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AVIATION LAW IN AUSTRALIA

BY RONALD I C BARTSCH

5TH EDITION 2018

FOREWORD

The Hon. Michael Kirby AC CMG

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A hundred years ago, a lot was happening in aviation. The Great War had seen the introduction of air combat. The outstanding Australian General, Sir John Monash had pioneered the closely coordinated interaction of ground forces and military aircraft that contributed to the collapse of the axis powers. Famously on 11 November 1918, at 11am, the guns fell silent. An Armistice came into effect. Ambitious people quickly turned to the rapid development of civil aviation. In August 1919, the International Air Transport Association (AITA) was founded. Soon after, in The Hague, Royal Airline Company (KLM) was founded and is the oldest such carrier still flying. As every Australian knows, in November 1920 Qantas was established to earn its iconic status and to contribute to the confidence of passengers in the reliability and safety of flight. Also in 1919, the Paris Convention was the signed. It was the first attempt to address imperative need of this new industry to adopt international rules. 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 recent decades that the need for a single and universal

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

system to regulate the liability of international carriers came to be accepted. Nation states recognised the need for consistent and compatible legal regulation of air transport. Australia had special needs to participate in the international regulation. The tyranny of distance that had been such a feature of Australia's isolation became a tyranny no more. Australians became some of the most intensive air travellers on the planet. This meant their close involvement in applicable international conventions and regulations; and the adoption of Australian law to bring the international rules into operation at home.

This book is the 5th 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, 10 years after my retirement from that service 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." With a task of presenting, explaining and updating the Australian law of aviation, he has brought an insider's enthusiasm; a practical outlook; and a clear appreciation of the importance of law for the safe and compatible regulation of aviation. But also the importance of aviation to the growth on national and international integration so that we can see our blue planet from outer space and realise afresh the essential unity of all human beings. Unity with each other and integration in the precious biosphere that travels with us through Space on our insignificant planetary spaceship, planet Earth.

The last 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 regulation of those flying into or otherwise in accordance with,

Australia's legal jurisdiction. But also because of new problems that have emerged; important new regulations that have been adopted; and new forms of aviation that have required adaptation and adjustment of the legal mind.

The basic 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. New regulations introduced in Australia are closely aligned with the international regimes for aviation regulation now in force in Europe and North America. A feature of this new edition is the way in which new regulations, that include airline operations; charter flights; maintenance organisations; and flight training organisations are described and updated in this edition.

Also found here is *Annex 19- Safety Management Systems*. This is the latest annex of 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 the systems approach to safety regulation and to mandating state 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 object of aviation law and regulations, key aspects to this new Annex are described in the new edition. Self-evidently, it must be known and observed in and for aviation in Australia. To maintain the nation's prized record in aviation safety, there can be no excuses 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 international liability regime that was intended to be both fairer to the affected users and also quicker in the delivery of just resolution of claims. Australia subscribed to the Montreal Convention. However, its national law substituted “bodily injury” in place of “personal” injury allowed under the Montreal Convention.¹

In a recent case concerning a claim for post-traumatic stress disorder suffered after the ditching of a Pel-Air Aviation aeromedical flight near Norfolk Island was defeated in the NSW Court of Appeal,² the result has been a narrower ambit of recovery and also an eight year delay frustrates the speedy justice objective of Montreal.

This edition is admirably up to date. It describes practical obstacles for plaintiffs that have arisen in claims under the Montreal Convention in relation to the crash of Malaysia Airlines MH17, brought down apparently by a Russian made military rocket launched over Ukraine. Some of the issues raised in that case (and in the loss of MH370, off course in the Indian Ocean) are discussed. Most passengers and the dependants probably have an idea of recovery different from what has happened in recent cases. This fact may demonstrate the never-ending need for law reform in international and national aviation regulation.

The advent of new varieties of unmanned flying objects (drones) has brought about new laws. Australia was the first nation in the world to adopt

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.

national regulations relating to commercial operations involving drones.³ A new chapter has been introduced in 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. There are over 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 must be grateful to Ronald Bartsch for his new, updated edition. They must also be appreciative of the many experienced lawyers, air pilots and corporate regulators who have contributed to this work. As well as to Thomson Reuters, whose outstanding publication technology has ensured the production of this work, at once updated, interesting and important.

To imagine where aviation will bring humanity in a further 100 years, it is necessary to have resort to the science fiction. Little could Orville and Wilbur Wright have imagined where the world of aviation would be when they took off south of Kitty Hawk and leapt headlong into the age of aviation.



Sydney

1 October

³ Remotely Piloted Aircraft Systems (RPAS).