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Aviation Law Bulletin

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High Court of Australia to hear DVT appeal on 2 December 2004

The High Court of Australia recently granted leave to appeal to a DVT claimant, Brian Povey, in what has become an unofficial test case for at least 350 DVT claimants in Australia. DVT litigants in New Zealand are also interested in the outcome of the case.

Readers might recall that after Povey had commenced his court action and after he had supplied particulars about some of the specific allegations made against the airlines (and importantly what he alleges constituted the "accident" for the purposes of Article 17 of the amended Warsaw Convention), the airlines filed applications for judgment, for a permanent stay of the proceedings against them, and seeking that the statement of claim be struck out as against them.

The airlines' applications were initially heard by Bongiorno J and in December 2002 he gave judgment. While he agreed that the plaintiff's case as pleaded could not succeed, he allowed Povey the opportunity to amend his pleadings.

Not unexpectedly, the airlines sought and obtained leave to appeal this decision. The airlines' appeal to the Victorian Court of Appeal was successful. In a judgment delivered on 23 December 2003, the Court of Appeal struck out the Statement of Claim as against the airlines, ordered a permanent stay of the proceedings as against the airlines, and awarded the airlines their legal costs of the proceedings.

Povey then applied to the High Court of Australia for special leave to appeal. His application was heard by Gummow,

Hayne and Callinan JJ on 10 September 2004. The Court granted special leave to appeal on the condition Povey's Notice of Appeal be amended to more accurately reflect the real issues in the appeal.

While the usual waiting period for the hearing of the appeal could be as long as 12 months, the Court indicated the hearing date would probably be early in the new year, which amounts to substantial expedition. In fact, the hearing date has now been fixed for 2 December 2004.

We understand that the English House of Lords has not yet set a date for its hearing of the English DVT litigation, although current expectations are that the hearing could take place in the northern Spring of 2005. Recently two appellate courts in the United States have given judgments favourable to airlines in DVT cases (*Blansett v Continental Airlines*; *Rodriguez v Air New Zealand*). We are not currently aware of whether the US Supreme Court will accept a DVT case for determination, however, this may be a possibility in the not too distant future.

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Security toughens up

■ Aviation Security Amendment Bill 2004

New legislation introduced in Parliament in early August aims to tighten Australia's aviation security and seeks to amend both the *Aviation Transport Security Act 2004* and the *Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004*.

Annex 17 of the *Convention on International Civil Aviation 1944* provides the source of Australia's aviation security framework and is administered by the International Civil Aviation Organisation (ICAO), of which Australia is a founding member. The Department of Transport and Regional Services (DOTARS) has management and control over this framework.

Australia enacted the Air Navigation (Checked Baggage) Regulations 2000 and the *Aviation Transport Security Act 2004* ("ATSA") following the 11 September 2001 terrorist attacks and the new Bill seeks to introduce a new Division to Part 4 of ATSA – Division 9 – Security Status Checking. This is aimed at individuals who

already hold "security designated authorisations", and those seeking to apply for such positions. While regulations are yet to define what falls within the ambit of "security designated authorisations", it is clear that it will include background security checks for pilots and other flight crew.

The Bill provides that the Secretary of DOTARS may determine if someone has an "adverse security status" and must provide this information to both the individual and to CASA (section 74G). In response, CASA may either refuse that person's application for a security designated authorisation or cancel such authorisation if one is already held. Although regulations may prescribe factors the Secretary must consider when determining someone's "adverse security status", it is likely that such factors will include criminal record, immigration status and ASIO security checks.

Regulations may enable CASA to directly assess whether someone has an adverse security status and other regulations may be made to avoid the application of privacy legislation to allow information to be transferred between agencies without threat of sanction.

Although the proposed amendments could be viewed to be somewhat persecutory in terms of targeting a particular group of people, in light of the recent breaches of aviation security the potential good attached to the proposed measures may well outweigh the harm.

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First-class pain in the back found to be an 'accident'

■ *Krum v Malaysian Airline System Berhad* [2004] VSC 185 – Victorian Supreme Court, 27 May 2004

In a recent case in the Supreme Court of Victoria, a plaintiff who suffered back injury as a result of a defective first-class passenger seat has been awarded \$146,000 in damages.

The plaintiff was a passenger on a Malaysian Airlines flight from Kuala Lumpur to Paris, travelling in first class. Upon boarding the aircraft, he found that his allotted seat (2H) was occupied. He asked a flight attendant what he should do and was invited to sit in a

seat adjacent to the occupied seat, across the aisle. Significantly, the seat had been recorded as “unserviceable” at the time of the flight.

One hour after departure, he attempted to recline his seat in order to sleep, however the automatic control failed to operate. A flight attendant manually lowered the seat to the fully reclined position. The passenger found that a portion of the seat was very hard, and he mentioned this to the flight attendant. The Court accepted that the “very hard” component was the protrusion of the lumbar support of the seat, which could not be adjusted manually.

There were five other empty seats in the first-class cabin, but by the time the passenger became aware of his discomfort, the cabin lights had been dimmed, the other passengers had settled down to sleep, and the vacant seats were filled with items belonging to others. The passenger gave evidence that he did not wish to be impolite and disturb those passengers, so he tried to settle into his seat with the assistance of cushions and blankets. He successfully managed to sleep for eight hours, despite remaining uncomfortable. When he awoke, however, he became aware of pain in his left leg, which subsequent investigation showed was probably caused by sciatica.

Prior to the flight, he had suffered from degeneration of the L5/S1 disc but he had not experienced any symptoms in the past 10 years. Evidence was given that he suffered ongoing, severe sciatica such that he was unable to sit for prolonged periods and every aspect of his day-to-day life was attended by limitation, discomfort and pain. Medical experts gave a reasonably favourable prognosis, with some improvement expected over the next 5–10 years.

In bringing proceedings, the passenger alleged that he had suffered bodily injury caused by an “accident” within the meaning of Article 17 of the Warsaw Convention. His Honour, Osborn J, found in favour of the passenger, accepting that the injuries had been caused by a series of circumstances which were unusual and unexpected, namely:

- (i) the use of a defective seat that was not operating in its usual, normal and expected manner;
- (ii) the invitation by cabin crew to use the defective seat and to use it in a reclined position when the lumbar support could not be adjusted; and
- (iii) the failure of cabin crew to relocate the passenger when the seat defect and discomfort became apparent.

The Court found that these circumstances, taken individually or together, constituted an “accident”. The defendant argued that the passenger’s decision not to

insist on an alternative seat once he realised his seat contained a “very hard” component broke the causal connection between any accident and the injury. The defendant also argued that the passenger had been contributorily negligent in identifying the problem to the flight attendant but not complaining further. His Honour rejected all of the defendant’s arguments, noting that the passenger “may with hindsight have been unduly polite towards and considerate of his fellow passengers, but that does not amount to contributory negligence”.

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Joy flight operators can’t contract out of liability

■ *Mount Beauty Gliding Club Inc v Jacob* – Victorian Supreme Court, Court of Appeal, 1 September 2004

Earlier this year a Victorian Supreme Court decision resulted in operators of flights, which took off from and landed at the same place in Victoria, being precluded from the operation of the *Civil Aviation (Carrier’s Liability) Act 1961*.

The matter came before Byrne J for determination of the preliminary question of whether the glider flight on which Jacob was a passenger was pursuant to a contract for the carriage of a passenger within the meaning of section 4 of the *Civil Aviation (Carrier’s Liability) Act 1961* (“the Act”).

According to His Honour, for a contract for the carriage of a passenger to fall under the Act, the flight had to be between a place in Victoria and another place in Victoria. In *Jacob*, the flight in question took off from Mount Beauty and was scheduled to return to Mount Beauty. In His Honour’s decision this did not equate to a flight between a place in Victoria and another place in Victoria.

On appeal

In a recent decision, the Supreme Court of Victoria, Court of Appeal, by a 2-1 majority decision, upheld an appeal by the Mount Beauty Gliding Club against the decision of Byrne J. Gallaway J (with whom Buchanan J agreed), held that a flight from Mount Beauty to Mount Beauty **did** fall within the definition contained in section 4 of the Act. His Honour held that the words in section 4 needed to be considered in the

context of what mischief the Victorian parliament was attempting to overcome when it made the legislation. According to His Honour, the mischief sought to be overcome by the Victorian Act “was the inability of the Commonwealth to implement the liability regime in the Warsaw Convention as amended by the Hague Protocol throughout Australia”.

Therefore, in interpreting the words of the Victorian Act, they should be interpreted having regard to the mischief the Act was designed to overcome.

That result is readily achieved by reading the words “between a place in a Territory of the Commonwealth and another place in that Territory” in s. 27(1)(c) as referring to a place of departure and a place of destination in a Territory and, similarly, reading the words “between a place in Victoria and another place in Victoria” in s. 4 as referring to a place of departure and a place of destination in the State.

On this interpretation, the flight was between a place in Victoria – being its point of departure, Mount Beauty – and another place in Victoria – being its destination, Mount Beauty. On this interpretation the flight was governed by the Act and, accordingly, Jacob was time barred from any claim he may otherwise have had.

Nettle J, in a dissenting judgment, held that the legislation was not ambiguous and after considering passages from the Second Reading speech of both the amendments to the Commonwealth Act and the Victorian Act, he determined that it was “impermissible to construe this legislation otherwise than in accordance with the natural and ordinary meaning of its terms”. Therefore, as the flight in question was not between a place in Victoria and another place in Victoria, he dismissed the appeal by Mount Beauty.

Is a glider an aircraft within the meaning of the Act?
Before the Court of Appeal, it was further argued that as a glider is not an aircraft within the meaning of s. 4 of the Victorian Act, the flight in question did not fall within the ambit of the Victorian Act.

Callaway J distinguished an English Court of Appeal decision, which held that a paraglider was not an aircraft for the purpose of Schedule 1 to the Air Navigation (No.2 Order 1995). His Honour held that “a glider is an aircraft within the ordinary meaning of the word, even if it more commonly refers to an aeroplane or helicopter”. Therefore, the glider flight which took off from Mount Beauty and was scheduled to land at Mount Beauty was carried out in an aircraft (glider) operated by the holder

of a charter licence (Mount Beauty Gliding Club), in the course of commercial transport operations (joy flight), under a contract for the carriage of the passenger between a place in Victoria (Mount Beauty, the place of departure) and another place in Victoria (Mount Beauty, the destination).

Consequences of decision for joy flight operators

Pending an appeal, the effect of this decision is that contracts of carriage between the operators of joy flights and their passengers, which take off and land at the same place in Victoria, are governed by the *Civil Aviation (Carriers Liability) Act 1961*. This means that the liability of the carrier is determined by the Act and the limitation period of two years will apply. Therefore, the provisions of the Victorian Fair Trading Act, which allow a provider of recreational services to contract out of liability, no longer apply to contracts of carriage for joy flights operated by the holder of an airline licence or charter licence.

It is unknown at this stage whether the plaintiff (respondent) is seeking leave to appeal to the High Court against the decision of the Victorian Supreme Court, Court of Appeal decision. We will monitor the position and follow up with a further article if and when leave to appeal is granted by the High Court.

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Challenging EU passenger compensation rules

■ Regulation No.261/2004 on Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding, Cancellation and Long Delays of Flights

A joint challenge by the International Air Transport Association (IATA) and the European Low Fares Airline Association (EEA) to the European Union (EU) rules on compensation and assistance to passengers who are denied boarding or face cancelled and long delays of flights succeeded on 14 July 2004.

The IATA and the EAA together obtained a referral from the High Court in London to the European Court of Justice (ECJ) of the question of the validity of the new EU Regulation.

The legal challenge

Firstly, the IATA/EEA allege that the Regulation denies air carriers a defence to claims for compensation for delays and cancellations caused by extraordinary circumstances such as bad weather, or acts of third parties such as an Air Traffic Control (ATC) strike.

By contrast, the Montreal Convention (“the Convention”) provides that air carriers are not held to be liable for delay if they prove that they took all measures that could reasonably be required to avoid the delay, or it was impossible for them to take such measures. The EU and most of its constituent states are signatories to the Convention, however, they appear to have adopted a Regulation wholly inconsistent with it (there is a reference in Recital 14 to the Regulation to a “Montreal” defence to claims made under the Regulation although this is not included in the text of the Regulation itself).

Secondly, the IATA/EEA also allege that there was an infringement of procedural requirements for cancellation provisions during the passage of the Regulation. In the EU Council it was agreed that air carriers should have the defence of extraordinary circumstances in relation to claims for reimbursement, re-routing and assistance. However, this agreement did not make it into the Regulation.

The Regulation

The Regulation was adopted by the EU on 11 February 2004 and is due to come into effect on 17 February 2005. It has potentially far-reaching effects for the future operation and booking practices of all airlines operating into or out of the now enlarged EU.

Pre-existing EU law on denied boarding

Since 1992 passengers of scheduled airlines operating into or out of EU airports have had statutory rights to compensation for denied boarding or “bumping” from flights for which they had a confirmed reservation. Passengers gained the right to minimum financial compensation, the choice between an alternative flight at the earliest opportunity, re-routing or ticket reimbursement and for assistance to reduce the inconvenience of waiting for a later flight (Regulation (EEC) No.295/91). This Regulation expands the existing rights of air passengers and treats air transport differently from other modes of transport.

In 1998 the EU Commission proposed amendments to the previous Regulation, including an increase in the minimum compensation levels in line with inflation and extending the scope of protection to include passengers

buying seats on non-scheduled flights. The EU Parliament proposed more radical reform, to include EU carriers flying from non-EU airports back to EU airports.

According to the UK Department of Transport, disagreements between the UK and Spain over the application of the proposal to Gibraltar led to the proposal’s failure. The recently adopted Regulation is, if anything, even more far-reaching than the abandoned proposal (the UK and Eire voted against the Regulation, Germany abstained).

The controversy

In European Commission press releases, the Vice-President in charge of Transport and Energy, Loyola de Palacio, claims that the Regulation:

...is one of the major initiatives of this Commission in order to put the citizens at the heart of EU policies... Too many times, air passengers are victims of practices which deserve that they receive a fair treatment and proper compensation: henceforth, they will all benefit from new strengthened rights... As we did in the past, the European Commission will ensure that the passengers are informed of their new rights and a proper information will be given in all airports (sic).

On the other side of the fence, IATA Director General and CEO, Giovanni Bisignani, maintains.

Airlines accept the need to compensate passengers for denied boarding, but we cannot accept to pay compensation for areas beyond our control. With this regulation, the EU regulators have endangered the consumer interest they seek to protect... This regulation is misguided and poorly conceived... The economic incentive to operate to schedule already exists—delays and cancellations are costly. But according to Eurocontrol over 50% of delays are completely outside of the control of airlines. This is why airlines have worked with our ATC partners to reduce delays in Europe by 37% over the last three years. (IATA Press Release No: 8, 21 April 2004)

The effect of the Regulation

The new Regulation, which is made up of “Articles”, introduces four important rights which will be directly enforceable in the courts of all EU jurisdictions:

1. The Regulation extends air passengers’ rights to all kinds of flights (Article 2):
 - covering both scheduled and non-scheduled flights (including air transport sold as part of a package holiday) and applying not only to passengers departing from an airport located in an EU State

but also, if the airline operating the flight is a “Community carrier”, to passengers flying from a third country to an EU State (Article 3), unless they receive similar treatment in the third country;

- passengers must have a confirmed reservation on a flight and check-in either as stipulated by the air carrier or tour operator or 45 minutes before the published departure time.

2. The Regulation purports to discourage denied boarding or passenger “bumping” (Article 4) and aims to reduce the frequency of involuntary denied boarding by:

- obliging airlines to call for volunteers to surrender their seats in exchange for advantages – only if insufficient volunteers came forward would airlines be allowed to deny passengers boarding against their will (Article 4);
- requiring an airline (or a tour operator) to pay compensation at a dissuasive level (Article 7) to a passenger who is denied boarding:
 - €250 (A\$425) for flights of less than 1500 km;
 - €400 (A\$680) for intra-Community flights of more than 1500 km and for other flights between 1500 km and 3500 km;
 - €600 (A\$ 1,020) for all other flights.

In addition to financial compensation, passengers denied boarding will continue to be entitled to:

- the choice between reimbursement of their ticket and an alternative flight (Article 10); and
- meals, refreshments and hotel accommodation (Article 9).

3. The Regulation extends the right to statutory compensation (at the rates specified for denied boarding) to passengers whose flights are cancelled (Article 5). Compensation will be payable unless:

- the passenger is informed two weeks before the scheduled time of departure; or
- the passenger is informed in due time and re-routed at a time very close to that of the original flight.

Passengers will receive three other additional rights in case of flight cancellations:

- meals and refreshments; and
- hotel accommodation, when a cancellation obliges a passenger to stay overnight; and
- reimbursement, if delayed for at least five hours.

4. The Regulation also purports to provide statutory assistance to passengers facing long delays. The length of delay beyond scheduled departure time required before an airline must give assistance depends

on the distance of the flight and whether the destination is within or outside the EU (Article 6). The length of delays which trigger the statutory protections of the Regulation are:

- two hours or more for flights of 1500 km or less; or
- three hours or more for all intra-Community flights of more than 1500 km and for all other flights between 1500 km and 3500 km; or
- four hours or more for all other flights.

In summary, the most far-reaching effects are:

- Increasing by a factor of five (from the previous statutory entitlement) the minimum amount of compensation for denied boarding.
- Requiring airlines to call for volunteers to surrender reservations in exchange for agreed benefits.
- Extending the rights of passengers denied boarding to passengers whose flights are cancelled.
- Requiring airlines to offer assistance to passengers for delays and to allow for ticket reimbursement if the passenger no longer wishes to travel.
- Extending the scope of the Regulation to include non-scheduled flights (for seat-only and tour passengers).
- Requiring airlines not to deny boarding and to give priority to a disabled passenger and any accompanying person, to a passenger whose mobility is otherwise reduced or to an unaccompanied child.
- Imposing more stringent obligations on airlines to inform passengers of their rights.
- Requiring compensation to be paid immediately in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

A contractual solution?

Under Article 15 of the Regulation, an airline or package tour operator is not entitled to contract out of or otherwise limit a passenger’s rights under the Regulation. If an airline or tour operator included such a clause in a contract of carriage and a passenger accepted compensation inferior to that in the Regulation, a passenger would be entitled to claim the difference in compensation in any of the EU courts. It is to be hoped that the ECJ will expedite the hearing on the validity of the Regulation prior to the date of its inception on 17 February 2005.

If the challenge is unsuccessful, Australian and other airlines operating from and into EU airports would be well advised to avoid denials of boarding, delays and cancellations.

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Conviction for failure to record aircraft defects quashed on appeal

■ *Fisher v Firkins* [2004] WASCA26 – Western Australian Supreme Court, 4 March 2004

This appeal of the first instance conviction for a breach of Regulation 50 of the Civil Aviation Regulations 1998 (“CAR”) related to a pilot’s failure to record aircraft defects on a maintenance release, which Australian flight crew members are required to do. The pilot pleaded not guilty to the charge at first instance but was convicted and fined \$700 in addition to costs and disbursements of \$2,988.

The pilot (Fisher) was charged with having breached r. 50 by failing to record the following defects on the maintenance release: fuel calibration card missing; co-pilot door will not open from the outside; landing gear warning horn going off at 17 inch MP; Auto-Pilot U/S (heading hold); and 1.5 inch split under right-side flap. While these five defects were identified in the inquiry which eventually led to the charge, they were not identified in the complaint, which stated that the flight crew member upon “becoming aware of the existence of defect in the aircraft failed to enter on the maintenance release... an endorsement signed by him setting out the particulars for the defect contrary to regulation 50”.

At the appeal, it was argued that the complaint was bad for duplicity being in breach of s. 43 of the Justices Act. In addition, an ancillary argument was raised in relation to the charge being “not a charge that is known to the law”.

Heenan J held that the complaint failed to identify clearly whether or not there had been one breach of the Regulation by a failure to record the five defects alleged, or whether there were five distinct breaches. His Honour held that the language of the complaint was capable of being construed as meaning that there had been only one breach of the Regulation. However, this is not the way in which the complaint was treated or determined by the trial judge, who did not appear to recognise that the complaint alleged five distinct breaches of the Regulation and, if proved, five offences. Consequently, Heenan J held that this complaint offended the

proscription contained in s. 43 of the Justices Act, that every complaint should be for one matter only.

In relation to the charge not being a “charge that is known to the law”, the pilot argued that r. 50 did not make it a singular offence to discover four defects on an aircraft and then fail to endorse on the maintenance release those four, particularly when the charge alleged that five defects were discovered and that the pilot failed to endorse all five on the maintenance release. Heenan J accepted the pilot’s argument and concluded that the conviction should be quashed and that the charge should also be quashed rather than dismissed.

Heenan J then proceeded to consider whether the appeal should be dismissed on the basis that no substantial miscarriage of justice had occurred pursuant to s. 199(1)(b) of the Justices Act, despite the complaint breaching s. 43 of the Justices Act, and instead charged the pilot with an offence “not known to the law”. In an effort to discharge the onus of establishing that there had been no substantial miscarriage of justice, the respondent submitted that the five alleged breaches of r. 50 constituted a series of acts omitted to be done in the prosecution of a single purpose and, accordingly, could have been joined in the same complaint under s. 43.

Heenan J rejected this argument and concluded that the existence of five separate alleged offences was never directly considered by the trial judge, as reinforced by the one conviction and one penalty for what were really four separate offences. His Honour held that the respondent had not established the onus that there had been no substantial miscarriage of justice. While His Honour stated that this was enough to dispose of the appeal, he went on to consider the nine other grounds of appeal. Central to these grounds of appeal was the concept of “defect” contained in r. 50. His Honour held that for a breach of r. 50 to exist there was a need for a “defect” to exist in fact. Once a defect is found to exist in fact it must be less serious than a “major defect”, which would immediately lead to the grounding of the aircraft.

A “defect” is a flaw or imperfection requiring attention by a qualified maintenance engineer, not immediately, but at the next compulsory inspection. Heenan J concluded that determination of a defect will ultimately be contingent on classification of the defect as one of fact and degree depending on the judgment of a suitably qualified flight crew member. On the facts of this case, His Honour held that there was no evidence for the prosecution from any person who had directly examined the aircraft or the alleged faults.

In light of the above, His Honour concluded that this appeal should be allowed and that the pilot's singular conviction, on what was a complaint incorrectly asserting multiple offences, should be quashed. His Honour stated that appeals from convictions based on complaints which offend the law relating to duplicity have generally resulted in orders quashing the convictions without reliance on provisions such as s. 191 of the Justices Act.

However, His Honour pointed out that in *Walsh v Tattersall* the courts left open the possibility for the complainant to institute fresh proceedings. Consequently, His Honour left open the possibility of whether any further prosecution should be commenced by way of a fresh complaint(s).

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News in brief

Air New Zealand & Qantas dream ends

On 20 September the two airlines lost their appeal against the New Zealand Commerce Commission rejection of the proposed trans-Tasman alliance, more than two years after the airlines first raised the idea of a partnership (*Sydney Morning Herald*, 21.09.04). In an interesting twist, the Australian Competition Tribunal subsequently approved the alliance on 12 October. However, as both the New Zealand and Australian approvals were required, the alliance as contemplated will not proceed (*Lloyd's List DCN*, 13.10.04).

Regulator phases out 'risky' airspace system

Airservices Australia announced its plans to reverse parts of the system to control airspace, just nine months after implementation, due to concerns that it creates an "intolerable risk" of an accident occurring, specifically at airports in Albury and Hobart (*AFR*, 12.08.04).

BA sells out of Qantas

In a share sale estimated to net British Airways more than A\$1 billion, BA announced its plans to sell its 18.25% stake in Qantas by 14 September. The airlines stated that their joint services agreement would not be affected by the share sale (*The Age*, 08.09.04).

The real life of...



Nick Burkett
Partner

Q Who is the most famous person you have met?

A At best I have a habit of running into Wallaby (rugby union) players.

Q Who is your favourite musician?

A You're asking someone whose interest in music puts Nick Hornby to shame – I am currently enjoying Jim White, Tom Waits, Brahms' Violin Concerto.

Q Who makes you laugh?

A My three boys mostly.

Q Who inspires you?

A As a keen reader of history I am constantly amazed at any number of achievements by individuals.

Q If you could live anywhere in the world, where would it be?

A Brisbane (seriously).

Q What do you do for recreation?

A Cycling... proud finisher of the Epic Off Road 50 km challenge in September.

Q Who would you most like to sit next to on an aeroplane?

A Bruce Willis could be handy if anything cropped up... but then again you're asking for trouble catching the same plane as him!

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