

Australia to accede to Cape Town Convention

Australia has passed legislation enabling the country to adopt the terms of the Cape Town Convention, an international treaty designed to protect and enhance commercial security and ownership interests in movable property including aircraft and engines.

As a result, lenders, lessors and investors will have the benefit of a uniform and internationally recognised security position across their portfolios, while borrowers are likely to be able to enjoy a discount on their existing funding costs in respect of Australian-registered aircraft or aircraft mortgaged by or leased to Australian entities.

The Cape Town Convention will also have a significant impact on the relevance of the recently introduced *Personal Property Securities Act 2009* (PPSA) to aviation finance.

Background

In October 2012, the Australian Minister for Infrastructure and Transport announced that Australia would accede to the Cape Town Convention with effect from 2014.

There are three equipment specific protocols to the Convention, relating to aircraft objects (qualifying airframes, engines and helicopters), railway rolling stock and space assets, but to date only the Aircraft Protocol has entered into force. This briefing focuses on the treaty as it applies to such aircraft equipment. The Convention and the Aircraft Protocol establish an "International Registry"

for the priority registration of certain creditor interests (known as "international interests") in such aircraft equipment and offer a harmonised set of rights and remedies for holders of international interests against debtors.¹

Two bills have now received royal assent and are expected to become applicable by early 2014 (once the relevant elections have been made by regulation).

The following Acts were assented to on 28 June 2013:

- the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013*

Key issues

- Australia likely to adopt "qualifying declarations"
- Convention to take precedence over all other laws in Australia
- accession is expected to address the uncertainties associated with the PPSA
- aviation industry stakeholders to reap the benefits of the Convention.

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

These Acts provide for the Cape Town Convention to have force of law in Australia and give the Cape Town Convention precedence over all other laws in Australia to the extent that any inconsistency arises. The Acts also propose to amend the *Air Services Act 1995*, *Civil Aviation Act 1988*, and the PPSA to ensure that the Cape Town Convention complements and operates consistently with other Australian laws.

In addition, the Acts enable the promulgation of rules that give effect to the Cape Town Convention. These rules will most likely be used to confer functions upon the Civil Aviation Safety Authority in relation to the de-registration and export of aircraft.

The benefits of acceding to the Cape Town Convention

The Cape Town Convention has received an overwhelming amount of support across the aviation industry in Australia. The advantages of acceding to the Cape Town Convention can be summarised as follows:

- there will be improved predictability in relation to enforcing asset security and ownership rights - this will most likely reduce risks for creditors and consequently facilitate the extension of international finance as a source of credit in Australia, including, it is hoped, in relation to capital markets funding
- airlines and operating lessors based in Australia should be entitled to premium discounts from export credit agencies under OECD rules
- the treaty will lead to a harmonisation of Australia's aviation securities laws with those that apply internationally, thereby strengthening Australia's competitiveness in the global aviation market.

However, the premium discount on export credit agency supported financing mentioned above will only be available if certain OECD requirements are met, including if "qualifying declarations" are made by Australia in implementing the Cape Town Convention. These include the

adoption of (a) a specific insolvency regime and (b) de-registration and export process, for aircraft objects.

For that reason, the explanatory memorandums to both Acts recommend that the qualifying declarations be made as soon as possible and it is expected that Australia will adopt those recommendations before year end.

Interaction between the Cape Town Convention and the PPSA

Although the PPSA and the Cape Town Convention are very similar in their application, the PPSA does not address aircraft security interests in a manner consistent with the Cape Town Convention and new concepts in the PPSA have resulted in a degree of uncertainty around the protections available to holders of security interests in aircraft equipment.

One key difference between the PPSA and the Cape Town Convention relates to the governing law provisions of the two regimes in respect of property interests, including security interests. The PPSA stipulates that when the relevant collateral is aircraft which ordinarily moves between jurisdictions, the applicable law governing the validity of a security interest can be determined by reference to the jurisdiction in which the grantor is located when the security interest attaches to the aircraft. In contrast, the Cape Town Convention focuses on the concept of an international interest, which arises if certain treaty conditions are met, and which exists independently of any national law security interests.

Another difference is the scope of each regime. While the PPSA applies

to all aircraft objects regardless of size and type, the Cape Town Convention only applies to airframes that can carry eight or more passengers or in excess of 2750 kilograms of goods (five passengers or 450 kilograms for helicopters) and aircraft engines with at least 1760 pounds of thrust. This means there will be certain aviation objects which will fall outside the treaty rules, and will still be subject to the PPSA.

Finally, the PPSA is less specific in terms of the remedies it can offer for security interests in aircraft. The PPSA is silent on the de-registration and export of aircraft whereas the Cape Town Convention specifically provides for this remedy upon debtor insolvency or default (subject to the Contracting State making the required declarations).

Timing

The necessary Acts have received royal assent but given the three-month transition period prescribed by Article 49 of the Convention, the Acts (together with regulations giving effect to the required elections) will likely come into force in late 2013 or early 2014.

Further information

Contact the Clifford Chance advisers listed on this briefing, or your usual Clifford Chance adviser, if you would like further information on the Cape Town Convention and its application in Australia.

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1. Please refer to our previous briefing: http://www.cliffordchance.com/publicationviews/publications/2012/10/australia_adoptscapecapetownconventiononasse.html

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