ALAANZ AVIATION BRIEFS

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1. Cases

Parkes Shire Council v South West Helicopters Pty Ltd [2019] HCA 14

Brent Fowler, GSG Legal

Facts

In 2006 Parkes Shire Council (**the Council**) engaged South West Helicopters Pty Ltd (**South West**) to provide a helicopter and pilot for the purposes of an aerial noxious weed survey. The helicopter pilot was an employee of South West. Two Council employees, one being Mr Ian Stephenson (**Mr Stephenson**), were on board the helicopter to conduct that survey. On 2 February 2006, while conducting the survey the helicopter struck a power line and killed all three occupants. The accident led to claims and cross-claims being brought in the New South Wales Supreme Court.

Relevant law and issue for determination

In Part IV of the *Civil Aviation (Carriers Liability) Act 1959* (Cth) (**the CACL**) Section 28 provides:

> *"…the carrier is liable for damage sustained by reason of the death of the passenger or any bodily injury suffered by the passenger resulting from an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking"*.

Also in Part IV of the CACL Section 35(2) provides

> *"…the liability under this Part is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger."*

The issue for decision in this case was ultimately whether non-passenger claims for common law nervous shock damages were within the exclusive scope of the CACL regime as referred to in Section 35(2).

Decision at trial

The New South Wales Supreme Court allowed the common law nervous shock claims to be brought by the Stephenson family after adopting the reasoning in the majority decision of the Full Court of the Federal Court of Australia in *South Pacific Air Motive Pty Ltd v Magnus* (1998) 157 ALR 443 (**Magnus**). In Magnus, an aircraft containing a group of school students crashed shortly after take-off from Sydney Airport. No passengers died in the crash. Proceedings were brought on behalf of the parents of the school students for common law nervous shock damages. The Full Court held that Section 36 of the CACL was not

> *"…intended to preclude claims by non-passengers seeking damages for nervous shock under the general law"*.[1]

Beaumont J in dissent stated:

> *"It is apparent that Pt IV was intended to operate exclusively, as a code, in the event of the death or personal injury of a passenger in an aircraft accident. In that area, Pt IV provides some benefits not available under the general law, yet is also restrictive of the rights of a plaintiff at common law in some respects."* [2]

[1] *South Pacific Air Motive Pty Ltd v Magnus* (1998) 157 ALR 443 at 487
[2] *South Pacific Air Motive Pty Ltd v Magnus* (1998) 157 ALR 443 at 458

Decision on Appeal

The New South Wales Court of Appeal by majority found that Section 35(2) of the CACL

> *"…is intended to be exclusive of all other remedies available to a moving party seeking relief in connection with injury or death covered by the Convention"*.[3]

That Court held that non-passengers are not entitled to bring common law nervous shock claims in the event of the death of a passenger on a CACL flight and therefore disallowed the common law nervous shock claims that were brought by the Stephenson family.

Decision of the High Court

The High Court granted leave to appeal the decision of the New South Wales Court of Appeal in respect of the CACL Section 35(2) issue.

The High Court stated (at paragraph 36) that:

> *"The cardinal purpose of the CACL Act in giving effect to the Convention was to achieve uniformity in the law relating to liability of air carriers, so that, in those areas with which the Convention deals, it contemplates a uniform code that excludes resort to domestic law".*

And further (at paragraph 124) that Section 35(2):

> *"…applies to make liability under s 28 (and related limitations) a substitute for any civil liability of the carrier under any other law in respect of the death of the passenger. Any liability to Mr Stephenson's family that might have been found to exist under the Civil Liability Act for psychiatric injury resulting from the sudden shock of Mr Stephenson's death was liability under "any other law" in respect of the death of Mr Stephenson."*

The High Court held that the non-passengers, here the Stephenson family, were precluded from bringing common law nervous shock claims against a carrier in the event of the **death** of a passenger (Mr Stephenson) on a CACL flight.

In doing so the High Court disapproved of the majority decision in Magnus and approved the dissenting Judgment of Beaumont J in that case, the High Court stating (at paragraph 25):

> *"Beaumont J was rightly focused upon the evident intention of the CACL Act to create uniform and exclusive rules as to the liability of a carrier for events involving injury to or the death of passengers in accordance with the intent of the Warsaw Convention."*

This leads to the conclusion that non-passengers are also precluded from bringing common law nervous shock claims against a carrier in the event that a passenger suffers **personal injury** on a CACL flight.

Commentary

This decision is significant as it confirms the exclusivity of the uniform code which is set out in the CACL and as it supports the proposition that non-passengers are precluded from bringing common law nervous shock claims against a carrier when a passenger dies or is injured on a CACL flight.

[3] *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312 at 114

IN BRIEF

Lina Di Falco v Emirates (No 2) [2019] VSC 654

Background

Ms Di Falco was a passenger on an Emirates flight from Melbourne to Dubai departing Melbourne on the evening of 15 March 2015. Some hours into the flight, feeling nauseous shortly after the first meal service, Ms Di Falco got up from her seat to go to the bathroom. At the bathroom doorway she fainted, fracturing her right ankle in the fall. Ms Di Falco's case was that the reason for her faint and subsequent fall was that she was dehydrated. Ms Di Falco alleged that although she had asked for water on the plane it had not been provided. Ms Di Falco sued Emirates, seeking damages for her injuries.

Claim

Ms Di Falco's only basis for recovering damages was by making a claim pursuant to the *Civil Aviation (Carriers' Liability) Act 1959 (Cth)* (**CACL Act**).

To succeed in that claim, Ms Di Falco was required to establish:
(a) that an 'accident', as is defined in the CACL Act, occurred; and
(b) whether the accident caused Ms Di Falco to fall and fracture her ankle.

What constitutes an accident?

Her Honour Forbes J determined from a review of international and Australian authorities that the following principles apply in determining whether an 'accident' has occurred:

> (a) a passenger's own internal reaction to the usual, normal and expected operation of the aircraft is not an accident;
>
> (b) an accident that is a cause of an injury is different to the occurrence of injury itself;
>
> (c) it is necessary to identify an event or happening that is external to the passenger;
>
> (d) identifying an event requires flexible application. An event may arise from acts, omissions or from a combination of acts and omissions;
>
> (e) the event must be unexpected or unusual;
>
> (f) there may be a chain of events that lead to injury;
>
> (g) it is sufficient that some link in the chain of causal events was an unexpected or unusual event external to the passenger;
>
> (h) if the event is described as inaction or as a failure to do something, the absence of action will not amount to an event unless it can be shown to be an omission by reference to some legal standard requiring action;
>
> (i) common law notions of actions or failure to act arising from a duty of care owed to passengers are irrelevant;
>
> (j) whether an accident has occurred is a question of fact.

Her Honour determined that no 'accident' had occurred because nothing unusual or unexpected occurred on the flight. That, in turn, was because her Honour found that the way in which the plaintiff's requests for water were dealt with by the airlines' attendants were in accordance with their usual practice and were not in disregard of, or contrary to, the airline's policy.

Her Honour did find, however, that the plaintiff's fall was caused by mild dehydration, meaning that if the plaintiff had established that an accident had occurred, her claim against the airline would have succeeded.

However, as Her Honour found that none of the circumstances leading to the plaintiff's mild dehydration amounted to an unusual or unexpected event or happening so as to engage liability under the CACL Act, the plaintiff's claim was unsuccessful.

Gibson v Malaysian Airline Systems Berhad (Settlement Approval) [2019] FCA 1007

This decision concerned the representative proceedings brought against Malaysian Airline System Berhad (**MAS**) in connection with the shooting-down of flight MH17 on 17 July 2014.

Perram J of the Federal Court was required to decide whether to approve a final settlement of the proceedings on terms set out in a confidential agreement reached between MAS, the applicant and each of the group members. The Court's approval was required because of s 33V of the *Federal Court of Australia Act 1976 (Cth)*.

His Honour noted that, ordinarily, approving the settlement of representative proceedings required the Court to carry out a protective function. This is because the settlement affects group members who are not before the Court. The interests of those group members may not coincide with the interest of the applicant, and the applicant and the respondents may be "friends of the bargain" i.e. have their own interests in seeing the settlement approved.

In the present matter, his Honour determined that these issues did not arise. There were no more than 12 group members, each group member was a client of the firm that represented the applicant and each was a party to the settlement agreement.

In those circumstances, his Honour found that the Court's protective function had no role to play. He therefore approved the settlement.

His Honour found that had it been necessary, he would have been satisfied that the settlement was reasonable. The sum the respondent agreed to pay was not especially large, but it was also not small or trivial. In circumstances where the High Court's recent decision in *Parkes Shire Council v South West Helicopters Pty Limited* [2019] HCA 14 meant that the largest claim made by each group member (that for nervous shock) was no longer maintainable, the quantum appeared reasonable. His Honour was also satisfied that the costs charged by the lawyers were reasonable.

Gibson v Malaysian Airline Systems Berhad (Class Membership) [2019] FCA 1399

Subsequent to the approval hearing, Dr Dyczynski and Mrs Rudhart-Dyczynski (**Dyczynskis**) brought an interlocutory application.

Each of the 12 group members that entered into the settlement were relatives of a deceased passenger, like the Dyczynskis, who had lost their daughter (**Deceased**) in the tragedy. The Dyczynskis found out about the settlement which had occurred through the media. They did not understand why they were not part of the settlement and why they were not kept informed.

The immediate issue for the Court to determine was whether the Dyczynskis were members of the class and entitled to share in the settlement.

The Court had earlier made orders that caused the definition of Group Members to be limited to those representatives of passengers that could properly bring a claim in Australia, having regard to Article 33 the provisions of the *Convention for the Unification of Certain Rules for International Carriage by Air* (**Montreal Convention**). This effectively meant that:

(a) the destination of the Deceased's ticket had to be Australia;

(b) the contract for carriage of the Deceased had to have been made in Australia and where the respondent's place of business was Australia; or

(c) Australia was the Deceased's principal place of residence.

There was no suggestion that Australia was the Deveased's principal place of residence, which left matters (a) and (b) to be determined.

In respect of (a), although the Deceased was heading to Australia, she was on a return ticket from Amsterdam, which meant that her destination was Amsterdam: *Gulf Air Company GSC v Fattouh* [2008] NSWCA 225.

In respect of (b), although the Deceased's ticket was purchased by Mr Dyczynski online from Australia, it was issued from Malaysia and that was the place of business of MAS.

Accordingly, his Honour declared that the Dyczynskis were not group members and could not participate in the settlement.

2. Government update

The unique noise of drones: a regulatory update

Marianne Robinson, Special Counsel, Sparke Helmore Lawyers

It is a unique sound and it really draws attention. It is an unknown, unexperienced type of frequency. In that specific frequency, with the higher pitch that really gets people's attention…"
- Wing's testimony to the Inquiry into drone delivery systems in the ACT, July 2019 (Inquiry)

Most Australians have never seen a drone or heard one, but the rapid evolution in drone technology and the steady progress from recreational use to commercial use has already put drone noise on the radar of various state, territory and Commonwealth government departments. State and territory laws presently regulate noise intrusion over residential suburbs or major shopping centres. Noises such as lawn mowers, motor vehicle, construction and animals are regulated at this level. Drone noise is regulated at a Commonwealth level and, to date, the law has not been modified to reflect the differences between high altitude commercial aircraft, such as passenger planes and small, low altitude operated drones.

Drone usage is rapidly increasing. Current users include agriculture, emergency services, sport, real estate, aerial mapping, lifesaving, search and rescue, delivery of medical supplies and food, road traffic control and even local government. Increasingly, commercial usage is encroaching on urban and built up areas, which is why noise-related issues are emerging.

In 2018, Wing was permitted to conduct a drone goods delivery trial in Bonython, ACT. During normal operating periods, Wing averaged 22 deliveries per day, with 85 deliveries on their busiest, and final, day of operations. Deliveries were made for various businesses, including Chemist Warehouse, Bunnings, Jasper + Myrtle, Kickstart Expresso, Guzman y Gomez and a local franchisee of Bakers Delight. Forty-seven percent of orders were placed with ACT-owned small businesses. Food items and coffee were the most popular items delivered, while over-the-counter chemist items were the most popular non-food items delivered. The average duration of a drone delivery (from the tester placing an order to receipt of goods) was seven minutes and 36 seconds (comprising approximately four minutes of merchant preparation and three minutes of flight time).

Following this limited trial, complaints were lodged by local residents about the noise generated by the drones and the ACT Government commenced an inquiry into drone deliveries.

Inquiry into drone delivery systems in the ACT (ACT Inquiry)

The ACT Inquiry published its report in July 2019. One of its four recommendations was to engage proactively with the Department of Infrastructure, Transport, Cities and Regional Development (Department) to share the experience of the ACT community in drone delivery trials, including the issue of drone noise regulation.

Current situation

Aircraft and airspace regulation in Australia, including the regulation of drones, is governed by the *Civil Aviation Act 1988* (Cth) (the Act) and the *Civil Aviation Safety Regulations 1998* (CASR). This federal Act and these Regulations are administered by the Department.

Presently, all aircraft noise complaints are managed through the Noise Complaint and Information Service administered by Air Services Australia. There are no international noise aviation standards for drones.

Until recently, the Department has considered the *Air Navigation (Aircraft Noise) Regulations 2018* (Cth) as not applicable to drones. The existing Regulations were developed for traditional aircraft, such as jets, prop planes and helicopters, whose noise type and general flying altitudes are much higher than drone altitudes.

Drones also have a very different pitch to that of traditional aircraft and because of the lower altitude can be "heard" differently, depending on the background noise. For example, drones monitoring heavy traffic flows while tethered to a multistorey building are likely to be heard by fewer people than a drone taking aerial photos for a real estate sale. Similarly, drones being used for sporting events at large arenas are less likely to be heard by individuals than when used in the neighbourhood park during a community sporting match. Also relevant to noise-related issues is the total number of drone movements per day, the duration, number per hour and take-off day.

Following submissions from the ACT Standing Committee on Economic Development and Tourism, the Department has reconsidered its position and formed the view that s 17 of the Regulations does in fact apply to drones. As a result of this new interpretation, commercial and recreational drone operations require s 17 approvals.

Department Issues Paper

In September 2019, in response to the ACT Inquiry, the Department released its Issues Paper: *Review of the Air Navigation (Aircraft Noise) Regulations 2018 – Remotely Piloted Aircraft.*

The specific purpose of the review is to have public consultation on the Regulations and the continued appropriate scope and breadth of drone noise regulation for remotely piloted aircraft (drones) and urban air mobility.

The review will address a range of noise-related issues, including:

- community acceptance noise impacts on built up and residential areas
- state, territory and a local government noise standards
- jurisdictional issues, and
- relevance of the existing Regulations and the role of Air Services.

This review is of specific interest to commercial operators, as well as to local government and state government departments that use commercial drone services.

Submissions close 22 November 2019 with the Review Report to be completed by 31 December 2019.

This article was first published by Sparke Helmore Lawyers on its website, www.sparkehelmore.com.au

Liability limits increased for domestic air carriage in Australia and Montreal Limits on the increase

Matthew Brooks, Partner, Simon Liddy, Partner and Lisa Gooneratne, Special Counsel

*Matthew Brooks, Simon Liddy and Lisa Gooneratne report on the increase to the liability limits under the Civil Aviation (Carrier's Liability) Act 1959 (**CACL Act**) that commenced on 1 October 2019 via regulations introduced by of the Civil Aviation (Carriers' Liability) Regulations 2019 (**Regulations**) and the updates to the Montreal Convention liability limits which have been proposed by the International Civil Aviation Organisation (**ICAO**).*

New limits for Australian domestic carriage now in force from 1 October 2019

The Regulations come into force on 1 October 2019 increasing the Australian domestic carriage liability limits for passengers, baggage and mandatory insurance as follows:

- *Passengers:* For the purposes of subsection 31(1) of the Act, the liability limit for claims in respect of passenger personal injury and death for Australian domestic air carriage is AUD$925,000.
- *Baggage:*
    - For the purposes of subsection 31(2) of the Act, the liability limit for claims in respect of destruction or loss of checked baggage, for Australian domestic air carriage, is AUD$3,000; and
    - For the purposes of subsections 31(3) of the Act, the liability limit for claims in respect of destruction or loss of unchecked baggage, for Australian domestic air carriage, is AUD$300.
- *Mandatory insurance:* For the purposes of subsection 41C(3)(aa) of the Act, the amount of personal injury indemnity insurance that an Australian air carrier must have in respect of each passenger, is 480,000 SDRs (approx. AUD$965,500).

New limits under the Montreal Convention expected to be in force on 28 December 2019

It is proposed the Montreal Convention Limits are to be increased by 13.9% and is based on the accumulated rate of inflation since the last revision in 2008. Subject to approval by the majority of member States, the Montreal Convention Limits are to increase on 28 December 2019, as follows:

- *Injury/death*: The Article 21 strict liability limit is increasing from 113,100 SDRs (approx. AUD$227,400) to 128,821 SDRs (approx. AUD$259,000);
- *Delay*: The limit is increasing from 4,694 SDRs (approx. AUD$9,450) to 5,346 SDRs (approx. AUD$10,750);
- *Baggage*: The limit is increasing from 1,131 SDRs (approx. AUD$2,275) to 1,288 SDRs (approx. AUD$2,590); and
- *Cargo*: The limit is increasing from 19 SDRs per kg (approx. AUD$38.23 per kg) to 22 SDRs per kg (approx. AUD$44.27).

In light of the increased limits for Australian domestic carriage to which the CACL Act applies, and international carriage to which the Montreal Convention applies, it will be prudent for air carriers to review their current liability and insurance arrangements.

This article was first published by HWL Ebsworth Lawyers on its website, www.hwlebsworth.com.au, and followed an earlier article published on that website which set out, in further detail, the Government's proposals prior to their commencement.

3. David Robert Boughen Memorial Address

International Aviation and Competition Policy – Complementary or in Conflict?

Russell Miller AM, Aviation Regulatory Group, Minter Ellison

The Aviation Law Association is to be commended for continuing to honour David's contribution through this Address. It is an honour to have been asked to deliver it this year.

As you know, David was a founding member of the Association. In addition to his active practice at the Bar he had a passion for flying. David was a Wing Commander in the RAAF, serving as a member of its Legal Panel. His practice at the Queensland Bar included both civilian and military aviation matters.

I am told that David took to aviation from an early age – that he had inherited his father's love of flying. His father had been a pilot during WWII. David's family reports that the freedom he experienced from aviation was of immense joy to him.

As the Queensland Chief Justice, Paul De Jersey, who knew David personally, said eloquently at this conference in 2007:

His tragic death … substantially diminished a community which respected and admired him.

Why me?

Today I join a long list of distinguished speakers who have delivered this address in David's memory.

So why did the organisers invite me? I have flown many miles, but never as a pilot. My only claim is that

aviation has been an enduring feature of my professional career.

The aviation law course at ANU, taught by the late Professor Jack Richardson, inspired me. But opportunities to work in that field were limited so I ventured into the competition field in my professional practice.

Quite early in my career the International Air Transport Association brought me back to aviation when I was asked to assist in relation to a challenge under Australia's *Trade Practices Act*. From then on competition law and aviation regulation became major focuses in my career in the law.

So it will not surprise you that I have chosen the intersection between aviation and trade practices as the topic for this Address in David's honour.

The topic I have chosen is *International Aviation and Competition Policy – Complementary or in Conflict?* – It is a topic of which I am sure David would have approved.

News Reports

Aviation is always in the news - sometimes it is good news and sometimes bad. Consider the following:

- On March 4 *Aviation Weekly* carried the headline *Australia's competition watchdog and Virgin Australia have argued against the proposed codeshare expansion between Qantas and Cathay Pacific.*
- In January the newspapers were full of reports over an aviation fatality. Not an aircraft crash, but the crash of online travel agent, Bestjet.
    - On 2 January *The Guardian* headlined: *Bestjet collapse leaves angry customers thousands out of pocket*.
    - On January 9 *Channel Nine News* followed with the headline '*Where the hell is the money?' Bestjet clients demand answers*.
- On June 27 last year Reuters carried the headline *Air New Zealand hit with $15m fine for price fixing.* Reuters reported:

    > *The court found Air NZ fixed fuel prices and insurance surcharges on air freight services from Hong Kong, and insurance and security charges from Singapore between 2002 and 2007 …*

- On 4 April last year The Guardian carried the headline *Flight Centre fined $12.5m for price-fixing after losing appeal.*

Each of these examples is a manifestation of challenges to international aviation presented by competition policy. Those challenges are not new. They had their genesis 40 years ago. So where did it all begin?

Global Rules

The global rules for international aviation had been forged at the end of World War II. They were based (and continue to be based) on bilaterally negotiated 'freedoms' enshrined in *Air Services Agreements* and derived from the 1944 *Chicago Convention*.

International aviation would not be possible without these agreements. They provide the legal foundation for all scheduled international airline flights.

Australia's first such agreement was with the United States, signed in 1946. Today Australia is a signatory to over 100 such agreements covering the world from Argentina through the alphabet to Zimbabwe.

Even today, capacity – flight frequency and seat numbers – on each international route is required to be negotiated bilaterally. Airlines cannot provide scheduled international services to and from Australia without the Government allocating negotiated capacity to airlines of Australia. The International Air Services Commission has responsibility for allocating capacity on international routes, applying public interest criteria.

The *Air Services Agreements* did more than deal with capacity – with their all-encompassing provisions they fostered and nurtured international aviation.

For instance, they required '*fair and equal opportunity for the designated airlines of each contracting State'*. Indeed, they go further, requiring each country's designated airlines to:

> *take into consideration the interests of the* other party's *designated airline so as not to affect unduly the services which the latter provides.*

That fundamental requirement was backed up by provisions requiring that '*tariffs on agreed services shall be established at reasonable levels*'.

To complete the picture, when it comes to tariffs, the agreements provide that:

> *The tariffs …, together with the rates of agency commission used in conjunction with them shall, if possible, be agreed … and such agreement shall, where possible, be reached through the rate-fixing machinery of the International Air Transport Association. The tariffs so agreed shall be subject to the approval of the aeronautical authorities of both Contracting States.*

As the movement to privatise government-owned airlines picked up and governments around the world adopted modern competition policies, conflict between the established international aviation order and domestic competition policy was inevitable. How would we reconcile the seemingly irreconcilable differences? I will return to that question shortly. First let's consider how the conflict unfolded

ICAO and IATA

In the 1940's two international organisations emerged to oversee international aviation, and they still do so today.

As you know, ICAO, the government-to-government organisation,

- sets air navigation standards and other technical operational health and safety rules and
- provides a forum for government officials to meet and discuss aviation policy and set and administer operational rules and standards.

The International Air Transport Association, incorporated by a special Canadian Act of Parliament in 1945, is the forum in which airlines resolve the commercial requirements for international air services.

This included determining fares on international routes throughout the world, as mandated by the *Air Services Agreements*.

Those fares were lodged with each relevant government and 'approved'.

It was an offence to charge a fare other than the 'approved' fare. The commission rate that could be paid to travel agents – 9% for international ticket sales – also derived from an approved IATA Conference resolution.

Emerging competition policy

In 1975, over the strong objections of the business community, Australia introduced a modern competition law. It was a law of general application, including to the international aviation industry.

As you can readily imagine, given the well-established rules for international air transport, the international aviation system was quite unprepared for Australia's new competition law. In the absence of an explicit exemption in Australia, which was to take precedence – the international aviation regime or the domestic competition regime? That question was not resolved until 2017.

ICAO resolutions called for the former and continually advocated for that position. As ICAO said as recently as 6 years ago:

> *States must exercise care in applying their national competition laws and policies to international air services. … [T]he traditional approach in many bilateral agreements favouring airline cooperation on issues like capacity and pricing is squarely at odds with competition laws that strictly prohibit price-fixing, market division and other collusive practices by market competitors.*

International precedent supported the ICAO position. Although the USA is the source of the world's

strongest competition law – a law dating back to 1890 - authority over international aviation was ceded to the National Civil Aviation authorities who 'approved' IATA fares. This exempted them from antitrust scrutiny, even though the full rigors of US antitrust law applied and was enforced against the aviation industry domestically.

In Australia, as soon as the *Trade Practices Act* came into force in February 1975 Qantas applied for an authorisation for all IATA programs. Authorisations are case-by-case exemptions granted on public interest grounds. IATA was granted an interim authorisation as expected.

But when the Trade Practices Commission came to consider the substance of the matter in 1984, it was a different story.

The Commission refused to grant an authorisation. IATA's global ticket distribution system – the Passenger Agency and Cargo Agency programs - were under threat, not to mention its tariff coordination activities. Diplomatic notes from countries concerned about the possible impact on international aviation followed.

The case moved to the Trade Practices Tribunal, where senior counsel for the Commission opened with an assertion that the IATA system was 'pure price-fixing'. But the Tribunal was never called on to resolve the matter. IATA was able to convince the Commission of the public benefits its systems delivered. The parties reached agreement on a broad-ranging authorisation immunising all IATA programs, including for tariff coordination. That immunity was to remain in place until voluntarily surrendered by IATA in August 2013.

One of the immunised IATA programs was the Passenger Agency Program about which I will say something in the context of *Flight Centre* and Bestjet shortly.

Although IATA's programs had been immunised in Australia, when it came to pricing, market forces challenged the established order. In 1979, KLM had advertised a cheap fare between Australia and the Netherlands that had not been approved by the Australian Government. The Government's reaction was swift. As the *Canberra Times* reported:

> *"They may be selling tickets but no passenger has yet been able to fly with one", a government official said yesterday. … It means, in effect, that the sale of the KLM tickets is regarded as illegal.*

The Dutch Government weighed in on behalf of its flag carrier. As the *Canberra Times* reported:

> *The Netherlands warned yesterday … that it would seek arbitration on KLM's low air fares unless they were approved by the Australian Government.*

But it was not KLM that finally succeeded in ending embargo on cheap airfares as we know them today.

The rigid fare approval mechanism that had applied for over 40 years finally crumbled 12 years later at the behest of another airline.

There were no 'legacy' airlines then. Only the established airlines pursuing '*fair and equal opportunity'* to compete on the routes on which they operated.

However, new entrants were starting to emerge. Singapore Airlines, now the No 1 foreign carrier serving Australia, was one. It had been established in October 1972 with limited routes and frequencies, including between Australia and Singapore. As a new airline it was seriously disadvantaged by the fare structure it was required by the *Australia-Singapore Air Services Agreement* to apply.

Of course, common sense shows us that new entrants deal with their disadvantages through keen pricing and superior service, and that is precisely what Singapore Airlines did.

Initially the Australian Government held the line. In January 1991 Singapore Airlines was prosecuted for selling tickets in Hobart at rates below those approved by the Civil Aviation Minister. As the *Canberra Times* reported:

> *[The Minister] had been expressing concern for more than a year over wide spread illegal discounting of international air fares, and had stated that he would enforce the law rather than allow an "open go" in fare discounting.*

But every now and again a legal case will produce unexpected results and this was one of them.

In an about face, the Government withdrew the prosecution, heralding a new era of price competition in the aviation industry.

Pandora's box had well and truly been opened by the Singapore Airlines decision and dynamic competitive pricing, resulted.

Although the IATA 'official' fares remained in place, and IATA Conferences continue to meet and set fares, over time their relevance declined. The emergence of alliances further eroded the relevance of IATA fares in the Australian market. Alliance networks largely replaced multilateral interlining.

As this decline accelerated, old notions faded of airlines being partners in a global joint venture facilitating smooth travel to and from anywhere in the globe. The old order – in which cooperation, so essential to international air travel in earlier times, was the norm - disappeared. In its place came competition, even within alliances.

Some airlines prospered in this new uncertain world - others did not. In Australia:

- Qantas, initially threatened by this new order, emerged stronger;
- Ansett and Compass failed;
- Virgin Australia emerged.

Internationally, Pan Am, the post –World War II behemoth, disappeared, as did SwissAir. KLM was taken over by Air France. Emirates, Etihad and Qatar grew and prospered.

In this dynamic new environment further conflict between international aviation regulation and competition law was inevitable.

Air New Zealand

That brings us to *Air New Zealand*.

Stated briefly, in 1996 widely fluctuating aviation fuel prices resulted in the IATA members resolving to impose a fuel surcharge. But the resolution never came into effect because the US Department of Transportation denied immunity.

If it had come into effect, the Australian authorisation IATA had obtained in 1985 would have immunised it.

Notwithstanding rejection of the IATA proposal, Lufthansa introduced an identical surcharge and other airlines, including Air New Zealand and Garuda, did so as well.

But the problem was that, under competition law understandings between competitors on price are characterised as illegal price-fixing. The result was unprecedented coordinated action by competition authorities around the world. Airlines paid fines and penalties in the USA exceeded $1.5 billion, in Europe $1 billion, in Australia $100 million.

While most airlines resolved their differences with the ACCC and paid significant penalties, Air New Zealand and Garuda fought the ACCC on all grounds, up to the High Court. Their arguments, grounded in aviation law and practice familiar to us all, were essentially twofold:

- First, they said, there is an inconsistency between competition law and the *Air Navigation Act* and *Air Services Agreements.* The relevant Agreements provided for tariff fixing between international airlines for scheduled international air services into Australia. The competition law prohibition on price-fixing is inconsistent with the international aviation regime.
- Secondly, the airlines were required by foreign governments to charge the surcharge because, under local law in the origin countries – Indonesia and Hong Kong and Singapore - the airlines were required to charge tariffs approved by local aviation authorities.

Both propositions were rejected by the High Court in June 2017. Carefully analysing the legal framework, the High Court decided that there was no inconsistency. International aviation had to abide by Australian domestic competition laws.

Alliances and Code Shares

Let me turn to another established area of airline cooperation of which my earlier reference to *Aviation Weekly* is an example It involves alliances and code sharing - now an ubiquitous feature of international aviation.

In the 1980s and 1990s airline privatisation became the order of the day. British Airways, Air Canada, Singapore Airlines, Lufthansa and Qantas, to name a few, were privatised by their government owners.

Consequently, the '*fair and equal opportunity'* provisions of bilateral air services agreements came under increasing pressure as airlines responded to the need to make profits. Government rates approval mechanisms gave way and, as I have mentioned, the '*rate fixing machinery of IATA*' failed to keep up with the pace of change.

Before alliances and code-sharing entered the picture, fares set in the cooperative environment of IATA Traffic Conferences were essential for interlining. IATA multilateral interlining allowed (and still allows) passengers to:

- buy a ticket in local currency anywhere in the world;
- to fly to almost any destination internationally;
- changing planes and airlines to reach the destination. And baggage arrives as well, mostly.

But in the past 10 years, IATA multilateral interlining had fallen into disrepute, essentially because the interline fares IATA Conferences set were so far out of kilter when compared with the point-to-point fares competition had produced.

Star Alliance, formed in 1999 by:

- Scandinavian Airlines, Thai Airways International, Air Canada, Lufthansa, and United Airlines, and

One World, formed in the same year by:

- American Airlines, British Airways, Canadian Airlines, Cathay Pacific, and Qantas,

filled the gap that IATA was unable to fill.

It was only a matter of time before code sharing also came to prominence, providing the operational means for airline alliances to operate. Starting modestly with an agreement between Qantas and American Airlines in 1990, code sharing has become universal today.

But alliances, and in particular code sharing, also brought regulatory challenges.

Airlines, regarded by competition authorities as competitors, were entering into cooperative arrangements for which there was no automatic immunity under Australian competition law, or that of many other countries. This brought competition law to the forefront yet again.

No longer was it a matter of negotiating a commercial arrangement and lodging the resultant fares with aviation departments for 'approval'. The arrangements needed explicit approval under competition law - approvals that were not always easily obtained.

For instance, in 2002 Qantas and Air New Zealand negotiated a Trans-Tasman Alliance. The ACCC refused to grant an authorisation. On reconsideration by the the Trade Practices Tribunal authorisation was granted after a hard-fought battle. But the alliance never came into effect because the New Zealand Commerce Commission refused approval.

But competition policy has accommodated alliances. Many have been authorised by the ACCC, including the Qantas-Emirates Alliance, reauthorised last year, and a Virgin-Hong Kong Airlines Alliance, authorised the year before.

The Qantas-Cathay code share to which I referred at the start of this Address is another example. Approval is required from the International Air Services Commission whose role is to:

> *foster, encourage and support competition in the provision of international air services by Australian carriers.*

But an IASC decision carries no immunity as far as Australia's competition law is concerned, so code

share airlines have to also satisfy the ACCC [and competition authorities at the other end of the routes] if their code share agreements involve joint pricing and are not covered by an existing authorised alliance agreement.

These requirements emphasise the focus of approving agencies on international aviation arrangements that deliver real consumer benefits.

Flight Centre

Airlines are not the only players in the aviation industry that have had to come to grips with competition law. Travel agents, and the IATA system that administers the distribution of airline tickets, have not been exempt either.

The ACCC's Federal Court case against Flight Centre is the latest manifestation of this. It concerned the relationship between airlines and their agents.

One of IATA's most significant achievements was to establish an efficient passenger agency program that has stood the test of time. The IATA Passenger Agency Program, established over 50 years ago, manages the distribution of airline tickets for all IATA member airlines through an accreditation system. IATA accredits travel agents, who are then entitled to sell tickets on IATA member airlines, account for sales centrally through IATA.

In order to obtain and retain accreditation, travel agents are required to meet IATA's prudential worthiness criteria. Although the airlines do not extend credit to agents - because all funds received by agents for ticket sales are held in trust for the airlines - nevertheless the exposure of airlines to potential loss is significant.

The general rule is that, once a valid IATA ticket is issued the airline will carry the passenger even if the airline has not been paid by its agent.

Originally IATA issued physical ticket stock to accredited agents and withdrew it when agents defaulted. Physical tickets have, of course, disappeared with the emergence of e-ticketing, but the IATA accreditation system remains essentially unchanged.

The environment t5oday is not the same as when the IATA passenger agency program was developed. At that time commissions were set by IATA at 9% of the approved ticket price.

But as deregulation took hold, competition for ticket sales through agents, who then accounted for over 80% of international tickets, accelerated.

Airlines offered travel agents 'override' commissions – rebates based on volumes of sales. The market responded by creating consolidators – 'super' agents through whom smaller agents purchased tickets rather than directly from the airlines, thereby obtaining a better price.

More recently airlines 'net fares' have become a feature of the Australian market. Rather than earning commissions, agents can sell tickets at any price they decide, up to a maximum price set by the airline, remitting the net fare to the airline and keeping the balance. This sowed the seeds for the *Flight Centre* case.

Flight Centre, Australia's largest travel agency, advertised that it would not be beaten on price. But it was at a disadvantage when airlines offered internet fares at the net price available to *Flight Centre*.

When Flight Centre complained to a number of airlines that it couldn't make money on those fares, the ACCC became involved.

In a case that went all the way to the High Court in 2016 and was concluded last year, the ACCC successfully claimed that Flight Centre was attempting to fix prices in contravention of the *Competition and Consumer Act*. The case turned on whether or not Flight Centre was in competition with the airlines for which it was an agent.

Conventional wisdom, reinforced by the IATA Passenger Sales Agency Agreement, was that Flight Centre was simply an agent for the airlines it served.

It will surprise none of you to observe that agents should be able to discuss prices with their principals, especially when their remuneration depended on it. This is a normal part of the agency relationship.

That is precisely what Flight Centre did. It complained to airlines that it had to match their advertised prices and made nothing from the sale.

In a controversial split decision, the High Court decided that, although Flight Centre was the agent of the airlines to which it had complained, that did not preclude it also being a competitor. The ramifications of this decision have not yet been fully assessed. As my partner, Justin Oliver said in a recent article:

> *… where the law treats the acts of agents as acts of the principal, is it really possible for the agent and the principal to supply a product in competition with each other …?*

That is a question for another day.

Bestjet

Finally let me say a few words about Bestjet, the $10 million+ travel agency insolvency reported in January. The full story is yet to unfold.

As I have said, IATA accreditation required (and still requires) travel agents to meet prudential requirements consistent with the level of airlines' financial exposure. This meant that agents had to provide IATA with sufficient security to cover ticket sales.

But protection of the airlines is one thing – what about protecting consumers? Travel agency licensing had been introduced in Australia in 1974 in the wake of a number of travel agency defaults that left travellers stranded. It was an offence to carry on an unregistered travel agency business.

While registration may have ameliorated the problem, it did not remove it. In the 1980s a further string of defaults led to calls for what *Choice* referred to as:

> *a safety net against licensed travel agent collapse, compensate[ing] consumers who were left high and dry when agents went bust.*

State and Territory Governments introduced a special fund – the Travel Compensation Fund – to which travel agents were required to contribute. The purpose of the Fund was to compensate consumers for travel agency defaults.

But then came competition policy initiatives directed at freeing up markets by removing government 'red tape'.

Deregulation – allowing freedom for market participants to compete - became the order of the day. The Federal Government kicked this off by paying bounties totalling almost $27 billion to State and Territory Governments over a 13 year period to free up markets. Ultimately one of the casualties was the Travel Compensation Fund.

In 2013 the Fund was abolished. At the time the Victorian Assistant Treasurer stated:

> *Now, after over two decades in operation, the national scheme has steadily become ill suited both to modern industry practices and to how consumers purchase today. The rise of electronic commerce in particular has fuelled the growth of direct distribution channels. Making travel arrangements is now predominantly an online business, with consumers cutting travel agents out of many transactions.*

Direct purchasing, credit card charge-backs and private travel insurance were seen as an acceptable substitute.

There is little doubt that the claim that consumers are cutting out travel agents is inaccurate. Travel agents account for more than 70% of international airline ticket sales and online travel agents like Expedia are well established.

It remains to be seen whether consumers are sufficiently protected by credit card charge-backs and private travel insurance. Bestjet is likely to ultimately provide an answer. But we do know that:

- Credit card companies have been covering passengers, but only those who used an applicable credit card to pay Bestjet. Not all credit cards provide this cover.
- As to travel insurance, many policies specifically exclude losses arising from travel agent insolvency.

Conclusions

So how should we sum this all up?

First, while international aviation policy and competition policy could not be said to be complementary, we have found a way for them to peacefully coexist.

Secondly, it can be said that, where conflict arises, competition policy has won out.

Is that a bad thing? No, I do not think it is.

The cooperative shield, so necessary for international aviation in earlier times, is no longer required. Competition law has had a healthy moderating effect on cooperation, without banning it outright, and the international aviation industry has thrived and prospered as a result.

As the statistics show, more people are travelling more often than ever before.

For instance, over the past 10 years the number of passengers carried internationally to and from Australia has almost doubled. In 2007/8 23 million passengers travelled on scheduled international air services to and from Australia. In 2017/18 that number had risen to 41 million.

New airlines, large and small, have commenced services to and from Australia. Emirates and Etihad are well known examples, but more recent examples include SriLanka Airlines, Samoa Airlines and Donghai Airlines from Shenzhen, China.

Passengers have more choice – more choice of airlines, routes, prices and service – than ever before. For instance, the travel website, Kayak, lists over 100 options on the Sydney – Singapore route alone, with return prices in business class ranging from just over $1,000 to $6,800.

Competition policy may not be perfect, but its contribution to a robust aviation industry that serves Australia well, cannot be denied

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