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RECENT CASES

Bootle v Barclay [2013] NSWCA 142 (31 May 2013)

This case was heard in the NSW Court of Appeal by Meagher JA, Sackville AJA and Ball J and involved application for leave to appeal, on a range of grounds, the decision of Williams DCJ on 28 June 2012 in the District Court.

Facts

The Barclays owned and occupied a property known as "Kilbirnie", located near Nyngan in northern New South Wales. Mr. Bootle, the first defendant in the District Court proceedings, was the proprietor of Bonna, a property adjoining Kilbirnie. The second defendant was Bootle Bros Management Pty Ltd ("**BBM**") which occupied and operated Bonna. Mr. Bootle was a director of BBM. A third defendant was Macquarie Valley Ag Services Pty Ltd ("**MVAS**") who conducted an aerial spraying business. The fourth defendant ("Mr. Shapley") was the pilot of the aircraft used to spray paddocks on Bonna in July 2005. MVAS arranged with Mr. Shapley, through AirXS Pty Ltd ("**XS**"), a company of which he was a director and shareholder, that he would pilot the aircraft during the aerial spraying operations.

The Barclays claimed damages against all four defendants for the loss of wheat and lucerne crops on Kilbirnie. The Barclays argued that aerial spraying of a herbicide known as glyphosate, which took place on Bonna in July 2005, caused damage to the crops. Their case was that glyphosate spray had drifted from the Bonna paddocks to paddocks in Kilbirnie, which was due to the negligence of each of the four defendants. The Barclays made an alternative claim against MVAS and Mr Shapley under the *Damage by Aircraft Act 1999* (Cth) ("**DA Act**").

The primary Judge found that all four defendants had breached their duty of care to the Barclays. Williams DCJ reached this conclusion because each could (and presumably should) have called off the spraying on the Pine and Taxi paddocks on Bonna on 6 July 2005.

On appeal the Court, in contemplating the breach elements, noted that "*a balance has to be weighed between economics and the risk that if your decision to spray in conditions that result in damage to your neighbour's crop, then you may be absolutely liable for any consequential damage*." A key issue in the eyes of the Court of Appeal was "*whether or not aerial spraying should have been conducted on that day having regard to all the circumstances*."

It was further observed that the finding of breach of duty by the primary judge hinged on the view that aerial spraying of glyphosate on Bonna was an inherently dangerous activity. On appeal Sackville AJA observed this would mean that BBM as the occupier of Bonna (and possibly Mr Bootle as the lessor) owed a non-delegable duty of care to the Barclays. On appeal the court noted that even if this were the case the plaintiff claiming damages must still prove that the occupier has breached the non-delegable duty of care.

The burden remained on the Barclays to show that Mr Shapley had been negligent and that, in particular, he failed to take precautions against the risk of damage to the sensitive crops on Kilbirnie that, in the circumstances, a reasonable person in his position would have taken: *Civil Liability Act 2005*, s 5B(1)(c). Since there was no evidence indicating that a reasonable person in Mr Shapley's position would have postponed the spraying, the finding of negligence against him could not be sustained.

Sackville AJA, with whom Meagher JA and Ball J agreed, noted that the Barclays had tendered a report prepared by Mr Nicholson, an expert witness. Nicholson was expert in the technical management of herbicide and pesticide usage. His report mainly focused on whether spraying on Bonna had caused the damage to the sensitive crops growing on Kilbirnie. However, His Honour observed that "*Nicholson did not say that aerial spraying*

of glyphosate should not have taken place on 6 July 2005 in the circumstances prevailing on that day." While Nicholson's evidence established that aerial spraying carried greater risks than ground spraying, His Honour said that this issue was not in dispute and that "*the primary Judge found no fault with the conduct of the spraying […]. The only basis for the finding of negligence was the asserted unsuitability of the weather conditions*." Sackville, AJA concluded that the "*primary Judge's findings of negligence against the Bootles, MVAS and Mr Shapley were not supported by the evidence*."

The Damage by Aircraft Act

It was accepted that if the DA Act applied, MVAS as a trading corporation was liable under s 10(2)(c)of the Act. On appeal the Court agreed with the primary Judge's conclusion that the DA Act applied and, as a consequence the challenge to the holding that MVAS was liable to the Barclays under the DA Act failed.

Another issue in contention was the status of the pilot Shapley and whether he was an "employee" of XS. The Court disagreed with the view of the primary judge who they felt had assumed that "*the director of a one-person company cannot be regarded as an employee*." On this issue the Court noted similarities with the case *Stephan v Pacesetter Cleaning Services Pty Ltd* [1995] NSWCA 455; 12 NSWCCR 19. In this case Rolfe AJA, with whom Kirby ACJ and Cole J agreed, ruled that there was an employer/employee relationship involved:

> "*Those who control, dismiss, regulate, delegate and organise are the directors and, in the present case, the directors were the workers. They made the arrangements, which were all predicated around the work being carried out. The absence of full books of account, an office, office equipment and other such trappings of a business seem to me totally irrelevant...*"

Here, the Court observed that XS contracted with MVAS and was paid by MVAS for the piloting services provided by Shapley. Although there appeared to be no written contract between Mr Shapley and XS, he performed work on behalf of XS for which the company received payment. Mr Shapley described his position with XS as that of a "pilot".

> "*There is nothing in the evidence to indicate that Mr Shapley provided his services as a pilot to any entity other than XS and the monthly receipts issued by XS to MVAS tend to suggest that he did not. Moreover* […] *Shapley received remuneration from XS for his services, in respect of which the company issued a PAYG statement*."

The Court concluded that Shapley was an employee of XS and as such fell within Section 7 of the DA Act.

Findings

In outlining its findings the Court of Appeal emphasized that care needed to be taken before granting leave to appeal in cases involving "*no significant issue of principle and raise only factual questions for determination*." Nevertheless, they found that (i) both sets of applicants for leave had demonstrated error by the primary Judge; and, (ii) they also demonstrated the primary Judge should not have found in favour of the Barclays, except on the cause of action under the DA Act against MVAS. Consequently, in allowing the appeal the Court of Appeal granted leave to appeal on Grounds 1 to 8 of the appeal.

Editors.

Commerce Commission v Cathay Pacific Airways Limited **[2013] NZHC 843 (22 April 2013)**

This case was heard in the High Court of New Zealand in Auckland and represents yet another jurisdictions response to the cargo cartel issues that involved a number of airlines in recent years.

The Commerce Commission made allegations in respect of to Fuel Surcharge Agreements (FSA) and Security Surcharge Agreements (SSA), entered into with a number of other airlines in respect of the carriage of air cargo from India and Singapore respectively to New Zealand.

The Fuel Surcharge Issue

In 2000, Cathay Pacific and a number of other airlines that were members of the Board of **Airline** Representatives (India) Cargo Sub-Committee, reached an agreement regarding the imposition of a fuel surcharge on cargo carried by air from India to New Zealand (the India FSA). Under this agreement, members of the Sub-Committee exchanged information as to their fuel surcharge intentions. They also charged fuel surcharges in accordance with those expressed intentions, and adjusted or maintained their fuel surcharges on air cargo from India to New Zealand, as agreed at meetings of members, or by email. These arrangements operated between February 2000 and February 2006.

A similar agreement was entered into by members of an inter-Airline subcommittee operating in Singapore. This agreement was in place and operating for New Zealand services around April 2002. The Singapore FSA also involved an agreement to exchange information on fuel surcharge intentions, the actual imposition of fuel surcharges in accordance with those intentions, and the adjustment or maintenance of surcharges as agreed at meetings or by email communications between members.

Security Surcharge Agreements

Cathay Pacific in October 2001 reached an agreement, with Air India and other airline members of the Indian Sub-Committee, on the imposition of a security surcharge on the carriage of air cargo from India to New Zealand (the India SSA). This agreement operated between 2001 and 2006. A similar agreement relating to Singapore (the Singapore SSA) was also formed in October 2001 and operated between that date and February 2006.

Acceptance of breaches

Cathay Pacific, for the purposes of these proceedings only, accepted that it had committed breaches of the *Commerce Act 1986* (the Act) by entering into the India FSA and the India SSA (in breach of s 27(1) of the Act via s 30) and by giving effect to each agreement (in breach of s 27(2) via s 30). It did not deny the Commissioner's allegations against it in respect of the Singapore FSA and the Singapore SSA. Its non-denial was deemed by the court to constitute an admission.

Fixing the penalty

The Court noted that in *Commerce Commission v Alstom Holdings SA (Alston)* [2008] NZCCLR 22 at [18] Rodney Hansen J had discussed the significant public interest in bringing about prompt resolution of penalty proceedings, and the role of the Court in ensuring the efficacy of negotiated resolutions. Citing the Federal Court of Australia case of *NW Frozen Foods v ACCC*[1996] FCA 1134 it was noted that:

> "[T]*he Court in cases where penalty has been agreed between the parties is not to embark on its own enquiry of what would be an appropriate figure but to consider whether the proposed penalty is within the proper range …"*

In considering the proposed penalty Allan J followed the principles outlined by Rodney Hansen J in *Alston* at [14] by assessing the seriousness of the offending, identifying relevant aggravating and mitigating factors to determine an appropriate starting point and, finally, having regard to any factors specific to the defendant that may warrant an uplift in, or reduction from, the starting point.

Decision

On considering these matters the court directed the defendant to pay the Commission $4.3 million. The defendant was further ordered to pay costs to the Commission of $159,079.18 for the stage one hearing, and $100,000 for the Commission's other Court costs.

Editors.

Hana Farid v Etihad Airways PJSC of Abu Dhabi United, United Arab Emirates t/as Etihad Airways [2013] NSWSC 591 (28 March 2013)

The case was heard in the Supreme Court of New South Wales before Hidden J and relates to an injury sustained in October 2007.

Facts

The case arose from an alleged injury suffered by Hana Farid when she tripped and fell while boarding an aircraft of the defendant, Etihad Airways, in Abu Dhabi for a flight to Cairo.

The applicable law as identified by the court was Article 17 of the *Warsaw Convention as amended by the Montreal No. 4 Convention* (MP4) under which the carrier is liable for bodily injury of a passenger if the accident which caused the injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The issue before Hidden J was whether an accident, within the meaning of Article 17, had occurred. The defendants, before Davies J, had in 2010 argued that "if the plaintiff merely slipped or twisted her leg there would be no accident under the convention unless it was the result of something external to her. This resulted in the matter coming before Hidden J exclusively on this issue.

Subsequently, on 18 February 2011 affidavits of the plaintiff and her husband, who had been with her at the relevant time, were filed. In her affidavit the plaintiff alleged that there was a gap between the platform at the top of the stairs and the step into the aircraft, and that she fell when she felt someone push her from behind as she was trying to step into the aircraft from the platform. The affidavit of her husband indicated he recalled that "someone was standing close to her right shoulder."

The plaintiff filed a motion to have the order of Davies J vacated and argued that the evidence as it then stood was capable of establishing that there was an accident. This was because "the push the plaintiff felt would amount to an unexpected event, external to her, which impacted upon her."

Decision

Counsel for the defendant acknowledged that the factual matrix of the separate question had changed. At the same time he did not concede that evidence of the push was conclusive of the issue. He argued that the enquiry remained a limited one, involving the application of the principles to the facts as found, as it always was. Consequently, he submitted there was no material change in the proceedings which would warrant revisiting the order of Davies J. This view was accepted by the court and the plaintiff's motion was dismissed.

Editors.

Sandy Lam v Rolls Royce PLC [2013] NSWSC 805 (19 June 2013)

This was an application by Qantas Airways Limited to set aside a subpoena relating to an incident which occurred during Qantas flight QF 32.

On 6 February 2013, the plaintiff, Sandy Lam, a Qantas flight attendant, commenced a "representative proceeding" against Rolls Royce PLC in which she alleges that Rolls Royce PLC was negligent in the manufacture, inspection and installation of a component in that aircraft engine which failed during flight QF 32 on 4 November 2010 (the "**incident**"). Ms Lam claims that as a consequence of the incident she has suffered "Post-Traumatic Stress Disorder" and a "Major Depressive Disorder".

The Representative Proceeding

Part 10 of the NSW *Civil Procedure Act* (CPA) sets out the relevant provisions relating the representative proceedings in the Supreme Court of New South Wales. Section 157(1) provides that a representative proceeding can be commenced when there are 7 or more persons who have a claim against the same person arising out of similar or same circumstances which give rise to a substantial common question of law or fact. The consent of a group member is not required (section 159), however a group member may "opt out" of the proceeding per section 162. A discontinuance may be

ordered by the Court if a matter arises under section 166, for example, the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or a representative party is not able to adequately represent the interests of the group members.

The statement of claim identifies the "group members" as having common questions of law and fact arising from the Incident, in particular, "*all persons on the aircraft who suffered psychological injury as a result of the engine failure*". It is further pleaded in the statement of claim that there were 469 persons aboard the flight, based upon which, the maximum size of the "group" is 469. At the time of the hearing, seventeen people had been identified as members of the defined class of this representative proceeding.

The subpoena

In the matter to hand, Qantas applied to set aside a subpoena issued at the request of the plaintiff which, in respect of flight QF32, sought production of:

i) The passenger manifest;

ii) Details of each passenger travelling on QF32 including the name, address and telephone number for each passenger;

iii) Copies of all reports filed by Qantas Airways Limited in Federal Court of Australia, Proceedings Plaint No: NSD1681/2010 - *Qantas Airways Limited v Rolls Royce PLC*; and

iv) Copies of all letters of instruction to experts/authors of reports filed by Qantas Airways Limited in Federal Court of Australia Proceedings Plaint No: NSD1681/2010 - *Qantas Airways Limited v Rolls Royce PLC*.

Qantas' application was supported by Rolls Royce.

In respect of subparagraph (iii) and (iv), counsel for Qantas submitted that there was only one document which fitted the description which was an expert report on English law. Counsel for the plaintiff accepted that, that being the case, the document was not relevant to the current proceeding, on which basis, the Court set aside that part of the subpoena.

In respect of the passenger manifest, Qantas submitted that the plaintiff's application to obtain that material was wholly premature because:

i) as the proceedings involved an "opt out" procedure, the consent of any person to be a group member was not required; and,

ii) since, under the CPA, the Court was afforded the power to make the appropriate orders, at a suitable point in the future, for the notification of the entirety of the class of group members and the manner in which that notification is to occur, and this point had yet been reached, there was no valid reason to give the plaintiff the means of contacting the potential class members now.

In addition, Qantas submitted that in view of the power under section 166 to order the discontinuance of the proceedings as a representative action, if Rolls Royce were to successfully invoke that provision, then there would be no utility in providing the plaintiff with the contact details for the remaining passengers and crew on the flight.

Qantas further submitted that the issue of a subpoena in these circumstances amounted to a form of "fishing expedition" in the sense that it allowed the plaintiff to have access to documents, namely the manifest, to ascertain "*whether a case exists, as distinct from the purpose of compelling the production of documents where there is already some evidence that a case exists*" (see the discussion in *Trade Practices Commission v CC (NSW) Pty Ltd (No 4)* (1995) 58 FCR 426 at 438 per Lindgren J). Qantas submitted that if the plaintiff "*doesn't know there are other people who have suffered psychiatric harm or any sort of harm and what the extent of that harm might be he doesn't even have the beginnings of a cause of action in negligence*".

In response, Counsel for Ms Lam submitted that:

i) obtaining early access to a list of persons who comprise the outer limits

of the group was justified on ostensibly pragmatic grounds;

ii) the task of contacting those people, ascertaining whether they fall or might fall within the group as described and determining whether they in fact wish to participate in the proceedings or opt out, would take a significant amount of time, he said that the earlier the task was undertaken the better; and

iii) if there are to be discussions about settlement, then the earlier that the boundaries of the class can be ascertained, the more likely that could be facilitated.

The Decision

Beech-Jones J accepted the submission of Ms Lam and considered that allowing her the opportunity to contact the potential "group members" and determine for an early stage how many of them have or may have suffered a psychiatric injury and wish to be part of the proceeding or to opt out. His Honour considered that this would allow the representative proceeding to advance more efficiently and when the Court reaches the point of determining the form and content of the opt out notice, if a majority of prospective group members have been contact, that task can be to focus on the remaining passengers or crew. His Honour noted that an unusual feature of this representative proceeding is that the potential size of the group is known, being the passengers and crew on board flight QF32.

In addition, His Honour did not accept Qantas' submission that the subpoena amounted to a "fishing expedition" and that to obtain the details from the passenger manifest facilitates the identification of the potential common interest plaintiffs much earlier and more cheaply than otherwise.

Editors.

Reggars v Emirates Pty Ltd (Civil Claims) **[2013] VCAT 1276 (12 July 2013)**

The applicant in this proceeding before the Victorian Civil and Administration Tribunal (VCAT) seeks compensation from Emirates Airline for an alleged range of damages she suffered when, over a period of 4 days, Emirates did not confirm her booking on the return leg of her holiday from Prague to Melbourne via Dubai.

In this interlocutory hearing, Emirates applied to strike out the claim on the basis that the VCAT did not have jurisdictions.

On 30 September 2011, the Applicant booked flights through Flight Centre which included Emirates Flight EK140 from Prague to Dubai, then Dubai to Melbourne, commencing on 17 January 2012.

On 23 November 2011 Flight Centre issued the Applicant an "e-ticket" which stated that the itinerary was booked. 4 days prior to the intended trip from Prague to Dubai, the Applicant checked through the Emirates' website, "Manage My Flight" section and found that she was not booked on either flight. The Applicant made many telephone calls to her parents in Melbourne, who contacted Flight Centre and Emirates, and the Applicant herself spent time dealing with Emirates in Prague and Dubai.

After 4 days of uncertainty, which the Applicant says ruined her holiday, she was restored to the flight from Prague to Dubai, and she says that 10 minutes before boarding she was also restored to the flight from Dubai to Melbourne. The Applicant claims that her stress had become so bad, that she had collapsed in the retail section of the airport in Prague, prior to receiving a boarding pass for the flight from Prague to Dubai.

The Applicant sought damages under various heads, including damages for personal injury, out of pocket expenses (telephone calls of $481.32 and medical expenses $696.00), the lost value of pre-paid concert and other tickets which the Applicant could not attend ($358.00), the value of 6 days of the 34 day holiday (18% of the total cost, being $5,452.00); "distress

and disappointment"; and "exemplary damages".

Emirates applied to the VCAT to strike out the proceeding under section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998. Emirates submitted that because the claim concerns a "personal injury" any liability to the applicant would be governed by the applicable aviation liability convention with is given force of law in Australia by the *Civil Aviation (Carriers' Liability) Act 1959* (C'th) ("**CACL Act**").

In turn, Emirates submitted that that because any liability which was imposed on it as a carrier under the Convention was imposed by Federal law, the VCAT cannot hear and determine the claim because it is not a "court" in the appropriate sense to be vested with Federal jurisdiction.

In response, the Applicant submitted a raft of decisions, both relevant and irrelevant, to oppose Emirates' application including *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110. Whilst the facts of that case have little similarities to the case at hand, the Tribunal found value in a statement made by Meagher JA in obiter when discussing the liability of a carrier when a passenger is embarking or disembarking from the aircraft "*if the plaintiff had been injured on the stairs from the plane it would have been, but that if she slipped in the airport cafeteria it would not have been*."

On that line of reasoning, the Tribunal found that, based upon the Applicant's version of events, she did not collapsed on board or after even receiving a boarding pass but whilst she was in the Prague airport expecting to receive the boarding pass. Thus, the collapse did not occur "in the course of any of the operations of embarking or disembarking". Therefore, the claim is outside the Convention.

In addition, the Tribunal indicated that those matters claimed as damages before 17 January 2013, that is, arising before the return flight from Prague were not "personal injuries" but rather claims for breach of contract and that part of the claim also does not fall within the Convention and so section 9E of the CACL Act is inapplicable.

On those bases, the Tribunal dismissed Emirates application to strike out the proceeding.

Editors.

CURRENT AND UPCOMING PUBLIC INQUIRIES

Changes to the Victorian Damage by Aircraft Regime

The Victorian Competition and Efficiency Commission is currently undertaking an inquiry into the provisions relating to surface damage by aircraft contained in the *Wrongs Act 1958* (Vic).

Surface damage by aircraft in Australia is primarily regulated by the *Damage by Aircraft Act 1999 (*Cth). Essentially, the Act applies to damage to persons or property caused by impact with an aircraft, or something from an aircraft, in flight. It also applies to damage which is the result of an impact. The Act makes the operator or owner of the aircraft strictly liable for any harm and the damages recoverable are unlimited.

Because of the limits of the Commonwealth's power to legislate, any claim for damage caused by aircraft engaged in intrastate travel which are not owned by a corporation and which do not depart from a Commonwealth place will be governed by State legislation which predates the Commonwealth Act.

The Victorian Government is considering reforming the provisions of the Victorian *Wrongs Act 1958* which deal with damage by aircraft. It is seeking submissions on whether there is sufficient justification to attach strict liability to aircraft owners and operators without requirement to prove negligence.

Although the circumstances in which the Victorian *Wrongs Act 1958* will apply to damage by aircraft will be very limited, the inquiry presents an opportunity for industry to instigate change to at least the damage by aircraft regime which may lead to changes elsewhere. The overall concept of strict liability with unlimited damages can, as the events of September 11 demonstrate, have catastrophic consequences. Owners, operators and insurers of aircraft in Victoria will doubtless consider making submissions for the enquiry.

Key Dates:

Submissions due	6 September 2013
Industry Consultation	June - September 2013
Draft report released for further consultation	November 2013
Industry submissions on draft report due	December 2013
Further consultation on draft report due	November 2013 – January 2014
Final recommendations to government	28 February 2014

Mark Mackrell, Partner & Ben Martin, Partner, Norton White, Sydney

Ambulance Function Flights as Air Transport Operations

On 31 July 2013 CASA released NPRM 1304OS which, if it comes into effect, will require operators of Medical Transport flights to conduct those flights as air transport flights rather than aerial work flights.

Presently, regulation 206(1) of the *Civil Aviation Regulations 1988 c*ategorises ambulance functions as aerial work operations.

Medical Transport flights, being aerial work operations, are currently relieved from a number of obligations which would attach to charter on RPT operations, including appointing key personnel, having a safety management system, maintaining a training and checking organisation, carriage of particular amounts of fuel and landing only at licensed aerodromes.

The new categories will presumably occur at the same time that CAR 206 is replaced by the new CASR Parts 121, 133 and 135

which introduce Air Transport as the new category to replace RPT and charter.

Under the new regime a flight, which commences with the express purpose of carrying a medical passenger at any time, will be a passenger transport operation. Medical Transport flights will be regulated by Part 121 (large aeroplanes), Part 135 (small aeroplanes) and 133 (rotorcraft) of the *Civil Aviation Safety Regulations 1998* and will require:

- An AOC authorising aerial transport operations (and thus approval of key personnel including the CEO, Head of Flying Operations, Head of Training and Checking, Head of Aircraft Maintenance Control and Safety Manager);
- An integrated safety management system;
- Carriage of particular amounts of fuel including destination alternate fuel;
- A fatigue management system;
- A risk management strategy for operations of single engine aeroplanes which intend to operate beyond 25nm from a safe landing area;
- Carriage of life rafts in certain circumstances;
- Aerodromes for take-off and landing to be suitable for the aeroplane to take off at and comply with the standards prescribed;
- Risk assessments for helicopter landing sites;
- A serviceable autopilot for single pilot operations unless the flight can be operated VMC; and
- Training and checking requirements.

CASA is seeking submissions on the following issues:

1. Re-classifying helicopter and aeroplane medical transport operations as air transport operations;
2. The best approach to the management of fatigue risk in Medical Transport operations;
3. Specific air transport issues that have additional compliance obligations and suggestions for relief for medical transport operators.

The proposed changes will make compliance with the legislation significantly more onerous and expensive for medical transport operators. This is of particular concern as many operators of medical transport operations are funded by charities.

Key Dates:

Submissions due	27 September 2013

Mark Mackrell, Partner & Ben Martin, Partner, Norton White, Sydney

Productivity Commission Inquiry into Civil Litigation in Australia

On June 2013, the Australian Government requested the Productivity Commission to undertake an inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law. It shall be known as the "*Access to Justice*" public inquiry.

Whilst the former Federal Government assigned the inquiry a name which may appear to be limited to matters of "social justice" the terms of reference reflect a much broader and challenging agenda which, given the 15 month timeframe, may be difficult to achieve. The Government set out the terms of reference and matters the Productivity Commission should have regard to as follows:

1. an assessment of the real costs of legal representation and trends over time;
2. an assessment of the level of demand for legal services, including analysis of:
   a. the number of persons who cannot afford to secure legal services but who do not qualify for legal assistance services, and
   b. the number of pro bono hours provided by legal professionals;
3. the factors that contribute to the cost of legal representation in Australia, including analysis of:

a. the supply of law graduates and barriers to entering the legal services market;
b. information asymmetry;
c. other issues of market failure;
d. the structure of the legal profession in State and Territory jurisdictions;
e. legal professional rules and practices
f. court practices and procedures;
g. models of billing practices;
h. the application of taxation laws to legal services expenditure; and
i. other features of the legal services market which drive costs;

4. whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute;
5. the impact of the costs of accessing justice services, and securing legal representation, on the effectiveness of these services, including analysis of:
   a. the ability of disadvantaged parties, including persons for whom English is a second language, to effectively self-represent; and
   b. the extent to which considerable resource disparity impacts on the effectiveness of the adversarial system and court processes;
6. the economic and social impact of the costs of accessing justice services, and securing legal representation;
7. the impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions, including analysis of discovery and case management processes;
8. alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional and remote communities, and the costs and benefits of these, including analysis of the extent to which the following could contribute to addressing cost pressures:
   a. early intervention measures;
   b. models of alternative dispute resolution;
   c. litigation funding;
   d. different models of legal aid assistance;
   e. specialist courts or alternative processes, such as community conferencing;
   f. use of technology; and
   g. expedited procedures;
9. reforms in Australian jurisdictions and overseas which have been effective at lowering the costs of accessing justice services, securing legal representation and promoting equality in the justice system; and
10. data collection across the justice system that would enable better measurement and evaluation of cost drivers and the effectiveness of measures to contain these.

These broad ranges of issues will be of relevance to many aspects of the aviation law and insurance community.

Key Dates:

Terms of reference	21 June 2013
Issues paper	16 September 2013
Initial submissions (9)	Due by 4 Nov 2013
Draft report	April 2014
Final report to Government	September 2014

Editors.

FOCUS ON FINANCE & THE AVIATION SECTOR

The Cape Town Convention and aircraft protocol – more to come

As we have previously reported, Australia has now enacted the implementing legislation to give effect to the Convention in Australia, however several steps remain to be taken before it is in effect as described in this article. In addition, the interaction of the Cape Town Convention and other Australian law will need to be considered, and industry advisors will need to come to a view and agree a new approach to documentation and registration of aircraft transactions.

What is the Cape Town Convention?

Signed at Cape Town in November 2001, the Cape Town Convention and the relevant Aircraft Protocol, together the "Convention", bring into force a framework for an international standard for the protection of ownership rights and security interests in aircraft.

The Convention establishes:

- that an "international interest" in aircraft assets (such as airframes, aircraft engines and certain helicopters) arises in favour of:
  - the seller/conditional seller under a sale/title reservation agreement;
  - the lessor under a lease agreement; and
  - the creditor under a credit agreement.
- an electronic registration system for the perfection and priority of "international interests" ("**International Registry**"); and
- default rights and remedies to enforce such international interests (including interim remedies) that are more tailored to aircraft finance transactions, such as giving secured parties the right to de-register or immobilise aircraft.

Afforded within the Convention's framework is flexibility whereby ratifying nations are permitted to make declarations ("**Declarations**") to opt-in, opt-out or determine within pre-defined parameters how the Convention is to apply to its jurisdiction. Based on the declarations we now know will be made, the Convention will not have retrospective effect and therefore existing transactions will not need to be registered on the International Registry.

We have described the Convention and its benefits and provided regular updates regarding the progress of draft enabling legislation through the Australian Parliament – see our articles from:

- 28 May 2013 - Joint Standing Committee on Treaties recommends ratification of Cape Town Convention and Aircraft Protocol
- 4 June 2013 - Cape Town Bills introduced in the Australian Parliament on 29 May 2013
- 4 July 2013 - Cape Town Convention Bills receive Royal Assent on 28 June 2013

Several steps remain before the Convention is in effect in Australia, which we expect will be progressed expediently by the new Coalition Government once it resumes business.

We expect that the Convention system would be operational in Australia for new transactions in early 2014.

As outlined below, there are a number of implications that industry needs to consider now, and take the necessary steps to prepare before the Convention is in effect.

What has happened to date?

As we previously reported, Australia has now enacted the following implementing legislation to give effect to the Convention in Australia.

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

Convention will have force of law in Australia and that the Convention will prevail over any law of the Commonwealth and any law of a State or Territory to the extent of any inconsistency.

- *International Interests in Mobile Equipment (Cape Town Convention) (Consequential Amendments) Act 2013* which provides for consequential amendments to the following legislation:
  - *Air Services Act 1995* – to make it clear that a registered interest under the Convention will be a security interest for the purposes of provisions of that Act dealing with the priority of statutory liens. Under the new regime, an earlier Convention registration will prevail over a statutory lien.
    Given Air Services Australia has had a long standing practice of passing on service charges by contract and not by statute, this is not expected to have any practical implications.
  - *Civil Aviation Act 1988* – to confer upon the Civil Aviation Safety Authority ("**CASA**") functions associated with the Convention
  - *Personal Property Securities Act 2009* ("**PPSA**") – if the PPSA is inconsistent with the Convention, then the Convention will prevail.

What are the next steps?

The following next steps are set to take place:

- CASA will be conferred functions to deal with recordation, removal and the exercise of the Irrevocable Deregistration and Export Request Authority (IDERA), the instrument under which an aircraft can be de-registered as part of an enforcement action.

  The Convention also provides that the "authorised party" under an IDERA is the sole person who can exercise such de-registration. This is important as it gives financiers the comfort of the negative assurance that there will be no change in the registration of the aircraft (nor re-registration in another country) without hearing from CASA.

- The formal lodgement of the Instrument of Accession to the Convention, accompanied by Declarations in respect of the Convention, with the International Institute for the Unification of Private Law (UNIDRIOT).

  We now know that Australia will take the following approach to Declarations:

  - it will declare that upon the substantive insolvency of a debtor, the aircraft will be returned to the creditor on the earlier of:
    - a waiting period of no more than 60 days; and
    - the date under applicable law on which the creditor is entitled to the possession of the aircraft,

  unless all defaults (other than the insolvency default) under the relevant security agreement have been remedied and the debtor has agreed to perform all further obligations under the relevant security agreement. This regime, based on the US Section 1110 of the Bankruptcy Code, is also known as "**Alternative A**";

  - it will declare that upon receiving an IDERA, CASA will record the authorisation and assist with the authorised party to exercise relevant remedies;
  - it will declare that transaction parties will continue to be free to agree which law will govern their contractual rights and obligations;
  - it will declare that any remedies available to a creditor under the Convention which are not expressed under the relevant provisions of the Convention to require application to a court may be exercised without leave of the court;

  - it will declare that Australia will co-operate to the maximum extent possible with foreign courts and foreign insolvency administrators in the repossession of aircraft as set out above; and
  - it will declare that the Federal Court and the courts of the States and Territories will have jurisdiction under the Convention.
- The formal ratification of the Convention with the Federal Executive Council's approval.

Questions arising from the implementation of Convention

The interaction between the Convention and Australian domestic law (particularly the PPSA and insolvency law) needs to be further considered. We understand that the Australian Government does not have any plans at present to enact any further legislation amending domestic laws to cater for the introduction of the Convention.

The guiding principle is that the Convention will prevail only to the extent of any inconsistency with any other Australian law (so the aviation industry and the courts will have to work out when the Convention is "inconsistent").

Various formulations for determining "inconsistency" have been put forward over the years in the constitutional law or statutory interpretation context, but in the present circumstances where industry participants will favour pragmatism, industry advisors will need to come to a view and agree a new approach to documentation and registration of aircraft transactions.

This was made clear in the *Explanatory Memorandum to the International Interests In Mobile Equipment (Cape Town Convention) Bill* ("**Explanatory Memorandum**"), which noted that if the Australian Government adopts an implementation model which provides that the Convention will prevail in the event of any inconsistency, the onus will be on the aviation industry and the courts to understand the operation of both the PPSA and the Cape Town Convention and identify where inconsistencies arise, and that it would not be unreasonable for industry to incur some of the costs associated with operating under and within the two schemes (see paragraph 4.32 of the Explanatory Memorandum).

In the following paragraphs below we raise some matters for consideration and highlight some examples where analysis needs to be undertaken to determine the extent of inconsistencies.

PPSA

Given the approach to implementing the Convention described above, it is expected that the PPSA will still apply in aviation transactions and registrations under the PPSA will be required. A multitude of reasons can be put forward for this position, but in simple terms the PPSA will continue to apply where there is no inconsistency between the Convention and the PPSA. One clear example which practitioners could put forward and was cited in a Parliamentary discussion earlier in the Convention implementation process and the Explanatory Memorandum (see paragraph 1.28 of the Explanatory Memorandum) is to do with the definition of "proceeds" under PPSA which is broader than the definition in the Convention.

It should be noted that the Convention provides that any additional remedies permitted by applicable law may be exercised with respect to a transaction registered under the Convention to the extent that those remedies are not inconsistent with the mandatory provisions of the Cape Town Convention. This could also be taken to suggest that the local law requirements for the creation and perfection of security interests under PPSA continue to apply.

Insolvency laws

Analysis will need to be undertaken as to what provisions of the Corporations Act will be inconsistent, and which provisions will continue to apply.

As the Australian government is not contemplating any specific amendments to

insolvency laws in Australia, it appears that the Convention will simply co-exist with the current insolvency regime (to the extent not inconsistent).

For example, practitioners will need to consider whether provisions such as s 588FL Corporations Act, relating to the vesting of security interests in collateral in the grantor if it becomes insolvent if not registered within a certain time, will continue to apply to aircraft. If this registration requirement is construed as being "inconsistent" with Alternative A of the Convention, then a secured party's rights under Alternative A to require the aircraft to be returned (or defaults cured) as described above would prevail (regardless of whether the secured party registered its security interest within the timeframe prescribed under s 588FL of the Corporations Act). However, because the Convention does not deal with any matters other than "international interests" and associated rights, registration under the PPSA would still be required at least in respect of other aspects of aviation financing transactions which are not covered by the Convention (for example, bank account charges and other ancillary security).

Taking another example, the maximum 60 day waiting period for repossession (or for the debtor to cure all defaults other than the insolvency default) will likely operate concurrently with the current regime under s 440B and related provisions of the Corporations Act. These are already quite creditor friendly in that it requires an administrator of a lessee to make a decision as to continuing to use or possess an aircraft or else incur personal liability for rent and other amounts attributable to the use or possession of the aircraft from the end of that decision period.

Even so, Alternative A would prevail after 60 days and the 60 day requirement under Alternative A of the Convention would alleviate any uncertainties around the present regime including, for example, removing the potential need to go to court or seek the administrator's consent even where the administrator has issued a disclaimer notice within the 5 business day decision period under s 443B of the Corporations Act.

Such a result would be consistent with one of the objects of the Convention which is to provide more certainty to those who invest in the aviation industry given the unique situation of aircraft assets as high value, highly depreciable and mobile assets requiring speedy, effective and tailored remedies.

The above are some examples of the interactions between the Convention and current domestic laws, and there will be others that will need to be worked through prior to and during the implementation period.

We continue to discuss the implementation of the Convention and the interaction of the Convention and Australian laws with the relevant government departments and we will keep you posted.

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Taking security over personal property in Australia, a cautionary tale for the aviation sector

1. Introduction

The introduction of the *Personal Property Securities Act 2009* (Cth) ("**PPSA**") has altered the way businesses participating in the Australian aviation sector manage their payment and repayment risk. This payment and repayment risk has been broadened by the PPSA and now includes transactions or arrangements such as the sale of goods such as jet fuel on retention of title; the leasing of goods such as vehicle, tugs or catering equipment and the bailment or sub-bailment of goods to contractors such as aircraft spares and maintenance equipment.

The decision of the Brereton J of the New South Wales Supreme Court in the recent case of *In the matter of Maiden Civil (P&E) Pty Ltd; Richard Albarran and Blair Alexander Pleash as receivers and managers of Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd & Ors* [2013] NSWSC 852 ("**Maiden**") highlights not only the risks involved in asset intensive industries (such as aviation), but also the importance of registering security interests where possible. The Court's decision in Maiden demonstrates that under the PPSA:

(a) a party or business may not rely on its legal title to personal property to defeat a perfected security interest in that personal property;

(b) generally the law gives priority to security holders who take steps to protect their security interests in personal property (even security holders in a non-traditional sense); and

(c) the range of security 'arrangements' that could constitute a security interest has increased significantly since the introduction of the PPSA.[1]

Whilst the assets involved in Maiden were not aviation related, the findings of the Court are equally applicable to the aviation sector in Australia (eg lessors, airlines, airports and aviation contractors).

2. The PPSA and the aviation sector in Australia

2.1 PPSA introduction and application

The PPSA was introduced to unify the law governing security interests in personal property and establish rules for determining the priority of these security interests.[2]

Generally, the PPSA applies to security interests in goods or financial property if:

(a) the goods or financial property is located in Australia; or

(b) the party granting the security interest in the property ("**Grantor**") is an Australian entity.[3]

2.2 Law applicable to determine validity of security interests

Whilst not relevant for the purposes of this discussion it worth noting that generally the validity of a security interest in goods is governed by the law of the jurisdiction in which the goods are located when the security interest attaches (under that law).[4]

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[1] Including arrangements that previously did not create security interests; eg sale on retention of title and flawed asset arrangements.
[1] See the explanatory memorandum accompanying the *Personal Property Securities Act 2009* (Cth).
[2] See the explanatory memorandum accompanying the *Personal Property Securities Act 2009* (Cth).
[3] *Personal Property Securities Act 2009* (Cth) ss 6 and 238; see also the connection requirement for intangible property in section 6(2) of the *Personal Property Securities Act 2009* (Cth); registration on the PPSR is permitted if the personal property or Grantor is located in Australia under section 152 of the *Personal Property Securities Act 2009* (Cth).
[4] *Personal Property Securities Act 2009* (Cth) 238(3); the *Personal Property Securities Act 2009* (Cth) will also apply where an Australian Grantor enters into an express agreement that the *Personal Property Securities Act 2009* (Cth) should apply; *Personal Property Securities Act 2009* (Cth) 237(1); This special treatment for 'multi-jurisdictional' personal property creates an interesting situation when the Grantor is both an operator of a 'multi-jurisdictional' aircraft (and its engines) and is located in Australia. In this case, the PPSA would apply to determine the validity of any

However, the validity of security interests in goods that are normally moved between jurisdictions (eg aircraft and their engines)[5] is only determined by Australian law if the Grantor is located in Australia at the time that the security interest attaches to the goods.[6]

2.3 Property Securities Register ("PPSR")

The PPSA creates and maintains the PPSR, which acts as a central repository to facilitate the taking of security interests in personal property in Australia.

2.4 Personal property

Under the PPSA, personal property includes many different kinds of tangible and intangible property, other than real property which traditionally would not have been capable of supporting a security interest.[7]

2.5 Security interest

A security interest is an interest in personal property provided by a transaction that, in substance, secures payments or performance of an obligation. Additionally, a security interest could arise where:

(a) a transferee transfers an account or chattel paper;

(b) a consignor delivers goods to a consignee under a commercial consignment; and

(c) goods are leased or bailed and a PPS Lease is created. [8]

2.6 PPS lease

A PPS lease arises where a lease or bailment occurs and:

(a) the term of that lease or bailment meets the requirements of section 13(1) of the PPSA; [9]

(b) the bailor or lessor is in the business of bailing or leasing goods; and[10]

(c) in the case of bailments, the bailee provides value.[11]

2.7 Perfection

A person who holds a security interest under the PPSA will need to 'perfect' the security interest to ensure that the security interest has priority over competing interests.[12]

A secured party can perfect a PPSA security interest by:

(a) registering a financing statement on the PPSR;

(b) taking possession of the collateral; or

(c) for certain types of collateral (such as shares), by taking control of the collateral.

security interests that arises regardless of whether the multi-jurisdictional aircraft has ever travelled to Australia.

[5] Eg aircraft or engines that are moved outside of Australia or even between states regularly; see also J Field, *Personal Property Securities in Australia* (at 6 August 2013) [4.5.300].

[6] *Personal Property Securities Act 2009* (Cth) 238(3); the *Personal Property Securities Act 2009* (Cth) will also apply where an Australian Grantor enters into an express agreement that the *Personal Property Securities Act 2009* (Cth) should apply; *Personal Property Securities Act 2009* (Cth) 237(1); This special treatment for 'multi-jurisdictional' personal property creates an interesting situation when the Grantor is both an operator of a 'multi-jurisdictional' aircraft (and its engines) and is located in Australia. In this case, the PPSA would apply to determine the validity of any security interests that arises regardless of whether the multi-jurisdictional aircraft has ever travelled to Australia.

[7] Personal property is defined by the PPSA as being all property (including a licence) other than land and rights that are granted by law, which are declared by that law not to be personal property for the purpose of the PPSA; *Personal Property Securities Act 2009* (Cth) s 10.

[8] *Personal Property Securities Act 2009* (Cth) s 21.

[9] *Personal Property Securities Act 2009* (Cth) s 13(1).

[10] *Personal Property Securities Act 2009* (Cth) s 13(2); what constitutes 'engaged in the business of bailing/leasing goods' has not been considered by an Australian court; there is New Zealand authority in *Rabobank v McAnulty* [2011] NZCA 212 that supports the view that the bailor/lessor should intend to profit from the bailment or lease; that there is Canadian authority that states that the bailments or leases must be a 'proper component' or a 'significant part' of the business of the bailor/lessor; see *David Morris Fine Cars Ltd v North Sky Trading Inc* [1996] WWR 332 and *Paccar Financial Services Ltd v Sinco Trucking Ltd* [1987] 7 PPSAC 176 (SQKB); the New Zealand authorities could possibly be distinguished as the New Zealand legislation does not refer to bailments, additionally, section 13(3) of the *Personal Property Securities Act 2009* (Cth) contains the requirement that the bailee provide 'value'.

[11] *Personal Property Securities Act 2009* (Cth) s 13(3).

[12] *Personal Property Securities Act 2009* (Cth) ss 21-9; in most cases perfection will also ensure that the security interest survives the insolvency of the grantor.

2.8 Attachment

In order for a perfected security interest to be enforceable against the Grantor in relation to particular collateral the security interest must have 'attached' to that collateral. [13]

A security attaches to collateral when the Grantor has rights in the collateral (or the power to transfer rights in the collateral to the secured party) and value is given for the security interest (or the Grantor does an act by which the security interest arises).

In addition to attachment, for a perfected security interest to be enforceable against a third party in relation to particular collateral the secured party must either possess the collateral; have perfected the security interest by control or ensure the written security agreement that creates the security interest covers the collateral.[14]

2.9 Purchase Money Security Interest ("PMSI")

Under the PPSA, a perfected PMSI will generally have priority over other security interests where the PMSI's PPSR registration states that it is a security interest. [15]

Section 14(1) of the PPSA defines a PMSI to include:

(a) a security interest taken in collateral, to the extent that it secures all or part of its purchase price;

(b) a security interest taken in collateral by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights

(c) the interest of a lessor or bailor of goods under a PPS lease; and

(d) the interest of a consignor who delivers goods to a consignee under a commercial consignment.

2.10 Taking free of security interests

A buyer or lessee of personal property, for value, takes the personal property free of any unperfected security interests in the property.[16] Therefore, if a secured party fails to register its security interest in personal property then the Grantor could sell the personal property to a third party. The third party would take the personal property free of the secured party's security interest and could deal with the asset as it wished.

In addition, a buyer or lessee of personal property takes the personal property free of any security interest in the property if:

(a) the regulations provide that the personal property may or must be described by serial number;[17] and

(b) searching the register, immediately before the time of the sale or lease, by reference only to the serial number of the property, would not disclose a registration that perfected the security interest.[18]

Therefore, if the PPSA Regulations state that the personal property may or must be described by serial number,[19] and the secured party fails to register its security interest in the personal property on the PPSR (by serial number), a third party could take the personal property free of the secured party's security interest.

2.11 Retention of title

Under the PPSA, suppliers or lessors who supply goods through retention of title contracts ("ROT Suppliers") and register their security interests in those goods receive two benefits:

[13] *Personal Property Securities Act 2009* (Cth), s 19.
[14] *Personal Property Securities Act 2009* (Cth), s 20.
[15] *Personal Property Securities Act 2009* (Cth), ss 62(2)-(3).
[16] *Personal Property Securities Act 2009* (Cth) s 43(1); see also the exception in section 43(2) of the *Personal Property Securities Act 2009* (Cth).
[17] See *Personal Property Securities Regulations 2010* (Cth) Schedule 1, r 2.2.
[18] *Personal Property Securities Act 2009* (Cth) s 44.
[19] Aircraft, specific intangible property (design, patent, plant breeder's right, trademark and some licences), motor vehicles and watercraft.

(a) PMSI super priority: ROT Suppliers registered security interests take priority over all other security interests in the collateral.

(b) Insolvency protection: Any collateral to which a ROT security interest has attached, which falls within the definition of 'PPS Act retention of title property,'[20] will not be available to the liquidator in insolvency. Therefore, the secured party could seize the collateral on the basis of their ownership and not be adversely affected by the liquidation.

2.12 The Cape Town Convention and Aircraft Protocol ("**Convention**")[21]

The future implementation of the Convention in Australia will impact the effect of the PPSA on aircraft, helicopters and aircraft engines. Under the Convention "international interests" are created in aircraft assets in favour of the certain sellers, lessors and creditors in relation to aircraft, helicopters and aircraft engines.[22]

Australian law provides that the Convention will prevail over Commonwealth or State laws in the event of any inconsistency (such as the PPSA).[23] However, where there is no inconsistency between the Convention and the PPSA, the PPSA will continue to apply. Therefore, it is likely that aviation related security interests will still need to be registered on the PPSR to attract the protections contained in the PPSA once the Convention has been implemented in Australia.[24]

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3. Recent case: *Maiden Civil (P&E) Pty Ltd v Queensland Excavation Services Pty Ltd & Ors* [2013] NSWSC 852

3.1 Facts

This case concerned three Caterpillar excavators and loaders:

(a) Caterpillar 320D excavator;

(b) Caterpillar 330D excavator; and

(c) Caterpillar 930 wheeled loader ("the **Caterpillars**").[25]

In 2010, Queensland Excavation Services Ltd ("**QES**") purchased the Caterpillars; with the deposits contributed by QES and the balance financed by Esanda (for the 320D) and Westpac (for the 330D and 390). QES then leased the Caterpillars to Maiden Civil (P&E) Pty Ltd ("**Maiden**"). There were no written leases, but the equipment had been in Maiden's possession for over a year and QES had periodically invoiced Maiden for the use of the equipment. The oral leases between QES and Maiden were not perfected. In addition, Maiden had paid QES a sum equivalent to the amount QES has paid as a deposit for the purchase of the Caterpillars.

In 2011, Maiden provided to QES the funds required to payout the Esanda finance in respect of the 320D, and QES thereupon discharged the finance and stopped invoicing Maiden for the 320D. QES continued to invoice Maiden for the 330D and 930.

In 2012, Maiden borrowed money from Fast Financial Solutions Pty Ltd ("**Fast**"). As part of the terms of the finance transaction Maiden granted security over

[20] Under the winding up provisions in the *Corporations Act 2001* (Cth); 'PPS Act retention of title property' is property which is owned by the secured party but is in possession of the receiver/ lessee of the goods.
[21] Convention on International Interests in Mobile Equipment, open for signature 1 November 2001 (entered into force 1 April 2004); Protocol on Matters Specific to Aircraft Equipment , done at Cape Town on 16 November 2001.
[22] Convention on International Interests in Mobile Equipment, open for signature 1 November 2001 (entered into force 1 April 2004), Article 7.
[23] *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth); *International Interests in Mobile Equipment (Cape Town Convention)(Consequential Amendments) Act 2013* (Cth); see also the Explanatory Memorandum to the *International Interests in Mobile Equipment (Cape Town Convention) Bill 2013*
[24] See John Canning, The Cape Town Convention and aircraft protocol – more to come (2013).
[25] The Caterpillars could be driven, had individual vehicle identification numbers and were powered by their own engines; categorised as motor vehicles.

all of its assets (including the Caterpillars) to Fast under a General Security Deed ("**GSD**"). Fast then registered this purported security interest on the PPSR, thereby perfecting its security interest.

Later in 2012, Maiden fell into financial difficulty and Fast became aware of the occurrence of events of default under the GSD. Fast then enforced its rights under the GSD to appoint receivers to Maiden. QES terminated the leases and asserted primary rights to the equipment as owners. Fast's receivers asserted primary rights to the equipment as sole perfected security interest holder.

3.2 Security interests and priority

The Court found that both QES and Fast had competing security interests in the 330D and 930.

Fast's security interests

The Court held that the 'all assets' security granted in the GSD created security interests in favour of Fast in all three of the Caterpillars. The Court found that Fast's security interests were perfected under the PPSA when Fast registered the security interests on the PPSR.[26] Under section 19(5) of the PPSA, Maiden had proprietary rights in the Caterpillars under each lease even though it was not the owner of the equipment. Therefore, Fast's security interests attached to the Caterpillars when Fast advanced funds (gave value) to Maiden under the terms of the GSD.[27]

QES' security interests

The Court held that QES had unperfected security interests in the 330D and 390.[28] The Court found that each lease between QES and Maiden amounted to PPS lease within the meaning of section 13 of the PPSA.[29] The Court stated that for a lease or bailment to amount to a PPS lease under the PPSA the lease or bailment must be either:

(a) for a term longer than a year;[30] or

(b) for a term longer than 90 days where the personal property may or must be registered by its serial number under the PPSA Regulations.[31]

The Court found that the Caterpillars were personal property that 'may or must be described by serial number under the PPSA Regulations'[32] and the Caterpillars had been in Maiden's possession for more than 90 days. Therefore, the Caterpillar leases between QES and Maiden were PPS leases for the purposes of the PPSA, and QES' interest as lessor was a security interest within the meaning of section 12 of the PPSA.[33]

The Court found that QES' PPS leases were transitional security interests as they were entered into before 31 January 2012.[34] Under the PPSA, most unregistered transitional security interests are temporarily perfected until 31 January 2014.[35] However, unregistered security interests are not temporary perfected if they could have been registered on a pre-PPSA register before the PPSA commenced operation, but were not registered on that register. In the present case, the unregistered PPS leases were capable of being registered on a state based register before PPSA commencement, but had not been registered.[36] Therefore, QES' PPS leases did not have the benefit of temporary perfection and were unperfected.

[26] See the perfection-main rule in section 21 of the *Personal Property Securities Act 2009* (Cth).
[27] *Personal Property Securities Act 2009* (Cth) s 19(2); and enforceable under *Personal Property Securities Act 2009* (Cth) s 19(1).
[28] The lease did not in substance secure any obligation, but was a deemed security interest under PPSA s 12(3)(c).
[29] Regardless of the fact that the leases were not in writing.
[30] See *Personal Property Securities Act 2009* (Cth) ss 13(1)(a)-(d) for specific requirements.
[31] See *Personal Property Securities Act 2009* (Cth) s 13(1)(e).
[32] See *Personal Property Securities Regulations 2010* (Cth) Schedule 1, r 2.2.
[33] The Court found that there was a term in the oral agreement between WES and Maiden that the title to each Caterpillar would pass to Maiden once the finance in that Caterpillar was discharged. Therefore, the legal title to the 320D vested in Maiden when it finalised the outstanding finance.
[34] See *Personal Property Securities Act 2009* (Cth) s 308.
[35] See *Personal Property Securities Act 2009* (Cth) s 322.
[36] Under the *Northern Territory Registration of Interests in Motor Vehicle and Other Goods Act 2008* (NT).

Accordingly, both QES and Fast had security interests which attached to the Caterpillars; therefore, the dispute between them was a PPSA priority dispute not an ownership dispute.[37]

Competing priority between security interests

The Court stated that the competition between competing security interests must be resolved according to the system of priorities established by section 55 of the PPSA. Under the PPSA, a perfected security interest in collateral has priority over an unperfected security interest in the same collateral.[38] Therefore, because QES' PPS leases were not perfected, Fast's perfect security interests had priority.

3.3 Does legal title trump a security interest?

In the present case, the Court needed to determine whether QES' legal title to the Caterpillars[39] defeated Fast's security interests.

QES submitted that section 112 of the PPSA imported the nemo dat rule into the PPSA.[40] Therefore, Fast could get no better title to the Caterpillars than was possessed by Maiden. Section 112 of the PPSA states that when exercising rights and remedies under the PPSA, a secured party may only deal with collateral to the same extent as the Grantor would have been entitled.

The Court upon examining section 112 found that its purpose was not to invoke the nemo dat rule but to confirm that the limitations and restrictions imposed by the law on a Grantor's ability to deal with the collateral also apply to the secured party in enforcement action under Chapter 4 of the PPSA. The Court also found that section 112 does not detract from the effect of the PPSA in treating ostensible ownership, through possession, as a sufficient right in collateral for a PPS lessee to deal with it, to the extent of creating in a third party a valid security interest which, on perfection, prevails over the lessor's unperfected interest. In the present case, the fact that QES has legal title to the Caterpillars does not influence the priority rules in relation to the enforcement of security interests under the PPSA.

The Court stated that even if the proper construction of section 112 was to import the *nemo dat* rule into exercising rights and remedies under Chapter 4, Fast was exercising its rights and remedies under the GSD not Chapter 4.

Therefore, under the PPSA, the holder of the legal title to personal property gains no extra priority from that title. In regards to personal property, the PPSA priority rules fully displace the common law *nemo dat* position.

The fact that Maiden no longer had any right to possession under the leases (which were now terminated) did not affect this outcome for two reasons. First, section 267(2) of the PPSA provides that any security interest granted by a corporation that is unperfected at the commencement of its administration or winding up vests in the corporation.[41] Therefore, once Maiden entered winding up, QES' unperfected PPS leases vested in Maiden. The practical effect of a security interest vesting in the Grantor is that the security interest is extinguished. Second, under the GSD, Fast had an interest in the equipment which was not dependent on the lease continuing.

3.4 Outcome

Because Fast's perfected security interests had priority, Fast was entitled to possession of the Caterpillars.

[37] It is interesting to note that the Court also found that the exclusions in relation to PPS leases contained within sections 13(2)-(3) did not apply in the present case because QES was in the business of leasing good (the hiring of the machines was QES' only income) and Maiden provided value for the lease (in the form of finance payments plus a ten percent margin).
[38] *Personal Property Securities Act 2009* (Cth) s 55(3).
[39] Excluding the 320D which was owned by Maiden.
[40] The successor in title can only inherit the rights of the predecessor.
[41] *Personal Property Securities Act 2009* (Cth) s 267(2); note the exception in section 268(1)(a)(ii) of the *Personal Property Securities Act 2009* (Cth) does not apply because one or more of section 13(1)(a) to (d) of the *Personal Property Securities Act 2009* (Cth) applies.

4. Implications for participant in the aviation industry

Whilst the transitional security interests which were central to the dispute in Maiden will lose their temporarily perfected after 31 January 2014 there are some important lessons for the aviation sector arising from this case.

4.1 Aircraft and engines

Airlines, Aircraft owners, lessors and sub lessors need to be careful when leasing or bailing aircraft to another party that their security interest in that aircraft is perfected (registered by serial number) especially where a PPS lease has arisen.

4.2 Outsourcing

In cases where an aviation entity has previously undertaken a task internally (such as heavy maintenance on aircraft or IT system delivery) and subsequently:

(a) employs a contractor to provide this service; and

(b) leases or bails equipment (eg spares parts, tools or vehicles) to the contractor,

the aviation entity should look to perfect its security interest in the bailed or leased equipment.[42]

4.3 Slots

Where an airline leases airport take-off and landing slots to another operator (even another company within the same group who has a different Air Operator's Certificate) a PPS lease may arise. In this situation it would be advisable for the lessor of the slot to perfect its security interest in the landing slot.

4.4 Intellectual Property Licences

Under the PPSA, a person can register a security interest over intellectual property.

Because of the proliferation of intellectual property licences in the aviation sector, it is important for aviation entities to consider registering any intellectual property security interests it might have. Intellectual property licencing in the aviation sector could include:

(a) Trademarks: Airlines such as Jetstar, AirAsia or Virgin licencing their trademarks to joint ventures,

(b) Designs: Interior design or 'In Flight Entertainment' companies licencing their designs to airlines or other regional suppliers; and

(c) Patents: Aviation engineering companies licencing their patents to manufacturers and suppliers.

4.5 Retention of title

Within the aviation sector the sale of goods with the retention of title can be common (eg some Jet Fuel supply contracts). Upon entering into a 'retention of title' contract, the supplier should register its security interest in the goods supplied to avail itself of the PPSA protections.[43]

5. Conclusion

The asset intensive nature of the aviation sector requires its participants to invest large amounts of capital. The size of these investments can magnify any financial stresses and therefore make aviation business more susceptible to cash flow and insolvency issues. The aviation industry must be mindful of the Court's decision in Maiden, which has reinforced the imperative that secured parties perfect their security interests in collateral, so that their security interest can survive insolvency.

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[42] Eg tugs, catering trucks, baggage handling equipment, and non-fixed aerobridges.

[43] Note that in relation to goods such as jet fuel Part 3.4 of the PPSA provides rules for the priority distribution of processed or commingled goods.

UPDATE FROM THE UNITED KINGDOM

The broader use of AAIB accident investigation reports

The admissibility of an accident report published by the Air Accidents Investigation Branch of the UK Department for Transport (the **AAIB**) in civil proceedings in England and Wales has long been a grey area, but until recently there was no reported decision, on any contested issue, giving any direction one way or the other. For those who represent aircraft operators and other organisations in the aviation industry, there has traditionally been an acceptance that accident investigation reports are not admissible in civil proceedings, although, unlike in the United States, there is no legislation or regulation which prohibits this use. Why, therefore, have the courts not been troubled previously with the argument that such a report is inadmissible?

The background lies in the legal framework which grants the AAIB the power to investigate accidents and incidents and the remit of this function. The AAIB's powers are set out in the *Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996*, which implement the EU obligations of the UK under *Council Directive 94/56/EC* to carry out Annex 13 to the *Convention on International Civil Aviation* (the '**Chicago Convention'**). *EU Regulation No 1996/2010* contains the provisions for air accident investigations which operate in Member States.

The role of the AAIB is to investigate the cause of aircraft accidents from a safety perspective. Importantly, its role is not to apportion blame or liability. With that remit in mind, it is perhaps unsurprising that the AAIB's investigators must have access to the aircraft, its components and wreckage after a reported accident or incident and, importantly, an ability to take statements from witnesses, without impediment, as part of the gathering of evidence to determine the cause. What use then can subsequently be made of this factual enquiry, by a party seeking to rely on the published accident report in civil proceedings in England and Wales?

This question arose in a recent application before the High Court of Justice in *Rogers v Hoyle* [2013] EWHC 1409, where the Court considered whether an AAIB report, published in relation to a fatal aircraft accident on 15 May 2011, constituted inadmissible opinion evidence. That opinion evidence was argued to extend to all findings of fact in the AAIB report and, as such, it was argued that the report should be excluded from the proceedings before the court on the substantive dispute between the parties.

In an interesting and, perhaps, controversial decision, the Court concluded that the AAIB report was admissible as evidence in civil proceedings, and that it is for the Court to determine what weight should be given to the contents of the report. It did so having considered the relevance of the evidence contained in the AAIB report and, in particular, the evidence of the pilot and the eye witnesses in relation to the manner in which the aircraft was seen to be flown before it entered a spin, and the evidence of the AAIB's investigators on technical aspects. The Court was persuaded that statements made to experienced AAIB accident investigators during the course of their investigations had the advantage of immediacy and so could be regarded as more reliable than a recollection at trial, which may not take place until several years after the accident.

That is difficult to dispute, but where the AAIB report does not identify the person to whom any factual statement is attributed and, where the report is in a form to draw attention to particular issues and recommendations for safety purposes, it necessarily comprises analysis and discretion from the AAIB's perspective as to what is relevant for the accident report. The view taken by the Court is that evidential interrogation lends itself to the question of weight rather than admissibility, which reflects the position that it is for the Court hearing the evidence at trial to determine whether the evidence is persuasive and should be taken into account. The Court can accept or ignore that evidence, but the concern is that evidence which cannot be

tested, for example by cross-examining the witness, will be accepted without further scrutiny.

There is a distinction between expert evidence, where the person giving evidence has specialist skill and knowledge of particular facts on which to give an opinion, and an opinion of a person who is not placed to give such evidence. The general rule is that opinion evidence is not admissible. What then is the status of the evidence in relation to issues of fact contained in the AAIB report, where those facts are derived from interviews of eye witnesses and others?

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UPDATE FROM KOREA

China Eastern Airlines Case: Ruling and its Implications

On February 1, 2013, the Seoul High Court affirmed the lower court's decision, finding two individuals who bribed the CEO of the Korean subsidiary of China Eastern Airlines not guilty in Korea's firstever trial under the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions ("**FBPA**"). This case is noteworthy not only as the first court trial of a FBPA violation, but also for addressing the scope of "foreign public official" for purposes of the FBPA.

China Eastern Airlines Case

The CEOs of a logistics company and a travel agency allegedly bribed the CEO of the Korean subsidiary of China Eastern Airlines, requesting more shipments at more favorable freight fees and more flight tickets for sale, respectively.

One of the main issues was whether China Eastern Airlines' CEO constitutes a "foreign public official" under the FBPA.

Article 2 of the FBPA defines "foreign public official" similarly with the OECD Convention on Bribery, encompassing not only government officials but also individuals performing a public function such as employees of government-controlled companies or state owned enterprises.

Specifically, in Article 2(2)(c) of the FBPA, the term "foreign public official" is defined to include:

> *"[A]n executive or employee of a company in which a foreign government contributed more than 50% of the paid-in-capital or with respect to which a foreign government exercises de facto control over its overall management including major business decisions and the appointment or dismissal of its executives (however, this sub-paragraph shall not be applicable if a company conducts business on a competitive basis with other private-sector companies without receiving preferential subsidies or other benefits from the government)."*

The lower court found that even though there is some evidence to show that the CEO would fall within the definition of a "foreign public official" under the FBPA, the evidence presented did not rise to the level of satisfying the burden of proof. The Court did not specify which prong of the above provision the prosecution failed to prove.

On appeal, the prosecution sought to prove that the CEO is a foreign public official for purposes of the FBPA by arguing that the Chinese government exercises de facto control over China Eastern Airlines on the grounds that (i) a company wholly owned by the Chinese government owns more than 50% of China Eastern Airlines' capital and (ii) the Chinese government appoints and dismisses the CEO of China Eastern Airlines. Furthermore, the prosecution also presented the following reasons for finding that China Eastern Airlines does not conduct on a competitive basis with private-sector companies: (i) in the Chinese government is in charge of mergers and spin-offs of the company; (ii) such misconduct as embezzlement by an executive or employee of the company should be reported to the relevant Chinese local governments; (iii) a Chinese government agency monitors the performance of the company; and (iv) the company receives large amounts of government subsidies.

Despite the arguments put forth by the prosecution, the appellate court affirmed the lower court's holding without providing any additional reasoning. It is regrettable that the appellate court did not provide clearer guidance on this issue.

Comparison with the FCPA

The China Eastern Airlines case reveals an interesting parallel between the FBPA and the United States' Foreign Corrupt Practices Act ("**FCAP**") in connection with the scope of foreign public official.

The FCPA defines "foreign official" to include:

> *"[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."*

While it is usually clear what constitutes a government department or agency, the FCPA does not provide guidance on what type of entities are "*instrumentalit*[ies]" of a foreign government. In general, though, state-owned or controlled enterprises are regarded as "*instrumentalities*". Nevertheless, uncertainty remains as to the exact percentage of government ownership or voting rights required to constitute an instrumentality within the meaning of the FCPA.

With regard to this issue, *United States v. Esquenazi*, a recent FCPA case currently on appeal before the 11th Circuit, sheds some light. This well-publicized case (primarily due to the record 15-year sentence) involves a federal investigation into activities of a company called Terra Communications and its relationship with the national telecommunications company of Haiti ("**Haiti Teleco**"). The allegation was that Terra's executives used intermediaries to make illegal payments to Haiti Teleco's executives in exchange for lower rates and other business advantages. Before the trial, the defense moved to dismiss, arguing that the defendants were not foreign officials and that Haiti Teleco was not an instrumentality of the Haitian government.

Denying the motion to dismiss, the trial court in Miami instructed jurors to consider the following factors in deciding if Haiti Teleco was a government instrumentality under the FCPA:

1. Whether it provides services to citizens and inhabitants of Haiti;
2. Whether its key officers and directors are government officials or are appointed by government officials;
3. The extent of Haiti ownership of Haiti Teleco, including whether the government owns a majority of the company's shares or provides financial support, including subsidies and tax breaks;
4. Haiti Teleco's obligations and privileges under Haitian law such as a government-granted monopoly; and
5. Whether Haiti Teleco is widely perceived to be performing governmental functions.

The approach taken by the court implies that not all of the above is required to be met and none of the factors alone would be determinative. The Eleventh Circuit's forthcoming decision in Esquenazi will provide some guidance as to the definition of foreign official in the FCPA and thus should be closely monitored.

Implications for Korean Companies and Multinational Companies in Korea

As seen from above, the exact definition and scope of foreign public official is yet to be delineated not only in Korea but also in the United States. Needless to say, the standards should be clarified so that companies who transact business with foreign counterparties can do so without the fear of prosecution. Such uncertainty is further exacerbated when dealing with foreign companies in developing countries that undertake various forms of privatization, making it more difficult to evaluate the degree of government control.

In case of Korea, it should be noted that both the district and appellate courts in the China Eastern Airlines case ruled against the prosecution not because the CEO does not constitute a "foreign public official" but because the prosecution had not met its evidentiary burden of proof showing that China Eastern Airlines was an "enterprise" within the meaning of Article 2(2) of the FBPA. Furthermore, as the courts acknowledged that "there is some evidence that China Eastern Airlines might be an enterprise within the meaning of Article 2(2) of the FBPA," it remains to be seen how the Supreme Court of Korea will decide on this issue.

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Victory for Carrier in Korean Shock Watch Case

Those involved in the air freight industry will be familiar with shock watches. According to the manufacturers of these devices, shock watches are designed to protect products from impact and tilting. They may also provide evidence to support a damage

claim by the cargo owner/shipper. In practice, however, their use may be of more limited value. Following a recent judgment handed down by the Seoul Central District Court, if the only proof of damage is the activation of a shock watch, this alone may not be sufficient to guarantee a successful claim against the carrier.

The case in question involved the carriage by air from San Francisco to Incheon, South Korea, of five crates of medical equipment. Upon arrival into Incheon, and during segregation of the cargo, a shock watch stacked on one crate was found discoloured and a shock watch which had been stacked on a second crate was found to be missing. A survey report procured by the Claimants concluded that the cause of the damage was due to a 'hidden impact' during the carrier's custody. Photographs of the consignment in question showed no obvious signs of physical damage to the outer packaging of the crates, yet upon testing, the machinery within was found damaged and no longer functioning. A claim was brought against the carrier by the subrogated Insurers for the House Air Waybill consignees seeking to recover their outlay for the damaged consignment.

Based on carriage USA to South Korea, the carrier's liability was governed by the provisions of the *Montreal Convention 1999* (the **Montreal Convention**). Article 18(1) of the Montreal Convention provides that "*the carrier is liable for damage sustained in the event of...damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air*". In its defence, the carrier argued defective packaging (available under Article 18 (a) and (b)) since the cargo was found to have no shock absorbers or support. The carrier also argued that the mere fact that one shock watch was missing and one had been activated was not sufficient evidence that the damage had been caused during carriage by air. There was also no proof that the alleged missing shock watch was actually attached to the cargo on uplift at San Francisco. Informal tests carried out on the shock watches by the carrier (the results of which were presented to the Court) indicated that the shock watch used in respect of the consignment in question was also overly sensitive.

In the written decision, the Judge accepted that the claim should be adjudicated in accordance with the provisions of the Montreal Convention. He also held:

- That the burden of proof was on the Claimant to establish that the cargo in question had sustained damage during the course of carriage by air and that the Claimants had not discharged that burden of proof.
- The shock watch used was not appropriate for the weight/volume of the subject cargo.
- No prior notice had been given to the carrier that shock watches had been attached to the cargo (or that the cargo was sensitive to shock or tilting), and nor had any additional charge been paid for handling the cargo on the basis it was sensitive to impact.

In short, the Judge concluded that the mere fact that the shock watch had discoloured was not sufficient evidence of an external impact causing damage to the cargo during the carriage by air.

The Judge's analysis is positive news for carriers defending similar claims, as it underlines the fact that the simple activation of a shock watch may not, on its own, be sufficient to mount a successful case against the carrier. Although, for commercial reasons, most claims of this nature will never reach the courts (particularly if the Montreal Convention applies, as liability limits are unbreakable), carriers may be more willing to consider mounting a defence to such claims, particularly if the claim value warrants it and the carrier/its Insurers have the appetite to defend.

The authors' firm represented the carrier in these proceedings, brought by the cargo interests' subrogated insurers. The decision was handed down in June of this year.

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UPDATE FROM FRANCE

Passengers on blacklisted carriers must be warned before concluding contract

EU Regulation 2111/2005 established a list of air carriers that are subject to an operating ban within the European Community, and imposed an obligation to inform passengers of the identity of the operating air carrier. This provision has already been integrated into the French Civil Aviation Code.

On 24 April 2013, the French Parliament passed a new law (2013-343) which takes the obligation to inform passengers one step further: any party (whether an individual or a corporation) offering contracts of carriage which include, for any leg of the journey, carriage by an 'actual carrier' (as defined by Article 39 of the 1999 Montreal Convention), which is subject to an operating ban within the European Union, must:

Inform the passenger or ticket purchaser of this in clear and unambiguous terms, in writing.

Invite the passenger or ticket purchaser to seek alternative travel options.

Do so before conclusion of the contract of carriage (or where appropriate, the travel package).

Failure to comply with this obligation, and/or the sale of a package or contract of carriage involving a flight with a blacklisted carrier, will expose the seller to a fine of €7,500 per ticket sold (increased to €15,000 for a repeat offence).

This fine is distinct from the criminal proceedings which may also be pursued against the air carriage contractor (i.e., the carrier, tour operator or other seller) for deliberately endangering human life or criminal negligence (under Article 121-3 of the Criminal Code).

The law was first presented in draft form to the National Assembly in December 2009. It is slightly odd that even though the draft law was unanimously adopted before the National Assembly and the Senate, it still took more than three years to be passed into law.

The new law does not go so far as to prohibit the sale of tickets involving a carrier which is subject to an operating ban within the European Union; although this was initially envisaged, such a provision was considered to be ineffective or inappropriate, since in certain parts of the world alternative carriers are unavailable.

The law will enter into force on 24 April 2014 or on such earlier date as may be set down by decree.

A practical question arises as to who is affected by this new law. Clearly, any ticket seller or air carriage contractor (as defined by EU Regulation 2111/2005) operating within France will be affected. However, there is an issue of whether such sellers or contractors operating outside France can be affected by the law. The manner in which the authorities seek to apply the law will need to be monitored.

Nevertheless, it is clear that many tour operators and airlines offering contracts of carriage involving blacklisted air carriers within France will need to adapt their practices in order to ensure that potential passengers are warned of the situation and invited to seek alternative travel arrangements prior to the conclusion of the contract.

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