Aviation Law Association of Australian and New Zealand
2023 Conference
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Opening Keynote Address

“There and back again – the last quarter century.”

Mark Leeming[*]

The hardest thing which confronts a keynote speaker is the title. It is almost indispensable that there be a double entrendre, a play on words, or some other quirkiness – I do not why, but the same thing may be seen with the sub-editors in newspapers – and it needs to be fixed weeks or months before the event – before the speaker has worked out what is going to be said.

This conference has a session tomorrow on emerging technology, and of course I was very concerned like many judges not to appear out of date, and so I asked Chat-GPT to help me. Actually, that's not strictly true. Beware of judges who claim they are doing something modern. In a tried and true approach, familiar in litigation and in life, where the older generation is confronted with a problem they have no idea how to solve, I asked a younger generation, in this case, my son, to help. Chat-GPT came up with the following ten candidates: “Navigating the legal skies”; “Turbulent times in aviation law”; “The evolution of aviation law has really taken off”; “Taking a closer look at the legal runway”; “Clear for take-off: An overview of aviation law”; “The sky's the limit when it comes to aviation law”; “Flying through the legal clouds”; “The long and winding flight of aviation law”; “Safely navigating the twists and turns of aviation law”; “Landing on the legal tarmac”.

Many of these seemed perfect. They were catchy, quirky, and essentially meaningless. In other words, perfect as the title of an address for which the speaker hadn't worked out what to say.

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[*] Judge of Appeal, Supreme Court of New South Wales. I acknowledge the research assistance of Janek Drevikovsky in preparing this address. All errors are mine.

Then I had a another thought. Why stop with the title? Perhaps there was a *very* efficient way to prepare this keynote speech (and many other speeches). I had an idea that I would talk about some of the decisions over the last 25 years on aviation law. So I asked my son to get Chat-GPT to describe *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204 in a short paragraph. You may recall the litigation. It arose from the tragic crash of an aircraft operated by Sydney Seaplanes which had departed from Cottage Point and returning to Rose Bay on 31 December 2017. A passenger, Ms Heather Bowden-Page, was killed. Her father, Mr Alexander Mathew Brodie Page, commenced proceedings in the Federal Court on 18 December 2019, seeking damages under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth). Of course, the Federal Court had no jurisdiction to entertain the claim as the flight took place wholly within New South Wales, and the Federal Court constituted by Griffiths J so held.[1] Mr Page then commenced proceedings in the Supreme Court, but more than two years had passed, and so the cause of action under the State statute was extinguished. Accordingly, he relied on the *Federal Courts (State Jurisdiction) Act 1999* (NSW), which was legislation enacted immediately after the partial invalidity of the cross-vesting scheme, where dozens of proceedings filed in federal courts were found not to be within jurisdiction. He sought an order under that Act for the proceeding dismissed by Griffiths J to be "treated as a proceeding in the Supreme Court". He was successful at first instance,[2] but an appeal was allowed. Special leave was granted but the litigation was compromised.

So it's an important case showing the interplay of federal and State law, the intrusion of Warsaw Convention principles into federal and State law, the need for litigants and their advisers to be aware of the extent of federal legislative competence, and the limits of beneficial remedial legislation designed to respond to cases where a federal court dismissed proceedings for want of jurisdiction.

Here is Chat-GPT's response:

> Sydney Seaplanes Pty Ltd v Page, 2021 HCA 56 (15 December 2021)
> This case involved the issue of whether operators had a duty of care to passengers and whether they breached that duty. The High Court of Australia decided that the

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[1] *Page v Sydney Seaplanes Pty Ltd* (2020) 277 FCR 658; [2020] FCA 537.

[2] [2020] NSWSC 1502.

> operators did owe a duty of care to the deceased and that this duty was breached by the operators when they failed to prevent the passengers from getting on the plane. The case has raised important legal questions about the scope of a duty of care and the impact of exemptions.

[2021] HCA 56 does not exist – the High Court only delivered 44 judgments to which it gave media neutral citations in 2021. No judgments were delivered on 15 December 2021.

One feature of Chat-GPT is that it will give you a different answer to the same question asked a second time, so we tried again.

> Sydney Seaplanes v Page serves as a reminder of the legal responsibilities and potential consequences that employees may face when leaving a company and starting a competing business, particularly when using confidential information or trade secrets gained during their previous employment. This case emphasizes the importance of employers taking steps to safeguard their business interests, such as implementing robust confidentiality agreements and non-compete clauses in employment contracts.

The software also permits you to ask follow-up questions. So, acting under the guidance of my son, I did just that:

> I don't think that's right. I'm after the 2021 Sydney Seaplanes case in the New South Wales Court of Appeal.

It responded apologetically:

> I apologize for the **confusion** in my previous response. The case you are referring to is Sydney Seaplanes Pty Ltd v Aerial By Uber Pty Ltd [2021] NSWCA 106, which was heard in the New South Wales Court of Appeal in 2021. The case involved a dispute between Sydney Seaplanes Pty Ltd (the appellant) and Aerial By Uber Pty Ltd (the respondent) over the use of the term "Sydney Seaplanes" as a registered trademark.

I couldn't resist testing this. I entered this response:

> No that's quite wrong. The New South Wales Court of Appeal can't hear a trade mark case. The case you mentioned does not exist. Can you explain why you were wrong please.

Chat-GPT responded:

> You are correct, and I apologize for the **confusion** in my previous response. The Federal Court of Australia, rather than the New South Wales Court of Appeal, has jurisdiction over trademark cases. My previous response was inaccurate, and the case I mentioned does not exist. As an AI language model, I sometimes make errors based on the information or context provided. I appreciate your patience and understanding, and I apologize for any **confusion** my previous responses may have caused.

I gave Chat-GPT one last chance. It had problems with identifying the right case, but perhaps I could help it. So I asked an easily verifiable question:

> What case was [2021] NSWCA 204?

Chat-GPT responded:

> [2021] NSWCA 204 refers to the case "Sydney Seaplanes Pty Ltd v Aaron Shane Page," which was heard in the New South Wales Court of Appeal in 2021. The case involved a dispute between Sydney Seaplanes Pty Ltd (the appellant) and Aaron Shane Page (the respondent) over the non-payment of a debt. In this case, Sydney Seaplanes sought to recover a debt owed by Mr. Page for services rendered. The primary issue was whether the trial judge erred in finding that the respondent was not personally liable for the debt. The Court of Appeal considered the contractual arrangements between the parties and the principles of corporate liability, as well as the respondent's liability as a director of the company.

I draw three conclusions.

First, our jobs are safe from generative artificial intelligence – at least for the next week or so. Secondly, Chat-GPT uses language in a very special way. In particular, it doesn't make mistakes, or tell falsehoods. It is just “confused” and apologises profusely. Thirdly, I was going to have produce the substance of this keynote address the old-fashioned way.

After Chat-GPT's performance, I thought it would be wrong to use any of the ten titles prompted by the software. And so I took the course that I have taken before when things get a bit too much, and resorted to Tolkien. “There and back again” is a perfectly good title for a slim book about some dwarfs and a hobbit in a quest for treasure. But it is also not a bad description for a return ticket. And I hope you will see that it is not a bad description of the trajectory of aviation litigation over the last quarter century, which is full of recurring themes. In many ways we have ended up much where we started.

The Sydney Seaplanes litigation itself recalls some of the complexities when carriage by air intersected with Australian federalism in *Air Link Pty Ltd v Paterson*.[3] The facts were simple. Mr Paterson travelled there and back again, on 20 September 1998 from the Gold Coast to Sydney, thence to Dubbo and Cobar, on the same ticket which had him returning five days later. He slipped and fell as he disembarked on the return leg from Cobar to Dubbo. He commenced proceedings in contract and negligence 1 year and 362 days later in the District Court of New South Wales . The litigation concerned his application to amend to include a claim under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) based on an injury in the course of interstate carriage, and the carrier's application to strike out the claim. So the ultimate question was whether the rules relaxing the prohibition in *Weldon v Neal* – which permits amendments that introduce new, state-barred, causes of action arising out of the same facts – were available. But before they could be reached there were very difficult questions of federal jurisdiction and whether a New South Wales procedural rule could overturn a federal limitation defence.

In short, some things don't change. One thing that hasn't changed for many years is that Sir Roy Goode has been teaching transnational commercial law subjects at Oxford. I met him a few months ago. He was 89 then, he's now 90. He is more than 70 years older than some of the students, although he does not look it, nor does he sound it. I like his definition of "commercial law", which is actually quite profound.[4] Let me read it to you:

> If by commercial law we mean a relatively self-contained, integrated body of principles and rules peculiar to commercial transactions, then we are constrained to say that this is not to be found in England. The law affecting business transactions is not a seamless web, nor is it a jigsaw in which, with careful study and some luck, all the pieces can be fitted neatly together to make a harmonious whole. Rather it is a collocation of ill-assorted statutes bedded down on an amorphous mass of constantly shifting case law.
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> But if we view commercial law as the totality of the law's response to the needs and practices of the mercantile community, then, indeed, commercial law exists and flourishes in England, adapting itself constantly to new business procedures, new instruments, new demands.

Aviation law is like that, if you substitute "aviation" for "commercial".

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[3] (2005) 223 CLR 283; [2005] HCA 39.

[4] E McKendrick, *Goode on Commercial Law* (5th ed, Penguin Books, 2016), p 1299.

One of the great joys of practising in aviation law is the range of problems that arise. It is difficult to think of any other area where one can need to be familiar with – the operation of treaties and the Vienna Convention, many aspects of Australian federalism, the workings of federal jurisdiction, the operation of State laws being made applicable to matters in federal jurisdiction, the significance of air waybills, and so on.

Let me start with Australian federalism. I've already touched on the difficulties in the *Sydney Seaplanes* litigation, which ultimately derive from the lack of federal legislative power. The starting point is *R v Burgess; Ex parte Henry*,[5] where it was held that there was federal power to enact a law to implement the air navigation treaty made in Paris in 1919 (which established the International Commission for Air Navigation, ICAN, the ancestor of ICAO, and which in turn informed the Chicago Convention) and to regulate inter-State air navigation, but that did not extend to a regulation making it an offence for Henry Goya Henry to make short flights around Mascot. That was picked up in the popular press, with captions that show that nothing is new, including my favourite "The Airman Who has Upset the Constitution – Goya Henry's Fight for Freedom of the Skies" – Victory for Daredevil Pilot – Threw Govt into a tail spin".[6]

November 21, 1936 Smith's Weekly 3

The Airman Who Has Upset The Constitution

GOYA HENRY'S FIGHT FOR FREEDOM OF THE SKIES

Victory For Daredevil Pilot

THREW GOVT. INTO A TAIL SPIN

IN the constitutionally-historic dried fruits case, James, a man of substance, had the money to fight his long legal war. Goya Henry, a one-legged Sydney pilot, whose High Court victory last week threw

GLARING FORM REVERSALS

REV. GEORGE COWIE CALLS A MEETING FOR "SMITH'S"

Surry Hills Housewives Produce Their Basic Wage Budgets

EVERY sitting day of the New South Wales Parliament is opened with the following prayer:

"Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory and the true welfare of the people of our State and of Australia."

REV. GEO. COWIE

He later accepted a settlement of £500 in his claim for loss from being deprived of his air pilot's licence.[7]

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[5] (1936) 55 CLR 608.

[6] *Smith's Weekly*, 21 Nov 1936, p 3, and see "Aviator's Case Still in the Air" *Daily Telegraph*, 17 Aug 1938 p 4.

[7] *Singleton Argus*, 23 August 1937, p 3 "Settlement for Goya Henry".

The limitations of federal power were worked out in the *Airlines of NSW Nos 1 and 2* cases in the 1960s,[8] but the difficulties of federalism still haven't gone away to this day. In *Heli-Aust Pty Ltd v Cahill*,[9] the question was whether Commonwealth air regulation covered the field. A helicopter struck power lines while surveying for locusts in rural NSW. The pilot and a passenger died, and another passenger was injured. Charges were brought in the Industrial Relations Court against the helicopter operator under the *Occupational Health and Safety Act 2000* (NSW). The operator argued that the State OH&S law was, in the circumstances, invalid because the Commonwealth had covered the field of air safety regulation. The Full Court agreed. It found that the *Civil Aviation Act 1988* (Cth) created a detailed regime for comprehensively regulating safety in civil aviation. That this regime was designed to meet Australia's international obligations confirmed that the Commonwealth had intended to cover the field.

I'll leave the details of the sequel, *Work Health Authority v Outback Ballooning Pty Ltd*,[10] to Tom Brennan's presentation later in this conference. A majority of the High Court allowed an appeal brought by the NT Work Health Authority. It had charged an Alice Springs hot-air balloon operator with an NT OH&S offence, after a passenger died when her scarf was sucked into a balloon's inflation fan. The Court of Appeal had dismissed the charge, applying *Heli-Aust* to find the NT statute inconsistent with the CA Act. The High Court disagreed. True it was that the federal statute contained offences similar to those in the Territory statute. But that was *not* conclusive of inconsistency. In fact, s 28BE(1) of the Act, which imposed a duty of care on holders of air operators' certificates, was explicit that it did not exclude state and territory laws. While some parts of the CA Act might well exclude state and territory law, for example the prescription of air worthiness requirements, its provisions on the standard of care were not exhaustive. Edelman J gave a forceful dissent, saying it would be "surprising, confusing, and potentially dangerous" if interstate air travel was subject to multiple schemes of regulation, shifting with every border that was crossed.

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[8] *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1; *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54, see also *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.

[9] (2011) 194 FCR 502; [2011] FCAFC 62.

[10] (2019) 266 CLR 428; [2019] HCA 2.

Personal injury law

Of course a deal of aviation law concerns personal injury, although seen through a Warsaw Convention prism. *South Pacific Air Motive v Magnus*[11] is one of several cases which illustrate courts' efforts to ascertain the boundaries of the Convention's liability scheme. A chartered aeroplane travelling from Sydney to Norfolk Island ditched in Botany Bay. Among the group of school students on board, there were injuries but no deaths. Three years later, representative proceedings were brought against the carrier, on behalf of passengers and their families who understandably feared for the worst. But federal law was not pleaded. Instead, the pleadings alleged, *inter alia*: common law negligence for physical and psychological harm to the passengers, and common law negligence for psychological harm to non-passengers, namely, the students' parents. The question before the Full Court of the Federal Court was whether these claims should have been brought under Part IV of the *Carriers' Liability Act*: if so, they were barred by the Act's strict two-year limitation period.

The crucial provision was s 36: when the *Carriers Liability Act* applies, all other civil liability "in respect of" a passenger's personal injury is extinguished. Justices Beaumont, Hill and Sackville were unanimous that this section applied to claims for passengers' physical and psychological harm (including pure mental injuries). However, Hill and Sackville JJ found that *non-passengers'* claims for mental harm were properly brought at general law. They thought the Convention was intended to apply only to claims by passengers: non-passengers had no contract with a carrier and were owed a different duty of care, independent of the carrier's duty to the passenger. Special leave was refused. More recently, in *Pel-Air Aviation Pty Ltd v Casey*,[12] a claim for PTSD by a nurse after her CareFlight from Samoa to Melbourne ditched in the ocean failed because evidence at its highest suggested only that the traumatising crash *might* have caused biochemical brain changes; but there was no proof they had actually occurred. Her PTSD claim therefore could not be brought under Art 17.

The holding in *Magnus* on third party psychiatric injury did not survive the High Court's more recent decision with the regime in *Parkes Shire Council v South West Helicopters*

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[11] (1998) 87 FCR 301.

[12] (2017) 93 NSWLR 438; [2017] NSWCA 32.

Pty Ltd.[13] A regional local council chartered a helicopter to fly two of its employees in a "low-level aerial noxious weed survey". The helicopter crashed, killing all on board. The widow and children of one employee succeeded in a claim for psychiatric harm against the council and helicopter operator. In the NSW Supreme Court, the council won contribution from the operator, on the basis that the underlying claim for psychiatric harm was at general law. In the NSW Court of Appeal, Basten and Payne JJA disagreed with that characterisation, and declined to apply *Magnus*: s 35(2) extinguished liability "in respect of" a passenger's death, including a third party's psychiatric harm. I took the view, wrongly as it turns out, that there was an important difference based on the contract of carriage, which applied the Warsaw regime as a compromise between passenger and carrier. Non-passengers make no such contractual compromise.

The High Court this time granted special leave, but unanimously found that psychiatric harm to third parties *did* fall within Part IV of the *Carriers Liability Act*, and that liability under Part IV was not based on the legal relationship between parties. Rather, the liability was "event-based": by its "ordinary and natural" language, s 35(2) extinguished any general law liability flowing from the death of a passenger. A similar conclusion applied to s 28, which makes carriers strictly liable for damage "sustained by reason of" passengers' death and injury: anyone who sustains damage can sue under this section, even if they were not a passenger.

Povey v Qantas Airways Ltd concerned a different aspect of the Warsaw Convention, primarily as amended by the Montreal Protocol No 4: what is the meaning of "accident"?[14] Mr Povey developed deep vein thrombosis on a British Airways flight between Sydney and London. Because the flight was international, he brought proceedings under the Convention itself, which the *Carriers' Liability Act* applies as Australian law. Art 17 allows recovery for an injury caused by an "accident" on board the aircraft. Mr Povey claimed his DVT resulted from onboard "conditions and procedures", including cramped seating, discouragement of movement, a steady flow of alcohol and caffeine, and a failure to warn of the risk of DVT.

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[13] (2019) 266 CLR 212; [2019] HCA 14.
[14] (2005) 223 CLR 189; [2005] HCA 33.

Six judges of the High Court held that these conditions were not an "accident". Article 17 invites two questions: first, was there an on-board "event" that caused the injury; secondly, was what happened "unusual or unexpected"? In this case, the first question was answered in the negative: failure to warn, cramped conditions and drink service could not be described as "an event". McHugh J, in dissent, preferred a wider definition: an accident was either "an unexpected or unusual event", *or* "a voluntary and intended act that caused an unintended and reasonably unforeseeable injury". The pleaded "conditions and procedures" fell within the second category.

Sometimes jurisdiction and personal injury claims coalesce. In *Gulf Air Co GSC v Fattouh*,[15] the basic question arose: when does a court have jurisdiction over a Convention claim? Mr Fattouh flew from Beirut to Sydney, on a return ticket with Gulf Air. There was a three month gap before his flight back to Beirut. On the flight to Sydney, Mr Fattouh was punched by another passenger. He brought proceedings in the District Court of New South Wales, which found it had jurisdiction. The Court of Appeal disagreed. Under Art 28 of the Montreal Convention, a court has jurisdiction to hear a claim for Convention damages in any of four scenarios: if it has jurisdiction where the carrier is resident, or where the carrier has its principal place of business, or where it has an "establishment" that made the relevant travel contract, or if the court had jurisdiction at the "place of destination".

Gulf Air met none of the first three conditions. The appeal therefore turned on whether NSW was the "place of destination". Ordinarily, the Court found, the place of destination was as stated on the ticket: here, the nominated destination was Beirut. That statement is rebuttable by surrounding circumstances; but on the facts, there was no material to rebut it. The District Court therefore had no jurisdiction.

Cargo cases

Of course, aviation law deals with the consequences of carrying cargo as well as passengers. Art 18 holds carriers liable for "damage sustained in the event" of cargo destruction, loss or damage. Unlike Art 17, there is no requirement for an "accident". In

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[15] [2008] NSWCA 225; 251 ALR 183.

Singapore Airlines Cargo Pte Ltd v Principle International Pty Ltd,[16] a live animal exporter contracted with a carrier to transport cattle from Sydney to Harbin, China. Because of poor onboard ventilation, 18 head of cattle died. At first instance, the exporter was successful with a claim under Art 18. On appeal, the carrier argued that it was not liable because there was no relevant “event”. The Court of Appeal found that the inquiry under Art 18 was *not* whether there was an unusual or unexpected event; rather, whether there was some event which caused the damage. Stowing the cows in an under-ventilated deck was that event. The carrier then argued that, under Art 18(2), it was not liable because the loss of cattle was caused by a third party’s “defective packing”. But the “event” that caused loss was poor onboard ventilation, which was in no way caused by any packing done by a third party.

A little more surprisingly, aviation extends to land transport. In *Siemens Ltd v Schenker International (Australia) Pty Ltd*,[17] the High Court had to construe contracts for carriage of equipment between Germany and Melbourne. The equipment was to be flown to Siemens Australia, a daughter company of Siemens Germany. A German air carrier, Schenker, had a contract with Siemens Germany to undertake consignments of this kind. Before despatching the equipment, Schenker issued Siemens Australia with an air waybill for its carriage. The equipment was damaged after it arrived in Melbourne, while being trucked from the airport to Schenker’s warehouse. Schenker argued that cl 4 of the waybill limited its liability for “carriage”, including road carriage. By majority, the High Court agreed. It found that, while the goods were still airborne or within an airport, the Convention’s liability scheme applied. However, once they were outside the airport, the Convention was inapplicable. Clause 4 was then engaged. Because clause 4 applied only where the Convention did not, it used “carriage” to mean carriage *other* than by air: for example, by road. The contract between Siemens Germany and Schenker strengthened this conclusion. The agreement continued until goods were delivered: the waybill operated at least up to that point. Schenker’s liability, which arose before delivery, was therefore limited.

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[16] (2017) 96 NSWLR 737; [2017] NSWCA 216.

[17] (2004) 216 CLR 418; [2004] HCA 11.

Finally, in the cargo cartel cases which occupied around a decade, the *Garuda v ACCC* litigation produced decisions on the scope of sovereign immunity of a State carrier under the *Foreign State Immunities Act 1985* (Cth) and a leading case on market definition.

Other cases

There are many familiar appellate cases dealing with certain aspects of aviation law. In *Endeavour Energy v Precision Helicopters Pty Ltd*[18] it was held that a telecommunications carrier owed a duty of care to persons conducting aerial inspections of transmission cables, and that the *Carriers' Liability Act* applied to low-level inspection flights, since the inspector was a “passenger” being carried for commercial purposes within the state by a charter licence holder.

The damage by aircraft regime was clarified in *ACQ Pty Ltd v Cook*.[19] Once again the analysis is complicated by Federation. In rural NSW, a crop dusting plane collided with a power conductor, causing it to collapse partway to the ground. An energy company employee, Mr Cook, was sent to make repairs: he approached the conductor on foot, over a boggy and irregular cotton field, until he tripped, falling within 60 mm of the still-active unit. There was an electric arc; Mr Cook was severely injured. The NSW Court of Appeal found the aircraft pilot owed Cook no duty of care in common law negligence. But under the *Damage by Aircraft Act 1999* (Cth) the aircraft operator or owner is liable for damage caused by the “result” of an “impact” with an aircraft, with part of an aircraft, or with something that fell from an aircraft. The Court of Appeal held that this provision applied to the indirect consequences of an impact. Common law causation principles applied, but the defence of contributory negligence in the *Civil Liability Act 2002* (NSW) did not, because it was not picked up by Commonwealth law. In *ACQ Pty Ltd v Cook* the High Court confirmed this construction of the provision.[20]

May I return to Roy Goode's definition, in order to mention something of the range of litigation that emerges in aviation, by way of examples from less mainstream areas. It has always been thus. The high point may have been *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*,[21] a carrier's defamation action against *Women’s Day* which published a a novella titled *Dateline Masada*, a purple prose romp through the Arab-Israeli conflict,

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[18] [2015] NSWCA 169.

[19] (2008) 72 NSWLR 318; [2008] NSWCA 161.

[20] (2009) 237 CLR 656; [2009] HCA 28.

[21] (1975) 134 CLR 1.

with Zionist politics, Arafat-look-alikes, hijackings and three romances – all in 78 pages, which continues to be a leading case in innuendo in defamation law. In one scene, two Zionist zealots used deadly nerve gas to commandeer an entire fleet of Middle East Airlines' planes (all passengers escape when a plucky Australian miraculously saves the day). Middle East pleaded that, by innuendo, the scene carried an imputation that its passengers were at serious risk of an Israeli hijacking. The High Court ruled that a jury should determine whether the publication carried an imputation that passengers were at risk of an Israeli hijacking. It was no bar that the work was fiction or that the statement did not allege some act by Middle East Airlines: instead it implied that it was characteristic of the plaintiff to be at risk of hijacking, and was capable of being defamatory.

The more unusual modern cases include *Francis v Firkins*,[22] a prosecution for packing dangerous goods in disguise. The appellant was a warehouse supervisor. He received an urgent order from a remote hospital for three cartons of a dangerous, corrosive sterilant. To ensure the sterilant was air-shipped without delay, the appellant packed it in a way that disguised its true nature. He took only minimal protective measures and did not declare that the goods were dangerous. In the WA Magistrates Court, he was sentenced to nine months' gaol, but was released on a bond of $1000. That sentence was reduced on appeal, because of a failure to take into account his state of mind, namely, to help a hospital, rather than make gain. The WA Supreme Court reduced the sentence to a $5,000 fine.

A deal of the industrial litigation in aviation law also encounters constitutional law and questions of statutory construction and extraterritoriality. An example is *Fair Work Ombudsman v Valuair Limited (No 2)*,[23] where Jetstar staffed some of its flights with Singaporean and Thai cabin crew, based in those countries and employed by Singaporean and Thai labour hire companies. The foreign crew flew mostly international legs, although some of their work was on wholly domestic Australian flights. The Fair Work Ombudsman considered that it was a breach of the *Fair Work Act 2009* (Cth) not to pay these workers the rates set out in the *Aircraft Cabin Crew Award 2010* (Cth). Buchanan J of the Federal Court disagreed. For the Act and Award to apply, the Singaporean and Thai employers had

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[22] [2008] WASC 189; 224 FLR 8.
[23] (2014) 224 FCR 415; [2014] FCA 759.

to meet be a ‘national system employer’, defined by the FW Act as a ‘constitutional corporation’ that has employees within the meaning of s 51(xx) of the Constitution. There was nothing to indicate this definition had extra-territorial effect: the relevant employment relationship had to be ‘in and of Australia’. The employment contracts and foreign companies had no connection to Australia: the relationship therefore did not meet the test, and neither the Act nor Award applied.

The best criminal law case – which may indicate my liberal definition of “aviation law” – must surely be *Mok v Director of Public Prosecutions* (NSW).[24] Mr Mok pleaded guilty to offences charged in NSW, before absconding to Victoria. A NSW arrest warrant issued. Upon his recapture, a Victorian magistrate made a SEPA order extraditing Mok back to NSW. At Tullamarine, he made his break for freedom, running almost 100 m before yet another arrest. Once he was flown back to Sydney, he was charged with a NSW offence of attempting to escape custody. But was there any offence contrary to New South Wales law by an attempted escape from custody of New South Wales police officers in Victoria at an airport which was a Commonwealth place? The Court noted that, since Tullamarine was a Commonwealth airport, state laws do not apply of their own force. Normally, the *Commonwealth Places (Application of Laws) Act 1970* (Cth) picks up the laws of the surrounding state, in this case Victoria. Nothing turned on this, however, because SEPA excluded the operation of state laws concerning interstate service and execution of process, which included the charged offence. Instead, another provision of SEPA applied a state’s “escape from custody” laws if that state had issued an arrest warrant and if the escape happened while the accused was being extradited to that state. Mok satisfied those conditions.

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[24] (2016) 257 CLR 402; [2016] HCA 13.

Conclusion

If I have a theme, it is this. Variety is said to be the spice of life. In fact the cultural history of that phrase is extensive and fascinating.[25] One classical author with whom this tradition is closely associated, Aulus Gellius, commenced his famous work *Attic Nights* with an account of the ingenious and exceedingly witty titles[26] which others had used, in contrast with his own much simpler title.[27] He didn't have the dubious assistance of Chat-GPT, but otherwise, little has changed. But if variety is the spice of life, aviation law is surely one of the spiciest, most flavoursome dishes imaginable. An aviation lawyer needs more than a passing acquaintance with tort, contract, statute, equity, constitutional law, public law, regulation, crime, competition law – broadly speaking the entirety of most undergraduate law school course, and then with extra helpings of statutory construction. One of the problems with law, not assisted by the pandemic, is the tendency of lawyers to live in their own isolated silos. It is very difficult to take that course with aviation law. And it has always been thus.

As for how aviation law fits within the legal system, I would echo the sentiments of Ron Bartsch, who is also speaking later in this Conference:[28]

> [a]ny attempt to place aviation law into a particular category may prove to be counter-productive. Aviation law is a separate entity but at the same time, part of so many different branches of law. So where then does aviation law fit? The best answer to this question might be “nowhere”. In other words, do not try to categorise aviation law within any established division of law but rather consider it on its own merit. After all, it was the distinct and peculiar features of aviation initially that persuaded governments to afford it special status.

I shall leave you, then, to spend a couple of days enjoying this very special, very stimulating and very important area of law.

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[25] See W Fitzgerald, *Variety: The Life of a Roman Concept* (University of Chicago Press, 2016).

[26] “Exquisitissimos” titulos. See J Wolfe (ed), *Aulus Gellius: The Attic Nights* (Harvard University Press, 1927), p xxix.

[27] “But I, bearing in mind my limitations, gave my work off-hand, without premeditation, and indeed almost in rustic fashion, the caption of *Attic Nights*, derived merely from the time and place of my winter's vigils; I thus fall far short of all other writers in the dignity too even of my title, as I do in care and in elegance of style”: Wolfe, above, pp xxix-xxxi.

[28] R Bartsch, *Aviation Law in Australia* (Thomson Reuters, 5th ed, 2019), p 33.