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Aviation Law Bulletin

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Australian aviation safety in line with rest of world

The Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004 was introduced to federal Parliament on 11 May 2004 as part of the government's attempt to bring Australian aviation safety regulations into line with international standards.

The purpose of the bill is to amend section 98 of the *Civil Aviation Act 1988* to allow the Governor-General to make civil aviation regulations that may contain provisions inconsistent with the current Australian anti-discrimination laws, where the inconsistency is necessary for aviation safety.

The bill, if passed, would have retrospective application in order to address uncertainty as to the validity of current regulations which are possibly inconsistent with either the *Sex Discrimination Act 1984* or the *Disability Discrimination Act 1992*. In particular, special conditions imposed on pregnant pilots and regulatory requirements affecting disabled passengers would not be unlawfully discriminatory under the amendment.

Although the Civil Aviation Safety Authority (CASA) has already been granted a five-year exemption in relation to certain provisions of the *Disability Discrimination Act 1992* and the *Sex Discrimination Act 1984* by the Human Rights and Equal Opportunity Commission, the proposed amendment to the *Civil Aviation Amendment Act 1988* will provide long-term certainty for carriers and insurers in terms of exposure to claims for discrimination when acting in accordance with CASA regulations.

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Regulatory powers stripped from Airservices

On 1 April 2004 new arrangements for the management of Australian airspace were jointly announced by the Deputy Prime Minister and Minister for Transport and Regional Services, John Anderson and the Minister for Finance and Administration, Senator Nick Minchin.

The catalyst for this initiative is the Civil Aviation Safety Authority's (CASA) findings into the near-collision that occurred close to Launceston, Tasmania in December last year between a light aircraft and a Boeing 737, only one month after the controversial new airspace rules referred to as "see and avoid" were implemented.

The new arrangements consist of the government stripping Airservices Australia of its regulatory powers and transferring the regulatory role to a new directorate within the Department of Transport. Mr Anderson justified the separation of regulatory functions from operational activity on the basis that it is not "appropriate for a commercial service provider such as Airservices to also have a regulatory role, particularly when its decisions about the designation of air routes and the classification of airspace could have profound effects on the costs borne by users of airspace".

“The new arrangements consist of the government stripping Airservices Australia of its regulatory powers and transferring the regulatory role to a new directorate within the Department of Transport.”

The Deputy Prime Minister further highlighted that this separation of roles was the rationale underpinning the creation of two distinct bodies in the form of Airservices and CASA in 1995.

The new directorate to be created within the Department of Transport and Regional Services will focus on the efficient and safe use of airspace in the context of a safety regulatory regime to be contained in Pt 71 of the

Civil Aviation Safety Regulation 1998 (Cth) ("CASR"). The commencement of Pt 71 of CASR through enabling legislation currently being considered by Parliament will mark the actual transfer of the regulatory function from Airservices to the new directorate.

Until Pt 71 of CASR comes into force, Mr Anderson stated that Airservices will continue to perform its regulatory function, however, internal procedures will be established to ensure that its regulatory activities are separate from its operational air traffic control activities. Despite a new directorate being formed to regulate air traffic and safety, it does not appear that CASA will dispense with the controversial US-based airspace rules which have angered pilots, air traffic controllers and their unions as they believe these rules are unsuitable for Australian skies.

In contrast, Bruce Byron, Chief Executive Officer of CASA, stated that he could find no reason to recommend radical changes to the new airspace system following a review of the report into the Launceston incident. Rather, CASA has "fine-tuned" the airspace system through more information being supplied to pilots, and the placing of air traffic control frequencies and the inclusion of instrument flight rules routes on all visual charts, in addition to the provision of extra pilot training and education material.

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Air rage passenger jailed

A drunk Canadian passenger who caused a number of incidents on an international flight from Hong Kong to Melbourne on 4 December last year has ended up with a one month jail sentence.

Incidents of air rage continue to attract attention around the world. Airlines are understandably concerned at these incidents, the dangers they pose, the inconvenience to others, and the often considerable costs they generate. Governments in many countries, including Australia, have legislated to deal with what is perceived as an increasing problem. This recent case in Australia is an example of how the courts are dealing with these incidents.

The passenger became loud and destructive after drinking alcohol. When flight attendants refused to serve him any more alcoholic drinks, the passenger screamed obscenities and punched the seats in front of him, forcing flight attendants to relocate surrounding passengers.

The offending passenger also punched a flight attendant in the stomach, punched and kicked the door of an occupied toilet and urinated in the aisle and against the toilet door.

On arrival at Melbourne, the passenger was arrested and subsequently charged under the *Crimes (Aviation) Act 1991* (Cth) for an “act likely to endanger aircraft”, “assault/threat member of aircraft crew”, “behaviour offensive on aircraft” (three times), and “offensive/disorderly manner on aircraft”.

The passenger pleaded guilty to the three charges of “behaviour offensive on aircraft” and “offensive/disorderly manner on aircraft”. The Prosecutor withdrew the charges of “act likely to endanger aircraft” and “assault/threat member of aircraft crew”. The matter was initially heard in the Magistrates Court of Victoria on 18 December 2003 and the passenger was sentenced to three months imprisonment.

The Magistrate said the offending passenger’s behaviour was “abominable” and also said “to attack staff... was unforgivable and then you took it a step even further by urinating in the plane and making it incredibly uncomfortable for people” (*The Age*, 18 December 2003).

The passenger sought bail and appealed the sentence to the County Court of Victoria. The appeal was heard on 2 February 2004. The County Court Judge set aside the orders imposed by the Magistrate and sentenced the passenger to one month imprisonment for the charges of “behaviour offensive on aircraft” (three times) and fined him \$1,000 for the charge of “offensive/disorderly manner on aircraft”.

While some readers may be disappointed at the reduction in the sentence on appeal, the Australian courts do appear to be treating passenger air rage as a serious criminal offence and will, depending on the circumstances, impose a period of imprisonment on passengers guilty of such conduct.

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Obligations under the Aviation Transport Safety Security Act 2004

The *Aviation Transport Safety Security Act 2004* (Cth) was passed by parliament on 3 March 2003 and received Royal Assent on 10 March 2003. The Act’s operative provisions will commence on a day which is yet to be proclaimed by the government.

In addition to creating a new offence of actual or threatened “unlawful interference with aviation”, the Act places a number of obligations on industry participants which are discussed below.

1. First, the provisions of the Act require aviation industry participants to have in place transport security programs approved by the Secretary of the Department of Transport (“the Secretary”). The programs must detail how the participants will aim to manage security for their operations. The parties that will be required to implement transport security programs include operators of certain airports, as prescribed by the Secretary, operators of certain air services (as yet to be prescribed by the regulations), and any other participant of a kind prescribed by the (yet to be proclaimed) regulations. Aviation industry participants who do not conform with an accepted program will be guilty of an offence of strict liability, punishable by a fine.
2. The provisions of the Act will enable the Secretary to prescribe certain airports as being security controlled airports. If an airport is designated as such, it will be subject to special security requirements that are yet to be spelled out in the regulations. Breaches of these requirements may also result in fines.
3. The provisions of the Act establish a number of specific security measures including those relating to on-board security, screening of passengers, the treatment of persons in custody and offences in relation to weapons and other prohibited items. Airport operators and other aviation industry participants will need to ensure that they comply with the various provisions and regulations relating to these specific security measures.

4. The Act establishes reporting obligations for aviation industry participants in relation to any aviation security incidents which amount to either:
 - a) a threat of unlawful interference (as defined in the Act) with aviation, or
 - b) an actual unlawful interference with aviation.

The regulations, once proclaimed, are to regulate the form and content of the reporting obligations. Failure to report an aviation security incident is an offence of strict liability and may result in a fine.

“The provisions of the Act... will have far-ranging effects upon the industry as a whole... participants will be required to ensure that they comply with a number of obligations or face prosecution or fines.”

5. Finally, the Act allows the Secretary to require aviation industry participants to provide information about their compliance with the provisions of the Act. Failure to comply with any request is also an offence for the purposes of the Act.

Roles and powers under the Act

In addition to the above obligations, the Act also establishes the role and powers of various officials under the Act including aviation security inspectors, law enforcement officers, airport security guards and screening officers. Furthermore, the Act also provides a range of enforcement mechanisms.

The provisions of the Act, once proclaimed, will have far-ranging effects upon the industry as a whole. Various participants will be required to ensure that they comply with a number of obligations or face prosecution or fines. An assessment of the actual requirements of the Act and their effects upon industry members will have to await the proclamation of the regulations. We will report further as soon as the content of the regulations are made public.

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Taking the joy out of flying

■ *Jacob v Mount Beauty Gliding Club Inc & anor* – Victorian Supreme Court, 7 April 2004

A recent decision exposes operators of joy-flights to potentially greater liability in circumstances where a flight takes off and lands at the same place in Victoria, which would be likely in most situations.

However, joy-flight operators may be able to limit their exposure as a result of amendments to the *Fair Trading Act 1999* (Vic) and the *Trade Practices Act 1975* (Cth) which allow providers of recreational services to exclude terms otherwise implied in contracts for services by these Acts. (Note: The amendments to the *Fair Trading Act 1999* (Vic) incorporate and amend provisions previously contained in the *Goods Act 1958* (Vic). Contracts for services entered into prior to the amendments to the *Fair Trading Act 1999* (Vic) are still covered by the repealed Part IV of the Goods Act; see section 122 of the Goods Act and section 32DA of the Fair Trading Act.)

Facts

Ryan Jacob contracted with the first defendant for a joy-flight in a glider at the cost of \$45, taking off from the Mount Beauty Airstrip and returning there after the flight. It is unclear what occurred during the flight, however, Jacob claimed damages for an injury he suffered from an accident in which the glider was involved. Jacob claimed that he had suffered the injury due to negligence of the operator of the aircraft and the pilot (“the defendants”). The defendants denied any negligence, relying on a defence that the contract for carriage was governed by the provisions of the Victorian Act. Pursuant to section 5 of that Act, the provisions of Part IV of the *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) (“Commonwealth Act”) apply to contracts of carriage which are governed by the Victorian Act.

The Court was asked to determine whether a joy-flight, which began and ended at the same place in Victoria, constituted a contract for the carriage of the passenger between a place in Victoria and another place in Victoria and was therefore covered by the Victorian Act.

If the Court determined that the flight was covered by the Victorian Act, then Jacob would have no cause of action as the proceedings would have been time barred

by virtue of section 34 of the Commonwealth Act (as a claim must be brought within two years of when the aircraft ought to have arrived or the carriage stopped). This, in conjunction with section 36 of the Commonwealth Act, would have defeated his cause of action.

One of the difficulties faced by the defendants was that the flight had taken off and landed at the same place, therefore to fall within the Act they would have to show that this constituted the carriage of a passenger between *a place* in Victoria and *another place* in Victoria. To convince the Court of this point the defendants submitted that:

- the Court should construe the various stages of the flight as being from one place in Victoria to another place in Victoria, being from the airstrip to the plane location at a given time during the flight; and
- the Court should construe the section as if the word “another” was not included so the section would read, “from one place in Victoria to a place in Victoria”. This, it was said, would be in accordance with other similar State legislation and the intention of the Victorian Parliament in enacting this section.

The Court rejected both of these arguments and held that the ordinary meaning of the words did not allow for any extrinsic aids to be used in construing the meaning of the section.

Therefore, it would appear that a contract for a flight which takes off and lands at the same place in Victoria, without landing anywhere else, is not a contract to which the Victorian Act applies. Subject to this decision being overturned on appeal or the Victorian Parliament amending the Victorian Act, joy-flight operators appear to be no longer able to rely on the provisions within the Victorian Act.

Unlimited liability?

Although at first instance this decision would appear to open a joy-flight operator to unlimited liability for negligence, this may not be the case. If a contract of carriage is covered by the Victorian Act, then section 32 of the Commonwealth Act precludes a party to a contract covered by the Act from contracting out of its liabilities.

However, a joy-flight which takes off from a place in Victoria and lands at the same place, is not covered by the Act, so section 32 would not apply. This means that a contract for a joy-flight would be a contract for services and may be governed by the common law and the provisions of the Victorian Fair Trading Act when the services are provided by a natural person or a sole trader

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and/or by the Trade Practices Act in circumstances where the services are supplied by a corporation.

Both of these provisions imply terms in contracts for services, however, as a result of recent amendments, a provider of recreational services and the user of those services can now contract out of these implied terms, provided certain pre-conditions are complied with.

Goods Act and Trade Practices Act

Part 2A of the *Fair Trading Act 1999* (Vic) implies conditions and terms in certain sale and lease contracts. These provisions operate in contracts where the consideration for the provision of the services is less than \$40,000, or if more than \$40,000 but the services are of a kind normally acquired for personal, domestic or household use or consumption. It is anticipated that the greater majority of Victorian joy-flights would not exceed this amount, and even if they did, it is arguable that the service is for personal use.

Pursuant to section 32F(b) of the Fair Trading Act, Part 2A applies to “a contract of supply of services, whether or not the contract includes a supply of goods”.

Section 3 of the Fair Trading Act defines services as including:

- any rights (including rights in relation to, and interests in real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, including the rights, benefits, privileges or facilities that are, or are to be provided, granted or conferred under a contract for or in relation to—*
 - (a) *the performance of work (including work of a professional nature) whether with or without the supply of goods; or*
 - (b) *the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or*
 - (c) *the conferring of rights or benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar payment— but does not include rights or benefits being the supply of goods or the performance of work under a contract of service...*

The provision of joy-flights would fall within subsection (b) and, therefore, be classified as a service. Section 32J of the Fair Trading Act provides that in the supply of services there is an implied term that the services will be performed with due care and skill.

32J. Implied conditions in supply of services

In a contract of supply of services there is:

- (a) an implied condition that the services will be rendered with due care and skill; and*
- (b) in the case of a sale of services by a person who sells services in the course of a business, an implied condition that the services are as fit for the purposes for which services of that kind are commonly bought as it is reasonable to expect having regard to the price of the services, the terms of the sale and all other relevant circumstances.*

Similar provisions are implied into contracts entered into by a corporation for the provision of services to a consumer (section 74, *Trade Practices Act 1974*).

Section 32L and section 32LA of the Fair Trading Act provide that any term of a contract which seeks to restrict or limit the liability of a supplier of services for breach of the terms implied by Part 2A is void. Prior to the amendments to the Acts, these or similar worded sections meant that a supplier of any type of service was not able to limit or restrict the implication of terms by the Acts.

However, since the amendments, if the services being supplied are recreational services then pursuant to section 32N of the Trade Practices Act a term of the contract for the supply of services may not be void by virtue of sections 32L or section 32LA, if it seeks to restrict or limit the liability of a supplier of recreational services. This means that, subject to certain restrictions contained in section 32N, a supplier of recreational services may contract out of the terms implied by the Fair Trading Act and a contract provision giving effect to this will not be void by section 32L or section 32LA.

Recreational services are defined in the Fair Trading Act as meaning:

...services that consist of participation in—

- (a) a sporting activity or a similar leisure-time pursuit; or*
- (b) any other activity that—*
 - (i) involves a significant degree of physical exertion or physical risk; and*
 - (ii) is undertaken for the purposes of recreation, enjoyment or leisure.*

A similar definition is contained in the Trade Practices Act. These provisions are limited to liability for death or personal injury and are subject to certain conditions contained within each Act (for example, see section 32N(2) of the Fair Trading Act). This means that a joy-flight operator can contract with passengers to exclude the operation of section 91 and therefore, can agree with the passenger that the term is not implied into the contract for the joy-flight. While these provisions will not restore the protection afforded to joy-flight operators under the Victorian Act, it will enable them to limit any exposure to liability arising out of the provision of services in the form of joy-flights.

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Reported incidents near 4000 in past year

As we approach the one year anniversary of the commencement of the *Transport Safety Investigation Act 2003* (Cth) (on 1 July 2003), the compulsory reporting of incidents provision has resulted in some interesting statistics. The Australian Transport Safety Bureau (ATSB) indicated that as at 16 June 2004 there have been 3997 reported incidents involving fixed wing aircrafts.

The Act distinguishes between a “immediately reportable matter” and a “routine reportable matter” which are defined in the Regulations.

“**Immediately reportable matters**” for “all aircraft operations” and “air transport operations” are set out in detail in clause 2.3 of the Regulations and must be immediately reported by a “responsible person” as soon as reasonably practicable and a written report must be provided within 72 hours.

“**Routine reportable matters**” for “air transport operations” and “aircraft operations other than air transport operations” are set out in detail in Clause 2.4 of the Regulations and a written report must be provided within 72 hours.

Reportable matters are far-reaching and just about any incident involving aircraft operations and/or air transport operations will be considered a reportable matter.

Some examples of incidents reported to date are:

- any major incident;
- injuries including broken limbs;
- incapacitation of a crew member;
- fumes in the cabin arising from cooking in the galley; and
- aircraft leaking fuel reported by Air Traffic Control.

Of particular interest, a “routine reportable matter” includes any injury, other than a serious injury (which is an “immediately reportable matter”) to a person on board or in contact with the aircraft or anything attached to the aircraft or anything that has become detached from the aircraft or a person exposed to jet blast. (Please note there are many other prescribed reportable matters which do not involve incidents of death or injury to a person.) Arguably, any person injured in connection with aircraft operations and/or air transport operations will be a reportable matter.

Death or serious injury to a person in connection with aircraft operations and/or air transport operations is an “immediately reportable matter”. However, the death of, or serious injury to, a person does not include death or serious injury:

- resulting from natural causes (except to a flight crew member);
- that is self-inflicted;
- that is intentionally caused by another person;
- that is suffered by a stowaway in a part of the aircraft that is not usually accessible to crew members or passenger after take-off; or
- death occurring more than 30 days after the occurrence that caused the death, unless the death was caused by an injury that required admission to hospital within 30 days after the occurrence.

The Regulations clearly make it compulsory for almost all injuries to be reported, no matter how minor or in what circumstance the injury arose. For instance, a passenger injured by an item falling from an overhead locker would likely be a reportable matter.

The ATSB does not have the capacity to investigate all reportable matters and will only investigate serious matters or matters of special interest. However, the information collated from the reportable matters is studied to identify any trends and make recommendations regarding safety and required modifications.

“The airline industry in Australia has asked what type of injuries are reportable matters. The answer is, if in doubt, report it.”

The airline industry in Australia has asked what type of injuries are reportable matters. The answer is, if in doubt, report it. All most all injuries which occur in connection with aircraft operations and/or air transport operations are required to be reported (unless excluded), no matter how minor the injury. It will then be up to the ATSB to investigate if appropriate.

Finally, the Act has a wide jurisdiction and all airlines which travel to Australia will need to be familiar with the Act and Regulations to be able to comply. Pursuant to section 22 of the Act, a transport safety matter cannot be investigated unless it has some connection with Australia, such as:

- it occurred here or involved an Australian transport vehicle;
- the evidence relating to the occurrence is to be found in Australia;
- Australia is obliged under an International Agreement to participate in an investigation; or
- Australia is requested to investigate by an appropriate authority of another country.

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News in brief

Landmark aviation security deal signed between Australia and the United States

On 8 May 2004 the Australian Minister for Justice and Customs, Senator Chris Ellison, announced new aviation security measures in the form of air security officers, who will be deployed on flights between Australia and the US. US air marshals will be deployed on US-registered flights and Australian Air Security Officers on Australian flights to and from Australia and the US.

This deal will enhance aviation security as part of a comprehensive multi-layered approach by the Australian government to boost security both on the ground and in the air, according to Senator Ellison, with the details surrounding the timing of the arrangements remaining confidential.

The real life of...



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Q Who is the most famous person you have met?

A My wife tells me she is.

Q What/who is your favourite movie/music/artist...?

A Anything by author John Mortimer, but especially Rumpole, like the Simpsons it works on so many levels.

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

A Antarctica for 12 months.

Q What do you do for recreation?

A Attempt to finish the DIY renovations. And every now and then squeeze in a few hours flying to keep my PPL current.

Q Who makes you laugh?

A Our 12 year old son Casey, wicked sense of irreverence.

Q Who inspires you?

A Anyone with a dream and the passion to pursue it.

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

A My wife when she is in first class, alternatively, Leonardo da Vinci. In addition to being just about the smartest person ever, Leonardo is reported to have been a strikingly handsome man with a fine singing voice.

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