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□ FOREIGN INSURERS AND MUTUALS

New requirements for foreign insurers and mutuals

On 3 May, the Australian government announced a package of measures to regulate foreign general insurance companies and discretionary mutual funds (DMFs). The regulation of direct offshore foreign insurers (DOFIs) and DMFs raises complex issues and there has been a lengthy discussion and review process with stakeholders.

Further information can be found at www.apra.gov.au. The package has implications not only for DOFIs, but also for insurance brokers, underwriting agents, domestic insurers and foreign reinsurers.

DOFIs

All DOFIs will have to be regulated by the Australian Prudential Regulation Authority (APRA) except:

- if they only provide insurance to Australia's largest businesses;
- where appropriate cover cannot be obtained locally; or
- for specialised risks that cannot be underwritten in Australia.

The Insurance Act will be amended this year and the changes are expected to come into force on 1 July 2008. APRA will apply its regulation and supervision through its prudential standards on different levels so that categories of insurers with lower risk profiles will be subject to less extensive prudential requirements. Risk profiles will arise from factors including the home regulatory environment, ownership structure, reinsurance arrangements, customer base and type of business offered. On this basis, while captive insurers will be regulated, we would expect that less extensive prudential requirements would be applied.

Prudential standards relating to capital requirements will be reviewed. Offshore foreign reinsurers may be indirectly affected by the changes that will apply to insurers.

Australian financial services licence (AFSL) holders will be required to deal only in authorised general insurance products, with limited exceptions. AFSL holders will also need to supply data on any dealing in DOFI and DMF products.

DMFs

DMFs will be subject to a rigorous and compulsory data collection regime to enable a review to be taken after three years to determine whether they warrant prudential regulation.

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introduction



Simon Liddy
Partner

Welcome to the June 2007 issue of our Aviation Law Bulletin. In this issue, we discuss the psychiatric injury to persons on the ground caused by an aircraft, the commencement of the Air Navigation (Confidential Reporting) Relations this year and the new requirements for foreign insurers and mutuals. Of particular interest, we review the new anti-money laundering laws and the new obligations on airlines and passengers.

On the home front, Matthew Brooks shaves to raise funds for the Leukaemia Foundation and Marcus Saw gives us the low down on his holiday in La Paz, Bolivia.

□ MONTREAL CONVENTION UPDATE

Montreal Convention 1999 – Australia yet to legislate

We have previously reported on the progress of the Australian Government and its declared intention to legislate to make the Montreal Convention 1999 part of the law of Australia (please refer to our December 2006 law bulletin).

There was some hope that legislation would be introduced into the Australian Parliament during the course of 2007 in order to bring Australia into line with a number of our other major trading partners. However, the latest indications from the Department of Transport and Regional Development, which is responsible for the legislation, are that another year may well come to pass before this becomes reality.

Given the current backlog of legislation to be considered by Parliament and the looming Federal election, we do not expect the situation to change until at least the middle of 2008. Until that time, the Warsaw regime in its various guises remains on foot and relevant under Australian law.

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□ ANTI-MONEY LAUNDERING LAWS

New anti-money laundering laws – new obligations on airlines, shipping companies and passengers

The first stage of Australia's new laws to combat money laundering and the financing of terrorism create new obligations for commercial airlines and shipping companies.

Australia's anti-money laundering laws in-line with those of countries like the USA, severe penalties (including imprisonment), apply for a breach of the new laws.

Fortunately, the government has granted businesses an additional 15 months to become compliant with the legislation so long as a business uses its best endeavours to comply.

Obligations on aircraft or ships carrying people

Under section 62(2) of Part 4 of the Act, a person in charge of an aircraft or ship travelling to Australia (without stopping between the point of departure outside Australia and Australia) must give a copy of the required notice (or cause one to be given) to all persons travelling on the aircraft or ship, including the crew.

The required notice is a written notice relating to reporting obligations under Part 4 of the Act, in the form and with the contents specified under the relevant rules. A failure to give the notice is an offence, with a penalty of up to \$5,500 possible.

To date, no rules relating to notices under section 62 have been issued. In the absence of such rules, it is reasonable to assume that notices given by people in charge of an aircraft or ship should mention the kind of reports required to be made under Part 4. These are reports regarding:

- movements of physical currency (above \$10,000) into or out of Australia (section 53);
- receipts of physical currency (above \$10,000) from outside Australia that have not been reported in accordance with section 53 of the Act (section 55); and
- movements of bearer negotiable instruments for any amount (e.g. traveller's cheques), but only if a report is required in relation to the instrument by a police or customs officer (section 59).

In addition, it would be prudent that the notice set out when the reports are required to be made, and the civil and criminal penalties that apply if reports are not supplied.

From 13 December 2006:

- an aircraft or ship travelling into Australia must give passengers (including crew) a notice explaining a person's reporting obligations under the new laws; and
- if a commercial carrier knowingly moves into or out of Australia more than \$10,000 in physical currency, or is made aware at any time that it is moving or has moved such currency (e.g. as part of transporting goods), then the carrier must report that movement.

The new obligations are set out in Part 4 of the *Anti-Money Laundering and Counter Terrorism Finance Act 2006* (Act), which came into force on 13 December 2006. As part of bringing

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□ PSYCHIATRIC INJURY

Psychiatric injury to persons on the ground caused by an aircraft

On 11 June 2007, an emergency window detached from a 1970s built Rockwell Aero Commander which had taken off from a regional airport in Victoria. The window fell to the ground next to a football pitch where a number of soccer players were enjoying a game. Fortunately, nobody was hurt. This narrow escape does, however, raise the spectre of how the Damage by the *Aircraft Act 1999* will operate in Australia and the classes of persons to whom compensation under the Australian Act may be payable in certain circumstances.

The decision of the Queen’s Bench Division of the English High Court in *Glen and ors v Korean Airlines Co Ltd* [2003] EWHC 643 (QB) held that claimants under section 76(2) of the *Civil Aviation Act 1982* (UK Act) are entitled to claim for psychiatric injury and that the rules of foreseeability and remoteness apply to claims under the section.

The decision provides some guidance as to the interpretation that may be applied to the damage by the *Aircraft Act 1999* (Australian Act), the equivalent legislation in Australia.

Facts

On 22 December 1999 a Korean Airlines Boeing 747-2B5F took off from Stansted Airport in England, bound for Milan. Shortly after takeoff the aircraft crashed into a forest located near Great Hallingbury.

The plaintiffs that brought the action lived nearby to the crash site and sought damages for personal injury and loss and damage, including damages for psychiatric injury resulting from the crash, under section 76(2) of the UK Act.

Section 76(2) relates to loss and damage caused to persons on the ground by an aircraft or something falling from an aircraft. To successfully claim damages for the loss and damage to which section 76(2) applies, a claimant need not necessarily establish the existence of negligence, intention or another cause of action (strict liability).

Issues for determination

The court was asked to determine three issues as follows:

- whether “material loss or damage”, referred to in section 76(2), is limited to “physical loss or damage”?
- whether “personal injury”, in section 105 of the UK Act, includes mental injury where the mental injury

is evidence of structural changes to the brain and/or central nervous system?; and

- whether, if damages are recoverable under section 76(2), the recovery is subject to the common law rules of foreseeability and remoteness?

Interpretation of the UK Act

The UK Act is a “consolidation act” – it is expressed as being for the purpose of consolidating earlier UK aviation acts.

This is significant in that it affects the interpretation applied by the court when considering the UK Act’s terms. The court was required to interpret the terms in the UK Act that were derived from earlier acts, as having the same meaning that they had in those earlier acts.

Relevant for the purpose of this case was the fact that section 76(2) was said to have been derived from section 9 of the *Air Navigation Act 1920*.

Submissions

Korean Airlines argued that the definition of “material loss or damage” referred to in section 76(2) should be interpreted as meaning physical or bodily injury to the exclusion of psychiatric injury, on the basis that the words derived from the *Navigation Act 1920* (UK), which at the time of enactment did not envisage these words as including psychiatric injury.

In addition, Korean Airlines argued that on its proper construction, section 76(2) envisaged that damages recoverable under the section would be in negligence and should be subject to the common law rules of foreseeability and remoteness.

Conversely, the plaintiffs argued that the word “material” in section 76(2) meant “legally significant” or “relevant” and did not exclude mental injury.

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Importantly, commercial passenger carriers are not responsible for reporting movements of physical currency in the possession of their passengers (section 53(5)(b)).

Obligations on commercial aircraft or ships carrying goods

If a commercial carrier knowingly moves physical currency greater than \$10,000 into or out of Australia, it is required to report that movement (see obligations affecting people below).

Under section 53(6) of the Act, for a commercial carrier of goods, the obligation to report the movement of physical currency greater than \$10,000 does not apply if:

- the physical currency is carried on behalf of another person; and
- the other person has not disclosed to the carrier that the goods carried on behalf of the other person include physical currency.

The Act does not specify any obligations on the carrier to search for currency in the goods it transports. However, if a carrier wants to rely on the protection of section 53(6), then under section 53(7) the carrier bears the evidential burden, i.e. as a minimum, if required the carrier will need to prove that there has been no disclosure to it that more than \$10,000 was to be carried with the goods.

It follows that if a commercial carrier is somehow made aware that physical currency greater than \$10,000 is being carried with goods (e.g. discovered during transit), then the carrier must report that movement.

Obligations affecting people, including passengers and crew members

People are required to report:

- movements of physical currency (above \$10,000) into or out of Australia (section 53), e.g. a passenger or crew member carrying more than \$10,000 on an aircraft or ship that is leaving or entering Australia;

- receipt of physical currency moved to the person from outside Australia, and the movement of that currency into Australia has not been reported in accordance with section 53 the Act (section 55); and
- movements of bearer negotiable instruments of any amount (e.g. traveller's cheques), but only if a report is required in relation to that instrument by a police or customs officer, e.g. when a report regarding travellers cheques is requested following a baggage search by a customs officer.

Failure to provide any of the abovementioned reports is an offence, making the person liable for a maximum of two years imprisonment, \$55,000 penalty or both.

It is worthwhile noting that reference to "person" above also includes a body corporate, such as a company. Commercial airlines and shipping companies will rely on the exceptions referred to above when transporting passengers and other people's goods.

Moving currency out of Australia

If a person takes more than \$10,000 out of Australia and does not report it in accordance with Part 4 of the Act, then an offence is committed.

It is clear that getting caught trying to take more than \$10,000 out of Australia, without reporting it, is an offence. This follows from section 57 of the Act. Under that section, if a person leaving Australia goes towards an aircraft or ship through an embarkation area and takes physical currency into the embarkation area (or has it in their baggage) and that person does not report that currency at the place where passports are examined, the person is deemed to have moved physical currency out of Australia.

It needs to be seen to what extent the Australian government will try to prosecute people who have left Australia and are then discovered to have taken money out, but who remain

overseas and do not return to Australia for prosecution, e.g. Nationals of other countries.

Best efforts to comply

As noted above, the government has granted businesses an additional 15 months to become compliant with the legislation so long as a business uses its best endeavours to comply.

In general law, "best efforts" is a high standard requiring an entity to do what may reasonably be done in the circumstances. Accordingly, to take advantage of the non-prosecution period, businesses will need to do what they can in the circumstances to comply.

If you need any assistance in helping you comply with the new Act, please contact Simon Liddy or Barry Stewart.

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□ CONFIDENTIAL REPORTING

Air navigation — confidential reporting

The Air Navigation (Confidential Reporting) Regulations 2006 commenced on 29 January 2007.

Since the Regulations were introduced in January this year in excess of 60 reports have been made through the REPCON scheme.

The purpose of the Regulations is to enable confidential reporting of safety concerns in air navigation, both in and out of Australia. REPCON is the scheme set out by the Regulations that governs the confidential reporting of information.

REPCON sets out specific circumstances where safety concerns can and cannot be reported. Reportable safety concerns include:

- incidents affecting safety;
- procedures that a reasonable person would consider endangers the safety of air navigation;
- the failure to comply with governing aviation legislation, being the *Civil Aviation Act 1988*, the Civil Aviation Orders, the Civil Aviation Regulations 1988 or the Civil Aviation Safety Regulations 1998; and
- any matter that endangers, or could endanger, the safety of air navigation.

Safety issues that are not reportable to REPCON include:

- matters showing a serious and imminent threat to a person's health or life;
- acts of unlawful interference;
- industrial relations issues; or
- conduct that may constitute an offence punishable by a penalty of life or more than two years imprisonment.

The Executive Director of the Australian Transport Safety Bureau (ATSB) must approve the form in which reports are to be made, and put any oral reports in writing.

The Executive Director can accept a report if they are satisfied that REPCON is the most suitable avenue for making the report, and the matter described in the report is a reportable safety concern

After accepting a report, the Executive Director must:

- determine and include relevant information from a report into the databases maintained by REPCON;
- determine whether to disclose any information from the report; and
- return the report to the reporter or have the report destroyed.

If the Executive Director of the ATSB reasonably believes that the making of a report constituted an offence under the Criminal Code, because the reporter knowingly supplied a false or misleading report, the report must be retained for up to two years or as long as required if a prosecution has commenced.

The scheme enables information to be disclosed from a report if the Executive Director has removed all personal information prior to disclosure.

Information from a report cannot be used to found a disciplinary action, form the basis of an administrative decision, or be admitted as evidence in a court or tribunal.

In the event that a report relates to an act of unlawful interference, the Executive Director must inform the Office of Transport Security Operations and may upon request send the report to that office.

The Ebsworth & Ebsworth team have been informed some of the safety reports made to date include issues relating to rostering, aircraft serviceability, and communications.

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□ WORTH GIVING PROGRAM

The Leukaemia Foundation World's Greatest Shave

The Leukaemia Foundation World's Greatest Shave is one of Australia's biggest fundraising events with over 100,000 people across the country either shaving, colouring or waxing their hair to raise funds for this needy charity.

Every dollar raised during the event goes towards helping patients and families living with leukaemia, lymphoma, myeloma and other related blood disorders. The funds raised help the Leukaemia Foundation offer support services such as transport, accommodation, education and support programs and practical assistance free of charge. The money also goes towards funding cutting-edge research into treatment and cures.

Other members of our Transport team also got behind the event this year to raise funds. We thank Matthew Burston and Sacha Christopher, Transport Lawyers, for raising online funds from family and friends, and Amanda Ingrey, Secretary, who raised funds in addition to organising this year's event! A fantastic effort from our Transport team for their fundraising efforts for the Leukaemia Foundation World's Greatest Shave for 2007!



For the past two years, Ebsworth & Ebsworth has hosted the Leukaemia Foundation World's Greatest Shave event with staff members from across the firm taking part. This year, the event was held in our Sydney and Melbourne offices on Thursday 15 and Friday 16 March.

This year, Matthew Brooks, Special Counsel, from our Melbourne Transport team (pictured left) participated by shaving his hair. This is the third year Matthew has taken part in the World's Greatest Shave, as he is a strong supporter of the Leukaemia Foundation. This year, Matthew was the highest individual fundraiser for the event, raising over \$1,400 – congratulations Matthew!

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Next

APRA proposes to publish a discussion paper on its prudential approach by June 2007 with a second round of consultation on draft prudential standards by the end of the year. The final prudential standards are intended to be in place by early 2008.

Collection of data requirements for DMFs are intended to start in 2008.

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□ MEET THE TEAM

The real life of...



Marcus Saw
Lawyer

The world in my sight...

Upon arrival in La Paz, Bolivia, having landed at the world's highest commercial airport which is perched at the dizzying altitude of 4,100 meters, my traveling companion and I were at once struck not only by the beauty of a patchwork city that sprawls haphazardly down the walls of canyon-like enclaves of mountains, but by the nausea inducing altitude sickness that the lack of oxygen inevitably produces to the uninitiated at that height.

We had little time to contemplate our lack of high altitude endurance training, as after bunking down in our cheap but cheerful hotel, we were picked up early the next morning, together with 12 other apprehensive-looking tourists by our "adventure tour guide" to make the half hour drive, to La Cumbre, a Bolivian mountain from the peak of which the "Road of Death" descends.

Standing at the top of La Cumbre in pelting snow, our fingers clenched numbly on the handlebars of our mountain bikes, it was not hard to see how the "Road of Death" earned its title. It is estimated that 200 to 300 people die every year along this stretch and the road itself is punctuated by crucifixes marking spots where tragedy has struck. Described by the Inter-American Development bank as "the world's most dangerous road" in 1995, this unsealed road is theoretically two lanes, however, with a sheer drop on one side and no guard rails and a mountain on the other side, it is in parts barely wide enough for a small car to navigate in one direction without sending dirt, mud and rocks cascading into the canyon below.

It descends an altitude of 3,600 meters over a distance of 64 kilometres, winding precariously along the side of a valley, which, we were soon to find out, makes the road extremely steep.

With these daunting statistics in mind, we listened attentively as our guides explained the rules. On our descent, there would be two guide buses, one in front of us and another following us. One horn meant go, two horns meant slow down and find somewhere to stop, and three horns meant stop immediately and dismount the bike (although we were told never to dismount on the cliff-side for obvious reasons)!

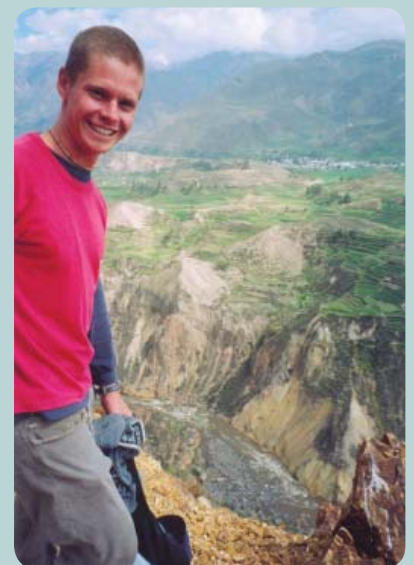
Having not ridden a bicycle properly since being propelled at the age of seven over the handlebars in a painful but spectacular crash at my local BMX track, I was given very brief instructions on the operation of my mountain bike's gears by my traveling companion, and we were away!

We started the ride in sub-zero temperatures and pelting snow, wearing jumpers, jackets, beanies and mittens, and made our way at alarming speeds in a blur of scenery, ducking under waterfalls, negotiating through rivers that spilled over the cliff's edge and skidding through muddy ruts left by the lumbering trucks that brave the road every day. The scenery was breathtaking although the opportunities to enjoy it were somewhat fleeting, because as our guide explained, a young woman the previous year became so engrossed in the scenery that she had cycled straight off the edge. At each rest stop layers of clothing were shed as we passed through various climate zones, until at the bottom of the road we wore only t-shirts and jeans in a balmy, sub-tropical 25 degrees.

In about six hours, we had cycled the extreme 64 kilometres, breathless but elated, and were greeted by much

needed soap and showers, a generous buffet and cold beer! However, we soon realised that that the hardest part was yet to come, as exchanging nervous glances, we piled into a bus not unlike one that had toppled over the side the year before and commenced the ascent back up the "Road of Death".

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Psychiatric injury to persons... > from page 3

The plaintiffs further argued that damages under section 76(2) included damages for deliberate infliction of injury and that as a result should not be subject to the common law rules applicable to negligence.

The court's determination of the issues

After considering the legislative history of the UK Act and the earlier acts the court answered the questions as follows:

- the *Navigation Act 1920* (UK) was within the category of “always speaking” acts, that is, its terms should be interpreted in the light of contemporary scientific understanding, social conditions, technology, medical knowledge and the meaning of particular words. Based upon a contemporary interpretation the meaning of “loss and damage” in that act (and consequently in the UK Act) is not limited to physical loss and damage and includes psychiatric injury;
- if a person establishes that their mental injury was the result of a structural change to the brain or the central nervous system, then they are entitled to claim for bodily and personal injury under section 105 of the UK Act; and

- the damages under section 76(2) are for “wilful acts” and not for “deliberate wrongdoing” and consequently the common law rules of remoteness and foreseeability apply to any entitlement to claim for them.

Relevance to the Australian Act

The Australian Act is not expressed as being a “consolidating act” and consequently the interpretation of its terms does not require a consideration of the meaning of terms contained in earlier enactments.

The Australian Act is unambiguous as to the type of damages that may be claimed, as it refers to damages claimable in respect of liability for “personal injury” (which term has been held by Australian courts to include psychiatric injury). Consequently, plaintiffs may be entitled to claim for psychiatric injury under the Australian Act.

Should the Australian courts follow the decision of the English High Court when interpreting the Australian Act, a plaintiff will not be able to recover for damages for loss and damage caused by an aircraft, or something falling from an aircraft, in circumstances where that

loss and damage was not reasonably foreseeable or was too remote. Consequently the strict liability nature of damages under the Australian Act will be tapered by issues of foreseeability and remoteness.

Hypothetically, had the detached window killed or injured one of the players on the field, they would be entitled to damages under the Australian Act. Arguably, in addition, a spectator could claim damages for psychiatric injury on the basis that it is foreseeable that spectators to a football match could suffer psychiatric harm resulting from the trauma of witnessing injury or death to a player caused by the falling window.

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