



Aviation Newsletter

April 2016

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Welcome to the inaugural Clyde & Co Australia Aviation Newsletter.

Since joining Clyde & Co in late 2013, we have been steadily building the firm's aviation capabilities in Australia with the support of our market leading global aviation team.

In response to the volume of issues that arise in the aviation sector, we have decided to offer our clients and their insurers a local newsletter to highlight issues specific to the Australian market. This newsletter will add to our aviation insights series that includes Clyde & Co's premier global aviation and aerospace biannual newsletter to ensure our clients are kept abreast of industry developments.

In this edition, we review some of the key aviation issues, which have attracted attention over the past year in Australia. We present our Australian team, including our recent joiners Michael Tooma (Partner) and Scott Castledine (Senior Associate). We highlight some upcoming aviation events that we will be speaking at.

We hope you find this newsletter of interest and insightful.



Remotely piloted aircraft in Australia – New rules to take effect in September 2016

Written by Maurice Thompson (Partner) and James Cooper (Special Counsel)

After some delay, Australia's aviation safety regulator, the Civil Aviation Safety Authority (CASA), has announced the approval of new rules governing the operation of remotely piloted aircraft (RPA) in Australia. The new rules will take effect from [29 September 2016](#).

Understanding the foundations

The recent proliferation of RPA in the market, particularly at a commercial and recreational level, is now a familiar tale worldwide. This has led to debates in all key jurisdictions about the adequacy of current laws to address the needs of this developing industry.

Australia, via CASA, has been at the forefront of the regulation of RPA. From 2002, Australia has had a legal framework in place governing the use of RPA via [Part 101 of the Civil Aviation Safety Regulations \(CASR Part 101\)](#).

Pursuant to the existing CASR Part 101 regime, unless otherwise approved by CASA, all RPA (regardless of size and the purpose of use), are to be operated within the same mandatory operating conditions. In addition, commercial users of RPA (as distinct from recreational users) are also required to hold an operator's certificate (for the operating entity) and a controller's certificate or remote pilot certificate (for the individual remote pilot). These certificates are obtained via an application process managed by CASA. Additional approvals/certificates are required for the operation of "large RPA" i.e. those more than 150 kilograms in weight.

For prospective commercial operators in Australia, a common complaint has been that the existing certification process is onerous, costly and time consuming. At a more general level, concerns have been raised about safety and privacy. These concerns have been heightened by the regular reporting of incidents involving errant RPA, often with serious or potentially serious consequences.

The new RPA regulation

We reported back in [July 2014](#) that CASA had undertaken a review of the existing CASR Part 101 to produce an "up-to-date" regulation better suited to meeting industry

demands. Essentially, CASA proposed a new risk-based framework for regulating RPA commercial operations, to be set out in a new standalone regulation (CASR Part 102). CASA had initially set mid-2014 as a preliminary date for the implementation of its proposed new rules.

On 31 March 2016, CASA [announced](#) that its proposed new rules governing RPA had been approved at a meeting of the CASA Executive.

The cornerstone of the new regime is the simplification of regulatory requirements for RPA that are considered to be lower risk based on size and operational use (defined in the new regulation as 'excluded RPA'). Thus, all persons operating very small RPA (i.e. RPA weighing 2kg or less) for hire or reward will be exempt from requiring CASA certification or licencing approval. Instead, those operators will merely be required to notify CASA of their identity and the nature of the proposed flight at least 5 business days before the operation, and ensure the flight is then conducted in accordance with a set of prescribed operating conditions. Those operating conditions include:

- during the day
- with a visual line of sight maintained by the remote crew
- less than 400 feet above ground level
- in non-populous areas, including more than 30 metres from any person not directly involved in its operation
- not within 5.5 kilometres of a controlled aerodrome.

CASA is creating an online notification system for use by commercial operators for that purpose. It will be an offence to operate such a flight without the appropriate notification to CASA in advance.

CASA's justification for this significant change is that very small RPA of 2kg or less are considered to pose very little

risk to aviation and have a low potential for harm to people and property on the ground and other airspace users, provided they are operated under the mandatory operating conditions. The expectation is that this will, in turn, ease the difficulties that have been faced regarding the timely processing and approval of RPA certifications.

Other noteworthy elements of the new regime are:

- RPA with a gross weight of more than 2 kilograms in all operating conditions, and all RPA operating outside the prescribed operating conditions, will, subject to some exclusions, still require CASA approval / licencing when operated for commercial purposes
- private landholders will be permitted to carry out some RPA commercial operations on their own land without the need for licencing or other approvals from CASA
- allowing for more detailed operational matters to be dealt with in a 'Manual of Standards'
- the creation of 11 strict liability offences, including operating an RPA beyond visual sight, conducting non-excluded RPA operations without holding the appropriate certification, and not complying with the operator's documented practices and procedures.

The authority of the Minister for Infrastructure and Transport has [released](#) an explanatory statement setting out the full suite of changes.

Possible implications on the industry

In July 2014, we posed the question “...with commercial operations of such aircraft continuing to increase at a rapid rate and with technological advancements in this area only expected to grow in the coming years, can the law makers keep pace?” It is a challenge being faced across the global industry and one that, in many ways, is out of the regulators' hands.

Safety and privacy are issues that arise repeatedly in this context. Will the new rules provide adequate safeguards to protect against unauthorised or uncontrolled use of RPA? Will existing privacy laws be sufficient to protect third parties against invasive conduct? CASA has already made it clear that issues of privacy are beyond its remit, so where does that leave the industry? Concerns over the new regime have already been expressed, specifically in relation to RPA under 2 kilograms being classified as “low risk” and not requiring operational approval for commercial use, and that this in turn will encourage a drastic increase of RPA flights by unlicensed and uninsured operators with little knowledge of airspace rules and safety.

Despite these concerns, CASA's efforts to modernise the existing regulations should be welcomed and they ensure that Australia remains at the forefront of this developing area.

Once the new regime takes effect in September 2016, it will lead to a very interesting and potentially challenging period assessing the effectiveness of the new rules against the expected continued proliferation of RPA and RPA users in the market. We will continue to monitor developments with interest.



Two recent enforceable undertakings highlight the need for those in the aviation industry to comply with work health and safety requirements

Written by Michael Tooma, Tim Armstrong and Elana O'Reilly

In December 2014 ACT Attorney-General Simon Corbell announced that for the first time WorkSafe ACT had accepted an enforceable undertaking (**EU**) under the *Work Health and Safety Act 2011* (**ACT**). The first of which was entered into by Virgin Tech Pty Ltd (**Virgin Tech**), part of Virgin Australia Group.

The EU arose out of an incident in May 2013 where a Virgin Tech employee was struck on the back of the head by a high speed roller shutter door when collecting recycling from the terminal premises at Canberra Airport. The employee injured their neck, received treatment for this injury and later returned to work.

Virgin Tech responded by proposing an enforceable undertaking which included implementation of internal safety programs, a compliance reporting platform, external audits, employment of a WHS specialist, sponsorship of an education program for community members and a donation to the Neurosurgical Unit, Canberra Hospital at a total cost of AUD 625,000.

More recently, as a result of another incident at Canberra Airport involving a Qantas Airways Ltd (**Qantas**), an employee who was injured when he fell backwards approximately 1.5 metres while cleaning an aircraft at Canberra Airport.

WorkSafe ACT investigated the incident and alleged that Qantas failed to comply with their duty to ensure the health and safety of workers and contractors, exposing an individual to a risk of serious injury. Qantas proposed an EU which included internal programs, improvements to the infrastructure designed to prevent a fall from height, employment of a WHS coordinator, sponsoring a research project into managing safety risks and a donation to the

Snowy Hydro Rescue Helicopter service in the ACT at a total cost of AUD 680,000. The EU was accepted in 2016.

EU's arise under part 11 of the *Work Health and Safety Act 2011* (**ACT**)¹ that provides that WorkSafe ACT may accept a written undertaking in connection with a matter relating to an alleged contravention by the person of the Act.

An EU is a legally binding agreement between WorkSafe ACT and the person who proposed the undertaking whereby in exchange for various safety initiatives, WorkSafe ACT will not prosecute for an alleged breach of the Act.

EU's are primarily aimed at addressing the underlying issue that led to the incident and also includes community based and industry initiatives with the aim of improving community awareness and safety outcomes.

During the term of the EU, which is usually two years, contravention of the terms of the EU may result in substantial penalties but more significantly, WorkSafe ACT can bring proceedings for the original alleged contravention of the Act. It is important to note that an undertaking cannot be accepted for an alleged contravention that is a category 1 offence (see s 31 of the Act).

While to some, EU's may be seen as a quick fix to avoid a prosecution, in reality this is far from true. In some cases, EU's can result in high levels of expenditure, sometimes

¹ Also see Work Health and Safety Act 2011 (NSW) Part 11, Work Health and Safety (National Uniform Legislation) Act 2011 (NT) Part 11, Work Health and Safety Act 2012 (Tas) Part 11, Work Health and Safety Act 2012 (SA) Part 11, Work Health and Safety Act 2011 (QLD) Part 11, Occupational Safety and Health Act 1984 (WA) Part VII Div 3, Occupational Health and Safety Act 2004 (Vic) Div 4 and Work Health and Safety Act 2011 (Cth) Part 11

greater than that of the likely original fine. In both the Virgin Tech and the Qantas examples, both organisations committed over half a million dollars to improving their internal systems and contributing to community initiatives. While Virgin Tech and Qantas safety budgets are likely to be significant given the size of their organisations, a contribution of this nature is not insignificant to the further improvement of safety.

Entering into an EU does result in additional ongoing compliance obligations with the regulator to ensure compliance with the EU, but they also provide an opportunity to develop and implement ongoing and lasting change within an organisation and provide a positive contribution to the community.

The priority should always be ensuring a workplace is free from risks to health and safety, but when an incident does occur, EU's provide an opportunity to grow and learn from an incident, which can only be a good thing.



They understand our business and quickly grasp the commercial issues; we get the full package from Clyde & Co.

Chambers Asia Pacific 2015 - client testimonial



Air cargo cartel: litigation of the ultra long-haul kind but is it finally starting to run out of fuel 10 years on?

Written by **Scott Castledine** (Senior Associate)

Scott Castledine considers recent litigious surprises in the UK and Australia and avoids answering this question.

On Valentine's Day 2006, as an IATA meeting in Hong Kong was in full swing, mobile phones rang in unison as numerous general counsel were alerted to parallel, co-ordinated dawn raids being conducted on their respective carriers by, among other regulators, the US Department of Justice and the European Commission.

They had been tipped off about an alleged widespread cartel between participants in the global air cargo market.

Over the past 10 years, a mixture of criminal prosecutions, regulatory investigations, enforcement proceedings and class actions have hit carriers in practically every major jurisdiction across the globe for allegedly fixing the price of fuel and security surcharges. Six employees have done jail time, close to USD 2 billion in civil (and in some cases, criminal) penalties have been extracted by regulators in seven countries and, to date, over USD 1 billion in settlements have been paid out by carriers to shippers, plaintiff law firms and third party litigation funders (largely in the USA).

Surely it is nearly all over for the airlines involved, or are there more twists and turns to come even 16 years on from when the cartel conduct is alleged to have first started?

In November 2010, the Commission fined 10 airlines a total of nearly EUR 800 million, which hit the industry hard at a time when carriers were constantly battling to keep out of the red.

The GBP 1 billion follow-on action in the UK, brought by 500 or so shippers in the English High Court, initially proceeded at a snail's pace (in parallel to another EUR 500 million class action brought in the Dutch courts) largely due to the Commission's delay in publishing its decision, which generated criticism from far and wide.

In 2014, however, Mr Justice Peter Smith, ordered British Airways to disclose the confidential version of the

Commission's decision (within a confidentiality ring), eagerly awaited by the plaintiff lawyers. Finally, the proceedings in the Royal Courts of Justice looked set to get going in earnest.

With BA as the principal defendant and 23 other airlines joined as co-defendants, it was billed as the juggernaut commercial case of the year, involving the "Who's Who" of the London Competition Bar and City law firms.

While it was indeed a juggernaut, it was one with various often surprising twists and turns. In July 2015, on application by BA, Peter Smith J. was forced to recuse himself as the sitting judge on account of perceived bias after complaining directly to the Chairman of BA about his lost luggage, mislaid somewhere between Florence and Gatwick, as well as raising the issue in open court.

October 2015 saw further success for the airlines. On 15 October, BA managed to persuade the English Court of Appeal to overturn Peter Smith J's refusal to strike out two common law economic tort claims: interference and conspiracy to injure by unlawful means, both of which fall outside EU competition law rules.

The Court held that it could not be demonstrated that BA and the other airlines intended to injure the claimants (intent being a prerequisite element) as they could not have any idea at the relevant time where the loss would ultimately fall given the shippers could well have "passed on" the higher costs to indirect purchasers down the supply chain.

BA's success on appeal reduced the size of the claim by 60% to GBP 400 million. The appellate bench also overturned Peter Smith J's order for disclosure of the confidential decision of the Commission as it held that it contravened BA's rights under EU law.

On October 27, BA was also successful before the

English High Court in having a separate class action brought against it dismissed summarily, which had been purportedly brought on behalf of nearly 65,000 Chinese businesses by a plaintiff law firm. The key problem, was that none of those businesses had in fact authorised the law firm to bring the action on their behalf and, moreover, only a fraction of those claimants had in fact even used air cargo services. Industry chatter would suggest that this dismissal may be appealed.

Additionally, in December 2015, the General Court of the European Union annulled the Commission's decision on account of it containing inconsistent descriptions of the cartel (the allegation of a "single and continuous infringement" by all cartel participants was not borne out by the evidence offered only in respect of a small group of carriers on specific routes) and ordered a refund of hefty fines that had been levied against the airlines.

If the Commission does not appeal to the ECJ, then conventional wisdom would suggest that this about-face ought to have a significant impact on the follow-on litigation which was founded, at least in part, on the investigation and findings of the Commission. It would be a brave commentator to predict with any degree of certainty what may happen next.

Closer to home, in Australia in 2012, 13 airlines conceded liability and paid penalties to the ACCC amounting to AUD 98.5 million. Neither Air New Zealand nor Air Garuda adopted that position, both electing to proceed to trial, at which they successfully persuaded Justice Perram to dismiss the case on the technical point that the relevant air cargo services were not supplied in a "market in Australia" (a requirement of the Trade Practices Act 1974 (Cth) in force at the time). However, on 21 March 2016, the Full Federal Court (by a majority of two to one) overturned that ruling in favour of the ACCC, finding that the anti-competitive conduct had in fact occurred in a market in Australia.

In spite of the alleged conduct affecting surcharges on air cargo carried to and from Australia, the Full Federal Court held that all aspects of the market are relevant to the question of whether the market is in Australia, such as the presence of customers in Australia, and not simply the geographic dimension of the market. This decision has wider significance for other competition cases still on foot relating to pre-2009 conduct and also for other parts of Australian Consumer Law which include the same condition.

It remains to be seen whether Air New Zealand and Air Garuda will seek special leave to appeal to the High Court of Australia.

While the litigation still on foot is likely to yield further surprises, the one thing that can be said with certainty, is that, 10 years on, a large number of airlines are still facing the flow-on effects, including those that had only peripheral involvement of the alleged anti-competitive conduct. We are consistently reminded that the anti-bribery and corruption legal and policy landscape is evolving rapidly throughout Asia-Pacific. The air cargo case serves as a salutary reminder to all participants in the aviation industry (and in other sectors) to maintain and continually improve internal compliance frameworks and training across the board to avoid another decade of expensive, unpredictable turbulence.

Scott was the lead senior associate at a London Magic Circle law firm acting for BA in the air cargo investigations and litigation until his move to Australia in 2013. He was also seconded to BA's legal team in 2010.



Passenger claim dismissed after 9 year battle – Federal Court rejects ability of state tribunals to determine carriage by air claims

Written by Maurice Thompson (Partner), Joel Cockerell (Associate) and Matthew Bulfer (Graduate).

The Federal Court of Australia (**the Court**) recently considered whether the Victorian Civil and Administrative Tribunal (**VCAT**) had jurisdiction over a matter in which a defence under the Civil Aviation (Carriers' Liability) Act 1959 (Cth) (**CACL Act**) was relied upon.¹

This decision will be significant to aviation industry participants in assessing whether claimants in the context of international or domestic carriage by air have commenced claims in an appropriate forum in Australia.

Background

The claim arose out of a confrontation between two passengers and a Qantas flight attendant when the passengers sought to board a flight from Sydney to Melbourne back in April 2006.

On boarding, the passengers – who had economy class tickets – requested that they be able to hang certain articles in a coat locker. The flight attendant refused this request, informing the passengers that the locker was reserved for business class passengers. A verbal altercation occurred and the flight attendant requested that the passengers disembark from the aircraft.

The passengers subsequently attempted to re-board the aircraft. Following a further altercation with flight staff, the passengers again agreed to disembark and were arrested and charged by the Australian Federal Police. Soon after the incident, Qantas notified the passengers that they had resolved not to carry either of them on any Qantas Group Services.

Six years after this incident occurred, the two passengers separately filed applications in VCAT against Qantas seeking damages for misleading or deceptive conduct for breach of the Fair Trading Act (1999) (Vic) (**FTA**) and other remedies including an apology and award of frequent flyer points.

In its defence in the VCAT proceeding, Qantas relied upon

a provision of the CACL Act to the effect that the CACL Act “applies to the exclusion of any other right of action [not provided for by the Act] and precludes an action after the expiry of two years”. Qantas subsequently applied to the Court for remedies that VCAT lacked jurisdiction to determine the claim, arguing that as it relied on a defence under a federal statute, the proceedings arose in federal jurisdiction while VCAT was only invested with state jurisdiction.

The Court decision

The Court concluded that VCAT lacked jurisdiction because of the federal defence raised by Qantas.

Given this finding, the Court did not consider it necessary to consider whether the claims were federal in nature on the alternative basis put by Qantas that the relevant events occurred in a “Commonwealth place”.

In reaching those conclusions, the Court addressed the following issues:

Can VCAT exercise federal judicial power?

The Court relied on well-established authority to conclude that the conferral of federal judicial power on a body is exclusively provided for by Chapter III of the Commonwealth Constitution.

Under Chapter III of the Commonwealth Constitution, the Commonwealth Parliament can invest any court of a state with federal jurisdiction. It follows that federal jurisdiction can only be invested on VCAT:

- (a) by Commonwealth and not state law; and
- (b) if it is a “court of a state”.

¹ Qantas Airways Limited v Lustig [2015] FCA 253.



The Court was satisfied that an administrative tribunal such as VCAT is not a “court of a state”, and was not (and could not be) invested with federal jurisdiction.

Does the matter before VCAT arise under federal law?

As the Court held that VCAT was not invested with federal jurisdiction, the issue for determination became whether Qantas raising a defence under the CACL Act meant that the claim was “federal” in character.

The Court held that once part of a matter is held to arise under federal law, then the whole of that matter falls to be determined by the exercise of federal judicial power. Therefore even though the passengers’ claims were made under the FTA, which is a law of the state of Victoria, in raising a defence to the claims under a law of the Commonwealth, the whole of the matter was rendered federal in character.

In addition, the Court rejected the passengers’ submission that the raising of the federal defence by Qantas was “colourable” as it found that the defence was not raised “*for the improper purpose of fabricating jurisdiction*”.

Summary

The Court’s decision is a significant one in clarifying the lack of jurisdiction held by VCAT and the various other state administrative and consumer tribunals around Australia in hearing and determining claims involving international and domestic carriage by air falling within the scope of the CACL Act.

As a result of this decision, even where a claim is made under a law of a state, any matter in which a defence under the CACL Act is properly raised must be dealt with in a federal court (or an appropriate state court vested with federal jurisdiction).

It is not uncommon for passenger claims, in particular, to be commenced in one of Australia’s state-based tribunals given the perceived benefits to consumers. Airlines and, in particular, their insurers should take note of the strong objections that can be raised on jurisdictional grounds in such claims on the back of this latest decision.



Who is a “passenger”?

Written by Maurice Thompson (Partner), Joel Cockerell (Associate) and Matthew Bulfer (Graduate).

The New South Wales Court of Appeal (**NSWCA**) recently considered whether the Civil Aviation (Carriers’ Liability) Act 1967 (NSW) (the **CACLA**) applied to a person injured on a helicopter, other than the pilot, while conducting an aerial inspection of power lines.¹

The main issue for consideration related to the correct interpretation of the term “passenger” in Section 4 of the CACLA. The decision is noteworthy as it provides clear guidance on the application of the strict liability regime imposed by the CACLA.

Background

On 4 April 2006, a helicopter’s tail rotor came into contact with a wire strung across a gully by Telstra Corporation Ltd (**Telstra**). The pilot, David Carter (**Mr Carter**), was able to land the helicopter. However, because of damage to the rotor, the helicopter tipped over (the **Event**).

The helicopter was owned and operated by Precision Helicopters Pty Ltd (**Precision**). In addition to Mr Carter, two power line observers employed by Endeavour Energy (**Endeavour**) were on board the helicopter at the time. Endeavour had engaged the services of Precision to conduct an aerial inspection of power lines.

One of Endeavour’s power line observers, Simeon Edwards (**Mr Edwards**), suffered “catastrophic head injuries” as a result of the Event.

Resulting claims

The Event gave rise to a number of complex interlinked claims. These claims were made by Mr Edwards and his family against Endeavour, Precision and Telstra.

Those claims were not, however, the issue dealt with by the NSWCA. Rather, the appeals dealt with proceedings commenced by Endeavour, Precision and Telstra amongst themselves in relation to their respective liabilities. As Sackville AJA commented, this case is an example of the “astonishing complexities that can arise when several parties are alleged to have been at fault in an accident in which another person is injured”.

Consideration of issues on appeal

The NSWCA considered a number of issues in relation to the respective liabilities of Telstra, Endeavour and Precision.

Of particular interest to carriers, however, is the ancillary issue considered by the NSWCA in respect of the liability of Precision. That issue was whether Mr Edwards was a “passenger” for the purposes of the CACLA, and therefore whether the CACLA applied to place a monetary cap on Precision’s liability.

Was Mr Edwards a passenger for the purposes of the CACLA?

Precision submitted that its liability was governed by the CACLA. This was significant in a high-value claim such as this because if the CACLA applied, it would render Precision strictly liable for the damage suffered by Mr Edwards but also cap Precision’s liability at AUD 500,000.

The CACLA relevantly applies to carriage of a “passenger” where the carriage takes place within New South Wales. As the NSWCA found that the operation of the aircraft came within the terms of its Air Operator’s Certificate, the main question for the NSWCA was whether Mr Edwards was a passenger within the meaning of the CACLA.

Basten JA, with which the other two judges agreed on this point, noted that the issue of whether Mr Edwards was a passenger was to be determined by considering the “actual activities” carried out by him.

Basten JA also noted that Mr Edwards’ role was “in part to record the condition of the power line, but primarily to indicate the route and to provide warning of approaching hazards to the pilots”.

Despite this, his Honour noted that Mr Edwards’ role did not extend to “operating the helicopter or directing the pilot in his



operation of the helicopter". Combined with the fact that Mr Edwards was not employed by Precision and was serving the interests of his own employer (Endeavour), he could not be said to be part of the crew of the helicopter. It followed that Mr Edwards was a passenger within the meaning of the CACLA.

As the CACLA applied, Precision's liability was therefore limited to AUD 500,000. It followed that Telstra and Endeavour would be responsible for the lion's share of the damages awarded to Mr Edwards.

The negligence issues

The NSWCA also made a number of findings in relation to the respective liabilities of Endeavour, Telstra and Precision. In summary, the NSWCA found that there was a failure by:

1. Endeavour to inquire of Telstra as to its lines in the area;
2. Endeavour to require Mr Edwards to wear a helmet;
3. Precision to require Mr Edwards to wear a helmet; and
4. Telstra to remove the catenary wire, instead of re-erecting it when a pole collapsed.

Impact of the decision

The decision of the NSWCA makes clear that the term "passenger" in the CACLA is not to be given an unduly narrow interpretation. The term may extend to persons on an aircraft who are carrying out functions in the course of their employment, so long as they are not seen as being part of the crew of the aircraft. This will be of particular interest to operators and their insurers seeking to rely upon the monetary cap on damages forming part of the CACLA strict liability regime, particularly when responding to high-value claims.



Australia accedes to the Cape Town Convention

Written by *Maurice Thompson (Partner)*, *James Cooper (Special Counsel)* and *Jess Harman (Graduate)*.

The Cape Town Convention on International Interests in Mobile Equipment 2011 (“the Cape Town Convention”) came into force in Australia on 1 September 2015 following completion of the formal accession process.

In Clyde & Co’s Aviation and Aerospace Newsletter in August 2015, Mark Bisset reported on the [United Kingdom’s ratification of the Convention](#) and its related Protocol on Matters Specific to Aircraft Equipment (together for the purposes of this article, “the Cape Town Convention”). In Australia, too, there have been developments on that front, with the Cape Town Convention entering into force in [Australia on 1 September 2015](#) following completion of the formal accession process.

The Cape Town Convention

Signed in November 2001, the [Cape Town Convention](#) establishes an “International Registry” for registration and priority of “international interests” in aircraft objects. These interests may include a financier’s or lessor’s security interest or purchaser’s interest under a purchase agreement. It is designed to create a uniform legal framework across signatory States that aims to protect creditors of aircraft and aircraft objects. As of March 2016, there are [70 Contracting States](#).

The Cape Town Convention regulates the priorities of international interests and also sets out a number of remedies in the event of default. Priorities are determined on a “first-to-file” basis; that is, the interest that is registered earliest on the International Registry will have priority over all other interests for the same object that are registered later or are unrecorded.

The effect on Australian law

The Cape Town Convention framework allows Contracting States to make a number of declarations that affect how the Convention will apply domestically. Australia made declarations under Articles 39(1)(a), 53, 54(2) and 55 of the Cape Town Convention, and under Articles XXX(1) and XXX(3) of the Aircraft Protocol:

(i) Article 39(1)(a): certain non-consensual rights or

interests have priority over registered interests;

- (ii) Article 53: the Federal Court of Australia and the State and Territory Supreme Courts are the relevant courts for the purposes of the Convention;
- (iii) Article 54(2): if a Convention remedy does not expressly require application to the Court, then leave of the Court is not required;
- (iv) Article 55: Australia will not implement the Convention’s interim relief remedies; and
- (v) Articles XXX(1) and (3): Parties to an aircraft lease, contract of sale or security agreement will be free to choose the law which is to cover their rights and obligations; “Alternative A” under the Convention will apply, meaning that in the event of default, the debtor must give possession of the aircraft to the creditor in no later than 60 calendar days.

Interaction with the Personal Property Securities Act 2009 (Cth)

Prior to accession to the Cape Town Convention, security interests in aircraft objects in Australia were solely governed by the *Personal Property Securities Act 2009 (Cth)* (PPSA). The Cape Town Convention now has an overriding effect and will prevail over the PPSA to the extent of any inconsistency.

The Cape Town Convention applies in Australia to certain interests that are created on or after 1 September 2015. It applies to the following aircraft objects:

- (i) Airframes that can transport at least 8 persons (including crew) or goods in excess of 2,750 kilograms;
- (ii) Helicopters that can transport at least 5 persons (including crew) or goods in excess of 450 kilograms; and

(iii) Aircraft engines that have at least 1750lb of thrust.

The PPSA continues to apply to a number of interests in aircraft objects not mentioned above, such as those that were created before 1 September 2015. Accordingly, the PPSA's application to aircraft objects has not become obsolete.

If an aircraft object is subject to the rules of the Cape Town Convention, a security interest registered with the International Registry under the Convention will have priority over a registration on the Personal Property Security Register (**PPSR**), despite the fact that the registration may have been affected on the PPSR first.

Consequently, aircraft financiers ought to create, and check for, registrations on both the PPSR and the International Registry of Mobile Assets.

Economic benefits

The Cape Town Convention should generate tangible economic benefits for the Australian aviation industry. Prior to the Convention, creditors' interests were solely governed by domestic laws and processes which provided varying and fractured levels of protection in different jurisdictions. The Government noted, in its Explanatory Memorandum, that financiers had indicated a lack of confidence in the

Australian personal property securities framework as it applied to aircraft following the collapse of [Ansett Australia in 2001](#). The cross-border consistency of the Cape Town Convention should have the effect of boosting creditor confidence and lowering creditor risks in Contracting States.

Accordingly, Australian airlines should be able to obtain financing on more favourable terms. Discounted financing will also be available for purchasers of second hand aircraft which should particularly assist smaller regional airlines to upgrade and maintain their fleets.

What lies ahead?

The ratification of the Cape Town Convention by a large number of other countries, and notably major aviation jurisdictions such as the UK, United States, UAE, China and India, indicates the increasing influence of the Convention on the global aircraft financing market. Australia's accession to the Cape Town Convention will ensure that it remains on par with the global aviation community. It stands to benefit many industry stakeholders through the creation of certain and secure rights and enforcement of default remedies for creditors.



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Maurice leads our aviation practice in Australia and has been advising clients in the aviation industry in a broad spectrum of contentious and non-contentious aviation law matters for in excess of 20 years.

Prior to joining Clyde & Co in the Middle East in 1998, Maurice was part of the Australian aviation law team at a Big Six law firm conducting cargo and personal injuries claims matters for all of the major Australian and international airlines and their insurers and in particular, Air New Zealand, South African Airways, Ansett, Qantas and Emirates.

While in the Middle East, Maurice handled a large volume of contentious claims for Qantas, Emirates, Asatinsure and all of the other principal carriers from the GCC States.

After 6 years abroad, Maurice returned to Australia and joined a rival national law firm where, together with Special Counsel James Cooper, they conducted aviation law matters across multiple jurisdictions in Australia. In 2013, shortly after Clyde & Co opened in Australia, Maurice re-joined Clyde & Co with James Cooper and has been developing the firm's aviation capabilities nationally from their base in Melbourne.



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Michael Tooma is the Asia Pacific lead partner of Clyde & Co's Regulation and Investigation practice. He is recognised as one of the pre-eminent health and safety lawyers in the region.

Michael's practice covers a broad range of regulatory areas particularly occupational health and safety, aviation safety, security and anti-terrorism, product safety, construction safety, food safety, road safety and chain of responsibility.

Michael is passionate about creating innovative solutions to improve airline safety culture. This includes identifying critical risks and implementing strategies to prevent incidents from occurring in the first place. He has reviewed or written the safety management systems of companies across industries, including for major airlines, such as Virgin Australia, and other companies in the aviation sector. He regularly undertakes global benchmarking projects for clients and facilitates safety peer reviews. Michael also regularly provides legal advisory services to airports, ground handling service providers and other industry representatives.

Michael has direct experience is managing high profile catastrophic incidents across various sectors, including aviation and offers 24/7 incident response services.



James Cooper
Special Counsel, Melbourne

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James has over 10 years' experience in contentious and non-contentious matters working with clients in the aviation industry in Australia and internationally.

James is a highly accomplished aviation lawyer who brings to Clyde & Co Australia a wealth of international sector knowledge and experience having previously worked in Clyde & Co's London aviation group conducting major contentious and non-contentious matters for some of the world's largest aviation carriers and their insurers.

He has extensive experience representing airlines and their insurers in litigation arising from the carriage by air, with an emphasis on personal injury, cargo and baggage claims. He also advises on a range of aviation-specific regulatory and compliance issues, including licensing, ticketing, privacy requirements, competition law rules, sales of package holidays, general operations, and the application of the conventions governing the international carriage by air.



Scott Castledine
Senior Associate, Sydney

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Scott is a highly experienced dispute resolution lawyer with notable expertise in complex, large scale, high value or corporate-threatening/reputational litigation, arbitration and regulatory matters (including white collar crime), often multi-party and/or multi-jurisdictional in nature. He also provides strategic management of foreign proceedings for key clients, often in emerging markets.

He trained and practised for nearly nine years in London at a leading Magic Circle firm and then at a top tier firm in Sydney on moving to Australia. Scott has handled a wide range of contentious aviation matters including global regulatory investigations and litigation arising out of alleged cartels in the air cargo industry; criminal prosecutions for alleged price-fixing of YQ charges; contested scarce capacity hearings; passenger claims and major disputes between blue ribbon carriers and freight forwarders, ground handlers and other downstream industry players.

In 2010, Scott was seconded to British Airways to assist in its response to a wide range of contentious matters during which he also assisted the carrier in its crisis management of cabin crew strikes and the closure of European air space due to an Icelandic volcanic ash cloud.



Joel Cockerell
Associate, Perth

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Joel works out of the firm's Perth office. He specialises in contentious and non-contentious matters in Australia and internationally in the aviation, maritime, resources and insurance industries.

He has experience representing airlines and their insurers in litigation arising from the carriage by air, with an emphasis on personal injury and cargo claims. Joel has extensive experience representing insurers in litigation and all other forms of dispute resolution.

Joel completed his law degree with first class honours and was awarded the Attorney-General's Medal.



Helen Tieu
Senior Associate, Sydney

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Helen is an insurance law specialist with expertise across various lines of insurance business including aviation.

Helen brings a wealth of insurance sector experience to her role at Clyde & Co, having gained commercial in-house and private practice experience in Australia and overseas. Prior to joining Clyde & Co, Helen worked for a Lloyd's of London syndicate in Sydney and London as an aviation underwriter. During that time, Helen underwrote general aviation and airline risks in Sydney and at Lloyd's of London, and was part of an in-house legal team which managed high profile aviation hull and liability claims.



Jess Harman
Graduate Lawyer, Melbourne

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Jess has two years' experience with Clyde & Co's aviation group in Australia and has recently joined the firm as a Graduate Lawyer in 2016. She specialises in contentious and non-contentious matters in Australia and internationally in the aviation and maritime industries.

She has experience representing airlines and their insurers in litigation arising from the carriage by air, with an emphasis on personal injury claims.

Jess graduated from her law degree in 2015 with first class honours.



Clyde & Co Australia: Aviation Calendar

 @AviationClydeCo

- Clyde & Co are pleased to have once again taken up the opportunity to be a major (silver) sponsor of the Aviation Law Association of Australia and New Zealand (ALAANZ) National Conference held this year in Canberra. James Cooper, Special Counsel in Clyde & Co's Melbourne office, will be chairing the 'Topical Mix' panel session, while Nick Humphrey, Senior Associate in Clyde & Co's Dubai office, will be speaking as part of the 'Litigation and Insurance Update' panel.
- The 13th edition of Clyde & Co's biennial 'Beaumont International Aviation Conference' will be held in London on 22-23 June 2016. James Cooper will be presenting as part of the 'Geographical Round-up' panel.
- Clyde & Co Australia will be hosting an event for aviation industry participants in Sydney in mid-2016 (date to be confirmed).

**Further advice should be taken
before relying on the contents
of this Newsletter.**

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