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RECENT CASES

Auskay International Manufacturing and Trade Pty Ltd v Qantas Airways Limited **[2010] FCAFC 96 (12 August 2010)**

This matter relates to two applications for leave to appeal separate judgments given on 11 December 2009 against Auskay, the applicant. It will be recalled that Auskay International Manufacturing & Trade Pty Ltd has commenced a representative proceeding in the Federal Court of Australia against various airlines relating to the cargo cartel allegations.

In the first judgment, the primary Judge struck out the Fourth Amended Statement of Claim and refused a motion by the applicant to amend the definition of the represented group. In the second judgment, the primary Judge refused the applicant's application for a transfer of the proceeding to the New South Wales District Registry of the Court.

On the first and most significant issue, the applicant's pleadings had been the subject of judicial scrutiny as long ago as 29 September 2008, when the Statement of Claim was struck out on the basis the applicant failed to identify the market in which the respondents were alleged to be in competition with other. Consequently, the applicant made substantial modifications to its pleading resulting in the Fourth Amended Statement of Claim making "*copious provision on the question of the relevant market or markets*". However, the primary Judge considered that the pleading remained deficient in that it failed to allege the facts necessary to sustain the conclusion that there was a relevant market in Australia, as required by s 4E of the *Trade Practices Act*.

The primary Judge stated that there could be "*no objection to the applicant pleading ... that there is a global market for air freight services and that part of that market is a 'market in Australia'*" but it had failed to alleged the material facts that would be necessary to justify such a conclusion. On this point, Jessup J, who delivered the leading judgment, considered that "*[t]here could be no suggestion that the primary Judge misdirected himself as to what constituted a "market"*."

The material facts relied on by the applicant to establish the existence of a "global market" include the possibility that carriers are able to substitute routes and modes of carriage between hubs and ports when providing services.

The judgment covered extensively the issue of defining a "global market" and a "market" for international cargo services under the *Trade Practices Act*. On defining the relevant "market" Jessup J found that:

> *"I consider that [the primary Judge] was in error in two related respects in the approach he took to the applicant's allegation that there was a global market. His Honour ought not to have treated the routes followed by aircraft as effectively defining the service which was supplied by the respondents; and he ought to have recognised that the applicant's factual case was that there was global supply-side substitutability for the provision of airfreight services, however improbable that circumstance may appear at this interlocutory stage of the proceeding*." (at [45]).

His Honour also found that the pleadings were not embarrassing because whether certain facts pleaded by the applicant could justify the conclusion will be a matter of argument and an interlocutory strike out hearing is not the s4E" (at [47]).

Finally, Jessup J considered that "*substantial injustice would be occasioned to the applicant if [the primary Judge's] decision was allowed to stand: see Wright Rubber Products Pty Ltd v Bayer AG [2010] FCAFC 85 at [83]*" (at [49]).

Accordingly, the orders striking out the Fourth Amended Statement of Claim were unanimously were set aside.

Concurring with Jessup J, Moor J also added:

> "*In my opinion this history provides a reason additional to those identified by Jessup J for granting leave to appeal from the order striking out the applicant's most recently formulated statement of claim. To refuse leave and thus to defer to the views of the primary judge about the adequacy of the pleadings would potentially add considerable further delay.*"

Should this matter go to a final hearing, it will be curious to see how the Court deals with the pleadings when subjected to full scrutiny.

On the second issue, the Applicant had sought to transfer the proceeding from Melbourne to Sydney on the basis of the common issues this proceeding has with those proceedings the ACCC has commenced against several of the airlines. As a matter of practice and substance, the primary Judge had refused the transfer. On the issue of substance, His Honour averted to the possibility "*that s 23B(1) of the Wrongs Act 1958 (Vic) might operate differently, in relevant respects, from s 5(1) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW). The latter provided only for the recovery of contribution as between joint tortfeasors, while the former allowed for recovery of contribution from another person who was "liable in respect of the same damage".*" (at [57]). On these matters, Jessup J found that: "*In my view, these other considerations to which His Honour adverted are conventional and appropriate ones, and lead naturally to the conclusion that the proceedings should not be transferred."*

On the issue of costs see: *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Limited* (No 2) [2010] FCAFC 129.

Eds.

Brannock v Jetstar Airways Pty Ltd **[2010] QCA 218 (20 August 2010)**

In a recent Queensland Court of Appeal decision, an airline has successfully obtained summary judgment against a claim for damages for personal injury pursuant to section 28 of the *Civil Aviation (Carriers 'Liability) Act* 1959 (the Act) which provides for the strict liability of a carrier for damage sustained to a passenger by reason of an "accident" occurring on board an aircraft or during embarkation or disembarkation.

In this case the passenger allegedly suffered injuries whilst embarking an aircraft operated by the airline for interstate domestic carriage in Australia. The passenger alleged that he was directed down a set of stairs to embark the aircraft via the tarmac. Upon descending the stairs, it is alleged that the passenger and his companion were unable to identify the door giving access to the tarmac. They then ascended back up the stairs, only to be met by other passengers who offered to direct them to the aircraft. The passenger then turned on the stairs, lost his footing and fell.

The meaning of "accident" for the purpose of the Act is found by reference to Article 17 of the Warsaw Convention. Article 17 was considered by the High Court of Australia (in the context of DVT litigation) in *Povey v Qantas Airways Ltd* 223 CLR 189. In Povey the High Court adopted the interpretation of "accident" as stated in the US Supreme Court case of *Air France v Saks* 1985 470 US 392, that in order for the passenger to succeed, he must establish the following:

(a) There must have been an unexpected or unusual event or happening;

(b) That unexpected or unusual event or happening must have been external to the passenger. Thus the injury must not have been the passenger's "own internal reaction to the usual, normal, and expected operation of the aircraft"; and

(c) There must be a causal link between the injury and the unusual or unexpected event.

Following an unsuccessful application for summary judgment in the District Court, the airline appealed to the Court of Appeal on the basis of the facts pleaded there was no "accident" for the purpose of the Act.

In a 2:1 decision, the majority of the Court of Appeal found that the "*chain of causes*" alleged by the passenger which comprised the aborted attempted to locate the door, ascending the stairs, turning and re-descending the stairs did not, "*either individually or collectively, create an event external to the passenger*" [2010] QCA 218 at [52].

The Court referred to two international cases that had been distinguished by the first instance District Court Judge in which the passengers were unable to plead an unexpected or unusual event external to their person. Firstly, in *Chaudhari v British Airways Plc* [1997] EWCA Civ 1413, the claimant fell while attempting to leave his set to go to the toilet and the Court concluded that the fall was caused "*by his own personal, particular or peculiar reaction to the normal operation of the aircraft*". In *Barclay v British Airways Plc* [2010] QB 187;[2008] EWCA Civ 1419, a passenger slipped on a strip embedded in the floor of the aircraft. Here the Court concluded that for an "accident" to have occurred under Article 17, a distinct event must occur, "not being any part of the usual, normal and expected *operation of the aircraft*".

The Court of Appeal allowed the airline's appeal with costs and observed that this was the first Queensland appellate decision involving the construction of the Act and would impact all persons carried by aircraft within Australia.

Allison Radcliffe, HWL Ebsworth Lawyers

***Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd* [2010] QSC 313 (27 August 2010)**

The recent decision in *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd* [2010] QSC 313 reinforces the position that an insurer must be clear and unequivocal in electing to repair damaged property under a policy of insurance. If the election is not sufficiently clear an insurer may be required to pay the full insured value of the property.

The Facts

On 8 February 2004 a 1986 Cessna 208 Caravan owned by the insured plaintiff, Cape York Airlines (CYA), suffered engine failure and was ditched into the ocean near Cairns, resting in a partially submerged state. Prior to recovery 42 hours later, the aircraft underwent four periods of complete immersion due to tidal ebbs and flows. The aircraft suffered very little structural damage. However it was not until 10 days later that the aircraft could be washed and corrosion inhibitor applied.

The relevant policy of insurance provided that:

> "*The Company will at its option pay for, repair or pay for the repair of, accidental loss or damage to the Aircraft.*"

The amount insured under the policy was $1.8 million. However, a respected company based in the USA known as Aircraft Structures International Corporation (ASI Corp) provided an estimate of about US$700,000 for repair, cleaning and corrosion protection in order to return the aircraft to service. This estimate was based on experience and photographs forwarded to the repairer, no inspection took place.

The Importance Of An Unequivocal Election To Repair

After preliminary telephone discussions regarding the intention of the defendant QBE to have the aircraft repaired, on 26 February

2004 QBE formalised their intention to CYA in a letter stating, amongst other things:

> "*We have the option to pay for, repair or pay for the repair of accidental loss or damage to the aircraft... could you please instruct Aircraft Structures International Corporation to proceed with the repairs to the aircraft as per their estimate. We enclose an Authority to Repair for your signature... Our interest is limited to the cost of the accident repairs as quoted in accordance with your entitlement under the policy."*

The substantive content of this letter was repeated to YA on 22 March and another Authority to Repair was enclosed.

On 23 March 2004 CYA sent a fax to QBE outlining concerns held with returning an aircraft to service that had been fully and repeatedly immersed in tropical salt water. It was of particular concern to the insured that a company based in the United States would not satisfy the requirements of CASA such that the Certificate of Airworthiness could be reissued and that the insured may suffer exposure to liability should the aircraft be returned to service and fail in some respect due to corrosion.

On the following day a letter was sent by QBE to CYA addressing these concerns and assuring that the relevant enquiries had been made to ensure the aircraft would be repaired in accordance with regulations and noting that:

"*In accordance with the policy provisions we would, as is our obligation, return the aircraft to your organisation in the same or in this case a better condition as many of the parts would be new rather than up to 18 years old."*

From this date forward, correspondence was exchanged between the parties as to the viability of returning the aircraft to service. During this time the aircraft continued to deteriorate due to corrosion.

On 19 November 2004, the repair of the aircraft was estimated at AU$1.4 million due to the additional corrosion.

QBE advised CYA that they now required the repairs to proceed and that CYA should bear the difference due to their delay in allowing the repair of the aircraft, limiting the repair amount to approximately $1 million.

No agreement for repair was reached and proceedings were then commenced in the Supreme Court of Queensland seeking payment of the $1.8 million insured value.

The Decision

CYA submitted that QBE had not m ade an unequivocal election under the policy to repair or pay for the repair of the aircraft and as such were required to pay the agreed value of $1.8 million.

QBE argued that the three letters extracted above were unequivocal notice of an election to repair.

Justice Daubney held that none of the correspondence to CYA constituted an unequivocal election. The inclusion of the advice that liability was limited to the cost of the repair estimate by ASI Corp was not an option available under the policy as the estimate was not a binding quote.

Further, the request to authorise the repair was unnecessary and was not an election, as had QBE elected to repair, they held a legal right without authorisation to take and reinstate the aircraft and CYA could not prevent it from doing so. There was no evidence of an unconditional demand on CYA to deliver up the aircraft, nor any refusal of CYA to do so.

As no election was made, the plaintiff was entitled to the agreed value under the policy including interest and a claim for loss of use with the judgment amount totaling $3.17 million.

Conclusions

When damaged insured property is capable of repair for less than the agreed value, it is vital to make a clear election to the insured

that the property will be repaired in accordance with the terms of the policy.

In time critical matters such as corrosion, difficulties can arise when consulting the insured as to their authorization of repairs and the appropriateness of doing so, when it is the insurer's election alone as to whether to repair. An insurer must state specifically which option is chosen and in the instance of repair, take unconditional steps to do so.

Doubtless, with the benefit of hindsight, QBE would now be less ready to be consultative with its insured to obtain agreement on the proposed course of action. Its claim personnel no doubt considered that they were better to proceed with the repair option with the concurrence and authority of the insured in the hope that a later dispute would be avoided as a result. However, in this instance that attempt to reach agreement on repairs back-fired for the insurer with most unfortunate consequences.

Alexander Sudbury, DLA Phillips Fox

***McCandless Aircraft LC v Payne & Anor* [2010] EWHC 1835 (QB) (21 July 2010)**

This case, heard before Justice Tugendhat in the Queen's Bench Division of the UK High Court, involved the purchase of a helicopter. The plaintiff, McCandless Aircraft LC (MAL) had purchased the helicopter some four (4) years earlier from Payne (AP). Although the purchase agreement was made in Iowa in the United States, UK law was applied to the dispute by virtue of the fact that neither party pleaded the law of Iowa.

The Factual Background

The helicopter was sold four years after its initial purchase from AP. It was arguably purchased on the basis of re-sale within the UK in the near future. Over the four years that it took to sell the helicopter MAL had incurred expenditure by way of interest on a loan. The Defendant also incurred expenses associated with shipping, store, repairs and other matters, which was the subject of a counter-claim.

His Honour, Justice Tugendhat, depicted the transaction in the following terms:

> "*The transaction was a financial disaster. MAL's claim is that it paid a price of $242,500 to purchase the helicopter and that the interest charges it incurred are of the order of $90,000, making a total cost to it of the order of $330,000. It has recouped $180,000 on the resale, making a difference of the order of $150,000. MAL claim that its loss is greater than that. It claims that the transaction was a sale to AP, and it claims the price of $265,000 (a further $22,500 over and above the price it paid). The Defendants deny any liability to MAL and counterclaim for the expenses which they quantify at a net figure of £104,013.52 (about $156,000 at today's exchange rate). The counterclaim is for breach of contract, alternatively in restitution. The combined loss claimed by both the parties is thus of the order of $300,000. This exceeds the purchase cost of the helicopter in 2006.*"

The Issues

The issues between the parties included:

1. The nature of the agreement or agreements (August 2006 and February to May 2007) between them with MAL claiming a conditional sale, with the seller retaining title until payment of the price. On the other hand, the Defendants claimed there existed an agency or joint venture agreement, with profit being divided equally between the parties.
2. The parties: MAL claimed that the buyer was AP. The Defendants claimed that the agent and bailee was the Second Defendant ("EAL").
3. The date of the agreement: MAL claimed the agreement was reached in August

2006. The Defendants claimed that there was an agreement reached in August 2006 on the visit of GP and AP to Iowa, and that this was varied on February, alternatively May, 2007 to substitute EAL for AP as the party.

4. The description of the helicopter: the Defendants claimed that MAL described the helicopter (1) as a Raven model and (2) fully inspected and tested and was in excellent condition. MAL claimed that the Defendants knew it was a Clipper before it was shipped (namely by 19 October 2006). As to its condition, TM reported to the Defendants that he had been to Puerto Rico, flown in the helicopter, inspected its log books and Certificate of Airworthiness, and that all seemed to be in order.
5. The period of the agreement: MAL claimed that the helicopter was to be sold within 6 months after its arrival in England, and that AP was to buy it himself if he had not found a buyer by that date. The Defendants claimed that EAL had the right to retain the helicopter indefinitely in order to sell it to a third party.
6. Which party was to bear the interest and other expenses which might accrue in the period until sale: MAL claimed that AP was to bear the interest, shipping and other costs. The Defendants accepted that shipment costs were to be borne by them, and AP had refunded expenses of $5,200 in May 2007. But they claimed that all interest charges and other expenses were to be borne by MAL, and that the Defendants would be reimbursed for the shipping costs they incurred. They claimed in contract, alternatively in restitution.
7. The cause of the defects in the helicopter: the Defendants claimed all of the defects were present upon the arrival of the helicopter in England. MAL advanced the affirmative case that they arose as a result of the helicopter being flown for a number of hours after its arrival in England.
8. The cause of the delay: MAL claimed that the 8 month delay between 15 February and 26 October 2007 (when the helicopter was first certified as airworthy in England) was due to the failures of AP. The Defendants blame MAL for this delay.
9. The amount of the claim: the Defendants put MAL to proof of the claim for interest.
10. The amount the counterclaim: in addition to the net expenses of £104,013.52, EAL, alternatively AP, counterclaimed an unquantified figure for the loss of the opportunity to make a profit on the sale of the helicopter. MAL put the Defendants to proof of the whole of its counterclaim.

The court found that MAL was entitled to damages for non-acceptance under s.50 of the *Sale of Goods Act* (U.K) on the grounds that there was no available market for the second hand helicopter in the sense used in that section, and there was no suggestion that the sale by MAL was at an undervalue, or unreasonably delayed.

Section 50 of the *Sale of Goods Act* provided as follows:

> "*50 Damages for non-acceptance*
>
> *(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.*
>
> *(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.*
>
> *(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."*

The court determined the measure of damages to be £85,000, which was the difference between the price of £265,000 and the resale price of £180,000.

Additionally, it was found that MAL was entitled to interest, being the sums that MAL

was liable to pay, and did pay, to its bankers from the date when it paid for the helicopter until the date when it recovered damages. The interest was the sum that MAL paid for the helicopter, and was to be calculated on the amount outstanding from day to day. In the event that the parties disagreed on this the court indicated it was prepared to entertain further submissions.

Justice Tugendhat found no additional damage in respect of the claim in conversion. While AP chartered the helicopter and received money His Honour found that to be profit, not damage suffered by MAL.

The Counterclaim

In respect of the counterclaim the court was unconvinced that there had been an agreement in the terms alleged by the counterclaim. Justice Tugendhat opined that any chances of success in this regard could only occur on the basis of restitution. In particular the claim by AP for repairs of rotor blades made in 2008 was unsuccessful because His Honour held that the new blades were reflected in the sale price.

In respect of the cost of insurance and storage it was ruled that these were costs that AP "was bound to assume and that they occurred at a time when AP was in breach of contract" for either "having failed to pay for and take title to the helicopter, or to deliver it up to MAL."

The amount of £1,864 claimed for repairs to the paint on the body work succeeded on the basis that (i) it took place after TM had inspected the helicopter and (ii) before the helicopter was delivered to AP at a time when it was still at the risk of MAL. Hence MAL were liable for it.

The remaining items on the counterclaim were held to relate to wear and tear and were ruled to have failed.

Eds.

Ryanair Holdings plc v European Commission supported by Aer Lingus Group plc and Ireland **General Court European Union T-342/07 & T-411/07(6 July 2010)**

This case was heard by the General Court of the Court of Justice of the European Communities and relates to a take-over attempt by Ryanair. Ryanair on 23rd October, 2006, announced its intention to launch a $1.86 billion public bid ('the public bid'), a hostile takeover bid for the entire share capital of Aer Lingus Group.

The General Court ruled on an appeal by Ryanair against the European Commission's rejection of its takeover bid and on an appeal by Aer Lingus against the EC's dismissal of its request to order that Ryanair divest its Aer Lingus stake.

On 27th June 2007, after an examination of the bid, the European Commission declared that the notified concentration was incompatible with the common market (Case COMP/M.4439 – *Ryanair/Aer Lingus*). In reaching its decision the Commission examined the substitutability in terms of demand. It defined the relevant markets on the basis of the 'point of origin and point of destination' approach, known as the 'O&D-approach', whereby each route between a point of origin and a point of destination is defined as a separate market. The Commission found that the proposed concentration would lead to horizontal overlaps in respect of 35 pairs of cities which make up the relevant markets (recital 333) and that it might raise concerns in relation to a large number of pairs of cities which make up the relevant markets where only one of the parties to the concentration operates.

In reaching its decision the Court noted that:

> "*[T]he Commission took care to carry out an in-depth analysis of the conditions of competition by taking account of factors other than just market shares, such as the effects of the concentration on competition between Ryanair and Aer Lingus, the reactions which*

could be expected from customers and competitors and the actual situation on each route affected by the concentration."

The court observed that this approach was "*consistent with the analytical approach which the Commission must adopt when assessing the anti-competitive effects of a concentration.*"

"Therefore, the applicant does not show to the required legal standard that the Commission wrongly concluded in recital 431 of the contested decision that Aer Lingus and Ryanair were 'closest competitors' on the relevant routes out of Ireland. That conclusion may thus be taken into consideration in the examination of the effects of the concentration on competition and the criticisms advanced by the applicant on this point must be rejected." (at [95]).

In its decision to dismiss Ryanair's action with costs payable to the European Commission and the Aer Lingus Group, the ECJ was upholding the EC decision to veto the deal.

Eds.

St Clair v Timtalla Pty Ltd & Anor **[2010] QSC 296 (20 August 2010)**

On 20 August 2010, judgment was delivered in the Supreme Court of Queensland case of *St Clair v Timtalla Pty Ltd & Anor* [2010] QSC 296 in which damages were claimed in negligence against On 21 June 1994, the plaintiff Mr St Clair had been mustering cattle by helicopter in the Northern Territory using a Robinson R22 helicopter. At about 200 feet above ground he heard a very loud noise and the helicopter lost power. The helicopter made impact with the ground after Mr St Clair tried unsuccessfully to achieve autorotation. Mr St Clair suffered injuries such that he had great difficulty walking, experienced severe pain in his back as well as burning pain in his legs and was only able to walk short distances with the aid of calipers and crutches as his primary form of mobilisation.

The proceedings were pursued against Timtalla Pty Ltd (Timtalla), the owner of the helicopter and against Aircraft Technicians of Australia Pty Ltd (ATA) who had serviced the helicopter at certain times.

The Court held that the accident was contributed to by the use of an incorrect upper actuator bearing. The case against Timtalla was based on it being the owner and lessor of a piece of equipment that could readily cause death or injury if not maintained in an airworthy state and that it had a non-delegable duty to ensure the safety of the helicopter. Mr Justice Martin dismissed the claim against Timtalla, rejecting the non-delegable duty argument on a number of grounds.

However, the court found ATA liable in respect of work which it had undertaken on the helicopter, having breached the duty it owed to the plaintiff and the failure of the bearing being, in part, due to that breach, Mr St Clair was awarded damages against ATA in the amount of $1,729,566 including general damages in the amount of $150,000 and future economic loss of more than $500,000, together with various expenses incurred in the past or anticipated for the future.

Andrew Tulloch & Marcus Saw, DLA Phillips Fox

Thornton v Lessbrook Pty Ltd **[2010] QSC 308 (26 August 2010)**

Recently in the case of *Trad Thornton v Lessbrook Pty Ltd Trading as Transair* [2010] QSC 308 the Supreme Court of Queensland found that the liability limit of A$500,000 for interstate air carriage is exclusive of legal costs.

The widower of a deceased passenger made a claim for damages under the *Civil Aviation (Carrier' Liability) Act* 1964 (Qld) which applies Part 4 of the *Civil Aviation (Carriers Liability) Act* 1959 (Aviation Act). Under Section 31 of the Aviation Act, the carrier's liability is limited to a maximum of A$500,000. Such limit is unbreakable and there is no capacity for a person to receive compensation in excess of the limits by, for example, establishing intention, or reckless

conduct, wilful misconduct, or gross negligence.

However, arguments raised in the pleadings led the Court to revisit the question of the extent of the limit of liability under the Aviation Act, and in particular whether such limit includes legal costs.

Facts

The plaintiff was engaged to be married to Mrs Sally Urquhart. Their wedding was planned for 9 September 2005. On 7 May 2005 Mrs Urquhart was killed when the aircraft in which she was a passenger crashed on approach to Lockhart River Airport on far North Queensland. The plaintiff brought a claim for pecuniary loss under the Aviation Act.

Quantum

The bulk of the claim was for pecuniary loss suffered by the plaintiff on the basis that the deceased would have maintained her career and earned more than the plaintiff. There were life assurance and superannuation considerations also taken into account. Legal costs for an unspecified amount were claimed by the plaintiff in addition to damages. The Court assessed damages at A$526,232. Accordingly, the assessment of damages and the claim for legal costs exceeded the liability limit provided for under the Aviation Act of A$500,000.

Argument Raised By The Defendant

The defendant sought to argue that the limit of liability provided for under Section 31 of the Aviation Act was inclusive of legal costs. It sought to rely on an English case of *Swiss Bank Corporation v Brinks Mat Limited* (Swiss Bank) (1986) QB 853. In this case the Court made an award in accordance with the limits provided for under the Warsaw Convention and rejected the plaintiff's claim that interest should be awarded in excess / addition of Convention limits.

Court's Decision

The Court distinguished the case of Swiss Bank by pointing out that interest and legal costs should not be dealt with in a similar fashion. The Court referred to the Australian case of *Colombera v MacRobertson Miller Airlines* (1972) WAR 68 where it was decided that the liability limit was exclusive of legal costs. The Court also reviewed the legislative intention of Parliament and found the wording of sections 31 and 35 of the Aviation Act referred to the civil liability of the carrier and that there was no specific reference to legal costs being included within the liability limit. The Court concluded that the liability limit of A$500,000 was exclusive of legal costs and as the assessment of damages exceeded the liability limit, the Court awarded damages in the sum of A$500,000 plus legal costs in addition.

Simon Perrein, HWL Ebsworth Lawyers

***Thornton v Lessbrook Pty Ltd (No 2)* [2010] QSC 363 (23 September 2010)**

The plaintiff subsequently sought an order for indemnity costs on "what *was said to be a formal offer to settle made in accordance with the rules on 15 June 2009 for the sum of $300,000 plus costs*". However, that offer, and two other offers served by the, did not comply with the UCPR, which the plaintiff conceded. However, the plaintiff submitted that indemnity costs should be awarded in any event in view of the defeant's failure to accept reasonable offers over an extended period of time.

Applegarth J, denied the plaintiff's application finding that:

> *"The case was one that involved a number of substantial issues, including assessments of a variety of contingencies. A more realistic assessment by the first defendant of the strength of the plaintiff's case would have led it to accept the plaintiff's offer to settle for $300,000 plus costs. However, I am not persuaded that its failure to accept this informal offer in June 2009 was so imprudent as to justify an order for indemnity costs"* (at [10].

Eds.

FOCUS ON CANADA

Air Canada v Toronto Port Authority and Porter Airlines Inc. **(2010) FC 774 (21 July 2010)**

This case was heard by Justice Hughes in the Federal Court of Canada. His Honour delivered his judgment on the 21st July, 2010. The case relates to decisions taken by the Toronto Port Authority (TPA) related to the Toronto Island Airport which is now known as the Billy Bishop Toronto City Airport (the Airport). Porter Airlines operates out of this Airport. The TPA had announced in December 2009 that it would appoint an independent, IATA accredited slot co-ordinator to manage commercial carrier demand at the Airport and allocate available slots. There were 42-92 additional slots available due to the opening of a new terminal. Air Canada filed two notices for judicial review. This case deals with the second of Air Canada's two applications and deals with "what Air Canada characterizes as a decision made by the [TPA] on the 9th April and communicated in its bulletin released on that day.

Air Canada in its Factum stated the issues as:

1. Are the Decisions subject to judicial review?
2. Are the Decisions invalid?

Justice Hughes dealt with eight issues raised by the written and oral arguments in his judgment with the following observations.

Issue 1: *Was the Toronto Port Authority a "federal board, commission or other tribunal" so as to be subject to judicial review*?

After examining relevant case law, including *Anisman v Canada (Border Services Agency)* [2010] FCA 52, *Aeric, Inc. v Chairman of the Board of Directors, Canada Post Corporation* [1985] 1 F.C. 127 and *Irving Shipbuilding Inc. v Canada (Attorney General)* [2009] FCA 116, Justice Hughes found that the Court lacked jurisdiction to review the "decisions" at issue. He concluded that the TPA was not, in respect of the "decisions" under review, acting as a "*federal board, commission or other tribunal*". "*It was,*" His Honour observed at [56], "*operating and maintaining the airport as an ordinary commercial activity*." Despite finding that the Court lacked jurisdiction his Honour felt obliged to consider the other issues raised by Air Canada. All his subsequent findings were conditional on the TPA being a "federal board, commission or other tribunal" which he had found not to be the case.

Issue 2: *Was Air Canada a "party directly affected" who has standing to seek judicial review of the "decisions" at issue?*

As the basis upon which judicial review was sought rested upon an allegation of lack of procedural fairness His Honour found that Air Canada had a degree of involvement with the Airport and the TPA and so there was a basis under this heading for judicial review but for his jurisdictional finding

Issue 3: *Were the "decisions" of December 24, 2009 and April 9, 2010 of a kind that can be the subject of judicial review in this Court?*

It was found that the announcement of the 24 December, 2009, made by the TPA did not at law amount to a "*decision or order*," rather it advised that proposals would be solicited by the TPA. Nevertheless, both bulletins issued by the TPA were "*not 'decisions or orders' of the type for which judicial review was available*."

Issue 4: *Has Air Canada properly pleaded the grounds upon which it is now relying for judicial review?*

Justice Hughes observed that the Respondents, in their written material and in their argument, had met Air Canada's arguments as to a right to be consulted and

had legitimate expectations that it would be. His Honour also observed that Air Canada raised other arguments, including lack of proper reasons and lack of "*formal*" or "*substantive*" reasonableness. His Honour proceeded to examine these arguments although he dismissed them for lack of a proper pleading.

Issue 5: *Was there an obligation on the Toronto Port Authority to consult with Air Canada before making the "decisions" of December 24, 2009 and April 9, 2010?*

No obligation was found for the TPA to consult with Air Canada before reaching its decisions. In the words of the Court:

> "*Notwithstanding Air Canada's Counsel's able argument, there is simply insufficient evidence upon which this Court can find that Air Canada had any legitimate expectation that it would be consulted by TPA before any decision was made as to slot allocation.*"

I***ssue 6***: *Did TPA "decisions" lack "formal" or "substantial" reasonableness?*

His Honour concluded that the TPA's actions were within the acceptable range of reasonable actions and should not be set aside on the assumption, which he had found to be otherwise, that TPA was subject to judicial review.

Issue 7: *Did the TPA have any obligation to provide "reasons" for its decision and, if reasons were provided, were they adequate?*

This argument was also not pleaded in written submissions but only raised during oral arguments. The Court emphasised that the duty to provide reasons arises only in certain circumstances and that that duty may be fulfilled by the simple provision of notes. Those circumstances were if there was a legislative provision that reasons should be provided or if the process was adjudicative or quasi-adjudicative, neither of which were applicable here because it was a 'normal commercial transaction.'

> *"There is no "duty" to provide persons potentially interested with "reasons" for every "decision" made. Transactions would grind to a halt."[104]*

Issue 8: *Were the "decisions" made for an improper purpose?*

Air Canada had argued that the TPA decisions favoured Porter Airlines throughout the process giving it an 'unfair advantage'. The court found in the circumstances that it was reasonable for the TPA to 'grandfather' Porter's existing slots and that the TPA and Porter were simply engaging in 'normal, reasonable commercial activity'. It was not for the Court to 'rewrite or set aside' a commercial contract simply because one of the parties wanted a better deal.

To summarise, in dismissing both applications His Honour found that:

- the TPA was not acting as a 'federal board, commission or other tribunal;'
- it made no decision subject to judicial review; and,
- Air Canada had no right or legitimate expectation to be consulted before TPA made slot commitments.

Eds.

Parminder Singh Saini v. Law Society of Upper Canada, **2010 ONLSHP 0005 CANLII**

This was a "character hearing" before the Law Society Hearing Panel ("the Panel") in Canada in which Parminder Singh Saini ("the Applicant") sought to be admitted to the Law Society of Upper Canada as a lawyer. The relevance of this matter to aviation relates to the Applicant's involvement in a terrorist incident in 1984.

On 5 July 1984, the Applicant boarded Indian Airline Airbus A300, flight number IC 405 which was en-route from Srinagar, India to New Delhi, India. The aircraft had 265 passengers on board. The Applicant, who at that time, was 21 years of age, boarded the

aircraft armed with a kirpan and was later handed a loaded pistol by one of two of his fellow accomplices, who were also armed with kirpans. During the flight, the Applicant and his accomplices seized control of the aircraft and directed the captain to land in Lahore, Pakistan. On the ground in Pakistan, the Applicant acted as a spokesperson and leader for the group and, for over 24 hours, negotiated with the Pakistan authorities. The hijackers released the passengers and were soon taken into custody. Three people received minor injuries.

On 20 January 1986, the Applicant was sentenced to death for his role. This was later commuted to a life sentence. In 994, the Applicant was released from custody due to medical issues and

1995 he was granted full parole by the Government of Pakistan.

The Panel reported that Applicant undertook these actions at the behest of leaders within his Zikh religious community and he was chosen to lead the hijacking because he spoke 4 languages including English. The Applicant testified that his actions were justified on the basis of bringing world attention to the repression of the Sikh community as a result of the military action known as Operation Blue Star ordered by the Government of India in which many members of the Sikh community were killed and religious shrines desecrated.

Following his release from prison, the Applicant was asked by Pakistan authorities to leave the country. He subsequently obtained a forged Afghan passport under the assumed name "Balbir Singh") and flew to Canada on 21 January 21 1995 and presented himself to an immigration official as "Balbir Singh". Upon arrival in Canada, the Applicant lived with his mother, his brother and his sister-in-law notwithstanding telling Canadian Immigration that he had no family living in Canada.

On 13 September 1995, he was arrested, detained, found to be an inadmissible person as a result of having been convicted of a serious offence and was ordered to be conditionally deported as the result of a Canadian Security Intelligence Service investigation that revealed the Applicant's true identity.

On 21 June 1996 and again on 16 April 1997, the Minister of Immigration issued an opinion that the Applicant constituted a "danger to the public".

In April 1998, while the Applicant was in prison in Canada, his father obtained a pardon from the Government of Pakistan.

In October 2001, the Federal Court of Appeal in Canada held that the pardon from Pakistan was not equivalent to a Canadian pardon and did not make the removal order ineffective. In *Canada (Minister of Citizenship and Immigration) v. Saini*, [2001] F.C.J No. 1577, The Federal Court of Appeal stated that:

> *"In our view, the gravity of the offence can and should be considered when deciding whether or not to give effect to a foreign pardon. Even if the Pakistani legal system were similar, and even if the pardon were given under a law similar to Canadian law, the conviction in this case was for an offence so abhorrent to Canadians, and arguably so terrifying to the rest of the civilized world, that our Court is not required to respect a foreign pardon of such an offence"* (at [44]).

In July 2000, the Applicant applied under the *Immigration Act* for an exemption to the requirement that he apply for permanent residency from outside Canada, on the basis of humanitarian and compassionate considerations. This application was denied in February 2002 and a judicial review was dismissed in February 2003 by the Trial Division of the Federal Court [*Saini v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J No. 225].

On February 6, 2002, Mr. Saini applied under the *Immigration Act* for status as a rehabilitated person on the basis that more than five years had elapsed since his sentence expired and that he had been rehabilitated. The Immigration Officer at the first level made a positive recommendation but the second level of review, at the review branch in Ottawa, recommended non-approval.

The persistence and tenacity demonstrated by the Applicant since the hijacking of 1984 was not sufficient to overcome the "good character" test required under the Law Society Act. The Panel found that:

> "*At this point in time, while Mr. Saini has shown an ability to obtain university degrees and has impressed a number of people, we are still left with a number of serious concerns. In view of: the seriousness of the crime of hijacking; the deception after landing in Canada; the state of the immigration applications, including the fact that he is still described as being a person of danger to the public; and the uncertainty that we are left with, with respect to Mr. Saini's good character at this time, we do not find that Mr. Saini has met the onus of proving, on a balance of probabilities, that he is now of good character*." (At [74]).

Eds.

***Société Air France v Greater Toronto Airports Authority et al,* (2010) ONSC 432 (14 January 2010)**

The action before Master Ronna M. Bott in the Superior Court of Justice, Ontario, was one of four actions commenced in Ontario flowing from an incident on 2nd August, 2005, involving an Airbus A340 aircraft, Air France Flight 358 from Charles deGaulle Airport in Paris, France, to the Pearson International Airport in Toronto.

In this action Air France, the operator of the flight and owner of the A340 aircraft, has claimed damages against NAV, named employees of NAV, the Greater Toronto Airports Authority and the Attorney General of Canada for the value of the aircraft hull and for contribution and indemnity for any and all claims paid by Air France arising from the aircraft incident.

This case arose out of motions brought by the defendants NAV CANADA et al (NAV) for orders that Air France produce:

1. the full and complete employee and training records of Captain Rosaye and First Officer Naud;

2. the full and complete medical records of Captain Rosaye and First Officer Naud;

3. the Air France internal investigation report into the accident, including all documents pertaining to or flowing from the Air France internal investigation; and,

4. a better representative for examination for discovery.

The requests for production arise from questions refused at the examinations for discovery of the Air France representative and the examination of Captain Rosaye.

Issue 1: *The Employment and Training Records of the Pilots*

The documents produced by Air France included two-page computerized print-outs of the pilot proficiency charts of each pilot. No other records of the pilots' training and proficiency were produced. The evidence at the examination for discovery of Captain Gangloff established that all documents, forms and reports which were completed following a training session or check ride were filed in the pilot's professional personal file.

Because the pleadings put at issue the proficiency and training of the flight crew in landing the aircraft in adverse weather

conditions the Court found that the files of the pilots were of relevance. In particular, relevant files included those related to line check reports, simulator reports, recurrent training reports, dangerous goods and LOFT reports. The Court observed that administrative documentation such as banking records was not of relevance.

Issue 2: *Medical Records*

Canadian Aviation Regulations require that operators of foreign aircraft in Canada must comply with the conditions of a Canadian Foreign Air Operator certificate. The conditions require that no flight crew member may operate an aircraft if there is reason to believe that the person is suffering from or is likely to suffer from fatigue.

At discovery it was established that Air France pilots submit to a medical examination at the Air France medical centre by a Department of Civil Aviation approved Air France doctor every six months. Air France argued that it was precluded from producing details of this examination by strict privacy laws in France. However, the Court was unpersuaded because Air France had chosen to initiate the action in Ontario whose law applied to it, not those of France.

The Court found that the medical records of Captain Rosaye were relevant due to evidence indicating that Captain Rosaye had been on a reduced work schedule due to fatigue. The pleadings, that Air France operated or continued to operate the flight when they knew or ought to have known that it was not safe to do so, and the Canadian Aviation Regulations made the issue of fatigue relevant to the disposition of the case. The Court found that the medical records of Captain Rosaye were relevant and should be produced. This was not the case with First Officer Naud where there was insufficient evidence to support recourse to them.

Issue 3: Other Internal Investigative Reports Conducted by Air France

The NAV also sought production of the internal Air France report into the accident and also other Air France reports relating to six other Air France accidents alluded to in the Canadian TSB investigation into the incident. In response Air France conceded that the internal investigation was relevant but argued that, because its internal investigation relies to a significant degree on confidential and privileged communications with the TSB, the internal investigation report is privileged. Air France resisted disclosure of the other files on the basis of common law privilege under the Wigmore test.

The Court in approaching this sensitive issue held that, because the internal investigation report was distributed within Air France, there was a waiver of the privilege attached to it on the part of Air France. Consequently, the Court ordered that the Air France internal investigation be produced.

With respect to the six other Air France incidents referred to in the TSB report or other non-Air France accidents, the Court ordered that the information or documentation related to the six other Air France incidents referred to in the TSB report be also produced. However, as the request for production of the TSB internal investigation file was not included as part of the written materials, the request was dismissed with leave to request at a later date, on sufficient notice, if necessary.

Issue 4: *Further and Better Representative of Air France*

Air France indicated a preparedness to produce Etienne Lichtenberger, Director of Safety in the Operations and Quality Executive Management at Air France, to be examined. This was accepted by the NAV, subject to reserving its right to examine another representative, and the Court convened a meeting to allow this to occur.

Eds.

COMPETITION NEWS

Virgin Blue's proposed alliances with Delta Air Lines and Air New Zealand denied by regulators

It might be recalled that in late 2009, the Australian Competition and Consumer Commission authorisation to Virgin Blue and Delta Air Lines to enter into a joint venture on their flights between Australia and the United States. The celebrations on that result have been short-lived.

On 8 September 2010, the United States Department of Transportation ("DOT") tentatively decided to deny the application of Delta Air Lines Inc. and Virgin Blue in respect of the proposed alliance and joint venture between the U.S. and Australia. The DOT found that the proposed alliance would not produce sufficient public benefits to justify a grant of immunity from the antitrust laws at this time. The parties were directed to show cause why the DOT should not make final the tentative findings and conclusions.

There was more bad news for Virgin Blue when, on 10 September 2010, the ACCC delivered its draft determination on the proposed alliance between Virgin Blue and Air New Zealand in relation to passenger services between Australia and New Zealand. The ACCC found that:

1. Virgin Blue is a significant competitor to Air New Zealand;
2. A number of trans-Tasman routes, which accounted for around one quarter of passenger traffic or about 1 million passengers per year, where it was concerned that alliance partners would not be constrained if that attempted to raise fares;
3. The alliance would likely result in some public benefits but there are doubts about the magnitude of such benefits; and
4. it could not be satisfied that the alliance is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition .

Final determination is expected in November or December.

However, the results were not entirely unfavorable when, on 23 September 2010, the ACCC granted the interim authorisation of the proposed alliance between Virgin Blue and Etihad under which the two airlines propose to cooperate on joint pricing and scheduling of services across their networks. The ACCC anticipates releasing a draft determination in November/December 2010.

Eds.

Recent merger proposals before the European Commission

The proposed merger between companies which operate into or within the European Economic Area will be regulated by the European Commission subject to the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

In view of the recent world-wide economic malaise, particularly in respect of international airline passenger operations, airlines have been looking at ways to reduce costs and improve economics of scale through mergers or enhanced strategic alliances.

Most recently the following proposed mergers have come under the scrutiny of the EC:

- On 14 July 2010, the EC approved the proposed merger between British Airways

of the UK and Iberia of Spain, both active in air passenger and cargo transport and related services. The EC concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

- On 27 July 2010, the EC approved the proposed merger between United Air Lines and Continental Airlines under the EU Merger Regulation. Again the EC found concluded that the transaction would not significantly impede effective competition in the EEA.
- On 30 July 2010, the EC opened an in-depth investigation into the planned merger between Greek passenger airlines Olympic Air and Aegean Airlines. The EC initial investigation indicated that the proposed merger could raise serious competition concerns, because the merged entity would have very high, if not monopolistic, market shares on all domestic routes and on a number of international routes where both parties operate. The merger was also likely to be contrary to EC Merger Regulation. The EC has until 7 December 2010 to take a final decision on whether the merger would significantly impede effective competition in the EEA.

Also see in the earlier section the case summary of: *Ryanair Holdings plc v European Commission supported by Aer Lingus Group plc and Ireland* General Court European Union T-342/07 & T-411/07(6 July 2010)

Eds.

European Commission fines 11 airlines for involvement in air cargo cartel

On 9 November 2010, Joaquín Almunia, the Vice President of the European Commission responsible for Competition Policy, announced that Eurpoean Commission had fined 11 eleven air cargo carriers nearly €800 million for operating a world-wide cartel over six years, from late 1999 to early 2006. See below.

Carrier	Fine (€)*	Reduction (%) under the Leniency Notice
Air Canada	21 037 500	15%
Air France	182 920 000	20%
KLM	127 160 000	20%
Martinair	29 500 000	50%
British Airways	104 040 000	10%
Cargolux	79 900 000	15%
Cathay Pacific Airways	57 120 000	20%
Japan Airlines	35 700 000	25%
LAN Chile	8 220 000	20%
Qantas	8 880 000	20%
SAS	70 167 500	15%
Singapore Airlines	74 800 000	
Lufthansa	0	100%
Swiss International Air Lines	0	100%

EC has indicated it based the level of the fines on the sales of the companies involved in the market concerned, the very serious nature of the infringement, the European Economic Area scope of the cartel and its duration. The fine against SAS was increased by 50% because of its previous involvement in a cartel in the airline sector. The biggest winner was Lufthansa (and its subsidiary Swiss) which received full immunity under the Commission Leniency Programme, as it brought the cartel to the Commission's attention and provided "*valuable information*".

It now remains to be seen which airlines will appeal the ruling. To date, both Air Canada and Singapore Airlines have given indications that they right contents the matter.

Eds.

REGULATORY DEVELOPMENTS

Headnotes of recent cases involving the Civil Aviation Safety Authority

Snook and Civil Aviation Safety Authority **[2010] AATA 582 (6 August 2010)**

CIVIL AVIATION –private pilot licence – aircraft maintenance engineer licence – certificate of approval – suspension or cancellation of licence or certificate – major defect or damage – fire in cockpit – defect reporting – fit and proper person to hold a private pilot licence – failure of duty with respect to matters affecting safe navigation or operation of aircraft – incompetent maintenance – maintenance work not authorised by AME licence or CoA – maintenance limits imposed by AME licence and CoA – use of out of date maintenance schedule – failure to observe changed maintenance requirements – compliance with Airworthiness Directives – certification of completion of maintenance – certification of co-ordination of maintenance – recording of parts fitted to aircraft – compliance with maintenance data – compliance with manufacturers maintenance schedule – status of Service Bulletins – calculation of aerobatic hours – fatigue life – nomination as senior LAME on CoA application – acceptance of nomination by conduct – alteration of entries on worksheets – fit and proper person to hold an AME licence and CoA

White and Civil Aviation Safety Authority [2010] AATA 604 (13 August 2010)

CIVIL AVIATION – application for renewal of Air Operator's Certificate rejected – helicopter charter company without a chief pilot – whether the issue of an Air Operator's Certificate can be suspended while applicant complies – company was not operating at the time of the application – decision maker cannot be satisfied that the enumerated criteria are met – decision affirmed.

Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority **[2010] FCA 994 (10 September 2010)**

PRACTICE AND PROCEDURE - application for extension of time and leave to appeal from interlocutory judgment refusing further amendments to statement of claim - whether decision attended with sufficient doubt to warrant reconsideration by a Full Court - numerous attempts to replead statement of claim - arguable merits in pleadings - limited leave granted.

Hazelton and Civil Aviation Safety Authority **[2010] AATA 693 (10 September 2010)**

CIVIL AVIATION – Class 1 and Class 2 Medical Certificate – Does Mr Hazleton satisfy the requirements for the issue of a Class 1 and Class 2 Medical Certificate – If the answer Is yes, should any restrictions or conditions be endorsed on those medical certificates – Applicant's head injury found to be mild – A finite figure for the applicant's absolute risk of post-traumatic epilepsy, based on the presence of his cerebral contusions cannot be calculated – Present body of scientific literature is insufficient on its own to make a determination in accordance with evidence-based medicine on the acceptability of the applicant's current epilepsy risk to resume flying aircraft 'with or as co-pilot' – Sufficient clinical expertise available which is substantial enough to enable the determination of whether the applicant's epilepsy risk is acceptably low enough to resume flying

aircraft 'with or as co-pilot' to satisfy the standards of evidence-based medicine – Estimation of present risk to be assessed on the basis of relative risk – The 1% Rule provides an adequate estimation of an acceptable risk, and is appropriate to apply to the applicant's case – Applicant satisfied the requirements for the issues of a Class 1 and Class 2 Medical Certificate – Matter referred back to CASA for consideration of conditions (if any) and if so, for what period.

Avtex Air Services Pty Ltd and Civil Aviation Safety Authority **[2010] AATA 716 (14 September 2010)**

PRACTICE AND PROCEDURE – stay application – substantive hearing – disqualification – reasonable apprehension of bias – fair minded lay observer – fictional observer – merit – findings of fact – selective statements – safety culture – flexibility of the Tribunal – rule against bias – prejudgment - expertise of Tribunal Members

Harvey and Civil Aviation Safety Authority **[2010] AATA 733 (27 September 2010)**

CIVIL AVIATION – Civil Aviation Regulations – denied medical certification at Class 1 or Class 2 – medical history of episodes of loss of consciousness – recent syncopal attack – expert opinion precludes a diagnosis of epilepsy and cardiac cause for syncope – decision varied

Robertson and Civil Aviation Safety Authority **[2010] AATA 788 (14 October 2010)**

CIVIL AVIATION – Aircraft maintenance engineer licence – Applicant certified completion of maintenance – Applicant coordinated maintenance – Aircraft not airworthy as result of work done by others – Applicant responsible for work done by others – Endorsement of conditions on licence – Decision under review affirmed.

Jones and Civil Aviation Safety Authority **[2010] AATA 795 (15 October 2010)**

CIVIL AVIATION – Class 1 and Class 2 medical certificates – History of substance use – Safety-relevant condition of substance use – Decision under review affirmed

Daddow and Civil Aviation Safety Authority [2010] AATA 805 (20 October 2010)

CIVIL AVIATION – cancellation of Flight Crew Licences comprising Flight Radiotelephone Operator Licence, Private Pilot (Aeroplane) Licence, Student Pilot Licence – applicant not a fit and proper person to have responsibilities and exercise and perform functions and duties of holder of Flight Crew Licences – decision under review affirmed

Eds.

TRANSPORT DEPARTMENT NEWS

Amendments to the *Transport Safety Investigations Regulations 2003*

The Australian Government has indicated that it proposes to amend the mandatory aviation accident and incident reporting scheme contained in the *Transport Safety*

Investigation Regulations 2003. The aviation industry has been invited to provide comment on the proposed changes by Friday 17 December 2010. For further details please go to: http://www.atsb.gov.au/about_atsb/legislation/tsi-amend.aspx

Eds.

Diplomatic Conference on Aviation Security adopts the Beijing Convention and Beijing Protocol

Between 30 August 2010 and 10 September 2010, under the auspices of the International Civil Aviation Organization, the Diplomatic Conference on Aviation Security was held in Beijing, China which was attended by 71 States, including Australia and New Zealand, and 4 international organizations as observers.

The Commission of the Whole to the Diplomatic Conference approved the text of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (known as the "2010 Beijing Convention") with 55 votes in favour, 14 votes not in favour and approved the text of the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* (known as the 2010 "Beijing Protocol") with 57 votes in favour, 13 votes not in favour.

The Beijing Convention and Beijing Protocol will require parties to criminalize a number of new and emerging threats to the safety of civil aviation, including using aircraft as a weapon and organizing, directing and financing acts of terrorism. In addition, the Beijing Convention will also require States to criminalize the transport of biological, chemical, nuclear weapons and related material. ICAO working papers indicate that these provisions reflect the nexus between non-proliferation and terrorism and ensure that the international community will act to combat both and the treaty will strengthen global efforts to ensure that these extraordinarily dangerous materials will not be transported via civil aircraft for illicit purposes and, if such attempts are made, those responsible will be held accountable under the law.

To date, the Convention and Protocol have been signed by 22 parties and instruments of accession have been deposited by 2 further parties. The Convention and Protocol shall, after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, enter into force on the first day of the second month following the date of the deposit by such State of its instrument of ratification, acceptance, approval or accession.

ICAO considers that the new treaties should receive the widest possible support with the greatest possible speed.

Eds.
