



In this week's Insurance Bulletin:

1. REGULATION AND LEGISLATION

UK: ILS Regulations approved by Parliamentary Committee

UK: Introduction of new drone legislation

2. COURT CASES AND ARBITRATION

Australia: Commercial intention guides the way through ambiguity

3. MARKET DEVELOPMENTS

Australia: Establishment of Royal Commission on misconduct in the financial services sector

UK: Pool Re to extend cyber cover to include material damage and business interruption

4. HFW PUBLICATIONS AND EVENTS

UK: HFW hosts a table at the AIRMIC dinner



WILLIAM REDDIE
SENIOR ASSOCIATE

“This development has been positively received by the market, as the culmination of several years of consultation between the government, the regulators and insurers. Aside from the clear benefits to insurers, the introduction of the ILS framework is an increasingly important way of attracting new insurance business to London in the lead up to Brexit.”

1. REGULATION AND LEGISLATION

UK: ILS Regulations approved by Parliamentary Committee

The Regulations that will form the basis of the UK’s insurance linked securities (ILS) regime have been approved by a Parliamentary Committee, and are expected to become law shortly. The Risk Transformation Regulations 2017 and Risk Transformation (Tax) Regulations 2017 will form the basis of the new regulatory regime enabling the issue of ILS and other instruments in the UK, which may be issued as early as 1 January 2018.

There has been a boom in the ILS market since the early 2000s and the approval of the legal and regulatory framework sets the stage for the UK to join. ILS vehicles are used by insurers/reinsurers to transfer risks to capital market participants. Investors are attracted by the perceived high rates of return offered by ILS and low correlation with the risks of other financial markets. From the perspective of insurers, issuing ILS allows them to transfer risk to a broad range of investors.

To date, jurisdictions such as Bermuda and the Cayman Islands have dominated as the issuers of ILS, with Singapore announcing last month that it would fund the costs of issuing catastrophe bonds out of Singapore in a bid to attract ILS business. In this increasingly competitive environment, there are concerns that the process of obtaining regulatory approval of new ILS vehicles in the UK could prove an impediment to the growth of the ILS market in London. For further details of the background, see our previous articles¹.

Nonetheless, this development has been positively received by the market, as the culmination of several years of consultation between the government, the regulators and insurers. Aside from the clear benefits to insurers, the introduction of the ILS framework is an increasingly

important way of attracting new insurance business to London in the lead up to Brexit.

The Regulations can be found here: <https://www.legislation.gov.uk/ukdsi/2017/978011160596> and <https://www.legislation.gov.uk/ukdsi/2017/978011160541>.

WILLIAM REDDIE

Senior Associate, London

T +44 (0)20 7264 8758

E william.reddie@hfw.com

Research by Rosa Pritchard, Trainee Solicitor, London

UK: Introduction of new drone legislation

Earlier this year, the government promised to crack down on the usage and regulation of drones following a number of “near-misses” with passenger jets at UK airports. In 2016, Heathrow alone reported 70 drone incidents. In October of this year, a drone was reported to have nearly hit an aircraft which was approaching London Gatwick putting 130 lives at risk.

The government has proposed the introduction of new drone legislation which is expected to be published in Spring 2018. The proposals have been welcomed by the London Market Association as the legislation is intended to increase safety with the introduction of safety awareness tests for drone users and a registration process for users of drones weighing 250g or over. The government and drone manufacturers are also working together to use geo-fencing in order to prevent drones from entering restricted zones.

LIZZIE GRAY

Associate, London

T +44 (0)20 7264 8752

E lizzie.gray@hfw.com

¹ <http://www.hfw.com/Insurance-Bulletin-20-November-2015>, <http://www.hfw.com/Insurance-Bulletin-8-December-2016>, <http://www.hfw.com/Insurance-Bulletin-July-2017-Edition-4> and <http://www.hfw.com/Insurance-Bulletin-September-2017-Edition-1>

2. COURT CASES AND ARBITRATION

Australia: Commercial intention guides the way through ambiguity

In a case where there was ambiguity, the Supreme Court of New South Wales gave effect to the commercial intention of the parties to a professional indemnity insurance policy which sat excess of underlying policies¹.

The relevant Project Specific Professional Indemnity Policy (PSPI Policy) was purchased in October 2012 to cover six entities for works relating to the LNG Gladstone Pipeline Project. Liberty Mutual Insurance Company (Liberty) was the leading underwriter and the PSPI policy had a limit of liability of \$50m with a \$1m deductible and a 10 year policy period. It was stated to be "... in excess of any Additional Insurance" and the Schedule identified certain specified policies held by the insureds – including an "Annual Professional Indemnity" (2012 Lloyd's Policy), with a limit of US\$15m and a deductible of US\$5m.

In 2015, a dispute arose between parties to the Project, and one of the insureds, Kellogg Brown & Root (KBR), notified Liberty of a claim under the PSPI Policy. At this time, the 2012 Lloyd's Policy had expired and been replaced by the 2013 Lloyd's Policy, subject to the same limit and deductible. KBR also notified Lloyd's of a claim under the 2013 Lloyd's Policy.

Liberty sought a Court declaration that the PSPI Policy only applied in excess of the 2013 Lloyd's Policy. KBR argued that the reference to "Additional Insurance" was an exclusive reference to the 2012 Lloyd's Policy.

The Court granted the declaration sought, on the basis that a "reasonable business person in the position of the parties" would have understood that the PSPI Policy was to be applied in excess of the insurances effected and maintained in accordance with the Project parties' contractual obligations (i.e. to effect and maintain insurances both during, and six years after, the Project), because:

- Insured and insurers knew that KBR was subject to a contractual obligation to effect and maintain other insurance;
- insurers had explicitly enquired about the other professional indemnity insurance in its proposal form; and
- The reference in the Schedule to the expression "Annual Professional Indemnity" suggested the parties intended that the policy might "occur once every year".

This case demonstrates how the courts strive to give effect to the commercial intention of parties in complex commercial and insurance arrangements in circumstances where there is ambiguous wording.

PHIL KUSIAK

Senior Associate, Melbourne
T +61 (0)3 8601 4509
E phil.kusiak@hfw.com

Research by Andrew Keeghan, Trainee Solicitor, Melbourne

3. MARKET DEVELOPMENTS

Australia: Establishment of Royal Commission on misconduct in the financial services sector

Prime Minister Malcolm Turnbull has announced that a Royal Commission will be set up to look into the alleged misconduct of banks and financial services providers, including insurers. It will also consider whether regulators are currently sufficiently well equipped to identify and address misconduct in this sector. The aim is to ensure that the financial system is efficient, effective and fair with greater accountability. This in turn will result in long term stability, growth, efficiency and innovation.

For further details, please see the Prime Minister's press release and draft terms of reference at: <https://www.pm.gov.au/media/royal-commission-banks-and-financial-services>

REBECCA HUGGINS

Professional Support Lawyer, London
T +44 (0)20 7264 8120
E rebecca.huggins@hfw.com



PHIL KUSIAK
SENIOR ASSOCIATE

"This case demonstrates how the courts strive to give effect to the commercial intention of parties in complex commercial and insurance arrangements in circumstances where there is ambiguous wording."

¹ Liberty Mutual Insurance Company v Kellogg Brown and Root Pty Ltd [2017] NSWSC 1519

UK: Pool Re to extend cyber cover to include material damage and business interruption

The terrorism reinsurer, Pool Re, has announced that from April next year, it will include as standard cover for material damage and business interruption caused by acts of terrorism through a cyber attack to all policyholders purchasing terrorism cover through a Pool Re Member. The business interruption element will cover loss arising from events at the policyholder's premises, but will not cover intangible assets such as money and data which can be effectively covered by the cyber insurance market.

Prior to putting in place this cover, Pool Re commissioned a research study into the nature of the cyber terrorism threat from the Centre for Risk Studies at the University of Cambridge Judge Business School. Pool Re's Chief Executive, Julian Enoizi commented "The threat from a cyber-attack is evident and businesses have become increasingly concerned about the extensive repercussions these types of attacks could have on them. This was a clear gap in our coverage which left businesses potentially exposed."

This development is indicative of the growing awareness within businesses that the potential repercussions of a cyber attack extend much further than data breach and of their increasing concern to extend the protection available to them for this type of loss.

REBECCA HUGGINS

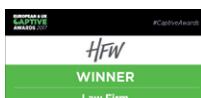
Professional Support Lawyer, London
T +44 (0)20 7264 8120
E rebecca.huggins@hfw.com

4. HFW PUBLICATIONS AND EVENTS

UK: HFW hosts a table at the AIRMIC dinner

Jonathan Bruce, Andrew Bandurka, Nigel Wick, Simon Banner and Alison Proctor are hosting a table at the AIRMIC dinner on Tuesday 12 December at the Grosvenor House Hotel, London.

HFW has over 450 lawyers working in offices across Australia, Asia, the Middle East, Europe and the Americas. For further information about our Insurance/reinsurance capabilities, please visit <http://www.hfw.com/Insurance-Reinsurance-Sectors>



hfw.com

© 2017 Holman Fenwick Willan LLP. All rights reserved.

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Souhir Jemai on +44 (0)20 7264 8415 or email souhir.jemai@hfw.com

Beirut Brussels Dubai Geneva Hong Kong Houston Kuwait London Melbourne Paris Perth Piraeus Riyadh São Paulo Shanghai Singapore Sydney