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Recent cases

Airlines of Papua New Guinea Ltd v Air Niugini Ltd **[2010] PGNC 49; N4047 (9 June 2010)**

In this matter, Airlines of PNG applied to the National Court of Justice of Papua New Guinea for an interim injunction to restrain Air Niugini from removing it, pursuant to a notice to vacate, from that part of the premises at the Mount Hagen Airport Terminal Building which Airlines of PNG currently uses for its lounge.

Before considering whether there was a serious question to be tried, Air Niugini submitted to the Court that Airlines of PNG had failed in its duty to disclose all material facts to the Court including (at [8]):

(a) the existence of the Agreement for Lease for the premises that expired in August 2006 and the option to renew therein which was not exercised by Airlines of PNG;

(b) that Air Niugini had occupied the Airport Terminal, part of which includes the premises, pursuant to a Head Lease from the State for 85 years which commenced in 1991; and

(c) that Airlines of PNG occupied other premises close to the Air Niugini Terminal at Mount Hagen Airport.

On these matters, Hartshorn J found that

> *"The non disclosure of these material facts is not a good reflection on Airlines [of] PNG. I am satisfied that the non disclosure is such that the application of Airlines [of] PNG should be refused*" (at [10]).

Despite this finding, His Honour proceeded to considered whether there was q serious question to be tried. It was the contention of Airlines of PNG that there was a serious question to be tried because: (i) there was a dispute over Air Niugini's legal title to the premises and this its entitlement to evict Airlines of PNG; (ii) if Air Niugini had title, Airlines of PNG had accepted its offer of a new lease of the premises at an increased rental rate and had paid the increased rent; (iii) Air Niugini's conduct in seeking to evict Airlines of PNG is in breach of the *Independent Consumer and Competition Commission Act* ("ICCC Act").

In response, Air Nuigini submitted that there was no evidence that Air Niugini's actions were in breach of the ICCC Act, it has a statutory right to occupy the premises, there is no lease agreement to enforce, and it had not been pleaded that the registered Head Lease that Air Niugini has is unenforceable.

The Court agreed with Air Nuigini and found that the evidence presented by Airlines of PNG failed to show that there was a serious question to be tried. His Honour found that, in any event, if Airlines of PNG succeeded at a final hearing, damages would be adequate compensation for any loss suffered.

Australian Competition and Consumer Commission v P.T. Garuda Indonesia Ltd **[2010] FCA 551 (2 June 2010)**

This case, heard by Jacobson, J, arose out of allegations that PT Garuda Indonesia, and a number of international airlines entered into price fixing arrangements in contravention of the *Trade Practices Act* (TPS) ss 45(2)(a)(ii) and 45(2)(b)(ii). The ACCC sought relief against Garuda including pecuniary penalties under s 76 of the TPA.

Garuda as a predominantly state owned enterprise (more than 95% State owned) claimed to be an agency or instrumentality of the Republic of Indonesia and to be entitled to the immunity conferred by ss 9 and 22 of the *Foreign States Immunities Act 1985* (Cth) from the jurisdiction of the Court in a proceeding brought against it by the ACCC. Two issues were involved, first, whether or not Garuda was a "separate entity" under s 3(1) of the *Foreign States Immunities Act* 1985 (Cth) (FSI Act), and, second, if it was a separate entity whether the immunity conferred by s 9 of the Act is removed by the exception stated in s 11. That section provides that a foreign State is not immune in a proceeding insofar as the proceeding concerns a 'commercial transaction' under s 11 (3) of the FSI Act. Garuda's counsel argued that the matter did not concern a 'commercial transaction' but rather the alleged price fixing allegations made in contravention of Part IV of the TPA.

In determining these issues the Court turned to the Report of the Australian Law Reform Commission ("ALRC") which led to the adoption of the FSI Act and the FSI Bill's *Explanatory Memorandum*. The ALRC's note on the definition of a "separate entity" in the draft Bill is as follows:

> "*A separate entity of a foreign State is a person or body corporate (not being an Australian national or corporation) acting as an agency or instrumentality of the foreign State. Australian examples might include the Law Reform Commission, CSIRO, OTC, the Export Finance and Insurance Corporation or the Australian Meat and Live-stock Corporation*."

The Court noted that the Report underlined that **"***a court would consider whether the entity is exercising governmental functions on behalf of the foreign state***."**

In that part of its report dealing with commercial transactions (at [90]) the ALRC noted the trend towards foreign States acting in ordinary commercial matters being subject to the jurisdiction in which they are acting and not the recipient of absolute immunity. As a consequence of the ALRC's recommendations Australia followed the substance of the *State Immunity Act 1978* (UK) definition of 'commercial transaction'. His Honour noted that this involves an objective enquiry which avoids an enquiring into the State's motive for entering into the transaction. The note to clause 22 in the Explanatory Memorandum specifically deals with the issue of State immunity to separate entities and provides that:

> "*In practice, it is unlikely that claims to immunity by separate entities will succeed, as most entities do not perform in Australia the sort of activities that entitle foreign States to immunity.*"

His Honour was of the view that the language of the definition in s 3(1) and the structure of Part II indicate that an agency or instrumentality of the State is one which is subject to the necessary degree of control and which performs governmental functions. "*In particular, a separate entity does not receive the protection of the special provisions which apply between States*" (at [68]). Therefore a separate entity that is the recipient of immunity is an agency or instrumentality that performs many which performs many of the functions of a department or organ of the foreign State, although organised separately from it ... it is not merely a corporation which is owned or controlled by the State."

The requirement is that the agency or instrumentality serves a "particular government purpose". Jacobson J at [73] reached the conclusion that there was nothing in the structure of Part II of the Act to provide support for the view that the definition of separate entity applied to government owned or controlled corporations. His Honour was also of the view that the concept of an agency of a foreign State was intended to embrace something more than an entity which is subject to State control. The requirements for the immunity to be extended were (i) a sufficient degree of State control and (ii) the performance of governmental functions.

While it was clear the Republic of Indonesia had the power to control Garuda His Honour noted that the evidence in the application was silent as to how the day-to-day management of Garuda is conducted. Therefore, even if ownership and control of the corporation met the statutory test of separate entity, the evidence presented in the application did not satisfy the test.

Was Garuda exercising governmental functions?

His Honour was not persuaded by the analogies presented by counsel such as the Overseas Telecommunications Commission ("OTC"). The analogy was along the lines that Garuda exercises governmental functions when it transports people and goods around Indonesia and internationally, just as the OTC used to transport electrons and signals outside Australia in the field of telecommunications. In response His Honour did not consider that "*the mere conduct of a commercial airline is sufficient to constitute the performance of functions of a public character*." Second, even if the operation of an airline is capable of amounting to a governmental function, there is no evidence that demonstrates whether any governmental function or task has been entrusted to Garuda.

Given that Garuda was not viewed by the court as a separate entity to which immunity applied it was not necessary for the court to consider further. Nevertheless, the court chose to consider the issue at some depth exploring relevant jurisprudence ultimately concluding that the proceeding did not concern a commercial transaction within the meaning of s 11 of the Act. Consequently, Garuda's motion was dismissed with costs.

On 9 June 2010, Garuda filed a Notice of Motion for Leave to Appeal Jacobson J's decision.

***Australian Competition and Consumer Commission v Malaysian Airline System Berhad* [2010] FCA 757 (21 July 2010)**

Less than 3 weeks after delivering his judgement in the *Garuda* case, on 23 and 24 June 2010, Jacobson J was again presiding over a motion by an airline, on this occasion Malaysian Airlines Systems Berhad ("MAS") and Malaysia Airlines Cargo SDN BHD ("MAC"), to set aside the proceeding by the ACCC on the basis that they claimed to be agencies or instrumentalities of the Government of Malaysia, and, as such, are immune from the jurisdiction of the Court under the *Foreign States Immunities Act 1985*.

In this case, the parties agreed that Jacobson J could determine this matter upon the basis of the principles as applied in *Garuda* whilst reserving their right to appeal if some of the principles applied in *Garuda* were incorrect.

The Court first considered the ownership structure of MAS and MAC. At the time proceeding was commenced (April 2010), the Malaysian Government did not own directly any shares in MAS but rather its shareholding was indirect and was held through three Government Linked Investment Companies: Khazanah Nasional Berhad, Penerbangan Malaysia Berhad and Employees Provident Fund Board. Also, Articles 4 and 5 of the Articles of Association of MAS provided for the creation of one Special Share to be held by Ministry of Finance or a Minister or representative of the Government of Malaysia which would carry the right to appoint or nominate three Government Appointed Directors and to appoint one of them as

Chairman. This only constituted a minority number of shareholders in MAS. The Special Shareholder was entitled to receive notice of, and to attend and speak at general meetings, but the Special Share carries no right to vote at general meetings of MAS and MAS is precluded from undertaking certain activities without the permission of the Special Shareholder, including disposal of shares or any significant corporate restructure or merger.

As to MAC, it was a wholly owned subsidiary of MAS and for all intensive purposes any finding against MAS would also apply against MAC.

Jacobson J found that the necessary degree of control ("the control test" as applied in *Garuda*) did not exist in respect of MAS at the relevant times because:

i. the Government's power of control over MAS as a shareholder through its ability to exercise control at a general meeting was not sufficient to satisfy the test;

ii. the Special Share did give the Ministry of Finance a position of influence in the day-to-day control and management of the business of MAS;

iii. there was no evidence to suggest that the Government controls the composition of the Board or that it is accustomed to act in accordance with the Government's directions;

iv. the evidence showed that the Government Linked Investment Companies which owned the shares in MAS had influence but not necessarily control over MAS;

v. MAS's tax free status did not of itself give rise to an inference of Government control;

vi. there was no evidence from any State officials of the exertion of actual control; and

vii. the Government's involvement in certain MAS decision, for example, the maintenance of flights to New York and Los Angeles, was not indicative of Government control.

Jacobson J also considered the government function test, that is, whether the Government of Malaysia had extended its reach to the conduct of the business of MAS so as to constitute the performance by MAS of governmental functions. On this matter, Jacobson J found that "*that there is nothing in the factual material to distinguish the case from Garuda in a relevant way"* (at [171]) and that "*MAS's wide ranging airline business, pursued for commercial gain, is quite different from the governmental functions identified in* [*Mellenger v New Brunswick Development Corporation* [1971] 1 WLR 604]" (at [174]).

MAC, as a wholly owned subsidiary of MAS also failed the control test and government function test.

On 28 July 2010, MAS and MAC filed a Notice of Motion for Leave to Appeal Jacobson J's decision.

Other related proceedings:

Katayama v Japan Airlines Corporation [2010] FCA 794 (30 June 2010)

***Cathay Pacific Airways Limited v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* [2010] FCA 510 (28 May 2010)**

In January 2007 Auskay International Manufacturing & Trade Pty Ltd ("Auskay") filed proceedings in the Federal Court of Australia in which it sought relief pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the "ADJR Act"), the *Judiciary Act 1903* (Cth) and the *Trade Practices Act 1974* (Cth) ("TPA") against nine international airlines, including Cathay Pacific Airways Limited. The proceedings were filed as a class action pursuant to the provisions of the *Federal Court of Australia Act 1976* (Cth).

The class action group members were Australian residents who during the period 1 January 2000 to 11 January 2007 paid more than $20,000 for the carriage of goods to or from Australia by air.

Auskay claimed that it and the group members suffered loss and damage by reason of the conduct of the airlines alleging that they made, and gave effect to, certain price fixing arrangements in and outside Australia in contravention of s 45(2) of the Act. Relief was claimed pursuant to section 82 of the TPA.

This particular case arose from a challenge by Cathay Pacific to the approval of the Minister for Competition Policy and Consumer Affairs required under Section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for the above litigation to proceed. Cathay Pacific challenged the decisions of the Minister relying upon s 5 of the ADJR Act, s 39B (1A) of the *Judiciary Act 1903* (Cth) and s 163A of the Act. In substance Cathay Pacific contended that the decisions were not authorised by s 5 of the TPA and fell within a number of the provisions in s 5(1) of the ADJR Act.

Cathay Pacific's challenges to the decisions of the Minister fell into five categories:

(a) Auskay's application to the Minister seeking his consent failed to specify the "conduct outside Australia" it alleged Cathay Pacific engaged in, as required by s 5 of the Act with the result that the decisions made by the Minister fell outside the scope of the power conferred upon him by s 5 of the Act;

(b) the Minister incorrectly applied the criterion or condition contained in s 5(5)(a) of the Act, namely his consideration whether the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct;

(c) the Minister incorrectly applied the criterion or condition contained in s 5(5)(b) of the Act, namely his consideration whether it was in the national interest that his consent be given;

(d) the Minister had regard to an irrelevant consideration, namely he took into account a request for ministerial consent that had been made and granted in *Bray v F Hoffmann-La Roche* (2002) 118 FCR 1, a proceeding concerning an alleged vitamins cartel, the context, process and terms of which had no connection with the consent sought by Auskay;

(e) the Minister was not permitted by s 5(4) of the Act to grant ministerial consent pursuant to that subsection.

Justice Goldberg identified Cathay Pacific's main argument as being that because Auskay's application to the Minister failed to identify precisely the "conduct outside Australia" in respect of which it sought ministerial consent for Pt IV of the TPA to operate externally, the Minister had no power to give the consent. Cathay argued that the Minister's failure to consider Auskay's application on the basis of specified conduct in specified places outside Australia

constituted a jurisdictional error rendering that the decisions made invalid. However, Goldberg, J, was not persuaded by this argument and maintained that the submissions made by Auskay and the airlines enabled the Minister to understand that the alleged conduct occurred in Japan, Singapore and Hong Kong.

His Honour determined that, in any event, it was not for the Minister to determine whether there was sufficient material before him justifying the conclusion that the arrangements and meetings in question occurred in one or more of the countries. His Honour observed at paragraph 58 that "it was sufficient for his purposes, that he was able to identify the nature of the conduct, that is the arrangements, and the countries outside Australia in respect of which it was alleged that the relevant conduct had occurred."

Section 5(5)(a) Arguments

Section 5(5)(a) provides a potential justification for the airline in respect of the offending conduct if the conduct engaged in is specifically authorised by the law of the country in which it occurred. Cathay argued that the Minister in making his decision had not given proper consideration raised by the Hong Kong Civil Aviation Department (CAD) in the letter sent to him. Goldberg J did not agree and stated that it was apparent in the statement of reasons provided by the Minister that he had given "proper consideration" to the issues raised by the Hong Kong CAD. "In short," His Honour observed at paragraph 61 of the judgment, "the Hong Kong CAD did not approve of, require or specifically authorise the Global Cartel Arrangement alleged."

Cathay also alleged an error on the part of the Minister in interpreting and applying section 5(5)(b) of the TPA, namely, whether or not it was in the national interest that the consent to prosecute be given. Again Cathay was unsuccessful in arguing a failure to heed the views of the Hong Kong regulatory authority in relation to conduct in Hong Kong.

> "*The Minister did not disregard that request; the Minister took the Hong Kong CAD's process and approval system into account and did not act inconsistently with it*."

On the fourth point (d) [above] His Honour declared that he was "not satisfied that the Minister particularly or specifically took into account the issues raised in *Vitamins Cartel* case in reaching his decisions."

On the final point argued, that there had been an error by the Minister in breach of section 5(4) of the TPA, Cathay had asserted that:

1. the Minister cannot give his consent under s 5(4) in relation to an extant proceeding;
2. Auskay had not informed the Minister that it was proposing to bring any new proceeding or make any new applications for relief under s 87 of the Act; and
3. in the proceeding Auskay had expressly confined the proceeding to conduct in Australia insofar as it sought relief under s 87 of the Act.

In rejecting Cathay's contentions Goldberg, J, opined that a consequence of accepting Cathay's arguments would be that that "a consent by the Minister can never be given in accordance with s 5(4) of the Act." In ruling that there had been no jurisdictional error or any improper exercise of power, Goldberg, J rejected all submissions by Cathay that the Minister had erred in granting consents to Auskay pursuant to s 5 of the TPA.

***Ryanair Ltd v Billigfluege.De GmbH* [2010] IEHC 47 (26 February 2010)**

The case of Ryanair Ltd v Billigfluege.De GmbH was recently heard before Mr Justice Michael Hanna in the High Court of Ireland. The broader dispute related to the defendants' provision of a website which offered a price comparison service allowing users to compare prices for flights. It was argued that this breached the plaintiff's website Terms of Use, trademark, copyright and database rights in that it takes information from the plaintiff's site, an activity known as screen-scraping, and provides that information to others for a fee.

The narrow issue related to the defendants' motion to dismiss on jurisdictional grounds pursuant to Article 2 of the Brussels Regulation (EC Reg. 44/2001) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, as transposed into Irish law by the EC Regulation No. 52 of 2002. The defendants argued that under the regulations they should be sued in their own domicile, Germany. At issue in the eyes of the court was the interpretation of Article 23 of the Brussels Regulation which permits agreement between the parties that the court of a particular Member state should have exclusive jurisdiction for matters in connection with the particular legal relationship.

In reaching his decision Mr Justice Hanna had recourse to the case law of the European Court of Justice and US jurisprudence including *Decker v Circus Circus Hotel* 49 F. supp. 2. D 743 and *Caspi v Microsoft Corporation* 323 N.J. super. 118, 732 A. 2d 528.

Ryanair argued that in carrying out the screen-scraping activity the defendants were making use of the website for their own commercial advantage and therefore assented to the terms of its use. In resolving the issue of the validity of the plaintiff's Terms of Use, the Court turned to traditional contract law principles. Although the defendants argued that there had been no consideration His Honour found that the provision of information as to flights and prices by Ryanair on the site did amount to "*a sufficient act of consideration for the purposes of making the contract legally binding*."

On the jurisdictional issue His Honour also ruled that the exclusive jurisdictional clause was binding on the basis of the defendants' use of the website to make a profit. His Honour concluded that "*if you use the site, you agree not to breach its terms and if you do so, the exclusive jurisdiction clause set out in the Terms of Use make it clear that Ireland is the appropriate jurisdiction for the purposes of litigating any disputes that may arise as a result*."

***M/S. Dilawari Exporters v M/S Alitalia Cargo & Ors* [2010] INSC 282 (16 April 2010)**

This case, heard by Jain J in the Supreme Court of India, related to the appellants exports of readymade garments and handicrafts. The dispute concerned their export of a consignment of Ladies and Gents Dhotis to be shipped under an airway bill issued by Fourway Movers P. Ltd to a consignee located in New York. Simultaneously a Master Air Waybill on a numbered proforma printed by Alitalia was prepared. This listed Fourway Movers (the third respondent) as the consignor and had the same consignee as the other waybill issued by Fourway Movers. Both Airway Bills had the others numbers recorded on them.

As the consignment failed to reach the consignee in New York by the required date they cancelled the order and claimed damages from the appellant.

The appeal arose out of the finding that there was no privity of contract between the plaintiff and defendant, here the appellant and the respondent, and hence the initial arguing of the case was unsuccessful. Counsel for the appellant argued that it was clear from the evidence that both air waybills were prepared contemporaneously and that Fourway Movers, despite being nominated as the consignor in the Master Waybill for the Al Italia flights were acting as agents for the appellants, Dilwari Exporters. Counsel for the respondent had also submitted that under

Part III of Chapter II of the Second Schedule to the *Carriage by Air Act*, the consignor bears the obligation to make out the Air Waybill and hand it over to the carrier. It is the responsibility of the consignor to see that all the particulars and details of the cargo inserted in the Air Waybill are correct. This provision mirrors Article 10 of the Warsaw and Montreal Conventions.

Justice Jain declared that the critical question was whether on the evidence Fourway Movers could be said to possess an express or implied authority to act on behalf of the first respondent, Al Italia: "*If respondent No.3 had such an authority, then obviously respondent No.1 was bound by the commitment respondent No.3 had made to the appellant*."

Jain J was of the opinion that the third respondent had an express authority to receive the cargo for and on behalf of the first Respondent, Al Italia. This was manifest from the Master Air Waybill which was issued and signed by the third respondent on the Air Waybill printed by the first respondent.

Despite acknowledging that no privity existed the Court allowed the appeal as on the above basis and because Fourway Movers "*was, in fact, acting in dual capacity - one as a Shipper on behalf of the appellant and the other as an agent of respondent No.1*." As a consequence of this finding Al Italia were "*bound by the acts of their agent, viz. respondent No.3, with all its results*."

News from the United States

Measures to enhance the protection of airline passengers in the United States

On 2 June 2010, the United States Department of Transport announced a further expansion of consumer protection measure for air travelers. The new measures build upon the Department of Transport's rule "*Enhancing Airline Passenger Protections*"" of 30 December 2009 which banned carriers from subjecting passengers to long tarmac delays and other practices deemed deceptive.

Features of the new measures include:

- increasing compensation for passengers involuntarily bumped from flights as follows:
    - increase from the current level of $400 to $600 in circumstances where the carrier arranges substitute transportation scheduled to arrive at the passenger's destination one to two hours after the passenger's original scheduled arrival for domestic flights, or one to four hours for international flight; and
    - increase from the current level of $800 to $1,300 if the substitute transportation is scheduled to arrive more than two hours later for domestic flights, or more than four hours later for international flights;
- allowing passengers to make and cancel reservations within 24 hours without penalty;
- require full and prominently displayed disclosure of baggage fees as well as refunds and expense reimbursement when bags are not delivered on time;
- requiring fair price advertising;
- prohibiting price increases after a ticket is purchased;
- mandating timely notice of flight status changes;
- reporting of tarmac delay data to the Department of Transport from all U.S. and foreign airlines operating aircraft of 30 or more seats on flights to and from the United States and charter flights.

The Department of Transport outlined that the new rule is extended to increase the scope of the consumer protection of airline passengers: "*the rule published last December, which adopted a three-hour limit for airline tarmac delays for domestic flights, also required U.S. carriers to adopt contingency plans for lengthy tarmac delays at large-hub and medium-hub airports and to publish those plans on their websites. Today's proposed rule would expand the requirement for having contingency plans to include foreign airlines' operations at U.S. airports and would require carriers to adopt contingency plans for small- and non-hub airports*."

Competition news

European Commission grants approval for the joint control of Air China Cargo by Air China and Cathay Pacific Airlines

A transaction in which the Hong Kong based International Airline Cathay Pacific has acquired a stake in Air China Cargo, which is a wholly-owned subsidiary of Air China, has received recent scrutiny and, ultimately, approval by the European Commission.

Air China is an international airline that is active mainly on the Chinese domestic air transport market. Air China Cargo is a wholly owned subsidiary of Air China. Part of the motivation for the venture was to facilitate the two airlines competing better with China Eastern Airlines who have around half of the Shanghai market after its merger with Shanghai Air.

The referral to the European Commission was pursuant to their competition policy, in particular Article 4 of Council Regulation (EC) No. 139/2004 by which the undertakings of Cathay Pacific and Air China fell under the scope of Article 3(1)(b) of the Merger Regulations.

While the acquisition has resulted in a situation where the two companies will have joint control in the Air China Cargo, the EU Commission concluded that the acquisition would not significantly impede effective competition in the European Economic Area or any substantial part of it.

It is understood that completion of the transaction will see Air China holding 51% control with Cathay Pacific acquiring 25% equity interest. They will also fund an off-shore trust, in the form of a loan, to hold the other 24%.

Editors' note: Future development in the Auskay representative proceeding

It may be recalled that on 11 December 2009, Tracey J struck out Auskay's fourth amended statement of claim on the basis of a range of deficiencies which were "*so fundamental that it is not possible selectively to strike out parts of the document leaving a coherent pleading*." (see *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Limited* (No 5) [2009] FCA 1464). In particular, Tracey J found that Auskay failed to plead material particulars necessary to identify the relevant markets in which the alleged anti-competitive conduct occurred.

Auskay subsequently appealed Tracey J's decision to the Full Court of the Federal Court of Australia. The appeal was heard before Moore; Jessup and Dodds-Streeton JJs and judgment is scheduled to be delivered on **12 August 2010**.

Aviation Finance

New Zealand accedes to the Cape Town Convention and Aircraft Protocol

ON 23 June 2010, the New Zealand Parliament passed the *Civil Aviation (Cape Town Convention and Other Matters) Amendment Bill* which will give effect to New Zealand's accession to the *Convention on International Interests in Mobile Equipment* (Cape Town Convention 2001) and *Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment* (the Aircraft Protocol). On 20 July 2010, the New Zealand Government subsequently filed the instruments of accession with the International Institute for the Unification of Private Law (UNIODOIT). The Cape Town Convention and the Aircraft Protocol shall come into force in New Zealand on 1 November 2010, being the first day of the month following the expiration of three months after the date of the deposit of the instruments of accession.

Déjà vu – the Australian Government calls for public submissions on Australia's accession to the Cape Town Convention

On 25 May 2010, the Australian Department of Infrastructure, Transport, Regional Development and Local Government wrote to industry inviting submissions on whether Australia should accede to the Cape Town Convention and Aircraft Protocol. This repeats the invitation for submissions made in the "*Cape Town Convention 2001 - Consultation Paper*" which was released by the Department in February 2008. To the best of the editors' knowledge, the Department never publicly reported the results of the initial public consultation.

Relevantly, in Volume 54 of *Aviation Briefs*, the editors reported on the release of the Exposure Draft and Commentary to the Personal Property Security Regulations. In the Exposure Draft it was noted that the Australian Government was considering whether to accede to the Cape Town Convention and that adopting the same definition for 'aircraft engine', 'airframe', and 'helicopter' would assist in any transition to the Cape Town Convention rules. Curiously, in somewhat contradictory terms, the Department's letter of 25 May states that "*a key consideration for Government is to ensure that the interaction between any Cape Town system and the Personal Property Securities reforms does not create burdensome or duplicated regulatory requires for industry*."

The lack of progress made towards Australia's accession to the Cape Town system is reminiscent of the bewildering path taken in Australia's accession to the Montreal Convention 1999. It may be recalled that in respect of the Montreal Convention 1999, over a period of almost 10 year, the Department of Transport and Regional Services (as it was then known) issued several consultation papers and on each occasions received numerous public submissions. When the Montreal Convention 1999 came into force in Australia on 24 January 2009, it became the 88th state party to the Convention.

Whilst the Cape Town Convention and Montreal Convention cover distinct issues, the Australian Government's treatment of these international aviation legal instruments has been plagued by similar bureaucratic impediment and lack of "legislative priority". Currently in the Asia Pacific region the following countries are parties to the Cape Town Convention and Aircraft Protocol: Bangladesh, China, India, Indonesia, Malaysia, New Zealand and Singapore. Based on the past experience, it remains unlikely that Australia will join this list in the near future.

Regulatory Developments

CASA suspends the Air Operator's Certificates of Skymaster Air Services and Avtex Air Services

On 24 July 2010, pursuant to section 30DC of the *Civil Aviation Act 1988*, CASA suspended the air operator's certificates of two Sydney-based charter operators which share the same ownership, Skymaster Air Services and Avtex Air Services.

In the press release issued by CASA, it stated that until it completes further safety investigations allowing these airlines to continue to operate while CASA completes further safety investigations poses a serious and imminent risk to air safety.

Section 30DC of the *Civil Aviation Act 1988* relevantly provides the basis of immediate suspension of an air operator's certificate if CASA has reason to believe that the AOC holder has engaged in, is engaging in, or is likely to engage in, conduct that constitute constitutes, contributes to or results in a serious and imminent risk to air.

According to CASA, Skymaster aircraft have been involved in three serious accidents and a number of incidents in the last three months, including the accident of 15 June 2010, in which an aircraft operated by Skymaster crashed at Canley Vale in Sydney, in which the pilot and a flight nurse were killed.

CASA stated that its decision to suspend Skymaster Air Services and Avtex Air Services is also based on issues relating to the safety culture of the operations, aircraft maintenance control and pilot training.

On 23 July 2010, CASA applied for certain relief against Skymaster and Avtex pursuant to 30DE of the *Civil Aviation Act* 1988 for an order to continue the suspensions. Initially Moore J ordered that each operator be prohibited from engaging in any of the activities which would otherwise be authorised by their air operator's certificate to 5pm, 4 August 2010.

According to CASA, the suspension of Skymaster's and Avtex's air operator's certificates will continue until at least 11 August 2010. The suspension will on that date unless CASA issues the operators a show cause notice asking why their certificates should not be varied, suspended or cancelled.

Notes of other recent cases involving CASA

Vasta and Anor and Civil Aviation Safety Authority [2010] AATA 499 (6 July 2010)

> FREEDOM OF INFORMATION – exemptions – documents relating to aircraft maintenance and safety claimed to be exempt under sections 40, 43 and 45 of the FOI Act – whether disclosure could prejudice future supply of information to agency – whether disclosure of documents could reasonably be expected to unreasonably affect an organisation's lawful business, commercial or financial affairs – distinction between mandatory and voluntary disclosure of information to agency – whether certain reports can be characterised as interim reports – scope of requests and adequacy of identification of documents responsive to request – costs – in respect to the first application the decision under review is set aside and in respect to the second application the decision under review is varied and remitted

Vasta and Anor and Civil Aviation Safety Authority [2010] AATA 500 (6 July 2010)

> PRACTICE AND PROCEDURE – proceedings – freedom of information – application for confidentiality order – basis for consideration – order granted

Ovens and Civil Aviation Safety Authority [2010] AATA 481 (29 June 2010)

> CIVIL AVIATION – Conditions for private pilot licence – Class 2 medical certificate under Regulation 67.155 of the Civil Aviation Safety Regulations 1998 (Cth) – Type 1 diabetic to fly with safety pilot – safety requirements under the Civil Aviation Act 1988 (Cth) and associated regulations – Applicant diabetic over 50 years with progressive and irreversible symptoms – Civil Aviation Safety Authority 'Protocol for Type 1 Diabetic Pilot Applicants' preferred over US Federal Aviation Authority Protocol – decision under review affirmed.

Civil Aviation Authority of New Zealand suspends balloon operation

On 9 July 2010, the Civil Aviation Authority of New Zealand issued Balloon Adventures Up, Up and Away Ltd, an operator of seven hot air balloons, with a Notice of Prohibition pursuant to section 21 of the *Civil Aviation Act* prohibiting it from operating with immediate effect and indefinitely. The CAA indicated that this action follows serious safety concerns discovered by its safety audit and spot check. In particular, the company was found to have breached several minimum safety standards and carried out unauthorised maintenance.

The CAA said that was the first occasion it had issued a notice under section 21 to prohibit an aviation company from operating. Usually, the CAA would suspend or cancel the relevant air operator's certificate but hot air balloon operators are not required to obtain air operator's certificates.

This position will soon change when the proposed new rule *Part 115 - Adventure Aviation* is introduced later this year. According to the relevant Notice of Proposed Rule Making, Part 115 will prescribe specific requirements for the issue of an Adventure Aviation Operator Certificate, the continuation of that certificate, and the operational requirements for the various categories of adventure aviation, including hot air balloons, microlights, warbirds, and tandem hang gliders and paragliders.

Transport Department News

Airports Amendment Bill 2010

On 26 June 2010, the *Airports Amendment Bill 2010* (the Bill) was introduced into Parliament to give effect to the airport planning and development policies outlined in the Australian Government's National Aviation White Paper of 2009.

The Bill proposes to make the following amendments to the *Airports Act 1996*:

- Airport-lessee companies will be required to provide detailed information in relation to the first five years of the master plan including:
    - a ground transport plan on the landside of the airport;
    - the likely effect of the proposed developments set out in the master plans on employment at the airport and on the local and regional economy and community, including an analysis of how the proposed developments fit within the planning schemes for commercial and retail development in the area adjacent to the airport; and
    - detailed information on the proposed use of precincts at the airport that are to be used for purposes not related to airport services.

- The airport environment strategy will be incorporated into the master plan, which will allow airports to undertake only one approval process, and the period for updating and renewing the environment strategy will be aligned with the master planning process.
- Proposed developments with significant community impact, regardless of size or cost, will be subject to the optimal level of public comment. It is suggested in the Explanatory Memorandum that this will enable members of the community and other stakeholders to have input into the proposed developments that may be contentious or may cause concern within the local area.
- The airport-lessee company may seek exemption from the major development plan process for aeronautical-related developments.
- Airport-lessee companies will be entitled to seek a reduction in the public consultation period to not less than 15 business days, if the draft major development plan aligns with the details of the proposed development set out in the final master plan and the proposed development does not raise additional issues that would have a significant impact on the local or regional community.
- Subject to an "exceptional circumstances" exception, a range of development types regarded as incompatible with airport operations, such as long-term residential development, residential aged or community care facilities, nursing homes, hospitals and schools would be prohibited.

Whilst Parliament has been prorogued until the completion of the Federal election, the changes proposed in the Bill are not likely to be impeded should there be a change in government.