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Proposed $1.9m civil penalty against UAS operator reaches new heights

Shannon O'Hara

The United States Federal Aviation Administration (**FAA**) recently announced[1] it has proposed a US$1.9 million dollar civil penalty against a United States company[2] for unauthorised unmanned aerial system (**UAS**) operations across New York City and Chicago.

The FAA alleges a total of 65 unauthorised operations, 43 of which occurred in New York Class B airspace[3] and absent air traffic control clearance. The FAA further alleges the operator failed to equip the UAS with a two-way radio, a transponder or any altitude-reporting equipment (required for operations in Class B Airspace).

In further breach of the regulations, the FAA is also claiming that in respect of each of the 65 unauthorised operations, the aircraft 'lacked an airworthiness certificate and effective registration, and the operator did not have a Certificate of Waiver or Authorisation for the operations'.[4]

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The UAS operator has 30 days to respond to the FAA from when it receives the FAA's enforcement letter.[5] There is no information to hand at this stage in regards to if, and how, the company proposes to respond to the FAA's enforcement letter.

It is understood this is the largest civil penalty proposed by the FAA against a UAS operator and certainly demonstrates the FAA's commitment to a strong stance on the regulation and management of UAS's in United States airspace and will no doubt serve as a deterrent to inappropriate UAS operations in the United States.

While UAS regulatory developments in the United States are worthwhile noting and are of interest in the Australian aviation industry, readers should bear in mind the civil penalty proposed by the FAA in this matter is regulated exclusively by the laws of the United States and so will not have application in Australia.

By contrast, operations found to be in breach of the Australian regulations[6] on similar grounds (i.e. operations in controlled airspace[7] and hazardous operations[8]) carry maximum fines of up to AU$9,000.00,[9] although to date the majority of fines issued by the regulator have been significantly lower than the maximum penalty.

1. http://www.faa.gov/news/press_releases/news_story.cfm?newsId=19555.
2. SkyPan International, Inc. of Chicago.
3. Class B airspace in the USA is defined around key airport traffic areas, usually airspace surrounding the busiest airports in the country. In New York the Class B airspace services all three major airports John F. Kennedy International Airport (JFK), Newark Liberty International Airport (EWR) and La Guardia Airport (LGA).
4. http://www.faa.gov/news/press_releases/news_story.cfm?newsId=19555.
5. Ibid.
6. Refer to the Civil Aviation Safety Regulations 1998 (Cth), Part 101 (CASRs).
7. CASRs, 101.070.
8. CASRs, 101.055.
9. 50 penalty units; calculated by reference to the Crimes Legislation Amendment (Penalty Unit) Act 2015 (C'th), Schedule 1, Subsection 2 (definition of penalty unit; $180).

The Cape Town Convention in India: repossessing aircraft after default

Patrick Wilson

Prior to October 2012, Kingfisher Airlines, formerly one of India's major carriers, experienced severe cash-flow problems and defaulted on multiple aircraft leases. Subsequent issues associated with Kingfisher Airlines in relation to the default highlight problems faced by aircraft financiers and lessors generally in enforcing their rights in India despite that country being a

signatory to the *Cape Town Convention on International Equipment in Mobile Equipment* (2001) (**Convention**).

The Directorate General of Civil Aviation (**DGCA**) suspended Kingfisher's operating certificate in October 2012 and revoked the airline's certificate in February 2013. However, the DGCA delayed deregistration of aircraft owned by multiple lessors who had correctly filed Irrevocable De-Registration and Export Request Authorisations (**IDERAs**). It took six months of legal battles for International Lease Finance Corporation (**ILFC**) to procure authorisation to remove one of its leased aircraft—five further aircraft took longer to repossess.[1]

This happened despite India acceding to and implementing the Convention. The DGCA's refusal to de-register aircraft and issue the aircraft with an export certificate of airworthiness shook some lessors' confidence in the Indian aviation leasing market. Those lessors' fears may have been well founded.

By December 2014, Spicejet, another large Indian airline, was experiencing significant financial difficulty and had defaulted on a number of Boeing 737 leases. The lessors wrote to Spicejet terminating the aircraft leases and requiring it to immediately return the aircraft and associated documents.[2]

Spicejet did not comply with the directive, forcing the lessor to approach the DGCA to de-register and issue export certificates of airworthiness for the aircraft. Under the Convention, the DGCA has five days to comply with the request. The DGCA, however, did not de-register or issue export certificates of airworthiness for the aircraft. Spicejet continued to operate the aircraft despite the lessors terminating the leases.

The lessors took action in the High Court in New Delhi. The DGCA and Spicejet argued inter alia that: 1) certain unspecified non-consensual rights and interests trumped the lessors' claims; 2) the DGCA's power to de-register an aircraft under the Convention was simply an enabling power rather than a direction to act; and 3) de-registering the aircraft would impinge upon public interest.

The Court dismissed all of the respondents' arguments. The Court found that the Government of India had filed the correct declaration to allow certain liens which constitute non-consensual rights and interests to take priority over a creditor's rights. The respondents could not, however, point to any non-consensual right or interest that could take priority in this case. The Court also found that, under revised Rule 30(7) of the *Aircraft Rules 1937* (New Delhi), the DGCA had no discretion in deciding whether to de-register an aircraft object upon a creditor fulfilling the conditions listed in Rule 30(7)—if the conditions are fulfilled, the DGCA must de-register the aircraft.

Notably, the Court stated, in relation to the respondents' public interest argument:

> ***I AM ALSO NOT IMPRESSED BY THE SUBMISSION ADVANCED ON BEHALF OF SPICEJET THAT DE-REGISTRATION AND/OR REPOSSESSION OF THE AIRCRAFT OBJECTS WOULD IMPINGE UPON PUBLIC INTEREST… [T]HERE IS AS MUCH IF NOT MORE PUBLIC INTEREST IN ENSURING THAT TREATY OBLIGATIONS ARE HONOURED AND THAT PARTIES ADHERE TO THEIR RESPECTIVE CONTRACTUAL OBLIGATIONS. THE VERY FACT THAT INDIA HAS RATIFIED THE CONVENTION AND PROTOCOL GIVES***

RISE TO THE PRESUMPTION THAT IT HAS BEEN DONE IN THE LARGER PUBLIC INTEREST, AS AGAINST A NARROW INTEREST OF ONE PARTICULAR AIRLINE.[3]

What this means for lessors

The New Delhi High Court's ruling assists lessors to understand their rights and the circumstances in which Indian courts will enforce the Convention. An important issue lessors have faced in India is the DGCA's refusal to promptly de-register aircraft (if indeed it agrees to de-register aircraft at all). While Rule 30(7) of the *Aircraft Rules* now explicitly requires the DGCA to de-register aircraft when presented with an IDERA-holder's application for de-registration and export, there is so far no evidence that the DGCA will follow the rule in a timely manner; even after the rule was added, the DGCA did not de-register the aircraft in question.

As a result of the ruling, lessors may take some comfort in the fact that Indian courts will now likely uphold their claims under the Convention. It is the author's view, however that until there is evidence the DGCA will enforce Rule 30(7) and the Convention requirements, lessors may not be confident they can enforce these rights absent legal action.

1. Centre for Aviation "Kingfisher suspension raises questions for lessors & financiers, could add to India's cost pressures" 28 March 2013, <http://centreforaviation.com/analysis/kingfisher-suspension-raises-question-for-lessors--financiers-could-add-to-indias-cost-pressures-102603>
2. AWAW39423 Ireland Ltd & Others v Directorate General of Civil Aviation WP(C) 871/2015, WP(C) 747/2015 & CM Nos. 2894/2015 & 2895/2015 19 March 2015, available at <http://indiankanoon.org/doc/131705572/>
3. At 27.

MH17 - 'Justice', but for whom?

David Hodgkinson and Rebecca Johnston

In mid-October, the final report of the Dutch Safety Board found definitively that the Malaysia Airlines Flight 17 (**MH17**) crash in July 2014 was caused by the detonation of a 9N314M warhead. It was launched by a Russian-made Buk surface-to-air missile system from a 320-square-kilometre area in the eastern part of Ukraine.

According to the report, the warhead was detonated to the left and above the cockpit. Due to the impact and the blast, the occupants of the cockpit were killed immediately and the aircraft 'broke up in the air.' All of the 298 occupants were killed.

Russian-supported rebels were – and are – fighting Ukrainian forces in the eastern Ukraine. And while the Dutch Safety Board, of course, made no findings as to who launched the warhead, it has widely been reported that that report's conclusions are consistent with the view that MH17 was shot down by Russian-backed separatists.

In the wake of the Board's report, Prime Minister Malcolm Turnbull has said that Australia is 'determined to do everything we can … to identify those responsible and bring them to justice.'

Foreign Minister Julie Bishop referred to international tribunals or national prosecutions as possible 'effective means of bringing the perpetrators to justice.'

Justice?

However, 'justice' itself, of course, is not straightforward. And in terms of MH17 there are multiple 'strands' and forms of justice:

- justice for the families of MH17 in terms of identifying, bringing to trial and punishing those who launched the Buk missile which brought down the aircraft (the Turnbull/Bishop 'justice');
- justice in the form of monetary compensation (to families) for the death of passengers on board MH17;
- holding MH to account for choosing to fly a route which some airlines chose not to fly due to the conflict on the ground in eastern Ukraine; and
- justice with regard to the conflict between Russian proxies and the Ukrainians on the ground.

And there are issues, of course, with notions of justice. Do we mean fairness in protecting rights and protesting wrongs? Fairness in the way people are dealt with? The process (or outcome) of using laws to fairly judge and punish crimes and criminal activity? And do we confuse justice with compensation (at least in liability terms) – perhaps the point here given the various issues? MH17 raises all of these questions.

Launch of the Buk missile

We know that the crash of MH17 was caused by the detonation of a warhead launched from the eastern part of Ukraine using a Buk missile system. It is not known definitively who launched the missile; the Dutch Safety Board report makes no findings regarding the issue.

Australia's foreign minister is focused on prosecution of those responsible for the launch and detonation. She refers to returning to the UN Security Council and establishing an international tribunal. She mentions national prosecutions. She also says that payment of passenger compensation is reliant on criminal investigations:

> ***ANY ISSUE OF COMPENSATION WILL DEPEND UPON HOLDING TO ACCOUNT THE PERPETRATORS OF THE CRIME...I THINK THAT BEING ABLE TO IDENTIFY THE PERPETRATORS OF THE CRIME WOULD BE A PRECONDITION TO DEMANDING COMPENSATION.***

But, of course, this is not the case – justice in the form of compensation for passenger death (or injury) under relevant aircraft liability and passenger compensation regimes is entirely distinct.

Compensation for passenger death or injury

'Justice' in terms of passenger, or next-of-kin, compensation which applies to MH17 (unrelated to criminal investigation or international tribunals) is determined by finding the same treaty in

place at the point of departure and the passenger's final destination as ticketed. For MH17 passengers that will mostly be the Montreal Convention, but other less favourable regimes may apply to other passengers.

Article 17 of the Montreal Convention provides that a carrier justice in the form of monetary compensation (to families) for the death of passengers on board MH17

> ***IS LIABLE FOR DAMAGE SUSTAINED INCASE OF DEATH OR BODILY INJURY OF A PASSENGER UPON CONDITION ONLY THAT THE ACCIDENT WHICH CAUSED THE DEATH OR INJURY TOOK PLACE ON BOARD THE AIRCRAFT …***

Death or injury must be caused by an 'accident.' The most widely and generally accepted definition of an accident is set out by the US Supreme Court: liability under Article 17 'arises only if a passenger's injury [or death] is caused by an unexpected or unusual event or happening that is external to the passenger …'.

Under Article 21 of the Montreal Convention, for damages arising under Article 17 not exceeding 113,100 SDRs (or about USD 170,000) per passenger, the carrier cannot exclude or limit its liability.

MH's liability is potentially *unlimited* unless it can prove (and burden of proof is with the carrier) that damage 'was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents' or that such damage was solely due to the negligence or other wrongful act or omission of a third party. And that could be a problem.

Liability for flight path choice: The Dutch Safety Board report

The issue is whether it was reasonable, given the conflict below, for MH to choose the flight path it did – and whether it should be held to account for that choice.

The Dutch Safety Board report notes that the airspace over eastern Ukraine 'was much in use' between 14 and 17 July 2014; 61 airline operators from 32 countries 'routed their flights through this airspace,' including MH. On the day MH crashed, while 160 commercial airliners flew over the area, other airliners stopped flights over the region (it should be noted that it's rare for states to close their airspace because of armed conflict).

It appears that current arrangements with regard to flying over conflict areas are inadequate. The Board notes that operators 'assume that unrestricted airspaces are safe,' and that they do not usually take into account the safety of the countries they fly over. When flying over a conflict area, an additional risk assessment, then, is necessary.

It is recommended by the Safety Board that operators and states 'exchange more information about conflict areas and potential threats to civil aviation.'

Armed conflict in eastern of Ukraine - parties

Finally, what does justice look like in terms of resolving the armed conflict in the eastern part of Ukraine? The conflict arose out of the Ukrainian government's attempts to align the country with the EU following difficult economic circumstances. The Ukrainian president, however, pulled out of a trade deal with the EU and accepted billions of dollars from Russia. Protests began and have continued, the president fled, and Russian soldiers occupied Crimea, a Ukrainian province.

And, on 17 July 2014, a Russian-made Buk surface-to-air missile system, likely operated by Russian-backed separatists, launched a warhead from eastern Ukraine which caused the crash of MH17.

Aviation confronts 21st century problems

Aviation, which transformed travel and way of life in the 20th century, is itself being transformed in the 21st century and faces some difficult 21st century problems. These problems include the aviation emissions problem (emissions from aircraft remain unregulated), economic viability, the system of bilateral airservices agreements, and terrorism.

All involve difficult issues of sovereignty. MH17 involves additional issues of justice and compensation.

Footnotes can be supplied on request.

Off to the High Court: Robinson Helicopters granted special leave

Shannon O'Hara

In *Graham McDermott & Ors -ats- Robinson Helicopter Company Incorporated* (**RHC**)[1]:

- the primary judgement found the RHC was neither negligent nor in breach of the consumer protection provisions set out under the *Trade Practices Act 1974* (Cth) (**TPA**) in regards to periodic inspection procedure instructions set out in the R-22 maintenance manual; and
- the Court of Appeal overturned the primary judgment finding instead that the RHC maintenance manual did not provide adequate guidance to Licensed Aircraft Maintenance Engineers (**LAMEs**) performing periodic inspections.

Following the Court of Appeal's decision, RHC filed a Special Leave Application (**Application**) with the Australian High Court heard on 16 October 2015 before Justices Kiefel and Gordon.[2]

At the Application, Counsel for RHC[3] contended the Court of Appeal erred in two respects:

- It overturned important findings of fact made by the trial judge about the absence of a torque stripe without any proper basis to have done so.[4]

- The majority did not consider the evidence presented at trial[5] about whether the absence of certain directions in the maintenance manual either directly or indirectly caused the failure which lead to the subject helicopter crash. RHC argued that despite having not considered this evidence, the majority proceeded to make a determination in favour of McDermott in both tort and the TPA.[6]

Counsel for McDermott[7] disputed RHC's contention that the relationship between the cause of the accident and the absence of certain directions in the maintenance manual was an issue during the Court of Appeal hearing. Counsel for McDermott argued this matter is one where:

> ***SPECIALIST AND HIGHLY TRAINED AIRCRAFT MECHANICS ARE INVOLVED AND WHO REGARD EACH AIRCRAFT MAINTENANCE MANUAL AS THOUGH IT IS TO BE FOLLOWED TO THE LETTER.***[8]

Despite having followed the maintenance manual to the letter, that manual lacked the requisite directions to enable the LAMEs to detect the defect that existed in the helicopter and, as a result, the subject helicopter crash ensued.[9]

The Court granted RHC's request for a grant of special leave in this matter with the parties estimating it will be heard by the High Court over the course of two days in early 2016.[10] Developments in relation to this matter will be monitored and a further report in *ALAANZ Briefs* on the outcome of the High Court hearing will be provided.

In the meantime, the ongoing litigation of this matter serves to highlight for manufacturers the importance of ensuring all manuals associated with aircraft provide not only clear and concise instructions, but also instructions which accord, where appropriate, with industry practice.

Finally, for those involved in the provision of maintenance services to the aviation industry, this case continues to affirm the importance of following the instructions set out in the maintenance manual without deviation, and provides ongoing insight into the court's expectations of LAMEs involved in the provision of aircraft maintenance services.

1. McDermott & Ors v Robinson Helicopter Company [2014] QSC 34 and McDermott & Ors v Robinson Helicopter Company Incorporated [2014] QCA 357.
2. Transcript of proceedings, Robinson Helicopter Company Incorporated v Graham James McDermott & Ors [2015] HCATrans 274 [16 October 2015].
3. Mr S.L.Doyle, QC.
4. Transcript of proceedings, Robinson Helicopter Company Incorporated v Graham James McDermott & Ors [2015] HCATrans 274 [16 October 2015] [Opening by Doyle, QC].
5. RHC suggested the relevant evidence included: the absence of reliance by the LAMEs on the manual in carrying out the performance of their work; confirmation the LAMEs did not comply with the manual in certain respects; and evidence from the relevant LAMEs that they knew the way to determine whether the bolt was properly torqued was by application of a torque wrench, notwithstanding the absence of a direction to do so in the manual.
6. Transcript of proceedings, Robinson Helicopter Company Incorporated v Graham James McDermott & Ors [2015] HCATrans 274 [16 October 2015] [Opening by Doyle, QC].
7. Mr W. Sofronoff, QC.
8. Transcript of proceedings, Robinson Helicopter Company Incorporated v Graham James McDermott & Ors [2015] HCATrans 274 [16 October 2015] [340].
9. Ibid [350].
10. Ibid [715 – 725].

Aviation has an emissions problem – and COP 21 can't (and won't) solve it

David Hodgkinson and Rebecca Johnston

The aviation emissions problem is a significant one. Aviation is a growing source of emissions, and those emissions are largely unregulated. Emissions from aviation are increasing against a background of decreasing emissions (or, at least, emissions regulation) from many other industry sectors.

If global aviation was a country, its emissions would be ranked about seventh in the world, between Germany and South Korea on CO_2 emissions alone. Put another way, aviation's contribution to worldwide annual emissions could be as high as 8%.

And the International Civil Aviation Organization forecasts significant further emissions growth: against a 2006 baseline a 63-83% increase by 2020 is expected, and a 290-667% increase by 2050 (without accounting for more use of biofuels).

UN action on aviation emissions so far – no COP involvement

Under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (**UNFCCC**), developed-state parties to the Protocol (including Australia) 'shall pursue limitation or reduction of emissions of greenhouse gases … from aviation … working through the International Civil Aviation Organization (**ICAO**).

In other words, aviation is excluded from (to date) the world's primary climate change instruments. It leaves the aviation emissions problem up to ICAO, a UN agency.

At ICAO's triennial assembly in 2013, an agreement was reached to proceed with a roadmap towards a decision to be taken in 2016 for implementation in 2020.

ICAO resolved to make a recommendation on a global scheme, including a means to take into account the 'special circumstances and respective capabilities' of different nations, and the mechanisms for the implementation of such a scheme from 2020 as part of a basket of measures. These include operational improvements and development of sustainable alternative fuels.

It is an agreement to agree. If everything goes to plan, from 2020 we might see a global market-based mechanism – presumably an emissions trading scheme, although a (non-fuel) tax can't be ruled out – covering global aviation.

But that outcome is far from guaranteed. In effect, states have agreed to agree, and to keep talking at their next major meeting next year – and nothing more.

COP 21 – aviation won't get off the ground

Given that ICAO is tasked with addressing the aviation emissions problem, aviation is most interesting in terms of references to it in successive draft versions of the UNFCCC Conference of the Parties climate change conference (**COP 21**) negotiating text and related documents.

The negotiating text for the agreement to be finalised in Paris in December stood at 90 pages after the UNFCCC Bonn meeting in August and September. It was essentially a compilation of state parties' proposals – it wasn't really negotiated. This text was subsequently reduced to just 20 pages in a 'non-paper' note dated 5 October 2015 but has now expanded to 51 pages as a result of the 19-23 October Bonn UNFCCC meeting.

In that 5 October draft note aviation was excluded. In the latest draft negotiating text (from the Bonn working group dated 23 October) - Article 3, 'Mitigation,' clause 19 – aviation is definitely included. Unsurprisingly, the clause – as expected – refers to ICAO as the appropriate UN agency to deal with the aviation emissions problem.

The only real uncertainty for aviation emissions at COP 21 is whether the words 'shall' or 'should' – which currently appear in square brackets in the negotiating text – or some other like word – will be used in relation to reduction of aviation emissions …

Footnotes can be supplied on request.

David Hodgkinson and Rebecca Johnston will be providing reports, analysis and summaries on aviation live from COP 21 in Paris from 30 November to 13 December 2015. To subscribe contact reception@hodgkinsonjohnston.com.

Second Annual Australia and New Zealand Air Law Moot

Charles Giacco

The second annual Australia and New Zealand Air Law Moot competition (**ANZALM**) was hosted by the TC Beirne School of Law at the University of Queensland, St Lucia campus, Brisbane, in late September 2015.

This year's ANZALM was facilitated by Associate Professor Peter Billings of the TC Beirne School of Law, University of Queensland, and ANZALM co-conveners Joseph Wheeler, Principal, International Aerospace Law and Policy Group and Charles Giacco, Lecturer, Victoria Law School, Victoria University, Melbourne.

The moot problem involved a hypothetical scenario concerning a New Zealand-manufactured civilian passenger aircraft operated by an Australian airline downed by a missile over Mount Taka

Island, a disputed island within the South Pacific nation of the Kingdom of Takalae. The incident related to fictitious island nations located between Tonga and the Cook Islands - the Peoples' Republic of Grundana and the Kingdom of Takalae. The moot problem was largely based on the downing of MH17 over Ukraine in July 2014, and raised challenging international law issues.

The teams comprised law students from universities in Australia and New Zealand: Olivia Klinkum and Zared Wall Manning (University of Otago); Kate Thorogood and Alexander O'Hara (University of Queensland); Nicholas Porter and Michael Greenop (University of Auckland); andMikayla Brier-Mills and Alana Rennie (Bond University).

All teams performed to a very high standard; all judging panels commented favourably on the oral advocacy skills of the participants.

After three preliminary moots before judges with academic and legal practice backgrounds, the University of Auckland and the University of Queensland proceeded to the Grand Final.

The Grand Final was held at the Federal Court of Australia in Brisbane. The presiding judges (acting as the International Court of Justice) comprised the Hon. Justice Darryl Rangiah of the Federal Court of Australia; Mr Joseph Wheeler; and Gerrard Mullins, Barrister, Darrow Chambers. Congratulations go to the team from the University of Auckland who won the overall team title and prize for best written submissions.

This year's ANZALM events also included a seminar evening with presentations from Joseph Wheeler, who spoke about his experiences in recent air disasters and the limits of the Montreal Convention, and from Gerrard Mullins, who spoke about his experiences in some notable Australian aviation cases.

This year's Second Annual ANZALM was made possible with the generous support from ALAANZ and from: TC Beirne School of Law; McGill University Institute of Air and Space Law; Australian Federation of Air Pilots; and the International Aerospace Law & Policy Group.

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Questions

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