a kind as to induce an insurer to enter into a contract of insurance against fire.

It was interesting to note that the insured argued that Section 21(3) of the ICA applied in that the insured had given an obviously incomplete answer to a question in the proposal form by saying that nothing of the material that comprised the floor was disclosed. The court held, however, that the insurer was not relying on the failure of the insured to disclose the composition of the floor. It would have accepted the risk without knowing what the composition of the floor was. It was in fact relying on the misstatement of the building as "brick/iron," meaning walls of brick and roof of iron. Consequently, any waiver of a duty to disclose the composition of the floor was irrelevant. The court reduced the liability of the insurer to nil as it accepted that if the misrepresentation had not been made, the insurer would have declined to insure.

CONCLUSION

The cases cited herein illustrate that in the context of suspicious fire claims, insurers can be successful with defenses other than arson fraud. This is important when one takes into account the cogency of evidence required to prove arson fraud.

It could also be argued that the cases show that in the context of suspicious fire claims, the "thread" of moral risk is often a link between the circumstances of the actual fire and the previous conduct of the insured in failing to disclose relevant matters. In fact the nature of the nondisclosures and misrepresentations are often of a kind relating to moral risk, such as previous criminal history or claims history. Where there is financial motive, greed can be a factor resulting in multiple fraudulent claims. See the case of Sun Alliance -v- Sheldon[11] where evidence was given of six previous house fires.

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FIRE INVESTIGATION: ETHICS AND OTHER DILEMMAS

By Senior Constable Paul Bahr, SAPOL Fire Investigation Section

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Introduction

Fire Investigation is a vocation which has stalled at a cross-roads. Historically fire investigations were carried out by those whose training and skills were directed toward other areas, but who, either by coercion or, in most cases, bluff, put themselves forward as 'fire specialists'. During this phase it could justifiably be said that fire investigation was an 'art form'. An art in that it defined events in terms of imagination and creativity.

Evolution, however, saw the practitioners of the art of fire investigation increasingly attacked as being subjective, undisciplined and uninformed. To survive fire investigation was forced to move toward a scientific basis which involved specialised training, recognition of unacceptable methodologies and analyses of the past and an acceptance of the need for fire investigators to be professional. It is at this latter point that the science of fire investigation now finds itself.

Many fire investigators talk of their 'professionalism' or of the 'unprofessional' conduct of others, but what do they really mean? Do they suggest that fire investigation has joined the elite occupations of law, medicine, religion and some re others in attaining professional status? Unfortunately, the facts would suggest that there is still some way to go before this type of kudos can be achieved. There is much more to professionalism than just individual attitudes or ability. Likewise there is a distinction between professionalism and competency. As Timothy Row (1990; p.2) points out a profession has seven main characteristics:

1. A profession has an organised body of knowledge which is constantly being developed and refined.
2. Members of a profession undergo a lengthy training/education period during which time they study the body of knowledge and are tested about their understanding of the body of knowledge.
3. A profession operates autonomously and exercises control over its members.
4. A profession develops a community of practitioners through various professional associations including management and industrial associations.
5. A profession enforces a code of ethics and behaviour upon all members of a profession.
6. A profession establishes uniform standards of practice, and
7. A profession provides mobility for its members.

Several of these characteristics have been or are being developed as part of the evolutionary processes which have seen the art of fire investigation move to the science of fire investigation. It is not the purpose of this discussion to question whether or not fire investigation will at some stage deserve professional status. However, there is one of these characteristics which will need to be debated, argued and more importantly accepted before any notion of professionalism can be achieved that is a code of ethics.

Developing a Code of Ethics

In terms of fire investigation the notion of ethics has meant 'all things to all people'. Whilst

all fire investigators, no doubt, maintain that they have always upheld high ethical and moral standards, too few have been able to articulate these standards in a succinct form and even fewer have been able to agree upon what these standards should include.

To it's credit the International Association of Arson Investigators (IAAI) has adopted a code of ethics for it's members which is enforced via the Ethical Practice and Grievances Committee:

I will, as an arson investigator, regard myself as a member of an important and honourable profession.
I will conduct both my personal and official life so as to inspire the confidence of the public.
I will not use my profession and my position of trust for personal advantage or profit.
I will regard my fellow investigators with the same standards as I hold for myself.
I will never betray a confidence nor otherwise jeopardise their investigation.
I will regard it my duty to know my work thoroughly. It is my further duty to avail myself of every opportunity to learn more about my profession.
I will avoid alliances with those whose goals are inconsistent with an honest and unbiased investigation. I will make no claim to professional qualifications which I do not possess.
I will share all publicity equally with my fellow investigators, whether such publicity is favourable or unfavourable.
I will be loyal to my superiors, to my subordinates and to the organization I represent.
I will bear in mind always that I am a truth-seeker, not a case-maker; that it is more important to protect the innocent than to convict the guilty.

This code does espouse high moral values within the IAAI membership, but is it the model for a professional code of ethics?

The great problem in Australia (as is no doubt the case with other countries) with the IAAI code is that it is not a compulsory code for all investigators, even those who are IAAI members, and it does not appear to have been accepted by the ultimate arbiter - the courts - as being relevant. There are numerous cases where well meaning fire investigators have, as part of their claim to expertise, stated that they are IAAI members only to have the opposing side belittle the organisation by alleging that the only condition for membership is the payment of a fee.

Although legal practitioners cannot be criticised for doing what they can to protect their client's interests, surely there must be occasion where the IAAI Code of Ethics itself could be used to great effect to question the work of an investigator (especially those who are IAAI members).

So is there an alternative which may find greater acceptance? Sarantakos (1993; p 23) suggests that the following issues relate to ethical standards in professional practice:

Accuracy in data gathering and data processing. With regard to collection and processing of data, ethical codes contain a clause suggesting that researchers are expected to plan, collect and process data by employing high professional standards, a systematic and objective procedure and well accepted ethical standards.
2. *Relevant research methodology.* Further, methods and techniques should be chosen as required by the research objective and not for other reasons.
3. *Appropriate interpretation of the data.* The researcher is expected to interpret the data in full according to general methodological standards.
4. *Accurate reporting.* Researchers are expected to include in a report the research findings accurately expressed and in an unbiased manner and to also explain the methods employed in the collection and analysis of the data. Research problems, errors or distortions known to the researcher should be stated in the report.
5. *Fabrication of data is misconduct.* Researchers should not publish findings on data they did not collect.
6. *Falsification of data in misconduct.* Researchers should abstain from falsifying data, not even changing words.

Discussion

1. *Accuracy in data gathering and data processing*
Don't be fooled by the language used, data is nothing more than information - the

cornerstone of all successful fire investigations. Data processing relates to the means of recording that data. The information which is collected must be objective and not tainted by any subjectivity or biases on the part of the investigator (researcher). In effect, all relevant information should be collected regardless of the motivation of the investigator. This information must be gathered in a systematic process and Ford (1989; p 39) suggests that the same process should be followed at each individual fire scene.

2. *Relevant research methodology*

In any scientific endeavour the accepted basis for enquiry is the Scientific Method. Having said that it should also be pointed out that there is no one single Scientific Method. Authors have suggested a number of models - linear, closed and helix. However, there are steps which are consistent to them all:

Recognise the need
Define the problem
Collect data
Analyse the data
Develop an hypothesis
Test the hypothesis

(NFPA, 1992; pp 921-9 & 10)

In an investigation the process can be as stated above (linear) or in a closed circle or helix form where the testing of the hypothesis (in the case of fire investigation, the suspected cause or conclusion and the elimination of all other possible causes or conclusions) is unsuccessful requiring the investigator to return to the data collection/analysis phase. Regardless of which process is employed or the nomenclature used, investigators should be able to demonstrate the systematic methodology which they have utilised.

3. *Appropriate interpretation of the data*

Investigators will be required to interpret the collected information. This interpretation should be in line with the accepted scientific norms relative to fire investigation. Equally, interpretation should not rely upon scientific dictum whose validity may have been questioned or disproven by subsequent research. There is a need therefore for investigators to remain up-to-date with current developments in the science of fire investigation. For instance, using this model, there would be an argument to suggest that those investigators who still insist that spalling of concrete is, in itself, an indicator of the use of a flammable liquid are involved in unethical practice. Where interpretation is made investigators should be able to quote the appropriate references upon which it is based.

4. *Accurate reporting*

Again objectivity is the key. Any report should contain all information and a full interpretation. Information should not be withheld because of potential embarrassment, personal bias or the objectives of the investigator's sponsor.

5. *Fabrication of data in misconduct*

Much debate has raged within the ranks of fire investigators about the use of another's photographs to discredit that investigator's findings. Much of this debate has occurred within the pages of the *Fire and Arson Investigator.* Most of those involved in the debate appear opposed to the use of somebody else's photographs as a tool to developing a differing conclusion. The reasons for this are varied, ranging from the two dimensional perspective of photographs, the inability to view the entire scene and the possibility of subjectivity on the part of the photographer. It appears that nothing can replace the actual physical examination of a fire scene.

A far simpler example of the misuse of another's data is in the selective use of some other investigator's notes. For instance, if an investigator was to note that "damage to this area is heavy", a person reading or using this passage may place their own interpretation on the term "heavy" without regard for the scale used by the original author or further observations of other areas which may use terms such as "severe", "very severe" or "extensive" and so place the original quote in some perspective.

6. *Falsification of data is misconduct*

This probably goes without saying and is already an important consideration for all investigators given the laws relating to perjury, swearing a false affidavit etc. Some other inclusions within this characteristic could include the presentation of conjecture or guesswork as fact and ignoring relevant data which could lead

to other interpretations or analyses and therefore other conclusions.

Overationalisation - The South Australian Model

It is one thing to establish a theoretical basis for a code of ethics for fire investigators. It is quite another to produce that code in a workable and practical form. In South Australia the SAPOL Fire Investigation Section has developed a Statement of General Principles which has been designed not specifically as a code of ethics but more as an outline of the ethical and operational considerations. A copy of this Statement is attached to reports/statements prepared by members of the Section.

FIRE SCENE INVESTIGATION. GENERAL PRINCIPLES.

Fire scene investigation, like all crime scene investigation, must be carried out with a methodical and systematic approach. Although each individual scene will present a unique set of circumstances for the investigator concerned there are a number of fundamental steps in this systematic approach which will be common to the majority.

Firstly, there is the paramount requirement for the delay between the time of the fire and the commencement of the investigation to be limited to as short a period as possible. This requirement is qualified however, by the equally pressing need to assess the safety of both, the scene itself prior to entry and environmental conditions present at the time. Should this delay become excessive then there is the danger that evidence may be lost and/or that the characteristics of the scene may alter (due to a number of factors including: salvage, repair, demolition and weather) creating a situation where the cause of the fire cannot be determined or that an incorrect determination is made.

It is for the above reasons that it becomes difficult for any investigator to make any assessment in relation to a fire scene when that investigator has not physically examined the scene or has had an excessive delay prior to examination. This does not however, rule out the possibility of an investigator's determination being subjected to scrutiny and question but does question the ability of an investigator to form a determination without examining the scene itself.

The investigation as to the cause of any fire is carried out in two phases, these can be described as the "Interview Phase" and the "Examination Phase". The Interview Phase relates to the need for the investigator to garner as much information as possible in relation to the fire. This usually requires information from the Occupiers, Owners, Fire Fighters, Witnesses and any other relevant person. This phase is conjunct to and not distinct from the Examination Phase and indeed the two may overlap as the investigator clarifies points during the Examination.

The Examination Phase is normally conducted via a number of distinct steps dependent upon the characteristics of the scene. These steps include the 'External Examination', 'Preliminary Internal Examination', 'Detailed Internal Examination', 'Collection of Evidence' and 'Recording'.

During the Examination Phase the investigator will utilise a sound knowledge of the behaviour of fire to arrive at an 'Area of Origin'. Further examination, again reliant upon a sound knowledge may lead an investigator to a 'Point of Origin'.

It is at (or very near to) the Point of Origin that a 'Cause' for the fire may be found. In establishing the Cause the investigator will need to account for all and every possible cause which could be found at the Point of Origin. It is only after a process of elimination of all other possibilities and consideration of all information gathered during both phases of the investigation that an investigator will be in a position to determine the cause of the fire.

Enforcement

If there is to be an accepted code of ethics in fire investigation then there is a need to also develop a means of enforcing that code.

Other professions require their practitioners to hold a license before they can practise. Any breaches of their code of ethics

or conduct are dealt with by an established (often statutory) body which has the power to either withdraw, suspend or place conditions upon that license. This can have a severe impact upon the livelihood of the individual concerned.

Fire investigation is in the fortunate position of having only a relatively small number of practitioners. With so few, reputation becomes all important when potential clients are deciding upon which individual they should place their faith. Although, this is perhaps more critical for those employed within the private sector it is still an important factor for those in public positions.

Perhaps the greatest factor in determining this reputation is the performance of the individual before courts. This empowers courts to have the potential to act as a pseudo-enforcement body for any code of ethics. Before this can take place, however, courts (and more importantly the legal profession in general) need to be educated as to what are ethical and unethical practices. The Statement of General Principles is one method being employed by SAPOL fire investigators in educating courts.

However, this Statement is in use by only a handful of the total number of fire investigators operating within Australia. If a uniform code of ethics is to be established then it is incumbent upon all fire investigators to ensure that they inform courts of the code and that they abide by it. Not only will this create a climate of uncertainty for those whose practises are questionable but, ultimately it will also place fire investigation firmly on the road to professional status.

Conclusion

The purpose of this discussion has not been to pontificate as to what the code of ethics for fire investigation is. It's purpose has been to demonstrate the importance of developing a code of ethics - one that is workable, based on accepted professional practice and, most importantly, one which is acceptable to all including the courts.

The South Australian model is by no means the long term answer to this question, but it is a starting point upon which future discussion/debate can be based. No doubt this debate will at times be heated and some will feel threatened, but if fire investigation is to attain the status of a profession then this issue must be resolved.

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AEROSOLS

(From a paper by Ross Brogan, NSW Fire Brigades Fire Investigation Unit, to the NSW AFI Seminar held in Sydney on August 3, 1995).

It would be an unusual household or business that did not possess at least one aerosol product at any one time. Products so packaged include food e.g. whipped toppings, release agents for cooking, deodorants, hair sprays, carburetor cleaners, paints and pesticides. Due to the nature of the propellants and the pressure under which they are used, aerosol products present some very real fire prevention and protection problems.

CONTAINERS/ PROPELLANTS

The typical aerosol container is a small welded-joint , high strength metal can with a capacity up to (approx.) 500 mL of liquid. The top and base of the container are domed to withstand the pressure which may be as high as 2758 kPa (400 psi). A spring loaded plunger nozzle cap is pressed to release the pressurised product or mixture of liquefied gas and product.

Current propellants are chiefly hydrocarbons such as propane and butane in various mixtures, depending on the product and its uses.

They are gaseous at ambient temperatures and pressures, and they will condense to liquids at moderate pressures or low temperatures. They maintain constant pressure at a given temperature until all contents are converted to a gas. The quantity of propellant in an aerosol product ranges from 0.5 to 90 percent of the total weight of the contents.

Aerosol products have been directly involved in and sometimes responsible for extensive, costly, and occasionally fatal fires.

The most costly fire involving aerosols is thought to have been the fire that destroyed the 10.9 hectare distribution centre of the K Mart Corporation in Pennsylvania, USA. Palletized petroleum based aerosol containers were involved in the fires, which overwhelmed the sprinkler protection.

The facility was protected with hydraulically designed ceiling sprinkler systems. The extremely fast developing fire spread through the aerosol storage; rocketing cans spread the fire throughout this and adjoining areas. The fire overtaxed fire protection systems, resulting in early roof collapse and broken sprinkler piping. There was no loss of life, but property loss exceeded $US100 million.

The following press reports are examples of fire incidents involving aerosols:

1. DAMAGES FOR BUG BLAST

An insecticide manufacturer was ordered to pay $608,000 to a man whose face was disfigured by a blast when he lit a cigarette after spraying for bugs. The damages fell far short of the $1.35 million pre-trial settlement offer to Denis Benoliel, who was left without a nose, ears, hair or eyebrow, despite 30 operations.

The product had no warning label about flammability.

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2. COCKROACH BLAST

As Steven 'Tran closed the front door behind 25 pesticide bombs clustered on the floor, he thought he had seen the last cockroach waltz through his house. Instead, the bombs blasted his screen door across the street, blew out all his windows, melted his brown carpet and set his furniture ablaze.

"I really wanted to kill all of them" Mr. Tran said today. No one was injured in the explosion and fire, which caused about $137,000 in damage. "He damn near blew himself up", said Fire Captain Craig Campbell. The noise was so loud that several neighbours scrambled to dial the emergency number, thinking they had heard a gunshot.