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**Australian High Court gives broad interpretation to the third party liability regime in the *Damage by Aircraft Act 1999(C'wlth); ACQ Pty Ltd v Cook; Aircair Moree Pty Ltd v Cook (French CJ, Gummow, Heydon, Crennan and Bell JJ)* [2009] HCA 28 (5/8/09)**

In a short, unanimous judgement, the High Court recently pronounced upon the operation of the Damage by Aircraft Act 1999. The timing of the decision is poignant as the recent discussion paper 'Review of Carriers' Liability and Insurance' explores some questions relating to the question of third part liability of aircraft owners and operators. It discusses the existing Damage by Aircraft Act 1999 regime and replacements for the Rome Convention (which as discussed below was the foundation for the regime prior to the enactment of the current arrangements in 1999). It is lukewarm about replacements for the Rome Convention being developed within ICAO but canvasses revision of the Damage by Aircraft Act regime to provide for contributory negligence.

The situation that led to the High Court's involvement was that a crop dusting aircraft collided with a high-voltage electricity transmission line, reducing its height above the ground and thus created safety concerns. The company responsible for it arranged for two employees to attend the site. While one of these employees subsequently left the site to isolate the line and it was agreed the other would await his return, the second employee approached the damaged line across muddy, irregular terrain planted with cotton. An 'electric arc' formed between the employee and the line as a result of which the employee was severely injured. The High Court, on appeal from the Court of Appeal of New South Wales, had to decide whether the aircraft operator and owner were liable under the Damage by Aircraft Act.

The proceedings turned on Section 10 of the Damage by Aircraft Act 1999 which provides:

"This section applies if a person or property on , in or under the land or water suffers personal injury, loss of life, material loss, damage or destruction caused by:

(a) an impact with an aircraft that is in flight, or that was in flight immediately before the accident happened; or
(b) an impact with part of an aircraft that was damaged or destroyed while in flight; or
(c) an impact with a person, animal or thing that dropped or fell from an aircraft in flight; or
(d) something that is the result of an impact of a kind mentioned in paragraph (a), (b) or (c)"

The extent of liability is set out in Section 11:

"Damages in respect of an injury, loss, damage or destruction of the kind to which Section 11 applies are recoverable in an action in a court of competent jurisdiction in Australian territory against all or any of the persons who are jointly and severally liable under that section in respect of the injury, loss, damage, or destruction without proof of intention, negligence or other cause of action, as if the injury loss or damage or destruction had been caused by the wilful act, negligence or default of the defendant or defendants."

Section 10(2) provides for the joint and several liability of the operator and the owner of the aircraft immediately before the impact.

In seeking to avoid liability, the appellants argued for a narrow construction of the legislation, that the injury to the employee was too remote from the impact of the aircraft on the power line and that there needed to be a single identifiable cause of the injury (referring to the 'something' identified in Sec 10(d) of the Act) rather than a chain of circumstances. Argument contemplated the operation of the legislation in factual circumstances other than those before the Court.

In responding to these arguments the High Court pointed out (para 14) that 'The words of the legislation are brief and general…The field of debate, causation, is one of the most difficult in the law, and one about which abstract discussion is seldom valuable for courts and those who practise in them'.

In deciding that the Act provided for broad rather than narrow liability, the Court took the view that the Damage by Aircraft Act 1999 was quite specifically intended to go beyond implementation of the Rome Convention (while the High Court does not specifically make the point, it is of interest that while Sec 9 of the Damage by Aircraft Act 1999 relies upon a broad range of Commonwealth powers for its 'application', it stops short of invoking the 'external affairs' power). The Court pointed out that, whereas the Rome Convention as applied in Australia by the Civil Aviation (Damage by Aircraft) Act 1958 was apparently limited to 'direct' consequences of an aircraft accident, the Damage By Aircraft Act 1999, which replaced it, was deliberately intended to widen the ambit of recovery because of shortcomings in the Rome Convention regime. The High Court agreed with the NSW Court of Appeal's view that the 1999 Act extended liability from 'direct consequences' to indirect or consequential results' (paras 19-25)

Having interpreted the legislation in the manner just described, the High Court also supported the NSW Court of Appeal's approach to the question of causation, including the recognition 'that there can be multiple causes of the damage suffered by the plaintiff' (paras 26-27).

Finally, the High Court rejected an argument that, if liability arose on the present set of facts, liability could have arisen if the employee had been injured while travelling to the scene of the accident, an "absurd, extraordinary, capricious, irrational or obscure" construction. The Court took the view that 'it is far from clear that those epithets would be correct: but, in any case, decisions about the injuries postulated can be made when it is necessary to make them. The problems they pose are different from the problems posed in these appeals' (para28).

In canvassing the question of third party liability regimes the Discussion Paper referred to above had in mind the proceedings in the case up to the time of the NSW Court of Appeal decision. Given that the High Court upheld the Court of Appeal's decision, the issue canvassed in the Discussion Paper, whether provision should be made in the Damage by Aircraft Act regime for contributory negligence, presumably remains alive. The paper states that 'The Government notes that it would only be in very rare occasions that a third party victim on the ground could be considered to have been partly negligent in causing the damage they suffered as a result of an air crash. However, following the outcome of *Cook v Aircair Moree,* the Government recognises that it may be appropriate to allow defendants an opportunity to argue that their liability should be appropriately reduced if they can show that the victim was partly negligent in causing the damage (page 28)'.

No doubt, insurers, owners and operators of aircraft are reflecting upon the High Court's interpretation of the Act to give it maximum reach and recovery.

James Kimpton
August 2009

**Australia's Infrastructure Minister approves Sydney Airport Master Plan and paves way for resolution of the Second Sydney Airport Issue:** ***Hon Anthony Albanese MP, Minister for Infrastructure, Press Release, 19/6/09***

Australia's Minister for Infrastructure, Transport, Regional Development and Local Government announced on 16th June that he had approved Sydney Airport's Master Plan, prepared in accordance with the requirements of the Airports Act 1996.

The announcement had a number of interesting features, not least the description of the way forward for a further attempt to resolve the second Sydney Airport issue.

The statement draws attention to the predication that Sydney Airport's aircraft traffic volumes are likely to rise to 427,000 by 2029. The announcement states that the government is 'absolutely committed' to retaining the existing 80 movement per-hour cap and the curfew. The announcement also indicates that noise-sharing arrangements by means of use of multiple flight paths will continue. It refers to the role of the airport in handling one third of the nation's air traffic, generating $8billion in annual economic activity and supporting more than 200,000 jobs.

The announcement states that 'my approval of the Master Plan does not however indicate acceptance that the airport can and should handle the projected growth in traffic…' It notes that such traffic volumes would 'place considerable added pressure on those communities living around the airport'. The statement refers to the congestion of supporting road and rail infrastructure, frequent delays and the exposure of nearby residents to longer periods of aircraft noise.

New airport capacity for Sydney is stated to be in the national interest.
The statement goes on say that the Minister has invited the NSW government to participate in a joint study 'to assess options, identify potential sites and evaluate investment strategies for delivering additional airport capacity.'
The announcement states that the study will also look at ways of providing 'integrated transport solutions' for the existing and any second airport.
The final terms of reference for the study are to be released in the National Aviation White Paper expected to be released later this year.
The government obtained independent expert advice from Access Economics to assist its assessment of the Sydney KSA Master Plan.

A number of comments are raised by the announcement:

-given the Minister's reservations about the long-term activity levels at Sydney Airport, the true meaning of a Master Plan approval that contemplates such activity levels is uncertain

-the use of the National Aviation White Paper as the place for announcement of the terms of reference for a joint Commonwealth/State Government study of the Second Sydney Airport issue, again demonstrates ( as have recent single-subject Discussion Papers on Insurance and Carriers' Liability and Airport Planning) that the White paper will contain significant decisions for the industry

-the use of Access Economics to advise the government on the Sydney Airport Master Plan suggests (as have recent decisions for other airports eg Canberra Airport) that the Government takes consideration of these plans very seriously

-notwithstanding the infrastructure issues raised by growth at the existing airport and at any new airport, the statement does not identify any role for Infrastructure Australia; perhaps it is assumed that the private sector will finance all such developments

Macquarie Airports and its colleagues may not feel unduly uncomfortable about the first of these points, given the provisions in Sec 18 of the *Airports Act 1996* that provide that 'Sydney West' airport and the existing Sydney airport are to be in common ownership.

James Kimpton
August 2009

**Australian Infrastructure Department releases Discussion Paper on '*Safeguards for airports and communities around them*' (June 2009)**

As part of its ongoing National Aviation White Paper process the Minister for Infrastructure's Department released a Discussion Paper entitled 'Safeguards for airports and the communities around them'. Comment closed on 31st July.

The thrust of the paper is to effectively deal with the 'effective use of airports and the safety of aviation activity at the airport'. It notes that 'the issues raised in the discussion paper potentially apply to all aerodromes in Australia, but the risks and complexity are much greater for the high volume airports in densely populated areas'. The paper arguably proceeds from an airport perspective but readers from that sector no doubt will 'read between the lines'.

The paper reflects the government's commitment to:

-national airspace legislation that protects approaches to major airports to prevent intrusion into airspace by buildings approved at state and local government level
-developing a clear policy on the definition of public safety zones around airports which can be taken into account in local planning with a view to ensuring that the community is not exposed to any undue risk from aircraft operations
-developing strategies and plans to address other airport related issues such as aircraft noise, traffic linkages, and best practice community consultation models

The options developed to achieve these outcomes include:

-public safety zones
-safety management systems
-adaptation of state and overseas models to safeguarding risks such as Queensland's State Planning Policy as applicable to airports, UK airport planning arrangements and the Netherlands' and Irelands' planning arrangements.

In relation to the Queensland State Planning Policy ( *1/02 Development in the Vicinity of certain Airports and Aviation Facilities*) the paper notes that it requires 'airspace protection, bird hazards and also noise' as matters to be taken into account and also provides for public safety zone arrangements for less busy airports. The UK safeguarding model is described as minimising operational risks and provides both for consultation with officially safeguarded civil and military aerodromes and other aerodromes. The Netherlands arrangements are described as involving a risk management approach and the Irish arrangements are explained as a hybrid version of the UK and Irish models.

In its detailed discussion of 'Planning for Compatible Development' the paper indicates some of the shortcomings that are perceived with the current ANEF (noise exposure forecast) system. These include its apparent unsuitability to the range of airports to which it is applied, the apparent inability of contours to give a comprehensible picture of the noise to which residents will be exposed, the difficulty of equating ANEF noise levels to decibel levels, the apparent unsuitability of ANEF levels of indicating noise levels resulting from intensive light aircraft activity at general aviation airports.

In the face of these perceived limitations the paper raises the question of review of the Australian standard (AS 2021) and the ANEF system. However, the paper also canvasses the more effective protection of corridors under flight paths, including more conservative criteria for developments under flight paths.
The paper canvasses the extension of the protection of airports' immediate hinterlands from developments that would physically intrude into flight paths that are currently protected at some capital city and regional airports by Airports (Protection of Airspace), the Civil Aviation (Buildings Control) and so forth regulations. Part 12 of the Airports Act 1996 would appear to allow substantial progress in this regard to be made without amendment of the Act.

The paper also deals with such matters as turbulence and wind shear, wildlife hazards, wind turbines, technical facilities and lighting and pilot distractions
The paper is relatively non-specific as to consultative arrangements that might apply. It merely states that consideration is being given to 'special arrangements for state and local government consultation with the Commonwealth government on proposed developments around federal airports so that the impacts upon airport operations can be fully assessed and taken into consideration in decision-making'. On its face, this is considerably less threatening to airports than the consultative arrangements the Minister has imposed as conditions for approving airport master plans, as noted in previous issues of *Aviation Briefs.*
No doubt interested parties have made their views known.

James Kimpton
August 2009

**Australia's and New Zealand's Prime Ministers report upon their countries' efforts to improve facilitation of Trans-Tasman travel:** ***Prime Minister of Australia (Hon Kevin Rudd) and Prime Minister of New Zealand (Hon John Key) Joint Statement 20/8/09***

As we go to press, the Australian and New Zealand Prime Ministers, Hon Kevin Rudd and Hon John Key respectively, delivered a joint report on trans Tasman Co-operation. Amongst the issues identified was trans-Tasman air travel.
The statement makes it clear that this issue is being given attention, even if tangible progress has yet to be visible.

The statement indicates that 'sustained focus' would be brought to 'a further streamlining of trans-Tasman travel, working towards full implementation of a new trans-Tasman passenger clearance model; and work on streamlining trans-Tasman goods trade'.

The statement referred to their agreement regarding 'a joint plan to streamline trans-Tasman travel, with improvements to be seen as early as next year. The plan includes roll out of the automated SmartGate passenger clearance system in New Zealand, and improvements to screening and processing for low risk passengers on both sides of the Tasman. They also agreed to trials of direct exit paths for passengers and the transfer between Australia and New Zealand of x-ray images for more efficient biosecurity screening. To foster long term improvements, Australia and New Zealand will explore further streamlining passenger processing through studies on pre-clearing passengers at point of departure and through expanding and integrating SmartGate systems'.

These efforts in passenger facilitation come seventeen years after the first single Australasian air services market agreement was signed between Australia and New Zealand. Since that event in 1992, mutual recognition of technical qualifications has enabled the movement of most aeronautical personnel between the countries. More recently, each of the countries' Civil Aviation Acts have been amended to provide for operability of airlines' AOCs in both countries. That facilitation issues have not kept up with these other developments, so that from the passenger's point of view travel between the two countries is still 'international', is not necessarily reflective of lack of effort. The Customs, Immigration and Quarantine issues involved are not easily resolved. There is; much that can be learned about these issues in a single market from the EU and much that can be learned about pre-clearance from the US and Canada. No doubt the policy makers are examining the issues with vigour with a view to progress being made by the next bilateral meeting early in 2010.

The writer can recall statements in 1992 predicting services between airlines' domestic terminals on each side of the Tasman in the then near-term future. Without different approaches to customs, immigration and quarantine, this cannot happen

James Kimpton
August 2009

## WINE COLUMN

by David Were

Some of the world's greatest value can be found in wines from Chile. Chilean wines have been imported into Australia for many decades; I can recall impressing friends in the 70s with a Champagne-style sparkling wine carrying the label **Undurraga**, which I now know is a long-established vineyard in Maipo Valley, just outside Santiago, the capital. Serving a Chilean 'Champagne' allowed, I felt, a touch of the exotic but at a very modest price tag. Now, I find that a wide range of Chilean wines are available here, all representing great value, wines that are somewhat different from our own.

Chile has grown grapes for winemaking since vines were introduced by the Spanish Conquistadores in the mid-16th Century. In the first few centuries of winemaking, Spain consistently sent orders to its colony to uproot their vines and to buy more vines from Andalusia – instructions which were generally ignored.

Around the 1820s, Chile and the other South American Colonies gained their independence from Spain. Prosperous Chileans began travelling to Europe, whence they brought back root stocks of all the main Bordeaux grape varieties, together with French Vignerons and Oenologists. Chile's modern wine industry dates from about 1850, when much Cabernet Sauvignon was planted, along with Merlot, Malbec, Sauvignon Blanc and Semillon (and even some Riesling). Previously, most wine had been made from the rustic grape Pais (Criolla), and some from Muscatel which was mainly used to make sweet white and the national spirit, Pisco.

The ruling elite, largely Basque and some British and Irish veterans of the Napoleonic Wars, built large Bodegas (wine estates) planted with European varieties. The peasant farmers continued with the Pais grape.

Chile's Central Valley, running south from Santiago, contains most of the wine regions, although there are other smaller regions outside this strip, particularly the warmer Aconcagua region, north of the capital. The Central Valley, which includes four principal and distinct wine regions between 32 and 38 degrees of latitude, offers fertile soil, plenty of sunshine, low humidity and unlimited water for irrigation (the 'snow-melt' from the Andes). Chilean vines have virtually no disease, which adds to their reliability. The moderating influence of the ocean (the Central Valley is separated from the ocean by a low range of hills) means that the climate is Mediterranean, very similar to the Napa Valley and Bordeaux.

As an aside, the renowned Colchagua Valley, near San Fernando in the middle of the Central Plain, sits in a province which glories in the name Libertador General Bernardo O'Higgins – a lovely example of the Irish connection.

Chilean white wines tend to be clean and acidic, but less fruit-driven than our own equivalents. They tend more towards the French style than the Australian and New Zealand – clean and well-made rather than strongly characteristic of the particular grape variety. Chardonnay and Sauvignon are common, although Sauvignon is often Sauvignon Vert or Sauvignonasse rather than necessarily Sauvignon Blanc.

Chilean red wine exports are predominantly Cabernet Sauvignon, Merlot and Cabernet blends. Again, they tend towards the French styles rather than our own but they can vary a lot – reds from the Maipo Valley and the northern regions tend to be big and full-bodied, those from the more southerly regions complex but lighter in body. **Carmenere** (pronounced 'car-men-air') is an old Bordeaux variety, now rarely found in Bordeaux but becoming widely planted in Chile, where it was at first thought to be Merlot. It makes lovely full-bodied wines with the charm of Merlot and the structure of Cabernet Sauvignon

**Los Vascos** is a large wine estate in the Colchagua Valley, largely now owned by Lafite Rothschild, one of the great Chateaux of Bordeaux. The Lafite winemaking team travels to Chile in the French off-season which coincides with the southern hemisphere vintage, and makes the wine with a French influence. The result is an outstanding range of wines – a very pleasant Sauvignon Blanc, an excellent spicy Cabernet, and a very clean acidic Chardonnay with flavours of melon and peach. At around $15 per bottle, these are outstanding value, and can be found at Nick's Cellars. For a few dollars more (around $20 – 22), look for the Grand Reserve (a Cabernet, Carmenere, Syrah and Malbec blend) – it is magnificent.

**Concha Y Toro** is a long-established wine estate in the Central Valley, which makes a wide range of excellent wines. Their **Casillero Del Diablo** range (Cabernet, Merlot, Sauvignon and a very good Carmenere) are well worth seeking out at around $15 a bottle (available at all Vintage Cellars outlets). The label translates as 'Cellar of the Devil', and the story goes that an early owner was losing a lot of wine at the hands of his cellar hands and vineyard workers, and so he stored the wine in the 'Devil's Cellar' so that the workers would be too frightened to go in there and steal the wine.

I have tasted many Chilean wines over the last few months, and I can't list them all, let alone describe them – you will need to search for yourself. But, apart from the ones I have mentioned, I particularly recommend looking for the reds and white from **Caliterra** (at $12 -16) and **Arboleda** (an outstanding 2006 Cabernet /Cabernet Franc and a rich elegant Carmenere, both at about $20). There are also plenty of cheapies, and the **Montes** range from Dan Murphy offers some pleasant wines at $9 -10. Don't aim to keep any of them – their longevity has not really

been tested. Just enjoy them now, and see if you agree with me that Chile's export wines offer tremendous interest and value.

*David Were is a Solicitor and a Consultant at the Leo Cussen Institute in Melbourne, whose tastes in wine is not confined to this side of the Pacific.*

## ALAANZ 2010 CONVENTION

The 29th Annual Conference of the Aviation Law Association of Australia and New Zealand Ltd will be held on the 12th to 14 May 2010 in Canberra. The Canberra Organising Committee has chosen University House as the venue for the Conference.