

Aviation Finance Alert

Australia to become a signatory to Cape Town Convention

In brief

- Australia will be "signing up" to the Cape Town Convention, an international treaty intended to regulate and protect security interests in moveable property such as aircraft, railway rolling stock, etc
- The Convention is likely to take effect in Australia from some time in 2014.
- Adopting the Convention will require enabling legislation to be enacted, including amendments to the *Personal Property Securities Act 2009* (Cth), which took operational effect earlier this year.

The Australian Minister for Infrastructure and Transport, the Hon Anthony Albanese, has announced¹ that Australia will "sign up" to the Cape Town Convention ("Convention").² Under the timetable proposed, the Convention will take effect in Australia from some time in 2014.

The Convention is an international treaty intended to regulate and protect security interests in moveable property such as aircraft, railway rolling stock, etc. There is a specific Protocol to the Convention to deal with the application of the Convention to "aircraft equipment" ("Aircraft Protocol").³

The Minister's announcement mentions only the Convention, but it seems clearly intended that Australia will also become a signatory to the Aircraft Protocol.

The stated objective for Australia in becoming a signatory to the Convention, according to the Minister's statement, is to give the Australian aviation industry "access to lower cost finance for aircraft

purchases". Export credit agencies ("ECAs") in the United States and several other countries, in line with the aircraft sector understanding ("ASU") that was agreed in 2007 under the auspices of the OECD, offer a lower fee rate to support finance for the purchase of aircraft by buyers in countries that have ratified the Convention.

The Convention and Aircraft Protocol establish an "International Registry", maintained in Ireland, for the registration of security interests in aircraft equipment. Registrations and searches on the International Registry are made online. They are simple and relatively inexpensive.

As at 1 November 2012, there were 52 signatory countries to the Convention and 46 to the Aircraft Protocol. In New Zealand, the Convention and Aircraft Protocol came into force in November 2011.

Amendments needed to PPSA

Enabling legislation will be needed in Australia before the Convention and Aircraft Protocol can enter into force under domestic law. In particular, amendments will need to be made to the *Personal Property Securities Act 2009* (Cth) ("PPSA"), which took operational effect on 30 January 2012.

Various definitions in the PPSA (eg "aircraft equipment") have already been drafted to harmonise with the Convention and Aircraft Protocol.

¹ See: http://www.minister.infrastructure.gov.au/aa/releases/2012/October/aa216_2012.aspx#text.

² International Institute for the Unification of Private Law (UNIDROIT), "Convention on International Interests in Mobile Equipment" (Cape Town 2001) – see: <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>

³ Protocol on Matters Specific to Aircraft Equipment (Cape Town 2001) – see: <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR2>.

Importantly, however, provisions will be needed to govern the interaction between the different registration regimes established under the Convention and the PPSA. A fundamental issue – canvassed in a discussion paper issued by the Department of Infrastructure and Transport ("DIT") in November 2010⁴ but without any recommendation – is whether to adopt a system of "dual registration", with security interests in aircraft equipment being registrable under both the Convention and the PPSA, or a system of "deemed registration", with registration under the Convention being deemed also to constitute registration under the PPSA.

In addition, the Convention and Aircraft Protocol contain a range of options which signatory countries need to decide on, and declare to apply if they so wish.

Regulation Impact Statement updated

Following the Minister's announcement, the DIT has released an updated version of a Regulation Impact Statement ("RIS"), first issued in December 2010, about whether and how Australia should implement the Convention.⁵

The original RIS presented three options:

- Option 1: to accede to the Convention and to make all declarations specified in the ASU;
- Option 2: to maintain the status quo and not accede to the Convention; and
- Option 3: to accede to the Convention without making all declarations necessary under the ASU to qualify for a financial discount from the relevant ECAs.

The updated version of the RIS recommends adopting Option 1.

Next steps

The DIT, together with Australia's Attorney-General's Department ("AGD"), have responsibility for progressing accession to the Convention and administering related legislation and amendments. According to the RIS, the AGD has begun analysing the Convention to identify "convergence and

divergence" between the Convention and the rules and concepts under the PPSA.

The RIS notes that "it is possible that comments and input from [industry] stakeholders will be sought" during this process, and we would strongly encourage that.

What do you need to do?

It will be some time before any details will be known of how the PPSA will be amended to accommodate the Convention.

In the meantime, airlines and aviation financiers in Australia should:

- continue to register security interests in aircraft equipment under the PPSA;
- include suitable provisions in their aviation finance documentation to anticipate registration under the Convention once it takes effect in Australia; and
- seek to participate, through consultation with the AGD, in the development of the legislation to implement the Convention and amend the PPSA, to ensure that the legislation is practicable and reflects industry needs.

⁴ The discussion paper can be accessed at: http://www.infrastructure.gov.au/aviation/international/consultation_cape_town.aspx.

⁵ See: <https://ris.govspace.gov.au/files/2012/10/cape-town-ris-dec-2010-20121016.pdf>.

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