

Aviation 2009 Year in Review

by Glenn Biggs, Partner and Shannon O'Hara, Associate

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I don't think anyone in our industry expected an uneventful or dull 2009! But likewise, it's debateable the last decade has presented a more challenging and dynamic period. From a regulatory point of view, the December 2008 Federal Government Aviation Green Paper laid down a major road map for 2009 and beyond. Many areas of the aviation industry were to come under scrutiny; some of which was welcomed but others not so. From a performance and revenue point of view, there were clear signs on the 2008 year-end figures that revenue across most aspects of the sector would fall. The word 'unprecedented' was a descriptor to many of the facts and figures for international travel; 22.6% decline in cargo traffic for December 2008 had never been experienced before. Indeed, the very economic environment which continues to pervade 2009 has itself outstripped the effects of 'September 11' and the 1991 recession when global passenger traffic declined by a mere 2.6%.¹

The first seven months of the 2009 calendar year showed a 6.8% decline in international passenger demand.² The most recent IATA forecast for 2009 commercial airline losses is \$11 billion worldwide.³ With the aviation industry chiefly affected by economic cycles, there is no question that many in the industry have been affected by these changes and their downstream effects; Macair being an unfortunate casualty being wound up in February after failing to receive a \$7million cash input from the Queensland Government. Few people would expect such major contraction to be corrected in the short term. Signs of an early recovery may be on the horizon for the Asia-Pacific region though with a 2.1% increase in passenger traffic in September.⁴

Some of the events affecting aviation in 2009 need no explanation; the 'GFC', the Air France flight 447, Swine Flu and the outstanding efforts of Captain Sullenberger landing an Airbus A320 on the Hudson River in New York. Other events and changes do require more detail

and with so many key developments, incidents and changes over the last year, our final Aviation Newsletter for this year reflects on some of the more noteworthy events of 2009 and concludes with a look ahead into the twenty-tens.

Aviation law

2009 brought some interesting legal developments in aviation; two of particular note were the introduction of the Montreal Convention (by the *Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Act 2008* (Cth)) and the High Court hearing of *ACQ Pty Ltd –v- Cook; Aircair Moree Pty Ltd –v- Cook*.

The terms of the *Convention for the Unification of Certain Rules for International Carriage by Air* are now law in respect of international air carriage between Australia and other countries which have implemented the Convention. A two-tiered system now operates for claims on a strict liability basis with damages capped at 100,000 Special Drawing Rights (approximately AU\$225,000), or unlimited damages unless the carrier proves that it was not negligent or that the damage was due solely to the negligence of a third party.

While the Department of Infrastructure, Transport, Regional Development and Local Government in its May Discussion Paper says there is no Government support "for the time being" to apply this regime to domestic caps, it likewise does flag that "it is entirely appropriate to ensure the liability cap is adjusted to reflect changes in the cost of living". From this, the Government is proposing to increase the domestic cap to \$725,000 which in turn will require a like increase to the mandatory passenger liability insurance for domestic travel.

Before moving on, it is noteworthy that the Government appears to accept the ambiguity and inconsistency in the compensation of pure mental injuries under the domestic and international passenger liability regimes. The Government appears to prefer a consistent approach to the exclusion of pure mental injuries under the domestic legislation and so clarification on this may follow. Likewise, clarification may also follow to ensure the assessment of damages within these regimes are in accordance with state based civil liability legislation.

Readers will remember from our September and October newsletters that the case of *ACQ Pty Ltd –v- Cook; Aircair Moree Pty Ltd –v- Cook* turned on the application of the *Damage by Aircraft Act 1999* (Cth), and was the first

In brief

by Paul Hopkins, Senior Partner

It's hard to believe that we are nearly at the end of another year! Inside our final newsletter for 2009 (and our final newsletter for the decade!) readers will find a year in review report together with a sneak peak of what we can expect 2010 to have in store for the Australian Aviation Industry. Enjoy!

occasion the High Court had cause to consider this legislation. The defendants' High Court Appeal was not successful for much the same reasons as the appeal to the NSW Court of Appeal. This case is quite interesting because it directly provoked comment by the Australian Government in the May Discussion Paper from the Department of Infrastructure, Transport, Regional Development and Local Government.

While there would appear no impetus for change to the strict and unlimited nature of liability within the *Damage by Aircraft Act*, the Government does accept a review is needed to consider allowing defendants to argue a discount for contributory negligence, and to apportion liability where a third party claim can be sustained. Whilst the Discussion Paper was produced before the High Court handed down its finding, we see little reason this view will change. Other changes flagged for review in respect of this legislation are to clarify the exclusivity of damages within the Act, to ensure damages are assessed according to State based civil liability regimes, to disallow pure mental injury claims for crash witnesses, to consider a mandatory insurance scheme for third party surface damage, and to harmonise the Commonwealth and State regimes.

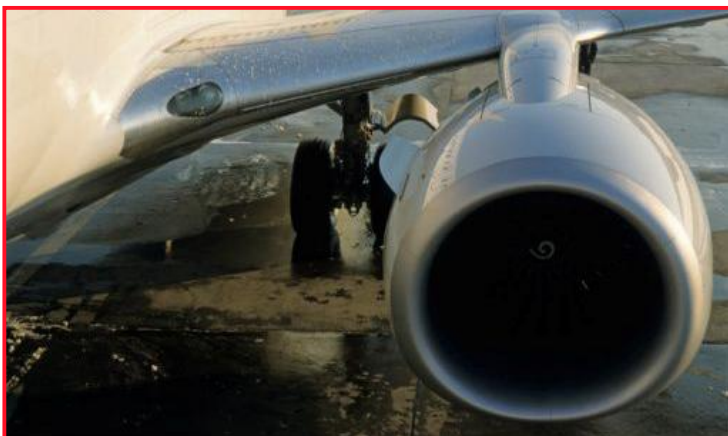
Airports

While Australia's international and GAAP airports remain highly competitive, they too have not avoided the impact of the economic downturn. Funding from the Australian Government continues under the Remote Aerodrome Safety Program which this year saw \$5.9 million applied to some 44 remote and isolated aerodromes across Australia.⁵ Regulations surrounding GAAP aerodromes were upgraded in July to reduce the risk of incidents in respect to runway clearances, air traffic control, procedures and circuit operations.

When a ground handling incident saw a pallet loader catch fire whilst still attached to an aircraft at the Melbourne airport, CASA served a timely reminder to highlight the importance of having a proper emergency plan which incorporates service providers. While the ground handler in this instance provided an immediate and effective response to the fire, they did not involve the airport's emergency plan which would have ensured a coordinated reaction from all key parties.

Environment

Environmental concern continued to pervade aviation in



2009, with a fine balance between an ever-increasing cost base and the longer term outlook for the health of the planet. Better technology is leading the way with Australian operators playing a key role worldwide in the use of 'Required Navigation Performance' to reduce flight times by navigation independent of ground-based aids. The prospect of a worldwide carbon tax for airline passengers remains on the agenda in Australia and is an issue for 2010 and beyond. Perhaps the only benefit from the economic meltdown has been its immediate impact on the environment with a 5% smaller carbon footprint from aviation worldwide. Major environmental targets have been mooted for the aviation industry (such as a 50% reduction in emissions by 2050), and the challenge of how the Australian Government and the aviation industry will achieve the right balance remains.⁶

Industry Regulation

Our regulator and accident investigation authority changed in 2009.

By the *Civil Aviation Amendment Act 2009* (Cth), CASA returned to its board structure to ensure a strategic and high level approach to regulatory and safety oversight, and a more transparent and accountable organisation. Federal Transport Minister, the Honourable Anthony Albanese MP said "*the new Board will provide high level direction to the organisation's regulatory and safety oversight role*". Other changes were also adopted by this legislation to improve CASA's powers of enforcement, investigative powers and search warrant procedures.

CASA spread its wings substantially in 2009 with a sweeping safety audit at more than 25 aerodromes from Cairns to the Kimberley, and added four new work bases at Horn Island, Gove, Kununurra and Broome. CASA's reminder to update analogue emergency locator aircraft transmitters in 2009, as part of a worldwide change towards digital transmitters, was mostly successful. One operator obviously forgot that while satellites no longer detect the old analogue signal, passing aircraft still can – after a six hour rescue helicopter search costing \$50,000, a discarded transmitter was located in a NSW dump emitting a signal. With ATSB figures showing almost double the bird strikes over recent years, CASA responded with updated advice for airports, operators and pilots on how to manage the risk of bird and animal incursion. A long held view and a key focus on this project was the better and more consistent reporting of strikes and a new advisory circular now outlines how airports can comply.

The commission style ATSB came into being from 1 July 2009 by dint of the *Transport Safety Investigation Amendment Act 2009*. The key changes for the ATSB was the clarification of its independence, a new power compelling responses to formal recommendations made by the ATSB, and confirmation that evidence obtained by the ATSB is protected from disclosure.

Insurance

The Department of Infrastructure, Transport, Regional Development and Local Government in its May discussion paper noted the stabilisation of aviation premiums in recent years and a relative decrease in the cost of aviation insurance as a proportion of aircraft value. Australia is said

to be consistent with the worldwide market in this trend where insurance may represent only 2 – 3% of a small operator's total costs, and significantly less for larger operators. It is estimated the Australian premium revenue has dropped by some 20% since 2001 (worth around \$100 million), with some signs that the market has bottomed out, and will harden in the forthcoming period. New entrants to the market may still appear in coming years and this continues to keep the industry competitive and premiums tight.⁷

¹ Federal Government Aviation Green Paper, December 2008

² IATA Industry Times News – 'In the Red, Despite Demand Improvements', August 2009

³ IATA CEO Brief, October 2009

⁴ IATA Industry Times News – "Two Years of Lost Growth - Slow Improvement Trend", 30 November 2009

⁵ The Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, Media Release - '\$5.9 Million Boost For Remote Aerodromes', 27 July 2009

⁶ IATA Industry Times News – 'G8 Supports Global Sectoral Approach for Aviation', July 2008

⁷ Department of Infrastructure, Transport, Regional Development and Local Government – 'Review of Carriers' Liability and Local Government Discussion Paper

2010 ... Looking forward to the Twenty-Tens: Aviation in 2010

The first of January 2010 will not only herald a new year for the Australian aviation industry, but also the commencement of a new decade. While the next decade will undoubtedly bring challenges and change to the international and domestic aviation industry, 2010 has the potential to significantly shape the direction of the new decade.



At the time of writing, the Australian Government's Aviation White Paper was still yet to be delivered. The contents of this paper, when released will likely be the subject of significant debate by key stakeholders and once formalised, will see the establishment of a new framework for the next decade of aviation in this country.

Hot on the heels of the Aviation White Paper is the Australian Government's commitment to the establishment and implementation of an Emissions Trading Scheme (ETS) which is consistent with a burgeoning global environmental consciousness. In addition to the Australian Government's plans for the implementation of an ETS, ICAO has confirmed that its new CO² Emissions Standards will likely be developed for the market by the end of 2010.

While the implementation of an Australian ETS and the development of key international standards sees a commitment to environmental sustainability into the future, the cost of these schemes and standards will undoubtedly have an impact on the Australian aviation industry. Whether the industry will be supported or compensated or able to offset the costs of these enforced environmental commitments remains to be seen.

It is without doubt that 2010 will bring continued expansion of the 'low cost carrier market' in Australia. Many new domestic and international services have been announced in 2009 with planned commencement dates in 2010. Such expansion will likely continue well into the next decade heralding a new era in consumer choice and market competition. The expansion of the low cost carrier market across Australia also brings with it greater commercial opportunities for aviation support and ground handling services.

Finally, 2010 will mark a historical milestone for the Australian aviation industry with celebrations for a 'Century of Aviation'. On 18 March 2010, it will be 100 years since Harry Houdini made history flying a powered aeroplane at Diggers Rest and on 16 July 2010, it will be 100 years since the first flight of the Duigan Aeroplane at Spring Plains in Victoria. The Duigan Aeroplane was designed and constructed by John Robertson Duigan and his younger brother Reginold Charles Duigan with a commemorative replica of the aeroplane being built for the celebrations and for viewing at the Australian International Airshow to be held at Avalon in 2011.

A final word from us...

2009 has been a big year of newsletters and publications and 2010 is looking even BIGGER! We've already got plenty of great material to kick off the new year, so keep an eye out for the first 2010 edition which will discuss:

- the recent WA Supreme Court decision in *Cifuentes -v- Fugro Spatial Solutions Pty Ltd [2009] WASC 316* where the Court held that the pilot, the pilot's employer and the Aeronautical Engineer were all liable (in differing proportions) to the plaintiffs in negligence for the crash of an aircraft following the failure of a fuel pump.
- the European Court of Justice decision of *Sturgeon and others -v- Condor Flugdienst GmbH (Case C-402/07)* and *Bock and Another -v- Air France SA (Case C-432/07)* where the Court considered the issue of whether passengers suffering delays were entitled to receive the same compensation treatment as passengers on cancelled flights.
- also, keep an eye out for our 'White Paper Special Edition' which will be delivered pending the release of the paper by the Federal Government.

The Carter Newell Aviation Team has welcomed the opportunity to keep you, your clients and your staff updated on the developments across the aviation industry during the course of 2009. We look forward to producing a new series of newsletters and updates on the challenges and changes facing the aviation industry as they arise in 2010.

Australian Airports Liability and Compliance Guide

The inaugural edition of the Australian Airports Liability and Compliance Guide, launched by Julieanne Alroe, Brisbane Airport Corporation's CEO and Managing Director on 22nd July 2009, provides a number of tools to assist in the emerging challenge of regulatory compliance for Australian airports.



The Guide provides a detailed review of four key areas for airport liability and compliance risks including: airport design and development; operations, service and pricing; safety and security; and environment and culture.

Those key to ensuring airport compliance are airport operators, operational and risk managers, consultants, tenants and contractors. Underwriters, claim managers and brokers also have a vital role in understanding the ambit of airport liability and compliance risks.

The aviation team at Carter Newell encourages the use of this Guide where possible and we look forward to a strong ongoing partnership with Australian airports with a commitment to world class regulatory compliance and risk management.

The guide is available by contacting Jaqueline Stephan at jstephan@carternewell.com or by visiting www.carternewell.com.

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Carter Newell takes this opportunity to wish everyone a safe and happy festive season.



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