



**Australian Government**

**Department of Infrastructure and Transport**

*File Reference:* 13/1047

Committee Secretary  
Joint Standing Committee on Treaties  
Parliament House  
CANBERRA ACT 2600

Dear Secretary

**Hearing – Monday 4 February 2012 – answers to questions on notice**

I refer to the questions on notice which the Department took at the appearance before the Joint Standing Committee on Treaties hearing on 4 February 2013. I am pleased to provide answers to the questions at Attachment A.

Please do not hesitate to contact me if I can further assist the Committee.

Yours sincerely

Stephen Borthwick  
General Manager  
Aviation Industry Policy

14 February 2013

**Answers to questions on notice**

1. Definition of commercial reasonableness (p10)

*Question*

**CHAIR:** The National Interest Analysis says that 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. Is there a definition of 'commercially reasonable manner' for this purpose?

**Ms Redmond:** I do not believe there is.

**CHAIR:** Obviously, if you want to have a look and check, feel free to take the question on notice.

**Mr Borthwick:** Thank you, Chair.

*Answer*

Extra judicial remedies (where not precluded by a declaration of the relevant Contracting State under Article 54) are required to be implemented in a 'commercially reasonable manner.'

Remedies are exercised in a 'commercially reasonable manner' if the creditor takes proper steps to safeguard an object from loss or damage upon repossession and makes reasonable efforts to obtain the best price on sale of an object.

2. Unpaid employment entitlements in the event of insolvency (p10)

*Question*

**CHAIR:** In the event of a default, the protocol gives priority to registered international creditors—does that mean that those creditors have priority over staff, employees, who have unpaid entitlements?

**Mr Adams:** There are certain declarations you can make under article 39(1) of the convention. That covers non-statutory liens that we can nominate as having priority over the interest in the aircraft that is registered on the international registry. I would imagine staff see that as something that could be included under—

**CHAIR:** Again, I think it might be helpful if you gave us a written response.

**Mr Borthwick:** We will give you a considered response to that.

*Answer*

Under Australian law if a company is liquidated, the rights of secured creditors have priority over the right of unsecured creditors (including employee entitlements).

Whilst the Cape Town Convention does allow a Contracting State to declare under Article 39 certain categories of non-statutory liens that can have priority over a registered international interest, this provision cannot be used to alter priorities that are currently applicable under national law. This means that a declaration cannot be made under Article 39(1) of the Cape Town Convention that would prioritise employee entitlements over the rights of secured creditors in the event of insolvency/liquidation.

Therefore, should Australia accede to the Cape Town Convention, the rights of secured creditors would continue to have priority over unsecured creditors, including employee entitlements.

It is important to note that the secured creditors only have rights over the uniquely identifiable asset registered on the International Registry.

### 3. Definition of supervising authority (p12)

#### *Question*

**Senator FAWCETT:** Article 17—supervising authority—talks about a supervising authority being an international entity designated by resolution that essentially will oversee this whole process, and their staff enjoy a whole range of immunities et cetera. Who is the supervising authority and what immunities will they enjoy within Australia by virtue of being that authority? I am happy for you to take on it notice but I am interested to know who that is.

**Ms Redmond:** We will take it one on notice.

#### *Answer*

The Supervisory Authority referred to in Article 17 is the Council of ICAO (ICAO).

ICAO is a Specialised Agency of the United Nations. It enjoys privileges and immunities as set out in the clauses of the 1947 UN Convention on the Privileges and Immunities of the Specialised Agencies and Annex III to that Convention.

Specialised Agencies (including their property, assets, premises and archives) are sacrosanct, and they enjoy immunity from every form of legal or administrative process. The only exception to this is a circumstance when ICAO themselves would waive their immunity.

If Australia accedes to the Convention, ICAO as the Supervisory Authority would not receive any extra immunity in Australia beyond those it already enjoys by virtue of being a Specialised Agency of the UN.

### 4. The role of enforcement agencies in the event that an aircraft is shifted (p12)

*Question*

**Senator BOYCE:** Wouldn't that require some sort of compliance activity on our side, though? It is one thing for CASA to say, 'Stick a sticker on the windscreen saying "Not to be shifted to the Bahamas"' but wouldn't there also be some policing involved? If an attempt were made to in fact shift the aircraft, what would be the role of our enforcement agencies, given that we have signed this agreement, potentially?

**Ms Redmond:** If I can explain in this way: if a foreign aircraft has arrived in Australia and becomes the subject of an insolvency, the creditors who own that aircraft, who want it back and flying again, paid out, would need CASA to deregister the aircraft. Then that aircraft would be free to be moved back by the creditors.

**Dr STONE:** So, in effect, it would just be paperwork?

**Ms Redmond:** Yes.

**Dr STONE:** Not a requirement of someone in CASA actually locking down the aircraft somewhere—

**Ms Redmond:** No.

**Dr STONE:** or watching it to make sure it does not move to places where it should not?

**Ms Redmond:** Can we get back to you with further information just to clarify that point?

**Dr STONE:** Yes.

*Answer*

The Irrevocable De-registration and Export Request Authorisation (IDERA) is the mechanism by which a creditor can procure deregistration and physical transfer of an aircraft object from the territory in which it is situated.

If a declaration is made in respect of Articles XI and XIII of the Protocol, a debtor would be able to submit an IDERA to the Civil Aviation Safety Authority (CASA).

Upon receipt of the IDERA, CASA would be required to record the IDERA against the aircraft and make available certain remedies to the creditor within five working days. Australian authorities would also be obliged to co-operate and assist in the exercise of those remedies. The remedies include the right to have the aircraft removed from the Australian Civil Aircraft Register.

In the event that the aircraft was deregistered and a party then attempted to move the aircraft without the creditor's authority, CASA may detain the aircraft. In accordance with Civil Aviation Regulation 288 (CAR 288), CASA may detain an aircraft when it appears that the aircraft is intended, or is likely, to be flown in circumstances that would involve an offence against the regulations (in this case, flying an unregistered aircraft).

CAR 288 authorises a delegate to "take such action by way of detention of the aircraft or such other action as is necessary". While in most cases it will be sufficient for the

delegate to issue a notice of detention, in extreme cases it may be necessary to take physical steps to prevent an aircraft from being flown. CASA's Enforcement Manual cites examples of measures that could be taken to detain the aircraft if deemed necessary.

It should also be noted that there are also criminal penalties for flying an unregistered aircraft. Under section 20AA of the *Civil Aviation Act 1988*, flying an unregistered aircraft carries the penalty of up to two years imprisonment.

#### 5. Existence of similar arrangements in the maritime sector (p12)

##### *Question*

**Mr FORREST:** It is probably more from curiosity from my point of view, and you may not be able to answer this, but in the opening statement you mentioned as justification of the need to sign this agreement that arrangements like this exist for spacecraft and I think you said railway stock. I am thinking about the maritime industry with ships. It may be that these are easier to nab, I am not sure, but can you advise the committee whether similar agreements occur in the maritime sector?

**Ms Redmond:** I would have to say that we do not have any advice on what happens in the maritime sector. This particular protocol relates to space assets, aircraft assets and railway rolling stock. I am not sure why it does not apply to the maritime sector? If you are interested in that we could ask.

**Mr FORREST:** If you could background us a bit more on that it would assist us with the justification of the need.

##### *Answer*

There is no international convention of similar scope to the Cape Town Convention that deals with security interests in ships.

The International Convention on Maritime Liens and Mortgages 1993 (The Convention) came into force in 2004. The Convention requires parties to recognise and permit the enforcement of ship mortgages and charges that are registered under the domestic law of any other party to the Convention. It specifies certain rules of fairly limited scope in relation to the protection and priority of such registered mortgages and charges, but otherwise does not require the parties to grant any uniform rights or remedies to the registered mortgagees or chargees or to holders of other kinds of security interests in ships. The Convention does not establish an international register for security interests in ships and Australia is not a party to it.

In Australia, security interests in ships are covered by the Personal Property Securities Act 2009. Ships come within the definition of "goods" in the Act. The Act deals with the rights and remedies of holders of security interests in goods and certain kinds of financial assets, and establishes a publicly accessible electronic

register called the Personal Property Securities Register where security interests in goods and relevant financial assets can be registered and thereby gain priority over non-registered or later-registered interests. Section 6 of the Act sets out the type of connection with Australia that security interests need to have in order to come within the scope of the Act (generally the Act applies to goods located in Australia), and Part 7.2 of the Act (which contains sections 233 to 241) sets out rules for determining whether a security interest which has some connection to persons or events in a foreign country is subject to Australian law or the law of another country. (Subsections 238(3) and (4) are particularly relevant to ships.)