Leonie Cameron v Qantas Airways Limited [1995] FCA 1304; (1995) Atpr 41-417 (1995) 55 FCR 147 (16 June 1995)

FEDERAL COURT OF AUSTRALIA

LEONIE CAMERON v. QANTAS AIRWAYS LIMITED
No. G205 of 1993
FED No. 396/95
Number of pages - 55
Trade Practices - Negligence
[1995] FCA 1304; (1995) ATPR 41-417

[1995] FCA 1304; (1995) 55 FCR 147

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
BEAUMONT J

CATCHWORDS

Trade Practices - Passive smoking on aircraft - unconscionable conduct - whether conduct "clearly" unfair or unreasonable - whether decision to permit smoking on flights unconscionable - whether policy of seat allocation unconscionable

Trade Practices - Misleading or deceptive conduct - misrepresentation - travel agents - whether representations made by travel agents binding - whether representations made with authority - whether statements as to seat allocation misleading

Negligence - common law - duty of care - forseeability - damages - causation - whether provisions of international treaty detract from common law "neighbourhood" principle - whether duty to warn of risk of exposure to smoke drift

Trade Practices Act 1974 s51AA, s51AB, s 51A, s52, s82, s84
Federal Court of Australia Act s21, s33Z, s33ZB

Jones v Grand Trunk Railway Company (1905) 9 OLR 723 - cons
Staron v McDonald's Corporation, 4 April 1995 (reported 10.1 TPLR 2.33) -

cons
The Commonwealth v Verwayen (1990) 170 CLR 394 - appl
Zoneff v Elcom Credit Union Ltd (1990) 94 ALR 445 - cons
Massey v National Mutual Life Association Ltd, Supreme Court of Victoria,

unreported, 1 May 1995 - cons
Stephens Travel Service International Pty Limited (Receivers and Managers appointed) v Qantas Airways Limited (1988) 13 NSWLR 331 - cons
Howard v Jarvic [1958] HCA 19; (1958) 98 CLR 177
Donald L Helling v William McKinney [1993] USSC 85; (1993) 125 L Ed 2d 22
Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 128 ALR 353 - cons
Commissioner for Railways v Cardy [1960] HCA 45; (1960) 104 CLR 274 - cons
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479 - cons
Wyong Shire Council v Shirt [1980] HCA 12; (1980) 146 CLR 40 - cons
Medlin v State Government Insurance Commission [1995] HCA 5; (1995) 127 ALR 180 - appl
Baltic Shipping Co. v Dillon [1993] HCA 4; (1993) 176 CLR 344 - cons

HEARING

SYDNEY, 21, 22 and 23 November 1994, 23 February, 10, 11, 12, 18, 19 and 20 April 1995
16:6:1995
Counsel and Solicitors Mr. N. Francey instructed by

for Applicant: Cashman and Partners
Counsel and Solicitors Mr. P. Hely QC with

for Respondent: Mr. A. Robertson instructed by
Dunhill Madden Butler

ORDER

THE COURT ORDERS:
1. That the respondent pay damages to the applicant and other
group members in the following amounts:
(1) Leonie Cameron - $250
(2) Bryan Norman Hooper - $200
(3) Ian Ronald Lewis - $175
(4) Eric Donald Glass - $ 50
(5) Russell Jean Aroney - $750
(6) Anita Louise Jacoby - $250
(7) Paula Irene Underwood - $200
(8) Paul Leslie McMahon - $175
(9) Kenneth Charles Thomas - $750
(10) Francis William Millane - $200
2. Application otherwise dismissed.
3. Liberty reserved to apply for costs.
NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

DECISION

INTRODUCTION
BEAUMONT J In the amended statement of claim filed in these group proceedings, the

applicant alleges that the respondent engaged in unconscionable and/or misleading or deceptive conduct in contravention of the provisions of Part IVA and Part V of the Trade Practices Act 1974. Further, or in the alternative, it is alleged that each of the group members suffered loss or damage occasioned by negligence and/or breach of duty on the part of the respondent.

2. In particular, it is claimed, inter alia, that the respondent engaged in the following specific misleading or unconscionable or negligent conduct, which is said to be common to all group members:

(1) That the respondent knew, or ought reasonably to have known, that the smoking of cigarettes and other tobacco products on board its aircraft was a health hazard in that smoke circulating in the air in the aircraft could cause or be a contributing factor in causing detrimental physical effects (para. 4).
(2) That the respondent knew, or ought reasonably to have known, that the allocation of seating which was designated smoking or non-smoking was not effective to prevent cigarette smoke generated from persons smoking in a designated smoking zone also being dispersed into the air circulating in the area of seats designated non-smoking, and that group members, wherever seated, were exposed to such smoke (paras. 5, 12).
(3) That the respondent has implemented a policy in the allocation of seating in its aircraft such that ticket holders or prospective passengers can request to be seated in a designated non-smoking zone either upon, or prior to, presenting themselves at the airport for seat allocation and/or a boarding pass; that, upon making such a request, group members were informed that they have been, or will be, allocated a seat designated non-smoking. (In the alternative) That group members were informed that they could not be allocated a designated non-smoking seat and could only be allocated a seat in a designated smoking zone; and, further, certain passengers receiving a boarding pass at a later time may be allocated a seat in a non-smoking zone, even though they did not previously request such a seat (paras. 6, 10, 11).
(4) That the respondent made representations with respect to the facts that (a) the passenger will be seated in a seat designated non-smoking; (b) the seat will be in a designated non-smoking zone; (c) by occupying the seat the passenger will not be exposed to cigarette smoke during the flight (para. 7).
(5) That the group members were misled by these representations, in that they (a) were not allocated a seat designated non-smoking for all or part of the flight; (b) were

allocated a seat which, whilst designated non-smoking, was not in a designated non-smoking zone, but was in a smoking zone or in a "buffer zone" immediately in front of, behind or beside a seat in a zone designated for smoking; and (c) were exposed to cigarette smoke during flight while occupying the allocated seat (paras. 8, 9).

3. In the amended application filed in the proceedings, it is stated that the application is brought by the applicant as a representative party and that the group members to whom the proceedings relate are the applicant and nine others as follows: Bryan Norman Hooper, Ian Ronald Lewis, Eric Donald Glass, Russell Jean Aroney, Anita Louise Jacoby, Paula Irene Underwood, Paul Leslie McMahon, Kenneth Charles Thomas and Francis William Millane.

4. The application seeks, inter alia:

(1) A declaration that the respondent has engaged in unconscionable or misleading conduct.
(2) An injunction restraining such conduct.
(3) Damages or other compensation.

FINDINGS OF PRIMARY FACTS WITH RESPECT TO THE DEALINGS BETWEEN THE PARTIES

5. Given the complexity of the litigation, it will be convenient, in the first instance, to make findings as to the primary facts with respect to the dealings between the parties, although very little of this primary material turned out to be contentious. On the whole, the versions given by the group witnesses of their dealings with the respondent were not seriously challenged. All other matters, including the secondary facts, the resulting inferences to be drawn, and the medical and other expert evidence will be considered later. That material was, in general, very much in contention.

(a) Leonie Paula Cameron

6. In 1992, Mrs Cameron and two of her friends, Mrs Erickson and Mrs O'Donohue, planned a holiday in Bangkok. Mrs Erickson made all the travel arrangements for them for a one week package holiday, departing 3 July 1992. The package was arranged through Jetabout Travel, North Sydney, which, it is claimed, was associated with the respondent. She booked economy airline tickets with the respondent for both Mrs Cameron and Mrs O'Donohue. As Mrs Erickson's husband was an employee of the respondent, she separately booked her economy ticket in order to receive a concessional fare.

7. On 3 July 1992, two hours prior to departure, Mrs Cameron checked-in at Sydney airport for her flight to Bangkok. At that time, she requested a "non-smoking" seat; neither she nor Mrs Erickson had made any previous requests as to seating preference. The respondent's check-in staff informed Mrs Cameron that there were no available "non-smoking" seats; she was allocated an economy seat (seat 75A) in a designated "smoking" area.

8. At check-in, the respondent's staff apparently made what has been described by Mr Hely QC (for the respondent) as an "inconclusive and insubstantial" statement (see below) to Mrs Cameron, on the question whether, once on board the aircraft, Mrs Cameron might request that a

flight attendant move her to a "non-smoking" seat. (As no witnesses were called by the respondent to dispute this evidence, I would find, if necessary, that the respondent's check-in staff made a statement, albeit an "inconclusive and insubstantial" statement, to Mrs Cameron concerning possible arrangements as to change of seating once she was on board the aircraft. It should be noted here that it appears to be unnecessary to pursue the point, since the parties are agreed that such a statement, even if made, did not rise to the level of a representation, or a promise, or an assurance.)

9. Because of the nature of her concessional ticket, Mrs Erickson checked-in at a different location, the respondent's staff travel check-in, and was allocated a seat about a quarter of an hour before the flight. Mrs Erickson was given a "non-smoking" seat in the economy class section of the aircraft.

10. After she boarded the aircraft, Mrs Cameron requested to be moved to a "non-smoking" seat. After "hav(ing) a look" around the cabin, the flight attendant told Mrs Cameron "that there were no seats available." Mrs Cameron remained seated in her allocated "smoking" seat for the remainder of the flight. At least one person across the aisle and one person behind Mrs Cameron were smoking. She described the air as "smelly". She stated that she felt nauseous, her eyes dried up, her throat got raspy, and she did not feel like eating. (As indicated during the hearing, these last statements have been received as evidence of the symptoms Mrs Cameron experienced and not as medical diagnosis or causation in any technical sense.)

11. Two days after arriving in Bangkok, Mrs Cameron "went to bed" in her hotel, due to problems with her eyes and throat, and did not attend any further tours with Mrs Erickson and Mrs O'Donohue. On 8 July, Mrs Erickson telephoned Qantas in Bangkok and requested "non-smoking" seats for herself, Mrs Cameron, and Mrs O'Donohue for their return flight to Sydney. Mrs Erickson testified that a female Qantas staff said:

"You can rest assured, and tell your friend (Mrs Cameron) to
go back to bed and rest, it'll be okay, she won't have a
smoking seat going home."

12. On 10 July, Mrs Cameron checked-in at Bangkok airport, and was allocated a "smoking" seat. She protested, and an hour later was re-allocated seat 43J in a "non-smoking", economy section of the aircraft.

13. On the Monday following her return to Sydney, Mrs Cameron said she saw a doctor and was prescribed antibiotics for her condition. She subsequently wrote a letter of complaint to Qantas dated 18 July 1992.

14. I accept the applicant's version of these events.

(b) Bryan Norman Hooper

15. In 1992, Mr Hooper telephoned a travel agent (Gary Fox of Travel Scene), and booked a flight to Hawaii for a holiday. At that time, he asked the travel agent if he could have a "non-smoking", economy class seat on the flight. The travel agent stated that "that should be fine". (It should be noted here that evidence of this kind was objected to by the respondent upon the

ground that the agent did not have the authority of the respondent to make statements that bound it. I will return to deal with this question of law later.) Mr Hooper subsequently went to the travel agent to pay for his ticket. At that time, the following conversation took place:

"To the best of my recollection, I asked (the travel agent) if the ticket was okay? He said, 'Yes, it's fine.' He said, 'I've booked you on this flight on the 10th, to return on the 19th December' and he said 'I've got you a non-smoking seat.'"

16. (The respondent did not cross examine Mr Hooper on this conversation with the travel agent, but, as has been noted, maintained an objection to the evidence on the ground that it was an inadmissible hearsay statement made by a person without authority to make admissions on the part of the respondent. However, a statement in a letter in evidence (Ex. A), from the respondent's Customer Relations department to Mr Hooper dated 5 February 1993, appears to corroborate Mr Hooper's testimony:
"Examination of your Reservations Record shows that a 'generic' seating request was notated on your booking for the return sector, which indicated that your preference was for a window seat in the non-smoking zone.")
I find that Mr Hooper made a request for a "non-smoking" seat.

17. On 10 December 1992, Mr Hooper flew from Sydney to Hawaii. On 19 December, he attended to check-in at Honolulu airport approximately one hour before his return flight to Sydney. Mr Hooper testified that at that time the respondent's check-in staff stated:

"I'm sorry, we cannot give you the non-smoking seat that you requested. It is fully booked in that area (economy class) and we will have to give you a smoking seat."

18. Although Mr Hooper stated in cross-examination that he was not sure whether economy class was mentioned, the context of the conversation would suggest that it probably was mentioned.

19. Mr Hooper then told the staff that he could not fly in the "smoking" section because "it makes (him suffer from) nausea". She stated that Mr Hooper should raise the matter with the flight attendants on board the aircraft to see whether something could be done for him in relation to his seating.

20. Mr Hooper boarded the flight and took his allocated economy class seat in the "smoking" section. He said that:

"From the time the plane took off everyone was lighting up cigarettes, it was pretty well, the cabin was full of smoke."

21. Prior to take-off, and several times after take-off, he requested to be moved to a "non-smoking" seat. He was told by the flight attendant "that the plane (was) totally booked out (in economy class)."

22. Over the next four to five hours he got up and walked around the aircraft; he said he also went to the toilet several times, in order to vomit. (Again, as noted, these last statements were received as evidence of the symptoms Mr Hooper experienced and not as medical diagnosis or causation in any technical sense.) Approximately an hour and a half outside Sydney, Mr Hooper was moved to a flight attendant's fold-down seat. About 20-30 minutes later, he was moved to a "non-smoking" seat in the forward business class section of the aircraft. (Mr Hooper's evidence is not clear on whether this actually was the business class section of the aircraft; however, the parties now appear to be in agreement that, based on his testimony, he was moved to the business class section. The parties also appear to agree that Mr Hooper's testimony suggests that there were approximately ten empty seats in the business class section of the aircraft.)

23. In the business class section of the aircraft, Mr Hooper said that he observed two passengers, whom he recognised from the check-in area at the Honolulu airport. At the time of check-in, he overheard a conversation between those passengers and the respondent's check-in staff, who told them, "I'm sorry we are fully booked, there are no seats available at this stage." The two passengers were seated in the business class section for the entire trip from Honolulu to Sydney.

24. However, the evidence does not indicate whether these passengers paid an economy fare and were upgraded to business class by the respondent's check-in staff, or whether they paid for a business class fare.

25. On 18 January 1993, Mr Hooper wrote a letter of complaint to the respondent.

26. I accept Mr. Hooper's account.

(c) Ian Ronald Lewis

27. In September 1992, Mr Lewis made arrangements with a travel agent (Warren Flower of National Mutual Travel) to travel to Bali on holiday with his wife and two children, booking economy class tickets with the respondent. At that time, he requested non-smoking seats; the travel agent said "that should be okay." Mr Lewis said that one week before the flight:

"I made a phone call to Qantas, it was just the general number in the phone book, I think it's just their general customer inquiry line in relation to flights departing Sydney. I asked 'Was my flight details as I read them out to them?' and they said 'Yes they were' and I also at that time requested non-smoking and they said 'Yes it's been requested.'"

28. In any event, a letter from the respondent dated 17 February 1993 (Ex. C) stated:

"Your reservations record shows that Non-Smoking seats were, indeed, requested."

29. On 19 January 1993, Mr Lewis and his family checked-in at Sydney airport for their flight to Bali. Mr Lewis was allocated seats in the smoking section of the aircraft. He gave this evidence:

"I then asked her (the respondent's check-in staff) what could be done about it and she said to me that most of the plane had been pre-booked and once on board the plane see

what you can sort out and basically (she) let it go at that
because (she said) there is nothing more that she could do."
30. Once on board the aircraft, Mr Lewis requested that he and his family be moved to non-smoking seats. The flight attendant stated that nothing could be done about the situation. Once airborne, he said approximately "25 to 30 people" began smoking. Mr Lewis testified that he experienced sinus problems, felt ill, and had irritation of the eyes. (Again, these statements, and similar material from other group members, are received as evidence of the symptoms Mr Lewis experienced and not as medical diagnosis or causation in any technical sense.) He moved his wife and two children to the galley of the aircraft, putting them on blankets and pillows.

31. In order to smoke, several passengers from the "non-smoking" section of the aircraft left their seats and sat in the seats which Mr Lewis and his family had vacated. He asked these passengers if they would switch seats, but they refused. Mr Lewis and his family returned to their allocated seats for landing.

32. During the flight, Mr Lewis wrote a letter of complaint to the respondent dated 19 January 1993.

33. I found Mr. Lewis' version to be credible.

(d) Eric Donald Glass
34. In 1993, Commander Glass, who is employed by the Royal Australian Navy, phoned the respondent to book a return flight from Melbourne to Frankfurt, via Bangkok, for a business trip. At that time he requested a "non-smoking" seat in the business class section of the aircraft.

35. On the Frankfurt-Bangkok leg of his return trip to Sydney, Commander Glass was seated in seat 24A, a "non-smoking" seat in the business class section of the aircraft. During that flight, he was aware that someone was smoking in the business class section. (These events are now common ground between the parties.)

36. On the subsequent Bangkok-Melbourne leg of the return trip, the aircraft made a stop-over in Bali. (There was no evidence that Commander Glass flew on the same type of aircraft on both the Frankfurt-Bangkok and the Bangkok-Melbourne legs of the journey. From Bali to Melbourne, Commander Glass said that he was seated in a "non-smoking" seat, (seat 27A), in the business class section of the aircraft, and that his boarding pass so indicated. He further stated that the seat directly adjacent to his seat (seat 27B) appeared to be a "non-smoking" seat. (Exhibit G, a Qantas aircraft configuration diagram for a B767-338 aircraft, indicates that seats 27A and 27B are in a "no preference buffer zone" rather than a "non-smoking" zone.) However, the two seats in row 27 located directly across the aisle, in the centre of the aircraft, were designated "smoking" seats. (This is now common ground between the parties and is corroborated by Ex. G.) Commander Glass stated that the passengers in those two seats "commenced to chain smoke immediately (after) the 'no smoking' sign was switched off after take off from Bali." As a result, he was unable to sleep for the whole of the trip to Sydney. (Again this statement is received as evidence of the symptoms Commander Glass experienced and not as medical diagnosis or causation in any technical sense.)

37. Commander Glass raised the matter with a flight attendant, who produced a diagram indicating that he was seated in a "smoking" seat. (The parties are now agreed that the attendant showed him an incorrect diagram.) After "(his) complaint persisted", the flight attendant offered to move him to another seat. He stated that he declined the offer because, as he put it:

"the flight attendant agreed that there was smoke throughout the cabin and that was the only option I was given. It was also my impression that the cabin was full and I was unable to see how that move could be done without causing disturbance to other people which I felt was unnecessary as this was 2 or 3 o'clock in the morning."

38. Commander Glass subsequently wrote a letter of complaint to the respondent dated 5 June 1993.

39. I accept the evidence of Commander Glass.

(e) Russell Jean Aroney

40. In September 1993, Ms Aroney made arrangements through a travel agent, Mr Walker of Walkers Travel Centre, for a round-the-world business class airline ticket. The flights which were with the respondent were from Sydney to Harare and from Los Angeles to Sydney. She said that she told the travel agent "that (she) had to have a non-smoking seat", due to the fact that she has asthma. With respect to the sectors of her journey with the respondent, she requested a particular seat, 18A (as she had been told by a friend that it had extra leg room.) She said that:

"in that conversation (with the travel agent) I was told that I could not have the requested seat number from Sydney to Harare because it was too soon a time, but I could have the seat from Los Angeles to Sydney because it was subsequently further on."

41. On the trip from Sydney to Harare, Ms Aroney sat in a "non-smoking" seat in business class. She stated that she observed at least one person smoking "in the same compartment that (she) was in but they were nowhere near (her)."

42. On 20 November 1993, Ms Aroney checked-in with the respondent at Los Angeles airport for her return flight to Sydney. The respondent's staff told her that he had "no knowledge of (her) booked seat." He stated that he would give her a different "non-smoking" seat, 25A, in business class, and her boarding pass so indicated.

43. Once on board the aircraft and after dinner had been served, Ms Aroney said that she:

"was awakened with this sense of a lot of smoke around me and ... I turned around to see a lady with her light on, smoking, directly behind me and I couldn't understand this so I called the flight attendant and said,'There's a lady smoking behind me, how can this be?' and he said, 'Yes.' I said, 'But I'm in a non-smoking seat, what's the situation?'

So he asked me to show him my boarding pass which I did and
he said, 'You're not in a non-smoking seat, you're in a
smoking seat.'"

44. (It is now common ground between the parties that the woman seated behind Ms Aroney was the only person she saw smoking.)

45. The male flight attendant showed Ms Aroney a plan of the aircraft which indicated that seat 25A was a "smoking" seat.

46. He then told her that:

"(the woman smoking behind her) was in a smoking seat and
she could not be asked not to smoke, that (Ms Aroney)
couldn't have another seat because there wasn't one empty on
the aircraft, even in first class, and that there was
nothing he could do."

47. Ms Aroney stated that she then moved to the flight attendant's jump seat "because the smoke was affecting (her) physically" in that her "lip was swollen and trembling, (her) eyes were watering and (she) had a wheeze." She also stated that the wheeze was characteristic of her asthma in that "(she) wasn't able to take in enough oxygen."

48. She remained either in the jump seat or on the floor of the aircraft for eight to ten hours of the flight. She returned to her seat only to eat breakfast and for landing in Sydney.

49. A few days after she returned to Sydney, Ms. Aroney said, she "developed an earache" and sought medical attention. On 5 December, Ms Aroney wrote a letter of complaint to the respondent.

50. I find that Ms. Aroney's account should be accepted.

(f) Anita Louise Jacoby

51. In 1993, Ms Jacoby, a television producer for the program "60 Minutes" produced by 9 Network Australia Ltd, booked a business trip through Show Travel, which books all the travel for Channel 9 employees. Her itinerary was Sydney-Los Angeles-London-Morocco-London-Sydney. Ms Jacoby arranged pre-allocated, "non-smoking", business class seats in the bulk head of the aircraft from Sydney to Los Angeles (seat 16B) and from London to Sydney (seat 18J). She said that she prefers a seat with extra leg room, such as the bulk head seat, because she lost part of her right leg in a motor bike accident and "need(s) to stretch (her) leg out."

52. On 26 May 1993, Ms Jacoby flew with the respondent from Sydney to Los Angeles in her pre-allocated seat, 16B. On 11 June 1993, she and three crew members with whom she was travelling decided to return to Sydney a day early. She said that she telephoned a member of the respondent's London office staff and said:

"'I wish to change the four seats that were booked on the
13th of June returning London Sydney to the 12th of June.'

She (the staff member) said: 'What class?' I said:
'Business class.' I indicated that we had those four seats
booked on the 13th. She said we could have four seats in
business class coming back on the 12th. I requested four
seats that were in the bulk head and that were non smoking.
She said that we should - that we'd get non smoking seats
and that she would endeavour to get us seats in the bulk
head."

(It appears to be accepted that, at this stage, Ms Jacoby was not assured that she would be allocated a seat in the bulk head.)

53. On 12 June, approximately one hour before departure, Ms Jacoby and the three crew members attended Qantas check-in at London-Heathrow airport for their return trip to Sydney, via Bangkok. At that time, the respondent's staff said to her:

"'that (Ms Jacoby and the three crew members) would be given
four non smoking seats (in business class)'"

54. The tickets and the boarding passes were issued at that stage. As not all of the camera equipment was loaded on board the aircraft before departure, one of the crew members stayed behind in London to ensure that it was loaded on a later flight. Ms Jacoby boarded the flight and took seat 23G, a "non-smoking" seat, as indicated on her boarding pass, in the lower deck business class section of the aircraft.

55. Exhibit "T", a Qantas aircraft configuration diagram for a B747-438 aircraft, indicates that seat 23G is in a "no preference buffer zone" rather than a "non-smoking" zone. Ms Jacoby said that when she changed her return flight date, she was not informed that her seat was in a "no preference buffer zone". She said that if she had been so informed, "(she) would have gone the following day (in her pre-allocated seat)".

56. The two crew members travelling with her were seated in the upper deck business class section of the aircraft. She said that:

"after take off or as soon as possible there were chain
smokers about two seats in the aisle away from me so the
smoke became unbearable."

She further said:
"I just started sneezing; my eyes were running; I had
inflammation; I was just coughing; it was really
unpleasant."

57. At that time, she spoke with the Flight Services Director, Geoff Hudson. She said that:
"(Mr Hudson) was going to endeavour to find me another seat
somewhere else. He - because the plane was full basically
in first class and in business class he was unable to find
another seat in either of those sections, so he proceeded to
have a look in economy for a seat for me and he found one

and I subsequently moved to the back of the plane (in
economy class)."
58. She remained in a non-smoking economy class seat for "almost the entire trip" from London to Bangkok.

59. Upon arriving in Bangkok, Ms Jacoby was re-allocated seat 12J in the upper deck, non-smoking business class section of the aircraft, and she remained in that seat for the trip from Bangkok to Sydney.

60. She said that after she returned to Sydney:

"I was really congested. Those symptoms remained with me
for, you know, quite a period; it was almost up to a month
that I felt all blocked up. I actually went and saw my
local doctor to try and get something to deal with it."

61. She wrote a letter of complaint to the respondent dated 16 June 1993.

62. I accept this evidence.

(g) Paula Irene Underwood
63. In June 1992, Ms Underwood telephoned a travel agent (Geoff Smith of Kelly Travelling, Coffs Harbour) to book a return economy class ticket with the respondent from Brisbane to Bali. At that time she requested a "non-smoking" seat, and the travel agent said "'I will make a note of that.'"

64. (Ms Underwood subsequently telephoned the travel agent to confirm her flight arrangements and to ensure that her request for a "non-smoking" seat had been noted. The parties appear to be agreed that she merely confirmed at this stage that her request had been received by the travel agent.)

65. On 19 August 1992, Ms Underwood and her two travelling companions attended check-in at Denpasar airport in Bali for their return flight to Brisbane. She said:

"I went to the check-in counter to confirm the seating
arrangements and there was a male attendant there and I just
confirmed that my seat was a non-smoking. I said, 'Is that
a non-smoking seat?' and he said, 'Yes, it is.'"

66. Ms Underwood and her two companions boarded the flight and took their seats in the rear section of the aircraft (seats 59A, 59B, and 59C).

67. Exhibit "P", a Qantas aircraft configuration diagram for a B747SP-38 aircraft, indicates that seats 59A, 59B, and 59C are in a designated non-smoking zone in economy class, approximately three rows behind a designated smoking zone in economy class.

68. Ms Underwood said that the smoke:

"was coming towards the back of the plane where my seat was
and there was no barrier between the two sections (smoking
and non-smoking). So, there was nothing to stop it from
coming back into the non-smoking area."

69. She said that as a result of the smoke drifting into the section where she was sitting:
"My eyes were watering continually. My nose became blocked
and I found it quite hard to breath. At one stage I got up
and went to the toilet to try and get some smoke free air."
70. At this stage, Ms Underwood spoke to a female flight attendant and said:
"'I was experiencing discomfort because of the smoking - the
situation of the smoking section in front of the non-smoking
section and the smoke coming through' and she said, 'Yes I
know, we have talked about it to them time and time again.'"
71. During the flight, Ms Underwood said that the flight attendants:
"handed out a market research study, a general study on the
service of Qantas and the flight and it had a place for
comments, further comments in which I reported the
dissatisfaction I felt with the flight, the seating
arrangements, the discomfort I had had through the evening,
through the whole flight and I asked for a reply to be sent
to me."
72. She said that she did not receive a reply from the respondent.

73. Upon arriving in Brisbane, Ms Underwood stated that she:

"felt too ill (to travel home by bus to Lennox Head). A
friend of (hers) picked (her) up and (she) stayed at her
place for the evening."

74. She said that her friend drove her home to Lennox Head the next day because "(she) was too ill to get the bus, basically". She purchased some cold and flu tablets and "spent the rest of (her) holiday in bed and (she) lost her voice."

75. I find that this is a credible version of the events.

(h) Paul Leslie McMahon
76. In early 1993, Mr McMahon telephoned a travel agent (Westpac Travel) to make flight arrangements for a business trip from Sydney to the United States and Europe. He booked a business class seat with the respondent through the travel agent who asked, "'Do you want non-smoking or smoking?'" and he said "'Non-smoking.'"

77. Mr McMahon's itinerary from Westpac Travel (Ex. "Q") received, as noted, subject to objection, indicates that his request for a "non-smoking" seat, in regard to the Sydney-Los Angeles sector of the trip with the respondent, was received. Ex. "Q" does not refer to his return flight with the respondent from London to Sydney.)

78. He purchased a ticket where the return flight to Sydney "was an open ended date, an approximate open ended date with the option to change if (he) didn't fly that date."

79. Approximately one week prior to his proposed departure date of 20 February 1993, Mr McMahon telephoned the respondent's London reservations office to schedule his return flight from London to Sydney. At that time, he told the respondent's reservations staff that he "require(d) a return trip to Australia (on 20 February), business class, non-smoking." At that stage, he said, the respondent's staff "confirmed availability." Approximately three to four days prior to 19 February 1993, Mr McMahon again telephoned the respondent's reservations staff in London and asked whether his departure date could be changed from 20 February to 19 February; he said that the respondent's reservations staff replied, "Yes".

80. On 19 February, Mr McMahon attended the respondent's check-in at London-Heathrow airport for his return flight to Sydney. The check-in staff informed him that he was "still booked on 20 February," but that "(they) could get (him) on a later flight (that day) via Singapore." Mr McMahon said:

"Again I asked whether it would be business class and would it be non-smoking? and they said 'Yes.'"

81. The check-in staff gave Mr McMahon three boarding passes for his flight to Sydney, via Singapore and Brisbane.

82. (His boarding passes, Ex. "Q", indicate that he was allocated "non-smoking" seats for all three legs of the trip to Sydney.)

83. Mr McMahon boarded the aircraft and travelled from London to Singapore without incident. After approximately a two hour transit stop, he boarded the aircraft in Singapore and sat in his allocated seat, 27A, in the lower deck of the business class section of the aircraft.

84. (There is no evidence as to whether this was, in fact, the same aircraft as that on the leg from London to Singapore. According to his boarding passes (Ex. "Q"), Mr. McMahon was seated in different seats on all three legs of the flight from London to Sydney.)

85. Mr McMahon said:

"After the flight commenced I noticed people lighting cigarettes near me and I immediately conferred with the person sitting next to me who was equally surprised."

86. He then had a conversation with a flight attendant and asked:
"'Is this smoking or non-smoking?' and he said 'Smoking.'... I showed him my boarding pass and said, 'It indicates that it is non-smoking.' ... He said 'I'm sorry,' and I said, 'How could this happen?' and he said, 'It's possibly due to the change in configuration of the plane, it is not compatible with this boarding pass.' Then he (the flight

attendant) said, 'I've never seen this sort of thing happen
before.'"
87. (Exhibit "R", a Qantas aircraft configuration diagram for a B767-338 aircraft, indicates that seat 27A is in a "no preference buffer zone" rather than a "non-smoking" zone.)

88. Mr McMahon said that the smoke was coming from the passengers sitting in row 27 across the aisle from him, in the centre seats.

89. (Exhibit "R" indicates that the centre seats in row 27 are in a "smoking" zone.)

90. He said that he was aware of the cigarette smoke in the air, and that he felt "immediate distress and discomfort and unhappiness," but that he did not experience any physical effects on his body at that time.

91. Mr McMahon remained in his seat for the duration of the flight to Brisbane.

92. During cross-examination, Mr McMahon agreed that if he had been seriously inconvenienced by the smoking, it "would've been natural for (him) to ask (the flight attendant to move him to another seat.)" He did not make such a request.

93. On the leg from Brisbane to Sydney, Mr McMahon sat in his allocated seat, 25B, and said that the trip was without incident.

94. Mr McMahon said that, upon arriving at Sydney -

"... Within, to the best of my recollection, 24 to 48 hours
I had a runny nose, coughing, sore throat, deteriorated day
by day to the point of bronchitis, couldn't speak or found
difficulty speaking, went to the doctor on at least five
occasions and eventually I started experiencing severe pains
in my ribs as if I had a knife in them and I was diagnosed
as having pleurisy."

95. He said that he was sick "over a three week period."

96. I accept Mr. McMahon's account.

(i) Kenneth Charles Thomas
97. In October 1992, Dr Thomas, who is a senior lecturer in education at the University of Nottingham School of Education, made arrangements with a travel agent (Andres Holidays Limited) to travel to Australia via Bangkok, booking an economy class ticket with the respondent. At that time, he did not request a "non-smoking" seat because he was not aware that it was possible to make a seat reservation before checking in.

98. On 12 March 1993, Dr Thomas checked-in at Heathrow Airport approximately three hours before his flight to Sydney. He requested a "non-smoking" seat. The staff told him that it "won't be a problem".

99. Upon inspection of his boarding pass he noticed that the seat number was quite high. He inquired of the check-in staff whether the seat allocation was "non-smoking" and was informed that it was.

100. Once on board the aircraft, Dr Thomas sat in his allocated seat (seat 71H) in the "non smoking" economy class. He became concerned that he was close to the "smoking" section. Shortly after take-off, both passengers sitting on his right hand side started smoking. He raised the matter with a flight attendant and informed the attendant that he was an asthmatic. The attendant replied that Dr Thomas would have to remain in his seat as the flight was full.

101. For the duration of the flight to Bangkok, Dr Thomas said that he was severely distressed.

102. On the subsequent Bangkok to Hong Kong sector Dr Thomas was allocated a "non-smoking" economy class seat.

103. On 15 March 1993, Dr Thomas wrote a letter of complaint to the respondent, and received a reply dated 17 March 1993. On 18 March 1993 Dr Thomas wrote a further letter of complaint to the respondent and received a reply on 24 March 1993. Dr Thomas wrote another letter to the respondent on 31 March 1993.

104. On 5 April 1993, Dr Thomas and his wife flew from Hong Kong to Sydney. During the time Dr Thomas was staying in Sydney, he was examined by a doctor. On 15 April 1993, Dr Thomas and his wife attended at the check-in counter at Sydney airport for their return flight to London. They were informed by the staff that they had been upgraded to the business class "non-smoking" section. They were allocated seats 17A and 17B.

105. Dr Thomas and his wife disembarked at Bangkok airport and upon boarding the flight were reallocated to seats 23A and 23B. During the flight people in seats directly behind Dr Thomas were smoking.

106. Dr Thomas raised the matter with the flight attendant and inquired whether he and his wife were in the "smoking" section. The flight attendant replied "No you are not". Dr Thomas made further inquiries and the attendant said he would "check it out". The flight attendant returned and informed Dr Thomas and his wife that they were in fact in "smoking" seats. Dr Thomas said that as "an asthmatic I cannot endure another 11 hour flight in a smoked filled environment".

107. The flight attendant asked the flight director to speak to Dr Thomas. The flight director explained that a family had been split up during the flight from Sydney to Bangkok and that a young girl member of the family, who was an asthmatic, had been allocated a "smoking" seat; and that in order to resolve the situation, Dr Thomas and his wife had been moved down since they were upgrades.

108. Dr Thomas said that during the flight he "had difficulty breathing".

109. On 19 April 1993, Dr Thomas wrote a further letter of complaint to the respondent.

110. I accept this evidence.

(j) Francis William Millane

111. In October 1993, Mr Millane who travels frequently with the respondent for business reasons, telephoned his travel agent (Julianne Tattersall of Travel Connection, Rockdale), to make arrangements to travel to Los Angeles. At that time, he asked the travel agent if he could have a "non-smoking", business class seat in the "bubble". Mr Millane was wait-listed on a flight with the respondent. On 29 October 1993 he was advised that his reservation was confirmed.

112. On 1 November 1993, Mr Millane checked-in at Sydney airport. The attendant informed Mr Millane that he had been allocated a "smoking" seat in business class (seat 23A). He replied that he had a chest complaint and that his doctor had told him to stay away from smokers. The attendant then called a supervisor. The supervisor told Mr Millane that "they would do what they could to see if they could find a non smoking seat".

113. On departing the Qantas frequent flyer lounge Mr Millane checked-in at the service desk and the attendant informed him that his seat had not been changed and that there was nothing they could do.

114. Once on board the aircraft, Mr Millane asked the head steward if there was anything he could do about his seat allocation (seat 24B). He stated that there was nothing he could do about it, but, after about half an hour, returned and told Mr Millane that he could change seats with a passenger in first class who wanted to smoke. Mr Millane then changed seats for the duration of the flight. Mr Millane suffered no ill-effects or discomfort.

115. Mr Millane was originally booked on a flight from Singapore to Sydney on 21 November 1993. Mr Millane changed his flight in Zurich. On 20 November 1993, Mr Millane was wait-listed on two direct flights for his return to Sydney from Singapore. At Singapore airport Mr Millane spoke to the attendant at the business class check-in counter. The attendant informed him that he could guarantee an economy seat in "non-smoking" on a flight to Sydney, but via Jakarta. Mr Millane did not immediately accept the offer but requested the checking in staff to continue to look for a "non-smoking" seat on a direct flight to Sydney even if an economy seat only was available.

116. After waiting in the lounge to be informed of his flight details, Mr Millane spoke to staff in the lounge area, who told him that he was on the 8 o'clock direct flight to Sydney.

117. When Mr Millane boarded the flight, he realised that he had been allocated a seat in the "smoking" area (seat 24B). At that time, he told the flight attendant:

"I can't sit in a smoking seat. Can you do something to
change it?"

118. The attendant replied that there was nothing he could do and he would send a supervisor up. The supervisor informed Mr Millane that there were only smoking seats left in the plane. The passenger in seat 24A was smoking.

119. Mr Millane said that as a result of the smoke:

"(I) start(ed) coughing and then ... vomiting and I was not able to eat the meal. The flight was very uncomfortable because of all the smoke."

120. The passenger in seat 24A realising that his smoking was having an impact on Mr Millane, cut down his smoking; and "after that things improved".

121. On 1 December 1993, Mr Millane wrote a letter of complaint to the respondent.

122. On 2 June 1994, Mr Millane made travel arrangements through his travel agent, Julianne Tattersall, to travel to London, booking a business class ticket. At that time he requested a "non-smoking seat in the bubble". The travel agent later confirmed this reservation.

123. At the check-in counter at Sydney airport Mr Millane was informed by check-in staff that his seat was "as requested, in the bubble".

124. Once on board the aircraft, or perhaps in the departure lounge, he found that his seat was on the main deck. Mr Millane had several conversations with the flight staff who informed him that the seat next to the "smoking" section was his allocated seat. During the flight, the flight service director told Mr Millane that he would make a report of the incident.

125. Mr Millane suffered no discomfort on the Sydney to Singapore leg of his flight.

126. Upon arrival in Singapore, Mr Millane attended the service desk in the lounge and made inquiries about changing his seat allocation. He was told that a seat was available in the "bubble".

127. On 22 June 1994 Mrs Millane wrote a letter of complaint to Mr Millane's travel agent, Julianne Tattersall, on behalf of Mr Millane.

128. I find this to be a credible version of the events.

FINDINGS OF PRIMARY FACT WITH RESPECT TO THE RESPONDENT'S SYSTEM FOR ALLOCATING SMOKING AND NON-SMOKING SEATS ON ITS INTERNATIONAL FLIGHTS

129. The respondent's evidence in this area, given by Robert William Handley, a field support analyst, was, so far as concerns the nature of the system, not contentious.

130. The responent has a computerised departure control system, which has been in operation since 1979, and which allocates seats on its international flights. In the case of all first and business class passengers and in some special instances, economy class passengers, the respondent offers pre-allocated seating. However, the respondent does not make it generally known, and it is not generally known, that in special circumstances, it may be possible for an economy class passenger to obtain a pre-allocated seat. The special circumstances include passengers travelling with infants and passengers who can produce a medical certificate.

131. Subject to certain other matters, for instance, considerations of weight and balance, and requests to travel in a group, the computer programme is designed to allocate "non-smoking" and "smoking" seats. In practice, the great majority of first and business class seats are pre-allocated.

132. The computer system will show the configuration of the aircraft and the seats available. This information is available to the check-in clerk, and via the reservation system, to the travel agent. The clerk or the agent will enter any expressed preference, whether general or for a particular seat.

133. The computer system is programmed with these fields: (1) forward and "aft" search for an available seat; (2) left and right search for an available seat; (3) group requests; (4) window or aisle seat; (5) smoking or non-smoking seat. The system will search for a suitable combination with all prerequisites satisfied. If all requests are unable to be satisfied, the system will drop off requests one at a time until a seat is allocated. It is programmed to drop off criteria in this order: (1) aisle or window seat; (2) smoking or non-smoking seat; (3) group seating; (4) seat management; (5) weight and balance considerations.

134. If any difficulties arise in the implementation of the system, the matter is referred to the Load Controller for decision.

135. Aspects of the operation of the system were described by the respondent in its letter to Mr. Hooper dated 5 February 1993 as follows:

"Several different types of advance seating can be requested for Qantas flights: actual seat numbers can be booked from availability, 'generic' seating (by location and seat type) can be requested and, thirdly, actual seat numbers may be requested. The latter method is used either when a customer nominates a particular seat number which has already been allocated to another person, or when a threshold level has been reached where 50% of seat numbers have already been pre-allocated.
Examination of your Reservations Record shows that a 'generic' seating request was notated on your booking for the return sector, which indicated that your preference was for a window seat in the non-smoking zone.
Our procedure is that 24 hours prior to flight departure, our Load Controllers complete an editing process, in which they attempt to pre-allocate all customers who have indicated their seating preferences. I am sure you can appreciate that it is not always possible to be completely successful, due to the popularity of certain types of seating.
The pre-allocating process means that those seats which are considered to be the most desirable are often allocated prior to the opening of check-in for the flight. Once seats

have been pre-assigned, our check-in agents are not able to make changes to them until the time of flight close-out, some 30 minutes before departure.
As this 'pre-seating' affects passengers joining and leaving the aircraft along its route, there is only a limited selection of seats available at check-in at any particular airport, even including the first departure airport.
On a heavily laden aircraft the selection is even more limited and an apparently simple seat request such as 'non-smoking' or 'window seat' can sometimes not be met, because there are no uncommitted seats of that kind left. I should also advise that actual seat numbers are allocated on a 'first come, first served' basis and therefore it is recommended that bookings are made as early as possible."

FINDINGS OF PRIMARY FACT WITH RESPECT TO THE RESPONDENT'S SYSTEM OF ALLOCATING SMOKING AND NON-SMOKING FLIGHTS

136. The respondent's evidence as to this system, which was not contentious, was given by Garry Stephen Saunders, Manager, Brands and Product Development since 1993.

137. At present, 79% of all Qantas international flights are smoke-free, and on most of the other flights, between 12 and 15 per cent are "smoking" seats. Smoking is permitted on flights to Continental Europe, Japan, Korea, Malaysia and South Africa.

138. These matters are kept constantly under review and Mr. Saunders' duties include the recommendation of the configuration of aircraft, including (1) the allocation of the proportion of non-smoking and smoking seats and (2) the designation of flights as non-smoking flights. In making a recommendation to senior management, Mr. Saunders takes the following into account: (a) The popularity of smoking in the country of destination and whether the popularity of smoking in the country of destination is greater than Australia. (b) The mix of passengers on the route and in particular whether there is a high proportion of passengers who are business passengers or who are in tour groups. (c) The nature of the service offered by competing carriers on the same route or routes and whether those carriers offer non-smoking flights. (d) Any surveys of customer preference which may have been carried out in the country of destination. (e) Information from local Qantas Managers as to the impact, in terms of the bookings and passenger numbers, that might be felt by the respondent if it then reduced the percentage of smoking seats or made flights non-smoking.

139. For instance, in Japan, Korea and Taiwan there are significant numbers of smokers in those communities. Moreover, the greater proportion of those travelling between these countries and Australia are from these countries, not Australian citizens.

140. Research carried out by the respondent in December 1994 indicated that in all markets, with two exceptions, there was "considerable support" for non-smoking flights. The exceptions were Japan and Germany, where those asked were evenly divided.

141. Air Canada (as from January 1991) and Delta (as from January 1995) are the only international carriers that have prohibited smoking on all international flights.

142. As a result of the review process, the respondent has, since March 1992, designated the following flights as non-smoking -

. 25.8.92 - flights to New Zealand and flights QF107/108 to and from Los Angeles.
. 1.8.93 - all remaining international flights of five hours' duration or less.
. 1.1.94 - all flights to Singapore; flights QF9/10 to/from London; and all flights to/from the United States, except QF11/12 and QF100/101.
. 28.8.94 - flights to Hong Kong, Manila, Jakarta and Denpasar.
. 31.10.94 - flights QF1/2 to/from London; flights QF71/72 to/from Bangkok; and flights QF100/101 to/from Los Angeles.
. 1.3.95. - flights QF11/12 to/from Los Angeles.

143. The respondent indicates, in its timetables, and in the manuals it supplies to travel agents: (1) which flights are smoke-free and (2) the seat configuration. Where smoking is permitted on a flight, in an attempt to accommodate the problem of smoke drifting from the "smoking" section to the "non-smoking" area, the aircraft configuration allows for a number of seats adjoining the smoking section which are described as "no preference buffer zone" or "non-smoking least desirable".

144. As a consequence, on a 747 "Longreach" aircraft, as at March 1992, it is possible to calculate the following proportions in terms of seats (a) in which smoking is permitted or (b) which may be affected by smoke drift (noting that, as between the respective classes, account should also be taken of the differences in the space between seats):

	First class	Business	(Lower business)	Economy	Total
Non-smoking	16 seats = 53%	40 seats = 69%	4 seats = 18%	196 seats = 70%	252 seats = 68%
Buffer zone	8 seats = 27%	4 seats = 7%	4 seats = 18%	50 seats = 17%	62 seats = 17%
Smoking	6 seats = 20%	14 seats = 24%	14 seats = 64%	36 seats = 13%	56 seats= 15.1
	30 seats = 100%	58 seats = 100%	22 seats = 100%	282 seats = 100%	370 seats = 100%

145. Accordingly, the percentages of seats which may be affected by smoke are as follows:

First class	Business	(Lower business)	Economy	Total
47%	31%	82%	30%	32%

146. As of February 1993, for the same aircraft configuration, the figures are as follows:

First Business (Lower Economy Total
class business)
Non-
smoking 12 seats 42 seats 6 seats 264 seats 318 seats
= 75% = 70% = 25% = 80% = 78%
Buffer 0 seats 6 seats 6 seats 20 seats 26 seats
zone = 0% = 10% = 25% = 6% = 6.4%
Smokin 4 seats 12 seats 12 seats 46 seats 62 seats
= 25% = 20% = 50% = 14% = 15%
16 seats 60 seats 24 seats 330 seats 406 seats
= 100% = 100% = 100% = 100% = 100%

147. Accordingly, the percentage of seats which may be affected by smoke are as follows:

First class Business (Lower Economy Total
business)
25% 30% 75% 20% 22%

148. The respondent's publication "Qantas Worldwide Timetable effective 30 October 1994" has a section entitled "Passenger Information" as follows:

"SMOKING
Smoking areas are designated in all classes, but the smoking
of pipes and cigars is not permitted. Smoking is not
permitted on:
. All domestic sectors within Australia
. All services to/from USA/Canada except for QF11, QF12
. USA domestic sectors including Honolulu-mainland
services
. Flights between Honolulu and Canada
. All flights between Australia and New Zealand/New
Guinea/New Caledonia/Fiji/Solomon
Islands/Vanuatu/Indonesia/Philippines/Hong Kong
. QF1, QF2, QF7, QF8, QF9, QF10, QF51, QF52, QF61, QF62,
QF81, QF82
Please refer to the itinerary pages of this timetable for
information regarding smoking on your flight."

149. Under the item "Travel Care", it is stated that information booklets are available from "your Qantas office or Travel Agent" providing "relevant information and tips to ensure a smooth and relaxed journey with Qantas". One of the booklets has the title: "Air Travel for People with Disabilities or Special Medical Conditions".

THE REPORT OF DR. ISLES

150. The applicant tendered a report by Dr. William Isles dated 20 February 1991 entitled "Report on Flight Attendant Passive Smoking Studies 1990". The report was typed on a document bearing the respondent's name, but no witness was called by the respondent to explain its provenance or context; although in its filed statement of issues, facts and contentions the respondent has admitted that Dr. Isles was "in its employ". In the circumstances, the inference should be drawn that in 1990 the respondent commissioned the report from a medical

practitioner retained by it as a member of its staff, in the light of the respondent's concerns in the area.

151. The objective of the report was "to make a scientific assessment of exposure of flight attendants to environmental tobacco smoke (ETS) in the aircraft cabin".

152. The report gave the results of the studies of personal air sampling for nicotine then carried out, including comparison with an Air Canada study. The results were also compared with studies of other situations, for instance, restaurants, cars and trains. The respondent's study -

"shows (nicotine) concentrations generally below those from a variety of situations. Concentrations, even for flight attendants working in the smoking sections, are also below those for passengers seated in the smoking sections. This is to be expected as these flight attendants do not spend all their time in the actual smoking section where the high concentrations are found."

153. The report went on:

"Taking an average of all the results from the flight and applying it to an average time in the cabin per year of 640 hours a total figure of 2.18 cigarette equivalents is attained. It must be stressed that this concept is based on many assumptions but it does help to put the exposure into perspective.

ETS is thought to contain higher levels of carcinogenic and toxic compounds than mainstream smoke (smoke inhaled by smokers). Thus lower levels of exposure to ETS may have larger health effects than mainstream smoke. On the other hand, it is believed that people absorb far less ETS (only 8-11%) than mainstream smoke (30-40%).

154. The report's conclusions were expressed as follows:

"CONCLUSIONS

There is little doubt that passive smoking causes eye, nose and throat irritation and annoyance particularly to non-smoking passengers and crew. This factor is aggravated by the low humidity in the aircraft cabin. Medical authorities (and soon, perhaps the courts) now agree that there is sufficient evidence to link passive smoking with aggravation of asthma in existing asthmatics, respiratory disease in children, and from long term exposure, lung cancer.

THE EVIDENCE OF PROFESSOR A.B.X. BRESLIN

155. Professor Breslin was called by the applicant. He is Clinicial Associate Professor in Medicine at the University of Sydney and a consultant thoracic physician who has carried out studies and published in the area of the effects of passive smoking.

156. In his report dated 23 February 1995, Professor Breslin expressed the opinion that "there is no doubt whatever" that exposure to passive smoking by individuals "may cause physical symptoms and objectively measurable changes in various parameters in some of those individuals". He went on to say:

"My own clinical experience indicates to me that many individuals complain of the physical effects of ETS in overseas aircraft. I see many patients with respiratory disease who are adversely affected by ETS and this exposure may occur on aircraft. The airlines themselves in effect recognise this by requesting that people do not smoke pipes and cigars even in 'Smoking' areas. There is absolutely no doubt in my mind that the areas designated 'Smoking' in aircraft have very significant levels of ETS and even the areas designated 'Non Smoking', particularly if they are adjacent to the 'Smoking' areas, also have significant levels of ETS."

157. Professor Breslin elaborated on this in his oral evidence by reference to the ambient conditions prevalent in aircraft:

"... there are a number of studies that show that the effects of environmental tobacco smoke in causing irritation both streaming eyes and dry eyes and nasal irritation are worse, the effects are worse and more pronounced in conditions of low humidity and as we all know the humidity in aircraft is low, approximately 15 per cent as I understand it. So, the likelihood of environmental tobacco smoke causing eye irritation, nasal irritation, is more likely to occur in aircraft than it may in other places given the lowness of the humidity and taking into account similar amounts of environmental tobacco smoke that might occur on those two situations. So, I have no doubt that the conditions in aircraft are such that environmental tobacco smoke could and does cause both irritation and significant objectively measurable changes in airways of some patients and some normals.

... the pressure of most international aircraft is between 5 and 8000 feet pressurised and the humidity about 15 per cent. It's the humidity that's the major factor in aggravating these environmental tobacco smoke effects."

158. Professor Breslin referred to studies indicating that both nausea and anorexia are "recognised consequences" of exposure to tobacco smoke, although they may also be due to motion sickness.

159. Professor Breslin went on to give this evidence with respect to patients upon whom ETS has a marked effect:

"The first and the one that I studied specifically, asthmatics, and there is no doubt that is well established both medically and in law that environmental tobacco smoke produces asthmatic attacks in certain asthmatic individuals. The other group is people with allergic rhinitis because they already have nasal swelling, mucosal swelling and that may be aggravated by environmental tobacco smoke. The third group of people are people who are atopic, that is so-called allergic individuals who may not actually manifest that in any disease so that there are people who are allergic. I mean, the classic symptom of allergy is hay fever, but even in allergic individuals who do not have any particular clinical symptoms, it has been shown in a number of studies that they are more susceptible to environmental tobacco smoke than non-allergic individuals. Now, allergic individuals make up 35 per cent of the Australian population of whom asthma and allergic rhinitis or hay fever occur in that group of people but of course asthmatics make up about 10 per cent of the population and 20 per cent in children so we are looking at a significant group of people with atopic disease, with asthma, with allergic rhinitis, who are particularly prone to environmental tobacco smoke but even normals are prone to it in certain ways. Now, a normal is not going to get an asthmatic attack from it but a normal may get nausea, a normal may get dry eyes, runny eyes and nasal obstruction.
And if an otherwise normal individual has a particular problem caused by some other infection, be it some respiratory disease or some sinus or nasal problem, that may be affected for the duration of that temporary illness that the person was suffering from?---Yes, it may be exaggerated by the exposure to ETS."

160. I accept all of this evidence.

THE EVIDENCE OF PROFESSOR D.K. McKENZIE

161. The respondent called Professor McKenzie, Associate Professor and Chairman of Respiratory Medicine, University of New South Wales.

162. In his report dated 20 March 1995, Professor McKenzie referred, without being exhaustive, to several environmental factors associated with prolonged flight in a commercial aircraft. He nominated, as the major problem, reduced barometric pressure which, he said, could cause pain in the sinuses or in the middle ear; and in patients with severe asthma, there is a risk of pulmonary barotrauma. Another potential problem is that the extreme low humidity results in the drying of mucus membranes in the nose, throat and eyes. There is a risk of transmission of infectious agents.

163. On the subject of passive smoking, Professor McKenzie said:

"There is an extensive medical literature concerning the possible health affects of environmental tobacco smoke. I have personally reviewed the bulk of this material. ... For otherwise healthy adults it has proven extremely difficult to show any clinically significant adverse health affects from prolonged exposure to environmental tobacco smoke. The one disease for which there remains concern is lung carcinoma. Although the bulk of cases of lung cancer can be attributed to active smoking, the fact that cigarette smoke is a potent carcinogen has led many researchers to consider the possibility that prolonged exposure to much lower doses in environmental smoke might also be carcinogenic.

In contrast to the above, it is well documented that perhaps the bulk of non-smokers find exposure to environmental tobacco smoke unpleasant and irritating. Typical symptoms include some watering of the eyes with increased rates of blinking and soreness and irritation of the throat. These symptoms are transient and disappear within a matter of minutes to several hours. A number of studies has shown that there is no detectable impairment of airway function following acute exposure to extremely high levels of environmental tobacco smoke. Indeed, it is controversial whether chronic exposure to ETS over many years can lead to any clinically significant decline in lung function in otherwise healthy individuals.

The situation is possibly different for asthmatic individuals who are known to be sensitive to a wide range of non-specific irritants ... Approximately ten scientific studies have been undertaken to determine whether asthmatics suffer a significant decline in airway function following acute exposure to environmental tobacco smoke. Although a number of these studies reported negative results it is generally accepted that a minority of asthmatics will respond to environmental tobacco smoke with a clinically significant decline in airway function (of 15-20% or more). However, the same studies show that the effects are completely reversed within minutes by the use of an asthma inhaler and that there are no long lasting effects. Moreover, the effects can be readily prevented by pre-treatment with an asthma inhaler."

164. In his oral evidence, Professor McKenzie elaborated on his statement that for otherwise healthy adults it has proven extremely difficult to show any "clinically significant" adverse health effects from prolonged exposure to ETS, as follows:

"Clinically significant I believe is an accepted term and it
is used frequently in the passive smoking literature to
distinguish between something that might be a measurable
change in the function of an organ as opposed to something
that might remotely even cause symptoms or any impairment of
that organ or ultimately any disability of the individual,
so, if you like, a clinically significant problem is one
which might be severe enough to require treatment if there
was any treatment available or which might cause the
individual some impairment of their total functioning."

165. In cross-examination, Professor McKenzie agreed that in the case of a passenger with a pre-existing condition, exposure to ETS would be annoying and irritating. If a passenger already had sinus problems or nasal congestion, exposure to ETS may add further discomfort.

166. When asked to comment on Professor Breslin's view that ETS may have aggravated other conditions, Professor McKenzie's opinion was that "the effect of smoking per se is probably relatively small".

167. To the extent that there may appear, in some areas, to be conflict between the opinion evidence of the two experts, I would accept the views of Professor Breslin given his greater experience in the particular area now in question.

RESPONSE BY THE RESPONDENT TO THE GOVERNMENT'S PROPOSALS TO RESTRICT OR BAN SMOKING

168. In June 1992, the Minister for Transport raised with the respondent the adverse health effects of active and passive smoking in a letter to be mentioned shortly. Prior to this, by memorandum dated 23 April 1992, the respondent's Manager, Market Research and Product Development, reported on his research to determine whether the introduction of a smoke free aircraft "would have a net positive or net negative effect on (the respondent's) most loyal group of customers (i.e. frequent flyers)".

169. The research suggested that, although only 10% of "frequent flyers" smoked, a further 17% of passengers who did not themselves smoke, travelled with smokers; so that 27% of the "user base" would be affected by a ban, either directly or indirectly.

170. In recommending that the respondent not introduce the ban at that stage, the Manager said:

"Although the majority of non-smokers were extremely
positive about the idea of a smoke ban, the smoking issue is
not as important as other Scheduling and Service factors in
choosing an airline and therefore the disposition to fly
QANTAS remained the same after exposure to the concept.
However the negative effect of a smoke ban on smokers had an
adverse effect on brand disposition.
There was some comment from both smokers and non-smokers
about the ban in an economic sense and both groups held the

view that the move would mean a loss of business for QANTAS rather than a gain."

171. By letter to the respondent's Chairman dated 22 June 1992, the Minister stated that inflight smoking had been banned on all domestic services since 1987; that in 1990 these bans had been extended to all services operated between Australian airports by the respondent and foreign international carriers; and that as from 1 July 1992, there would be total smoking bans in all Federal Airports Corporation domestic and international passenger terminals. The Minister said that the Commonwealth was committed to "eliminate or reduce" the exposure of people to tobacco.

172. After referring to a recent common law precedent for employees to recover damages from employers for health problems linked to passive smoking, the Minister said:

"...approximately one quarter of the Company's workforce (consisting of cabin and technical air crew) are required by occupation to work in aircraft based environments where they are subject to the effects of passive smoking. This situation clearly has implications for Qantas as the direct employer and also currently for the Commonwealth as the ultimate shareholder of the enterprise. In this capacity the Commonwealth has a duty of care and responsibility to ensure that Government business enterprises provide employees with a safe workplace guarding against the dangers of passive smoking. In view of this situation, I would appreciate receiving advice from the Board on strategies and policy the Company will need to adopt to address the issues involved."

173. The Minister went on to stress that the Government "strongly supports" the need for carriers to implement smoke-free international flights to and from Australia.

174. In his reply dated 9 July 1992, the respondent's Chairman referred to earlier concern on the part of the Government that the airline's "commercial viability" was not adversely affected by any decision to limit smoking, particularly if that action were to be taken unilaterally by the respondent without reciprocation by other carriers. The Chairman also referred to research done in 1989 during a three month trial of non-smoking flights on the trans-Tasman route, indicating that only 13% of passengers would consider changing airlines for this purpose.

175. The Chairman said:

"Qantas, however, has been continuing to monitor the issue closely and to pursue opportunities as they present themselves. We have continued to assess the issue through our customer feedback process which still indicates that the smoking issue is low on the list of priorities considered by customers when deciding which airline to choose. We have however, had concern on the issue expressed by members of

our cabin crew staff and in consultation with them, we have been pursuing investigation of actions which can be taken to lessen the effect of smoking on cabin crew on smoking flights. The ratio of our non-smoking to smoking seats is now 12% smoking. As with elsewhere in the community, even amongst our cabin crew we have a vocal group in support of smoking and an equally vocal group opposing it.

Nevertheless, your letter on this was timely because at its 11 June meeting, the Qantas Board decided that it would introduce a no smoking policy in all Qantas workplaces on the ground in Australia. This will be fully implemented by 1 January 1993, thus allowing a period during which effective implementation strategies can be developed in each workplace. Experience has shown that this is essential if implementation is to be effectively achieved. The Board also decided that the process of consultation with the unions covering staff working in the air would continue to identify measures to alleviate the effects of smoking in the air in a way that minimises the commercial effects.

Strategies being considered here include engineering measures as well as identifying whether certain routes could become smoke free. In negotiations with Air New Zealand, we are close to reaching agreement for the two companies to introduce no smoking on Trans Tasman flights. While we have needed to tread carefully around the Trade Practices legislation, we are now confident that we can achieve this outcome for implementation later this year.

The Company believes that every opportunity should be taken to pursue the elimination of smoking on airline flights on a bilateral basis. It would be helpful if the Government could pursue such an approach in international forums such as ICAO. The issue could also be considered in negotiations on air services agreements.

The issue of smoking is a complex one and one which elicits strong views in the protagonists and the opponents. The Company has been looking closely at the issue and weighing up the competing interests. As you will appreciate, the balance at the moment in the competitive airline industry is very fine. However in this regard we believe our current position successfully addresses the complicated mix of factors."

176. By memorandum dated 16 October 1992, the respondent's International Relations Manager reported to management that the International Civil Aviation Organisation ("ICAO") of which Australia was one of 173 Member States, had considered a proposal, co-sponsored by Australia, that all Member States progressively restrict smoking on all international passenger flights with the aim of achieving a total ban by 1 July 1994. In the working paper describing the proposal

sponsored by Australia, Canada and the United States of America, reference was made to the conclusion of the World Health Organization that exposure to ETS "is a health hazard" and to its 1990 resolution "calling for public protection from ETS in public transport". In the working paper, it was said, by way of background that -

"Persons aboard aircraft in flight are captive and should be protected against the health hazard of ETS."

177. In the resolution passed by the General Assembly, it was recited that the World Health Organization had unanimously adopted a resolution urging Member States "to ban smoking in public conveyances where protection against involuntary exposure to tobacco smoke cannot be ensured". The Assembly requested the ICAO Council to take "appropriate measures to promote a smoke-free travel environment on all international flights". It also urged all contracting States, in the meantime, "to take necessary measures" as soon as possible to restrict smoking "progressively" on all international passenger flights with the objective of implementing complete smoking bans by 1 July 1996.

178. By letter dated 15 December 1992, the Minister congratulated the respondent on its introduction of smoke-free flights on all trans-Tasman routes and on the three non-stop Sydney/Los Angeles flights.

179. By memorandum dated 4 February 1993, the respondent's Manager, Market Research and Product Development reported on further research into customer reaction to the respondent's non-smoking flights. It was found that the "overwhelming" (86%) majority of customers (including 38% of smokers) considered non-smoking flights "a good idea". However, such flights were not "a major consideration" in choosing an airline. Price, convenient schedules and inflight service were more important.

180. Replying to the Minister's December letter, the respondent's Chairman mentioned that prior to 1990, 25% of seats on each flight were smoking seats. Since 1990, that proportion had been reduced, first to 18%, then to 13% and that percentage had, effectively, been further reduced upon the introduction of the smoke-free flights. Although the Chairman said that the respondent was evaluating the possibility of extending non-smoking flights to other "shorthaul" destinations, he emphasised the need for a bilateral approach to the problem, lest the respondent be placed "at a competitive disadvantage in what is an extremely cut-throat market".

181. By letter dated 19 August 1993, the Minister congratulated the respondent on its decision to operate smoke-free all of its international flights of four hours or less. The Minister referred to the 1992 ICAO resolution and suggested that the Government agree to a proposal by the United States that Australia, Canada, New Zealand and the United States enter into an agreement to ban smoking on non-stop scheduled flights between those countries from the end of 1994. The Minister also proposed that this would be followed by a complete ban on smoking on all scheduled international services to and from Australia from 1 April 1995.

182. In his reply dated 20 September 1993, the respondent's Chairman informed the Minister that, on a trial basis, flights between Australia and the U.K. would be smoke-free from January 1994. He went on to say:

"Multi-lateral arrangements ... put no airline at a competitive disadvantage. The unilateral ban to which your letter also refers, on the other hand, would put Qantas in a difficult position particular(ly) in relation to flights to Asia (and in particular Northern Asia) and continental Europe. Our research indicates that whilst there is widespread support for smoke-free services in countries such as America, New Zealand and the UK, there is no similar pressure in Japan, Korea, Germany and Italy. As you will appreciate, Qantas is charged with acting in a commercial manner. Qantas' approach has been to balance the commercial interests of all its passengers."

183. In February 1995, the Transport Minister announced that, with the support of the respondent, as from 1 March 1995, smoking would be banned on all non-stop flights between Australia, the United States and Canada; and that, as from 1 July 1996, the ban would be extended to all Australian international flights, regardless of destination. The Minister said that the Government was "very concerned" about the adverse health effects of active and passive smoking and that these effects "are accentuated in enclosed environments such as aircraft cabins".

CONCLUSIONS

(a) Introduction

184. It appears to be common ground that, under the general law, in the absence of an express term to the contrary, a traveller can have no claim to a particular seat in any conveyance (see, Heilbronn, Travel and Tourism Law in Australia and New Zealand at 217). The respondent's standard ticket refers to its conditions of carriage. Article VI (4) of those conditions states that the carrier "does not guarantee to provide any particular seat in the aircraft and the passenger agrees to accept any seat that may be allotted on the flight in the class of service for which the ticket may be issued".

185. There appears to be no real authority in the present area. Heilbronn, above, comments (at 218):

"Even if it is a principle of common law that a passenger cannot be compelled to travel in a smoking car and is entitled to the accommodation usually provided for such passengers (Jones v Grand Trunk Rly Co (1905)), contractual terms excluding any obligation to provide a particular seat are found in the IATA GCC ... and appear to negate any right to demand a seat in a non-smoking or smoking section. Provided a carrier has available a reasonable number of seats in each category, no obligation to allocate a non-smoking seat to a non-smoker and vice versa will exist, in the absence of government regulatory intervention..."

186. The headnote in the Ontario case of Jones v Grand Trunk Railway Company (1905) 9 OLR 723 states somewhat simplistically:

"A railway passenger holding a second-class ticket is
entitled to reasonable accommodation of the kind usually
furnished to passengers of that class and cannot be
compelled to travel in a smoking car".
187. However, the case does not seem to be of much assistance here, at least in terms of the illumination of the position under the general law.

188. It appears that, in fact, the passenger had sued, not under the general law, but under the provision of a special statute, s.246 of the Railway Act. It provided: (1) that all regular trains "shall furnish sufficient accommodation" for the transportation of passengers; (2) that such passengers shall be transported on the due payment of the fare lawfully payable therefor; and (3) that every person aggrieved by any refusal or neglect in the premises shall have an action against the company.

189. The facts of the case were also rather special. The plaintiff was the wife of an Indian and brought the action to establish an alleged right to travel at half fare. The railway had for a long time sold to Indians first-class tickets at one-half fare. Shortly before the occurrence in question, the railway changed its practice and issued "Indian" tickets at half of the first-class fare. They purported on their face to be second-class tickets; however, half the first-class fare was not the same as a second-class fare. The plaintiff purchased one of these tickets and, as she had been accustomed to do, went into a first-class car. However, a conductor pointed out to her that the ticket was second-class and she could not remain in the first-class car unless she paid a further fare, which she declined to do. The conductor then insisted that she must travel in the second-class car. She refused to do this, saying that it was a "smoking" car.

190. At the trial, the jury found that, even if as a matter of law (as the trial Judge ruled) the plaintiff had no right to travel first-class, nonetheless the car to which she was asked to go was not sufficient for her accommodation on account of its being a smoking car. The jury assessed damages at $10. The defendants appealed.

191. On the appeal, counsel for the appellant defendants argued that the statute went no further than the common law and, in particular, did not impose any liability as to the nature of the accommodation to be furnished. It was also contended (at 725) that, at common law, the sole duty was "to carry safely but not necessarily in special comfort".

192. On behalf of the respondent plaintiff, it was argued (at 726) that in furnishing "sufficient" accommodation, the railway was bound to use reasonable care and diligence in providing for the safety and comfort of the passengers. It had previously been held that a railway company was bound to take reasonable means to prevent one passenger from assaulting another and "there is really in principle no difference between an actual assault and the puffing of tobacco smoke in the face of a fellow passenger".

193. It was held, by a majority (Moss, CJO, Maclennan and Maclaren JJ; Osler and Garrow JJ dissenting), that the appeal should be dismissed.

194. Moss CJO said (at 727) that the findings and the evidence established, inter alia, that a "smoking" car "used as such" is not "sufficient" accommodation for the transportation of second-class passengers.

195. The Chief Justice went on to say (at 728):

"I see nothing improper or fraught with the dire consequences suggested by counsel for the defendants in the finding of the jury that as a smoking car the carriage in question was not sufficient accommodation for second-class passengers. The light in which Parliament regards the practice of smoking tobacco in railway carriages is found in sec.214, sub-sec. (e) of the Railway Act which authorizes railway companies to make by-laws, rules or regulations for prohibiting the smoking of tobacco and the commission of any other nuisance in or upon such carriages."

196. Moss CJO added (at 728):

"If as the defendants contended, there was a small compartment of the carriage in question not devoted to smoking, the plaintiff was not aware of it. As before mentioned there was nothing on the outside to indicate that it was a second-class passenger carriage, and all the indications the plaintiff observed pointed to its being a smoking car. I think it was the conductor's duty, seeing, as he must have seen, that the plaintiff was under that impression, to have told her of the compartment. The duty is to 'furnish' sufficient accommodation, and I cannot think that duty was performed in this instance. To 'furnish' must include giving or bringing to the notice of those for whom the accommodation is provided, some intelligible direction to where it is."

197. In his dissent, Garrow JA said (at 730):

"There were two passenger cars, one first-class and the other second-class. The second-class car had two compartments, one of which, the largest, was used as a smoker, but in the other smoking was prohibited by a notice posted up on the door, and there is absolutely no evidence or reasonable evidence that the plaintiff could not have ridden in this smaller compartment in reasonable and sufficient comfort and safety."

198. The applicant also relies upon a recent decision of the United States Court of Appeals for the Second Circuit in Staron v McDonald's Corporation, 4 April 1995 (reported 10.1 TPLR 2.33) in actions brought by children with asthma and a woman with lupus against two fast-food restaurant chains. Again, given its special context, the case is of marginal importance here. The plaintiffs claimed that the defendants' policies of permitting smoking in their restaurants constituted discrimination in violation of s.302 of the Americans with Disabilities Act ("ADA"),

which provided that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation". Under this section, "discrimination" included the failure of an owner, operator, lessee or lessor of public accommodations to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods etc. to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services or facilities.

199. In addition to a declaration that the defendants' policies were discriminatory, the plaintiffs sought an injunction to prohibit the defendants from maintaining any policy which interfered with the plaintiffs' rights under the ADA and "more specifically to require (the defendants and their franchisees) to establish a policy of prohibiting smoking in all of the facilities they own, lease or operate".

200. The Court of Appeals, reversing a judgment of the U.S. District Court granting the defendants' motions to dismiss plaintiffs' claims for failure to state a claim upon which relief could be granted, remanded the cases for further proceedings, that is, a trial on the facts.

201. For the purposes of the motions, the defendants did not dispute that s.302 applied to them as owners and operators of public accommodations; and that the plaintiffs qualified as "individuals with disabilities" under the ADA. The defendants' contention on the appeal was that a total ban on smoking did not constitute a "reasonable modification" under the ADA. However, the Court of Appeals found that the plaintiffs' complaints did on their face state a cognizable claim, which, depending on the facts, might be made out.

202. Turning first to the permissibility of smoking bans under the ADA, Circuit Judge Walker, writing for the Court of Appeals, said (at 2.35):

"Cases in which individuals claim under the ADA that allergies to smoke constitute a disability and require smoking restrictions are simply subject to the same general reasonableness analysis as are other cases under the Act. See e.g., Vickers v Veterans Admin. ... (evaluating whether a ban on smoking is a reasonable accommodation under the circumstances); ... . ('The determination as to whether allergies to cigarette smoke ... are disabilities covered by the regulation must be made using the same case-by-case analysis that is applied to all other physical or mental impairments.'). We see no reason why, under the appropriate circumstances, a ban on smoking could not be a reasonable modification. Accordingly, we turn to the magistrate judge's conclusion that plaintiffs' request for a smoking ban under the circumstances of these cases was unreasonable as a matter of law."

203. In dealing with the scope of the plaintiffs' proposed accommodation, the Judge said (at 2,35):

"The magistrate judge's principal objection to plaintiffs' proposed modification was that plaintiffs were seeking a total ban on smoking in all of defendants' restaurants even though 'there are certain restaurants which reasonably can accommodate a 'no-smoking' area.' We do not think that it is possible to conclude on the pleadings that plaintiffs' suggested modification in this case is necessarily unreasonable.

To be sure, the few courts that have addressed the question of reasonable modification for a smoke-sensitive disability have found a total ban unnecessary. See Harmer, ... Vickers ... .Yet these courts only reached this conclusion after making a factual determination that existing accommodations were sufficient. In granting summary judgment to the defendant, the Harmer court concluded that the plaintiff could perform the essential functions of his job with the modifications already made by the defendant, which included moving smokers further from the plaintiff's desk, mandatory use of smokeless ashtrays, and installation of air filtration and oxygen infusion devices. ... In Vickers, the court found after a bench trial that the nine steps defendants had taken to alleviate plaintiff's suffering constituted sufficient accommodation, and that a total ban was therefore not necessary. ... Neither case held that a ban on smoking would be unreasonable if less drastic measures were ineffective, much less that a ban on smoking is unreasonable as a matter of law."

(b) The causes of action alleged by the applicant

204. It will be necessary to consider each possible cause of action in turn.

205. Two background considerations should be mentioned initially. First, to identify the period of time now in question, it will be recalled that the flights complained about by the group members took place between July 1992 (the first) (Mrs. Cameron) and November 1993 (the last) (Ms. Aroney).

206. Secondly, reference should be made to the dimensions of the respondent's operations. Measured by "revenue-passenger" kilometres, the respondent is ranked the 12th largest airline in the world, carrying 4.2 million international passengers as at March 1991 (4.5 million currently).

(1) The claim of "unconscionable" conduct

207. By s.51AA(1) (s.52A has now been repealed and replaced) of the Trade Practices Act, a corporation must not, in trade or commerce, engage in conduct that is "unconscionable within the meaning of the unwritten law". By s.51AA(2), the section does not apply to conduct that is prohibited by s.51AB.

208. By s.51AB(1), a corporation shall not, in trade or commerce, in connection with, inter alia, the supply of services, engage in conduct "that is, in all the circumstances, unconscionable". There is no definition of what is "unconscionable" for this purpose, but s.51AB(2) provides:

"(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened sub-section (1) in connection with the supply or possible supply of goods or services to a person (in this sub-section referred to as the 'consumer'), the Court may have regard to -
(a) the relative strengths of the bargaining positions of the corporation and the consumer;
(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation."

(A) The applicant's case
209. On behalf of the applicant the following is submitted:-
(i) There was a material inequality of bargaining power between the respondent and group members in that -
(a) The respondent had control of smoking policies on its aircraft and was in a position to dictate those to passengers so that it is not possible for non-smoking passengers to insist on a smoke-free flight or to be seated in a "genuine" smoke-free area; yet it is within the capacity of the respondent to determine that all flights be non-smoking; and
(b) Where a passenger is told that a non-smoking seat cannot be allocated (whether or not the passenger had previously been informed that he or she would be allocated a seat designated "non-smoking"), the respondent does so in circumstances which involve "unfair tactics" in not

providing a reasonable opportunity for such passengers to be allocated a "non-smoking" seat which may later become available.

(ii) As a result of the respondent's conduct, the group members and other passengers are required to comply with conditions that are not reasonably necessary for the protection of the respondent's legitimate interests in that -

(a) Some passengers are required to accept seating in a seat designated "smoking" in circumstances in which the respondent has decided either (i) to permit smoking on that flight; or (ii) to allocate a number of seats in the designated "non-smoking" zone which is insufficient to allow all passengers requesting a "non-smoking" seat to be allocated a seat in that zone; or

(b) Alternatively, such passengers may be allocated a seat in a designated "buffer" zone, resulting in exposure to more smoke than in the case of a "non-smoking" zone, again for reasons (i) and (ii) above.

(iii) In allocating "non-smoking" or "smoking" seats, the respondent issues documents signifying that designation, which passengers do not fully understand, in that those documents do not disclose that what purports to be a "non-smoking" seat may be in a "buffer" zone, and thus exposed to smoke from nearby seats to an extent greater than if the seat were in strictly "non-smoking" zone.

(iv) It is also "unfair tactics" for the respondents to provide passengers with assurances as to seating allocation in a "non-smoking" area knowing (or ought reasonably to know) that it may not be able to do so.

(v) The respondent unnecessarily exposes passengers to a health risk which could be avoided by a ban on smoking.

(vi) In each of the above circumstances, the passenger is not afforded the option of travelling on another "smoke-free" flight, especially where travel arrangements involve a "packaged" holiday or travel with relatives or friends.

(B) Conclusions on the "unconscionability" claim

210. I am not persuaded that the applicant has made out this claim.

211. As has been noted, there is no statutory definition of "unconscionability". But it appears that, to qualify, serious misconduct, something clearly unfair or unreasonable, must be demonstrated.

212. The mischief sought to be removed by the precursor provision, s.52A, was described by the Attorney-General in his Second Reading speech as follows:

"The section is directed at conduct which, while it may not be misleading or deceptive, is nevertheless clearly unfair or unreasonable. For example, a corporation which attempted to take advantage of a buyer's obvious lack of understanding of a transaction might fall of this section. The new provisions will supplement existing provisions of Part V and strengthen the protection afforded to consumers against unscrupulous trading practices." (Emphasis added)

213. In my view, although, for reasons to be given later, I find that the respondent was negligent in certain respects, it has not been shown that the respondent's conduct was clearly unfair or unreasonable. Nor, in my opinion, whatever the limits of the passengers' understanding of the detail of the respondent's system of seat allocation, could it be said that the respondent sought, in any unscrupulous way, to obtain an advantage from the situation.

214. Whilst the Second Reading speech is useful to identify the mischief at which the legislation is directed, it is not, of course, definitive of its interpretation, given especially the reference in s.51AA to the unwritten law.

215. In The Commonwealth v Verwayen (1990) 170 CLR 394, Deane J observed (at 441) that conduct which is "unconscionable" will commonly involve the use of, or insistence upon, legal entitlement "to take advantage of another's special vulnerability or misadventure ... in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing". As Deane J went on (at 441) to note, in borderline cases, there will be an element of value judgment involved. His Honour had earlier (at 440) pointed out that it is one thing to save persons from the consequences of their own mistake. It is another, (and a situation where the law will intervene) to save them "from being victimised by other people".

216. In my view, no such victimisation has been demonstrated here.

217. In Zoneff v Elcom Credit Union Ltd. (1990) 94 ALR 445, Hill J said (at 463):

"... in general terms, it may be said that conduct will be unconscionable where the conduct can be seen in accordance with the ordinary concepts of mankind to be so against conscience that a court should intervene. At the least the conduct must be unfair. It invites comparison with doctrines of equity ... where inequality of bargaining power or absence of the ability to bargain freely will be relevant to the finding that there has been an unfair advantage taken by one person of the other."

218. In the present case, although there were references in the evidence to the circumstance that the respondent's decision-making in the present area was, generally speaking, driven by "commercial considerations", when attention is focussed upon the dealings between a particular passenger and the respondent, it is by no means easy, accepting that questions of degree may be involved, to identify any specific "advantage" which may be said to accrue to the respondent vis-a-vis that passenger as a consequence of the respondent's policies, or their administration.

219. In his paper "Unconscionable Conduct" (1994) 8 JCL 37, Professor Paul Finn reminds us (at 42) that liability at common law for negligence is not divorced from moral considerations: rather it is "based upon a general public sentiment of moral wrongdoing for which the offender must pay" (per Lord Atkin in Donoghue v Stevenson (1932) AC 562 at 580). But (as Lord Atkin then went on to say (at 580)) "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief". So it is with the doctrine of unconscionability. It has always been recognised that the legal system cannot provide a remedy whenever the defendant's conduct is against "conscience", even if it be accepted that the primary dictionary meaning of the term "unconscionable" is "against conscience". Professor T.F.N. Plucknett and J.L. Barton have pointed out ("St. German's Doctor and Student", Selden Society, Introduction, at xxvi) that:

"Conscience in modern times, at least in popular speech, is merely the subjective sense of right and wrong possessed by a particular individual ... Gerson, and St. German, took the word 'conscience' very differently. Synderesis, that rational faculty which compels our assent to self-evident propositions, shows us that good is to be done and evil eschewed. What is good and what evil is not a matter of personal taste, but is to be determined by revelation and by reason. Thus conscience, which is the art of translating this general rule into specific rules of conduct to be followed in particular situations, is a form of applied knowledge. Conscience, we are told more than once, must always be founded upon some law."

220. Yet there is force in the observations of Duggan, Bryan and Hanks ("Contractual Non-Disclosure" (1994) at 104):

"The scope of the unconscientious dealing principle remains obscure. Is it posited on knowledge by one party of the other's mistake (or knowledge which should have led the party to make further inquiries) or can the principle be invoked even where a party is ignorant of the other's mistake?"

221. Yet, in Massey v National Mutual Life Association Ltd., Supreme Court of Victoria, unreported, 1 May 1995, Brooking J (Ormiston and Nathan JJ concurring) held (at p.5) that it is a necessary ingredient that a party was in a position of special disadvantage of which the respondent knew, or concerning the possibility of which the respondent should be taken to have known.

222. It should always be borne in mind, as Deane J noted in Verwayen, above (at 440), that the notion of unconscionability "is better described than defined".

223. In his explanation of aspects of unconscionable behaviour, Professor Paul Finn adverts (at 47-8) to the abuse of power and vulnerability as underlying themes. He proceeds (at 49):

"To overgeneralise greatly, and subject to what earlier was said about limiting factors such as volenti, unconscionable conduct can be said to be synonymous with the use of a manipulative power to induce or produce a course of conduct, in a way which offends the fundamental assumptions on which the making of a binding contract are premised, be this by contriving the information on which a judgment is made or by contriving choice itself.
Secondly, passive exploitation. The singular feature of unconscionable conduct of this variety is that it involves, in essence, a species of intentional wrongdoing - and wrongdoing moreover which arises from a failure positively to assist a person with whom one is negotiating and who is known to be in such a position of disadvantage as to be unable properly to conserve his or her own interests in the contracting in question. That incapacity may arise because that person is mistaken as to a matter basic to the dealing; because the capacities of that person are not equal to comprehending properly the dealing in question; etc. Here, and to maintain the integrity of contract as a socially acceptable medium for the making of binding bargains, the law understandably sets limits to the exploitation it will countenance."

224. (For a similar analysis of the ingredients of the doctrine of "unconscientious dealing", see A.J. Duggan, "Trade Practices Act 1974 (Cth), Section 52A and the Law of Unjust Contracts" (1991) Syd LR 138 at 141-2; cf Carter v Boehm (1776) 3 Burr. 1095 at [1766] EngR 157; 1910-1; 97 ER 1162 at 1164-5.)

225. I have concluded that none of these features, in particular manipulation or exploitation by the respondent, were shown to exist in the present case.

226. It is convenient to consider the issue first from the perspective of the respondent's decision to permit smoking, at all, on at least some of its flights.

227. In concluding that this decision has not been shown to be unconscionable, the following considerations are, I think, material:

(i) Smoking itself remains a lawful, albeit hazardous, activity.
(ii) The Australian Government has had ample constitutional power to prohibit smoking on international flights to and from this country (Constitution, s.51(i); s.51(xx); s.51(xxix)), but, at this stage, has elected not to exercise that power, although it did so in the domestic context (see Air Navigation Regulations, reg. 246).
(iii) Some, although not all, other international carriers permit smoking on certain, or, in the case of two carriers, all of

their flights.
(iv) It is legitimate for the respondent to take into account its competitive position, especially where regional cultural differences are perceived to be significant.
(v) The respondent has, in fact, responded to evolving community attitudes in this area. Mr. Saunders, in particular, has been active here.

228. Turning next to the question whether the respondent's policy of seat allocation is "unconscionable", in my opinion, the following considerations serve to indicate that, accepting that questions of degree are necessarily involved, it has not been shown, to use the Attorney-General's words, that either the policy or its administration, is "clearly unfair or unreasonable":
(i) The system is designed to separate smokers from other passengers.
(ii) The existence of a "no preference buffer zone" is a necessary incident of such a system. It is inevitable that there will be an area that is immediately adjacent to the "smoking" zone. It is not "clearly" unfair or unreasonable for the respondent to offer seating in the "NPBZ".
(2) The claim of misleading or deceptive conduct
229. By s.52(1) of the Trade Practices Act, a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or likely to do so. By s.51A(1), where a corporation makes a representation with respect to any future matter, and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading. By s.51A(2), the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

(A) The applicant's case
230. The applicant contends that, by allowing smoking on some flights and by continuing its seating allocation policy, the respondent is likely to mislead passengers for these reasons:

"(a) Passengers who have pre-requested a non-smoking seat and been advised that a non-smoking seat has been or will be allocated to them, are led to believe:-
(i) that they will be seated in a seat designated non-smoking;
(ii) that the said seat will be in a designated non-smoking zone; and/or
(iii) that by occupying the seat, the ticket holder or prospective passenger will not be exposed to cigarette smoke during the flight.
(b) Such passengers are in fact allocated:-
(i) to a seat designated smoking:
(ii) to a seat which, whilst designated non-smoking, is in fact in a 'no preference buffer zone';
and/or
(iii) to a seat which, whilst designated non-smoking,

is in a section of the aircraft whereby, because of the configuration of the aircraft and the designation of particular areas of smoking, the passenger is exposed to susceptible amounts of cigarette smoke."

231. Because the applicant's case in this area is, in essence, based on what is claimed to be a misrepresentation of the true position by the respondent, the authority of a travel agent who makes a statement about the position can be important. For instance, if a travel agent informed the passenger that the passenger had been allocated a seat in the "non-smoking" zone when, in fact, the allocation was to the "smoking" zone, that statement would bind the respondent only if made with its authority, express or implied, or if made "on behalf of" the respondent within the meaning of s.84(2) of the Trade Practices Act. It will be recalled that a ruling was deferred on the admissibility against the respondent of statements made to passengers by their travel agent.

(B) The role and authority of the travel agent

232. Gary N. Heilbronn, Travel and Tourism Law in Australia and New Zealand has commented (at 185-6) that "travel agent" is not a legal term of art, but is a generic term describing persons engaged as "middlemen" or "brokers" in selling travel products; and that in acting as middlemen between potential travellers and persons or corporations in the business of supplying travel and tourism products, e.g. airlines, it is not always clear when an agent is acting for one, the other, both, or merely for himself or herself.

233. I agree that it is not possible to generalise in this area and that regard must be had to the particular circumstances of the case at hand.

234. So far as express general authority is concerned, the applicant made no attempt to call a travel agent or to tender an agency agreement or to prove a course of dealing between agents and the respondent (cf. Stephens Travel Service International Pty. Limited (Receivers and Managers appointed) v Qantas Airways Limited (1988) 13 NSWLR 331). However, in some areas, the respondent has expressly nominated some agents as having its authority to receive, and pass on, information and this would be something done "on behalf of the respondent" for the purposes of s.84(2). For instance, in the respondent's timetable (effective October 1994 but no doubt also found in earlier versions), under the title "reservations" (p.10) it is stated that:

"It is advisable to make all reservations well in advance, through approved Travel Agents, or any Qantas office.... All bookings are processed through the Qantas computerised reservation system."

235. Under the title "Meals and Refreshments" (p.20) it is stated:
"... Should you require a dietary meal please advise Qantas or your Travel Agent at the time of booking."

236. (It will also be noted that the timetable speaks, at one stage, of "approved (sc. by the respondent) Travel Agent" and, at another, of your (i.e. the passenger's) Travel Agent".

237. It will be necessary to consider the role played by the travel agent in respect of each group member.

(i) Mrs. Cameron
238. This booking was made through Jetabout Travel. Although it was claimed that Jetabout was associated with the respondent, it is not necessary to pursue the point since it is not suggested that Jetabout made any material representation.

(ii) Mr. Hooper
239. It is common ground that the respondent noted, and had accepted, Mr. Hooper's request, made by the agent on his behalf, for a "non-smoking" seat. Although Mr. Hooper gave evidence that the agent said to him "I've got you a non-smoking seat", in my opinion, when viewed in context, this statement meant no more than, as has been found, that the respondent had accepted Mr. Hooper's request.

(iii) Mr. Lewis
240. Again, it is common ground that the respondent accepted this request for the "non-smoking" zone. It follows that it is not necessary to pursue the significance of the agent's earlier statement that the request "should be okay".

(iv) Commander Glass
241. No agent was involved here.

(v) Ms. Aroney
242. I have found that the agent indicated to Ms. Aroney that she "could have the seat" (business class seat 18A) on the Los Angeles/Sydney section.

243. In her letter of complaint to the respondent dated 5 December 1993, Ms. Aroney stated that she had "pre-booked" seat 18A on this leg "and this was confirmed by Qantas, to my travel Agent, Walkers Travel ...". In its reply dated 3 February 1994, the respondent said:

"...there is no record in your computer reservations of a request for specific seating on the Los Angeles to Sydney sector. Nor is there a request lodged for a gluten free meal. We did however receive these requests for the Sydney to Harare sector. As the system is fully computerised we do rely on our agents and reservations staff to ensure that the requests are recorded as required.
I would like to assure you that Qantas is very sensitive to the needs of its non-smoking passengers. However, we are forced to accommodate both non-smoking and smoking passengers on board our aircraft. Unfortunately, in the closed environment of an aircraft cabin, it is impossible to ensure that smoke does not drift to other areas of the cabin.
While we do not guarantee that passengers will sit in any particular seat on board our aircraft, we do try to accommodate our non-smoking passengers in a non-smoking zone. In this regard, we have, for some time, offered the

facility of pre-selecting seats on board our aircraft at the time of booking. Had this taken place we may have been able to avoid the unpleasant circumstances you experienced. However, we should advise that pre-selecting a seat does not guarantee that a passenger will sit in that seat."

244. (It will be recalled that, after a discussion at the check-in counter at Los Angeles airport, Ms. Aroney was re-allocated a seat, viz. 25A. According to Mr. Handley's evidence, by use of a manual override of the computerised system, the load controller would have been able, in his or her discretion, to increase the size of the "non-smoking" section by changing row 25 from "smoking" to "non-smoking".)

245. I have already accepted Ms. Aroney's version of the events, and in particular that the agent informed her that she "could have" seat 18A. The inference I would draw, in all the circumstances, is that the agent purported to request seat 18A and that the request was accepted by the respondent; but that it was not properly treated by the respondent's system. Again, viewed in its context, the remark of the agent should be regarded as a statement that the respondent had accepted the request. In my opinion, the agent had the respondent's authority to make such a statement as its agent for that purpose.

(vi) Ms. Jacoby

246. In the contentious area, there was no agent involved. However, reference should be made to the following statement in the respondent's reply (dated 24 June 1993) sent in response to the letter of complaint dated 16 June:

"By way of background we have, for some time, offered the facility of pre-confirmed seating to our First and Business Class customers at the time of booking and, generally speaking, reconfirmation. Most travel agents have access to seat plans and are therefore in a position to advise their customers about the location of smoking and non-smoking seats."

(vii) Ms. Underwood

247. Here, a request was made of the agent for a "non-smoking" seat and he said that he had made a note of the request. In my opinion, he had the respondent's authority to make that limited statement in accordance with the respondent's practice of accepting reservations placed through agents.

(viii) Mr. McMahon

248. In the contentious area here, the material dealings were with the respondent's own staff in London.

(ix) Dr. Thomas

249. Again, the dealings in question here were with the respondent's staff.

(x) Mr. Millane

250. Here, a request was made of the agent for a "non-smoking" business class seat in the upper

deck. The agent confirmed the reservation. In my opinion, in accordance with the respondent's usual practice, the agent had the respondent's authority to confirm the reservation. (It should be noted, in this connection, that in his letter of complaint dated 1 December 1993, Mr. Millane stated, in respect of this sector of the flight, when "I booked my travel I requested non smoking as usual ... . On Friday Oct 29th the seat was confirmed... ." The respondent did not reply to this letter.)

251. The subsequent dealings at Singapore were with the respondent's own staff.

(C) Was the respondent's conduct misleading or deceptive?
252. Again, it will be necessary to consider the particular circumstances of the individual group members.

(i) Mrs. Cameron
(aa) Sydney-Bangkok sector
253. Mrs. Cameron made no request for a "non-smoking" seat. The respondent made no representation in this area at all. Subject to limited exceptions, it is well established that mere silence does not amount to a misrepresentation (see, e.g., David Harland, "The Statutory Prohibition of Misleading or Deceptive Conduct in Australia and its Impact on the Law of Contract" (1995) 111 LQR 100 at 115). Prima facie then, there was no conduct on the part of the respondent that was likely to mislead.

254. It is true, as Mr. Handley said in his evidence, that the respondent was aware that "(i)t is a common misunderstanding on the part of economy class passengers that if they arrive early at check in counters they will have a better choice of seats". But, whilst the respondent is aware of this misapprehension, there is nothing in the evidence to suggest that the respondent played any role in its creation. If it had, it may have been obliged to dispel that false impression. In the absence of any role to that effect on the part of the respondent, it had no duty to speak on the point. Accordingly, no contravention of Part V has been made out here.

(ab) Bangkok-Sydney sector
255. Despite initial problems, Mrs. Cameron was eventually allocated, and received, a non-smoking seat. It follows, in my view, that no contravention of Part V has been demonstrated.

(ii) Mr. Hooper
256. Although the respondent accepted Mr. Hooper's request for a "non-smoking" seat, it did not have sufficient "non-smoking" seats on the flight from Honolulu to Sydney to meet the request.

257. On behalf of the respondent, it is contended that these requests should be taken literally; that is to say, that no more is meant than that the passenger cannot smoke in that seat. In my opinion, this is too restricted a view of its intended meaning. In its ordinary signification, a request for and acceptance and allocation of, a "non-smoking" seat, means that smoking will be prohibited both (1) in that seat and (2) in the area or zone in which the seat is located.

258. There being no evidence on the point from the respondent, in my opinion the respondent did not have reasonable grounds for believing that it would have sufficient "non-smoking" seats on

the flight for the purposes of s.51A(2). It follows that, for the purposes of s.52, the representation to Mr. Hooper that he would be seated in a "non-smoking" zone, is to be taken to be misleading.

259. I find a contravention of s.52(1) accordingly.

(iii) Mr. Lewis
260. The group aspect apart, the position is, in principle, the same as Mr. Hooper's. For present purposes, in my view, nothing turns on the group (of four persons) context because the respondent did not explain to Mr. Lewis that it might be a material factor in the operation of the respondent's system.

261. I find a contravention of s.52(1) accordingly.

(iv) Commander Glass
262. On behalf of the applicant, it is contended that it was misleading for the respondent to accept a reservation for a "non-smoking" seat, yet allocate a seat in the area designated "no preference buffer" or "non-smoking least desirable" zone. I cannot accept the submission. Although there may be questions of degree of exposure to smoke drift involved, it remains true, both literally and as a matter of substance, that such a seat is located in an area of seating where smoking is not permitted.

(v) Ms Aroney
263. Having regard to my finding that the respondent accepted the request for seat 18A, in the absence of any explanation from the respondent why it was not possible to allocate this seat on the Sydney/Los Angeles sector, it must follow that the respondent had no reasonable grounds for its representation that it would be able to allocate that seat.

264. I find a contravention of s.52(1) accordingly.

(vi) Ms. Jacoby
265. The position here is the same, in principle, as in the case of Commander Glass.

(vii) Ms. Underwood
266. The position here is similar, although not the same.

(viii) Mr. McMahon
267. The position is the same as Commander Glass.

(ix) Dr. Thomas
268. So far as concerns Dr. Thomas' belief that early arrival at the airport to check in for the London/Bangkok flight would ensure allocation of a seat in a "non-smoking" zone, the position is the same, in principle, as Mrs. Cameron's. In this respect, I find no contravention.

269. However, in the Bangkok/London flight in April 1993, notwithstanding the representation made by the respondent's staff at Sydney Airport (that Dr. Thomas and his wife) had been allocated non-smoking seats (albeit on an "up-grade"), they were seated in the "smoking zone"

on this sector. In the absence of any direct evidence from the respondent (I put aside the hearsay material from the flight director, who was not called), the respondent did not, in my view, have reasonable grounds for making the representation.

270. I find a contravention of s.52(1) accordingly.

(x) Mr. Millane
271. With respect to the Sydney/Los Angeles flight, the position is the same, in principle, as in the case of Ms. Aroney, that is, the respondent, without reasonable grounds, represented that the passenger would be allocated seating in a specific part of the aircraft (the upper deck) being a "non-smoking" and smoke-free zone.

272. I find a contravention of s.52(1) accordingly.

273. The position with respect to the Sydney/Singapore flight in June 1994 is the same.

274. The flight from Singapore to Sydney in November 1993 was complicated by the circumstance that Mr. Millane was "wait-listed" ("business" class) on three of the respondent's flights. However, the respondent's staff did represent, without reasonable grounds, that the respondent could "guarantee" a "non-smoking" seat, albeit in "economy" class.

275. I find a contravention accordingly.

(3) Was the respondent negligent?
276. I will later consider what damages should be awarded under s.82(1) of the Trade Practices Act in respect of the contraventions of Part V that I have found to have been proved. Since it is now settled that the common law concepts of causation, and of the measure of damages, will ordinarily be applicable under s.82(1) as well (see Wardley Australia Ltd. v Western Australia [1992] HCA 55; (1992) 175 CLR 514 at 525-6), it appears that the question of negligence need be addressed only in those instances where no contravention of Part V was established.

277. The ordinary principles of negligence are applicable in the present context; that is, in order to establish negligence, the plaintiff must prove (i) that the situation was such that the defendant was under a duty of care towards the plaintiff, (ii) that there was a breach of that duty of care and (iii) that damage to the plaintiff resulted therefrom (see Shawcross and Beaumont, Air Law, at 1/107).

(i) Mrs. Cameron
(aa) Duty of care
278. It will be recalled that, prior to Mrs. Cameron's flight in July 1992, the management of the respondent were aware of the opinion expressed by Dr. Isles in February 1991 (relevantly) that -

"There is little doubt that passive smoking causes eye, nose
and throat irritation and annoyance particularly to
non-smoking passengers ... . This factor is aggravated by the
low humidity in the aircraft cabin. Medical authorities ...

now agree that there is sufficient evidence to link passive smoking with aggravation of asthma in existing asthmatics, respiratory disease in children ... ."

279. Dr. Isles was not called. Although the structure of the report of Professor McKenzie might at first sight have appeared to suggest otherwise, there was, in the end, no serious contest that, for present purposes, Dr. Isles' opinion may be accepted as correct. As has been seen, it was confirmed by Professor Breslin, whose evidence on this point I accept without reservation. If Professor McKenzie's report might be read to suggest otherwise (itself a doubtful matter), I would, as previously indicated, have preferred Professor Breslin's opinion, having regard to his greater experience in this specific area. In any event, in his oral evidence, Professor McKenzie readily accepted that there was sufficient evidence to link passive smoking with aggravation of asthma and with respiratory diseases in children.

280. It will also be recalled that in the Minister's letter to the respondent written in June 1992, the Government was concerned with the adverse health effects of passive smoking. (It will be convenient to note here that, soon after the experiences of Mrs. Cameron and Ms. Underwood, but before the experiences of the other group members, the respondent became aware of the concerns of the WHO and of the particular complaints of passengers who wrote to the respondent of the inconvenience and annoyance they had suffered.)

281. It will further be recalled that the respondent was aware that there was a common misunderstanding among "economy" passengers that if they arrived early to check in they would have a better choice of where they sit.

282. Mention should also be made, in the present context, of the evidence of Professor McKenzie, which on this aspect I accept, that, for instance, the effects of ETS can be substantially reversed by pre-treatment with an asthma inhaler.

283. Reference should also be made, in the present connection, to the evidence of Professor Breslin, which I again accept, to the effect that 35% of the population are allergic.

284. As the WHO noted in the context of passive smoking on aircraft, passengers are, in a real sense, "captive". The position may, in truth, be seen to be analogous to the situation in Howard v Jarvis [1958] HCA 19; (1958) 98 CLR 177 where, during a period of detention in custody, it was held (at 183) that those in control were subject at common law to a duty to exercise reasonable care for the safety of a prisoner during his detention in custody, those persons having deprived the prisoner of his personal liberty and assumed control of his person (see R.P. Balkin and J.L.R. Davis, The Law of Torts, at 222-3; cf Donald L. Helling v William McKinney [1993] USSC 85; (1993) 125 L Ed 2d 22).

285. On behalf of the respondent, reference was made to the provisions of Art.6(1) of the Tokyo Convention 1963 as follows:

"(1) The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act

contemplated in Article 1, paragraph (I), impose upon such person reasonable measures including restraint which are necessary:
(a) to protect the safety of the aircraft, or of persons or property therein; or
(b) to maintain good order and discipline on board; or
(c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter."

286. It was suggested that this provision indicated the limits of the powers of the respondent in this area, as compared with the domestic legislative regulation in the form of Reg.246, above.

287. In my opinion, the provisions of the Treaty cannot, in any relevant sense, in the private, as distinct from a public law context (see Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; (1995) 128 ALR 353 at 361-2) detract from the common law "neighbourhood" principle which underpins the existence of a duty of care in an occupier's situation such as the present (see Commissioner for Railways (NSW) v Cardy [1960] HCA 45; (1960) 104 CLR 274 per Windeyer J at 316; Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479).

288. The circumstance that States, including Australia, have joined in a treaty with a provision in the terms of Art.6(1) cannot, in my view, excuse the respondent from any of its common law responsibilities in the present area. Even if the treaty could have had a relevant municipal operation, it is plain that it was intended to confer additional powers, rather than to absolve a carrier from common law liability.

(ab) Breach of duty?
289. The question whether there was a breach of the duty of care is more difficult, even if the general proposition be accepted that, in this context, foreseeability of the risk of injury and the likelihood of that risk are two different things (see Wyong Shire Council v Shirt [1980] HCA 12; (1980) 146 CLR 40 per Mason J at 47).

290. In Shirt's Case, Mason J went on to say (at 47-8):

"A risk of injury which is quite unlikely to occur ... may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.
In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a

reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

291. What would a reasonable person in the respondent's position do in response to the risk involved here? In my view, it was reasonable to expect that the respondent would warn its passengers that, although a passenger might be allocated a seat in an area where smoking was not permitted, there was still a risk of exposure to smoke drift from smoking in other areas of the aircraft. This warning could, without any real practical difficulty, or substantial expense, be placed in (1) the respondent's timetable and information booklet and (2) on the passenger's ticket. If such a warning were given, it would provide passengers with smoke-sensitive disabilities with several options, including the taking of pre-medication by way of preparation for the flight, or choosing a smoke-free flight.

292. I find that, in this respect, the respondent was in breach of its duty of care.

(ac) Did the breach of duty cause damage?
293. The legal principles in this connection were stated by the High Court (Deane, Dawson, Toohey and Gaudron JJ in Medlin v State Government Insurance Commission [1995] HCA 5; (1995) 127 ALR 180 as follows:

"For the purposes of the law of negligence, the question whether the requisite causal connection exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience.

... And that remains so in a case such as the present where the question of the existence of the requisite causal connection is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case, the 'but for' test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. ... If, in such a case, it can be seen that the necessary causal connection would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of common sense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision. It will be seen that, on the plaintiff's evidence, the present was such a case."

294. Applying those principles, in my view, the respondent's negligence caused Mrs. Cameron at least some damage.

295. On behalf of the respondent, in submitting that the applicant had not established causation and damage, emphasis was sought to be placed upon the existence of the other factors present in the cabin, especially the low humidity and the fact of pressurisation. It is true, as the expert evidence unanimously indicated, that the presence of those factors could be expected to increase the risk of irritation from ETS; but, as a matter of common sense, it does not follow that the applicant has failed to establish that the respondent's failure to warn (of the risk of exposure to ETS in the significant proportion of passengers with smoke-sensitive disabilities, such as Mrs. Cameron), caused the damage in the form of aggravation of an existing condition which was suffered by Mrs. Cameron.

296. It was further submitted on behalf of the respondent that the medical evidence was equivocal on this question. I cannot accept the argument. Certainly, as indeed the respondent acknowledges, Professor Breslin was of the opinion, which I accept, that ETS can cause an aggravation of the condition of those who are smoke-sensitive. But as has already been said,

although the form of the report of Professor McKenzie might have suggested the contrary, a reading of the whole of his evidence shows that the experts are not really at issue on this point. In the end, whilst neither expert suggested that ETS caused a viral infection, both agreed that ETS could aggravate such a condition.

(ad) The quantum of damages
297. I deal with this below.

(ii) Other group members
298. The position is the same, in principle, as in the case of Mrs. Cameron. Again, I deal with the quantum of damages below.

RELIEF
299. Apart from compensatory damages, the applicant seeks the following relief for the contravention of Part V of the Trade Practices Act:

"2. It be declared that the Respondent's current system for allocating seating designated smoking or non-smoking on those flights where smoking is permitted constitutes conduct that is misleading or deceptive or likely to mislead or deceive.
3. The Respondent be restrained from permitting smoking on international aircraft flights operated by it, subject to the proviso in Order 4.
4. The Respondent shall not be in breach of Order 3 by virtue of permitting smoking on international flights in the period until 1 July 1996 provided the Respondent discloses information about the following matters in the manner set out below:-
Matters about which information is to be provided
(a) The fact that environmental tobacco smoke may be dangerous to health in that it may cause at least the following:-
(i) Eye, nose and throat irritation and annoyance;
(ii) Acute irritant effects to the respiratory tract;
(iii) Acute attacks of asthma or aggravation of asthma in existing asthmatics;
(iv) Respiratory disease or exacerbation thereof in children;
(v) From long term exposure, lung cancer;
(b) The fact that the Respondent permits smoking on certain flights and the fact that smoking is prohibited on certain flights.
(c) The configuration of aircraft on flights where smoking is permitted including the designation of seating as

between smoking zone, no preference buffer zone and non-smoking zone.
(d) The availability of pre-allocated seating whether in first, business or economy class and the method by which a passenger may obtain such a pre-allocated seat.
(e) The fact that if pre-allocated seating is not obtained, seating will be allocated by computer 24 to 13 hours before the scheduled departure time and such allocated seating is not able to be altered other than in the period approximately 30 minutes prior to departure time."

300. It is clear that, in an appropriate case, the Court has power to make declarations (see Federal Court of Australia Act, s.21), grant injunctions (Trade Practices Act, s.80) and make other orders (Trade Practices Act, s.87). But, it is equally clear that these kinds of relief are discretionary. Although I propose, in some instances, to award damages under s.82 of the Trade Practices Act, I am of the view that I should refuse to make the declarations, injunctions and other orders sought. I will deal with these separately.

(a) A declaration?
301. In my opinion, it would not be appropriate to make a declaration, in general terms, to the effect that the respondent's conduct, in the relevant instances described in the reasons for judgment, was misleading. Without an understanding of the material, but crucial, details (and it would be impractical to pick the amount of detail up in a declaration), such a declaration would itself be capable of creating a false impression (cf Pacific Pharmaceutical Industries Limited v Australian Stock Exchange Limited, Gummow J, 19 April 1995, unreported, at 35).

(b) An injunction (s.80) or other orders under s.87?
302. Again, there are, I think, discretionary reasons why the orders sought ought not to be made.

303. In the first place, I bear in mind that I propose to award compensatory damages; and that, in any event, in 12 months' time, all of the respondent's flights will be smoke-free.

304. More important, there are substantial problems with any attempt by a court to grant an injunction which is likely to require the Court to supervise performance of the injunction in a detailed manner. This appears to be likely if mandatory injunctions of the kind now sought, requiring, as they would, the provision of detailed current information on a wide range of topics, some of which involve technical data, which themselves may require further explication. Another undesirable aspect of the proposal is that it may unwittingly put a number of persons at risk of penalty for contempt of court, if the precise scope of what is to be done to comply does not appear clearly on the face of the order (see, e.g., ICI Australia Operations Pty. Ltd. v Trade Practices Commission [1992] FCA 474; (1992) 38 FCR 248 per Lockhart J at 259-60, 262).

305. I take into account also the circumstance that, especially in the light of relationship between the Government and the respondent, but not only for that reason, the likelihood of further infraction by the respondent is slight (see ICI, above, per Lockhart J at 256; per Gummow J at

267). In this connection, I give considerable weight to the impressive attitude to the present problem shown by Mr. Saunders on behalf of the respondent.

306. I refuse relief under either s.80 or s.87.

(c) Compensatory damages?
307. As I have previously indicated, I have concluded that some compensation damages should be awarded to each of the group members, either by virtue of s.82(1) or at common law. It will be necessary to take each member in turn. However, I will proceed, in each case, upon the footing that I accept Professor Breslin's assessment that, although ETS may not have caused a condition such as an upper respiratory infection, it is likely that it aggravated the condition. It should also be noted that, in the absence of any claim in contract, I do not think that any compensation should be awarded here for alleged disappointment at the loss of enjoyment of a holiday (cf. Baltic Shipping Co. v Dillon [1993] HCA 4; (1993) 176 CLR 344).

(i) Mrs. Cameron
308. In my judgment, a sum of $250 is appropriate compenstion for irritation and distress arising out of the aggravation of Mrs. Cameron's condition.

(ii) Mr. Hooper
309. For the irritation suffered by Mr. Hooper, I propose to allow an amount of $200.

(iii) Mr. Lewis
310. The respondent provided, ex gratia, a travel voucher to the value of $400, but there were four persons travelling in his group. Taking these matters into account, I allow him the sum of $175.

(iv) Commander Glass
311. This is not a claim of serious discomfort. I allow $50.

(v) Ms. Aroney
312. For the aggravation of her asthma, a serious matter, I allow $750.

(vi) Ms. Jacoby
313. For the aggravation of her upper respiratory infection, I allow $250.

(vii) Ms. Underwood
314. For her discomfort, I allow $200.

(viii) Mr. McMahon
315. For his distress, I allow $175.

(ix) Dr. Thomas
316. For the aggravation of his asthma, again a serious matter, I allow $750.

(x) Mr. Millane
317. For the aggravation of his bronchial condition, I fix the sum of $200.

THE WARSAW CONVENTION AND THE CIVIL AVIATION (CARRIERS LIABILITY) ACT 1959
318. For completeness, it should be noted that, notwithstanding previous indications to the contrary, ultimately neither party sought to rely upon any of the provisions of this Convention or of this statute.

ORDERS
319. By s.33Z(1)(e) of the Federal Court of Australia Act 1976, the Court is empowered to make an award of damages for, inter alia, individual group members, being damages consisting of, inter alia, specified amounts. By s.33ZB(a) of the Act, a judgment given in a representative proceeding must describe or otherwise identify the group members who will be affected by it. I will make orders accordingly in respect of each of the individual group members in the amounts previously mentioned respectively.

COSTS
320. Given the mixed outcome of the litigation, I am provisionally of the view that there should be no order for costs. However, in the event that it may be necessary, I will reserve liberty to seek costs.
