

Choppergate: The Urgent Application to Get the Melbourne Media Helicopter Back in the Sky

Conor O’Beirne, Associate, Thomson Geer, tells the story of the urgent application to oppose CASA’s designation of the Melbourne CBD as a no fly zone, preventing the Melbourne media helicopter from being able to cover the COVID protests.

The last week of September is one of the best weeks of the year to be in Melbourne. Finals fever grips the city. The CBD buzzes. And even if you’re not a footy fan, it’s the first long weekend since early June.

Enter COVID. 2020 was a write off. 2021 too. Our holy day, the last Saturday in September (cruelly now the first Saturday in October) was ripped away from us. First Brisbane, now Perth.

As if losing the AFL Grand Final wasn’t a bitter enough pill, over what is meant to be one of the best, most enjoyable weeks of the year, the city was gripped by disgraceful and violent protests.

With patience, unity and decency at an all-time low, the city erupted.

This isn’t an article about the protests, nor the protesters. This is an article about something else that should never have happened.

This is an article about how the Melbourne media chopper – whose footage is shared between Channel Nine Channel Seven and the ABC – was grounded.

As Melbourne descended into an angry stupor, careful, considered and transparent coverage of the protests wasn’t just required, it was essential.

The shameful footage of Paul Dowsley being hit in the head by a can of energy drink is, in the worst possible way, iconic. It captured the city at its worst.

As coverage of the protests extended into Wednesday, Victoria Police put in a request to the airspace regulator – the Civil Aviation Safety Authority (CASA) – for the city to be declared a no fly zone.

They said live streaming of the protests from the media chopper was giving protesters on the ground who were watching the footage on their phones an unfair advantage and exposing their members to risk.

CASA agreed. A Notice to Airmen (NOTAM) was issued, and the airspace within 3 nautical miles of

the Melbourne CBD was off-limits. No aircraft were allowed in without the clearance of Victoria Police.

Those familiar with Australia’s airspace laws and regulations may find this odd. Given the CBD is what is known as “controlled airspace”, shouldn’t that be handed over to Airservices Australia, the statutory body set up to control and oversee the regulation of “controlled airspace”?

A great question. Which was promptly answered with a second NOTAM, which revoked the first. Now, no aircraft were allowed in the “controlled airspace” without the clearance of Airservices Australia, or the “uncontrolled airspace” without the clearance of Victoria Police.

We digress. The term unprecedented has been abused these past two years. Unprecedented this, unprecedented that. It’s an ugly term, often used incorrectly and as a filler. Well, we’re going to go there. CASA’s decision was unprecedented.

This was a disaster unfolding in the middle of Melbourne, and all of a sudden the media weren’t able to cover it from the sky.

Footage of protests from the sky gives a sense of scale. You might be told, “here’s footage of the protests as the protesters walk down Flinders Street, past the T-intersection with Elizabeth Street, as they head towards the Westgate Bridge.” Footage on the ground can’t tell that story – you can’t roll an extended clip to show the swell of protesters as they fan out along Flinders Street. Much like reporting a name in the context of a criminal proceeding, vision matters. If nothing else it’s important for context: words alone don’t capture the scale of a protest, let alone the one in Melbourne that week.

So, with the second NOTAM in force and the media chopper unable to capture any footage, we needed to work out a way in. Live streaming the footage was the non-negotiable. File or delayed footage wasn’t the tonic.

Melbournians needed to see what was unfolding in their city in real time.

From late on Tuesday afternoon our deep dive into the murky and technical world of airspace regulation began. Counsel were briefed – the inimitable and long-time friend of the media, Will Houghton QC, and administrative law guru Collette Mintz – and we set to work.

Judicial review. That was our way in. Reviewing the decision of the CASA to issue the second NOTAM.

An urgent Federal Court listing for 9am Wednesday morning sought. The application and supporting affidavit were drawn up overnight.

The documents went in not long before 9am and our application was underway.

3 and a half hours later, we obtained interim relief. The second NOTAM was stayed, pending final determination.

The chopper was back in the sky.

Upon receipt of the Court’s decision, CASA decided to permanently withdraw the NOTAM in the interests of safety. A new NOTAM wasn’t issued.

The chopper was back in the sky for good.

After the NOTAM was withdrawn, there was nothing left to litigate. Precedential value of a decision on the question of CASA’s delegation aside, a final determination of a thing no longer in force was neither an efficient nor appropriate use of the Court’s time or resources.

Questions remain about the legality and appropriateness of any delegation under Australia’s airspace laws remain, but the primary objective was realised.

The now petering-out protests were once again able to be covered from the sky: public backlash against the protests and the protesters grew and Melbourne’s healing started.

We won’t be quite whole again until the MCG hosts the AFL Grand Final, but we’re getting there.