ALAANZ AVIATION BRIEFS

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1. Cases

Street v Arafura Helicopters Pty Limited [2018] NTSC 15

Robert Csillag, Solicitor, GSG Legal

The Facts

The Plaintiff sought to make a claim under the *Civil Aviation (Carrier's Liability) Act 1959* (Cth) ("**the CACL Act"**) in respect of injuries he sustained during a helicopter accident that occurred on 12 November 2013. He retained lawyers for that purpose.

At some point prior to 11 November 2015, two documents were drafted by the Plaintiff's lawyers. The first was titled 'Form 5A' and included the word 'Writ'. It contained the names of the parties to the proposed action. The second was titled 'Originating Process' and also contained the names of the parties. These documents were drafted with the apparent intention of complying with the *Supreme Court Rules* of the Northern Territory ("**the Rules"**). However, each was deficient in a number of ways, the most relevant being that the Writ did not contain an Endorsement of Claim and (under the Rules) a Statement of Claim is not an Originating Process. Under the Rules, the Statement of Claim should also have been drafted into the Writ under part 2 of that document so that just one, rather than two, documents would then be filed.

On 11 November 2015 (the date of expiry of the two-year extinguishment period under s 34 of the CACL Act), a private enquiry agent and process server, was engaged to file the above documents in the Supreme Court of the Northern Territory and attempt service on the Defendant. It was an error under the Rules to not engage a solicitor as a town agent. The Registrar in the Alice Springs Registry of the Supreme Court of the Northern Territory sent an email to another Registry employee advising that the documents would have to be returned as they did not comply with the Rules. The Registrar also noted that the Plaintiff's solicitor would need to engage a solicitor as its town agent. A Registry employee relayed these comments to the Plaintiff's solicitor.

On 12 November 2015 the Plaintiff's solicitor engaged a solicitor in Alice Springs as its town agent. It forwarded to her the same documents that had been returned by the Registry. The solicitor town agent delivered the same documents to the Registry and attempted to file them again on 12 November 2015. The Plaintiff's solicitor contacted the solicitor town agent that day to confirm that the documents had been filed. The solicitor town agent advised that the documents had been delivered to the Registry but that it would take some time to receive the sealed copies.

Later that day the Plaintiff's solicitor sent the unsealed and defective Writ and Statement of Claim to the Defendant. In that letter they advised that the documents were being filed that day in the Registry. A further letter was sent to the Defendant on 17 November 2015 advising that the documents had been delivered to the Registry on 12 November 2015 but that they had not yet received the sealed copies.

On 17 November 2015 the Registry wrote to the solicitor town agent advising that the Registrar had rejected the filing as it did not comply with the Rules. The Registry advised it would return the defective documents. The Registry also provided guidance on how to correctly initiate proceedings in the Northern Territory.

On the Plaintiff's solicitor's instructions a second solicitor town agent filed a Writ endorsed with a Statement of Claim that was in accordance with the Rules. This Originating Process was accepted by the Registry. The Originating Process was accepted and backdated to 12 November 2015. The sealed Originating Process was served on the Defendant's solicitors on 13 January 2016.

On 15 January 2016 the Defendant's solicitors telephoned the Registry. The Registry informed the Defendant's solicitors that the documents were not accepted on 12 November 2015 because they did not comply with the formatting requirements dictated by the Rules. The Registry advised that as the

formatting issue had been corrected the Registrar had backdated the document to 12 November 2015. The Registry advised the Defendant's solicitors that the Registrar had a discretion to backdate the filing of documents and had decided to do so on this occasion.

The Court's Decision

Southwood J in the Supreme Court of the Northern Territory considered that 'an action' could only be commenced when the appropriate steps had been taken to invoke the jurisdiction, power and authority of the Court to grant some relief or remedy.

The Rules provide that a proceeding should be commenced by Writ or Originating Motion. The Rules also contained very specific rules for the format and filing requirements in respect of those documents and further provide that a document received in a Registry is not filed until it is accepted by the Proper Officer of the Court.

Southwood J noted that despite this there are ways in which a defective or irregular Originating Process might be used as a placeholder until a duly prepared copy is made available to the Registry.

Under Section 49 of the *Supreme Court* Act a Registrar may exercise and perform all of the powers and functions of an Associate Judge. Noting this the Registrar could have made an order under Rule 27.06(2)(b) that the party responsible for filing an irregular Originating Process would not be entitled to rely on it in any manner in the proceeding until a document which is duly prepared is made available.

If such an order was made the proceeding would have commenced on the date the original defective document was received by the Registry. No such order was made.

Section 34 of the CACL Act imposes a condition (which is of the essence) that an action be brought within two years of the stipulated event. The burden of proving that a proceeding was brought within the time prescribed is on the Plaintiff.

Southwood J considered that the critical question was on what date was the jurisdiction of the Supreme Court of the Northern Territory invoked. His Honour considered that this question could only be determined by reference to what the Rules provide.

The Rules clearly provide that the jurisdiction of the Court is only invoked when a Writ is delivered to the Registry and accepted by a Proper Officer of the Court. This occurred only on 18 December 2015 when the second solicitor town agent filed the Writ which was in accordance with the rules. None of the documents were previously accepted by the Registrar.

Even though the Registry had a practice of backdating Originating Processes there was no power for them to do so.

In the circumstances his Honour found that the Plaintiff's claim was extinguished by the operation of Section 34 of the CACL Act.

Comments

His Honour's decision highlights the importance of observing the rules of the jurisdiction in which proceedings are being commenced. In the usual course an action will not have commenced until the Court's jurisdiction has properly been invoked. Practitioners should be aware of the applicable deadlines for extinguishment of their client's claims and allow themselves sufficient time to address any issues that might arise when invoking the Court's jurisdiction.

Hevilift Limited v Tower [2018] QCA 89

Shannon O'Hara, Senior Associate, Carter Newell

On 11 May 2018, the QLD Court of Appeal dismissed an Appeal by Hevilift Ltd (**Hevilift**) against the decision[1] of Supreme Court, Justice James Henry's ruling that Hevilift was responsible for a helicopter crash in the Highlands of Papua New Guinea in April 2006 which resulted in the death of three mine workers and seriously injured another three workers and the pilot, Bruce Towers (**Towers**).

Background

Towers was employed by Hevilift as a pilot to transport mine workers between highland camp sites.

Late in the afternoon of 20 April 2006, Towers was in command of a helicopter on approach to one of the mine camps; the helicopter was equipped for VFR flight only. Towers was reportedly advised by the mine's aviation coordinator in the area of approaching cloud, to which Towers responded by confirming he would assess accessibility and visibility. Moments later, and upon final approach to the camp site, Towers encountered extraordinarily fast moving / developing cloud or fog and this reportedly enveloped the helicopter. In response, Towers allegedly tried to fly the helicopter by visual reference to the treetops for guidance, keeping the helicopter under control and level, and attempting to go as slowly as possible; within approximately 30 seconds however, the helicopter struck a tree and crashed.

Trial

Following the accident, Towers commenced proceedings against Hevilift for damages for negligence and breach of contract, Towers alleged his employer, Hevilift owed him the following duties of care:

1. to investigate and ascertain the risks posed to its pilots by local weather conditions and patterns and to have safe work systems which managed those risks; and

2. to warn Towers of the phenomenon of fast formation of cloud at the time of day and locale in question at an out of the ordinary speed and the consequential risk of inadvertent IMC, and

   either:

3. to monitor weather in the region of the mine camp and prohibit flight into it by Hevilift's pilots and divert them to a safe area when prescribed conditions were forecast or present in the vicinity in the later afternoon, particularly where the aircraft being operated were not IFR equipped; or

4. in the alternative, for Hevilift to equip its helicopters with IFR instruments and to train its pilots in the use of such equipment in an emergency, such as to give the respondent a chance of escaping the otherwise likely fatal consequences of inadvertent IMC.

In relation to the duties alleged in paragraphs 1 and 2 above, the Trial Judge agreed with Towers finding there was no evidence of Hevilift having investigated the risks posed to its pilots by local weather conditions or any systematic approach to managing the meteorological phenomenon. Additionally, the Trial Judge found that Hevilift had breached its duty of care to Towers by failing to warn him of the meteorological phenomenon of fast moving / developing cloud or fog in the area and concluded that had Towers been warned of the risk, then upon learning of cloud / fog in the area, he would not have elected to continue toward the camp to assess the visibility and would have instead proceeded directly to an alternative camp.

With respect to the duty alleged in paragraph 3 above, the Trial Judge concluded there was no system of monitoring, flight prohibition and diversion, but that such a system could have easily been adopted. Furthermore, the Trial Judge found that if such a system had been in place, Towers would have complied

[1] Towers v Hevilift Ltd & Anor [2016] QSC 267

with it (including any prohibition / diversion instructions) with the result the crash would not have occurred.

Finally with respect to the duty in paragraph 4, the Trial Judge found the failure by Hevilift to equip the helicopter with IFR instruments / equipment was also a breach of its duty of care. However, in analysing the evidence, the Trial Judge was not satisfied that Towers' qualifications and ability in IFR flight would have avoided him crashing the helicopter even if the helicopter had been so equipped and he had been appropriately trained in the use of IFR instruments / equipment.

Appeal

Numerous grounds of appeal were raised in this matter challenging the Trial Judge's findings in respect of the various findings of fact, the existence of a duty of care and breach of duty by Hevilift. In unanimously dismissing Hevilift's appeal, the Court of Appeal comprehensively addressed each of the matters in issue and these are addressed in turn below.

Grounds of Appeal - Findings of Fact

The Trial Judge's findings of fact about the circumstances in which the helicopter crashed and the cause of the crash were challenged as follows:

1. the Primary Judge erred in accepting evidence from a meteorologist (who had never been to PNG) as to the speed of formation of cloud in the Southern Highlands of PNG, over the evidence of pilots experienced in flying in PNG;

2. the Primary Judge erred in concluding:

    a. Towers was unaware that the cloud could move rapidly, where Towers had himself accepted that he was so aware; and

    b. Towers ordinary experience of cloud in the area at the subject time was that it appeared slow moving in circumstances where Towers had accepted other evidence presented at the trial indicating that on a previous flight piloted by Towers, the cloud was moving incredibly quickly;

3. The Primary Judge erred in fact in finding that as Towers proceeded in the helicopter toward the helipad toward the mine camp:

    a. cloud formed extremely rapidly within [the helicopter's flight path] enveloping the helicopter suddenly; and

    b. cloud formed with out of [sic] the ordinary speed in the air in which the helicopter was flying, surrounding the helicopter, as if instantaneously;

    in circumstances where:

    c. the evidence at trial was that cloud formation was not instantaneous, but rather could take minutes to form; and

    d. the helicopter was being flown at approximately 30 to 35 knots, and was able to travel faster than the rate at which cloud could form in its immediate flight path.

The Court of Appeal disagreed with Hevilift, finding that in respect of each matter, the Trial Judge's conclusions were supported by the evidence (and the Trial Judge's careful and detailed reasons for judgement) and as such did not supply the Court of Appeal with a substantial basis for setting aside the Trial Judge's findings. Indeed the Court of Appeal noted that the Primary Judge's findings of fact were neither glaringly improbable nor contradicted by any incontrovertible evidence and that no other ground had been articulated that might justify the Court in setting them aside.

In making the above findings and comments, the Court of Appeal emphasised this case was one in which the advantage of the Trial Judge in seeing and hearing the evidence unfold at trial was particularly significant, and confirmed it was not persuaded that the Trial Judge had misused that advantage or made any finding that lacked reasonable support in apparently credible and reliable evidence.

Grounds of Appeal – Duty of Care

Hevilift also challenged the Trial Judge's findings in regards to the duty of care owed by Hevilift to Towers on four grounds, the Trial Judge erred:

1. in law in failing to accurately or at all identify the duty of care owed by Hevilift to Towers by failing to take into account the contract of employment between the parties and the PNG Civil Aviation Rules;

2. in finding Hevilift should have investigated and ascertained risks posed to pilots by local weather conditions and patterns and implemented work systems to safely manage that risk when such an allegation of negligence was not brought by Towers;

3. in concluding Hevilift did not implement a local regime for monitoring weather in the area of the subject camp in the absence of such a case being brought by Towers against Hevilift and on the evidence; and

4. in finding Hevilift ought to have directed the prohibition of the flight and the diversion to a safe landing area, contrary to the requirements of the PNG Civil Aviation Rules.

The Court of Appeal noted that the effect of the argument in respect of items 2 and 3 above, was that Hevilift was denied procedural fairness in relation to the Trial Judge's conclusions that the duty of care owed by Hevilift to Towers included a duty to investigate and ascertain the risks posed to its pilots by local weather conditions and patterns and to have safe work systems which managed those risks.

The Court of Appeal expressly rejected this ground, finding instead that the duty found by the Trial Judge in respect of item 2, was implicit in the breaches alleged and pleaded by Towers and further, that the issues raised in respect of item 2, were in the Court of Appeal's view clearly litigated by both parties during the course of the trial. The Court of Appeal observed that Hevilift did not argue that it insisted at the trial upon a strict construction of the pleadings, that it did not participate in the litigation of the issues now the subject of complaint in item 2, or that it might have adduced other evidence if the pleadings had been more clearly expressed.

With respect to item 3, the Court accepted Hevilift's submission that Towers did not bring a case that Hevilift failed to implement proper weather monitoring in the region of the mine camp and that the primary judgement in this regard was not justifiable with reference to a breach of that alleged duty, however also concluded that the Trial Judge's finding did not 'falsify the judgement', because no error had been identified in the findings and that those findings established that the breach of duty was an independent cause of the crash and Tower's consequential injuries.

Appeal Grounds 1 and 4 above were also rejected. In that regard, the Court of Appeal said that 'the question of whether there is a duty of care, and if so, what its scope and content are, must be determined by reference to what is reasonably foreseeable and the salient features of the relationship between the plaintiff and the defendant. The salient features include relevant obligations the parties owe each other under the employment contract and relevant statutory obligations.

The Court of Appeal concluded that the Trial Judge undertook such an analysis, including by reference to each of the matters which Hevilift argued were salient features of the parties' relationship, but in particular with regards to the acknowledgments and warranties provided for in Towers' contract of employment. Additionally, on the issue of inconsistency between the obligations incorporated into the employment contract and the aviation regulations, the Court of Appeal said it would not construe the aviation rules as being inconsistent with a duty of care by Hevilift to warn Towers of the existence of meteorological phenomenon creating a serious risk to aviation safety, of which the employer was, or should have been, aware and of which Towers was reasonably unaware.

The Court of Appeal acknowledged that the aviation rules impose 'very important responsibilities upon pilots, but the rules themselves reveal that responsibilities for the supply of relevant information, including meteorological information, are also imposed on others, including those who, like the appellant [Hevilift], conduct commercial air operations. On that basis, the Court of Appeal found Hevilift's characterisation of

the rules, i.e. that the pilot has primary responsibility for the safety of passengers', is not inconsistent with the employment relationship imposing upon Hevilift a duty of care to ensure that the pilot in command is informed about meteorological phenomenon and associated risks, of which Hevilift was, or should have been, aware and that the pilot might be reasonably aware.

Grounds of Appeal – Breach of Duty

The following four grounds of appeal were raised by Hevilift and considered by the Court of Appeal in respect of the Trial Judge's findings in regards to breach of duty, the Primary Judge erred:

1. in concluding Hevilift has breached the duty of care;

2. in fact, finding Towers was not told he could be enveloped in cloud in the way he was on 20 April 2006 when his own evidence was directly contrary;

3. in finding a breach of duty against Hevilift in the absence of evidence as to a safe alternative system of work; and

4. in concluding Hevilift did not implement a local regime for monitoring weather in the region of the mine camp, in the absence of such a case being brought by Towers against Hevilift and in the face of the evidence.

Hevilift conceded, and the Court of Appeal acknowledged, that the general contention in item 1 above added nothing to the other three grounds which themselves identified suggested errors in the Trial Judge's finding that Hevilift had breached its duty of care.

The Court of Appeal rejected item 2 above, noting that Hevilift's argument in this regard was inconsistent with Hevilift's primary case that there was no such phenomenon. The Court of Appeal said that the finding of a breach of duty to warn was not vulnerable to challenge. It noted the conclusion reflected Tower's evidence, and Hevilift did not adduce any evidence, that the training provided to Tower included any warning that cloud could form out of the ordinary speed in the late afternoon in the region where he would be working.

Hevilift did not support item 3 above with argument, but the Court of Appeal noted it seemed self-evident that minimal difficulty and expense would have been involved in Hevilift fulfilling the duties of care alleged by Towers.

Finally, with respect to item 4 above, the Court of Appeal noted its previous finding that Towers did not bring a case that Hevilift did not implement a local regime for monitoring weather in the region of the mine camp; on that basis that aspect of the Trial Judge's findings were treated accordingly.

Comments

It is apparent from the Court of Appeal judgement that the importance of expert evidence in aviation cases cannot be understated. Parties should also ensure that technical evidence which properly responds to an opposing party's evidence be produced for consideration by the Court. This is particularly the case with complex aviation matters, as these claims require technical expertise and specialist skills to address the key issues in dispute.

It was also evident that the Court of Appeal was not willing to disturb the Trial Judge's findings of fact in circumstances where it did not have the opportunity to see firsthand the delivery of technical and other evidence in the matter. Parties ought to carefully consider this when considering an appeal based principally on factual findings.

Finally, and perhaps most relevant for aviation operators, is the fact that this case emphasises the rigorous duties of care owed by an employer to its employees, notwithstanding the specialist technical training and expertise of pilots, and particularly when those employees are engaged in flight operations in complex operational environments.

IN BRIEF

WIAL v NZALPA & Anor; Director of Civil Aviation v NZALPA & Anor [2017] NZSC 199

- By Richard McCabe of Counsel

Background

In 2015, Wellington International Airport Limited (**WIAL**) sought approval from the Director of the Civil Aviation Authority of New Zealand (**DCA**) to extend its runway. The primary reason for the proposed runway extension was to enable large aircraft to operate there.

WIAL's proposal provided for Runway End Safety Areas (**RESA**) of 90 meters rather than the required 240 meters on the grounds of cost, supported by a cost-benefit analysis. The DCA gave approval.

The New Zealand Air Line Pilots Association Inc (**NZALPA**) challenged the scope of the DCA's authority to approve a RESA of less than 240 metres, by way of judicial review. NZALPA's case turned particularly on the requirements in:

- Rule 139.51(c) of the Civil Aviation Rules that RESA must be "acceptable" to the DCA;
- Appendix A.1 of those Rules that RESA must "if practicable" extend for a distance of at least 240 metres.

In the first instance, NZALPA was unsuccessful in the High Court and appealed to the Court of Appeal. The Court of Appeal held in February 2017 that the DCA had made several errors of law in his decision and set it aside *(NZALPA v DCA CAA & anor* [2017] NZCA 27).

Both the DCA and WIAL appealed the Court of Appeal's decision to the Supreme Court. To all intents and purposes, the appeals were treated by the Supreme Court as a single proceeding.

Summary of Decision

The DCA and WIAL appeals were unsuccessful. The Supreme Court held that the DCA had made two legal errors in his decision:

1. He had based his decision as to what was "practicable" solely on a cost-benefit analysis; and
2. He had adopted the wrong starting point for his decision by focusing on WIAL's proposal rather than the requirements of the Act and in not turning his mind to EMAS (a collapsible concrete arrestor system) because it was not part of WIAL's proposal.

The DCA's decision was therefore set aside. The Court noted that WIAL's latest proposal for an extension of 355 metres will in any event require a further decision from the DCA. The Court directed the DCA to consider any new application from WIAL in light of the reasoning in the judgment.

The key elements of the Court's reasoning that the DCA will need to consider are:

1. The DCA is responsible for determining whether RESA are acceptable. His role is not simply reactive; he has a more active regulatory role, which may involve the active identification of alternatives to what the airport operator has proposed.
2. The starting point for the DCA's decision must be the requirements of Appendix A.1 of the Rules, not what the airport operator proposes.
3. Under Appendix A.1 the starting point is a RESA of at least 240 metres if practicable. If a RESA of that length is impracticable the DCA must consider whether a length between 240 metres and 90 metres is practicable. Only if it is not is a 90 metre RESA acceptable.
4. What is "practicable" is not assessed solely by balancing the costs against the safety benefits. Nor does it mean what is "feasible" or "actually capable of being constructed".
5. A cost-benefit analysis may provide assistance to the DCA in reaching a determination as to what RESA is acceptable, but a cost benefit analysis is an incomplete tool.
6. The assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework of the Civil Aviation Act 1990. That includes the Act's purpose of promoting aviation safety. The DCA must consider whether safety can be improved when making his decision.
7. What is "practicable" will also depend on the particular circumstances of the particular airport, including any proposed extension to the runway. It may be practicable to require a longer RESA as part of a larger project to enhance the capacity of the airport by lengthening the runway. The additional benefit accruing to an airport operator from a longer runway may mean that a longer RESA is "practicable" in those circumstances.

Amber Aviation Academy Pty Ltd v Dmitry Agarev [2018] FWCFB 1066

- By Morgan Moroney, Sparke Helmore

Facts

Mr Dmitry Agarev was employed by Amber Aviation Academy Pty Ltd (**Amber Aviation**) until his employment was summarily terminated. Mr Agarev made an application to the Fair Work Commission seeking remedy for unfair dismissal against Amber Aviation. Amber Aviation sought to resist the application on the basis that it was a small business and the dismissal was consistent with the Small Business Fair Dismissal Code (**Code**).

Events Leading to the Dismissal

Mr Agarev was involved in the following safety incidents in the lead up to his dismissal (other incidents he was involved in are not relevant for present purposes):

1. Mr Agarev deleted from a whiteboard certain data relating to maintenance schedules and aircraft operations. This amounted to the following breach: '*leaving the aircraft status board blank and proceeding to change an approved system without formal change request or approval'.*
2. Mr Agarev was ill and obtained a medical certificate, and was then absent for 5 days. He did not disclose the nature of his condition. However, Mr Agarev had been suffering from stress, which if disclosed would have meant he was not assigned to active flight duties immediately on his return.
3. Mr Agarev was booked to undertake a three-hour training flight with a student. This required a flight plan involving the aircraft landing at Essendon Airport at least 10 minutes before last light. Mr Agarev did not confirm the end of daylight in the plan. He ultimately had insufficient time to return to Essendon Airport before last light and was forced to land at another airport south west of Melbourne. When the plane landed, it had only ten litres of fuel left, which is below the fuel reserves required by CASA regulations and company policy.

The Dismissal

A meeting was held between Mr Agarev and Amber Aviation's CEO Mr Naidu where the allegations about the breaches of policy arising from the flight plan incident and the fuel incident were put to Mr Agarev. Mr Naidu also put to Mr Agarev all other allegations. At the conclusion of the meeting, Mr Naidu stated there were 'a number of things of great concern here', and that he had to ensure that everyone operates with a 'safety mandate'. He then summarily dismissed Mr Agarev.

The Code

There are two steps required to determine whether an employer satisfies the Code in respect of the immediate dismissal of an employee. First, did the employer have a belief that the employee's conduct was sufficiently serious to justify immediate dismissal? Secondly, was this belief held on reasonable grounds? The second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the employer was correct in the belief that it held.

The Decision

The Commission found that Mr Naidu could not reasonably have formed the view that Mr Agarev breached safety policies on more than one occasion. Accordingly the Commission was not satisfied that there was any reasonable basis for Mr Naidu to have formed the view that he did in relation to Mr Agarev's approach to safety or his safety record.

The Fair Work Commission held the dismissal without notice was harsh. There was no evidence that Mr Agarev's conduct in failing to check end of light was wilful or deliberate or that his conduct caused a serious and imminent risk to anyone's health or safety or the reputation, viability or profitability of the business.

The Commission did accept that there was a valid reason for Mr Agarev's dismissal and Mr Agarev was afforded procedural fairness. However, the failure to give Mr Agarev notice of dismissal was found to be harsh and meant that the dismissal was unfair.

Amber Aviation was ordered to pay Mr Agarev a sum referable to his notice period.

Pascoe and CASA (Freedom of Information) [2018] AATA 1273

- By Melissa Dever, Sparke Helmore

When can a third party access information provided to the Civil Aviation Safety Authority (CASA) under the *Freedom of Information Act 1982*?: A review of CASA's decision to withhold requested information under the Freedom of Information Act.

Mr Pascoe made complaints about an individual to the Civil Aviation Safety Authority (CASA). In November 2015, to satisfy himself that the complaint was adequately addressed, Mr Pascoe applied to CASA for access to all documentation and correspondence concerning these complaints and CASA's subsequent investigation under the *Freedom of Information Act 1982* (FOI Act). In May 2016, CASA provided Mr Pascoe with access to most of the requested documents, however, refused access to 10 documents on the basis of the legal professional privilege exemption (s 42), the certain operations of agencies exemption (s 47E(d)) and the personal privacy exemption (s 47F) contained in the FOI Act.

Mr Pascoe's application to the Tribunal sought a review of the decision to withhold these documents.

Decision

The Tribunal found that each exemption had been properly applied and upheld the decision to refuse access to the 10 remaining documents.

In providing its reasons, the Tribunal considered each category of exemption in turn and made the following comments about the requirements for establishing each exemption:

1. Legal Professional Privilege (**LPP**)

   The Tribunal relied upon *Waterford v Commonwealth* (1987) 163 CLR 54 for the authority that "the test for common law legal professional privilege does not exclude government lawyers advising or acting in litigation for government".

   In addition to the 'dominant purpose test', the Court in Waterford held that for government lawyers to assert LPP, there "must be a professional relationship which secures to the advice an independent character notwithstanding the employment" and this will be a question of fact.

2. Certain Operations of Agencies

   Section 47E(d) states that a document is conditionally exempt from disclosure if its disclosure would, or could reasonably be expected to, "have a substantial adverse effect on the proper and efficient conduct of the operations of an agency".

   CASA's evidence noted the following:

   - CASA relies on informants within the Aviation industry to report unsafe and unlawful practices;
   - disclosure would remove informant anonymity, making potential informants reluctant to report safety breaches for fear of personal repercussions; and
   - the full and frank cooperation of the subjects of complaints during investigations would diminish for fear these records would become publicly available.

   The Tribunal accepted that CASA is primarily concerned with safety and releasing such information under the FOI Act would adversely affect their ability to perform this role.

3. Personal Information Exemption

   The release of personal information not publicly available, or solely regarding an individual's commercial and professional affairs, without consent and especially when volunteered to assist CASA with its investigations, is protected by this exemption.

The Tribunal held the above reasoning for exemptions two and three also satisfied the requirement that it be in the public interest to apply these exemptions to ensure CASA's effectiveness continues.

2. Government update

CASA's Review of aviation safety regulation of remotely piloted aircraft systems

Michael Nas, Associate Principal, Bennett +Co

The release of CASA's Drone Safety Review in May this year marks an inflection point in the development and regulation of commercial drones.[2] It follows a period of enormous growth in the sector and is CASA's first opportunity to take stock since CASA implemented its overhaul of Part 101 of the *Civil Aviation Safety Regulations 1998* (Cth) (**CASRs**) in late 2016. This short article outlines the key outcomes of CASA's Review, and considers the possible implications for the commercial drone sector.

The 2016 changes introduced new legal concepts and terminology, including the 'sub-2kg' rule, the 'landholder' rule and the 'excluded' category.[3] They added to the already-rich lexicon surrounding drones, also known as remotely piloted aircraft systems (**RPAS**) and unmanned aircraft systems (**UAS**).

The commercial drone sector has changed in many ways in the two years since the 'excluded' categories of operations were implemented. Today, drones are being used for genuine commercial purposes, from asset inspection (power-lines, infrastructure, and agriculture) to coastal surveillance, and all manner of things in between. It is not possible to prescribe the number of possible applications – they are essentially limitless.[4]

Predictions for the commercial drones of tomorrow are even more impressive. With an emerging global market estimated to be worth $127b according to a recent study by PWC,[5] drones now represent real business. This has caught the attention of established management consultants such as McKinsey[6] and Boston Consulting Group,[7] confirming this is an area of significant commercial interest. Australia is well-placed to take advantage of this technology.[8]

The opportunities inherent in drone technologies are also accompanied by certain challenges, the most 'pressing, pervasive and persistent' of which (according to CASA) relates to safety and the management of risks to people and property on the ground and in the air. Many of these challenges stem from the unique nature and capabilities of drone technologies. These capabilities were recently highlighted by *Time* magazine in its special report entitled 'The Drone Age', where nearly 1000 drones were used to simulate an image of the magazine's front cover.[9]

CASA's Review is therefore both reflective and prospective, outlining the current state of play for drone

[2] See CASA, 'Review of aviation safety regulation of remotely piloted systems' (2018) (https://www.casa.gov.au/aircraft/standard-page/drone-safety-review).
[3] See CASA, *Advisory Circular* 'AC 101-10 Remotely piloted aircraft systems - operation of excluded RPA (other than model aircraft)' .
[4] Australian Aerospace Industry Forum, 'Recommendations of the Australian Aerospace Industry Forum Sub-Committee on Unmanned Aircraft Systems Certification and Regulation for Routine Access of Small UAS to Class G Airspace' (Recommendation Paper, Australian Aerospace Industry Forum, November 2010), 2.
[5] Mazur, Michal, 'The drone revolution is disrupting industries ranging from agriculture to filmmaking' (https://www.pwc.pl/en/publikacje/2016/clarity-from-above.html)
[6] Cohn, Pamela, Green, Alastair, Langstaff, Meridith and Melanie Roller, 'Commercial Drones are here: The future of unmanned aerial systems', December 2017 (https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/commercial-drones-are-here-the-future-of-unmanned-aerial-systems/)
[7] Amoukteh, Alexandre, Janda, Joel and Justin Vincent 'Drones Go to Work', 10 April 2017 (https://www.bcg.com/publications/2017/engineered-products-infrastructure-machinery-components-drones-go-work.aspx).
[8] See Australian Centre for Robotic Vision, 'A Robotics Roadmap for Australia 2018' (https://www.roboticvision.org/wp-content/uploads/Robotics-Roadmap_FULL-DOCUMENT.pdf)
[9] http://time.com/longform/time-the-drone-age/

regulation and operations, and foreshadowing areas of future regulatory work.

CASA'S Review in Context

In CASA's own words, 'few developments in the history of civil aviation have given rise to the number and complexity of challenges that have been generated by the emergence and proliferation of remotely piloted aircraft…'.[10] These challenges are numerous and varied: maintenance of the safety of the aviation system of course takes primacy, but there are numerous other challenges, including social, economic, political and legal, involved in the integration of drones into the aviation system.[11]

Whilst technology has steamed ahead in recent years, the law has often struggled to keep pace. This has not always been the case for drones: in 2002, Australia became the first country in the world to promulgate substantive drone regulations, in the form of Part 101 of the CASRs. Around that time, the drone industry was in its infancy, there being then only a handful of manufacturers and operators, and with the industry largely being focused on medium-sized fixed wing drones such as the Australian-designed Aerosonde. This trend continued through the early 2000s as drone expertise within the military supplied a stream of new developments and applications for drones to the civil/commercial sector.

With continued miniaturisation and the increasing sophistication of components and sensors, the advent of the quad-rotor commercial-use drone signified a sea-change in the industry. With such capabilities now available to a broader range of participants, utilising "aircraft" traditionally foreign to the aviation industry, the need for regulatory change became an item of more pressing, global significance.

By 2015 there were approximately 2,000 remote pilot licenses (**RePLs**) on issue in Australia.[12] By 2016 the figure had reached in excess of 4,000.[13] In July 2017 there were reportedly nearly 6,000 licenses on issue, and at the time of writing the number is now in excess of 7,300.[14]

There are also now in excess of 1,200 operator certificates (**ReOCs**) issued to entities operating drones. Significantly, that number now *exceeds* the number of holders of Air Operator's Certificates issued to operators of conventional manned aircraft.[15] In addition, there have been over 10,000 online notifications from commercial RPAS operators intending to undertake commercial operations in accordance with the standard operating conditions forming part of the amendments released in September 2016.[16] Practical, commercial applications have also emerged in Australia, such as Google's Project Wing, which commenced trials of supply deliveries by drones to residents of Royalla, on the border of the ACT and NSW, in 2017.

The activity in the drone sector prompted the Minister of Infrastructure and Transport to request CASA undertake a review of the regulatory environment following the amendments to Part 101 in 2016 to ensure the effectiveness of the present regulatory approach towards drones.[17]

Outline of Review

In conducting its review, CASA first published a discussion paper in August 2017 setting out the issues for

[10] CASA Review, 6
[11] Clothier and Walker identify technical, operational, economic, political and social differences in Reece A Clothier and Rodney A Walker, 'The Safety Risk Management of Unmanned Aircraft Systems' in Kimon P Valavanis and George J Vachtsevanos (eds), Handbook of Unmanned Aerial Vehicles (Springer Science & Business Media BV, 2014) 2229, 33
[12] CASA Review, 19.
[13] CASA Review, 19.
[14] CASA Discussion Paper, 3; CASA Review, 19.
[15] CASA, 'Drone Safety Review', 5 June 2018 (https://www.casa.gov.au/aircraft/standard-page/drone-safety-review).
[16] CASA, 'Drone Safety Review', 5 June 2018 (https://www.casa.gov.au/aircraft/standard-page/drone-safety-review).
[17] CASA, 'Drone Safety Review', 5 June 2018 (https://www.casa.gov.au/aircraft/standard-page/drone-safety-review).

consideration and inviting public comment by way of a survey.[18] The discussion paper and survey were concerned with understanding the present state of play for drones in Australia, and obtaining information to help plot the next steps towards a more comprehensive regulatory framework for drones for the purposes of the Review.

CASA's Review deals primarily with the following issues:

1. the possibility of a mandatory registration system for drones (that is, both recreational and commercial drones);
2. proposed education and training initiatives for drone operators;
3. the possibility of deployment of mandatory 'geo-fencing' solutions; and
4. the status of CASA's responses to growth, safety and enforcement-related issues concerning drone usage in Australia.

CASA's Review concludes with an outline of the forthcoming regulatory roadmap, which will outline the path towards the mainstream integration of drones into the existing aviation system and is slated for release later this year. The key findings of the Review follow the same format below.

Key findings

Mandatory Drone Registration

The results of CASA's survey showed significant support for the implementation of a mandatory registration system for drones—both commercial and recreational.[19] The survey results indicated general support for mandatory registration by 86% of the surveyed participants. This is consistent with trends towards formal registration requirements in other jurisdictions, including the US, UK and Europe more generally.

The precise formulation of a proposed registration system is not addressed in the Review, though CASA considers the benefits for implementing such a scheme would include:

a) additional data gathering as to the types, numbers, locations and categories of drone activities;

b) increased transparency and avenues for communication by CASA to drone operators, which would facilitate educational and informational activities; and

c) a probable 'disincentive effect' such that the need to register would signify to operators that their details were 'on file' (as it were), operators therefore being on notice that infractions are capable of enforcement action by CASA.

In the future, registration may be coupled with 'e-identification' technologies whereby drones can be identified by radio signal or other means, allowing for further enhanced enforcement options.

These measures will of course carry some cost, expected to be borne by industry, with CASA endorsing an approach that would see commercial drone registration cost proportionally more than for recreational operations.

[18] CASA, 'Discussion Paper: Review of RPAS Operations', August 2017 (https://consultation.casa.gov.au/regulatory-program/dp1708os/)
[19] CASA notes that support in this instance was demonstrated by selection of any of the available registration options in the survey.

In light of the survey results indicating a preference by commercial operators for a weight- or mass-based registration scheme, CASA highlights the possibility of implementing a drone mass limit of 250g as the lower limit for a registration requirement. This may in turn mean raising the upper limit of the 'micro' class of drones – which are exempted from certain requirements – from 100g to 250g, so as to align with the practice in other jurisdictions such as the US and Canada.[20]

Education & Training

CASA's present approach to drone regulation utilises education and training as a critical means of ensuring the safe operation of drones. This approach has been utilised given the specific difficulties posed by drone usage, particularly the large number of new participants to the established aviation system, many of which participants have no prior exposure to this complex system.

For operations involving the issuance of RePLs and ReOCs, CASA found that it was satisfied that these processes were operating adequately to ensure the competencies of those involved in such operations. However, operations involving drones falling within the 'excluded' category are not currently obligated to meet these competency requirements, for instance, operations of sub-2kg drones.

CASA's Review therefore weighs up the costs and benefits of implementing a mandatory regime covering the 'excluded' operations so that competencies in terms of concepts relevant to aviation safety and drone operations can be verified. In that regard, CASA considered mandatory registration worthy of investigation given that:

1. there are an increasing number of drone operations conducted within 'excluded' categories; and

2. it believes there are an increasing number of operations – commercial and recreational – which have either an insufficient understanding of the rules or interpret those rules incorrectly[21] (CASA notes it has investigated but does not set out the specific data on which it relies for the proposition).

CASA determined from analysis of existing approaches in other jurisdictions that there was no consensus approach to training and education. For instance in the US, commercial operators of drones less than 25kg for certain purposes must pass an aeronautical knowledge test, whilst in Canada certain commercial operations with drones up to 1kg for certain purposes are excluded from the need to establish proficiency. In the UK a recent announcement was made that the Civil Aviation Authority was considering introducing a basic knowledge and safety test for any drone with a mass greater than 250g.

CASA concluded that its training and education regime as currently applied is sound and should be broadened to *include* those operations presently within the 'excluded' categories. CASA considers this would involve a simple online test with a minimum pass mark, with recreational operators subject to a similar, but less rigorous, process.

Geo-fencing

The term 'geo-fencing' refers to the isolation or 'fencing' of certain airspace to prevent drone access. This may be achieved through various means, most commonly involving drone software coded to prevent navigation into these areas delimited by GPS coordinates.

Geo-fencing therefore involves a technological solution to the complex issue of unauthorised airspace access by drones. Quarantined areas can be time-limited and subject to change, such as in the case of

[20] The UK is also considering a similar proposal: CASA Review, 14.
[21] CASA Review, 15.

temporary restrictions for a public event, or fixed, for instance, around airports. Some level of variation in the geo-fencing parameters may also be required to deal with the fact certain drones may be permitted within certain areas, with differences for commercial and recreational drones.

CASA notes the complexity involved in dealing with all of these matters, including the need to ensure the integrity of the data relied upon to ensure the accuracy of any geo-fencing system, and the need for continual update to the relevant geographical data. CASA also queries how CASA – together with AirServices Australia - might monitor and administer the use of such a system.

In that regard, while CASA notes the potential benefits, at this stage CASA does not have sufficient information – including as to the costs of designing and implementing such a system – in order to give full consideration to mandatory geo-fencing systems in Australia. This is an area of continuing research and development, but which has the potential to address significant safety concerns.

Growth, Safety & Enforcement Issues in Australia

The incredible growth of the drone sector is noted by CASA: current estimates place the probable number of drones in Australia (including recreational drones) as being in excess of 150,000. It is apparent from the data reported by CASA that there has been an increase in the number of incidents involving drones, including 151 reported 'near encounters' between drones and manned aircraft in 2017, exceeding the total number from the five-year period between 2012 and 2016 (127 reported near encounters).

CASA reports that the Australian Transport Safety Bureau (**ATSB**) has in turn conducted 10 investigations into drone occurrences, but has also commented that drones are in fact "safer than other aircraft conducting survey and photography aerial work" as noted by CASA.

It is unclear from the data presented by CASA as to the extent to which incidents relate to commercial and properly licensed/certificated drone operators as opposed to recreational drone or other users operating recklessly or deliberately. CASA does note that many recreational and excluded category operations are undertaken lawfully. However, whilst there is certain data available via the ATSB[22] there appears to be a need for more granular information. This ties in with the proposed information collection by CASA, perhaps reinforcing the stated benefits of a mandatory registration scheme set out above.

Indeed, CASA notes the difficulties inherent in its enforcement activities, stating that 465 safety complaints were received between September 2017 and mid-February 2018. Approximately 18% of those complaints were concluded on the basis there was insufficient information or evidence to proceed with an investigation and a further 30% of complaints were closed without there being any breach of regulation detected. In the remaining cases where there was sufficient information to establish an alleged breach, 29 complaints were escalated to enforcement level as serious matters with the remainder resulting in educational sessions being mandated by CASA as a penalty. CASA has publicly commented on the difficulties it faces in terms of enforcement when it comes to drones.[23]

Clearly, CASA is dealing with the rapid transformation of the aviation safety system needed to incorporate these diverse technologies, reflecting the the opening of its RPAS Branch last year and its expansion. Going forward CASA has signalled its focus on a commitment to a significant educational and marketing campaign incorporating all forms of media (for instance, CASA's 'Can I Fly There?' app) and continued industry

[22] Australian Transport Safety Bureau, 'A safety analysis of remotely piloted aircraft systems', 9 August 2017 (https://www.atsb.gov.au/media/5773362/ar-2017-016a_final.pdf).
[23] Emery, Kate, 'Drone control 'too hard' for aviation watchdog', 26 June 2018 (https://www.perthnow.com.au/news/aviation/drone-control-too-hard-for-aviation-watchdog-ng-b88877603z).

involvement. This includes CASA's involvement in international working groups (such as the Joint Authorities for Rulemaking on Unmanned Systems – JARUS – and the ICAO RPAS Panel). The effect of these programmes will be measured in due course by reference to additional safety and incident data accumulating over the forthcoming years.

Roadmap

CASA's roadmap is due for publication this year. Based on present indications, the roadmap will be a comprehensive document that will deal with numerous regulatory and safety matters.

The objective of the roadmap is to outline the steps that CASA foresees will be required in order to roll-out new and substantive regulation for drones to facilitate routine, efficient and effective commercial airspace access.

In that regard, CASA identifies 16 topics to be canvassed in the roadmap, including those set out above and several further topics of which the following are notable:

1. the role and nature of a future unmanned traffic management system (**UTM**), proposed to coordinate wide-scale drone integration and de-conflict flight paths between drones and other aircraft;

2. airworthiness and certification for the design and production of drones, and which may be seen (as it has been traditionally in conventional aviation) as a foundation for freedoms to access to airspace particularly over populous areas;

3. the requirements of increasingly autonomous systems, including automation in the drone, drone control system, and the UTM system itself; and

4. development of detection and collision avoidance systems that will be necessary in order to maintain separation between the various elements of the aviation system.

In light of the above issues, the roadmap will need to be adaptable to continual change in the technology and business cases for which drone technologies are applied.

Comment

CASA's Review highlights a number of possible forthcoming changes to the regulatory domain for commercial drone operations and outlines key issues that will be of increasing interest to all aviation stakeholders.

Chief amongst the possible near-term changes is the likely introduction of a mandatory registration system for drone users. The informational benefits CASA would derive from such a system and the reported general support amongst survey respondents for this proposal will likely see it come to fruition, particularly where such measures are being actively considered in other jurisdictions. These measures go hand in hand with the noted need for enhancement to CASA's oversight and enforcement abilities in order to tackle the difficulties caused by the lack traceability to the operator of any particular drone, complicating the task of identifying culpable individuals in the case of an accident.

Also of note is the possible amendment to the upper mass boundary for 'micro' drones from 100g to 250g, which arises in the Review in the context of both registration and training. Whilst seemingly a minor change, it will be interesting to see what effect this change (if made) would have on the drone

market. It appears that CASA has not conducted a risk assessment in relation to this proposal as yet.

With its focus on education and training as an integral aspect of the safety system, the introduction of a mandatory education regime for all drone users, including those presently excluded under the rules, seems likely. It is further likely this will not involve an overly rigorous testing system, but rather one in keeping with the proportionality of the risks involved. Indeed, as noted above, CASA considers that the training requirements forming part of the RePL and ReOC mechanisms are satisfactory, and those utilising these procedures to be operating in compliance with the rules.

In that respect geo-fencing offers a promising option for regulators such as CASA to effectively quarantine certain parts of the sky, particularly around vulnerable or congested areas. However, there are noted difficulties with design and implementation – and oversight thereafter – of such a system and, as with any other technological system, likely workarounds available to those wishing to circumvent the protection offered by the system. This is clearly an area for further research in CASA's view.

In the interim, CASA's internal mechanisms have responded to the growth of the drone sector with the opening of the RPAS Branch last year, increasing CASA's oversight of this sector. However, the sector's continual change and increasing complexity remains a challenge for CASA's existing resources.[24] In that respect, CASA recently announced it would become a 'fast follower' of regulatory developments in other jurisdictions rather than press to maintain a'market leader' status.[25] While this may be unfortunate given Australia's significant expertise in this area, this position is taken by CASA with the firm view of facilitating growth and innovation[26] by leveraging (and participating in) international work being conducted with greater resources.[27] In that respect, it may now be important to monitor the numerous and various developments overseas to ascertain the potential for adoption in Australia. For instance, an initial query would be whether CASA proposes to investigate the FAA's Low Altitude Authorization Notification Capability, which shows the potential for enabling drone access to certain controlled airspace at low altitudes and with near real-time approvals, and which is currently being implemented.[28] From there, the shape of a future UTM for drones will be an important issue for drone operators and the aviation system as a whole.

This is an exciting and continually changing area of technology and law, with the former (as usual) leading the latter. There are certainly many opportunities for lawyers to be involved in this sector. In fact, whether or not lawyers actively seek out such work they are more likely to encounter these issues in any case as drones become a greater and more visible component of everyday life. Accordingly CASA's Review indicates that CASA is alive to the present and future significance of drones, and that it will seek to facilitate innovation and integration safely and incrementally as demand for drone services continues to grow and the technology continues to mature.

[24] CASA, 'RPAS in Australian Skies', 13 March 2018 (https://www.casa.gov.au/about-us/standard-page/rpas-australian-skies-conference).
[25] CASA, 'RPAS in Australian Skies', 13 March 2018 (https://www.casa.gov.au/about-us/standard-page/rpas-australian-skies-conference)..
[26] See the terms of reference for the CASA Review: CASA Review, 7. See also CASA Review, 23.
[27] CASA, 'RPAS in Australian Skies', 13 March 2018 (https://www.casa.gov.au/about-us/standard-page/rpas-australian-skies-conference).
[28] Federal Aviation Administration, 'FAA UAS Data Exchange' (https://www.faa.gov/uas/programs_partnerships/uas_data_exchange/).

3. Geoff Masel Aviation Law Prize

Code-sharing in the Air Service Agreements

A critical analysis of the creation of another “un-freedom” of the air

Abstract

Starting from an analysis of the freedoms of the air and Article 6 of the Chicago Convention, this paper questions the legal admissibility of the inclusion of code-sharing authorization clauses in Air Service Agreements. The main finding is that such clauses are in breach of the Chicago Convention, as code-sharing falls outside the scope of application of Article 6 of the Chicago Convention.

Index

[Omitted]

List of abbreviations

CC44	Convention on International Civil Aviation signed at Chicago on 7 of December 1944.
IASTA	International Air Services Transit Agreement signed at Chicago on 7 December 1944
IATA	International Air Transport Association.
IATAG	International Air Transport Agreement signed at Chicago on 7 December 1944. VCLT Vienna Convention on the Law of the Treaties concluded at Vienna on 23 May 1969.

1 Introduction

In recent times a new shackle[1] has made its way in the international aviation negotiations between States. Under the impulse of increasingly restrictive domestic policies aimed at contrasting indirect market access, [2] the privilege to code-share has emerged in several Air Service Agreements (hereinafter ASA).[3]

My aim is to examine the extent to which the assimilation of code-sharing to the economic privileges exchanged in ASAs befits the framework of the CC44. Starting from an analysis of the sovereign nature of the freedoms of the air, I will move on to address how code-sharing has made its way from national regulations into the Chicago system[4]. As the inclusion of code-sharing within the Chicago concessionary system evokes the creation of a new freedom of the air, a question arises as to whether this outcome is admissible under the framework of the CC44.

For the cause of this assimilation lies in the artificial equivalence between operating carrier and marketing carrier as to the use of traffic rights, I argue that the wording of Article 6 CC44 does not support this conclusion. Therefore, an ASA that comprises regulation of code-sharing might lead to a conflict with Article 6 CC44, which under the principles of the VLCT ought to be resolved in favour of the latter.

2 From sovereignty to the freedoms of the air

To assess how code-sharing relates to the freedoms of the air, it is first necessary to address their source principle, sovereignty in the air.[5] Being "primarily the result of a desire on the part of nations to protect themselves from aerial attack in case of war, or to preserve their commerce in times of peace,"[6] Article 1 CC44 is a restatement of the sovereign structure of international aviation relations.[7] By prohibiting any scheduled international air service unless authorized by the interested State, Article 6 CC44 is the commercial expression of this principle.[8] As a consequence of States' inability to agree on a general exchange within the Convention,[9] Article 6 CC44 sets the normative background for the reciprocal transfer of the freedoms of the air between States.[10]

3 The freedoms of the air

3.1 Definition

The freedoms of the air are the by-product of the validation of States' sovereignty sanctioned by the CC44.[11] Mateesco Matte defines them as permissions for a foreign State to operate air services, by a designated carrier on agreed routes and carrying approved kinds of traffic, into or from the territory of the grantor State.[12] The use of the term "freedom" is a misnomer, as these concepts serve the purpose of withholding the relevant privileges unless specifically granted through detailed international Air Service Agreements and diplomatic letters.[13] Nonetheless, the term gained international normative application in the IASTA and the unfortunate IATAG. They are often unfittingly called "rights'', [14] a term well established in the bilateral negotiation system and which is also employed for the classification of transit/operational rights and traffic rights.[15]

3.2 Features

While sovereignty is the guiding principle, the economic needs of States characterize the actual structure and features of the freedoms of the air.[16]

According to the wording of Article 6 CC44, these transit and traffic privileges are focused on the operation of an air service. They embody a freedom to operate an aircraft between two or more points of the interested States. As discussed below, this feature is relevant because in a code-sharing scenario a distinction between the operation of the service and its marketing must be drawn.

Another important feature of these privileges is their transactional value. [17] The objective of an ASA is to support commercial air services by granting specific air traffic rights on a reciprocal basis.[18] The bilateral negotiation system underpinning this exchange has been described as reminiscent of "an exotic bazaar"[19]. As the freedoms of the air are exchanged like a commodity,[20] their value derives from the amount of protection each State wants to provide in its own airspace and territory: the higher the level of desired protection, the lower the traffic privileges exchanged.[21] Finally, each freedom represents a tool of economic regulation of international air transport, [22] alongside tariffs, capacity control and other features of an air service such as frequency. By means of their necessary exchange, States can control the economic exploitation of international air services operated to and from their territories.[23] This oversight extends to ancillary services that accompany the exercise of traffic rights: next to the right to operate an aircraft, foreign carriers enjoy the corollary right to sell transportation without limitation except for the need for approval of air tariffs and prices.[24]

4 Code-sharing and the freedoms of the air

4.1 Code-sharing as defined in ASAs

Code-sharing is a marketing practice by which an airline, the marketing airline, attaches its designator code to the service operated by another airline, the operating carrier. [25] There is no uniform international definition of code-sharing. [26] Nevertheless, in most ASAs, it is usually referred to as the combination of different IATA designator codes on the same flight.[27] This simple description highlights the equivocation problem of the term code-sharing: what airlines share is not the same designator code, but the aircraft and its operations, which are under their two or more designator codes.[28]

4.2 From national to international regulation of code-sharing

Code-sharing first emerged as a domestic US phenomenon. However, the practice gained international traction between 1980 and 1990 due to the interaction of different factors: the increase of hubs and seat capacity of the early 90's,[29] the policy of strict prohibition of domestic cabotage heralded by the US[30] and the introduction of the first Computer Reservation Systems.[31] On top of the marketing advantages, airlines saw in code-sharing an opportunity for virtual expansion of their networks where this was precluded by the absence of the necessary traffic rights.[32] As the practice emerged in the US, the Department of Transport was also one of the first aviation authorities to react to international code-sharing. In 1987 the agency started requiring all code-sharing agreements to be filed for approval and be subject to a public interest test.[33] Because of this policy,[34] the US and its bilateral partners started to negotiate expressly the right to code-share within the ASA framework thus setting the stage for the appearance of code-sharing in the Chicago system.

4.3 Code-sharing as a freedom of the air

Within the bilateral concessionary system,[35] code-sharing falls under the heading Commercial Opportunities.[36] Nonetheless, code-sharing lacks a uniform regulatory treatment and every ASA and national authority seems to freely adopt their own solutions,[37] thus reinforcing the idea of the persistence of States' "micromanagement of international aviation".[38]

Regardless of the qualification applied to this marketing practice,[39] there are two viewpoints on code-sharing and traffic authority.[40] The first deems code-sharing as neutral, to the effect that it does not require any prior authorization from the State affected by the code-shared service.[41] Therefore, where code-sharing is not regulated, it is allowed.[42]

The second views code-sharing as a form of indirect market access, which requires prior authorization based on underlying traffic rights or special code-sharing traffic rights.[43] According to this approach, code-sharing could amount to a quasi-traffic right[44] or even a full traffic right,[45] which must be specifically negotiated and granted in ASAs.[46] This more restrictive second view has gained traction among some major aviation jurisdictions and consequentially is reflected into the provisions of several ASAs.[47]

4.4 Concluding remarks

After having emerged as a simple marketing practice and following its national regulation, code- sharing is now openly addressed in ASAs.[48] The common thread is that code-sharing, like any traditional freedom of the air, has assumed a transactional value and serves the policy purpose of controlling scheduled air traffic. This outcome is possible since the principle of sovereignty over the airspace allows for States to regulate code-sharing as they desire.[49] Accordingly, code-sharing has shifted from a true liberty to yet another "un-

freedom" of the air.

5 Discrepancies between code-sharing and freedoms of the air

The inclusion of code-sharing within the economic activities authorized under ASAs and its assimilation to air operations points to the creation of a traffic privilege.[50] However, functional divergences between code-sharing and the concept of freedom of the air are apparent.

First, as far as the use of traffic rights is concerned, the identity of the marketing carrier is irrelevant. As code-sharing does not entail additional operations *per se*,[51] "it would be hardly compatible with the general principle of law that one cannot be required to have permission (local traffic rights) for something which is not there (local traffic).''[52] Moreover, code-sharing is not directly capacity-related, unless combined with a blocked space arrangement.[53]

The little relevance that ASAs give to interlining highlights the second discrepancy between code-sharing and a traditional traffic right. The practice of facilitating smooth connections impinges more on the authority to carry traffic internationally rather than code-sharing.[54] As a trunk route code-sharing arrangement relies on an amplified interlining accord, the operational and practical matters related to the effective use of the traffic rights fall under the interlining arrangement.[55] It follows that traffic rights are used under the interlining agreement and not by the overlying code-sharing arrangement. However, ASAs do not address interlining because it does not require other traffic rights in addition to these of the operating airline.[56] In other words, interlining interferes with much of the traffic authority, whereas code-sharing, in its purest form, [57] operates merely at the marketing level.[58]

A recent decision of the Verwaltungsgericht Braunschweig supports this conclusion.[59] The Lower Saxony Administrative Court had to assess the validity of German authorities' refusal to authorize Etihad's code-share on domestic routes operated by Air Berlin under the German-UAE bilateral. In rejecting Etihad's appeal, the court held *inter alia* that, regardless of the prohibition to attach its code to Air Berlin's domestic services, the claimant could effectively guarantee such services to its passengers through its interlining agreement with Air Berlin.[60]

6 Code-sharing in relation to Article 6 CC44

Notwithstanding the above-identified discrepancies, the alignment of code-sharing within the Chicago system has provided States with another bargaining chip for the "bilateral bazaar".[61] Whether this outcome is admissible, before being a problem of international aviation policy, is a legal question. In answering it, I argue that the inclusion of code-sharing in ASAs is disjointed from the legal framework established by Article 6 CC44.

6.1 Article 6 CC44 qualifies the principle of sovereignty

The leeway that States enjoy in including code-sharing within their ASAs relies on the idea that sovereignty allows them to regulate code-sharing as they wish. [62] But this assertion needs clarification. The CC44 does not merely restate the axiom of sovereignty in the air.[63] It also announces a

> broad principle, under which the former narrow nationalistic viewpoint with respect to sovereignty in airspace has given way to a more enlightened view, which in its ultimate aspects means that some part of each nation's sovereignty in airspace has been relinquished as means of serving the good of all.[64]

More specifically to the issue at hand,[65] Article 6 CC44 qualifies the principle of sovereignty in commercial

matters regarding scheduled services.[66] When addressing scheduled international air services, Article 6 CC44 is the reference for construing States' sovereignty, and not the general overarching principle of Article 1 CC44. In other words, Article 6 CC44, to which the States signatories of the Convention have bound themselves,[67] amounts to a limitation of the sovereignty principle as to the exchange of traffic and transit privileges.

6.2 Code-sharing falls outside the scope of Article 6 CC44

Since Article 6 CC44 is the guiding provision for the establishment of freedoms of the air, it is then necessary to understand how code-sharing fits within its framework. To this end, an interpretation of the exact wording of the CC44 provision is crucial, as it allows us to assess whether States can legitimately regulate code-sharing under its aegis.

Article 6 CC44 expressly prohibits the "operation" of scheduled international air service over or into the territory of a contracting State, unless authorized or permitted. This wording underlines a focus on the concept of aircraft operation that reverberates across all the Chicago system. As further suggested by Article 11 CC44, every policy and safety consideration related to the system of traffic rights attaches to this notion.[68] Although States exchange rights for the benefit of their designated airlines rather than for the aircraft,[69] any right provided for within the Chicago system refers to aircraft of a contracting State. Therefore, the notion of freedom of the air revolves around the concept of aircraft and its operation. By following an interpretative approach that starts from the ordinary meaning of the terms of the treaty,[70] the inference is that the framework provided for by Article 6 CC44 covers only instances of operation an aircraft.

Code-sharing involves holding out a service to the public,[71] which does not necessarily equate to operating the air service. This distinction is recognized in Article 96 c) CC44, which defines airline as "any air transport enterprise offering *or* operating an international air service".

The aircraft operator is the entity responsible for the navigation of the aircraft and employment of the crew.[72] Airlines from different States participating in a code-shared service do not coordinate with each other to offer a combined flight, rather, they pretend that each provides an integrated service that is effectively operated by just one of them.[73] The distinction between the operating carrier and the marketing airline is thus relevant. The latter does not operate the aircraft and is only involved in the marketing and sale of the service. Insofar as traffic rights cover the operation of the operating carrier, the service should not pose problems of economic authority.[74]

As Article 6 CC44 is concerned with the operation of the service, any regulation of an activity that does not affect that operation - such as attaching a designator code - falls out of its scope of application.[75] It follows that code-sharing is not a practice capable of being regulated as a freedom of the air. Any bilateral agreement that contains such clauses conflicts with Article 6 CC44. This conclusion is not affected by the level of liberalization sought by an ASA, because what it is in contention is the idea that code-sharing could be subject to bilateral negotiation.

6.3 ASAs that regulate code-sharing are in conflict with the CC44

The conflict that ensues between code-sharing clauses in ASAs and Article 6 CC44 could be avoided by asserting that such agreements have priority as *lex specialis*. Such objection is however rebuttable. As ASAs are international agreements, conflicts should be dealt with by referring to the guiding principles of the VLCT.[76] Article 30 VCLT provides that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". Since ASAs signed under the CC44 have to be registered with ICAO and contain an express reference to

the CC44,[77] under Article 30 VCLT the latter prevails in case of conflict.[78]

Moreover, the above-identified conflict between ASAs regulating code-sharing and Article 6 CC44 produces a second undesired effect on the Chicago bilateral system. An ASA that departs from the principles outlined in the CC44 could amount to a breach as opposed to States that are signatories to the CC44 but not to that specific ASA.

The practice of third-country code-sharing exemplifies this problem. This arrangement takes place when the marketing airline is from a State which is not a party to the bilateral agreement that covers the service to which the designator code is attached.[79] If an ASA expressly regulates code-sharing between two States, this might amount to an indirect prohibition of third- country code-sharing for a marketing airline of the third state, not party to that ASA.[80] However, as all three States have submitted themselves to Article 6 CC44, the third State whose marketing airline cannot attach its designator code might well argue that the ASA violates the CC44. This claim is founded, as the principle of parallel validity outlined in Article 30 (4) (b) VCLT "cannot apply to cases where one of these two treaties embodies interdependent or integral obligations, and the other treaty impedes the operation of those non-reciprocal obligations''.[81] Since Article 6 CC44 does not allow for the regulation of code sharing as a traffic right, States signatories to the ASA would be then in breach of the CC44 vis-a-vis the third State.

7 Conclusion

The inclusion of code-sharing within the reciprocal concession negotiated by States in ASAs points towards the creation of a new freedom of the air.

This trend is not only a further "shackle"[82] to international commercial aviation but also an illegitimate practice under international law.

A literal interpretation of Article 6 CC44 clarifies that the prohibition established under this provision revolves around the concept of aircraft operation. Code-sharing as defined in ASAs does not fit within this concept and thus falls outside the scope of application of Article 6 CC44. Therefore, a potential conflict between bilateral clauses that expressly regulate code-sharing as a freedom of the air and the CC44 arises. As the CC44 prevails, the inclusion of code-sharing in ASAs regulations amounts to violation of the current framework established under Article 6 CC44.

Endnotes

1 As Cheng evocatively observes, ''every newborn "freedom of the air" is in reality an additional shackle on the right to fly of foreign carriers, to be removed only at a price.'' B. Cheng, The Law of International Air Transport 17 (1962).

2 *See* ICAO, *Implications of airline codesharing* (Montreal, Canada: International Civil Aviation Organization, 1997). *See also*, B. Havel, *In Search of Open Skies: Law and Policy for a New Era in International Aviation* 114 (1997).

3 See P. Mendes de Leon, *Introduction Air Law* 85 (2017).

4 *I.e.* a "system of piecemeal give-and-take". B. Havel & G. Sanchez, The Principles and Practice of International Aviation law 75 (2014).

5 *See* A. McNair, *The Law of the Air* 8 (1953).

6 R. W. Fixel, *On the Law of Aviation* 70 (1928).

7 M. Zylicz, *International Air Transport Law* 59 (1992). See also P. Dempsey, *Public International Air Law* 28 (2008).

8 In the words of Mr. Barle, chairman of the International Convention on Civil Aviation, "in air commerce, there appears at present to be little place for the tramp trade". Proceedings of the International Civil Aviation Conference, I 57 (1948-1949).

9 *See* Section X, the Final Act of the International Civil Aviation Conference.

10 *See* P. Mendes De Leon, *Multifunctional Approach Towards Slot Allocation*, 62 *Zeitschrift fuer Luft- und Weltraumrecht* 559, ft. 31 (2013). *See* also R. F. Barron, *Code Sharing Agreements: A Developing Trend in U.S. Bilateral Aviation Negotiations*, 72 *Indiana Law Journal* 533 (1997).

[11] *See* Cheng, *supra* note 1, 123.

[12] *See* N. Mateesco Matte, *Treatise on Air – Aeronautical Law* 143 (1981).

[13] *Cf*. Wassenbergh, International Air Transport: Regulatory Approaches in the Nineties, at 75.

[14] *See* P. Mendes de Leon, *Cabotage in Air Transport Regulation* 44 (1992), where the Author notes that "in a world divided into closed airspaces, the grant of any transit or traffic right must be viewed as a privilege". See also Havel & Sanchez, *supra* note 4, 77 ft. 31.

[15] *Cf*. Zylicz, *supra* note 7, 81.

[16] See H. A.Wassenbergh, *International Air Transport: Regulatory Approaches in the Nineties*, 17 *ASL* 75 (1992). *See* also Havel, *supra* note 2, 117.

[17] See F. Loy, *Bilateral Air Transport Agreements: Some Problems in Finding a Fair Route Exchange*, in E. MacWhinney & M. A. Bradley (eds.) *Freedom of the Air* 179 (1968).

[18] *See* R. Kamp, *Bilateral Aviation Relations*, in S. Hobe et al. (eds.) *Cologne Compendium on Air Law in Europe* 215 (2013). See also E. Giemulla, *Chicago System*, in E. Giemulla (ed) International and EU Aviation Law 26 (2011).

[19] Zylicz, *supra* note 7, 143. *See also*, Havel, Beyond Open Skies: a New Regime for International Aviation 9 (2009).

[20] *See* Mateesco Matte, *supra* note 12 143.

[21] *See* A. P. Dobson & J. A. McKinney, *Sovereignty Politics and US*, 74 *Journal of Air Law and Commerce* 532 (2009).

[22] Wassenbergh, *supra* note 16, 75.

[23] *See* Havel & Sanchez, *supra* note 4, 75.

[24] *See* H.A.Wassenbergh & C. Cheng (ed), *Regulatory Reform in International Air Transport: Henri A. Wassenbergh's Select Essays over a Period of Fifty Years 1950-2000*, 239 (2000).

[25] *Cf*. ICAO, *Implications of Airline Codesharing* (1997).

[26] *See* P.P.C.Haanappel, *Airline Challenges: Mergers, Take-overs, Alliances and Franchises*, XX *AASL* 184 (1994).

[27] See e.g. Article 2.2 b) of the US open Skies Model Agreement, which reads ".[e]ach airline of a Party may, on any or all flights and at its option (…) combine different flight numbers within one aircraft operation". *See* also Article 25 of the ICAO Template Air Services Agreement (2004).

[28] *See* H.A. Wassenbergh, *supra* note 24, 236.

[29] *See* G. Gansfort, *Code-Sharing – ein neues Verkehrsrecht?*, in Müller -Rostin & R. Schmid (eds.) *Luftverkehrsrecht im Wandel* 80 (1997).

[30] *Cf*. Barron, *supra* note 10, 542.

[31] See R.I.R. Abeyratne, *Legal and Regulatory Issues of Computer Reservation Systems and Code Sharing Agreements in Air Transport* 165 (1995).

[32] See H. Ito & D. Lee, *Domestic Code Sharing, Alliances, and Airfares in the U.S. Airline Industry*, 50 The Journal of Law and Economics 356 (2007).

[33] See Havel, *supra* note 2, 109 ft. 390.

[34] *Cf*. Barron, *supra* note 10, 538.

[35] *See* Havel & Sanchez, *supra* note 4, 72.

[36] *See* Mendes de Leon, *supra* note 3, 84.

[37] *See* ICAO, *Manual on the Regulation of International Air Transport* 4.8-3 (2010). See also S. Neumann, *Code Sharing*, in S. Hobe et al (eds.), *Cologne Compendium on Air Law in Europe* 132 (2013).

[38] *Cf*. J. Shane, *Foreword*, in B. Havel, Beyond Open Skies: a New Regime for International Aviation x (2009).

[39] For an overview of the qualification of code-sharing as a non-traffic right, quasi-traffic right or full traffic right, *see* Gansfort, *supra* note 29, 94 ss.

[40] *See amplius* Abeyratne, *supra* note 31, 122 ss..

[41] *See* Neumann, *supra* note 36, 132.

[42] *See* Wassenbergh, *supra* note 24, 522.

[43] *Cf*. ICAO, *Implications of Airline Codesharing* at point 7 (1997).

[44] *See* K. Gunther, *Legal Implications of Code-Sharing Services – A German Perspective*, 22 ASL 9 (1997).

[45] *See* Gansfort, *supra* note 29, 109.

[46] *Id.*

[47] *See* e.g. Article 25 ICAO Template Air Service Agreement.

[48] *See* Neumann, *supra* note 37, 132.

[49] *See* Abeyratne, *supra* note 31, 122.
[50] *Cf.* Gansfort, *supra* note 29, 113. *See* also Neumann, *supra* note 37, 132. *But see*, J.E.C. de Groot, *Code-Sharing*, XIX *ASL* 72 (1994).
[51] de Groot, *supra* note 50, 71.
[52] *Id.* 70.
[53] *See* Wassenbergh, *supra* note 24, 524. *See* also Mendes de Leon, *supra* note 14, 116.
[54] *Id.* 525.
[55] *Cf.* Barron, *supra* note 10, 540.
[56] *See* Wassenbergh, *supra* note 16, 73. *See* also de Groot, *supra* note 49, 69. *See also* Gansfort,*supra* note 29, 107.
[57] *Id.*
[58] *See* de Groot, *supra* note 50, 63, who calls code-sharing a "marketing instrument along the lines of interlining''.
[59] VG Braunschewig 2. Kammer, Beschluss vom 29.12.2015, 369/15.
[60] *Id.* at 44.
[61] *Cf.* Havel, *supra* note 2, at 115.
[62] *See* Abeyratne, *supra* note 31, 122.
[63] *Cf.* Zylicz, *supra* note 7, 74.
[64] Fixel, *supra* note 6, 70.
[65] *See* Zylicz, *supra* note 7, 77.
[66] *See* Wassenbergh, *supra* note 16, 75.
[67] Although with reference to Article 7 CC44, *cf. Mendes de Leon, supra* note 14, 53.
[68] *See* also P. Mendes de Leon, *supra* note 3, 54.
[69] *See* Cheng, *supra* note 1, 290.
[70] *See* R. Gardiner, *Treaty Interpretation* 182 ss. (2015).
[71] *See* e.g. § 257.4 USCFR. See also Article 25 (a) [option 2] of the ICAO Template Air Service Agreement (2004).
[72] *See* Wassenbergh, *supra* note 24, 234.
[73] *See* Havel, *supra* note 37, 210.
[74] *See* Wassenbergh, *supra* note 24, 234.
[75] As Wassenbergh vividly notes ''a code is not flag'. Wassenbergh, in Cheng, at 236 ft. 8.
[76] *See* Kamp, *supra* note 18, 216.
[77] *See e.g.* the preamble and Article 38 ICAO Template Air Services Agreement (2004).
[78] A. Orekhelashvili, *Article 30*, in O. Corten & P. Klein (eds.), *VCLT A Commentary* 792 (2011).
[79] *See* Abeyratne*, supra* note 31, 119.
[80] *Cf.* E. Giemulla & H. van Schyndel, 'Rechtsprobleme des "Code-Sharing"', *Transportrecht*, 7/8 (1997), 255. See also Abeyratne, *supra* note 31, 119.
[81] Orekhelashvili *supra* note 78, 792.
[82] Cheng, *supra* note 1, 19.

4. Contributors

Robert Csillag
Solicitor, GSG Legal

Melissa Dever
Lawyer, Sparke Helmore

Morgan Moroney
Associate, Sparke Helmore

Richard McCabe
Counsel, New Zealand Airline Pilots Association

Michael Nas
AssociatePrincipal, Bennett + Co

Shannon O'Hara
Senior Associate, Carter Newell

Geoff Masel Award Winner
Pietro Benintendi
LL.M.Air and Space Law, Leiden University

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5. Editors and Secretariat

Genevieve Butler
Australian Transport Safety Bureau
Genevieve.Butler@atsb.gov.au

Dino Liistro
Sparke Helmore Lawyers
Dino.Liistro@sparke.com.au

ALAANZ Secretariat
Mecca Concepts Pty Ltd meccaconcepts@bigpond.com