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aviation lawbulletin

□ MERGER UPDATE

Merger of Ebsworth & Ebsworth and Home Wilkinson Lowry

With effect from May 2008, Ebsworth & Ebsworth and Home Wilkinson Lowry (HWL) will merge. This is a very exciting development for the firm, our staff and our clients and it will deliver real opportunities for the firm and our clients.

HWL is approximately the same size as Ebsworth & Ebsworth in terms of partners, solicitors and staff with offices in Melbourne, Sydney and Brisbane. We have very complimentary practice areas and it is the belief of all involved that the merger makes sense on a number of levels and will be of benefit to our clients locally and abroad. The merged firm will have more than 80 partners, and nearly 600 people in total.

Ebsworth & Ebsworth has been recognised for many years as one of Australia's leading law firms specialising in all aspects of aviation law. We will continue to focus on assisting clients in the aviation and aviation insurance industries, and the personnel and resources of the merged firm will enable us to continue to provide a full range of legal services in Australia and the Western Pacific region. As the merger date approaches we will provide you with further information regarding changed contact details.

For any enquiries regarding our aviation practice, please contact Simon Liddy, at sliddy@ebsworth.com.au or phone +61 2 9234 2381.

Airline cartel cases

A growing number of airlines around the world have been caught participating in conspiracies to fix prices, either in passenger or cargo operations. There have been some very large fines imposed to date in the US and UK. There are reportedly more fines or damages for other airlines to come, as well as possible criminal charges against individuals.

Government competition regulators are reportedly continuing to investigate the alleged cartels in relation to the cargo fuel surcharges in the US, Europe, Australia, Canada, New Zealand and South Africa, and in relation to the passenger surcharges in the UK and the US. There are also civil class actions underway in the US, Canada, and Australia. These investigations and the class actions have the potential to impose a heavy financial and administrative burden on airlines in the coming months and years as they respond and defend various court actions.

We strongly recommend compliance programmes and regular training for personnel as a means of reducing the risk of being caught up in these types of events.

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in this issue

- Bag-lift injury not caused by an Article 17 accident 2
- The battle for the Pacific: Open skies agreement between Australia & USA 2
- Integrity of IATA Clearing House upheld 3

in brief



Simon Liddy
Partner

Welcome to the February 2008 issue of our *Aviation Law Bulletin*.

In the news: A recent attempted hijacking of a domestic RPT aircraft in New Zealand has thrown the spotlight of concern onto smaller airports in the region, including within Australia. Earlier this month a female passenger attacked both pilots with a knife during a domestic flight in New Zealand before being restrained by the crew and subsequently arrested on the ground by police.

The incident has raised concerns across the region regarding the level of passenger security checks at smaller airports (of which there are many, particularly in Australia). At many airports such checks are minimal, and at some, non-existent.

While no doubt an expensive undertaking, governments are feeling some pressure to improve security at these airports, and dramatic events such as this will only increase the focus on this issue.

Feel free to send me an email if you have any comments to e: sliddy@ebsworth.com.au

□ CASE UPDATE

Bag-lift injury not caused by an Article 17 accident

The District Court of NSW recently dismissed an airline passenger's claim for personal injury at an interlocutory stage, having been satisfied that no reasonable cause of action was shown under Article 17 of the applicable Amended Warsaw Convention, incorporated into Australian domestic law by the *Civil Aviation (Carrier's Liability) Act 1959*. The plaintiff was ordered to pay the airline's legal costs.

Facts

The plaintiff was a passenger on board an international flight from Bangkok to Sydney in April 2005. The passenger claimed that she injured her back whilst lifting her carry-on baggage into an overhead locker in the economy section of the aircraft. The passenger claimed that she lifted two pieces of baggage weighing 8.5 kg and 13 kg respectively. As

she was manoeuvring to place her bags in the overhead locker, she claims to have been restricted and forced to push her knees against her seat. It was claimed that other passengers were passing close by causing further restriction.

Evidence was tendered showing the Airline's policy that carry on baggage must not exceed 7kg per bag. The passenger asserted that the airline did not enforce the policy and she was not in fact aware of the policy's existence or the limits imposed in her movements.

The airline applied to strike out the claim on the grounds that the circumstances alleged did not disclose a cause of action under Article 17 of the amended Warsaw Convention (which applied to the carriage in question).

Decision

In an oral judgment, the District Court judge dismissed the passenger's Statement of Claim pursuant to regulation 13.4 of the Uniform Civil Procedure Rules 2005 on the basis that no reasonable cause of action was disclosed by the passenger in her pleading or in

evidence. The judge found that the injury to the passenger resulted from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft. Whilst evidence of negligence on the part of the airline may have been available, the Judge, following a long line of international and domestic authority on the issue, found that negligence was not the relevant test.

He was satisfied that there was nothing "unusual and unexpected" that was external to the passenger, which caused her injury.

Whilst not a binding authority, the judgment is one more which airlines may rely upon in these types of cases. Given that the terms of Article 17 have been repeated in the Montreal Convention 1999, once Australia legislates to bring that Convention into operation, these cases will continue to be relevant in bringing guidance to the Courts. The passenger did not proceed with an appeal.

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□ OPEN SKIES

The battle for the Pacific: Open skies agreement

The Australian Government, tourism organisations and airline industry commentators are all predicting a significant increase in air traffic across the Pacific following the recent open skies agreement struck between the governments of Australia and the USA.

According to the Minister for Infrastructure, Transport, Regional Development and Local Government, the agreement, which was concluded in the last few days, will mean that:

- airlines of both countries will now be able to determine their own frequencies and routes without government interference.
- this will also apply to new entrants (subject to the usual regulatory approvals) rather than the previous restriction of four services a week for the first year of operation.
- designated airlines will be able to operate limited services between both

countries, via other countries and beyond other countries.

The agreement has already resulted in Qantas announcing increased flights across the Pacific, and it is expected the agreement will assist Virgin Blue (in the guise of V-Australia), begin flights to the USA in the near future. The expectation is that the increased competition will result in increased traffic and passengers, with flow-on benefits for both the economies of both countries.

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□ ANSETT COLLAPSE

Integrity of IATA Clearing House upheld

The High Court has upheld the integrity of the International Air Transport Association’s (IATA) Clearing House arrangements between member airlines by holding that the IATA alone was a creditor of Ansett for a particular billing period, to the exclusion of individual airlines.

International Air Transport Association v Ansett Australia Holdings Limited [2008] HCA 3

Facts

Ansett collapsed and was placed in voluntary administration by its directors on 12 September 2001. A Deed of Company Arrangement (“DOCA”) was executed. The DOCA was a binding agreement between Ansett and its creditors which determined how and in what order its creditors were to be paid. Ansett was a party to the IATA Clearing House arrangements, a centralised scheme where international airline operators’ accounts are debited and credited by IATA for carriage undertaken over the routes of other airlines, in order to avoid the necessity of airlines making and receiving numerous payments between each other.

The proceedings arose from a decision of Ansett’s administrators that IATA was not a creditor of Ansett for the Clearing House billing period from August to December 2001. IATA disputed this, arguing that it was a creditor and that a contractual provision of the IATA Clearing House arrangement continued to apply despite Ansett’s execution of the DOCA. The provision provided that there was no liability for payment or a right of action between member airlines of the Clearing House. That is, any action by a member in relation to payment must only be taken against the Clearing House and not against any other member.

Victorian Court decision

Ansett claimed in the Victorian Supreme Court that the Clearing House arrangements

were inconsistent with the *British Eagle* case (*British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758). In that case, IATA’s former Clearing House arrangement created an alternative method of dealing with unsecured debts between airlines, which was challenged when British Eagle became insolvent. The English House of Lords found that the Clearing House arrangement was void as it attempted to contract out of the principle that creditors were to be treated equally and according to the ranking scheme enshrined in England’s relevant corporations legislation. The Clearing House arrangement was held to be contrary to public policy.

The administrators of Ansett argued that even though the Clearing House arrangements which existed at the time of Ansett’s collapse had previously been amended in order to escape the effect of the *British Eagle* decision, the arrangement’s substantive meaning or effect was the same and was intended to deprive creditors of their rights under the DOCA and Australia’s corporations legislation.

The Victorian Supreme Court had held that members of the Clearing House were not debtors and creditors of each other and the contractual arrangements continued to apply. On appeal, the Victorian Court of Appeal overturned this decision and held that the members of the Clearing House were debtors and creditors of each other regarding their claims. IATA then appealed this decision in the High Court.

Australian High Court decision

The High Court overturned the Victorian Court of Appeal’s decision by a 6–1 majority (Kirby J dissenting). The majority found that the Clearing House contractual

regulations ought to be given effect according to their terms, with the result that members of the Clearing House are not to be characterised as debtors and creditors of each other. It was held that the only relevant property of Ansett’s was “the contractual right to have a clearance in respect of all services which had been rendered on the contractual terms and the right to receive payment from IATA if on clearance a credit in favour of the company resulted”. That is, IATA, and IATA alone, was a creditor of Ansett in respect of the relevant clearances.

As to Ansett’s argument that the Clearing House arrangement was contrary to public policy, the majority of the High Court found that no particular provision of Australia’s corporations legislation had the effect of the rule of public policy asserted, and in this absence no general overarching rule of public policy should be given effect to. It was further held that the argument of public policy could not operate to impose the relationship of debtor and creditor on airline parties to the MITAs where this relationship had not been agreed to.

Implications

The High Court’s decision is important as it confirms that IATA’s Clearing House arrangements continue to apply to airlines that are placed in some form of insolvency administration. It also eliminated the possibility of Ansett pursuing individual airlines for any monies owing under the Clearing House arrangements, as Ansett’s only contractual right to recover debt lay against IATA.

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Partner update

We are pleased to announce the promotion to the partnership of Sydney-based workplace relations lawyer Alice DeBoos. Alice’s areas of expertise include employment law, industrial relations, occupational health and safety and equal opportunity law. She is currently assisting clients in the aviation sector. Contact Alice on t: 61 2 9234 2430 or e: adeboos@ebsworth.com.au

□ AN ACTION-PACKED HOLIDAY SEASON...

Summer Down Under & a Whistler winter



Simon Liddy (top left) lets off steam over the summer vacation. Matthew Brooks (left) races around with the big guns at Phillip Island, while Richard Gratton (above) takes to the slopes in Whistler, British Columbia.

The final word... over-zealous enforcement of Sydney Airport curfew?

The night time curfew at Sydney Airport was recently once again in the news after summer storms caused havoc with aircraft flights, resulting in some passengers curling up for the night on sidewalks. The Commonwealth Government department that enforces the curfew (and which also has the power to grant exemptions), came in for criticism for not permitting some aircraft to take off shortly after the 11 pm curfew. It is understood that some members of the travelling public feel that the department, and the responsible Minister, appear to have preferred the interests of nearby residents to those of the inconvenienced passengers.

The newly elected Commonwealth Government has a clear intention of strictly enforcing the curfew which prohibits takeoffs and landings between the hours of 11 pm and 6am except in some exceptional circumstances.

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