



december
2006

aviation lawbulletin

□ EMERGENCIES AND DISASTERS

Analysis of in-flight passenger injuries

On 25 October 2006 the Australian Transport Safety Bureau released a Transport Safety Report which analysed in-flight passenger injuries and medical conditions.

The study examined injuries and conditions suffered and reported during the period between 1 January 1975 and 31 March 2006 within and outside Australian territory and over territorial waters, in relation to both Australian aircraft and foreign aircraft operating in Australia. The focus was on injuries sustained during routine or regular operations on board serviceable aircraft, while in-flight, during embarkation or disembarkation. The study excluded those injuries which resulted from an aircraft's direct impact with the ground or injuries where an aircraft was substantially damaged or destroyed.

The study was designed to determine the prevalence, nature, type and extent of medical problems and injuries occurring in passengers on board civil registered aircraft and, more particularly, to determine the most common in-flight medical problems in passengers and what proportion of those injuries resulted in an aircraft diversion.

The article may assist airlines and other entities involved in the management of safety on aircraft, including aircraft designers, engineers etcetera, to determine those areas where the safety of passengers is most at risk. In turn, it may also assist to identify the steps which can be taken to reduce both passenger injury and incapacitation while in-flight as well as the associated costs (including costs associated with personal injury claims, aircraft diversion and delays).

Addressing such matters is of importance to the tourism and aviation industries at a time when air travel and the costs of air travel is increasing, and the world's population is ageing with the result that there is a possibility of a greater number of personal injuries and/or medical conditions being suffered by passengers while onboard aircraft and/or in transit.

Pertinent findings in the report are:

- almost 76% of all incidents occurred on commercial airlines (this is to be expected given the number of passengers travelling on commercial airlines);
- in-flight deaths accounted for only 3% of the total passenger injury and medical events;
- the most common in-flight causes of death were internal to the passenger, being a heart attack;
- serious injuries (defined as an injury that required or would usually require admission to hospital within seven days after the injury was suffered) accounted for slightly more than a third of passenger injury and medical events;
- minor passenger injuries and medical events (defined as injuries not requiring

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introduction



Simon Liddy
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Welcome to the December 2006 issue of our *Aviation Law Bulletin*. In this edition we examine a number of current issues impacting the aviation industry in this part of the world. There is an increasing trend in regulation in all our lives, and the aviation industry is particularly affected, with competition, privacy, and security being some of the topics we delve into.

We also take this opportunity to wish all our clients and friends warm regards for the festive season and new year.

□ DOCUMENT DESTRUCTION

Victoria deals with the destruction of documents

The *Crimes (Document Destruction) Act 2006* (Vic) (“the Act”) began operation on 1 September 2006 and inserts a provision titled “Destruction of Evidence” in the *Crimes Act 1958* (Vic).

The Act will dictate the way in which all companies, including those in the aviation industry, retain and destroy documents in Victoria. The new provisions are a direct result of the Victorian Court of Appeal’s decision in *British American Tobacco Services Limited v Cowell*.

Person – section 254

The Act inserts section 254 which creates a new criminal offence for persons destroying or concealing documents that are, or are reasonably likely to be, required as evidence in existing or potential legal proceedings.

Under the new provisions, a person will be guilty of an indictable offence if they destroy, or expressly or impliedly authorise or permit the destruction of, a

document or other thing of any kind that they know is, or is likely to be, required in evidence in a legal proceeding. The penalties for breach of this provision are severe and individuals, including directors of companies, can face a maximum penalty of five years imprisonment and/or a fine of up to \$62,886. It should be noted that the person involved must have intended to prevent it from being used in the proceeding and thus have knowledge of the significance of the document.

Body corporate – section 255

The Act also includes section 255 which extends liability beyond the current common law to include criminal liability for corporations. Liability can be attributed to a body corporate where an “associate” of a body corporate has

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hospital admission, treated by first aid or other simple measures and not significantly affecting the health status of an individual) accounted for the majority of cases (53%); and

- the top five causes of passenger injury and medical events (not including those which were unspecified) were:

- musculoskeletal injury (26%), which includes minor joint, skin or limb injury, direct blunt trauma of a trivial nature. The majority of musculoskeletal injuries were caused by turbulent weather, minor slips or falls, and, occasionally, being struck by a cabin trolley;
- heart attack (15%);
- head injury (10%). The majority of cases of head injury were caused by loose objects falling from overhead lockers (55%);
- drunken and/or violent behaviour (5%); and
- bruising and lacerations (5%).

In 33% of all cases examined, the aircraft was diverted. More often than not the cause of diversion was heart attack (33%) and then fitting. Otherwise the cause of diversion was spread evenly over a variety of causes of injury or medical conditions.

The results of the study should, in some respects, be heartening for airlines:

- it is clear that relatively few passengers suffer injury or medical conditions. There is only approximately one medical event for every 11,000 to 50,000 passengers; and
- the majority of injuries are minor and are, more often than not, caused by matters arising in the ordinary course of air travel or as a result of matters internal to the passenger.

Of some concern (and somewhat surprising) is that in 33% of cases, it was necessary for a flight to be diverted to treat a passenger. This has the potential to result in significant costs being incurred by airlines in additional fuel

costs, accommodation costs, delays and the like. Diversion appears, however, to be something which is unlikely to be avoided except by the inclusion on aircraft of trained medical personnel and sophisticated equipment, which is unlikely to be either feasible or practical.

Finally, it should be noted that the data for the study was taken solely from the Australian Transport Safety Bureau’s accident and incident database after a search was undertaken for medical conditions and injuries. The study may therefore not be entirely reflective of the extent of medical conditions and/or injuries suffered by passengers while in-flight by reason that not all medical conditions or injuries suffered may be documented. Despite this, the study should prove a useful tool in assisting to identify and address risk factors.

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□ PERSONAL INJURY

Restricted costs in small personal injury matters

In late 2005, the Court of Appeal considered the boundaries of the capping of personal injury costs prescribed by section 198D of the *Legal Profession Act 1987* (now repealed) in *Newcastle City Council v McShane* (No.3) [2005] NSWCA 437.

The plaintiff suffered an injury in 1999 when he tripped and fell over plastic orange mesh placed around a footbridge to guard against its use. The plaintiff brought an action against the Council who was responsible for the care and maintenance of the footbridge.

The matter was first listed for a District Court arbitration hearing at which time the plaintiff was successful with costs. The Council exercised its right for a rehearing before a judge of the District Court at which time the plaintiff was again successful and obtained a verdict of \$62,300 plus an order for costs against the Council. However, those recoverable costs greatly exceeded the cap stipulated by section 198D. In an application for a stay and subsequent one day hearing, orders were granted giving Council leave to appeal but dismissing its appeal; refusing the plaintiff's leave to cross appeal; and ordering the Council to pay 85% of the plaintiff's costs in the Court of Appeal proceedings.

Following tort reform in 2002 and enactment of the *Civil Liability Act 2002* in New South Wales, section 198D was inserted into the *Legal Profession Act 1987* (now section 338 of the *Legal Profession Act 2004*) which restricts costs in personal injury cases if the amount recovered on a claim for personal injury damages does not exceed \$100,000. In such circumstances, the maximum costs for legal services (including counsel's fees) provided to a plaintiff in connection with the claim are fixed at either 20% (maximum \$20,000) of the amount recovered or sought to be recovered, or \$10,000, whichever is the greater.

Under this provision, the plaintiff in the present case would be entitled to \$12,460 (20% of \$62,300) for costs for legal services for all three hearings - Arbitration, District Court, and Court of Appeal, in circumstances where the defendant forced the plaintiff to each additional hearing. The plaintiff made an application to vary the costs order by substituting an order that the plaintiff be paid his costs in the Court of Appeal on an indemnity basis. This was rejected and a further submission was made in relation to section 198D.

The issue to be determined was whether the legal services provided to the plaintiff in the Court of Appeal were provided

“in connection with the plaintiff's claim for personal injury damages”, such damages being vindicated in the District Court and the verdict retained in the Court of Appeal.

The Court of Appeal took the view that a plaintiff who comes to the Court of Appeal seeking to challenge the verdict for the defendant or an inadequate award of damages seems self-evidently to be in connection with the original and continuing claim. The Court of Appeal concluded that appeal costs do fall within the section 198D and therefore the plaintiff's costs were to be accordingly restricted.

The legislation reflects recent legislative and judicial recognition of the principle that legal costs should be proportionate to the importance and complexity of the subject matter in dispute, although in some circumstances there will be situations where the scheme falls harshly on a litigant.

In 2004, the New South Wales Parliament thought fit to modify the scheme and from 1 October 2005, section 338A of the new *Legal Profession Act 2004* addressed arbitration and appellate proceedings specifically, providing for an uplift of the cap where additional appellate and arbitration costs are incurred. The amount for legal services for each additional hearing is 15% of the amount recovered or \$7,500, whichever is the greater. These new provisions of the 2004 Act succeeded the provisions in the 1987 Act and have now removed the uncertainty surrounding costs recoverable for small personal injury claims concerning rehearing and appeal costs.

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□ PERSONAL INJURY

Carriers' Liability Act applied

Poonkam v Royal Brunei Airlines

Earlier last month, a single judge of the District Court of Queensland applied *Sidhu v British Airways [1997] 1 All E.R. 193* when it held that the limitation period under section 34 of the Civil Aviation (Carriers' Liability) Act (Cth) ("the Carriers' Liability Act") extinguishes a plaintiff's right to damages for personal injury regardless of whether that leaves the plaintiff without remedy. The court further held that an airline's civil liability under the Carriers' Liability Act was the only liability the airline had with respect to personal injury suffered by passengers and acted as a bar to a passenger seeking to claim damages for personal injury under any other law.

Facts

The Applicant, Ms Chomsajee Poonkam, sought leave pursuant to section 59 of the *Personal Injury Proceedings Act 2002* (Qld) ("PIPA") for an extension of time to commence proceedings in the District Court. She alleged that she had suffered a personal injury whilst carrying her 21 month old son in transit at Brunei Airport and on arrival at Bangkok.

Ms Poonkam purchased a return airline ticket from Brisbane to Bangkok travelling via Brunei for herself and her two sons, aged 21 months and 10 years. Ms Poonkam and her children departed Brisbane on 15 February 2003 and arrived in Bangkok on either 15 or 16 February 2003.

Ms Poonkam alleged that during the one hour stop over in Brunei the airline did not provide her with the baby's stroller and consequently she had to carry her 21 month old son for the one hour period.

Ms Poonkam further alleged that on arrival in Bangkok the airline again failed to deliver the stroller and did not deliver the stroller for a period of five days.

Ms Poonkam alleged she had to carry her son for that entire five day period.

As a consequence of carrying her son, Ms Poonkam alleged she suffered injury to her back and wrists. Ms Poonkam issued a notice under PIPA against Royal Brunei Airlines alleging breach of contract and negligence. Ms Poonkam alleged she specifically told airline check-in staff at Brisbane airport that she required her stroller in Brunei.

Ms Poonkam had failed to take any steps to protect her interests within the two year limitation period of the Carriers' Liability Act as she asserted that the PIPA and not the Carriers' Liability Act applied in this case. However, Ms Poonkam also failed to take any steps to protect her interest under PIPA.

Seven months after the expiration of the PIPA limitation period, Ms Poonkam

applied to the District Court for an extension of time to commence proceedings.

Submissions

Ms Poonkam argued that her claim was governed by PIPA and the court should exercise its discretion under section 59 of PIPA to grant an extension of time to commence proceedings. To do otherwise, would cause her prejudice. Ms Poonkam also argued that the Carriers' Liability Act did not apply because she was not in the course of embarking or disembarking when the alleged injuries were sustained. The airline disputed the applicability of PIPA and asserted that the Carriers' Liability Act applied, specifically either:

- part IIIC which adopts the Warsaw Convention as amended by the Montreal No. 4 Convention; or
- part IV which applies to contracts of carriage to which the Convention does not apply.

The judgment

Her Honour Judge Kingham agreed with the airline's submissions and found that:

- the Carriers' Liability Act applies to Ms Poonkam's claim (though it should be noted that the court was not required to, and did not make, a determination as to whether part IIIC or part IV of the Carriers' Liability Act applied because the outcome of Ms Poonkam's application was the same regardless of which part was applicable);
- if there was a remedy under the Carriers' Liability Act (which it was not necessary for the court to determine), it had been extinguished by the passing of the two year limitation period and could not be revived; and
- any civil liability for personal injuries suffered by a passenger under any other law is excluded by the Carriers' Liability Act.

As the Carriers' Liability Act applied and excluded civil liability under any other legislation, her Honour further found that there was no utility in extending time

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□ PERSONAL INJURY

Exemplary damages in personal injury claims?

As it did with all aspects of NSW tort law, tort reform legislation altered and regulated the availability and quantification of exemplary damages in personal injury damage claims.

Last year an appeal was brought by the State of New South Wales challenging multiple awards of aggravated and exemplary damages for assault and trespass to land, on the ground that neither award was justified under the *Civil Liability Act 2002* (“the Act”): *State of New South Wales v Ibbett* [2005] NSWCA 445.

Section 21 provides that where the act or omission was one of negligence, a court cannot award exemplary, punitive or aggravated damages. The State’s challenge was that this provision operated in their case and thus such damages could not be awarded.

The difficulty that faced the case for the State and the Court of Appeal was whether the actions came within the boundaries of the “negligence” concept, as both assault and trespass to land are classically intentional torts. Interestingly, the noun “negligence”, rather than “negligent” is used in the provision, in legal parlance negligence being a basis for liability in tort involving the existence and contravention of a duty of care owed to the party injured.

Upon examination of the history and construction of the Act, Basten JA held that negligence is not limited to claims for the tort of negligence. Rather, the term is intended to cover damages flowing from a lack of reasonable care and skill, whatever the cause of action pleaded.

In the present case, the initial action was founded upon intentional conduct and thus the prohibition prescribed in section 21 did not apply. The appeal accordingly failed. However, the judgement demonstrates that section 21 can be satisfied even if the cause of action is not one founded in negligence, so long as the damages flowed from a lack of reasonable care and skill. There is no requirement for a corresponding existence of a duty of care.

Regardless of section 21, the test set for the satisfaction of an award of exemplary damages is that the defendant has engaged in “conscious wrongdoing in contumelious disregard for the rights of another person” (See *Gray v Motor Accident Commission* [1998] 196 CLR 1 at 7 [14]). It follows that the prohibition on the award of exemplary damages in respect of negligent or negligence based actions remains, notwithstanding the operation of section 21.

While awards of punitive damages are traditionally not available in cases governed by the Warsaw Convention on International Carriage by Air, awards of damages of that type may still be available, at least in theory, for claims which are not covered by the Warsaw Convention, or the Montreal Convention when it is finally enacted into Australian Law (see “Australia and the Montreal Convention 1999” on page 10).

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under PIPA for Ms Poonkam to commence proceedings.

Application

This case confirms that once the limitation period under section 34 of the Carriers’ Liability Act has passed it extinguishes a claimant’s right to remedy regardless of whether this would result in the plaintiff being left without remedy.

Ebsworth & Ebsworth acted for Royal Brunei in this matter.

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□ EMERGENCIES AND DISASTERS

Improving the exchange of information in emergencies

The Federal Government has recently introduced into law the *Privacy Legislation Amendment (Emergencies and Disasters) Act 2006* (“the Amendment Act”) which will have application to the aviation industry in the event of an emergency or disaster.

The Privacy Bill was passed by the Senate on 17 October 2006. It was then introduced into the House of Representatives on 18 October 2006 and passed on 28 November 2006. The Bill received assent from the Governor-General on 6 December 2006 and is now Act Number 148.

The Amendment Act was introduced in response to the events that unfolded following the Boxing Day tsunami disaster of 2004. The *Privacy Act 1988* (“the Privacy Act”) received much criticism and the Office of the Privacy Commissioner publicly recognised the Privacy Act’s inability to anticipate and cope with the extent of an emergency of this scale. In particular, the Privacy Commissioner’s Report and the Senate’s Legal and Constitutional Committee Report acknowledged the need for clarification of the provisions of the Privacy Act in times of an emergency. The Amendment Act potentially has significant implications for the aviation industry as it will allow the disclosure of personal information by private companies where there has been a large-scale disaster.

The Amendment Act allows for information to be more freely available to identify and assist disaster victims. The Amendment Act adds a new Part VIA into the Privacy Act to provide a clear legal basis to manage the collection, use and disclosure of personal information about people involved in an emergency or disaster either in Australia or abroad. Not surprisingly, there remains concern to ensure that there is an appropriate balance between the desirability of providing access to information that would otherwise be unavailable and protecting an individual’s right to privacy.

The new part VIA is only triggered if the Prime Minister or the Attorney-General make an emergency declaration. Such a declaration can be made in relation to events both in Australia and overseas.

The new provisions clarify the administrative procedures for emergency declarations to be made by the Prime Minister or Attorney-General. One of the concerns which have been raised in relation to the nature of such a determination is that there is no requirement for the declaration to specify the appropriate duration of the declaration.

The primary amendment authorises the collection, use and disclosure of personal information if an emergency is declared. An entity (which includes a person, agency or private organisation) may collect, use or disclose personal information in an emergency situation only for a purpose that is directly related to the emergency or disaster. The provisions provide examples to guide the types of situations which are intended to be covered. For example, material can be collected in order to identify individuals involved in the emergency or disaster.

Of particular significance is that private-sector organisations may disclose personal information only to government agencies, entities directly involved in providing services or persons or entities prescribed by regulations or legislation. Disclosure to the media is prohibited, as is unauthorised secondary disclosures (where a person to whom personal information has been disclosed under Part VIA subsequently discloses that information). Included in the classes of persons to whom disclosures can be made are “persons responsible” for the individual involved in the emergency. This reflects the current provisions in the National Privacy Principles (“NPP’s”) specifically NPP 2.5.

Of note however, is the omission of a definition of the terms “emergency” and “disaster”. Arguably, these terms have been undefined in an attempt to provide flexibility in the Privacy Act so as not to limit the scope of its application in respect of any unforeseen events.

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□ LEGISLATION

Aviation Transport Security Amendment Bill 2006

On 4 September 2006 the Senate passed the Aviation Transport Security Amendment Bill 2006.

The Bill introduces three major amendments to the *Aviation Transport Security Act 2004*, namely:

- the introduction of “event zones” for dealing with out-of-the ordinary events;
- the separation of the cargo clearance process from that of people, goods and vehicles; and
- providing an alternative method to make simple changes to a Transport Security Program (“TSP”).

These are the first amendments since the 2005 Wheeler Review on airport security and the 2005 Joint Committee review into aviation security in Australia.

Event zones

If a special event is occurring at an airport, the Secretary may declare a particular area of the airport an “event zone”. Event zones are designed to provide more flexibility to an airport’s security procedures when dealing with

events which are not part of its usual transport business. The Explanatory Memorandum provides two examples where an event zone would be appropriate – the arrivals and departures for APEC 2007 and the conduct of the Australian International Air Show at Avalon Airport in March 2007.

Event zones can be airside, landside or a combination. The event type and the area of the airport designated to that event type is determined by the Secretary by notice to the operator of a security controlled airport.

Event zones will be managed by a combination of regulations that apply to that particular type of event zone, and by specific provisions that the airport operator may have included in its TSP.

Event zones do not replace the existing security zones. Security zones continue to focus on enhancing the security

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The amendments allow private-sector aviation companies to disclose personal information in the event of a disaster such as an airline crash. Companies will be able to disclose such information with confidence and without hesitation provided that Part VIA has been triggered by the appropriate declaration.

Arguably the most significant example of a situation in which Part VIA could be triggered is an event similar to the September 11 attacks on the World Trade Centre in New York. Such an aviation disaster would involve mass casualties and missing persons. September 11 required an immediate and effective response by the United States Government and required basic access to personal information to assist the victims. If a similar disaster occurred in Australia, with the current Privacy Act in place, the limitations on the access to information would create significant

difficulties in that it would hinder the identification of victims, their treatment and the process of informing the families of the victims.

Despite the seeming advantages of the Amendment Act, many interest groups have criticised it for its wide scope. The Australian Democrats policy submission reflected their concerns and stated:

It [the Amendment Act] would allow information to be disclosed to, and by, a far greater range of organisations and individuals, for a far greater range of situations, and for far longer than most Australians would consider reasonable.

However, it is arguable that the addition of Part VIA to the Privacy Act will successfully facilitate the free flow of information in times of large-scale emergencies. It is likely that the new amendments will enhance public

confidence that in the event of an emergency, appropriate access to personal information will be granted. This new amendment to the Privacy Act is of particular significance to the already heavily regulated aviation industry as it will dictate the procedures to be adopted in the future in the event of large-scale accident or emergency where access to information is vital to ensure speedy and affective provision of services to victims.

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□ ADMINISTRATIVE APPEALS TRIBUNAL

Airline competition law

Airlines around the world are continuing their attempts to deal with the challenges of difficult trading conditions, surging fuel prices, and low cost carriers. However, competition regulations in many countries are making these attempts difficult to achieve. Here is another instalment regarding the situation in Australia and New Zealand.

Background

On 12 October 2004 the Australian Competition and Consumer Tribunal ("ACCC") authorised the Proposed Alliance between Qantas and Air New Zealand ("the Airlines"). The Tribunal overruled a negative determination, made on 9 September 2003, by the ACCC. The basis for the Tribunal's decision included the findings that there was minimal anti-competitive detriment. Air services over the Tasman were (inter-alia) price sensitive, there were no barriers to air carrier entry or expansion, there was the ability of Emirates and other fifth freedom carriers to engage in marginal cost pricing and there was the pricing constraint due to the low cost carrier operations of Virgin Blue. Sufficient available air carrier capacity existed to compensate for any reduction in overall capacity. In such circumstances the Tribunal concluded that the level of competition on the Tasman, and the ability of other airlines to expand, meant that there was no scope for sustainable price increases. However, authorisation for the Alliance was not forthcoming from New Zealand.

Many continue to operate across the Tasman Sea including Qantas (and Jetstar), Air New Zealand (and Freedom

Air), Emirates, Virgin Blue, Aerolineas Argentinas, Garuda Indonesia, Lan Chile and Royal Brunei.

The most recent application

In April 2006 application was made by the airlines to the ACCC for authorisations, pursuant to subsection 88(1) (Exclusionary Provisions and Agreements Affecting Competition) and subsection 88(8) (Exclusive Dealing) of the *Trade Practices Act 1974* ("the Act"), in respect of their proposed Tasman Networks Agreement ("TNA"). It was considered that elements of the TNA would, or might be, within the compass of provisions contained in sections 45 and 47 of the Act.

The TNA is an agreement between the Airlines to co-operate in respect of any flight operated on the "Tasman Network" by any member of the Qantas Group and the Air New Zealand Group. It involves a free sale codeshare, supported by revenue and pricing arrangements, the co-ordination of activities between the two Groups (to the extent reasonably possible) in scheduling and planning of flights, the pricing of passenger services, frequent flyer programmes, processing of passengers and baggage at airports, co-ordination of minimum in-flight service offerings, cargo services, commissions paid to travel agents and includes a "revenue allocation model". Also the Airlines may, from time to time, enter into contracts, arrangements and understandings which would be, or might contain, exclusionary provisions, including but not limited to (in connection with the joint supply or acquisition by them of) international air transportation services and other goods and services. As a result the TNA is conditional on approval by the ACCC and the New Zealand Minister of Transport. The Airlines submitted that they faced the continuing challenges of a global aviation industry. The involvement of the low cost carrier Virgin Blue and fifth freedom carriers, such as Emirates, together with the absence of barriers

to air carrier entry or expansion, led to excess air carrier capacity on the Tasman. In addition the vast majority of passengers travelling on Tasman services were price sensitive and expected cheaper fares. As a result, the network airlines could only remain viable if they lowered their cost bases. That could not be done by consolidation and merger since the international regulatory regime obstructed such solutions. A network carrier could not unilaterally remove excess capacity from a market, such as the Tasman, since that would cede competitive advantage to the competing airline's network while effectively marginalising its own network. The effect of this would be reduced passenger appeal and loss of market share on the wider network. Consequently, the Airlines each have strong incentives not to remove surplus capacity even when the outcome would be continued higher costs. In particular neither Qantas nor Air New Zealand could do that without one immediately benefiting the other.

The relevant authorisation tests for subsections 88(1) and 88(8) of the Act are set out in subsections 90(6) and 90(8) of the Act. Essentially they involve a finding that the TNA:

...would result or be likely to result in a benefit to the public and that benefit would outweigh the detriment caused to the public, constituted by any lessening of competition that would result in or be likely to result in if...the proposed conduct were engaged in.

The Airlines submitted that nothing had changed since 2003; and moreover that the conduct and business models of Emirates and Virgin Blue keep Qantas and Air New Zealand on constant competitive alert. In this respect, the factual circumstances facing the applicants have not changed since the Tribunal's decision.

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The central argument maintained by the Airlines was that:

The TNA between Qantas and Air New Zealand is necessary to further reduce costs by removing some of the existing surplus capacity, thereby improving load factors whilst still maintaining connectivity with the rest of their networks. This will have no impact on existing low fares and can only be achieved via the TNA.

Efficiency gains would accrue due to the cost savings associated with the better matching of supply to demand allowing for the removal of some surplus capacity, which neither airline could do unilaterally, with a consequent more efficient use of the remaining capacity. There would be a substantial net public benefit from the TNA - for example, cost savings from the removal of surplus capacity, more

direct flight options, greater flexibility for consumers to change itineraries reduction of wingtip flying (the Qantas and Air New Zealand flight schedules each matching the other) and so on.

The ACCC draft rejection

The ACCC did not agree with the Airlines. On 3 November 2006 it issued a draft decision proposing to deny authorisation of the TNA. In particular, the ACCC did not agree with the submissions concerning Emirates and Virgin Blue. Mr Graeme Samuel, the ACCC Chairman, stated that:

Authorisation of the Agreement would fundamentally change the competitive process on the trans-Tasman.

The ACCC considered that the TNA, although providing costs savings to the Airlines, would only result in limited public benefit.

By letters dated 15 and 17 November 2006 Air New Zealand and Qantas respectively notified the ACCC that they were withdrawing the April 2006 application for authorisation and therefore would not require a pre-determination conference and would not be making any further submissions.

Conclusions

The challenges facing airlines are likely to continue, at least in the foreseeable future. Therefore it is likely that attempts at cooperation between airlines will also continue, and that future applications to the competition regulators will be necessary. Whether market circumstances will make future applications more likely to succeed or not remains to be seen.

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destroyed documents that were reasonably likely to be required in evidence in a legal proceeding. Section 253 defines "associate" to mean an employee or agent of the body corporate to the extent that he or she is acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority; or an officer of the body corporate.

Pursuant to section 255, there are three elements of proceedings against a body corporate for an offence against section 254. The first two requirements are that the conduct and knowledge of the "associate" is attributed to the body corporate. The third element relates to intention and the requirement, under section 254, that the person involved in the breach must have intended to prevent the document from being used in the proceeding. This final element prescribes that the intention of the body corporate's

board of directors, an officer of the body corporate, or any other "associate" must be attributed to the body corporate if a "corporate culture" existed within the body corporate, that directed, encouraged, tolerated or led to the formation of that intention. "Corporate culture" is defined to mean a policy or rule but also includes the attitudes, course of conduct or practices that exist within the body corporate. The Act does, however, include a due diligence defence for body corporates if they can prove due diligence was exercised to prevent the contravention by the officer. The maximum penalty for breach by a body corporate is \$322,290.

Effective organisation and document management systems and policies are vital to ensure compliance with the Act. To avoid breaches of the new provisions, compliance programs and document retention policies should be re-examined

in light of these recent changes. The severity of the penalties for breach of these new provisions is not the sole deterrent for complying with the Act. Prosecution may also bring damage to reputation and public image which could have long term ramifications. All aviation companies would be well advised to revisit their existing systems and procedures to ensure that the possibility of prosecution under the Victorian Act is minimised.

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□ MONTREAL CONVENTION

Australia and the Montreal Convention 1999

Readers will recall that in the December 2005 edition of this Bulletin, we reported on the progress (or rather the lack thereof) of Australia ratifying the Montreal Convention 1999 (“MC99”).

For the Rip Van Winkles out there, MC99, is the “new” convention dealing with air carrier liability for passengers engaged in international air carriage. MC99 has been proclaimed as the long awaited, much simplified, replacement of the Warsaw Convention 1929 and a multitude of Protocols, Agreements and amending Conventions brought into existence during the 20th Century.

Aviation has been a topic of great interest for the Australian Government in recent years. While the Government first commenced a detailed enquiry into the benefits of ratifying MC99 in late 2000, it has taken until recently for the draft legislation to be prepared which, if passed by Parliament, will make MC99 part of the law of Australia.

But that draft legislation is currently on hold until the multitude of other issues

currently occupying the Government’s agenda are cleared, and a slot can be found to table the draft legislation, the Civil Aviation (“Carriers’ Liability”) Amendment Bill, in the Australian Parliament. The official government position is;

Timing of the proposed legislation is subject to the legislative priorities of the Government.

Given the Government’s current priorities, it is unlikely we will see the Bill tabled in Parliament until mid 2007. As usual, we will keep a keen eye on progress and will advise further in a future edition.

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objective of the zone and event zones are appropriate to manage the range of risks associated with the event.

Modification of the security process relating to cargo

Currently division 2 of the Principal Act deals with the screening and clearance of people, goods, cargo and vehicles. The bill creates a new division 2A which will deal exclusively with cargo.

Division 2A will focus on the concepts of examination and clearing of cargo. The operational matters will be governed by regulations which are yet to be developed. It is expected that the regulations would include powers to direct Cargo Terminal Operators to use explosive trace detection on cargo.

Division 2A will give the Secretary power to permit that certain air cargo be certified as cleared without going through the normal examination process.

This mirrors a similar provision under the current division 2.

The Bill also creates a new class of cargo business of Accredited Air Cargo Agent (“AACA”). AACA are likely to be useful to operators who have limited link with the air cargo industry. For example, a small courier company which operates in the city and occasionally picks up an item of cargo that will ultimately be carried by air. Unlike the existing Regulated Air Cargo Agent (“RACA”) the AACA is not required to have a TSP but will be required to comply with the security measures developed by Department of Transport and Regional Services (“DOTARS”).

Making changes to the Transport Security Program

Currently, an approved revision to a TSP will extend the TSP for a period of five years from the date of approval. The Bill provides an alternative way of making

simple changes to a TSP without increasing the life of the TSP by a further five years. This alternative method of modifying a TSP is anticipated to be useful for airport operators who need to modify their TSP in order to manage the security requirements due to the introduction of event zones.

Conclusion

The Aviation Transport Security Amendment Bill 2006 enhances the *Aviation Transport Security Act 2004* by addressing the security requirements for special events, making special provisions for the examination and clearance of cargo, and providing an alternative method to change an operator’s TSP.

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□ NOOSA ENDURO 2006

“See Noosa the hard way”

I have always been a keen road cyclist. A few years ago when a friend suggested I try off-road riding, I thought “how hard can it be?”, so I decided to enlist for a new event called the Noosa Enduro, a 105 km off-road event.

I had ridden a couple of similar events before but should have read the fine print for this event where it said “See Noosa the hard way”!

I also thought the people who wrote the course description were just being dramatic when, among other terrifying descriptions, they said that, following a climb up Mt Tinbeewah, you will reach the 40 km mark when you will start “the climbing that will be your friend for the next hour or so as you ride up Tablelands Range” before encountering the aptly named “Mother” described in an understated way as being “not overly rideable”.

Well, I had done my training and ridden 100 km events before and with a near-new bike I was not going to be put off! At 6.30 am I lined up with the rest of the crowd, feeling almost intimidated by their stealth bodies and unhealthy eagerness. It started well enough, until we hit the mud and sand, ankle deep, a few kilometers in. And as you may know, these surfaces are not conducive to riding!

The Mt Tinbeewah climb wasn't too bad and check point one was not too far beyond that. In hindsight I attacked this first section with a little too much vigour as I was soon to find out.

About half-way up the promised climb of the Tablelands Range warning twinges started going off in my thighs. Yes, the first sign of cramps were upon me. It didn't make sense, as I was otherwise feeling great. Unfortunately I had a very long way to go. Tackling the “Mother” was not the best way to overcome the early signs of cramps. As for the “Mother”, they were right – it wasn't “overly rideable” (in fact it was not rideable full stop! - not a single rider that day managed to stay on their bike up that particular ascent, despite there being a prize for doing so). There was a small crowd of people gathered just to watch the pain on people's faces as they struggled up the mountain. Oh yes, they may have sounded like they were giving words of encouragement, but secretly they were laughing at the fact that idiots like me had paid good money for the privilege of experiencing some self-inflicted pain.

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Surprisingly the downhill wasn't the unspeakably fast descent I had been hoping for. Instead it was narrow, rocky and very, very steep. But finally reprieve at the bottom and a decent cruise to the next check point negotiating through a few cows on the way (much to their amusement no doubt).

After a period of rest and recovery and some remarkable tales of the lead group who had stormed through there in less than two hours, I got back on the bike. At least only my legs were sore and I wasn't physically ill like some others who had

eaten too many red snakes! I only had two mountains to go. However, by the 85 km mark I had more cramps and succumbed, but not without substantial disappointment given the months of training and knowing that the distance was achievable.

The ride was fun and challenging, and the countryside was spectacular. And that cold beer by the shores of Lake Cootharaba at the end, tasted very good indeed. Now to get ready for 2007!

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□ MEET THE TEAM

The real life of...



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meet > Rebecca Scott Lawyer

up close & personal

Q Who is the most famous person you have met?

A The most famous person I have met is Sir Professor Anthony Bottoms, my supervisor under my M.Phil degree at the University of Cambridge.

Q What are your favourite movies?

A Old Musicals, in particular My Fair Lady, Guys and Dolls and High Society. I love the glamour, the class and (I hate to admit it) singing and dancing to the movies in my lounge room.

Q What are your favourite books?

A The books I enjoy reading the most are criminal fiction books.

Q What do you do for recreation?

A For recreation I love bike riding, climbing mountains, gardening and reading. Mount Beerwah in the Glasshouse Mountains on the Sunshine Coast in Queensland is a great and challenging climb, with spectacular views when you reach the top. Anybody who has a chance and the inclination should give it a go.

Q If you could live anywhere in the world, where would it be?

A If I could live anywhere in the world it would be France or, in fact, anywhere in Western Europe. The food, the history and the culture are great and everything is so close.

Q Who inspires you?

A The people who inspire me the most in life are my brother and my sister.

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