



september  
2006

# aviation lawbulletin

## □ SAFETY RECORD IN AUSTRALIA

### Flying in Australian skies... safe, safer, safest?

The safety record for fatalities and fatal accidents in the Australian civil aviation industry is improving and here we compare it to other Western countries.

In response to media reports in late 2005 that the commercial fatal accident rate in Australia was increasing (the information for which was primarily sourced from Dick Smith, businessman, pilot and former CASA member), the Australian Transport Safety Bureau (ATSB) published a paper in March 2006 responding to these claims. The paper analysed fatal accident and fatality rates involving civil aircraft in Australian airspace between 1990 and 2005. The analysis showed that the number of fatal accidents and fatalities in Australia were very low and significantly declined over the period of analysis.

As foreshadowed in that paper, the ATSB has now gone one step further by comparing the fatal accident and fatality rates for civil registered aircraft in Australia with similar datasets from New Zealand (NZ), the United Kingdom (UK), the United States (US) and Canada for the period from 1995 to 2004. The results have been published by the ATSB as a draft discussion paper. The international comparison revealed that overall the fatal accident and fatality rates for Australia were comparable (and often lower) than the other countries considered in the study.

Neither of these findings is particularly surprising given the following:

- the previous ATSB 2001 paper which compared Australian fatal accidents and fatalities with data from the US and Canada;

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## □ MELBOURNE TEAM

### Strong aviation representation in Melbourne

We are pleased to announce that from early September Matthew Brooks will be stationed in our Melbourne office as a key member of the firm's Aviation Group.

Matt, who has been with the firm since August 2000, takes on his new role as Special Counsel, and will continue to focus on supporting those involved in the aviation industry and their insurers, particularly in south eastern Australia. Matt will be able to call on the resources of the full aviation group as and when the need arises.



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## introduction



Simon Liddy  
Partner

Welcome to the September 2006 issue of our *Aviation Law Bulletin*. In this issue we discuss the announcement made by the Minister for Transport and Regional Services, Hon Warren Truss MP, regarding drug and alcohol testing, and compare the safety record for fatalities and fatal accidents in Australia to other Western countries. Of particular interest, we review a case that attempts to challenge the scope for passengers to claim in contract damages for mental distress and humiliation, and a case that revisits employers responsibilities under the *Occupational Health & Safety Act 2000* (New South Wales).

On the home front, Matthew Brooks has take up residence in our Melbourne office, and Hayley Robertson gives us the low down on 'Bob Geldof' and 'them Mondays'.

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- the 2002 New Zealand Civil Aviation Authority paper which compared NZ fatal accident and fatalities data with equivalent Australian data;
- the International Air Transport Association 2004 worldwide safety report which analysed accidents involving jet and turbo-jet planes in 2004; and
- the International Civil Aviation Organisation 2006 working paper on worldwide and regional trends in aviation safety.

These reports all indicated Australia had a comparable, and more often than not, better safety record than the majority of countries with which it was compared.

Further comments on the paper **“Analysis of fatality trends involving civil aviation aircraft in Australian airspace between 1990 and 2005”**

Although the paper’s title indicated the analysis was from 1990 to 2005, the last year in which data for all categories of comparison was available was 2004. The report highlighted Australia’s excellent record of no hull losses and no fatal accidents involving passenger jet aircraft. The analysis, based on the age of the pilot and the number of hours flown, showed that it is safer to fly with

a pilot aged 25 to 45 years and safer to fly with a pilot who has either less than 49 hours total flying experience or 1,000 to 10,000 hours total flying time experience.

Comments on discussion paper **“International fatality rates: A comparison of Australian civil aviation fatality rates with international data”**

Due to the different ways each country classified the categories of operations within civil aviation, and consequently recorded their data, it was not possible to conduct a comparison across all of the countries simultaneously. To overcome this problem, the paper compared the Australian data separately with each country using the datasets that were best comparable.

The paper also recognised that a further obstacle in comparing international data is the different way in which each country categorises what is an aviation “accident” and how each country records such incidents. To overcome this potential problem the paper used the definition of accident adopted by the Australian aviation industry, as provided by the International Civil Aviation Organisation, to define an

aviation accident and only compared the Australian data with countries that also adopted the same definition.

Benchmark and conclusion

Although the study provides a good benchmark on Australia’s performance, it has some limitations in direct data comparison and therefore should not be used for direct incident number comparisons. For example, in Australia the proportion of commercial charter operations is double that of on-demand services for the US (on-demand services being the term used by the American Aviation industry to describe commercial charter operations). Because of the higher fatality rates associated with commercial charter operations this difference had a marked effect on the overall aircraft carrier fatal accident rate for Australian when compared to the US.

The ATSB report concludes that if Australia’s aircraft operation activity mirrored that of the US (i.e. greater on-demand operations than commercial charter operations), the overall fatality rate would fall below that of the US.

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□ AVIATION SAFETY

# Safety first: the introduction of drug and alcohol testing in the Australian aviation industry

On 2 May 2006, the Minister for Transport and Regional Services, the Hon Warren Truss MP, announced that drug and alcohol testing will become mandatory for “safety-sensitive personnel” in the Australian aviation industry.

The results of a recent survey conducted by the Australian Transport Safety Bureau (ATSB) revealed that 22.5% of the 1196 pilots’ responses indicated that they had felt that safety had been affected in some way by alcohol, drugs or prescribed medication in the previous 12 months (ATSB Aviation Safety Survey – Pilots’ Flying Experiences, Aviation Research Investigation Report B2003/0176, June 2005). While some industry players have already taken steps to introduce random drug and alcohol testing of their

employees, regulated consistency in testing across the industry is likely to be more effective in accident prevention.

The Commonwealth Government has accepted the “Report of Review into Safety Benefits of Introducing Drug and Alcohol Testing for Safety Sensitive Personnel in the Aviation Sector”, by the Department of Transport and Regional Services (DOTARS) and the Civil Aviation Safety Authority (CASA), which

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□ OCCUPATIONAL HEALTH & SAFETY

# Airline fined \$150,000 for contractors unsafe fuel transfer

An airline was fined \$150,000 and ordered to pay costs for failing to ensure the safety of a contractor who was injured as a result of an explosion in a road tanker during the course of transferring fuel from an underground tank to an aircraft at an Australian airport.

## Facts

The airline leased a site which was used for refuelling its mobile ground plant and the storage and use of jet fuel, lead replacement petrol (“LRP”) and diesel fuel. The fuel was stored in underground tanks. The airline made a decision to decommission the site. The airline engaged an outside expert contractor with expertise and experience in these tasks to remove the LRP and diesel from underground tanks to transfer the fuel to a depot. Five workers attended the airline premises and were escorted by an airline employee to the site.

The workers involved in the fuel transfer were instructed to fill the tankers by bottom-loading. Prior to the explosion, the workers carrying out the task followed this instruction and filled five compartments on two tankers with LRP by way of bottom loading. However, when it came time to transfer the diesel fuel, a decision was made by the workers to pump the diesel fuel into the tanker by filling the tanker from the top and not the bottom. This decision was made because the pumping process was perceived to be too slow.

An explosion occurred and a flame came out of number four compartment of the tanker barrel causing burn injuries to the worker.

The decision to top load rather than continue to bottom load and the failure to ensure the previous fuel load products were completely drained from the compartment to be re-loaded was a departure from the training and instructions and proper procedure known to both the contractor company and the workers themselves. The court found that change in procedure was facilitated by the absence of supervision of the workers. Prior to the engagement of the contractors, the airline sought and received representations from the specialist contractors as to their expertise

in the fuel transfer. The workers involved in the fuel transfer had expertise and were trained in the proper methods to undertake such a transfer. The airline was not involved nor informed of the decision to change the method of pumping.

## Charge

It is an obligation under the *Occupational Health and Safety Act 2000* (New South Wales) (“OHS Act”) for employers to ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer’s undertaking while they are at the employer’s place of work. The specific charge by the prosecution in this case was that the airline failed to require of the contractor written procedures which would be adopted for the transfer of fuel which:

- nominated a suitably trained supervisor to supervise the procedure; and
- set out a method of work, which in the view of the contractor, eliminated the risks as far as possible, which in the circumstances required the process to be by bottom loading only.

## Decision

The airline pleaded guilty to the charge and by doing so acknowledged that it had failed in this responsibility.

The court found that while the airline did satisfy itself that the contractor was a company with appropriate expertise to do the work in a safe manner, it failed to require the contractor to provide in writing its procedures for the transfer of fuel, which left the airline exposed to the extent that it was not able to properly satisfy itself the procedures laid down were, in fact, safe and that when it came to implementing the procedures that they would, in fact, be followed.

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The court found that this was not a case where the airline failed to take any steps to ensure safety but where it fell short of fulfilling its obligations by relying too heavily on the expertise of others. The Court held that the airline should have taken a more active role in relation to ensuring a safe system of work was employed by requiring the contractor's procedures in writing before the fuel transfer was undertaken. In the courts view, if the airline had requested the contractor's procedures in writing, this document could have acted as a platform upon which it could properly assess the procedures and take any necessary measures to ensure safety.

The court fined the airline \$150,000 which, in part, was to act as a general deterrence to other operators who engage contractors and sub-contractors and for the purpose of compelling attention to occupational health and safety issues so

that persons are not exposed to risks to their health and safety. In separate proceedings, the contractor was fined a sum of \$240,000.

## Implications

The OH&S Act has broad reaching application across all industries in NSW. Employers must be proactive in ensuring the safety and health of employees and other parties attending their premises. During the course of his decision, Justice Boland commented that this was a classic example of an employer relying on a specialist contractor to carry out work that the employer did not have the expertise to undertake. While contracting out work is an everyday fact for many in the aviation industry, it is important to realise that it is not possible to contract out the responsibility for occupational health and safety.

In New South Wales, regardless of any contractual arrangement for carrying out

work between an employer and a contractor, if contractors or other persons not in the employer's employment are exposed to risks in their health and safety at the employer's premises, the employer remains liable to prosecution under the OHS Act. Employers in the aviation industry should be particularly conscious of ensuring the safety of contractors, given the potentially dangerous environment at airports.

In circumstances where contractors are engaged in dangerous tasks, it is important to request from the contractor written procedures and, where the party engaging the contractor does not have the expertise to assess these procedures, seek independent advice as to the safety of the written procedures.

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was published in January 2006. The Report examines the safety benefits of, and implementation issues concerning, the introduction of drug and alcohol testing in the aviation industry.

The Minister's announcement is a good thing for the industry and its customers. Industry consultation will be necessary to ensure that the most effective testing process is enshrined in the legislation.

A number of matters to be considered have been highlighted by the Report, including:

- **Who will be subject to testing?** The Minister indicated that "safety-sensitive personnel" would be subject to testing. The Report (p. 12) endorsed the definition of "safety-sensitive personnel" as including flight and cabin crews, flight instructors, dispatchers, maintenance personnel, aviation screeners, ground security coordinators, operations controllers, ramp personnel, drivers and frontline/operational staff in freight terminals, catering and airports.

- **What will be tested?** The Report (p. 8) recommends that the tests target alcohol, cocaine, amphetamines, marijuana, phencyclidine or PCP (angel dust) and opiates/narcotics.
- **When will testing occur?** The Report (p. 10) recommends random testing at strategic times including the start of shifts and strategic places, including high-traffic hub ports and regional and rural centres.
- **How will testing be conducted?** The Report (p. 16) suggests that testing be implemented according to Australian and international standards, including ANZS4308-2001, which establishes a standard protocol for the collection, detection and chain of custody of samples.
- **Other issues** – ensuring the integrity of testing by addressing the use of "masking" agents; regulation of use of prescription and over-the-counter drugs; the role of ATSB, DOTARS and CASA in monitoring the implementation of testing; and costs of compliance (p. 13; p. 16.)

The implementation of a national protocol for drug and alcohol testing is in many ways beneficial for the aviation industry. Whilst the financial cost of compliance may be significant in the short term, this will be outweighed by the likely long term benefits of the strategy: fewer workplace injuries, reduced property damage and accidents, improved productivity of a "clean" workforce and importantly, safety of passengers and employees.

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This article has been published in our regular legal column in *Aviation Business* magazine, August 2006.

□ CLAIM FOR DAMAGES

# Damages awarded to passenger after airline failed to honour ticket

Unless the damages alleged are clearly within the contemplation of the parties at the time the contract is entered into, the scope for passengers to claim in contract damages for mental distress and humiliation remains narrow.

■ *Raphael Wiseman-v- (An Airline)*  
29 June 2006

## Facts

Dr Raphael Wiseman purchased a return airline ticket from the United Kingdom to Nigeria, flying from Gatwick Airport on 19 April 2004 and returning on 13 May 2004. However, on presenting his return ticket to Airline staff at check-in in Nigeria, Dr Wiseman was not permitted to board. It was alleged that one of the airline's staff asked the passenger for a bribe. When Dr Wiseman refused to hand over the bribe, he was accused of having a fake passport, ridiculed by various members of the airline and accused of being a criminal.

Dr Wiseman was finally permitted to return to London on a flight leaving on 25 May 2004. As a result of his prolonged stay in Nigeria, Dr Wiseman alleged that he incurred 12 days of hotel, restaurant, taxi and other incidental expenses. It was further alleged that he was the victim of a violent street robbery during his extended stay in Nigeria.

After his return to Britain, Dr Wiseman suffered a mental breakdown. He alleged that his mental anxiety was brought on by the humiliation and stress of the prolonged stay in Nigeria, including the trauma of the robbery as well as the treatment received from the airline's staff in Nigeria. As a result of the events, Dr Wiseman brought an action against the airline for breach of contract. Mr Dr Wiseman claimed damages in the sum of \$19,999.00 plus interest.

The airline did not challenge Dr Wiseman's account and from the outset admitted a breach of contract. However, the airline disputed the amount of damages claimed and it was this issue of quantum that was required to be decided by the court.

## Decision

The High Court held that Dr Wiseman was only entitled to such losses as were clearly foreseeable by the parties at the

time the contract was entered into as being a likely consequence of a breach of contract. As such, the court awarded Dr Wiseman damages in the sum of \$2,147.24, together with interest, comprised as follows:

- reasonable hotel accommodation costs during his enforced stay in Nigeria from 13 to 25 May 2004;
- Reasonable restaurant bills for the same period;
- Taxi fares in and out of Port Harcourt as he was trying to make his arrangements for his return to England; and
- Postage and telephone bills

The court held that Dr Wiseman was not entitled to any non pecuniary losses, as it has long been established that compensation for injury to reputation and/or hurt feelings are not recoverable in a claim for breach of contract, save in very exceptional circumstances, none of which were relevant in Dr Wiseman's case.

*the law recognises that it is appropriate to compensate for nervous shock or anxiety....but it is necessary to demonstrate that, at the time the relevant contract was entered into, it would have been in the contemplation of the parties that such a breakdown would be 'a not unlikely consequence' of a breach.*

Whilst the court could understand that some mental distress was caused by the way he was treated, there was no authority to support the proposition that this is to be reflected in damages for breach of contract. As such, the court found that Dr Wiseman was not entitled to compensation for the insults he received in front of his friends at the airport or for the breakdown he later suffered on his return to Britain.

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The court also held that the street robbery in Nigeria, whilst unfortunate and distressing, was not caused by the airlines breach of contract. The robbery was held to be a supervening event and too remote. Consequently, the airline could not be held liable to compensate Dr Wiseman for the mental distress that flowed from it. However, the court was prepared to accept that it might be appropriate to compensate for mental distress in some circumstances, if at the time the contract was made, such a consequence was within the

contemplation of both parties. However, this was not the case here.

## Comments

Unless the damages alleged are clearly within the contemplation of the parties at the time the contract is entered into, the scope for passengers to claim in contract damages for mental distress and humiliation remains narrow.

Had the Montreal Convention applied to this case, it is unlikely the outcome would have been different. Since the

House of Lord's Judgement in *Morris v KLM Royal Dutch Airline & King v Bristow Helicopter's Limited* 2002, no recovery is possible under the Montreal Convention for mental injury following an accident if such mental injuries are not accompanied by a demonstrable physical injury. The Convention did not apply to this particular claim as the events complained of all occurred prior to Dr Wiseman actually checking in.

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## MEET THE TEAM

### The real life of...



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meet > Hayley Roberts Paralegal

#### up close & personal

**Q** Who is the most famous person you have met?

**A** One Monday I was waiting for my luggage at the baggage collection in Ballina airport (Ballina is a lovely coastal town in northern NSW) standing next to Bob Geldof. I (tragically) quipped that I didn't like them (Mondays) and he deadpanned "Tell me why?" silence...laughter...great moment ;) Other than that Keanu Reeves, Kelly Slater, Pamela Anderson....All right place right time.

**Q** What are your favourite movies?

**A** I guess I better drop in The AVIATOR here, but generally fighting movies. Martial Arts, Mafia-anything intelligently action-packed. (Editors note: Hayley loses points here for omitting all of the Terminator movies).

**Q** What are your favourite books?

**A** The Greatest Salesman in the World by Og Mandino. Can't go past the Bible. The Book of Five Rings. Anything with something good to say.

**Q** What do you do for recreation

**A** Sing /play piano, run, surf, karate, boxing, lay on the beach, dance....I don't do anything in moderation so it's either 0 or 100%. Preferably outdoors.

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

**A** The only thing I am decisive about is that I love peace and quiet, sun, the ocean, fresh air and adventure, so on a yacht. Then I could go everywhere.

**Q** Who inspires you?

**A** My family and partner. Selfless people. Kind people. Loving people. Successful people....In all truth though, you have to inspire yourself to continually become a better version of what you are. Learn from mistakes and grow (I'm a work in progress!). (Editors note: Hayley again loses points for omitting the partners of Ebsworth & Ebsworth).

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