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Editor's Notes

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Court of Appeal of NSW Supreme Court confirms finding of 'accident'; Civil aviation (Carriers' Liability) Act 1959, Sec 28: *Air Link v Paterson(Alsop P and Ipp JA, Sackville AJA concurring) [2009] NSWCA 251 (20/08/09)*

This is an appeal from the NSW District Court, which deals with the expression 'accident' as it is found in Part IV of the Civil Aviation (Carriers' Liability) Act 1959.This Part is concerned with domestic aviation and applies the Warsaw Convention regime (in a modified form not relevant to this appeal) to domestic aviation. Thus the Court was concerned with the application of Clause 17 of the Convention to the facts of the case.

Injury to the passenger occurred when he was disembarking from the appellant's small passenger aeroplane at Dubbo. The means of disembarkation was via a ladder suspended from the aircraft which did not reach all the way to the tarmac. A 'step' was therefore supplied to enable the passenger to reach the tarmac. The respondent, whom the evidence suggested was a physically substantial figure, was injured when the step failed to effectively perform its function and he fell. There was no apparent cause of the step's failure. In confirming the District Court's finding that the carrier was liable, the Court took the view that the absence of an explanation was no bar to the respondent's case.

It also took the view that there was nothing that the respondent did in the course of embarkation that caused the failure of the step and he had no characteristics that might have caused it to fail.

In reaching its conclusion the majority said that the respondent 'discharged the onus of proof in showing that the event which caused him to fall was one which was unusual, unexpected, and externally caused, even if the precise details and character of that external cause was not proved'(para 50).

Earlier, the majority had said (para 42): 'There was an event: the sudden movement of the step. That sudden movement of the step was physically external to the passenger. That sudden movement of the step was unexpected and abnormal. In our view there was plainly an accident within the meaning of Art 17.'

Sackville AJA, in his concurrence, pointed out that 'a passenger could not succeed unless something unusual or unexpected happened on board in the sense of a departure from the standard conditions of and procedures relating to air travel', factors missing from *Povey* but present in this case (paras 106 – 108).

Later His Honour sought to curtail the reading of the authorities to mean that the passenger must show that the accident occurred 'independently of anything done by the passenger….the mere fact that the passenger has brought himself or herself into contact with a piece of equipment that is not operating in the usual, normal and expected way does not prevent the event from being an "accident" for the purposes of the *Convention*…' (para 120).

In reaching its conclusion the Court canvassed the relevant authorities from Australian and overseas appellate courts (including *Air France v Saks 470 US 392 (1985), Barklay v British Airways plc [2009]1 All ER 871, Povey v Qantas Airways Ltd (2005) 223 CLR 189 and In re Deep Vein Thrombosis and Air Travel Group Litigation [2006]1 AC 495*) demonstrating once more the international nature of the law that governs Warsaw Convention matters.

The Court (per Sackville AJA at para 101) acknowledged the changes to Australian law in this area resulting from ratification of the Montreal Convention 1999 but took the unsurprising view that they did not affect the outcome in this case.

Full Court of Australian Federal Court takes the view that condition – imposing powers in CARS 30 and 296 operate simultaneously and that conditions requiring personnel to be 'acceptable' to CASA are within power; ***Civil Aviation Act 1988(Cth) and Civil Aviation Regulations 30 and 269 1988; Civil Aviation Safety Authority v Central Aviation Pty Ltd (Bennett, Flick and McKerrracher JJ) [2009] FCAFC 137 (2/10/09)***

This case arises from an appeal by CASA against a decision of the Federal Court at first instance to uphold the approach of the Administrative Appeals Tribunal (AAT) in issuing a Certificate of Approval (COA) where CASA had declined to do so. CASA had succeeded at first instance on one of its grounds for seeking an Order to review under the Administrative Decisions (Judicial Review) Act. This was inadequacy of reasons from the AAT. However, the order of the Court to remit the matter for reconsideration by the tribunal member who had earlier considered the matter could not be fulfilled. More pertinently for this note, CASA also challenged the view of the lower court as to the operation of the regulatory scheme in the circumstances.

The factual background was that CASA had decided to cancel the respondent's COA. As a result it was no longer able to undertake aircraft maintenance. It was this decision that was challenged in the AAT. In issuing a new approval, the AAT imposed conditions. Some of these were derived from Civil Aviation Regulation (CAR) 30 and some from CAR 269(1).CASA, seeking an Order to Review from the Federal Court, argued that it was not open for AAT to use conditions derived from both these regulatory provisions when an approval was being issued afresh. In other words, CASA's view was that only the condition-making power in CAR 30, which provides for the regime for approval of COA holders, was available at the time of issue of the approval.

Included amongst the conditions imposed by the AAT were requirements that a licensed aircraft maintenance engineer and auditor 'acceptable to CASA' be appointed by the respondent. These were also challenged on the grounds that they involved the AAT stepping into CASA's shoes and utilised 'un-stated criteria' (para 33).

In dealing with these regulatory aspects of the appeal the Court acknowledged that 'the better view is that the general regime for maintenance of aircraft is governed by reg 30 but reg 269 deals with specific matters that CASA may take in specified circumstances of concern' (para 27).As noted below the Court accepted the view of the judge at first instance that Reg 269 is concerned with the imposition of conditions for 'disciplinary reasons'.

The Court notes inter alia that Reg 269(1) 'does not contain any express limitation on its application other than any limitation imposed by reg 269 itself; is broad in its application, extending to matters such as air safety; allows for variation of, amongst other things, licences that have already been issued; and is directed specifically…to permitting a response by CASA when specified matters of concern have arisen….(para25).

At para 28 the Court took the view that the primary judge was correct in delineating the roles that both provisions could have simultaneously, in parallel as it were. The Court quotes with approval the primary judge's view that 'reg 30(3) is not to be seen, as the Authority contends, as specific power to impose conditions but rather as a general one enlivened whenever the safety of ait navigation requires it. It is reg 269(1) which is the specific provision. It is concerned, relevantly, with the imposition of conditions for, broadly speaking, disciplinary reasons. So viewed, it is not a question of a general provision being used to defeat the limitations of a more specific provision but rather the ordinary usage of a specific provision to carry out its clearly intended purpose'.

In relation to the conditions regarding the appointment of persons 'acceptable to CASA', the Court took the view (at para 32) that this was not a remission to CASA but the exercise by the Tribunal of a power granted to CASA and distinguished *CASA v Allan (2001) 114 FCR 14*.

The Court having rejected an argument that the concept of 'acceptability' involved indeterminacy (at paras 33 and 34), went on to describe what 'acceptability' means in practice: '[It] would be measured by both the fundamental purpose of the legislative regime, namely air navigation safety …' and the specific concerns with respect to the respondent (para 35) and it goes on to say (para 36) 'The notion of acceptability thus constrained is not difficult to understand. By the imposed conditions, CASA is given flexibility to ensure that any person so appointed is *'acceptable'* in the sense of being someone who can, in CASA's view, implement efficiently and consistently with the objectives of the legislative regime, the practices for which the proposed new employees are to be engaged. At all times CASA would have in mind the objectives of the *Civil Aviation Act 1988* (Cth) (to establish a regulatory framework for maintaining, enhancing and promoting civil aviation, with particular emphasis on preventing aviation accidents and incidents) just as it obviously did when initially exercising its powers to cancel the COA and licence'.

Full Court of the Australian Federal Court upholds the issue of Notices under Sec 155 of the *Trade Practices Act 1974* in relation to off-shore international air freight sectors; *Trade Practices Act 1974 (Cth)Secs 45 and 155; Singapore Airlines Ltd v Australian Competition and Consumer Commission(Black CJ,Mansfield and Jacobsen JJ) [2009] FCAFC 136; (2/10/09)*

The Full Court of the Federal Court was concerned, on appeal, with the question of whether city pairs fully outside of Australia are legitimately canvassed in a Notice under Sec 155 of the Trade Practices Act 1974. The proceedings arose from the long-running investigation and proceedings by the Australian Competition and Consumer Commission (ACCC) arising from the alleged air freight cartel which led to the imposition of fuel surcharges in 2006.

The Notices in question sought the production of materials with respect to a fuel surcharge 'including on routes to and/or from Australia'. Singapore Airlines' contention as summarised by the Court was that this phrase extended the notices to the 'making and giving effect to arrangements fixing the prices of international air cargo services supplied on any route throughout the world without any connection to Australia'(para 4).

The legislative context in which the Notices are issued is the requirement in the Act that a Notice under Sec 155 to furnish information or produce documents can only be issued if the ACCC has 'reason to believe' that the Act has been contravened. In this case the alleged contravention was in breach of Sec 45 of the Trade Practices Act which relates to the making of arrangements or understandings that have the effect of lessening competition, and the giving effect to such arrangements, in a market in Australia.

The Court took the view that what was being raised was not only the construction of the words in the Notices but also whether there was a proper 'matter' entitling the conduct of the investigation and the issue of the Notices in the first place.

At paras 56-59 the Court finds in favour of the Commission with respect to the ambit of the Notices. This is because 'international air cargo services' in the Notices means ' transportation of air cargo between international airports, including between Australia and foreign airports', and they include 'code sharing' or 'interlining' arrangements. The definition is seen as resolving the question of 'matter' because it indicates that the services 'are not confined to routes to or from Australia but include those legs of the journey which comprise individual sectors of the journey from Australia to the ultimate destination, or from the point of origin to Australia.

It then concludes (at paras 73 and 74), after discussion of the phrase 'market in Australia' that even if the airlines do not 'compete in a market in Australia for the supply of international air cargo services on every route throughout the world… it is not idle speculation or an improbable circumstance that facts will come to light which show that the relevant competition occurred in a market in Australia, or at least as part of such a market'. The court refers to the example given by the judge at first instance of the Singapore-Bangalore sector as a component of the Australia-Bangalore market.

Thus the Court finds that there a 'matter' for the purpose of the Notices and that the Notices are sufficiently linked to the 'matter'.

BRIEF BRIEFS

Commonwealth Infrastructure Minister approves Master Plan for Canberra International Airport but declines to endorse the airport's aspirations to become Sydney's second airport: In a press release dated 28th August entitled 'Canberra Airport's Master Plan approved', the Minister indicates his approval of the revised Draft Master Plan submitted by the airport following his refusal to approve an earlier version last year. However, the announcement specifically declines to 'endorse' the airport's ambition to become Sydney's second airport. This follows the Minister's similar earlier reluctance to approve projected activity levels for Sydney Airport when announcing his approval of Sydney airport's master plan. These approvals are given under the Airports Act 1996 but these press releases are not the Minister's formal approval documents, which are provided to the airport. The regulatory effect of these statements in the approval announcements is not clear.

Commonwealth Infrastructure Minister approves Brisbane Airport Master Plan with a number of potential constraints: In a press release dated 17th September entitled 'Approval of Brisbane Airport's Master Plan' the Minister announced that he had approved the airport's master plan with what could be characterised as five major constraints on its potential future development.

These are:

-the development of an integrated and comprehensive strategy for community engagement on its operations

-the establishment of a new permanent committee with community representatives to consider ways to improve long term noise mitigation measures

-the examination by the airport of all runway options for departures and arrivals with the aim of maximising over water operations and minimising aircraft noise over urban areas

-the establishment of a 'Community Experiential Centre' onsite with displays, demonstrations and online information about aircraft noise

-the periodic review by the Government of the need for a curfew at the airport

The release also acknowledges the economic benefit of the airport and ongoing investments at the airport. However, it also states that 'the airport has a responsibility to be a good neighbour'.

Three comments about these measures:

-it is not clear to what extent these were proposed by the airport or were the result of negotiation to secure master plan approval

-it is not clear whether any of them are reinforced by conditions in the formal approval

-there is a clear challenge in the new arrangements to the airport and the community to use them constructively to ensure that the airport is able to develop its full potential consistently with the interests of airlines, passengers and the community (both in the vicinity of the airport and the State at large)

Australian Government is contemplating 'unification' of military and civilian airspace: A front page lead story in 'The Australian' of September 15th canvassed the possibility that the Australian government is canvassing the 'unification' of the military and civilian airspace systems. The report, by Cameron Stewart and Steve Creedy, referred to savings of $300m per annum as a result of the creation of a 'unified national air traffic control system for the first time, ending the wasteful separation of the systems and providing the government a much-needed revenue boost'. The report also referred to Defence 'losing airspace'.

The following day 'The Australian' published a letter from Air Marshal Mark Binskin, Chief of Air Force, which while querying the overall thrust of the previous day's story, did indicate that 'Joint Airservices/Air Force project teams have been tasked with developing a joint national approach to the delivery of air traffic services that improves safety, efficiency and capability'.

It says that the joint project teams are seeking to improve 'the alignment of civil and military air traffic management systems and infrastructure, with associated flow-on benefits in sustainability, efficiencies and workforce arrangements'.
The outcome of these processes is awaited with interest.