

# Report 133

## **Treaties tabled on 1 November 2012**

Exchange of Notes, done at Tokyo on [TBA] 2012, constituting an Agreement to further amend the Schedule to the Agreement between the Commonwealth of Australia and Japan for Air Services, done at Tokyo on 19 January 1956, as amended

Agreement between the Government of Australia and the Government of the Republic of Kenya relating to Air Services

Agreement between the Government of Australia and the Government of the Republic of Palau relating to Air Services

Agreement between the Government of Australia and the Democratic Socialist Republic of Sri Lanka relating to Air Services

Air Transport Agreement between the Government of Australia and the Government of the United States of America (Washington D.C., 31 March 2008)

Exchange of notes amending the Air Transport Agreement between the Government of Australia and the Government of the United States of America

Convention on International Interests in Mobile Equipment, (Cape Town, 16 November 2001)

Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, (Cape Town, 16 November 2001)

Amendment of Australia's Schedule annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994

Amendment to Annex 3 of the 2007 Agreement on Operational and Strategic Cooperation between Australia and the European Police Office

© Commonwealth of Australia 2013

ISBN 978-1-74366-030-0 (Printed version)

ISBN 978-1-74366-031-7 (HTML version)

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website: <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.



# Contents

Membership of the Committee .....	v
Resolution of Appointment .....	vii
List of recommendations .....	viii
<b>1 Introduction</b>	
Purpose of the report.....	1
Conduct of the Committee's review .....	3
<b>2 Six Air Agreements</b>	
Introduction .....	5
Background .....	6
Overview and national interest summary .....	6
<b>Basic provisions common to all Agreements</b> .....	7
<b>Specific provisions in each Agreement</b> .....	9
The Sri Lanka Agreement .....	9
The Air Transport Agreement and Exchange of Notes with the United States .....	10
Amendment to the Japan Air Services Agreement.....	16
The Kenya Agreement .....	17
The Palau Agreement .....	18
<b>Reasons for Australia to take the proposed treaty action</b> .....	18
Implementation.....	18
Costs.....	19
Conclusion .....	19

<b>3</b>	<b>Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, done at Cape Town on 16 November 2001</b>	
	Introduction .....	23
	Background .....	23
	Overview and national interest summary .....	24
	Reasons for Australia to take the proposed treaty action .....	25
	Obligations .....	26
	Implementation.....	28
	Costs.....	28
	Conclusion .....	29
<b>4</b>	<b>Minor Treaty Actions</b>	
	Introduction .....	31
	Minor treaty actions .....	31
	Amendment of Australia's Schedule annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 .....	31
	Amendment to Annex 3 of the 2007 Agreement on Operational and Strategic Cooperation between Australia and the European Police Office .....	32
	<b>Appendix A – Submissions .....</b>	<b>35</b>
	<b>Appendix B – Witnesses.....</b>	<b>37</b>



## Membership of the Committee

Chair	The Hon Richard Marles MP <i>(from 8/5/13)</i>	
	Senator Matthew Thistlethwaite <i>(from 14/2/13 to 8/5/13)</i>	
	Mr Kelvin Thomson MP <i>(until 6/2/13)</i>	
Deputy Chair	Senator Bridget McKenzie	
Members	The Hon Justine Elliot MP <i>(from 6/2/13 to 22/4/13)</i>	Senator the Hon Kim Carr <i>(from 14/5/13)</i>
	Mr Laurie Ferguson MP <i>(from 14/3/13)</i>	Senator David Fawcett
	Mr John Forrest MP	Senator Scott Ludlam
	Ms Sharon Grierson MP	Senator the Hon Lisa Singh
	Mr Harry Jenkins MP	Senator Dean Smith
	Ms Kirsten Livermore MP	Senator Matthew Thistlethwaite <i>(from 13/2/13 to 14/5/13)</i>
	The Hon Richard Marles MP <i>(from 22/4/13)</i>	Senator the Hon Lin Thorp
	The Hon Robert McClelland MP <i>(until 14/3/13)</i>	
	Ms Melissa Parke MP <i>(until 6/2/13)</i>	
	Mrs Jane Prentice MP	
	The Hon Dr Sharman Stone MP	
	Mr Mike Symon MP <i>(from 6/2/13)</i>	

## Committee Secretariat

Secretary	Russell Chafer
Inquiry Secretary	Katie Ellis
	Kevin Bodel
	Dr Andrew Gaczol
Researcher	Rhys Merrett
Administrative Officers	Heidi Lushtinetz
	Dorota Cooley



## Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - (i) either House of the Parliament, or
  - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



# List of recommendations

## 2 Six Air Agreements

### Recommendation 1

The Committee supports the *Exchange of Notes, done at Tokyo on [TBA] 2012, constituting an Agreement to further amend the Schedule to the Agreement between the Commonwealth of Australia and Japan for Air Services, done at Tokyo on 19 January 1956, as amended* and recommends that binding treaty action be taken.

### Recommendation 2

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Kenya relating to Air Services* and recommends that binding treaty action be taken.

### Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Palau relating to Air Services* and recommends that binding treaty action be taken.

### Recommendation 4

The Committee supports the *Agreement between the Government of Australia and the Democratic Socialist Republic of Sri Lanka relating to Air Services* and recommends that binding treaty action be taken.

### Recommendation 5

The Committee supports the *Air Transport Agreement between the Government of Australia and the Government of the United States of America (Washington D.C., 31 March 2008)* and recommends that binding treaty action be taken.

**Recommendation 6**

The Committee supports the *Exchange of notes amending the Air Transport Agreement between the Government of Australia and the Government of the United States of America* and recommends that binding treaty action be taken.

**3 Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2001 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, done at Cape Town on 16 November 2001****Recommendation 7**

The Committee supports the *Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2001* and recommends that binding treaty action be taken.

**Recommendation 8**

The Committee supports the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, done at Cape Town on 16 November 2001* and recommends that binding treaty action be taken.



## Introduction

### Purpose of the report

- 1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty actions tabled on 1 November 2012.
- ⇒ *Exchange of Notes, done at Tokyo on [TBA] 2012, constituting an Agreement to further amend the Schedule to the Agreement between the Commonwealth of Australia and Japan for Air Services, done at Tokyo on 19 January 1956, as amended*
  - ⇒ *Agreement between the Government of Australia and the Government of the Republic of Kenya relating to Air Services*
  - ⇒ *Agreement between the Government of Australia and the Government of the Republic of Palau relating to Air Services*
  - ⇒ *Agreement between the Government of Australia and the Democratic Socialist Republic of Sri Lanka relating to Air Services*
  - ⇒ *Air Transport Agreement between the Government of Australia and the Government of the United States of America (Washington D.C., 31 March 2008)*
  - ⇒ *Exchange of notes amending the Air Transport Agreement between the Government of Australia and the Government of the United States of America*
  - ⇒ *Convention on International Interests in Mobile Equipment, (Cape Town, 16 November 2001)*
  - ⇒ *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, (Cape Town, 16 November 2001)*

- 1.2 In addition, the Report contains the Committee's views on the following Minor Treaty Actions:
- ⇒ *Amendment of Australia's Schedule annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994*
  - ⇒ *Amendment to Annex 3 of the 2007 Agreement on Operational and Strategic Cooperation between Australia and the European Police Office*
- 1.3 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.
- 1.4 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.
- 1.5 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.6 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. An RIS has been tabled with the *Convention on International Interests in Mobile Equipment*, (Cape Town, 16 November 2001) and *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, (Cape Town, 16 November 2001). The remaining treaties do not require an RIS.
- 1.7 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
- 1.8 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jsct/1november2012/tor.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/1november2012/tor.htm)

## Conduct of the Committee's review

- 1.9 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling. Submissions for the treaties were requested by Friday, 23 November 2012 with extensions available on request.
- 1.10 Invitations were made to all State Premiers, Territory Chief Ministers and to the Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.
- 1.11 The Committee held a public hearing into these treaties in Canberra on Monday, 4 February 2013.
- 1.12 The transcript of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaty's tabling date, being:
- **1 November 2012**  
<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jsct/1november/hearings.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/1november/hearings.htm)>
- 1.13 A list of submissions received and their authors is at Appendix A
- 1.14 A list of witnesses who appeared at the public hearing is at Appendix B.



## Six Air Agreements

### Introduction

2.1 The following six Air Transport Agreements were tabled together on 1 November 2012:

- *the Air Transport Agreement between the Government of Australia and the Government of the United States of America (Washington, 31 March 2008);*
- *the Exchange of notes amending the Air Transport Agreement between the Government of Australia and the Government of the United States of America (not yet signed);*
- *the Exchange of Notes Constituting an Agreement to further amend the Schedule to the Agreement between the Commonwealth of Australia and Japan for Air Services, done at Tokyo on 19 January 1956, as amended (not yet signed);*
- *the Agreement between the Government of the Republic of Kenya and the Government of Australia relating to Air Services (Nairobi, 24 May 2012);*
- *the Agreement between the Government of Australia and the Government of the Republic of Palau relating to Air Services (Koror, 2 May 2012); and*
- *the Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka relating to Air Services (Colombo, 3 May 2012).*

2.2 While two of these Air Services Agreements are amendments to existing Agreements, all six Air Transport Agreements have a similar basis and purpose.

## Background

- 2.3 An Air Service Agreement is an Agreement providing for the operation of commercial scheduled air services between the countries Party to the Agreement.<sup>1</sup>

Air Service Agreements are negotiated to permit and facilitate the operation and development of international air services between countries. Under the framework of the Chicago Convention of 1944, which provides the overarching framework for international civil aviation, international airlines cannot service a market between two countries without the framework of an air services agreement.<sup>2</sup>

- 2.4 The Air Service Agreements under consideration here are all made pursuant to the *Convention on International Civil Aviation*, which entered into force for Australia in 1947.<sup>3</sup>
- 2.5 Finally, as is standard practice with Air Service Agreements made by Australia, the arrangements contained in these Agreements are applied through non-legally binding memoranda of understanding until the proposed Agreement has been given force. In effect, this means that the arrangements have already been in place for some time. For example, the provisions of the Agreement with the United States (US) have been in place since 2008.<sup>4</sup>

## Overview and national interest summary

- 2.6 The Agreements under consideration here contain a basic set of provisions that are common to most Air Services Agreements negotiated by Australia. In addition, each of the Agreements differs in some respects from the others.

---

1 National Interest Analysis [2012] ATNIA 28 with an attachment on consultation *the Air Transport Agreement between the Government of Australia and the Government of the United States of America (Washington, 31 March 2008)* [2008] ATNIF 3, and the *Exchange of notes amending the Air Transport Agreement between the Government of Australia and the Government of the United States of America (not yet signed)* [2012] ATNIF 24, (Hereafter referred to as 'the US Agreement NIA'), para 7.

2 Mr Samuel Lucas, Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 1.

3 National Interest Analysis [2012] ATNIA 16 with an attachment on consultation *Amendment to the Agreement between the Commonwealth of Australia and Japan for Air Services, done at Tokyo on 19 January 1956* [2012] ATNIF 13, (Hereafter referred to as 'the Japan Agreement NIA'), para 8.

4 The US Agreement NIA, para 5.

- 2.7 The basic set of provisions the Agreements have in common will be discussed below. This will then be followed by a discussion of the provisions specific to each individual Agreement.
- 2.8 The *Air Transport Agreement between the Government of Australia and the Government of the United States of America* and the *Exchange of notes amending the Air Transport Agreement between the Government of Australia and the Government of the United States of America* are dealt with in a single National Interest Analysis. For the purposes of this discussion, the two United States Agreements will be considered together and referred to as the 'Air Transport Agreement with the United States'.

## Basic provisions common to all Agreements

- 2.9 The purpose of each Agreement is to allow the airlines of each Party to the Agreement to schedule air services carrying passengers or cargo between the two Parties.<sup>5</sup>
- 2.10 Each Party agrees to permit the airlines of the other Party the right to overfly the territory of the Party and to make stops in its territory for non traffic purposes, such as refuelling.<sup>6</sup> However, each Agreement prohibits airlines from one Party from operating domestic services within the borders of the other Party.<sup>7</sup>
- 2.11 In relation to airlines that wish to fly between the Parties to an Agreement, each Party designates airlines to operate the agreed services. In relation to a designated airline, the Agreement stipulates that:
- ..the other Party must grant the necessary authorisations provided that the airline being designated complies with the conditions for ownership and control set out in the proposed Agreement, holds necessary operating permits, and meets the conditions the Party normally applies to the operation of international air transport. It

---

5 National Interest Analysis [2012] ATNIA 25 with an attachment on consultation *Agreement between the Government of the Republic of Kenya and the Government of Australia relating to Air Services (Nairobi, 24 May 2012)* [2012] ATNIF 23, (Hereafter referred to as 'the Kenya Agreement NIA'), paras 6 and 9.

6 The Kenya Agreement NIA, para 11.

7 See for example *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka relating to Air Services, done at Colombo on 3 May 2012* [2012] ATNIF 8, Article 3; and *Air Transport Agreement between the Government of Australia and the Government of the United States of America (Washington, 31 March 2008)* [2008] ATNIF 3, Annex 1, section 2.

is also a condition of granting authorisation to a designated airline that the Party designating the airline complies with the safety and security provisions of the proposed Agreement.<sup>8</sup>

- 2.12 In addition, each Party is required to recognise certificates of airworthiness issued by the other Party in relation to airlines designated by that Party. However, each Agreement contains a caveat that the standards under which the certificates are issued must comply with the standards established by the International Civil Aviation Organisation (ICAO),<sup>9</sup> and each Party is required to advise the other Party of any differences between its national regulations and the standards of the ICAO.<sup>10</sup>
- 2.13 Designated airlines must observe a Party's domestic laws and regulations in relation to the operation and navigation of aircraft while they are within the territory of that Party.<sup>11</sup>
- 2.14 Each Party to an Agreement undertakes to protect the security of civil aviation from acts of interference as defined in the multilateral conventions relating to aviation security.<sup>12</sup>
- 2.15 Designated airlines of one Party are entitled to establish and conduct business in the territory of the other Party. Specifically, designated airlines are permitted to:
- establish offices;
  - bring or employ staff;
  - sell air transport services to the public;
  - perform ground handling;
  - use the services of other businesses or airlines to conduct their business;<sup>13</sup> and
  - establish arrangements for air or land transport connections with their international flights.<sup>14</sup>

---

8 The Kenya Agreement NIA, para 10.

9 The Kenya Agreement NIA, para 13.

10 The Kenya Agreement NIA, para 14.

11 The Kenya Agreement NIA, para 12.

12 The Kenya Agreement NIA, para 14.

13 The Kenya Agreement NIA, para 20.

14 The Kenya Agreement NIA, para 21.

- 2.16 Designated airlines are also permitted to import stores and equipment necessary for the conduct of their business without having to pay customs duties and related charges.<sup>15</sup>
- 2.17 The Agreement permits each designated airline to have a fair and equal opportunity to compete in providing international air services. The Agreement provides that each Party can take appropriate action within its jurisdiction to eliminate barriers to fair competition.<sup>16</sup>
- 2.18 Each Agreement provides a dispute settling mechanism on matters that are not related to the setting of airfares and have not been resolved through consultation, negotiation or mediation. Disputes of this sort are arbitrated by a three person panel. Often the result of the arbitration is final and binding.<sup>17</sup>

## Specific provisions in each Agreement

- 2.19 Each of the Agreements under consideration contain provisions specific to that Agreement. In general, these provisions relate to the routes designated airlines can fly, the capacity levels for each service, and whether designated airlines are permitted to operate on domestic routes. The specifics of each Agreement are set out below.

## The Sri Lanka Agreement

- 2.20 *The Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka relating to Air Services (the Sri Lanka Agreement)* replaces an existing treaty from 1950, the *Agreement between the Government of the Commonwealth of Australia and the Government of Ceylon for the Establishment of Air Services*.<sup>18</sup> The Sri Lanka Agreement is based on an Australian model Air Services Agreement.<sup>19</sup>

---

15 The Kenya Agreement NIA, para 17.

16 The Kenya Agreement NIA, para 24.

17 The Kenya Agreement NIA, para 24. (The exception in this batch of Agreements is the US Agreement, as discussed later in this Chapter).

18 National Interest Analysis [2012] ATNIA 27 with an attachment on consultation *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka relating to Air Services, done at Colombo on 3 May 2012*[2012] ATNIF 8, (Hereafter referred to as 'the Sri Lanka Agreement NIA'), para 3.

19 The Sri Lanka Agreement NIA, para 9.

- 2.21 The Sri Lanka Agreement will permit the designated airlines of Australia and Sri Lanka to provide services on specified routes between the two countries.<sup>20</sup> The list of specified routes is contained in Annex 1 of the Agreement.<sup>21</sup> There is no limit to the number of airlines that can be designated by each Party.<sup>22</sup>
- 2.22 Designated airlines can only provide services subject to capacity limits agreed between the Parties to the Sri Lanka Agreement. The capacity limits are set by less than treaty level Agreements, which are not publicly available.<sup>23</sup>

## The Air Transport Agreement and Exchange of Notes with the United States

- 2.23 As indicated earlier, the two treaty actions with the United States are being considered together for the purposes of this inquiry. The two treaty actions are proposed to be brought into force at the same time.<sup>24</sup>
- 2.24 The Air Transport Agreement with the United States replaces a previous Agreement, the *Agreement between Australia and the United States of America relating to Air Services*, signed in 1946.<sup>25</sup>
- 2.25 The Agreement is not based on Australia's model Air Services Agreement.

### Open skies

- 2.26 Unlike the other Agreements being considered here, the Air Transport Agreement with the United States is based largely on an 'open skies' principle, which provides for unlimited services between any destination in Australia and the US.<sup>26</sup> Specifically:

Each Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers under Annex I or Annex II based upon commercial considerations in the marketplace. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency, or regularity of

---

20 The Sri Lanka Agreement NIA, para 9.

21 The Sri Lanka Agreement NIA, para 25.

22 The Sri Lanka Agreement NIA, para 10.

23 *Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka relating to Air Services, done at Colombo on 3 May 2012*[2012] ATNIF 8, Article 11.

24 The US Agreement NIA, para 2.

25 The US Agreement NIA, para 4.

26 The US Agreement NIA, para 8.

service, or the aircraft type or types operated by the airlines of the other Party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention.<sup>27</sup>

2.27 Australian practice has not been to pursue the open skies model as an end in and of itself but:

to pursue liberalised markets that still provide airlines with rights well in excess of their commercial plans so that their judgements are based not on government regulations to which services they will provide, but purely on commercial considerations.<sup>28</sup>

2.28 The United States has over 100 open skies agreements with countries around the world, and the UAE and other Gulf States also have a policy of using open skies agreements. As well as the agreement Australia has with the United States, it also has an open aviation agreement with New Zealand and open capacity agreements with the UK and Singapore.<sup>29</sup>

### Foreign ownership

2.29 The Agreement covers airlines which are designated by the respective governments. Only airlines which are substantially owned and effectively controlled by a party to the agreement may be designated. Currently there are three airlines per party operating between the respective countries covered by this Agreement.<sup>30</sup>

2.30 This treaty has been instrumental in increasing the number of airlines flying between the parties. The inclusion of Delta Airlines for the US side and Virgin Australia would have been unlikely without this Agreement:

Prior to the negotiation or implementation of this treaty there were restrictions on the amount of capacity that could be operated between Australia and the US that would have effectively limited the number of airlines that could operate. This treaty removes that

---

27 *Air Transport Agreement between the Government of Australia and the Government of the United States of America (Washington, 31 March 2008)* [2008] ATNIF 3, Article 15.

28 Mr Samuel Lucas, Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 2.

29 Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 2.

30 Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 6.

restriction. It was instrumental in enabling Virgin to commence operations. In the absence of the agreement it is unlikely that Virgin would have commenced.<sup>31</sup>

## Dispute resolution

- 2.31 The *Exchange of notes amending the Air Transport Agreement between the Government of Australia and the Government of the United States of America* deals specifically with the dispute settling mechanism discussed earlier. The text of the main body of the Agreement was agreed in 2008, but the dispute settling mechanism was not finalised until 2010.<sup>32</sup>
- 2.32 In 2008, the US view on the dispute resolution clause was at odds with Australian government policy positions and discussions stalled. Concerns were around arbitration and the extent to which arbitration would be binding. The remainder of the Agreement was finalised to the extent that airlines could take advantage of the commercial entitlements flowing from it, while dispute resolution discussions continued.<sup>33</sup>
- 2.33 The compromise that was reached in 2010 was for an arbitration process without legally binding provisions.

What it does provide for is that if a party fails to comply with an arbitration order there is a right for the other side to suspend access to all rights under the agreement as a means of retaliation, if you will, or of seeking to force the other side to comply. The distinction is around the question of it being a legally binding dispute resolution process.<sup>34</sup>

## Freight task

- 2.34 The Agreement allows for either party to operate into the other country and then on to a third country without having to return to the point of origin. The NIA explains that this Agreement:

---

31 Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 6.

32 The US Agreement NIA, para 3.

33 Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 2.

34 Mr Samuel Lucas, Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 3.

... provides Australian airlines with the freedom to operate cargo services between the territory of the US and a third country without needing to serve a point in Australia. The proposed Agreement increases the opportunities for the Australian business interests, in particular the tourism and export industries, to develop and market new products and allows Australian airlines to compete for US government procured transportation services.<sup>35</sup>

2.35 This also gives American carriers increased opportunities for services direct from any point in the Asian hub back to Australia.

2.36 Analytical work undertaken by the Australian Government and a range of international organisations, companies and foreign governments has highlighted that 'the opening up of freight markets has tended to act as a catalyst to permit further growth in the market'.<sup>36</sup>

2.37 Particularly in the freight market, the freedom to pursue commercial opportunities without being constrained or restricted by the availability of rights has been very important.

Most of the freight routes that operate in and out of Australia – and it is a pattern globally as well – do not tend to operate as a 'backwards and forwards between two points' route. They tend to operate as large, round-the-world, circular routes, following the flow of trade. The rights that were made available under the agreement are, for example, used by Australian carriers to access the China-US freight market and other global markets like that.<sup>37</sup>

## U.S. Government procured transportation

2.38 This Agreement allows Australian airlines to compete for US government procured transportation services.<sup>38</sup>

The US 'Fly America Act' usually requires US Federal government employees to travel where possible on US carriers when their flight is funded by the US government. However, under Article 14 of the proposed Agreement, Australian airlines are also entitled to

---

35 The US Agreement NIA, para 8.

36 Mr Samuel Lucas, Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 3.

37 Mr Samuel Lucas, Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, pp. 3-4.

38 The US Agreement NIA, para 8.

carry US government travellers and transport cargo for US government agencies, where the travel is between a point in the US and a point in Australia or between any two points outside the US, thus giving Australian airlines access to the US government travel market.<sup>39</sup>

- 2.39 The only transportation exempt from the provisions of Article 14 is that which is obtained or funded by the (US) Secretary of Defense or the (US) Secretary of a military department.<sup>40</sup>

### Subsidised airlines

- 2.40 Article 3 of the treaty allows each Party to 'designate as many airlines as it wishes to conduct scheduled international air transportation in accordance with this Agreement'<sup>41</sup>. In relation to the differences between free trade and fair trade, the Committee was interested in how the treaty handles situations where airlines may have been subsidised or bailed out by governments after becoming uncompetitive, uneconomic or filed for a *Chapter 11* bankruptcy.<sup>42</sup>
- 2.41 In response, it was agreed that the question of state aid to airlines is a difficult issue around the world. The requirements that exist in this Agreement are that 'airlines must be substantially owned and effectively controlled by nationals of the designating country'. The Agreement does not judge the commercial standing of airlines when designation is permitted, and nor does it go into permitting either side to make judgements about whether or not the airline is being supported by a state.<sup>43</sup>
- 2.42 Whilst countries take a variety of approaches to dealing with states that are alleged to heavily subsidise their airlines, the most common way is through the negotiations. It goes to the level of access to that airline that may or may not be provided to the country under the Agreement. Although the issue remains largely unresolved, 'there is work and

---

39 The US Agreement NIA, para 23.

40 Department of Infrastructure and Transport, *Submission 5*, p. 2.

41 *Air Transport Agreement between the Government of Australia and the Government of the United States of America, done at Washington, 31 March 2008, [2008] ATNIF 3*, Article 3.

42 *Chapter 11* refers to a section of the US Bankruptcy Code. It protects a company from its creditors, giving it time to reorganise its debts or sell parts of the business. One the largest US airlines – American Airlines – filed for a Chapter 11 bankruptcy in late 2011. <http://www.bbc.co.uk/news/business-15935206>.

43 Mr Samuel Lucas, Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 4.

constant discussions in ICAO around how you try to ensure fair competition'.<sup>44</sup>

- 2.43 Australia undertakes these negotiations on an agreed mandate, developed after a range of consultations with interested parties on how the negotiations should take place. The views of Australian airlines are taken into account however most comments that are put forward are generally commercial-in-confidence.<sup>45</sup>

Following the outcome of talks we formally indicate the outcome to all of our stakeholders. I think it is fair to say that the conclusion of the Open Skies agreement with the United States was welcomed by a majority of our stakeholders as something that was overdue.<sup>46</sup>

## Safety audits

- 2.44 Article 6 says that each party is required to recognise the other's airworthiness and regulatory regime, but is entitled to ask for consultation to ensure safety and compliance with the Convention on International Civil Aviation, done at Chicago on 7 December 1944.<sup>47</sup>
- 2.45 The US Federal Aviation Administration (FAA) International Aviation Safety Assessments Program focuses on a foreign country's adherence to applicable international standards and recommended practices established by ICAO.

That Program does not involve an assessment of foreign operators or maintenance organisations per se, although in the course of assessing the foreign country's oversight activities, the FAA may visit operational and maintenance facilities within the foreign country. The Civil Aviation Safety Authority (CASA) does not undertake a similar program.<sup>48</sup>

---

44 Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 4.

45 Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 5.

46 Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 5.

47 *Air Transport Agreement between the Government of Australia and the Government of the United States of America, done at Washington, 31 March 2008, [2008] ATNIF 3, Article 6.*

48 Department of Infrastructure and Transport, *Submission 5*, pp. 2-3.

- 2.46 On the other hand, CASA assesses the safety of foreign operators and aircraft in Australia utilising a range of methods, including regular inspections of foreign aircraft operations at Australian airports to ensure operators adhere to the international standards established by ICAO.

Increased surveillance of particular aircraft operators is undertaken when CASA believes it necessary, utilising a range of different surveillance mechanisms. CASA liaises regularly with foreign safety regulators on matters of mutual concern and interest. One of the factors that CASA may take into account in its assessment of a foreign operator is the standard of oversight provided by foreign regulators over that operator. In assessing maintenance facilities in foreign countries that carry out maintenance on Australian aircraft in those countries, CASA routinely undertakes inspection visits to those countries.<sup>49</sup>

## Amendment to the Japan Air Services Agreement

- 2.47 As the title suggests, the *Exchange of Notes Constituting an Agreement to further amend the Schedule to the Agreement between the Commonwealth of Australia and Japan for Air Services, done at Tokyo on 19 January 1956, as amended* (not yet signed), hereafter referred to as the 'Amendment to the Japan Air Services Agreement,' amends the Schedule to the Agreement.
- 2.48 The Schedule to the Japan Air Services Agreement determines the origin and destination points in each Party between which designated airlines are permitted to fly.<sup>50</sup> Effectively, the Schedule is an equivalent of Annex 1 of the Australian model Air Services Agreement, discussed in relation to Sri Lanka above.
- 2.49 The Schedule has been amended on a number of occasions since the Japan Air Services Agreement was first signed. In this instance, the National Interest Analysis (NIA) indicates that:

The proposed amended Schedule provides for a more liberal route schedule that allows airlines to serve more flexible combinations of routes between points in the other country and any intermediate and beyond points. The proposed amended Schedule

---

49 Department of Infrastructure and Transport, *Submission 5*, pp. 2-3.

50 National Interest Analysis [2012] ATNIA 16 with an attachment on consultation *Exchange of Notes Constituting an Agreement to further amend the Schedule to the Agreement between the Commonwealth of Australia and Japan for Air Services* [2012] ATNIF 13, (Hereafter referred to as 'the Japan Agreement NIA'), para 2.

also sets out the traffic rights that can be exercised (i.e. the setting down and uplifting of passengers and cargo).<sup>51</sup>

- 2.50 As with all the other Agreements with the exception of the US Air Services Agreement, services on the agreed routes are subject to capacity restrictions, which are agreed using less than treaty level status Agreements.<sup>52</sup>
- 2.51 While the Japan Agreement is not one of Australia's model Air Services Agreements, all other provisions are in essence the same as those contained in the model Agreement.<sup>53</sup>

## The Kenya Agreement

- 2.52 The *Agreement between the Government of the Republic of Kenya and the Government of Australia relating to Air Services* (the Kenya Agreement) is the first such Agreement between Australia and Kenya. As such, it introduces the possibility of international air travel with passengers or cargo between Australia and Kenya.<sup>54</sup> The Kenya Agreement is based on the Australian model Air Services Agreement.<sup>55</sup>
- 2.53 The Kenya Agreement is similar to the Sri Lanka Agreement, and so will permit the designated airlines of Australia and Kenya to provide services on specified routes between Australia and Kenya.<sup>56</sup> The list of specified routes is contained in Annex 1 of the Agreement.<sup>57</sup>
- 2.54 There is no limit to the number of airlines that can be designated by each Party.<sup>58</sup> Designated airlines can only provide services subject to capacity limits agreed between the Parties to the Kenya Agreement. The capacity limits are set by less than treaty level Agreements, which are not publicly available.<sup>59</sup>

---

51 The Japan Agreement NIA, para 5.

52 The Japan Agreement NIA, para 6.

53 The Japan Agreement NIA, para 9.

54 The Kenya Agreement NIA, para 3.

55 The Kenya Agreement NIA, para 9.

56 The Kenya Agreement NIA, para 9.

57 The Kenya Agreement NIA, para 25.

58 The Kenya Agreement NIA, para 10.

59 *Agreement between the Government of the Republic of Kenya and the Government of Australia relating to Air Services 2012* [2012] ATNIF 23, Article 11.

## The Palau Agreement

- 2.55 The *Agreement between the Government of Australia and the Government of the Republic of Palau relating to Air Services* (the Palau Agreement), like the Kenya Agreement, is the first Agreement of this sort between Australia and Palau.<sup>60</sup>
- 2.56 As the Palau Agreement is also based on the Australian model Air Services Agreement, most of the comments made above in relation to the Kenya Agreement apply equally to the Palau Agreement.<sup>61</sup>
- 2.57 Of particular note in relation to the Palau Agreement is the fact that the preceding less than treaty status Memoranda of Understanding (MoU) has been in place since 2004, a period much longer than any of the other Agreements being considered here.<sup>62</sup>

## Reasons for Australia to take the proposed treaty action

- 2.58 In relation to all the Agreements considered here, the NIAs stress the benefits to Australian travellers and businesses resulting from the liberalisation of air services introduced by these Agreements.<sup>63</sup> However, given that these Agreements have been in place for a number of years as less than treaty level MoU, the benefits should arguably already be showing themselves. The NIAs do not contain any statistical or anecdotal evidence of the success or otherwise of the MoUs in liberalising services between the Parties to these Agreements.

## Implementation

- 2.59 The legislation relevant to these Agreements is:
- the *Air Navigation Act 1920*;
  - the *Civil Aviation Act 1988*; and

---

60 National Interest Analysis [2012] ATNIA 26 with an attachment on consultation *Agreement between the Government of Australia and the Government of the Republic of Palau relating to Air Services* (Koror, 2 May 2012) [2012] ATNIF 6, (Hereafter referred to as 'the Palau Agreement NIA'), para 3.

61 The Palau Agreement NIA, para 9.

62 The Palau Agreement NIA, para 2.

63 For example, the US Agreement NIA, para 8.

- the *International Air Services Commission Act 1992*.<sup>64</sup>

2.60 The NIAs indicate that the Agreements will not require amendments to any of these Acts.<sup>65</sup>

## Costs

2.61 According to the NIA, the proposed Agreements will impose no direct financial costs on the Australian Government.<sup>66</sup> Similarly, no financial implications for state and territory governments are expected.<sup>67</sup>

## Conclusion

2.62 The proposed set of Agreements grants access for Australian airlines to the aviation markets of the countries in question and allows for the establishment of air services in those countries. In the case of the US, the proposed Agreements will allow air services to operate between Australia and the US under an 'open-skies' framework.

2.63 These Agreements will enable airlines of Australia and the countries in question to provide services between any point in Australia and any point in those countries, based on capacity levels decided from time to time between the aeronautical authorities of the various Parties. It is expected that Australian travellers and Australian businesses, particularly in the tourism and export industries, will benefit from this proposed set of Agreements through the opening up of increased commercial opportunities.

2.64 As noted above, these Agreements have already been in place for a number of years as MoUs and thus the treaties here are providing a more formal and legal foundation to already existing arrangements. This being the case the Committee is, however, disappointed that the NIAs do not contain any statistical or anecdotal evidence of the success or otherwise of the MoUs in liberalising services between the Parties to these Agreements.

---

64 The Kenya Agreement NIA, para 27.

65 The United States Agreement NIA, Para 27.

66 The United States Agreement NIA, Para 28.

67 Mr Samuel Lucas, Director, Air Services Negotiations Section, Aviation Industry Policy Branch, Aviation and Airports Division, Department of Infrastructure and Transport, *Committee Hansard*, 4 February 2013, p. 1.

- 2.65 Nonetheless, given the increasing amount of air travel and trade conducted by air transport, it is appropriate that treaty level agreements are put in place to facilitate this increased activity and help ensure that appropriate safety, logistic and commercial standards are being met. The Committee supports the set of Agreements and recommends that binding treaty action be taken.

#### **Recommendation 1**

**The Committee supports the *Exchange of Notes, done at Tokyo on [TBA] 2012, constituting an Agreement to further amend the Schedule to the Agreement between the Commonwealth of Australia and Japan for Air Services, done at Tokyo on 19 January 1956, as amended* and recommends that binding treaty action be taken.**

#### **Recommendation 2**

**The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Kenya relating to Air Services* and recommends that binding treaty action be taken.**

#### **Recommendation 3**

**The Committee supports the *Agreement between the Government of Australia and the Government of the Republic of Palau relating to Air Services* and recommends that binding treaty action be taken.**

#### **Recommendation 4**

**The Committee supports the *Agreement between the Government of Australia and the Democratic Socialist Republic of Sri Lanka relating to Air Services* and recommends that binding treaty action be taken.**

**Recommendation 5**

The Committee supports the *Air Transport Agreement between the Government of Australia and the Government of the United States of America (Washington D.C., 31 March 2008)* and recommends that binding treaty action be taken.

**Recommendation 6**

The Committee supports the *Exchange of notes amending the Air Transport Agreement between the Government of Australia and the Government of the United States of America* and recommends that binding treaty action be taken.



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

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

## Introduction

- 3.1 On 1 November 2012, the *Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2001*, and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, done at Cape Town on 16 November 2001*, were tabled in the Commonwealth Parliament.

## Background

- 3.2 The Convention and Protocol are known as the ‘Cape Town Convention’. The Cape Town Convention entered into force generally on 1 March 2006,<sup>1</sup>

---

<sup>1</sup> National Interest Analysis [2012] ATNIA 24 with an attachment on consultation *Convention on International Interests in Mobile Equipment (Cape Town, 16 November 2001)* [2001] ATNIF 35, and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 16 November 2001)* [2001] ATNIF 36, (Hereafter referred to as ‘the NIA’), para 1.

introducing a uniform international legal framework to protect the financiers of aircraft.<sup>2</sup> A uniform framework should provide a mechanism for persons with a financial interest in aircraft (such as aircraft lessors, sellers or financiers) to recover their assets in the event that an airline defaults on its payments.<sup>3</sup> The key objectives are to:

- provide financiers of aircraft with increased certainty around Australia's insolvency laws as they apply to highly mobile equipment; and
- allow for increased access by the Australian aviation industry to cheaper asset financing and sources of finance external to the domestic market.<sup>4</sup>

3.3 As at 3 July 2012, 45 States and one Regional Economic Integration Organisation (the European Union) had become party to both the Convention and the Protocol.<sup>5</sup>

## Overview and national interest summary

3.4 The Cape Town Convention is intended to address the issue of inconsistent security and access to finance for mobile equipment creditors. The Convention will provide a homogenous securities system for such creditors.<sup>6</sup>

3.5 The Convention establishes an International Registry where creditors record security interests in mobile equipment. In the event of default, the International Registry gives a registered interest priority over other interests in the same equipment that are either registered later in time or are unregistered. The Convention also provides basic remedies in the event of default, increasing protection of creditors' interests and reducing their risks.<sup>7</sup>

3.6 The Protocol modifies and supplements the Convention in relation to aircraft. It enables security interests in the following types of aircraft to be registered on the International Registry:

- aeroplanes certified to transport at least eight persons including crew, or goods in excess of 2 750 kilograms;

---

2 NIA, para 5.

3 NIA, para 4.

4 NIA, para 7.

5 NIA, para 8.

6 NIA, para 8.

7 NIA, para 9.

- jet engines of at least 1 750 lb of thrust or its equivalent, and turbine or piston engines of at least 550 rated take-off shaft horsepower or its equivalent; and
  - helicopters certified to transport at least five persons including crew, or goods in excess of 450 kilograms.<sup>8</sup>
- 3.7 The Protocol offers two additional remedies to creditors in the event of default. The first is the removal of an aircraft from a State Party's civil aircraft register, and the second is the export of the aircraft to another State. It also establishes a special insolvency regime in relation to aircraft objects.<sup>9</sup>
- 3.8 Creditors who do not have access to the measures set out in the Convention and the Protocol remain subject solely to the domestic laws and processes of various jurisdictions at any given time, with varying levels of creditor protection. This instability has caused financiers to drive up their costs as a buffer against these risks, which are then passed on to the airline industry.<sup>10</sup>
- 3.9 It is worth noting that, under the Cape Town Convention, parties to financing agreements retain the right to determine what constitutes 'default' and what will give rise to default remedies.<sup>11</sup>

## Reasons for Australia to take the proposed treaty action

- 3.10 The NIA identifies two significant benefits arising from ratification of the Cape Town Convention: improved creditor security; and enhanced access to finance by Australian airlines.
- 3.11 According to the NIA, the collapse of Ansett in 2001 triggered a series of reforms of Australian law to deal with the problems that collapse highlighted in the domestic uniform securities framework.<sup>12</sup>
- 3.12 However, the aviation industry has expressed concern that this system does not provide for the unique financing requirements applicable to aviation, which have a significant international aspect, resulting from their mobility and the depreciative nature of aircraft.<sup>13</sup>

---

8 NIA, para 10.

9 NIA, para 11.

10 NIA, para 11.

11 NIA, para 18.

12 NIA, para 13.

13 NIA, para 13.

- 3.13 The NIA argues that accession to the Cape Town Convention will bridge this gap and reduce creditor risk exposure by providing a securities framework that applies across borders and allows for the prompt repossession of an aircraft asset or the taking of other action by a creditor upon insolvency.<sup>14</sup> According to the NIA:
- By enhancing financier security and reducing their risks, the Cape Town Convention will assist Australian airlines in achieving significant savings on financing costs, at a time when industry participants are seeking to both recover from the impact of the global financial crisis and modernise their fleet.<sup>15</sup>
- 3.14 For airlines, accession to the Cape Town Convention may result in reduced financing costs, primarily achieved by lowering creditor risk which will, in turn, manifest itself in the form of cheaper finance for airlines for the purchase of aircraft.<sup>16</sup>
- 3.15 The NIA argues that the financial benefits will be best realised through the 2011 Sector Understanding on Export Credits for Civil Aircraft (ASU), developed by the Organisation for Economic Co-operation and Development.<sup>17</sup>
- 3.16 The ASU provides a common framework for export-credit agencies of Australia, the Republic of Korea, Norway, Switzerland, New Zealand, the European Union, the United States, Japan, Brazil and Canada to finance aircraft objects.<sup>18</sup> A fee discount is offered for airlines of countries that are party to the Cape Town Convention provided they have made all specified 'qualifying declarations' upon becoming party to the Cape Town Convention. Should the Convention be ratified, Australia intends to make the requisite qualifying declarations upon accession.<sup>19</sup>

## Obligations

- 3.17 Under Chapter III of the Convention and Chapter II of the Protocol, Australia will be required to observe and make available particular remedies to creditors in the event of debtor default, including rights of
- 

14 NIA, para 14.

15 NIA, para 6.

16 NIA, para 15.

17 NIA, para 15.

18 "Aircraft objects" are airframes (aircraft bodies), aircraft engines and helicopters (Article 2(3)(a) of the Convention). NIA, p.1.

19 NIA, para 16. The relevant declarations can be found in para 1.17 of the Regulation Impact Statement.

repossession, sale and lease and rights to proceeds from objects subject to a security interest. All remedies are required to be carried out in a 'commercially reasonable manner'.<sup>20</sup> The ranking in priority of competing interests in Chapter VIII of the Convention will prevail over the *Personal Property Securities Act 2009* (PPS Act), to the extent of any inconsistency.<sup>21</sup>

- 3.18 Australia will have obligations arising from the declarations to the Cape Town Convention which Australia intends to make upon accession. For example, if a declaration is made in respect of Articles XI and XIII of the Protocol, the Civil Aviation Safety Authority would be required to record an irrevocable de-registration and export request (IDERA) form and make available certain remedies to the creditor within five working days. The IDERA form is the mechanism by which a creditor could procure the deregistration and export and physical transfer of the aircraft object from the territory in which it is situated.<sup>22</sup>
- 3.19 Australian authorities would also be obliged to co-operate and assist in the exercise of those remedies. The remedies could include the right to procure the removal of the aircraft from the Australian Civil Aircraft Register in the event of default, where this has previously been agreed by the parties to the financing arrangement.<sup>23</sup>
- 3.20 Australia is further obliged to permit a person to exercise those remedies and other remedies available under the Convention by recourse to Australian courts.<sup>24</sup>

### Unpaid employment entitlements in the event of insolvency

- 3.21 Under Australian law if a company is liquidated, the rights of secured creditors have priority over the right of unsecured creditors, including employee entitlements. The Committee heard that this situation would not alter with accession to the Cape Town Convention:

Whilst the Cape Town Convention does allow a Contracting State to declare under Article 39 certain categories of non-statutory liens that can have priority over a registered international interest, this provision cannot be used to alter priorities that are currently

---

20 "Remedies are exercised in a 'commercially reasonable manner' if the creditor takes proper steps to safeguard an object from loss or damage upon repossession and makes reasonable efforts to obtain the best price on sale of an object". Department of Infrastructure and Transport, *Submission 5.2*, p. 2.

21 NIA, para 19.

22 NIA, para 20.

23 NIA, para 20.

24 NIA, para 21.

applicable under national law. This means that a declaration cannot be made under Article 39(1) of the Cape Town Convention that would prioritise employee entitlements over the rights of secured creditors in the event of insolvency/liquidation.<sup>25</sup>

## Implementation

- 3.22 New legislation will be introduced to give the Convention the force of law in Australia. Minor amendments may also be required to existing legislation.<sup>26</sup>
- 3.23 The *Personal Property Securities Act 2009* (PPS Act), introduced following the collapse of Ansett, may require minor amendments to reflect the prevalence of the Convention to the extent of any inconsistency. The *Corporations Act 2001* may require minor amendments to implement the Cape Town Convention. The *Civil Aviation Act 1988* may require amendment to confer upon the Civil Aviation Safety Authority (CASA) the powers to record IDERAs and create new regulations to this end, depending on how Australia decides to approach the administration of IDERAs.<sup>27</sup>
- 3.24 The Civil Aviation Safety Regulations 1998 will require amendment to allow for Articles XIII (which requires the recording of an IDERA) and XI (remedies for insolvency) of the Protocol to be effectively carried out.<sup>28</sup>

## Costs

- 3.25 According to the NIA, accession to the Cape Town Convention will not result in significant financial implications for government stakeholders, business or industry. This is largely because registration under the Convention is voluntary and subject to commercial negotiations between creditor and debtor.<sup>29</sup>
- 3.26 Airlines and creditors that choose to register interests in accordance with the Convention will be subject to a small administrative fee (one-off fee of US\$200 for first time users; registration and search fees ranging from US\$35 to US\$100). It is anticipated that these low costs will be offset by the
- 

25 'It is important to note that the secured creditors only have rights over the uniquely identifiable asset registered on the International Registry.' Department of Infrastructure and Transport, *Submission 5.2*, pp. 2-3.

26 NIA, para 22.

27 NIA, paras 23-24.

28 NIA, para 25.

29 NIA, para 27.

broad benefits – financial and otherwise – available under the Convention.<sup>30</sup>

## Conclusion

- 3.27 The Cape Town Convention introduces a uniform international legal framework to protect the financiers of aircraft by providing a mechanism for persons with a financial interest in aircraft to recover their assets in the event that an airline defaults on its payments. This is intended to address the issue of inconsistent security and access to finance for mobile equipment creditors.
- 3.28 The Committee agrees that current gaps in the Australian legislative framework do not provide for the unique financing requirements applicable to aviation, resulting from the mobility and depreciative nature of aircraft, and that the Cape Town Convention is a way to address this.
- 3.29 Together the Convention and Protocol should reduce creditor risk exposure by providing a securities framework that applies across borders and allows for the prompt repossession of an aircraft asset or the taking of other action by a creditor upon insolvency, and the Committee recommends that binding treaty action be taken.

### Recommendation 7

**The Committee supports the *Convention on International Interests in Mobile Equipment, done at Cape Town on 16 November 2001* and recommends that binding treaty action be taken.**

### Recommendation 8

**The Committee supports the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, done at Cape Town on 16 November 2001* and recommends that binding treaty action be taken.**

---

30 NIA, para 28.



## Minor Treaty Actions

### Introduction

- 4.1 Minor treaty actions are generally technical amendments to existing treaties which do not impact significantly on the national interest.
- 4.2 Minor treaty actions are presented to the Joint Standing Committee on Treaties with a one-page explanatory statement and are listed on the Committee's website. The Committee has the discretion to formally inquire into these treaty actions or indicate its acceptance of them without a formal inquiry and report.

### Minor treaty actions

- 4.3 There are two minor treaty actions reviewed in this chapter. The Committee determined not to hold a formal inquiry into these treaty actions and agreed that binding treaty action may be taken in each case.

### Amendment of Australia's Schedule annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994

- 4.4 This proposed treaty action will amend Australia's Schedule of bound tariff commitments annexed to the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994* ([1995] ATS 8). It attaches two further schedules reflecting the 1996 and 2002 revisions of the Harmonized Commodity Description and Coding System (the Harmonized System). Although the classification of some products differs between successive versions of the schedules, this will not result in any products attracting a different rate of duty or in any other changes to Australia's World Trade Organization (WTO) commitments.

- 4.5 No legislative changes are needed to implement the proposed treaty action. The changes will not impose any additional obligations on Australia.
- 4.6 The Harmonized System, of internationally agreed and administered nomenclature, facilitates trade by ensuring that internationally traded goods are identified in a consistent way. The System is maintained by the World Customs Organisation (WCO), which updates the classification of goods every five years. WCO members record their tariff schedules, including their WTO tariff commitments, using the Harmonized System. WTO Members submit updated schedules to the WTO, so other Members can verify that all WTO commitments are accurately reflected in the new schedule.
- 4.7 Although Australia's HS1996 and HS2002 schedules have been submitted and accepted by WTO Members, Australia has delayed certifying these schedules as official (constituting binding treaty action), on the basis that the conclusion of the Doha Development Round of trade negotiations (Doha) would require all WTO Members to implement new schedules which would supersede these revisions of the Harmonized System. At present, Doha has not been finalised and Australia is among the few countries that have not certified their 1996 and 2002 revisions.

### **Amendment to Annex 3 of the 2007 Agreement on Operational and Strategic Cooperation between Australia and the European Police Office**

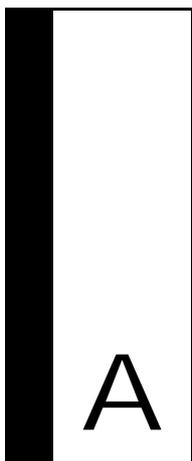
- 4.8 *The Amendment to Annex 3 of the 2007 Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (the Amending Agreement) was provided to the Committee on 29 April 2013.*
- 4.9 The Explanatory Statement by the Australian Federal Police (AFP) accompanying the Amending Agreement describes the *2007 Agreement on Operational and Strategic Cooperation between Australia and the European Police Office (the 2007 Agreement)* as enabling the exchange of intelligence between the AFP and the European Police Office (Europol) in combatting serious forms of international crime such as drug trafficking, people smuggling and money laundering.
- 4.10 The level of communication between Europol and third countries is significant, according to the Explanatory Statement, with 30,000 communications occurring each year. The AFP and Europol exchanged 700 specific requests for information in the 2011-12 financial year.
- 4.11 In accordance with Article 12(4) of the 2007 Agreement, exchanged classified information must be afforded an equivalent level of security classification by the sending and receiving Parties. Annex 3 of the 2007

- Agreement contains a 'table of equivalence', showing corresponding Australian and EU security classifications.
- 4.12 In 2011, the Australian Government revised the Protective Security Policy Framework (PSPF), which sets out the security classifications used in the 'table of equivalence' at Annex 3 of the 2007 Agreement. The revised PSPF reduced the number of security classifications from seven to four.
- 4.13 The Amending Agreement will amend the 'table of equivalence' at Annex 3 to reflect the revised PSPF security classifications.
- 4.14 The AFP argues that the Amending Agreement is a minor treaty action because, with one exception, it will not change how the 2007 Agreement operates in practice. In the bulk of instances, the Amending Agreement will simply result in exchanged information attracting a security classification that matches the new classifications contained in the revised PSPF.
- 4.15 The exception relates to information that can be exchanged in real time through an encrypted communications link between the AFP and Europol.
- 4.16 Only information of the lowest classification can be exchanged in real time. The revised PSPF changes the lowest security classification from 'In Confidence' to 'Protected', and increases the scope of information that can attract this classification.
- 4.17 Consequently, under the new security classification system, more information will be permitted to be exchanged in real time.

**The Hon Richard Marles MP**

**Chair**



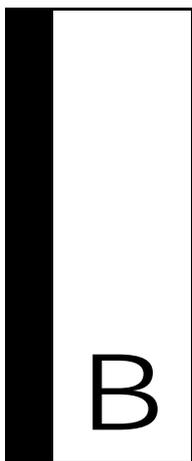


## Appendix A – Submissions

### Treaties tabled on 1 November 2012

- 5 Department of Infrastructure and Transport
- 5.1 Department of Infrastructure and Transport
- 5.2 Department of Infrastructure and Transport





## Appendix B – Witnesses

**Monday, 4 February 2013 - Canberra**

**Department of Foreign Affairs and Trade**

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

**Department of Infrastructure and Transport**

Mr Ross Adams, Assistant Director, Trade and Aviation Market Policy, Aviation Industry Policy Branch, Aviation and Airports Division

Mr Stephen Borthwick, General Manager, Aviation Industry Policy Branch, Aviation and Airports Division

Mr Samuel Lucas, Director Air Services Negotiations, Aviation Industry Policy Branch, Aviation and Airports Division

Ms Ann Redmond, Director, Trade and Aviation Market Policy, Aviation Industry Policy Branch, Aviation and Airports Division

Mr Glenn Smith, Policy Officer, Trade and Aviation Market Policy Section, Aviation Industry Policy Branch, Aviation and Airports Division

Mr Gilon Smith, Assistant Director, Air Services Negotiations, Aviation Industry Policy Branch, Aviation and Airports Division

