

Aviation Finance Alert

Australia passes laws to adopt Cape Town Convention

WHAT YOU NEED TO KNOW

- Australia has passed laws to adopt the Cape Town Convention (Convention) and Aircraft Protocol (Protocol), with an operative date yet to be proclaimed but expected to be sometime in 2014.
- Consequential amendments have also been passed to the *Personal Property Securities Act 2009* (Cth) (PPSA) and Australia's aviation legislation, with an operative date to be the same as for Australia's adoption of the Convention and Protocol.
- Once operative, the amendments will ensure that the Convention and Protocol will prevail over the PPSA to the extent of any inconsistency.

WHAT YOU NEED TO DO

Until the Convention and Protocol come into operational effect in Australia, airlines and aviation financiers 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; and
- monitor declarations made by Australia as to how the Convention and Protocol will apply once it does take effect.

As reported in our *Aviation Finance Alert* of 13 November 2012 ([see here](#)), the Australian Government announced in October 2012 that Australia would be adopting the Convention and Aircraft Protocol¹. Adoption would allow security interests in "aircraft equipment" under Australian law to be registered on the online International Registry maintained under the Convention.

Enabling legislation for Australia to adopt the Convention and Protocol was passed on 20 June 2013. The legislation comprises the *International Interests in Mobile Equipment (Cape Town*

Convention) Act 2013 (Cth) (Cape Town Act) and the *International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments) Act 2013* (Cth) (Consequential Amendments Act).

Once the legislation receives Royal Assent, the Cape Town Act and the Consequential Amendments Act will come into operational effect on the same day as each other, being a date to be proclaimed. In announcing Australia's intention to adopt the Convention and Protocol, the Minister indicated this was likely to be sometime in 2014.

Application to domestic Australian law

The Cape Town Act will give the Convention and Protocol the force of law in Australia. It provides that the Convention and Protocol will prevail over

¹ The International Institute for the Unification of Private Law (UNIDROIT) "Convention on International Interests in Mobile Equipment" (Cape Town, 2001) (<http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>) and "Protocol on Matters Specific to Aircraft Equipment" (Cape Town, 2001) (<http://www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR2>).

any other Australian law to the extent of any inconsistency.

The Cape Town Act also empowers the Minister to make rules for the purpose of carrying out and giving effect to the Convention and Protocol. By this means Australia will be able to make the various declarations needed for the Convention and Protocol to operate as part of Australian domestic law.

Interaction with PPSA

With the adoption of the Convention and Protocol, the operation of the *Personal Property Securities Act 2009* (Cth) (PPSA) in relation to "aircraft equipment" will not be excluded altogether; the Convention and Protocol will simply prevail to the extent of any inconsistency.² This leaves room for the continued operation of the PPSA in relation to aircraft equipment in some respects.

This contrasts with the legislation to adopt the Convention and Protocol in New Zealand, which effectively excludes the operation of the New Zealand PPSA to the extent the Convention or protocol applies.³

Pre-existing interests in aircraft

We do not expect the Convention and Protocol to apply to pre-existing interests in aircraft equipment. Under Article 60(1) of the Convention, the default position is that the Convention will not apply to pre-existing interests, which will retain the priority they enjoyed under applicable law before the application of the Convention, unless Australia makes a "declaration to the contrary" to override that. By way of comparison, we understand New Zealand has made no such declaration, and so retains the default position.

CASA functions

The Consequential Amendments Act will extend the functions of the Civil Aviation Safety Authority (CASA) to include functions conferred on CASA under the Convention Act or rules made under it. This will allow rules to be made under the

Convention Act to enable CASA to record, remove and exercise IDERAs (Irrevocable Deregistration and Export Request Authorisations) in respect of aircraft equipment as contemplated under the Convention.⁴

Airservices statutory liens

A further amendment that will be made by the Consequential Amendments Act is to include a new note to s.60(3) of the *Air Services Act 1995* (Cth) to clarify that a statutory lien over an aircraft in favour of Airservices Australia under s.59 of that Act for unpaid service charges will prevail over a later registered interest in that aircraft under the Convention.⁵

In reality, this should have little practical effect, because the current practice of Airservices Australia is to recover its service charges under contracts with air carriers, rather than under its statutory powers. As a result, no statutory liens under s.59 are currently imposed.

² Section 8 of the Cape Town Act, reinforced by an amendment made by the Consequential Amendments Act to s.256 of the PPSA.

³ Under s.106 of the *Civil Aviation Act 1990* (NZ), inserted by the *Civil Aviation (Cape Town Convention and Other Matters) Amendment Act 2010* (NZ), the Convention and Protocol have effect "in place of" any other New Zealand law "to the extent that the Convention or the Protocol applies to a matter to which the other law applies."

⁴ See the Explanatory Memorandum to the Consequential Amendments Act, p.1.

⁵ Airservices Australia is understood to have adopted this practice in response to a challenge by a number of airlines to its statutory powers, and to have maintained the practice despite the validity of the statutory powers being ultimately upheld by the High Court of Australia in the late 1990s.

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