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AVIATION LAW IN AUSTRALIA

FIFTH EDITION 2018

BY RONALD I.C. BARTSCH

FOREWORD

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A hundred years ago, a lot was happening in the world of aviation. The Great War had seen the introduction of large scale aerial combat. The outstanding Australian general, Sir John Monash, had pioneered the closely coordinated interaction of ground forces and military aircraft that ultimately contributed to the collapse of the opposing Central Powers.

Famously, on 11 November 1918, at 11am, the guns of war fell silent. An Armistice came into effect. Ambitious people quickly returned to the development of civil aviation. In August 1919, the International Air Transport Association (IATA) was founded. Soon afterwards, in The Hague, the Royal Airline Company (KLM) was established. It is the oldest such carrier still flying. As every Australian knows, in November 1920, QANTAS Airways was established to earn its iconic status in Australia and to contribute to the confidence of passengers by its reliability and safety in flight.

* Former Justice of the High Court of Australia (1996-2009); Editor-in-Chief, *The Laws of Australia* (2009 -).

Also in 1919, the *Paris Convention* was signed, as the first attempt to address the imperative needs for international rules of this new industry. Later, other rules were agreed to bring North America into the global system. These included the *Warsaw Convention* of 1929, the *Chicago Convention* of 1944, and the *Montreal Convention* of 1999. So huge had the airline industry become in later decades that the need for a single and universal system to regulate the liability of international carriers came to be accepted. Nation states recognised the need for consistent and compatible regulation of air transport.

Australia had special needs to participate in this international regulation. The tyranny of distance, that had been such a feature of Australia's geographical isolation, became a tyranny no more. Australians became some of the most inveterate air travellers on the planet. This meant their close involvement in the applicable international conventions and regulations; and the adoption of domestic Australian law to bring the international rules into operation at home.

This book is the fifth edition of the standard text that Ronald Bartsch first wrote in 1996. That was the year, as he reminded me, when I commenced my service as a Justice of the High Court of Australia. Now, ten years after my retirement as a Justice in 2009, Ronald Bartsch has brought his book up to date once again. As he points out in his Preface, he became aircraft pilot and “gained [his] wings long before [he] donned [his] wig.” To the task of presenting, explaining and updating the Australian law on aviation, he has brought an insider's enthusiasm; a highly practical outlook; and a clear appreciation of the importance of the law for the safe and compatible regulation of aviation. But he has also recognised the importance of aviation to the growth of national and international

integration, so that we can now see our blue planet from outer space and realise vividly the essential unity of all human beings. This means unity with each other and integration with the precious biosphere that travels with us through Space on our comparatively insignificant global spaceship, planet Earth.

The last (4th) edition of this work was published in 2013. Yet, more than in other disciplines, aviation law needs to be constantly kept up to date, both for the information of those flying into, or otherwise in accordance with, Australia's legal jurisdiction. But also because of new problems that have emerged; important new aviation regulations that have been adopted; and new forms of aviation that have required urgent adaptation and adjustment of the legal mind.

The present regulatory reform program governing Australia's civil aviation law dates back to 1996, 22 years ago. This was when the first edition of this publication was released. Yet the most recent phase of regulatory reform has only lately been adopted by Australia. The new rules introduced in Australia are closely aligned with the international regimes for aviation regulation now in force in Europe and North America. A special feature of this new edition is the way in which the new regulations, have included airline operations; charter flights; maintenance organisations; and flight training organisations. All of these features are described and updated in this edition.

Also found here is Annex 19 – *Safety Management Systems*. This is the latest Annex adopted by the International Civil Aviation Organisation (ICAO). It represents the first new Annex in over four decades. It took effect in 2013. It reflects the increasing importance of adopting a systems

approach to safety regulation and to mandating states approved safety management systems. Along with 192 state parties to the *Chicago Convention* of 1944, Australia is obliged to comply with the Standards and Recommended Practices (SARPs) in respect of safety management that are prescribed in this new Annex. As the promotion of aviation safety is the fundamental objective of aviation law and regulations, key aspects to the new Annex are described in this new edition. Self-evidently, it must be known and observed in aviation in Australia. To maintain the nation's prized record in aviation safety, there can be no excuse for ignorance or non-compliance.

The shift of nation states, including Australia, towards the *Montreal Convention* of 1999 now includes over 120 contracting nations that subscribe to an international liability regime that was intended to be fairer to the affected users and also quicker in the delivery of the just resolution of claims. Australia subscribed to the *Montreal Convention*. However, its national law substituted "bodily" in place of "personal" injury as allowed for recovery under the *Montreal Convention*.¹ A recent case concerning a claim for post traumatic stress disorder, suffered after the ditching of a Pel-Air Aviation aero-medical flight near Norfolk Island, was defeated in the NSW Court of Appeal.² The result has been a narrower ambit of recovery. However, there was also an 8 year delay that frustrated the speedy justice objective of *Montreal*.

This edition is admirably up to date. It describes practical obstacles for plaintiffs that have arisen under the *Montreal Convention* in relation to the crash of Malaysia Airlines flight MH17, apparently brought down by a

¹ See ACL Act, Part iv. See [11.155] below.

² *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 32. Contrast *Montreal Convention*, art 17.

Russian-made military rocket launched from Ukraine. Some of the issues raised in that case (and also in the loss of MH370, off course in the Indian Ocean) are discussed. Most passengers and the dependants probably envisaged a recovery different from what has happened in such cases. This fact may demonstrate the never-ending need for law reform in international and national aviation regulation.

The advent of new varieties of flying unmanned flying objects ('drones') has also brought about the need for new laws. Australia was the first nation in the world to adopt national regulations relating to commercial operations involving drones.³ A new chapter has been introduced to this edition to describe the myriad of legal issues associated with this form of aircraft. Those issues include protection of privacy; attention to security; and the risk of use by terrorists or others endangering traditional forms of aviation. Astonishingly, Australia has seen an exponential uptake of drone technology. Reportedly, there are 150,000 drones already in operation within Australian jurisdiction. More than 2,000 commercial operators are involved, already outnumbering the proliferation of piloted aircraft in Australia's aviation hungry continental airspace.

Aviators, lawyers, regulators and judges will be grateful to Ronald Bartsch for his new, updated edition. They will also be appreciative of the many experienced lawyers, air pilots and corporate regulators who have contributed to this work. They should also be thankful to Thomson Reuters, whose outstanding publication technology has ensured the production of this work, at once updated, perceptive and significant.

³ Remotely Piloted Aircraft Systems (RPAS).

To imagine where aviation will bring humanity in a further hundred years, it is necessary to have resort to science fiction. Little could Orville and Wilbur Wright have imagined where the world of aviation would be a century hence when they took off south of Kitty Hawk and leapt headlong into the global age of aviation. The past century has witnessed a technological and global miracle. Ronald Bartsch has chronicled the story from a global point of view. The miracle continues.

A handwritten signature in black ink, appearing to read "Ronald Bartsch", written in a cursive style.

Sydney, 1 October 2018