

**National Interest Analysis [2012] ATNIA 24
with attachment on consultation and Regulation Impact Statement**

**Convention on International Interests in Mobile Equipment,
done at Cape Town on 16 November 2001**

[2001] ATNIF 35

and

**Protocol to the Convention on International Interests in Mobile Equipment on Matters
Specific to Aircraft Equipment,
done at Cape Town on 16 November 2001**

[2001] ATNIF 36

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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Nature and proposed timing of treaty action

1. It is proposed that Australia accede to the *Convention on International Interests in Mobile Equipment* (the Convention) and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (the Protocol). Together, the Convention and Protocol are known as the *Convention on International Interests in Mobile Equipment as applied to aircraft objects*, commonly called the ‘Cape Town Convention’. The Cape Town Convention entered into force generally on 1 March 2006.
2. The Convention identifies three categories of “mobile equipment”: aircraft objects¹, railway rolling stock and space assets. The Convention does not apply to a category of objects until a relevant protocol is in effect. Accordingly, in the case of aircraft objects, the Convention will only enter into force for Australia when the Protocol enters into force for Australia.
3. While separate instruments of accession to the Convention and the Protocol are required, the Cape Town Convention will enter into force for Australia on the first day of the month following three months after the date of the deposit of its instrument of accession to the Protocol, pursuant to Article 49 of the Convention and Article XXVIII of the Protocol.
4. Australia intends to make certain declarations to apply or modify the application of provisions of the Cape Town Convention. An outline of the declarations Australia intends to make under the Cape Town Convention are detailed at paragraphs 34, 35 and 36 below.

Overview and national interest summary

5. The Cape Town Convention provides a mechanism for persons with a financial interest in aircraft objects (such as aircraft lessors, sellers or financiers) to recover their assets in the event that an airline defaults on its payments. The key objectives of Australia’s accession to the Cape Town Convention are to:

¹ “Aircraft objects” are airframes (aircraft bodies), aircraft engines and helicopters (Article 2(3)(a) of the Convention).

- a) provide financiers of aircraft and aircraft objects with increased certainty around Australia's insolvency laws as they apply to highly mobile equipment; and
 - b) allow for increased access by the Australian aviation industry to cheaper asset financing and sources of finance external to the domestic market.
6. The Cape Town Convention achieves these objectives by creating a uniform international legal framework to protect financiers of aircraft and aircraft objects. By enhancing financier security and reducing their risks, the Cape Town Convention will assist Australian airlines in achieving significant savings on financing costs, at a time when industry participants are seeking to both recover from the impact of the global financial crisis and modernise their fleet.
 7. As at 3 July 2012, 45 States and one Regional Economic Integration Organisation (the European Union) had become party to both the Convention and the Protocol.

Reasons for Australia to take the proposed treaty action

8. The Cape Town Convention, established under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organization (ICAO), addresses the issue of disjointed creditor security and access to finance effectively by providing a homogenous securities system tailored to the needs of the global aviation industry.
9. The Convention establishes an International Registry which enables creditors to record security interests in mobile equipment ('international interests'). In the case of aircraft objects, the International Registry² is administered by Aviareto³ under contract with ICAO. In the event of default, the International Registry gives a registered interest priority over other interests in the same equipment that are either registered later in time or are unregistered. The Convention also provides basic remedies in the event of default. This increases the protection of creditors' interests and concurrently reduces their risks.
10. The Protocol modifies and supplements the Convention in relation to aircraft objects. It enables security interests in the following objects to be registered on the International Registry:
 - a) aeroplanes certified to transport at least eight persons including crew, or goods in excess of 2,750 kilograms;
 - b) jet engines of at least 1,750 lb of thrust or its equivalent, and turbine or piston engines of at least 550 rated take-off shaft horsepower or its equivalent; and
 - c) helicopters certified to transport at least five persons including crew, or goods in excess of 450 kilograms.

² www.internationalregistry.aero

³ Aviareto is a joint venture between SITA SC (an information and communications company specialised in the needs of the air transport industry) and the Irish Government.

11. The Protocol offers two additional remedies to creditors in the event of default, being the removal of an aircraft from a State Party's civil aircraft register⁴, and the export of the aircraft to another State. It also establishes a special insolvency regime in relation to aircraft objects.
12. Without the measures set out in Convention and the Protocol, creditors' interests remain subject solely to the domestic laws and processes of various jurisdictions at any given time, with varying levels of creditor protection. In turn, this instability has caused financiers to drive up their costs as a buffer against these risks, which are then passed on to the airline industry.

Improved creditor security

13. The collapse of Ansett in 2001 highlighted gaps in Australia's existing insolvency measures that could benefit from a more rigorous and uniform securities framework. The *Personal Property Securities Act 2009* (PPS Act) largely addressed that issue as it overhauled the domestic regulation of personal properties securities interests. However, the aviation industry has expressed concern that this system does not provide for the unique financing requirements applicable to aviation.
14. Accession to the Cape Town Convention will bridge this gap and reduce creditor risk exposure by providing a securities framework that applies across borders and allows for the prompt repossession of an aircraft asset or the taking of other action by a creditor upon insolvency (addressing the highly mobile and depreciative nature of aircraft).

Enhanced access to finance by Australian airlines

15. For airlines, accession to the Cape Town Convention may result in reduced financing costs, producing significant savings at a time when airlines are looking to recover from the global financial crisis and remain globally competitive. These reduced costs are primarily achieved by lowering creditor risk which will, in turn, manifest itself in the form of cheaper finance for airlines for the purchase of aircraft objects.
16. This financial benefit is best realised through the 2011 Sector Understanding on Export Credits for Civil Aircraft (ASU), developed by the Organisation for Economic Co-Operation and Development (OECD), in which Australia is a participant. The ASU provides a common framework for export-credit agencies of Australia, the Republic of Korea, Norway, Switzerland, New Zealand, the European Union, the United States, Japan, Brazil and Canada to finance aircraft objects. A fee discount is offered for airlines of countries that are party to the Cape Town Convention provided they have made all specified 'qualifying declarations' upon becoming party to the Cape Town Convention. Australia intends to make the requisite qualifying declarations upon accession (refer to paragraph 36 below).

⁴ Australia's civil aircraft register is maintained by the Civil Aviation Safety Authority. Removal from the civil aircraft register would prevent the aircraft from operating.

17. By providing greater certainty to international creditors, accession to the Cape Town Convention will also see the availability of low-cost global finance open up for Australian airlines. This would allow better fleet planning, which may in turn improve operating efficiency, competitiveness and profitability.

Obligations

18. The Cape Town Convention preserves the autonomy of the contractual relationship between parties to financing agreements. Parties to such agreements retain the right to determine what constitutes 'default' and what will give rise to default remedies (Articles 8 and 11 of the Convention).
19. Under Chapter III of the Convention and Chapter II of the Protocol, Australia will be required to observe and make available particular remedies to creditors in the event of debtor default, including rights of repossession, sale and lease and rights to proceeds from objects subject to a security interest. All remedies are required to be carried out in a 'commercially reasonable manner' (Protocol, Article IX(3)). The ranking in priority of competing interests in Chapter VIII of the Convention will prevail over the PPS Act to the extent of any inconsistency.
20. Australia would also have obligations which arise from the declarations to the Cape Town Convention which Australia intends to make upon accession. For example, if a declaration is made in respect of Articles XI and XIII of the Protocol, the Civil Aviation Safety Authority (CASA) would be required to record an irrevocable de-registration and export request (IDERA) form (as set out in the Annex to the Protocol) and make available certain remedies to the creditor within five working days. (The IDERA form is the mechanism by which a creditor could procure the deregistration and export and physical transfer of the aircraft object from the territory in which it is situated.) Australian authorities would also be obliged to co-operate and assist in the exercise of those remedies. The remedies could include the right to procure the removal of the aircraft from the Australian Civil Aircraft Register in the event of default, where this has previously been agreed by the parties to the financing arrangement.
21. Australia is obliged to permit a person to exercise those remedies and other remedies available under the Cape Town Convention by recourse to Australian courts (see, for example, Articles 8(2), 9(2), 10 and Chapter XII of the Convention).

Implementation

22. The Government proposes to introduce new legislation to give the Cape Town Convention the force of law in Australia. Minor amendments may also be required to existing legislation, as described below.
23. The PPS Act may require minor amendments to reflect the prevalence of the Convention to the extent of any inconsistency. The *Corporations Act 2001* may require minor amendments to implement the Cape Town Convention.

24. The *Civil Aviation Act 1988* may require amendment to confer upon CASA powers to record IDERAs and create new regulations to this end, depending on how Australia decides to approach the administration of IDERAs.
25. The Civil Aviation Safety Regulations 1998 will require amendment to allow for Articles XIII (which requires the recording of an IDERA) and XI (remedies for insolvency) of the Protocol to be effectively carried out.
26. The States and Territories will not be required to amend their legislation. However, they will be consulted on any changes to the PPS Act.

Costs

27. Accession to the Cape Town Convention will not result in significant financial implications for government stakeholders, business or industry. This is largely because registration under the Convention is voluntary and subject to commercial negotiations between creditor and debtor.
28. Airlines and creditors that choose to register interests in accordance with the Convention will be subject to a small administrative fee (one-off fee of US \$200 for first time users; registration and search fees ranging from US \$35 to US \$100). It is anticipated that these low costs will be offset by the broad benefits – financial and otherwise – available under the Convention.
29. The administrative issue of the interaction between the International Register and the Australian PPS register will be determined in consultation with government agencies and industry during the legislative drafting process. If ‘dual registration’ is permitted through legislation (where an interest can be registered both on the Australian PPS register and the International Register) an additional, low fee will also apply for PPS registration. If a process of deemed registration is legislated, airlines will only be subject to the International Register fees.
30. Any administrative fees applicable to creditors in seeking to apply Article IX remedies are expected to be low.

Regulation Impact Statement

31. A Regulation Impact Statement is attached.

Future treaty action

32. Any amendment to the Convention or the Protocol must be approved by at least a two-thirds majority of State Parties that participate in a Review Conference (Article 61(3) of the Convention and Article XXXVI(3) of the Protocol). Where a proposed amendment to the Convention applies to more than one category of equipment, it must also be approved by at least a two-thirds majority of State Parties to each Protocol that are participating in the relevant Review Conference (Article 61(4) of the Convention). An amendment to the Convention or the Protocol will only enter into force for those States

that have ratified, accepted or approved the amendment, once the prescribed minimum number of States (three States for the Convention, eight States for the Protocol) have ratified, accepted or approved the amendment in accordance with Convention Articles 49 and 61(3) or Protocol Articles XXVIII and XXXVI(3) .

33. Reservations are not permitted under the Cape Town Convention.
34. Declarations are authorised by Article 56 of the Convention and Article XXXII of the Protocol. Australia intends to make a number of declarations upon accession to the Convention and the Protocol. In relation to the Convention, Australia intends to make declarations in relation to the following provisions:
 - a) Article 39: Australia would make a declaration that:
 - i. certain categories of non-consensual liens will have priority over a registered international interest; and
 - ii. The rights of a State, State entity, intergovernmental organisation or other private provider of public services to arrest or detain aircraft under domestic laws for payment of amounts owed to such an entity, organisation or provider directly relating to those services in respect of that object or another object will not be affected by the Cape Town Convention. (This provision provides protection to States around the recovery of debt related to the aircraft or operator including where the State is a creditor of an aircraft operator or has an interest in an aircraft object.)
 - b) Article 53: Australia would make a declaration that State and Territory Supreme Courts as well as the Federal Court of Australia will have jurisdiction under the Cape Town Convention.
 - c) Article 54(2): Australia would make a declaration that any remedies available to the creditor under any provision of the Convention which are not expressed under the relevant provisions thereof to require application to a court may be exercised without leave of the court.
 - d) Article 55: Australia would make a declaration that Article 13 (which provides that a State Party must ensure the availability of interim relief from a court pending final determination of a claim) and Article 43 (which relates to the jurisdiction of courts granting relief under Article 13) will not apply.
35. In relation to the Protocol, Australia intends to make declarations in relation to the following provisions:
 - a) Article VIII: Australia would make a declaration that parties may agree on which law will govern their contractual rights and obligations.
 - b) Article XII: Australia would make a declaration that Australian courts will cooperate with foreign courts and foreign insolvency administrators in carrying out Article XI.

- c) Article XIII: Australia would make a declaration that upon receiving an IDERA, the aircraft registry shall record the authorisation and assist the authorised party to exercise Article IX remedies.
36. It is also proposed that Australia would make a declaration in respect of Article XI of the Protocol. Article XI of the Protocol gives States the choice of one of two procedures to apply in the event of a debtor's insolvency (Alternative A and Alternative B). It is proposed that Australia make a declaration on accession adopting Alternative A, a 'hard', or 'rules based' procedure; that in the event of insolvency requires the insolvency administrator or debtor to give possession of the aircraft object to the creditor, after the expiry of a specified waiting period or the date on which the creditor would otherwise be entitled to possession, whichever is the earlier. Under Alternative A, the obligations of the debtor cannot be modified without the creditor's consent. The declaration to adopt Alternative A is a 'qualifying declaration' under the ASU to secure the fee discount (see paragraph 16 above). Australia's declaration in respect of Article XI of the Protocol would apply to all types of insolvency proceedings and specify a waiting period of 60 days.
37. Subsequent declarations (that is, declarations made after accession) are allowed under Article 57 of the Convention and Article XXXIII of the Protocol. Declarations may be withdrawn at any time by notifying the Depository (UNIDROIT) under Article 58 of the Convention and Article XXXIV of the Protocol. A subsequent declaration or withdrawal will take effect on the first day of the month following six months after the Depository receives notice of the declaration or withdrawal.

Future Protocols

38. As noted in paragraph 2, in addition to aircraft objects, the Convention is currently applicable to railway rolling stock (protocol concluded but not yet in force) and space assets (protocol currently being drafted by UNIDROIT). Article 51 allows for the Convention to be extended to other categories of equipment that are 'uniquely identifiable'.
39. Once a draft protocol is negotiated and prepared amongst State Parties to the Convention, other States, intergovernmental and non-governmental organizations, UNIDROIT will convene a Diplomatic Conference for its adoption. If Australia intends to become a Party to a protocol in the future, this will be subject to domestic treaty-making processes, including tabling and consideration by the Joint Standing Committee on Treaties, before it will enter into force for Australia.

Withdrawal or denunciation

40. Article 59 of the Convention and Article XXXV of the Protocol provide that a State Party can denounce the Cape Town Convention by notifying the Depository in writing. Any denunciation will take effect on the first day of the month following the expiration

of 12 months after the notification is received by the Depositary. The Convention will continue to apply to all rights or interests arising before the denunciation takes effect.

41. Any denunciation will be subject to Australian domestic treaty processes.

Contact Details

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Aviation and Airports Division
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ATTACHMENT ON CONSULTATION

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CONSULTATION

42. In 2003, aviation industry stakeholders were initially consulted by the Australian Government about whether Australia should become a signatory to the Cape Town Convention. This consultation round generated a limited response.
43. In 2008, the Australian Government decided to consult industry again about the Cape Town Convention, two years after it had entered into force. To this end, on 27 February 2008, the Department of Infrastructure and Transport (Infrastructure) issued a consultation paper to stakeholders, inviting their views about whether Australia should accede to the Cape Town Convention. The consultation paper was distributed to stakeholders in writing, as well as through publication on Infrastructure's website.
44. Echoing the outcome of the 2003 consultations, the 2008 round did not attract significant stakeholder interest, with only seven submissions received. Of those submissions, a majority indicated support for accession, provided any domestic implementation actions were consistent with the PPS reform process which, at the time, was yet to be finalised.
45. One regional aviation organisation acknowledged that the Cape Town Convention benefits would apply to regional airlines, which would significantly improve their existing borrowing arrangements. Two large law firms indicated their preference for a dual registration system to apply if accession were pursued. Most submissions favoured the Alternative A 'hard' insolvency regime.
46. One non-profit aviation organisation raised a concern that accession would result in considerable additional costs, administrative work and delays being passed onto industry. This concern was addressed through additional consultation and analysis of the impacts of the Cape Town Convention. This research found that any costs that would arise through the Cape Town Convention transactions would be minimal and would be largely outweighed by the financial benefits and security available under the Cape Town Convention. In addition, remedies available under Alternative A of the Convention (refer to paragraph 36 above) would allow for a more expeditious process of the re-possession of aircraft assets by creditors, especially when compared to the existing insolvency remedies system in Australia.

47. In 2008-09, the global financial crisis appeared to prompt renewed industry interest in the Cape Town Convention. The Government received numerous representations from industry about accession, indicating that the Cape Town Convention represented a source of significant cost savings at a time of economic uncertainty for aviation, both within Australia and internationally. The Government responded to these concerns by letter on 16 December 2009, advising industry about the Government's consideration of the Convention.
48. Over 2009 and 2010 the Government has separately consulted with a number of industry participants, including major airlines, small air operators, a peak tourism body, international financiers and manufacturers of aircraft objects.
49. The Government also released a consultation paper in November 2010, seeking industry views about how the Cape Town Convention could best operate domestically, particularly with regard to existing insolvency and PPS legislation. Submissions to this consultation process indicated industry was willing to make all mandatory ASU declarations to qualify for the fee discount and were supportive of adopting Alternative A set out in Article XI of the Protocol, whereby the Convention would hold primacy over the PPS Act to the degree of any inconsistency. This advice has informed the Government's approach to accession and implementation of the Convention.
50. In addition to Commonwealth Government stakeholders, the following stakeholders have been consulted about the Cape Town Convention to date:

Aircraft financiers/lessors

- Aircastle
- Allco
- Australasian Aircraft Finance
- Australian Commercial Credit
- Boeing
- BOC Aviation
- Capital Finance
- Finlease
- GE Capital Aviation Services
- Macquarie Aviation Capital

Law Firms

- Piper Alderman
- Norton Rose
- King & Wood Mallesons (formerly Mallesons Stephen Jaques)

Airlines

- Air North
- Regional Express
- Sky West
- Qantas

- Tiger Airways
- Virgin Australia (formerly Virgin Blue/V Australia)

Industry Organisations

- Aircraft Owners and Pilots Association of Australia
- Australian Airports Association
- Australian Aviation Council
- Australian Bankers' Association
- Australian Business Aircraft Association
- Australian Finance Conference
- Australian General Aviation Alliance Limited
- Aviation Law Association of Australia and New Zealand
- Aviation Working Group
- Board of Airline Representatives Australia
- Regional Aviation Association of Australia
- Law Council of Australia
- Personal Property Securities (PPS) Consultative Group
- Tourism and Transport Forum

Smaller operators and representative bodies

- Aerial Agriculture Association of Australia
- Aircraft Owners and Pilots Association of Australia
- Australia Aviation Council
- Australian General Aviation Administration
- Australian General Aviation Alliance Limited
- Australian Licensed Aircraft Engineers Association
- Australian Mooney Pilots Association
- Australian Sports Aviation Confederation
- Gliding Federation of Australia
- Horsham Aviation
- Recreational Aviation Australia
- Regional Aviation Association of Australia
- Regional Express
- Tasman Cargo
- The Royal Federation of Aero Clubs of Australia

State Government Agencies

- ACT Department of Territory and Municipal Services
- ACT Department of Treasury
- ACT Department of Justice and Community Safety
- Transport NSW
- NSW Treasury
- NSW Department of Justice and Attorney-General
- NT Department of Lands and Planning
- NT Treasury Corporation
- NT Department of Justice
- QLD Department of Transport and Main Roads

- QLD Treasury
- QLD Department of Justice and Attorney-General
- SA Department for Transport, Energy and Infrastructure
- SA Department of Treasury and Finance
- SA Department of Justice
- TAS Department of Infrastructure, Energy and Resources
- TAS Department of Treasury and Finance
- TAS Department of Justice
- VIC Department of Transport
- VIC Department of Treasury and Finance
- VIC Department of Justice
- WA Department of Transport
- WA Department of Treasury and Finance
- WA Department of the Attorney-General

51. The Cape Town Convention has been included on the Schedule of Multilateral Treaties for the consideration of the Standing Committee on Treaties since April 2010.

52. In addition, the Attorney-General's Department presented a paper entitled 'Australian Personal Property Securities Reform and Secured Finance in the Aviation Industry' at an Aviation Law Association of Australia and New Zealand (ALAANZ) conference on 12 March 2009. Infrastructure also outlined the Government's consideration of the Convention at an ALAANZ event held in Melbourne on 29 April 2010, as part of a presentation detailing changes to existing carriers' liability and insurance arrangements.