ALAANZ AVIATION BRIEFS

The newsletter for aviation lawyers in Australia and New Zealand

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1. Cases

NT Court of Appeal upholds Commonwealth legislative intent to cover the field of air safety:

Outback Ballooning Pty Ltd v Work Health Authority and Bamber [2017] NTCA 7

Background

This case involved a fatal hot air ballooning accident in Alice Springs in 2013. During the embarkation of passengers under the supervision of the pilot, the scarf around the neck of passenger Stephanie Bernoth was sucked into a fan that was used to inflate the balloon. She later died as a consequence of the injuries she suffered.

The Northern Territory Work Health Authority alleged that the operator of the balloon, Outback Ballooning Pty Ltd (Outback Ballooning), committed an offence contrary to s 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (WHS Act (NT)) by failing to comply with the duty under s 19 to, so far as is reasonably practicable, ensure the health and safety of Ms Bernoth.

Outback Ballooning alleged that the WHS Act (NT) was not applicable because:

1. Hot air balloons fall within the meaning of 'aircraft' for the purposes of the Commonwealth statutory and regulatory regime of civil aviation.
2. The enactment of an extensive body of Commonwealth acts and regulation that regulate the safety of air navigation reflects the Commonwealth's intention to 'cover the field'. If a Commonwealth law is a complete statement of the law on a particular subject, such that it covers the field, a Territory law which seeks to govern some aspect of that subject matter cannot operate concurrently with the Commonwealth law and will be considered inoperative to that extent.
3. The WHS Act (NT) was inconsistent with Commonwealth law so far as it purported to regulate or prosecute activities related to safety of civil aviation.

Court of Summary Jurisdiction

At first instance, the presiding magistrate dismissed the complaint, ruling that it did not disclose an offence because Commonwealth law covered the safety of air navigation. Territory law could therefore not operate to impose duties that affect the safety of air navigation. The magistrate held that "the Commonwealth legislative regime evinces an intention to exhaustively and completely 'cover the field' for all aspects of the safety of air operations".

NT Supreme Court judgment

The Supreme Court of the Northern Territory quashed that decision on appeal. Barr J held that the Commonwealth legislative and regulatory scheme was only concerned with safety *in flight.* It did not extend to operations that affected the safety of passengers prior to flight. The embarkation procedure in which the deceased was endangered was not found to be so closely connected with safety in flight to fall with the ambit of the Commonwealth scheme.

Barr J also opined that the *Civil Aviation (Carriers Liability) Act 1959* (Cth), which was enacted to give effect to the *Warsaw Convention as amended at the Hague, 1955* (Warsaw Convention), is not part of the Commonwealth scheme. This is despite the fact that the *Warsaw Convention* extended the liability of a carrier for damage caused by operations of embarking or disembarking, not just *in flight.*

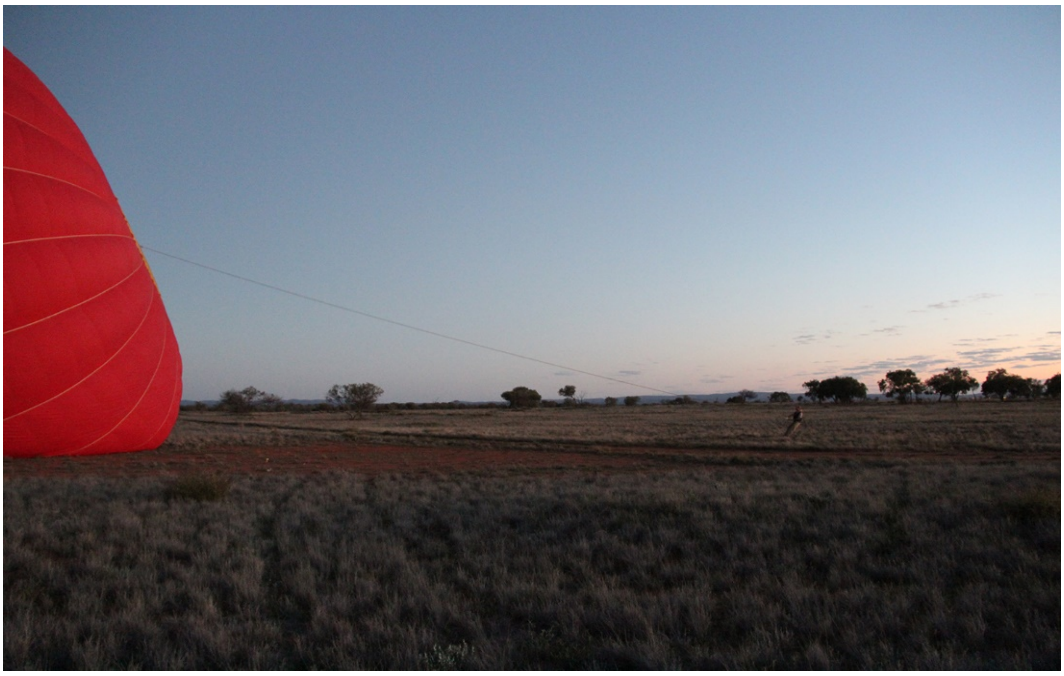
Appeal judgment

The Supreme Court decision was appealed to the Court of Appeal of the Northern Territory, with the judgment of Southwood, Blokland and Riley JJ delivered on 19 October 2017. The Court of Appeal overturned the Supreme Court decision, and followed the decision of the Full Court of the Federal Court in *Heli-Aust v Cahill and Another* (2011) 194 FCR 502 (Heli-Aust). The Heli-Aust decision had earlier determined that within its field of operation Commonwealth civil aviation law was intended to be a complete statement of the law.

Key issues

The key issue in the appeal was whether Territory law under the WHS Act (NT) was inoperative because it was inconsistent with Commonwealth civil aviation law. The main test for inconsistency between the Commonwealth and Territory law is whether the Commonwealth law was intended as a complete statement of the law governing a matter, such that the Territory law regulating the same matter would detract from *the full operation* of the Commonwealth law.

The resolution of that issue primarily depended on the extent of the field covered by Commonwealth civil aviation law. His Honour Judge Riley concluded that the federal law was a complete statement of the law governing the safety of air navigation, including the safety of flight of aircraft, which included safety both on the ground and in flight. It covered the embarkation of passengers in the circumstances of this matter. The Commonwealth law was not intended to operate in conjunction with any State or Territory laws, hence the WHS Act (NT) could not and does not operate. Having found that there was an indirect inconsistency between the Territory law and Commonwealth law, it was not necessary to consider whether any direct inconsistency existed. His Honour Southwood J (with whom Blokland J agreed) further noted that having regard to the Commonwealth law, the intention of Commonwealth Parliament was to cover the field.



Example of a ground crew member controlling the balloon crown line. Source: Australian Transport Safety Bureau

Court of Appeal put the “body” back into “bodily injury”: *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA

The New South Wales Court of Appeal (the Court) has clarified the application of the compensation regime under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (the Act) and the 1999 Montreal Convention relating to international carriage by air (Montreal Convention) to mental injuries such as post-traumatic stress disorder (PTSD).

In *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 32, the Court reversed the decision at trial and confirmed that:

- only mental injuries that are a manifestation of, or result from, a physical injury to the body are compensable under the Montreal Convention, and
- changes to brain function, including chemical changes to the brain, do not constitute a bodily injury.

This decision is relevant to carriers and their insurers, in terms of exposure for mental injuries.

Background

In November 2009, Karen Casey was employed as a medivac nurse. During a flight to retrieve a patient from Samoa back to Australia, she suffered serious physical and mental injuries, including PTSD, a major depressive disorder and an anxiety disorder, when the aircraft ditched in the ocean on approach to Norfolk Island. She brought a claim against the flight operating carrier, Pel-Air, under the Act.

The Act gives the Montreal Convention force of law in Australia. The question to be determined by the Court was whether Ms Casey's PTSD was a "bodily injury" under Article 17 of the Montreal Convention.

Pel-Air accepted that, in addition to the various physical injuries to her head, neck and other areas, Ms Casey's depressive and anxiety disorders were also bodily injuries. Evidence established they were manifestations of her physical injuries. Pel-Air denied that her PTSD was a bodily injury as it was not a manifestation of, or resulting from, her physical injuries, but was rather caused by the trauma of the accident.

Trial judgment

Ms Casey was successful at trial. Her Honour Schmidt J found that the ongoing dysfunction of Ms Casey's brain was consistent with chemical changes in her brain and body and alterations in her brain's neurotransmitter pathways, which had prevented a return to normal brain function.

Her Honour concluded that the evidence established Ms Casey's PTSD was consequent on damage to her brain and her other bodily processes, with the result that her brain was no longer capable of functioning normally. Her Honour found that the PTSD was either a manifestation of that damage, or that the damage had caused or contributed to the PTSD, or there was a combination of such cause and effect.

Appeal judgment

Pel-Air appealed the PTSD decision on two grounds. First, the authorities did not justify a conclusion that any change in bodily condition or function was sufficient to constitute a "bodily injury" under the Montreal Convention. Secondly, if her Honour's decision involved a conclusion that the evidence before her indicated that Ms Casey's PTSD was the manifestation of some damage to her body, that conclusion was erroneous.

The Court found in Pel-Air's favour on the first ground, holding that the authorities did establish that:

- a mental injury would be a bodily injury only if it was a manifestation of, or resulted from, a physical injury, and
- in the absence of compelling medical evidence otherwise, changes in brain function, including chemical changes to the neurotransmitter pathways, could not properly be described as an injury to the body.

The Court concluded that although the evidence demonstrated that biochemical changes to Ms Casey's brain had caused a level of malfunction, those changes or malfunctions cannot be described as bodily injuries.

On the second ground, Pel-Air accepted her Honour's judgment could be construed to mean that Ms Casey's PTSD was caused, at least in part, by her physical injuries and her other mental injuries. However, on appeal, Ms Casey conceded that, at its strongest, the evidence suggested that physical injury might exacerbate a PTSD condition, without establishing that it did so in her case. Ms Casey then submitted that the Court should infer that her physical injuries caused her PTSD.

The Court rejected Ms Casey's submission on the basis that there was no evidence to support the inference.

Comment

The Court of Appeal's decision will be welcomed by carriers, other aviation operators and their insurers who are faced with claims brought under the Act. The distinction between "bodily injury" and "mental injury" can be difficult to discern in cases involving multiple physical and mental injuries, such as Ms Casey's, where there is often significant overlap and interplay between the injuries and their effects.

Despite the Court's apparent qualification that "compelling evidence" may ultimately encourage a decision that the brain's chemical changes or malfunctioning could be considered bodily injuries, it has attempted to close the door on this possibility by citing support on the issue from the majority of Australian, UK and US authorities. However, a closer examination of those authorities suggests these decisions may not be as supportive as the Court contends. There appears to be at least an acceptance or acknowledgment by the majority that, if proven by the evidence, malfunctioning or chemical changes of the brain can be considered to be bodily injuries.

As developments in medicine continue at a rapid pace, we can expect it won't be long before this issue returns to the courts.

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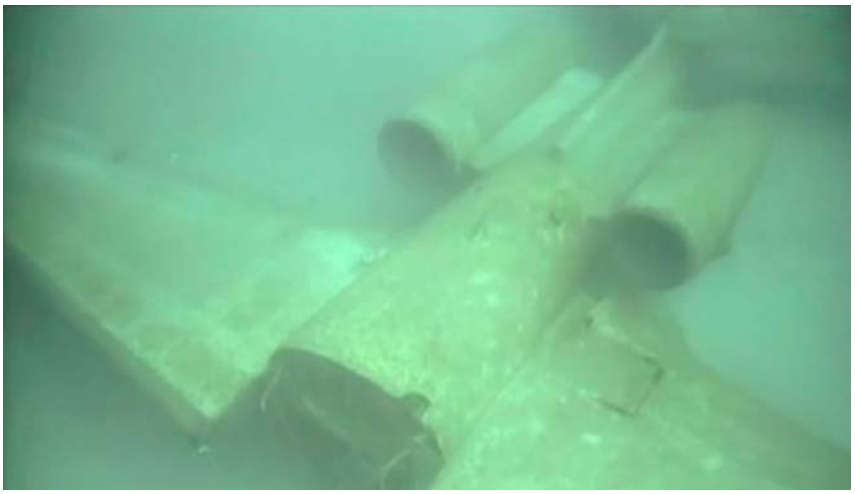

Wreckage of the aircraft off Norfolk Island. Source: Australian Transport Safety Bureau

IN BRIEF

Island Helicopters Pty Ltd v Central (Qld) Aviation Pty Ltd & Anor [2017] FCCA 1665

Island Helicopters Pty Limited (Island Helicopters) leased a helicopter to Central (Qld) Aviation Pty Limited (CQ Aviation). The helicopter was destroyed in a crash in Papua New Guinea (PNG).

Island Helicopters brought a claim against CQ Aviation in the Federal Circuit Court at Sydney seeking damages in respect of:

- an additional insurance premium that became payable as a result of the helicopter being operated in PNG;
- profits lost by the fact that the lease of the helicopter was brought to a premature end (thus bringing to an end Island Helicopters entitlement to receive monthly lease payments); and
- the loss of equipment associated with the helicopter that was not insured under the Hull policy.

Island Helicopters was wholly unsuccessful. Of most interest were his Honour's largely uncontroversial findings that:

- where a lease agreement is silent on where an aircraft can operate, operations will not be deemed to be limited to Australia merely because the lease refers to the aircraft having to be used in accordance with "*applicable Civil Aviation Laws of Australia*";
- the destruction of the helicopter frustrated the lease such that it brought an end the obligations of the lessee (i.e. CQ Aviation) to make ongoing payments towards the lease; and
- the terms of a lease, rather than the terms of a Hull insurance program, will govern whether as between parties there is an agreement to insure equipment associated with an aircraft.

His Honour declined to address the complex issue of whether or not Island Helicopters could prove it suffered loss at all in circumstances where the helicopter was insured for an amount above its market value because Island Helicopters failed to establish a basis for liability against CQ Helicopters.

The full text can be accessed at:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCCA/2017/1665.html.

Civil Aviation Safety Authority v Bellamy [2017] FCA 829

Michael Bellamy was convicted of an offence under s 145.1(1) of the *Criminal Code Act 1995* (Cth) for knowingly using a false maintenance release. Subsequently, the Civil Aviation Safety Authority (CASA) cancelled Mr Bellamy's private pilot licence, relying on two grounds:

- Mr Bellamy failed in his duty relating to the safe operation of an aircraft (in contravention of reg 269(1)(c) of the *Civil Aviation Regulations 1988* (Cth) (the Regulations)) by knowingly using the false document; and
- he was not a 'fit and proper person' within the meaning of reg 269(1)(d) of the Regulations.

Initially, the Administrative Appeals Tribunal set aside CASA's decision. On appeal to the Federal Court, however, the Tribunal's decision was set aside and CASA's decision reinstated. Tracey J held that the Tribunal erred by:

- finding that reg 229(1) of the Regulations does not apply to the private operation of an aircraft, when it does (Mr Bellamy contravened reg 229(1) by taxiing a gyroplane on a runway at the Bendigo Airport without a valid gyroplane licence); and
- by minimising the implications of a criminal conviction for dishonesty when

assessing Mr Bellamy's fitness and propriety, as those matters were relevant.

The full text can be accessed via the Federal Court website:

http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca0829

Air New Zealand Ltd v Australia Competition and Consumer Commission [2017] HCA 21*; Pt Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2017] HCA 21

Is there a market in Australia for air cargo services where those services are supplied from ports of origin outside Australia to ports in Australia, for the purposes of the *Trade Practices Act 1974* (Cth) (TPA)? The High Court unanimously says there is.

Air New Zealand (NZ) Ltd (Air NZ) and PT Garuda Indonesia Ltd (Garuda) were found to have been involved in price fixing in regard to air cargo services in a manner that had the purpose, effect, or likely effect, of substantially lessening competition. However, for that conduct to amount to a contravention of the TPA, the "competition" that had to be affected was "competition" in a market in Australia.

Air NZ and Garuda each argued that any price fixing did not occur in a market in Australia, but rather, it occurred where the cargo was delivered to the airlines at the port of origin as this was where the "switching decision" (i.e. the choice of airline) was given effect. That occurred outside Australia.

The Full Court of the Federal Court of Australia rejected that argument and the High Court upheld that finding, noting that a market is a notional facility that accommodates rivalrous behaviour involving sellers and buyers. The High Court held that it was the substitutability of services as the driver of the rivalry between competitors which identifies a market, rather than the circumstances of the act of substitution or the "switching decision" itself. Australia was the source of demand for those services as that is where the customers were and that is where the airlines competed for the business. The airlines' rivalrous pursuit of Australian customers was in a market which included Australia; that was so even though the market might also have been said to have included other countries.

The Court also rejected a defence raised by the airlines that foreign laws and administrative practices of a foreign regulator compelled them to arrive at, or give effect to, the impugned understandings. A further defence raised by Garuda that there was a practical and operative inconsistency between the *Air Navigation Act 1920* (Cth), when read with the Australia-Indonesia Air Services Agreement, and the prohibition in ss 45 and 45A of the TPA, was also rejected.

The full text of this decision, as well as the submissions made by each of the airlines and the ACCC, can be accessed via the High Court website:

http://www.hcourt.gov.au/cases/case_s245-2016.

2. Government update

Senate Inquiry on the regulation of drones

The Senate Standing Committee on Rural and Regional Affairs and Transport is due to report by 6 December 2017 on its inquiry into the regulatory requirements that impact on the safe use of Remotely Piloted Aircraft Systems (RPAS) and Unmanned Aerial Systems (UAS).

Submissions were received from 89 companies, organisations, government entities and individuals, reflecting the high level of interest in drone regulation. The submissions represented a diverse range of stakeholders, such as CASA, Airservices Australia, Dominos Pizza, Australia Post, the National Famers' Federation, Telstra Corporation and the International Aerospace Law & Policy Group.

The Committee noted that as the inquiry progressed, it became apparent that 'the safety regulations regarding drone use have not kept up with a rapidly-growing industry, and that immediate action should be taken to make drone use safer'. The Committee noted growing concerns within the aviation industry and amongst the general public about the safety of recreational drone use, due to an increasing number of reports of aviation incidents and fears of serious accidents.

The Committee is examining:

a. current and future regulatory requirements that impact on the safe commercial and recreational use of RPAS, UAS and associated systems, including consideration of:
    i. Civil Aviation Safety Regulation Part 101
    ii. local design and manufacture of RPAS and associated systems
    iii. importation of RPAS and associated systems
    iv. state and local government regulation and
    v. overseas developments, including work by the International Civil Aviation Organization (ICAO) and overseas aviation regulatory jurisdictions;
b. the existing industry and likely future social and economic impact of RPAS technology;
c. the international regulatory/governance environment for RPAS technology and its comparison to Australian regulation;
d. current and future options for improving regulatory compliance, public safety and national security through education, professional standards, training, insurance and enforcement;
e. the relationship between aviation safety and other regulation of RPAS for example, regulation by state and local government agencies on public safety, security and privacy grounds;
f. the potential recreational and commercial uses of RPAS, including agriculture, mining, infrastructure assessment, search and rescue, fire and policing operations, aerial mapping and scientific research;
g. insurance requirements of both private and commercial users/operators, including consideration of the suitability of existing data protection, liability and insurance regimes, and whether these are sufficient to meet growing use of RPAS; and
h. the use of current and emerging RPAS and other aviation technologies to enhance aviation safety.

The submissions received by the Committee are available on the Senate website: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Drones/Submissions.

3. Geoff Masel award

The following is an extract from Roberto Cassar's paper "SURVIVAL OF THE FREEST, The Impact of Brexit on EasyJet p.l.c.", winner of the 2016 Geoff Masel award.

EasyJet is a British low-cost carrier based at London Luton Airport which within the EU operates international scheduled services to 21 Member States (hereinafter 'MSs') on over 862 routes.

Of all these routes no less than 455 are operated from one EU MS to another without contact with the home State of easyJet and no less than 83 are operated between two points of an EU MS without contact with the home State of easyJet, meaning in other words that of all the routes that easyJet operates within the EU, 53 per cent are effectively seventh freedom services and 10 per cent are effectively ninth freedom services.

These figures are both of substantial significance since the right to operate seventh and ninth – unlike third and fourth – freedom services in the realm of carriage of passengers is not easily and frequently granted predominantly because both these rights imply full-fledged competition between the foreign air carriers and the national air carriers of the States granting them.

Nevertheless, starting in 1987 the EU embarked upon a process of liberalising its internal air transport market to which end it adopted three 'legislative packages' among which the 'third package', adopted in 1992 and comprised of three separate Regulations, was the most important as it was the one which truly accomplished the said liberalisation.

The importance of this 'third package' was indeed set in stone 16 years later when its three constitutive Regulations were repealed by, recast and consolidated into Regulation 1008/08 which among other things not only entitles 'EU air carriers' (then 'Community air carriers') such as easyJet to operate intra-EU air services, but also bars MSs from subjecting the operation of these services by such carriers to any permit or authorisation. The result of this Regulation is that air services are entirely liberalised for 'EU air carriers' operating within the EU, and accordingly it can be drawn that easyJet is able to operate such a substantial amount of services within the EU – particularly seventh and ninth freedom services – precisely because it qualifies as an 'EU air carrier'.

This notwithstanding, as is not so uncommon in life all good things must come to end, and never has this saying been any truer than in the context of Brexit, easyJet and the air services that the latter provides within the EU.

The full article can be accessed via the ALAANZ website.

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They are happy to receive any questions or feedback.

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We are happy to receive all contributions towards future editions of Aviation Briefs, either directly or through the ALAANZ branch representatives.

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EDITORS' NOTE

We are currently considering a proposal to modernise the format and delivery mechanism of Aviation Briefs. We welcome any feedback as to whether ALAANZ members would prefer to receive an electronic newsletter.

We also welcome feedback regarding the content of Aviation Briefs. We propose that Aviation Briefs contain regular features including case summaries and analysis of judicial decisions relating to aviation law, a government update reflecting any regulatory developments, and extracts of relevant essays that are submitted to us. We are also considering including a regular "on the move" section, noting personnel changes in the aviation law sector. However, this last section would be dependent on receiving input from members.