



ALAANZ AVIATION BRIEFS

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The Aviation Emissions Problem: No Solution in Sight



Aviation is the fastest growing source of emissions in the transport sector and the most climate-intensive form of transport, and those emissions are largely unregulated. And emissions from aviation are increasing against a background of decreasing emissions (or, at least, against a background of emissions regulation) from many other industry sectors.

Based on Intergovernmental Panel on Climate Change (IPCC) calculations, aviation's contribution to worldwide annual emissions, (estimated at 3%), could be as low as 2% or as high as 8%. And the United Nations aviation body, the International Civil Aviation Organisation (ICAO) – forecasts significant further emissions growth: Against a 2006 baseline, an increase of 63% to 88% by 2020 and 290% to 667% by 2050 (without accounting for the impact of alternative fuels).

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The views expressed in this publication do not purport to represent the position of ALAANZ Ltd on any issue.

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Passengers, Precautions and the *Civil Aviation (Carriers' Liability) Act* in General Aviation Accidents

Marcus Saw and Andrew Tulloch

In brief - All parties found to have contributed to crash

A recent decision in the NSW Supreme Court in *Stephenson v Parkes Shire Council & Ors* [2014] NSWSC 1758 highlights the duty of care of those involved in procuring or providing aviation services and sheds light on how courts determine what constitutes a "passenger" and the intention of the *Civil Aviation (Carriers' Liability) Act* in regard to nervous shock claims.

Helicopter hits power line and explodes killing all occupants

On 2 February 2006, a helicopter operated by South West Helicopters Pty Ltd took off from the Parkes aerodrome to conduct an aerial survey for the purpose of determining the presence of noxious weeds in an area for which the Parkes Shire Council was responsible.

South West was a company that conducted helicopter operations and was authorised to conduct charter and aerial work operations. In addition to the pilot (Mr Shane Thrupp), two employees of the council, Mr Ian Stephenson and Mr Malcolm Buerckner, were on board the helicopter.

While the helicopter was in the vicinity of a region known as "The Dungeons", it struck an overhead power line (owned by Essential Energy) and exploded. Sadly, all three occupants of the helicopter were killed in the accident.

Various proceedings were commenced in the Supreme Court of NSW by:

- Mr Stephenson's wife and children against the council and South West for damages arising from Mr Stephenson's death;
- South West and a related entity against Country Energy (the predecessor of Essential Energy) for damages in respect of the loss of the helicopter and lost profits; and
- the council against South West for amounts paid pursuant to the NSW workers' compensation legislation.

Liability and negligence of parties determined in court proceedings

The proceedings were heard and determined together and a number of issues arose with respect to the liability of the various parties to the proceedings that were ultimately determined in the judgment of Bellew J dated 19 December 2014, including:

- whether each of the council, South West and Essential Energy were negligent and caused the various losses arising from the crash pursuant to the terms of the *Civil Liability Act 2002* (NSW); and
- whether the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("the *Carriers' Liability Act*") applied by operation of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) ("the *NSW Act*") to the claims made by the Stephenson family members against South West.

Parkes Shire Council failed to assess risk and respond appropriately

Bellew J had little difficulty in concluding that the council owed a duty of care, among other matters, to avoid exposing its employees (including Mr Stephenson) to unnecessary risk or injury.

The court held that an assessment of risk and an appropriate response was fundamental to that duty, in circumstances where the council had commissioned an aerial survey which would involve low level flying with the attendant risk of wire strike.

The court considered what would have been an appropriate response to the identified risk and concluded that the following measures should have been implemented but were not:

- the conduct of a proper risk assessment in relation to the aerial survey;
- the imposition of a flight altitude threshold of 500 feet (Mr Thrupp had descended to a height of approximately 120 feet prior to the crash); and
- the provision to the pilot of information available to the council regarding the presence of overhead wires in the area.

On the basis of the council's failure to implement the measures described above, Bellew J found the council to have been negligent and that the council's negligence was a cause of the accident.

South West Helicopters pilot breached fundamental principle of good airmanship

Bellew J concluded that South West owed a duty of care to the persons on board the helicopter, including Mr Stephenson.

The court held that South West breached that duty of care by failing to brief the pilot properly to address the boundaries of the area which were the subject of the survey and to identify any

hazards or obstacles. The court also found that in descending to a height of approximately 120 feet, the pilot breached one of the fundamental principles of good airmanship and in so doing, breached his duty of care to Mr Stephenson.

The court was of the view that had a proper assessment of the risks been conducted by South West and then a proper briefing of the pilot carried out, the presence of the overhead wires would have been brought to the pilot's attention, putting him on notice not to descend to the level to which he did.

Accordingly, the court concluded that South West's breaches of duty were a cause of the accident.

Essential Energy owed duty of care to helicopter operators

South West made a claim against Essential Energy in respect of the loss of the helicopter and lost profits. Essential Energy's main argument was that it did not owe a duty of care to South West.

Bellew J rejected Essential Energy's argument on the basis that the following matters gave rise to a duty of care owed by Essential Energy to South West:

- the area in which the survey was conducted was fire prone and this was a factor that ought to have put Essential Energy on notice that low level flying for the purpose of fire control (with the attendant risk of wire strike) would be likely;
- the nature of the harm flowing from a wire strike incident would be serious "...if not catastrophic" (at [255]); and
- the wire struck by the helicopter was difficult to see and was located adjacent to a roadway which was likely to be used by pilots to assist with navigating the area.

The court held that Essential Energy failed to place markers on the wire such that they would have been visible from a distance of 300 metres and that this failure was a cause of the accident.

Nature of aerial work means two-year time bar on claims not applicable under the *Carriers' Liability Act*

An interesting issue dealt with in the judgment was the question of whether the claims were governed by the *Carriers' Liability Act*. The issue arose in the context of a defence raised by South West to the effect that the claims were subject to a two-year time bar in the *Carriers' Liability Act* (the two-year period having expired prior to the commencement of the proceedings).

Bellew J considered the case of *Edwards & Ors v Endeavour Energy & Ors* (No. 4) [2013] NSWSC 1899 (which also involved a helicopter wire strike accident) and concluded that, as the

helicopter was being used for an aerial weed survey as opposed to the carriage of passengers or cargo, the work fell outside the provisions of the NSW Act and hence outside the operation of the *Carriers' Liability Act*.

Referring to the judgment in *Edwards*, Bellew said (at [283]):

...THE AERIAL SURVEY BEING CONDUCTED BY SOUTH WEST INVOLVED LOW LEVEL FLYING WHICH WAS BEING CONDUCTED PURSUANT TO ITS AIR OPERATOR'S CERTIFICATE. EVEN IF MR STEPHENSON WAS PROPERLY REGARDED AS A PASSENGER (AND... IT IS MY VIEW THAT [SIC] WAS NOT) THE HELICOPTER WAS BEING USED FOR AN AERIAL WEED SURVEY, NOT FOR THE CARRIAGE OF PASSENGERS OR CARGO. IT WAS NOT, THEREFORE, ENGAGED IN COMMERCIAL TRANSPORT OPERATIONS AS DEFINED.

Definition of "passenger" considered but rejected by court

Having determined that the work that was undertaken by South West fell outside the terms of the NSW Act and, therefore, the *Carriers' Liability Act*, Bellew J went on to consider the question of whether Mr Stephenson was a "passenger" within the meaning of the NSW Act. In doing so he considered the following authorities on the point:

- *Fellowes (or Herd) v Clyde Helicopters* [1997] AC 534, in which the respondents were operating a helicopter for police in (among other matters) surveillance operations which collided with a block of flats. The court held that because the deceased officer was on board the helicopter for the purpose of carrying out his police duties and had no responsibility for the operation of the helicopter, he was properly regarded as a passenger.
- *Disley v Levine t/as Airtrak Levine Paragliding* [2001] EWCA Civ 1087, in which the plaintiff was injured in a paragliding accident while receiving instruction from the defendant. Referring to the decision in *Fellowes*, Henry LJ noted that it cannot be said that the plaintiff "contributed nothing to the flight." While the plaintiff watched the defendant demonstrate various manoeuvres she (at [52]):

...DID NOT PRACTICE CONTROLLING THE GLIDER, OR PLAY ANY PART IN ITS OPERATION DURING THE FLIGHT. HOWEVER, THE FLIGHT COULD NOT HAVE TAKEN PLACE WITHOUT THE CONTRIBUTION SHE MADE WITH HER LEGS BOTH ON TAKE-OFF AND LANDING. BUT OVER AND ABOVE THAT, SHE WAS NOT ON THE FLIGHT AS A PASSENGER, NOR ON THE FLIGHT UNDER A CONTRACT OF CARRIAGE, BUT ON THE FLIGHT AS A PILOT UNDER INSTRUCTION, AND SO AS ONE OF THE CREW.

- *Edwards*, in which Johnson J, referring to the decisions in *Fellowes* and *Disley*, in concluding that the plaintiff was not a passenger on a flight, said (at [132]):

...MR EDWARDS DISCHARGED FUNCTIONS INCLUDING ASSISTING THE PILOT WITH NAVIGATION OF THE AIRCRAFT, BOTH BY DIRECTING HIM TO THE POWER LINES WHICH HE WAS TO FLY NEAR TO, AND BY LOOKING OUT FOR, AND WARNING OF HAZARDS WHICH HE WAS TO AVOID. IN THESE WAYS, MR EDWARDS WAS SO CLOSELY INVOLVED IN THE CONDUCT OF THE FLIGHT, THAT THE CONCLUSION OUGHT BE REACHED THAT HE WAS A MEMBER OF THE CREW, AND NOT A MERE PASSENGER. IF MR EDWARDS HAD NOT BEEN PRESENT TO ACT AS 'OBSERVER', THE LOW-LEVEL AERIAL SURVEILLANCE FLIGHT COULD NOT HAVE TAKEN PLACE AT ALL.

Having considered the authorities, Bellew J concluded (at [296]) that:

IN MY VIEW, THE SAME APPLIES TO MR STEPHENSON. IT WAS PART OF MR STEPHENSON'S ROLE TO ACT AS AN OBSERVER, AND TO DIRECT MR THRUPP TO PARTICULAR AREAS WHICH WERE REQUIRED TO BE INSPECTED FOR THE PRESENCE OF NOXIOUS WEEDS. HIS PRESENCE ON THE FLIGHT WAS ESSENTIAL TO THE CONDUCT OF THE SURVEY. HE WAS NOT A PASSENGER BEING CONVEYED FROM ONE PLACE TO ANOTHER.

The role of section 36 of *Carriers' Liability Act*

A final issue that was determined in the matter was whether claims for nervous shock were caught by the *Carriers' Liability Act*.

In this regard, Bellew J followed the majority judgment in *South Pacific Air Motive Pty Ltd & Anor v Magnus* [1998] FCA 1107, in which it was concluded that the *Carriers' Liability Act* was not intended to constitute a complete code in respect of non-passengers who suffer loss or damage and that section 36 of the *Carriers' Liability Act* (which essentially provides that the remedies under that Act are in substitution of common law or other remedies) was not "...intended to preclude claims by non-passengers seeking damages for nervous shock under the general law." (at [308])

Consider precautions when procuring or providing aviation services

The judgment in *Stephenson* provides some insight into the types of precautions that employers, air operators and others involved with procuring or providing aviation services can be expected to take with respect to aerial survey and other aviation work.

It also demonstrates that whether a person is a "passenger" or not for the purpose of the *Carriers' Liability Act* (and the NSW Act) will depend upon a close analysis of the facts of the carriage, including the degree of control or instruction the person has with respect to the operation or navigation of the aircraft.

Finally, it expresses support for the majority decision in *Magnus* as good law (effectively rejecting the dissenting judgment in that case) regarding nervous shock claims.

Assistance Animals, Air Safety and the Disability Discrimination Act (Cth)

David Chitty

Traditionally, carriage of animals inside the passenger cabin of aircraft was strictly controlled by the Civil Aviation Safety Authority (CASA) pursuant to the *Civil Aviation Regulations* (CARs).

However, in recent years the scope for passengers to travel with their pet animals, normally a dog, combined with regulatory amendments has put the onus onto the operator to risk assess

the safety and suitability of the assistance animal for travel. The scope for passengers to travel with pet animals has also been widened to such an extent that some airlines are actually providing reward points for customers when travelling with their animals.¹

Animals have always been accommodated for air travel in the dedicated cargo holds that aircraft manufacturers provide, unless they are considered a bona fide guide dog for vision or hearing impaired. However the increasing numbers of passengers who are claiming a disability or medical need beyond the traditional guide dog that requires an assistance animal in the cabin is imposing additional processes on the operators to conduct risk assessments, check the bona fides of the person's claimed need and also the training records of the animal, to name but a few. This may not be warranted² or may raise legitimate unreasonable hardship defences for any subsequent refusal of carriage under the *Disability Discrimination Act 1992* (Cth) (DDA).

Current Aviation Legislation

In general terms CAR 256A (1) provides for the operator of an aircraft to permit a dog to be carried, in an aircraft cabin, providing the dog is assisting a person who is visually or hearing impaired:

Carriage of animals

- (1) Subject to subregulation (8), the operator of an aircraft may permit a live animal to be in the aircraft only if:
- (a) the animal is in a container and is carried in accordance with this regulation; or
 - (b) the animal is carried with the written permission of CASA and in accordance with any conditions specified in the permission.
- Penalty: 25 penalty units.

(1A) An offence against subregulation (1) is an offence of strict liability.

- (2) Subregulation (1) does not apply to a dog accompanying a visually impaired or hearing impaired person as a guide **or an assistant** if the dog is:
- (a) carried in the passenger cabin of the aircraft; and
 - (b) placed on a moisture-absorbent mat as near to the person as practicable; and
 - (c) restrained in a way that will prevent the dog from moving from the mat.

...

(8) An animal must not be carried on an aircraft if carrying the animal would be likely to affect a person on the aircraft in a way that may affect adversely the safety of the aircraft.

CASA may issue a **permission**,³ granted to individual airlines, for the carriage of an animal (dog) that is **assisting a person** who is other than visually or hearing impaired. This has given rise to requests from passengers who suffer such medical conditions as anxiety or diabetes to travel with their dog in the cabin. Refusal is sometimes met with passengers quoting the DDA. Before considering the relevant aspects of the DDA it is timely to mention some of the inflight safety concerns that could potentially arise.

Safety of Flight

The prime consideration is always safety of flight, with CAR 256A(8) stating that an animal must not be carried on an aircraft if carrying the animal would be **likely to affect** a person on the aircraft in a way that may affect adversely the safety of the aircraft. This section would apply to both animals carried in the cabin and/or the aircraft hold.

The areas of concern regarding safety of flight with carriage of animals generally encompass:

- (i) restraint during turbulence or jet upset (some assistance dogs are of considerable size and weight) as the animal is not restrained but tethered to prevent it moving from a moisture absorbent mat (s 256A(2)(d)); and
- (ii) the question of what will happen to the animal in the event of a passenger evacuation. This second scenario would probably be considered as 'unlikely' and therefore not captured by s256A(8).

For a published Report of the consequences, damage and injuries encountered within the cabin following a jet-upset event see the ATSB report into the QF72 (Singapore - Perth flight) accident that occurred in 2008.⁴

Whilst these scenarios point out **operational** safety considerations, other relevant factors also need to be considered when conducting a risk assessment. For example, what if the passenger(s) seated alongside the dog is actually scared of dogs, objects on religious grounds and consequently complains at being seated next to the dog, thereby causing potential passenger flash-points? Air rage is increasingly prevalent especially on cramped long-haul flights and experience shows that passengers quite regularly travel to and from the USA with an assistance animal, a flight time in excess of 13 hours.

Disability Discrimination Act 1992 (Cth)

Section 5 of the DDA provides that a person directly discriminates against another person (the "aggrieved person") on the ground of a disability if, because of the disability, they treat the aggrieved person less favourably than they would treat a person without the disability in circumstances which are the same or not materially different. Under section 24 of the DDA, it is unlawful for a person who provides services or makes facilities available to discriminate against a person on the ground of their disability by refusing to provide those services or make those facilities available. However, section 29A of the DDA provides that it is not unlawful discrimination if the provision of the services or the making available of the facilities would impose "*unjustifiable hardship*" on the person.⁵

When establishing the prima facie safety case for the carriage of the assistance animal in the cabin rather than the dedicated cargo hold for the aircraft, many factors are considered and aircraft operators should not feel intimidated or excessively constrained by the *Disability Discrimination Act*. The nature of high capacity air-travel combined with the unique operating environment provides the potential for an operator, following the application of proper risk

assessment principles and procedures, to plead the 'unjustifiable hardship' provisions contained within the Act.

1 <http://www.velocityfrequentflyer.com/content/ProgramBenefits/pets/>

2 A passenger when travelling with an assistance animal in the cabin is usually allocated a vacant seat next to them. Consequently, the bona fides of the need for an assistance animal will legitimately be brought into question.

3 This permission, in conjunction with CAR256A, permits the operator to consider the carriage of a bona fide assistance dog without further recall to CASA. This permission has placed the onus of checking the bona fides and assessing suitability onto the operator and consequently, the commander of the aircraft.

4 <http://atsb.gov.au/media/3532398/ao2008070.pdf>.

5 See *King v Jetstar Airways Pty Ltd* [2012] FCAFC 115. In this case, an airline policy of carrying a maximum of two wheelchair passengers was upheld as the Court considered that any increase in the number of wheelchair bound passengers would have imposed an unjustifiable hardship taking into consideration the nature of the airline's operation being subject to tight timelines for turn-arounds and difficulty in exiting the aircraft due to the narrow body – single aisle aircraft operated by Jetstar.

New Zealand Air Line Pilots' Association Incorporated v Air New Zealand Limited [2014] NZEmpC 168

Patrick Wilson

Air New Zealand's pilots may choose to be represented by either of two unions: the New Zealand Air Line Pilots' Association Inc (NZALPA) or the Federation of Air New Zealand Pilots Inc (FANZP). Both unions have negotiated collective agreements with Air New Zealand. NZALPA's current collective agreement came into force on 5 November 2012 and contains a provision that provides:

24.2 DURING THE TERM OF THIS AGREEMENT ANY AGREEMENT ENTERED INTO BY THE COMPANY WITH ANY OTHER PILOT EMPLOYEE GROUP WHICH IS MORE FAVOURABLE THAN PROVIDED FOR IN THIS AGREEMENT WILL BE PASSED ON TO PILOTS COVERED BY THIS AGREEMENT ON THE WRITTEN REQUEST OF THE ASSOCIATION.

FANZP's collective agreement came into force in early 2013. The FANZP agreement contained higher pay rates for 737 first officers and all second officers than the NZALPA agreement. But, according to Air New Zealand, these increases were obtained for trade-offs in terms of productivity and salary increases elsewhere as part of a package deal.

NZALPA purported to invoke cl 24.2 of the NZALPA collective agreement on 24 April 2013, asking that the higher pay rates for 737 first officers and all second officers contained in the FANZP agreement be passed on to NZALPA pilots. Air New Zealand rejected that cl 24.2 was applicable in a 3 May 2013 letter to NZALPA.

The Employment Relations Authority (ERA) decided the dispute in favour of Air New Zealand, stating that cl 24.2 provided NZALPA the opportunity to 'pick up the totality of the [FANZP collective agreement]' but not selected parts of it.¹ NZALPA appealed to the Employment Court.

The Employment Court rejected the ERA's analysis and decided in favour of NZALPA. The Court's decision focussed on the phrase 'which is more favourable than provided for in this Agreement.' The word 'in', according to the Court, suggests that individual terms and conditions found in the agreement that are more favourable may be passed on to NZALPA pilots.²

Air New Zealand has appealed the Employment Court's decision to the Court of Appeal. The Court of Appeal granted leave to appeal on 27 November 2014 on the question of whether 'the Employment Court err[ed] in finding that cl 24.2 ... meant that Air New Zealand Limited was required upon request by NZALPA to pass on to members of NZALPA part only of a collective agreement reached ... between Air New Zealand and [FANZP]?'³

1 New Zealand Air Lin Pilots Association Inc v Air New Zealand Ltd [2014] NZERA Auckland 11.

2 New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd [2014] NZEmpC 168 at [57].

3 Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc [2014] NZCA 570.

The Aviation Emissions Problem (continued)

David Hodgkinson and Rebecca Johnston

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Research published in 2013 by Manchester Metropolitan University (MMU) found that total aviation emissions in 2006 were 630 Mtonnes of CO₂ and that, by 2050, those emissions are projected to be between 1,000 to 3,100 Mtonnes depending on growth and level of mitigation assumed. Mitigation involves improved and advanced technology, more efficient operations, market-based mechanisms and biofuels.

If global aviation was a country its emissions would be ranked about 7th between Germany and South Korea on CO₂ alone. Air travel itself continues to show robust and sustained growth of 4-5% a year.

At a constant emissions rate, the MMU research found that radiative forcing (the metric used by climate scientists to measure climate impact) continues to increase for a constant emissions rate since CO₂ is accumulating much faster in the atmosphere than it is removed. And the longevity of CO₂ in the atmosphere (if a tonne of CO₂ is released, 30% is removed in a few decades, 50% over a few centuries, and the remaining 20% over millennia) means that the warming impact on the climate of aviation emissions will continue to grow relative to other sources.

Aviation, then, has an emissions problem. This article examines that problem and policy and legal solutions to it.

The article first reviews the international framework for the regulation of aviation emissions. It then examines Europe's attempt to include international aviation in its ETS, which resulted in (a) a challenge in the European Court of Justice; (b) China preventing its airlines from participating

in the European scheme; and (c) President Obama signing into law legislation (passed by Congress) prohibiting US aircraft operators from participating in the EU's ETS.

Primarily, this article assesses the outcome late in 2013 of the triennial Assembly of the International Civil Aviation Organisation (ICAO). ICAO, again, is the UN agency responsible for the regulation of international aviation. The Assembly's main task across two weeks (meeting in Montreal, Canada) was to find a solution to the aviation emissions problem.

Aviation represents in microcosm many of the difficult issues associated with addressing the climate change problem generally. Indeed, the ICAO aviation outcome – the ICAO solution – is strikingly similar to that which the international community has worked out to address the climate change problem generally, albeit with some important differences.

The international framework for the regulation of aviation emissions

The International climate change legal framework consists of the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.

The UNFCCC was adopted in 1992 and entered into force in 1994; it has almost universal state participation. It provides a framework for future action and cooperation by states on climate change. There are no legally binding limits on emissions for parties to the Convention, no quantitative targets. Instead, parties commit to mitigate climate change 'with the aim of returning individually or jointly to their 1990 [emissions] levels ... '

A crucial theme in the Convention is that developed and developing state parties have 'common but differentiated responsibilities and respective capabilities' in dealing with climate change; developed countries 'should take the lead in combating climate change' and its effects.

The Kyoto Protocol to the UNFCCC was adopted in 1997, and entered into force in 2005. It places quantifiable obligations upon states to decrease their levels of greenhouse gas emissions, and enjoys almost universal participation by states (excluding the United States; Canada, Japan and Russia have withdrawn from it). It is the world's primary climate change agreement.

Unlike the UNFCCC, the Kyoto Protocol sets legally binding limits on developed state parties' emissions of greenhouse gases and does so for the commitment period 2008 – 2012 (the 'first commitment period') and for the period 2013-2020 (after which it may be replaced by one agreement applicable to both developed and developing states). In terms of commitments, emission limitation or reduction commitments are set out for developed state parties expressed as a base year 1990 percentage. Australia's target in the first commitment period, for example, was 108%; only Iceland's target was more generous. Canada's target was 94%.

The Kyoto Protocol covers about 15% of the world's emissions.

Most importantly for the purposes of this article, Article 2(2) of the Kyoto Protocol provides that developed states 'shall pursue limitation or reduction of emissions ... from aviation ... through

the International Civil Aviation Organization.’ Put another way, aviation – international aviation – is excluded from the international climate change regime, from the world’s primary climate change instrument. The Kyoto Protocol leaves the problem up to ICAO, a Canadian-based UN agency, for resolution.

It should also be noted that, in terms of aviation regulation generally, international aviation is regulated by a complex web of over 3,500 bilateral air services agreements. In recent years, groups of countries have come together to negotiate multilateral ‘open skies’ agreements. The majority of international air services, however, are still traded bilaterally. None of these agreements address aviation emissions (although, in principle, there is no reason why they could not).

Aviation emissions, then, are excluded from the Kyoto Protocol. Further, ICAO since 1997 has failed to reach any kind of consensus on a comprehensive approach to addressing the aviation emissions problem. Given this failure, individual states and coalitions of states have taken action. That action has resulted in legal challenges and the possibility of a trade war between States, both of which are examined in the next section.

The inclusion of aviation in the EU’s emissions trading scheme

The European Union’s emissions trading scheme has been operational since the beginning of 2005 – and it has paved the way for the development of trading schemes around the world. And under a 2008 EU Directive on the inclusion of aviation in the EU’s ETS, all flights (EU and non-EU) landing at or taking off from any airport within an EU member state from 1 January 2012 must surrender emissions allowances equal to the emissions created from the entire flight.

However, most of these allowances – 85% – were to be allocated to the airlines for free, and the remaining compliance costs would be passed on to passengers (many of whom with little choice as to how to get to the EU other than by air travel).

International airlines, led by those in the US and China, vigorously opposed the inclusion of aviation in the EU ETS and challenged its legality in the European Court of Justice (the ECJ). The ECJ’s Advocate General, however, recommended that the ECJ find the scheme legal. And, in a 21 December, 2011 decision, the ECJ did just that.

The ECJ found that the European Union had expressly provided for *uniform* application of the allowance trading scheme to all aircraft operators on routes which depart from or arrive at an airport situated in the territory of an EU Member State and, in particular, it had sought to comply strictly with the non-discrimination provisions of bilateral air service agreements (which were mentioned earlier in this article) with non-EU States.

Therefore, the relevant Directive (Directive 2008/101), to the extent that it provided for application of the allowance trading scheme in a non-discriminatory manner to aircraft operators established both in the European Union and in third States, was not invalid, and examination of that Directive disclosed no factor of such a kind as to affect its validity.

However, just prior to the ECJ decision, ICAO through its Council endorsed a working paper approved by 26 states including the US, China, Russia and India (none of which have emissions reduction targets under the Kyoto Protocol) calling on the EU to exclude non-EU carriers from the EU ETS.

Subsequently, in early 2012, after the ECJ decision, China prohibited its airlines from participating in the scheme (the Chinese objection being, in part, that the carbon cost is calculated over the length of the entire journey, not just within EU airspace). It also blocked its airlines from buying dozens of aircraft from the Airbus unit of European Aeronautic Defence & Space (EADS), and said that (or, rather, the China Air Transport Association said that) the EU ETS would cost its airlines USD 123 million in its first year.

And in November 2012 the United States Congress passed legislation, which President Obama signed, essentially prohibiting a US aircraft operator from participating in the EU's trading scheme, making it illegal for US airlines to comply with the EU law. It is unambiguously called the 'European Union Emissions Trading Scheme Prohibition Act of 2012.'

Almost at the same time, largely because of such direct international opposition, the EU announced that it would freeze until late 2013 the inclusion of international aviation in its ETS. It said that it would 'stop the clock' on its ETS and look to ICAO to address the problem in that time, the same organization which, since 1997, has grappled unsuccessfully with the issue.

The EU stated that:

BASED ON THE ENCOURAGING RESULTS OF THE ICAO COUNCIL MEETING ON 9 NOVEMBER – AND THE CONSTRUCTIVE ENGAGEMENT OF OUR INTERNATIONAL PARTNERS IN THE RELEVANT DISCUSSIONS – THE EU IS CONVINCED THAT A GLOBAL SOLUTION FOR ADDRESSING THE FAST GROWING AVIATION EMISSIONS FROM INTERNATIONAL AVIATION IS WITHIN REACH AT THE UPCOMING ICAO ASSEMBLY IN 2013. AS A GESTURE OF GOOD FAITH THE EU WILL "STOP THE CLOCK" ON THE IMPLEMENTATION OF THE INTERNATIONAL ASPECTS OF ITS ETS AVIATION BY DEFERRING THE OBLIGATION TO SURRENDER EMISSIONS ALLOWANCES FROM AIR TRAFFIC TO AND FROM THE EU BY ONE YEAR.

As a result, the EU 'would not require allowances to be surrendered in April 2013 for emissions from such flights' in 2012. And while monitoring and reporting obligations would also be deferred in relation to such flights, obligation with regard to all operators' activities within EU would remain intact; 'compliance with the EU law will be enforced in this respect.'

'Stopping the clock,' the EU said, would create

SPACE FOR THE POLITICAL NEGOTIATIONS AND DEMONSTRATES CONFIDENCE ON THE SIDE OF THE EU THAT TOGETHER WITH INTERNATIONAL PARTNERS WE WILL SUCCEED IN ICAO TO AGREE ON MEANINGFUL INTERNATIONAL ACTION. THIS MEANS THE ICAO PROCESS IS ALLOWED TIME UNTIL THE 2013 ASSEMBLY IN SEPTEMBER/OCTOBER AND THAT NO COMPLIANCE WILL BE EXPECTED AS REGARDS AIR TRAFFIC OUTSIDE THE EU IN THE INTERIM.

The EU also said that 'in the unlikely event of the ICAO Assembly failing to move forward the EU ETS legislation would be applied in full again from 2013 onwards.'

Aviation, trade rules and climate change

In some respects this is all slightly curious. Again, under the main piece of legislation on the inclusion of aviation in the EU's ETS, all flights (EU and non-EU) landing at or taking off from any airport within an EU member state must surrender emissions allowances equal to the emissions created from the entire flight. But, again, most of the allowances are allocated to the airlines for free, and the remaining costs are passed on to passengers.

Why, then, is there a problem? At the heart of the matter is an issue of some significance – 'the principle of whether nations may adopt climate laws that have impacts on foreign companies offering goods or services in their territories.' Put another way, can aviation and trade rules 'seriously undermine efforts to prevent the disastrous consequences of unmanageable climate change' – a global problem?

It is a problem that has attracted the attention of Nobel laureates. Earlier this year a group of leading economists, including eight Nobel Prize winners, wrote to President Obama urging him to support a price on aviation emissions. They said this:

PRICING CARBON IN THE AVIATION SECTOR WILL INCENTIVIZE APPROPRIATE INVESTMENTS, [TRADE] AND CHANGES IN OPERATIONS THAT WOULD REDUCE FUTURE GREENHOUSE GAS EMISSIONS. IF CLIMATE CHANGE IS TO BE SLOWED APPRECIABLY AT TOLERABLE COST, IT IS WISE TO USE THE MARKET TO PROVIDE INCENTIVES FOR INDIVIDUALS AND FIRMS TO REDUCE GREENHOUSE GAS POLLUTION ... WHILE WE RECOGNIZE THE BARRIERS TO A UNIFORM GLOBAL PRICE ON ALL CARBON EMISSIONS, PRICING EMISSIONS IN THE AVIATION SECTOR VIA ICAO WOULD BE A GOOD START ... THE ICAO ASSEMBLY ONLY MEETS EVERY THREE YEARS, THE EU ETS IS ONLY SUSPENDED FOR ONE YEAR, AND THE UNPRICED FLOW OF CARBON EMISSIONS INTO THE ATMOSPHERE IS INCREASING THE RISKS TO SOCIETY EVERY DAY.

The Nobel laureates urged President Obama to advance immediately a 'proposal for a global market based measure for aviation.'

The next section of this article examines the environmental outcomes of the ICAO Assembly and what it achieved – or, put another way, whether the faith of the Nobel laureates in ICAO to solve the aviation emissions problem through a global market-based mechanism was justified (it should be noted that the Assembly dealt with matters other than environmental ones and the emissions problem, such matters including, for example, safety, security, air traffic management and competition (state subsidies) matters).

'Blood in the room': The 2013 ICAO Assembly

The ICAO Assembly on 4 October 2013 reached a consensus agreement to proceed with a roadmap towards a decision to be taken on a global market-based mechanism at the next Assembly in 2016 (the Assembly meets every three years) for implementation in 2020. It is an agreement to agree, and it mirrors quite remarkably the approach taken by the UNFCCC and the Kyoto Protocol generally on climate change matters.

Specifically, the Assembly:

- decided to develop a global market-based mechanism (an 'MBM,' or an ETS, in other words) for international aviation, and to 'finalize the work on the technical aspects, environmental and economic impacts and modalities of the possible options for a global MBM scheme, including

on its feasibility and practicability, taking into account the need for development of international aviation ...’;

- requested the Council to ‘make a recommendation on a global MBM scheme that appropriately addresses ‘key design elements, including a means to take into account special circumstances and respective capabilities’ of States, and

THE MECHANISMS FOR THE IMPLEMENTATION OF THE SCHEME FROM 2020 AS PART OF A BASKET OF MEASURES WHICH ALSO INCLUDE TECHNOLOGIES, OPERATIONAL IMPROVEMENTS AND SUSTAINABLE ALTERNATIVE FUELS TO ACHIEVE ICAO’S GLOBAL ASPIRATIONAL GOALS;

- said that any MBM taking into account the ‘special circumstances and respective capabilities of States’ [developing States] could be accommodated through ‘exemptions from, or phased implementation for, the application of an MBM to particular routes or markets with low levels of international aviation activity, particularly those serving developing States’; and
- agreed to report the results of this work for decision by the 39th Session of the Assembly in 2016.

Again, the Assembly decisions together represent an agreement to move ahead with a roadmap towards a decision to be taken at the 2016 Assembly on a global market-based measure.

It’s worth noting that, largely due to action by ‘developing’ States led by Russia, China and India, and notwithstanding the EU’s best efforts, a paragraph was included in the agreement, the purpose of which, in effect, is to eliminate the inclusion of foreign aircraft operators in the EU ETS. The EU attempted the inclusion of a ‘reduced airspace coverage framework’ in exchange for progress towards a decision on a global MBM in 2016 for implementation in 2020, but was not successful. The EU, it was reported, was ‘outflanked and outnumbered.’

Paragraph 16(a) of the agreement requires States (or regions), ‘when designing new and implementing existing MBMs for international aviation should ... engage in constructive bilateral and/or multilateral consultations and negotiations with other States to reach an agreement ...’ in the EU ETS, so Europe will have to limit the scope of its ETS to intra-EU flights only – and even such flights by foreign aircraft operators may have to be excluded if without the consent of the operator’s country of registration.

One report on this issue – and on the overall result - immediately after the Assembly concluded said this:

IT IS A BIG BLOW TO EUROPE’S PRESTIGE, [EUROPE] HAVING ALREADY CONCEDED GROUND IN EXPECTATION OF AN AGREEMENT TO ADOPT A GLOBAL MBM IN 2016 AND ACCEPTED A REDUCED SCOPE OF THE EU ETS TO REGULATE CARBON EMISSIONS THAT WERE EMITTED IN EUROPEAN AIRSPACE RATHER THAN FOR THE WHOLE OF THE DEPARTING OR ARRIVING FLIGHT, AS SET DOWN IN THE ORIGINAL LEGISLATION. THE EU HAS ALWAYS MAINTAINED THAT IF A “MEANINGFUL” AGREEMENT ... WAS NOT FORTHCOMING IT WOULD ‘SNAP BACK’ TO FULL COVERAGE ONCE THE PRESENT STOP-THE-CLOCK DEROGATION ENDS. UNLESS THE EU WISHES TO EMBARK ON FURTHER CONFRONTATION WITH CHINA, INDIA AND THE UNITED STATES, IT WOULD APPEAR TO HAVE TO ACCEPT THE NEW LIMITATION ON ITS POWERS.

Again, the resolution reflected demands from developing states in a range of provisions as to their ‘special circumstances and respective capabilities’ and the UNFCCC-enshrined principle of

'common but differentiated responsibilities' in terms of designing and implementing a global MBM. In working through ICAO to achieve a global annual average fuel efficiency improvement of 2% until 2020 and an aspirational global fuel efficiency improvement rate of 2% per annum from 2021 to 2050, calculated on the basis of volume of fuel used per revenue tonne kilometre performed, these goals

WOULD NOT ATTRIBUTE SPECIFIC OBLIGATIONS TO INDIVIDUAL STATES, AND THE DIFFERENT CIRCUMSTANCES, RESPECTIVE CAPABILITIES AND CONTRIBUTION OF DEVELOPING AND DEVELOPED STATES TO THE CONCENTRATION OF AVIATION GHG EMISSIONS IN THE ATMOSPHERE WILL DETERMINE HOW EACH STATE MAY VOLUNTARILY CONTRIBUTE TO ACHIEVING THE GLOBAL ASPIRATIONAL GOALS ...

And a further carve-out: Notwithstanding reference in the ICAO resolution to that agreed aspirational global fuel efficiency improvement rate of 2% per annum from 2021 to 2050, the resolution also makes clear at the outset (and it does this in the recitals) that the

GOAL OF 2% ... IS UNLIKELY TO DELIVER THE LEVEL OF REDUCTION NECESSARY TO STABILIZE AND THEN REDUCE AVIATION'S ABSOLUTE EMISSIONS CONTRIBUTION TO CLIMATE CHANGE, AND THAT GOALS OF MORE AMBITION WILL NEED TO BE CONSIDERED TO DELIVER A SUSTAINABLE PATH FOR AVIATION.

2% is, however, the goal of the world's airlines out to 2050. Reference, then, to 'goals of more ambition [being needed] ... to deliver a sustainable [aviation] path' for aviation can't apply before 2021 – or before 2050.

Footnotes have been omitted, and can be supplied on request. The concluding part to this article will appear in the next issue of Aviation Briefs.

The Inaugural Australia-New Zealand Air Law Moot 2014

Charles Giacco and Joe Wheeler

From 9 to 11 July 2014, the College of Law and Justice, Victoria University, hosted the inaugural Australia-New Zealand Air Law Moot Competition (the Competition).

This was the first time an aviation moot competition has been held in Australia and open to law students across Australia and New Zealand.

The Competition is the creation of ALAANZ Victoria and Queensland branch executive members, Charles Giacco (Lecturer, College of Law and Justice) and Joseph Wheeler (Senior Solicitor, Shine Lawyers, Brisbane).

The Competition was sponsored by:

- Aviation Law Association of Australia and New Zealand (financial sponsors);
- Australian Federation of Air Pilots (financial sponsors);

- International Institute of Air and Space Law, Leiden University, the Netherlands;
- Shine Lawyers; and
- College of Law and Justice, Victoria University.

Financial sponsorship kindly provided by ALAANZ and AFAP removed the need for any registration fee for moot participants.

The teams that participated in the inaugural ANZALM 2014 were:

- University of Queensland (Georgina Morgan, Ella Rooney and Jessica Duncan);
- University of Otago (Kimberly Lawrence and John Brinsley-Pirie);
- RMIT University (Gavin Van Rensburg); and
- Victoria University (Andrew Dowling and Brett Jones).

The adjudicators were all from the legal profession with aviation law expertise. The problem scenario involved fictitious civil aviation incident in Australia involving personal injury.

University of Otago and RMIT University reached the grand-final; Otago University won.

This year's inaugural ANZALM augurs well for future air law moot competitions.

Book review: *Competition and Regulation in the Airline Industry* by Steven Truxal (Routledge, 2012)

Charles Giacco

Of all the forms of global commercial activities, civil aviation is, without doubt, one of the most regulated and economically significant.

Understandably, operational safety-related objectives comprise a major part of the regulatory framework within civil aviation. However, given the vital importance of civil aviation for the economies of all nations, it is also understandable why competition-related objectives also feature prominently within that framework.

Since the late 1970s, there have been significant changes and developments across civil aviation as a result of market deregulation, bilateral open-skies agreements, codeshare arrangements, a growing number of low-cost/budget carriers, and the establishment of alliances and partnerships amongst airlines. The ever-increasing competitive nature of civil aviation has been instrumental in bringing about such changes and developments.

Making sense of the particular dynamics associated with the current regulatory frameworks and competition issues within civil aviation globally can be challenging. This is especially so given what may be seen as a complex and involved regulatory environment within which airlines across the globe are required to operate. To this end, the textbook 'Competition and Regulation in the Airline Industry: Puppets in Chaos' by Dr Steven Truxal (Routledge, 2012) is a very useful resource to assist in understanding the key regulatory and competition aspects of today's civil aviation markets.

The author of this text is an experienced academic with specialist research interests in the competition and environmental regulation of air transport. Dr Truxal is a senior lecturer in law at the City University, London, and a visiting professor of English law at Humboldt University, Berlin. Set out in six chapters across 188 pages, Dr Truxal's text provides a readable examination of some of the main issues relating to competition and regulation in civil aviation. This examination is undertaken mainly within the context of the United States (US) and European Union (EU) civil aviation regulatory environments. The chapter topics include the evolution of air transport; deregulation, liberalisation and re-regulation; American and European competition law and policy; and progress and challenge considerations of the development of tactical and strategic alliances.

The text explores a number of matters relating to the international nature of civil aviation and the regulatory environments that impact upon competition within civil aviation. Primarily from the US and EU contexts, Dr Truxal considers whether the differences between varying regulatory environments actually result in confusion and obstruct true competition. Whilst Dr Truxal acknowledges the difficult competitive nature of civil aviation, he also points out that many US and EU airlines have nonetheless continued to remain commercially viable. Such continued viability has been due to various initiatives and strategies, particularly multilateral cooperation.

A key premise of the text is that, although differences do exist between the US and EU regulatory systems, there are also similarities. For example, a feature of the EU regulatory environment is to compel fair and transparent competition, whilst a feature of the US regulatory environment is to catch proven anti-competitive behavior. However, a feature common to both environments is the existence of market innovation initiatives and strategies (as mentioned above). According to Dr Truxal, notwithstanding any perceived difficulties concerning competition, airlines generally appear to be able to appropriately adapt to prevailing competition rules and thus remain commercially viable. In this respect, the 'Puppets in chaos' reference is apt; according to Dr Truxal, prior to deregulation, regulators were 'puppets' whose 'strings were pulled' by airlines under regulatory capture. However, in today's post-deregulation environment, it remains unclear whether the regulators (as one would expect) or the airlines are 'pulling the strings'. Ultimately, it's up to the reader to decide.

In addition to a table of cases, decisions and legislation, the text also contains a table of common abbreviations used in civil aviation law and competition contexts.

Given the ever-growing civil aviation markets within the Asia-Pacific region, some comparative considerations with the regulatory and competition issues pertaining to airlines in this part of the world would have been a welcome inclusion in the text. For example, both the Australian and the

New Zealand competition and consumer regulators have been actively involved in the investigation and prosecution of a range of anti-competitive practices by airlines. This has particularly included such practices such as price-fixing and cartel conduct.

Dr Truxal's text highlights the very close relationship between legal and economic considerations within civil aviation. Legal practitioners, academics, commercial professionals involved in civil aviation and tertiary students will find this text to be a useful resource.

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Welcome to the Editors

David Hodgkinson and Rebecca Johnston are aviation lawyers at national Australian law firm, Clayton Utz. They are also directors of HodgkinsonJohnston Pty Ltd, aviation and climate change advisers.

David is an Associate Professor at the University of Western Australia Law School. Rebecca is an Adjunct Lecturer at the University of Notre Dame Fremantle Law School. Both have authored books and many journal articles on aviation and international law.

David and Rebecca were appointed as joint editors of the ALAANZ Aviation Briefs in December 2014, and they look forward to working with the aviation industry to produce a quality brief.



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Questions or contributions?

Please direct any questions, feedback or contributions to the Editors.