

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
OPENING REMARKS, 32ND ANNUAL AVIATION LAW
ASSOCIATION OF AUSTRALIA & NEW ZEALAND (ALAANZ)
CONFERENCE
REGULATION, COMPETITION AND THE CHANGING
STRUCTURE OF THE AVIATION INDUSTRY
SYDNEY
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1. Welcome and thank you for inviting me to open the 32nd annual ALAANZ Conference and to say a few words about the importance of the aviation industry to Australia and, of course, to our neighbour across the Tasman.

2. I have been told that in recent years the majority of speakers who were invited to open the ALAANZ Conference came from within the aviation industry. Unfortunately, I cannot offer insights similar to those of skilled flight captains or safety experts who directly shape the industry's future. In fact, I confess that my knowledge of aviation has come almost entirely from my experiences as a passenger, and of course, from a few matters involving companies within the industry when I practiced as a barrister. On that basis, and perhaps unfortunately for the non-lawyers present, my

remarks today will be limited to offering some thoughts regarding the interaction between the law and the regulation of the aviation industry.

3. The relationship is by no means new. Indeed, prior to legislation regulating air services, reports suggest that it was not uncommon for early flight pioneers in this country to come into contact with the law. For example, in 1913, the Postmaster-General brought an action for damages against a man named "Wizard" Stone arising out an incident in which Mr Stone's falling flying machine damaged telegraph wires in Ballarat.¹ Much later, in 1930, an aviator was fined for flying at a dangerously low altitude over the Rosehill track to photograph a race,² while in the same year, an aviator was charged with carrying a passenger for reward without holding the necessary licence. Those were indeed colourful times – the pilot apparently gave evidence that he had to seize the passenger by his collar and force him back into his seat after he threw a spirit flask.³

4. In 1936, Henry Goya Henry successfully challenged Regulations under the *Air Navigation Act* in the High Court.⁴ Henry was convicted of breaching Regulations prohibiting an unlicensed person from flying an aircraft "within the limits of the Commonwealth". This was because after his licence was suspended, he flew above Mascot aerodrome at less than 2,300ft and failed to make left hand turns when crossing the landing area. I hope

¹ *The Argus*, "Aviator's Fall. Telegraph Line Damaged", 14 October 1913, page 8.

² *The Mercury*, "Low Flying", 25 July 1930, page 7.

³ *The Mercury*, "Trouble in the Air", 22 August 1930, page 11.

⁴ *R v Burgess* [1936] HCA 52; (1936) 55 CLR 608.

someone will be able to explain the latter offence. Finally, and of particular note, in 1920 the *Sydney Morning Herald* reported an “interesting experiment in the use of aircraft in the outback regions” in which the “Commonwealth Ministry [was] taking a keen interest”. The company was the recently formed Queensland and Northern Territory Aerial Services Limited, or Qantas.⁵

5. These examples, apart from I hope providing some light relief at this early hour on a Monday morning, go some way to illustrating just how rapid the development and expansion of the aviation industry has been in the 90 or so years since Australia’s “experiment” with commercial flight began. Aviation – let alone commercial aviation – which was unforeseen during the period in which Australia’s Constitution was drafted,⁶ has become a highly regulated industry of vital importance to the Australian economy.
6. The National Aviation White Paper released in 2009 provides some insight into the scale and economic significance of the industry. In the financial year 2008-09, around 50 million people were carried by Australia’s domestic airlines, while 23 million people travelled on international air services in and out of Australia. The annual gross value added by the industry to the Australian economy was approximately \$6.3 billion, and it

⁵ *Sydney Morning Herald*, “Aviation in the Outback regions”, 16 October 1920, page 14.

⁶ See, for example, Tadao Kuribayashi, *The Basic Structure of Australian Air Law*, (1970) Keio Tsushin Co at 17.

directly employed nearly 50,000 Australians.⁷ These figures have continued to increase, with more than 54 million domestic and 27 million international passenger movements in 2010-11.⁸

7. Air services are a fundamental component of Australia's business activity, tourism industry and trade. Put simply, aviation plays an essential role in Australian's economy. In addition, the aviation industry is also integral to our social cohesion. While this may sound a little trite, air services are critical for isolated island-nations like Australia and New Zealand; they connect us with the world and narrow the significant distances between our regional cities and towns. I can attest to this as a regular passenger.
8. There have been significant changes to the Australian aviation industry since the deregulation of domestic air services by the Hawke Government in 1990. For example, following the removal of the two-airline policy, competition legislation has become increasingly important for the industry. This is a topic that I will discuss in further detail a little later. More generally, the industry has seen the rise of low-cost carriers, an entirely new security regime following the events of September 2001, the growth of tie-up or alliance arrangements and the ever-present challenges posed by fluctuating fuel costs. In preparing for this morning, I read a fascinating fact. In 1965, a Sydney to London air fare represented five months of

⁷ National Aviation Policy White Paper, *Flight Path to the Future* (December 2009) at 31.

⁸ Department of Infrastructure and Trade, Bureau of Infrastructure, Transport and Regional Economics, *Avline 2010-11*, at v.

average earnings. In 2007, the same fare equated to only two weeks of the average wage.⁹ Even in the last month, a new domestic terminal at Melbourne Airport was announced and Qantas unveiled what I'm told is a very smart new uniform.

9. It is in the context of the significant and constantly shifting nature of the industry that the ALAANZ Conference provides an opportunity to address current legal issues affecting aviation. As you are no doubt aware, the territory covered by aviation law is extraordinarily broad. It includes areas as diverse as safety and security, specific issues arising under negligence and criminal law, matters relating to sovereignty and international regulation, insurance and, of course, a wide array of regulatory issues. The width it covers is exemplified by the fact that one of the first cases an undergraduate law student encounters is one where the question is when a contract, consequent upon the issue of an airline ticket, is formed.¹⁰
10. As in previous years, the ALAANZ Conference brings together a wide range of outstanding speakers from diverse fields including practicing lawyers and barristers, regulators, academics and many experts who work within the industry. I have no doubt that during the course of the next two days presenters will explore recent developments that impact the aviation landscape both in Australia, New Zealand and further around the world.

⁹ National Aviation Policy Green Paper, *Flight Path to the Future* (December 2008) at 39.

¹⁰ *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* [1975] HCA 55, (1975) 133 CLR 125.

These include, for example, recent amendments in Australia to the *Civil Aviation (Carriers' Liability) Act* and the *Damage by Aircraft Act*, which alter the framework for air carriers' liability in the event of an accident. The amendments increase liability limits and insurance requirements, exclude compensation for pure mental illness, and significantly, allow compensation to be reduced where there is contributory negligence.¹¹ The final amendment is a response to a decision of the NSW Court of Appeal.¹²

11. One particular aspect of the Conference program that caught my attention was the two sessions this afternoon regarding unmanned aerial vehicles, or UAVs. I understand the number of licensed UAV operators in Australia has increased significantly over the past 18 months or so – from 15 certificate holders in February 2012 to 33 at present.¹³ I am the first to admit that I am no expert in engineering or remote aviation technologies. However, I can readily appreciate the broad array of applications for which UAVs might be used. Civilian functions range from the predictable, such as power line inspection, aerial property photography and agricultural spraying; to innovative uses such as in surf life saving; to perhaps more controversial applications in, for example, journalism, policing, border control and proposed monitoring by animal welfare groups. I should also

¹¹ Explanatory Memorandum, *Aviation Legislation Amendment (Liability and Insurance) Bill 2012* (Cth).

¹² *ACQ v Cook* [2008] NSWCA 161.

¹³ See John McCormick, Keynote address: Association for Unmanned Vehicle Systems Australia, *Delopment of UAS in civil airspace and challenges for CASA* (25 February 2013); http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_100959.

- briefly mention the fanciful as well – I have heard that an enterprising operator in the United States is proposing to deliver tacos to hungry customers on the West Coast using UAVs.¹⁴
12. Tacos aside, the increasing use of UAVs does present challenges in respect of both safety and privacy. I understand that Australia was early to adopt regulations in relation to remotely piloted aircraft, and that CASA is currently reviewing regulatory materials regarding the use of UAVs.¹⁵ Of course, the technical specifics of the Regulations, Orders and Manuals of Standards issued by CASA are probably outside my field of expertise.
13. However, the interaction between UAVs and laws dealing with privacy and a person's ability to quietly enjoy their property raises interesting questions. While I don't want to cover any territory that may be addressed this afternoon, there are certainly issues regarding the extent to which the laws in this area apply to the operation of UAVs. For example, there is a line of authority in Australia that at present there remains no action in tort for an unjustified invasion of privacy.¹⁶ In relation to trespass, causing an object to pass through airspace above a property is likely only to constitute a trespass if it interferes with a person's ordinary use and enjoyment of

¹⁴ See B Kapnik, "Unmanned but accelerating: Navigating the regulatory and privacy challenges of introducing unmanned aircraft into the national airspace system" (2012) 77 *Journal of Air Law and Commerce* 439, 440.

¹⁵ ABC South East NSW, Interview with Peter Gibson (24 April 2012).

¹⁶ See *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45; (1937) 58 CLR 479. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199, [108] it was held that *Victoria Park Racing* supra does not stand for any proposition respecting the existence or otherwise of a tort of unjustified invasion of privacy. This line of authority was recently discussed in *Maynes v Casey* [2011] NSWCA 156.

- land.¹⁷ Those few (if any) who are interested will I'm sure be familiar with a series of very old cases regarding wayward bullets fired over property.¹⁸ There is, of course, also the action of private nuisance in tort.
14. These avenues obviously require individuals to initiate litigation. However, a further limit is that in New South Wales the *Civil Liability Act* excludes actions in trespass or nuisance for aircraft flying over property at a reasonable height, so long as the Air Navigation Regulations are complied with.¹⁹ Questions are also likely to be raised as to whether legislation such as the *Surveillance Devices Act* applies to items like UAVs that do not necessarily need to be fixed directly to private property.²⁰ All I need say, not unexpectedly, is that the frontiers of aviation will continue to raise novel issues that the law may not yet have addressed exhaustively. Important events like the ALAANZ Conference provide an opportunity for you to consider emerging issues facing the industry.
15. I'm afraid that the excellent Conference program has been a distraction and taken me slightly off track. What I would like to discuss in the time remaining this morning are some issues regarding competition regulation that have significant implications for the aviation industry. Also, they have the advantage of being a little closer to my field of knowledge.

¹⁷ See *Bernstein v Skyviews* [1978] QB 479 at 488.

¹⁸ See, for example, *Pickering v Rudd* (1815) 4 Camp 219; (1815) 171 ER 70; *Davies v Bennison* (1927) 22 Tas LR 52.

¹⁹ *Civil Liability Act* 2002, s 72.

²⁰ *Surveillance Devices Act* 2007, s 8.

16. The laws regulating competition and consumer issues are particularly significant for air services. Despite deregulation of the domestic industry and the increasing liberalisation of international air services, aviation remains subject to substantial oversight in relation to anti-competitive practices. The Australian Competition and Consumer Commission, or the ACCC, is responsible for monitoring activities in relation to airports. In addition, airlines, like other industries, are subject to regulation under the *Competition and Consumer Act 2010*, formerly the *Trade Practices Act*.
17. The Act addresses an extremely broad range of legal issues ranging from anti-competitive practices like price fixing, the regulation of mergers and acquisitions, and the process for obtaining access to essential services, through to issues of consumer protection involving misleading or deceptive conduct, unfair contracts, product safety and the liability of manufacturers for defective goods. The object of the Act is stated broadly as being to “enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”.²¹ Much of the conduct regulated by the Act is relevant to the aviation industry. For example, you may recall group proceedings in the 1990s regarding alleged misleading conduct as a result of passengers suffering the effects of passive smoking on flights.²² However, the two more slightly more current issues that I plan to cover in further detail this morning are:

²¹ *Competition and Consumer Act 2010* (Cth), s 2.

²² *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246.

first, several matters relating to cartel conduct that are particularly relevant to transnational industries like aviation, and second, tie-up arrangements.

18. First, restrictive trade practices, which include cartel conduct, are regulated under Part IV of the *Competition and Consumer Act*. Part IV is directed at the type of conduct that Adam Smith famously described in *The Wealth of Nations*. In the often cited passage, Smith explained that:

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."²³

19. As I'm sure many of you are aware, the provisions under the *Competition and Consumer Act* that prohibit anti-competitive practices like cartel conduct have in recent years been of particular concern for the aviation industry. The ACCC, like many of its fellow regulatory agencies around the world, has pursued airlines in relation to alleged price-fixing arrangements for surcharges imposed on international air freight carriage. To date, the Federal Court has approved agreements between the ACCC and 13 airlines resulting in penalties totaling approximately \$98.5 million.²⁴ At present, contested proceedings against two airlines are continuing.

²³ A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book 1 Ch X, quoted in *Australian Competition & Consumer Commission v J McPhee & Son (Australia) Pty Ltd (No 3)* (1998) ATPR (Digest) 46-183.

²⁴ See ACCC Media Release, *Thai Airways to pay \$7.5 million in penalties for price fixing* (17 December 2012).

20. Around the world, significantly higher penalties have been imposed. In the United States, the Department of Justice has obtained over \$US1.7 billion in criminal fines, while the European Commission has fined carriers nearly €800 million.²⁵ I know this may seem a bit grim. However, please don't think I have come this morning to lecture any airline representatives present regarding the criminality of cartel conduct. I'm sure there is no need for me to do so. The reason I raise this particular topic is that there are several very interesting issues, particularly for transnational industries like aviation, which arise from the regulation of anti-competitive practices.
21. Prior to 2009, the provisions that regulated cartel conduct were fairly straightforward. The then *Trade Practices Act* contained a general provision that prohibited corporations from making a contract, arrangement or understanding that either had the effect of substantially lessening competition, or contained what was known as an exclusionary provision.²⁶ Put simply, an exclusionary provision is an agreement between competitors to restrict the supply or acquisition of goods or services from another person.²⁷ There was also a strict prohibition against price fixing arrangements irrespective of their effect on competition.²⁸
22. However, in 2009 the Act was amended to insert a division to specifically address cartel conduct. The division sets out parallel civil penalties and

²⁵ See Michael Bradley, "Airline cargo price fixing: cartel conduct gets sky-high penalties", *Competition and Consumer Law News* (January/February 2013) 98.

²⁶ *Trade Practices Act 1974* (Cth), s 45(2).

²⁷ *Trade Practices Act 1974* (Cth), s 4D.

²⁸ *Trade Practices Act 1974* (Cth), s 45A.

criminal offences for both making and giving effect to a contract, arrangement or understanding containing a cartel provision.²⁹ A cartel provision is defined according to the anti-competitive practices of price fixing, restricting outputs, market allocation and bid-rigging.³⁰ In addition, what I will call the old provisions, covering arrangements that substantially lessen competition or contain an exclusionary provision, were retained.

23. There is no need to get worried; I'm not here just to recite the legislation. Although, as a side note, it is interesting that New Zealand is progressing toward cartel criminalisation. The two issues I want to discuss in relation to the cartel provisions are market definition and private enforcement.
24. Under the regime, a process of defining the relevant market for the goods or services that are in issue is essential for the purposes of the old provision concerning arrangements that substantially lessen competition. This is because the provision refers to "competition" which is defined in relation to there being a market in Australia.³¹ Courts have approached the concept of a market as being an area of close competition between companies or the field of rivalry between them.³² However, the

²⁹ *Competition and Consumer Act 2010* (Cth), ss 44ZZRF and s 44ZZRG (criminal offences); ss 44ZZRJ and s 44ZZ RK (civil penalty provisions).

³⁰ *Competition and Consumer Act 2010* (Cth), s 44ZZRD.

³¹ *Competition and Consumer Act 2010* (Cth), s 45(3) and s 4E.

³² See *Singapore Airlines Ltd v Australian Competition and Consumer Commission* [2009] FCAFC 136; (2009) 260 ALR 244, [69] citing *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 190; *Queensland Wire Industries Proprietary Limited v The Broken Hill Proprietary Company Limited* [1989] HCA 6; (1989) 167 CLR 177 at 187.

boundaries of what constitutes a market in Australia are much less clear.³³

25. A more restrictive approach to the definition of a market in Australia may require the geographic area of the market to fall entirely within Australia. Alternatively, a broader reading could allow a market to be *in* Australia if there is some form of connection between the market and Australia.³⁴

This could, for example, extend to a global market for the supply of electronic books, or perhaps, markets for the supply of software products in other jurisdictions where they have an effect on prices in Australia.

26. A number of decisions relating to the air cargo cartel proceedings have considered, to some extent, the issue of what is a market in Australia.³⁵

These cases have established that the place where negotiations took place and where the contract was formed are not determinative of the location of the market.³⁶ They have also firmly stated that a market wholly outside Australia is not a market *in* Australia for the purposes of the Act.³⁷

³³ See *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Limited (No 5)* [2009] FCA 1464, [23].

³⁴ For a discussion of market definition see, for example, D Clarry, "Contemporary approaches to market definition: Taking account of international markets in Australian Competition Law", (2009) 37 *Australian Business Law Review* 143; A Duke, "Broadening the extra territorial reach of Australia's cartel prohibition: adopting the 'effects' doctrine without the negative effects", (2010) 28 *Federal Law Review* 97.

³⁵ See, for example, *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312, [55]-[74]; *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Limited (No 5)* [2009] FCA 1464, [17]-[44]; *Singapore Airlines Ltd v Australian Competition and Consumer Commission* [2009] FCAFC 136; (2009) 260 ALR 244, [60]-[77].

³⁶ *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312, [66], [72]; *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Limited (No 5)* [2009] FCA 1464, [37]-[41].

³⁷ *Singapore Airlines Ltd v Australian Competition and Consumer Commission* [2009] FCAFC 136; (2009) 260 ALR 244, [71]; *Wright Rubber Products Pty Ltd v Bayer AG (No 2)* [2009] FCA

27. In *Emirates v ACCC*, Emirates argued there was no market in Australia for the supply of inbound international air cargo services because marketing, competition, negotiation and contracting all occurred outside of Australia.³⁸ While the decision only concerned an interlocutory or procedural issue, the Court held it was not possible to conclude that the market for services into Australia was not part of an international air cargo market of which an Australian market was a component.³⁹ On appeal, the Court found that fixed prices for elements of a journey wholly outside Australia might affect competition in a market in Australia.⁴⁰ However, in another interlocutory matter, *ACCC v Singapore Airlines Cargo Pte Ltd*, the Court queried whether the market requirement was satisfied simply by asserting that higher prices on routes between points outside Australia have an effect on prices for consumers in Australia.⁴¹
28. A further complicating feature is that unlike the old provisions which I have just discussed, the new cartel prohibitions don't actually contain a market nexus. Instead, the definition of "cartel provision" includes a competition element. This requires that at least two parties to the contract, arrangement or understanding are, or are likely to be, in competition in

1317, [30]; *Auskey International Manufacturing & Trade Pty Ltd v Qantas Airways Limited (No 5)* [2009] FCA 1464, [23]; *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312, [69].

³⁸ *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312, [55].

³⁹ *Emirates v Australian Competition and Consumer Commission* [2009] FCA 312, [61]-[64].

⁴⁰ *Singapore Airlines Ltd v Australian Competition and Consumer Commission* [2009] FCAFC 136; (2009) 260 ALR 244, [74].

⁴¹ *Australian Competition and Consumer Commission v Singapore Airlines Cargo Pte Ltd* [2009] FCA 510, [74]-[75].

relation to the relevant goods or services.⁴² I know this is quite a mouthful. What is significant is that a very recent Federal Court decision has confirmed that the new cartel offences don't contain a territorial limit.⁴³ This case is subject to appeal. The Act states that certain provisions including the new cartel division extend to conduct outside Australia provided there is a connection between the corporation and Australia, and further, in actions for damages, that the Minister has given its consent.⁴⁴ Beyond that, there is no requirement for a link between Australia and the conduct in issue.

29. This means that it is entirely possible that conduct with limited and indirect connection to Australia could potentially breach the new cartel provisions. Of course, this remains subject to the company itself having a sufficient Australian link. This is in contrast with the provision concerning arrangements that substantially lessen competition. While the cases that I discussed a moment ago show that the geographic market limit is not settled, it certainly does not extend to markets wholly outside Australia.
30. These differences present a number of difficulties. There may well be questions as to how regulating conduct entirely external to Australia is consistent with the object of the Act, which as I mentioned earlier, is to enhance the welfare of Australians through the promotion of competition.

⁴² *Competition and Consumer Act 2010 (Cth)*, s 44ZZRD(4).

⁴³ *Norcast S.ár.L v Bradken Limited (No 2)* [2013] FCA 235. A notice of appeal has been filed.

⁴⁴ *Competition and Consumer Act 2010 (Cth)*, s 5.

There are also, perhaps, issues as to whether penalties imposed in Australia could result in punishment for conduct that has already been dealt with or penalised in other jurisdictions. For example, it could be that penalties for anti-competitive activity that occurred across a number of jurisdictions are imposed in each country to reflect the totality of the conduct, rather than the damage that occurred in that country alone.⁴⁵

31. Whether or not these issues arise, it is essential that there is certainty for businesses operating across global boundaries. This of course applies to transnational industries like aviation. However, with rapid changes in technology it is also equally applicable to businesses offering products online, like software, where programs can be purchased and downloaded via the Internet without any need for close proximity between the seller and consumer. Other examples may include electronic books or applications for mobile and tablet devices. For these types of products there may be issues regarding not only market definition, but also more fundamentally, the extent to which competition and consumer legislation in different jurisdictions applies to their business operations. Recently, I spoke at some length about the consequences of ambiguity in regulation; in particular, it can impose an economic burden on business by increasing the likelihood of disputes and other related costs. Certainty in the area of competition law should be a benchmark for both courts and regulators.

⁴⁵ See, however, *Australian Competition and Consumer Commission (ACCC) v Qantas Airways Ltd* [2008] FCA 1976 (2008) 253 ALR 89 discussed in Clarry, above n 33, 179-180.

32. The second matter that I want to briefly discuss in relation to cartel conduct is the issue of private enforcement. It may be obvious, but in addition to actions commenced by the ACCC, the Act also allows a person to bring proceedings where they have suffered loss as a result of another person breaching certain provisions of the Act.⁴⁶ In a number of instances, such proceedings have been conducted as class actions or group proceedings. My reason for raising this issue is not so much to comment on the regulation of class actions, but generally to offer a reminder that regulatory enforcement is not the only concern for parties involved in cartel conduct. While Australia does not have a strong history of class actions as compared with say the United States, particularly in relation to anti-competitive activity, this may be a growth area in the future.
33. There have been a small number of class action proceedings in Australia in relation to breaches of the anti-competitive provisions of the *Competition and Consumer Act* that have resulted in agreed settlements.⁴⁷ In addition, there are still proceedings ongoing in the Federal Court concerning the alleged air cargo cartel.⁴⁸ This is obviously a complicated area so I will only briefly mention two issues relating to class actions.
34. First, information disclosure in relation to private enforcement proceedings

⁴⁶ *Competition and Consumer Act* 2010 (Cth), s 82.

⁴⁷ See, for example, *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671; *Wright Rubber Pty Ltd v Bayer AG (No 3)* [2011] FCA 1172.

⁴⁸ See *Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd* (VID 12 of 2007).

is an issue that has been discussed at some length.⁴⁹ It commonly arises when plaintiffs in class action proceedings seek access to information that an alleged cartel member, the defendant, has provided to the ACCC. Such material may have been handed over as part of the process for seeking immunity from prosecution, or in response to a notice issued by the ACCC. Either way, there are incentives for both the regulator and the cartel participant that this information is not provided on to other parties.

35. There have been a number of cases concerning class action participants seeking to access documents provided to the ACCC.⁵⁰ As a result, in 2009 a series of further provisions regulating “protected cartel information” were inserted into the Act.⁵¹ These sections significantly limit the circumstances where information provided to the ACCC can be disclosed. Interestingly, however, the definition of “protected cartel information” only applies to information relating to breaches or possible breaches of the new cartel provisions.⁵² It does not appear to capture the old provisions covering arrangements that substantially lessen competition or that contain an exclusionary provision. This may well lead to information regarding alleged cartel offences being afforded tighter protection, be that good or bad, as compared with information provided to the ACCC concerning breaches of the general provisions. It may also lead to

⁴⁹ See, for example, C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, policy and practice in an international context* (2011) Cambridge University Press at 405-419.

⁵⁰ See, for example, *Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 88; (2008) 246 ALR 137; *De Brett Seafood Pty Ltd v Qantas Airways Ltd* [2011] FCA 440.

⁵¹ See *Competition and Consumer Act 2010* (Cth), s 157B and s 157C.

⁵² *Competition and Consumer Act 2010* (Cth), ss 157B(7), 157C(7).

difficulties when such information would be relevant to breaches of not only the new cartel provisions, but also breaches of the old provisions. It would be unfortunate if the court's time and the costs of litigants were added to by debating this issue. The amount of time spent by courts determining the dominant purpose of a document for the purpose of legal professional privilege is an illustration of what can occur.

36. Second, as I mentioned earlier, the Act states that in private enforcement actions for damages, certain provisions including the new cartel Division extend to conduct that occurred outside Australia. However, an action for damages based on conduct outside Australia requires the Minister to give written consent to the proceedings.⁵³ This requirement for Ministerial consent has itself resulted in litigation in the air cargo cartel proceedings in which one airline challenged the Minister's decision.⁵⁴ This type of administrative action arguably places a heavier burden on parties seeking damages for cartel behaviour and increases uncertainty for businesses defending such claims. In 2010, the OECD conducted a review of Australian competition policy and observed that:

“In other countries private enforcement has been recognised as making an important contribution to enforcement, and regulators have led the way in exploring avenues for facilitating private actions

⁵³ *Competition and Consumer Act 2010* (Cth), s 5.

⁵⁴ *Cathay Pacific Airways Ltd v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* [2010] FCA 510; (2010) 186 FCR 168.

while ensuring at the same time that public enforcement is not undermined.”

As some of you may remember, in the 1990s and the early years of this century, courts were flooded with litigation between Telstra and Optus in which each asserted that one or the other was breaching Part IV or Part V of the then *Trade Practices Act*. I recall one regulator, who should probably remain unnamed, saying that there was not much to do in relation to the telecommunication industry, having regard to the extent to which these parties policed the other’s conduct. Ultimately, however, the interaction between private enforcement proceedings and actions brought by the regulator may require further consideration. Once again, clarity for business, and also for third party claimants, is essential.

37. Market definition and private enforcement are only two of a myriad of issues that arise in relation to the regulation of anti-competitive conduct. The laws regarding cartel behaviour have significantly developed in recent years. Maximum civil penalties have increased to the greatest of either \$10 million, three times the value of the benefit obtained, or if the value of those benefits cannot be determined, 10% of annual turnover.⁵⁵ In Australia we have seen the arrival of criminal sanctions for cartel conduct, while in New Zealand progress toward cartel criminalisation is continuing.

38. These are important changes to an area of competition regulation that has

⁵⁵ *Competition and Consumer Act 2010* (Cth), s 76(1A).

been of particular significance to the aviation industry in recent years. Once again, however, it is necessary to emphasise the importance for business efficacy of ensuring clarity in legislative regulation, regulatory enforcement and judicial application. It is essential, particularly in an area as complex as competition law, that regulation be free from ambiguity.

39. The second, and I promise far shorter, issue that I want to say a few words about today is competition regulation in relation to acquisitions and tie-up arrangements in the Australian aviation industry. .

40. The recent growth in alliance or tie-up arrangements obviously represents an important structural change in the aviation industry. In only the last few years we have seen the authorisation of arrangements between Qantas and Emirates, Qantas and American Airlines, Virgin and Singapore, and Virgin and Etihad – this is to name only a few. More significantly, there have also been a number of acquisitions in the Australian aviation market. In January this year, the ACCC approved the proposed acquisition of Skywest by Virgin and, as everyone is no doubt aware, the ACCC has in just the last two weeks not opposed Virgin and Tiger Airways entering into a joint venture that will result in Virgin holding a 60% interest in Tiger.

41. These types of arrangements are clearly indicative of a broader structural change to both the domestic and international aviation industries. Tie-up arrangements can provide participants with a range of benefits including a wider array of destinations to offer customers, scheduling improvements,

- fleet management flexibility and, of course, general operating efficiencies. However, as you might imagine, the ACCC applies very different tests in relation to tie-up arrangements as compared with proposed acquisitions.
42. Alliance arrangements are regulated on the basis that they involve an agreement formed between competitors to coordinate in some respect. Hopefully, based on what I've talked about earlier, this immediately makes you think of cartel conduct or a contract, arrangement or understanding that might have the effect of substantially lessening competition. The ACCC has the power to authorise this type of conduct.⁵⁶ However, it must not grant an authorisation unless it is satisfied in all the circumstances that: first, the proposed conduct is likely to result in a public benefit, and second, the public benefit would outweigh any public detriment constituted by any lessening of competition that is likely to result from the conduct.⁵⁷
43. In response to an application for authorisation, the ACCC conducts an extensive analysis that involves receiving submissions from the applicants and any other interested parties. A broad array of factors are considered when assessing the likely public benefit and detriment of the proposed conduct. For example, in the recent Qantas/Emirates determination, the ACCC acknowledged that the arrangement was likely to result in a public benefit by allowing the participants to reduce what is called "wingtip"

⁵⁶ *Competition and Consumer Act 2010* (Cth), s 88.

⁵⁷ *Competition and Consumer Act 2010* (Cth), s 90(5A)-(7).

- flying.⁵⁸ I now know this refers to multiple airlines flying the same routes at almost the same time of day. It is obvious that the task undertaken by the ACCC requires a deep understanding of the parties and the industry.
44. The ACCC applies a very different test when assessing proposed mergers or acquisitions. Under section 50 of the Act, a corporation must not acquire shares or assets if the acquisition would have the effect, or be likely to have the effect of substantially lessening competition in a market. There is no need to worry – I have finished talking about market definition this morning. In determining the likely effect of the proposed acquisition, the ACCC assesses the future state of the market by comparing the likely competitive environment both with and without the merger taking place.
45. One interesting aspect of the now approved Virgin-Tiger joint venture is the extent to which the ACCC appears to have relied upon what is known as the failing firm defence. The failing firm principle – which is actually not a defence under either Australian or New Zealand law – evolved from case law in the United States.⁵⁹ According to the principle, competition *with* the merger may well be less than the current state of competition. However, in circumstances where one of the parties is likely to fail, the relevant test is whether future competition *with* the merger would be

⁵⁸ ACCC Determination, Applications for authorisation lodged by Qantas Airways Limited and Emirates (27 March 2013) at ii, 52.

⁵⁹ See, for example, M Berry and P Scott, "Merger Analysis of Failing or Exiting Firms Under the Substantial Lessening of Competition Threshold" (2010) 16 *Canterbury Law review* 272; D Poddar, "The Failing Firm: Its place under Australian merger control" (2009) 17 *Trade Practices Law Journal* 252.

substantially less than competition *without* the acquisition taking place, but obviously where the party in issue has failed and exited the marketplace. The failing firm principle is reflected in the ACCC's merger guidelines.⁶⁰

46. One aspect of the failing firm principle that is worthy of note is the guidance materials provided by the New Zealand Commerce Commission as compared with the ACCC. The ACCC provides information regarding its approach toward failing firms within its general Merger Guidelines.⁶¹ On the other hand, the Commerce Commission has released separate supplementary guidelines in relation to failing firms. These guidelines provide detailed information regarding the Commission's approach when assessing failing firm arguments and the supporting materials that should be provided.⁶² In addition, unlike the ACCC, the Commission specifically addresses the possibility of a failing division, rather than a failing firm. There may be benefits in the ACCC providing further information in this respect.

47. This morning, I hope I have raised a number of issues regarding aviation and competition regulation that illustrate the challenges for legislatures, regulators and courts in dealing with dynamic areas of business like the aviation industry. As I have mentioned, it has only been 92 years since the Sydney Morning Herald described commercial aviation as an

⁶⁰ ACCC, Merger Guidelines (November 2008) at [3.22]-[3.23].

⁶¹ Ibid.

⁶² New Zealand Commerce Commission, "Mergers and Acquisitions: Supplementary Guidelines on Failing Firms" (October 2009).

“experiment”. The industry today is almost unrecognisable from the experiential days of the unfortunate Wizard Stone and the pioneering era of Goya Henry. With Sydney Airport averaging in excess of 850 movements per day in 2011, the aviation industry is undoubtedly of fundamental importance to Australia, both socially and economically.

48. Issues arising under competition laws will continue to be of significant relevance to the aviation industry. There are many fascinating matters relating to the regulation of anti-competitive conduct that are particularly significant for industries operating across geographic boundaries – a phenomenon which will only increase in the coming years and decades.

49. The presentations and discussions that will take place over the course of the next two days are particularly important in the context of the broad legal landscape that interacts with the aviation industry. The Aviation Law Association of Australian and New Zealand is to be commended for providing a forum in which to discuss and consider current issues facing the industry. I thank you for inviting me here this morning, wish you the best for the coming two days and am very pleased to formally declare the 32nd Annual ALAANZ Conference open.