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SECURITY INTERESTS IN MOBILE EQUIPMENT: LAWMAKING LESSONS FROM THE CAPE TOWN CONVENTION

ABSTRACT

The announcement by the Australian government of Australia's intention to ratify the Cape Town Convention and its associated Aircraft Protocol provides a timely opportunity to describe the key elements of these two important international instruments adopted in November 2001 which, as will be seen later, have already attracted strong support which is steadily increasing. The Cape Town Convention has already received 61 ratifications and the Aircraft Protocol 55 ratifications. With its enactment of the *Personal Property Securities Act 2009* (Cth), Australia joined the many jurisdictions that have adopted a modern, functional approach to security interests based on art 9 of the United States Uniform Commercial Code and the Canadian Personal Property Security Acts. But domestic laws are not well suited to high-value equipment that moves regularly across national borders, such as aircraft objects and railway rolling stock, or to equipment that is not on Earth at all, such as satellites and other space assets. The conflict rule designating the *lex situs* as the applicable law does not work for objects having no fixed situs or for assets in space where no private law exists. Moreover, even if a uniform conflict rule could be devised it would not overcome major differences in national laws governing secured transactions. Hence the need for an international regime governing the creation, perfection and priority of interests in mobile equipment, with an international registry for the registration of such interests and priority rules based on the order of registration. This paper describes the key features of the Cape Town Convention and Aircraft Protocol and their relationship to national law.

I INTRODUCTION

This is a particularly opportune time to discuss personal property security law. Australia has not only become a Personal Property Security Act jurisdiction but has also announced its intention to ratify the Convention on International Interests

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in Mobile Equipment ('Cape Town Convention')¹ and its associated Aircraft Protocol² during the course of 2014. Many here today took part in the work leading to the *Personal Property Securities Act 2009* (Cth) ('PPSA'). But there is one person who is not here today, one person whose drive, incurable optimism and sheer bloody-mindedness drove this project forward when others were faltering. I refer, of course, to David Allan, whose commitment to the project over many years finally led to the enactment of the PPSA, though sadly David did not live to see it. He can truly be regarded as the architect of the modernisation of Australian personal property security law.³

Others in this symposium edition discuss national laws governing security in personal property, including the progenitor of the modern regime, art 9 of the United States Uniform Commercial Code ('UCC'), and equivalent legislation in force in about 80 jurisdictions, which now includes Jersey in the Channel Islands⁴ but not yet the United Kingdom.⁵ My focus will not be on national laws but on the international scene, and particularly the Cape Town Convention and Aircraft Protocol.

A International Developments

Over the past 25 years, there has been an explosion of international and regional activity in the field of, or including, security in movable property. Almost none of it has been successful, though with some recent instruments it is perhaps still too early to dismiss them as failures. If designing national laws is hard, the formulation and adoption of international instruments is harder still and usually takes many years of effort. There are several reasons for this. First, the work involves participation by practising and academic lawyers from numerous legal systems based in several legal families, each with widely differing approaches to secured transactions. Second,

¹ *Convention on International Interests in Mobile Equipment*, opened for signature 16 November 2001, 2307 UNTS (entered 1 March 2006).

² *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, opened for signature 16 November 2001, 2367 UNTS (entered into force 1 March 2006).

³ Whether he would have been wholly enthusiastic about the drafting of the legislation is another matter!

⁴ The *Security Interests (Jersey) Law 2012*, which deals with security interests in intangible movable property, was enacted some two years ago and came fully into force in February 2014. Its extension to tangible movables has already been drafted and sent out for consultation and is expected to be enacted within the next two years.

⁵ At the time of this address, I was the founder and Executive Director of the Secured Transactions Law Reform Project, which was established to resuscitate the proposals of the English Law Commission for the adoption of a Personal Property Security Act-style law in its Consultative Report: 'Company Security Interests' (Consultation Paper No 176, English Law Commission, 2004). The proposals, which broadly followed Personal Property Security Act legislation elsewhere, were considerably watered down in the Law Commission's final report: 'Company Security Interests' (Final Report No 296, English Law Commission, 2005). In the end, even the modified proposals failed to reach the statute book. I have now been succeeded as Executive Director by my Oxford colleague, Professor Louise Gullifer.

a significant amount of time and expense is involved in organising international meetings to carry a project forward. Third, it is difficult to balance both the needs of creditors with safeguards for debtors and the concerns of industry with those of government. Finally, governments around the world display inertia when it comes to ratifying an adopted instrument.

Let me give some examples. The International Institute for the Unification of Private Law ('UNIDROIT') *Convention on International Factoring*,⁶ concluded in 1988, is in force but has secured few ratifications, mainly because its scope is too narrow: it is confined to notification factoring, which went out of favour soon after its conclusion following a strong move towards non-notification invoice discounting. The UNIDROIT *Convention on International Financial Leasing*,⁷ adopted at the same diplomatic Conference, is also in force but has not been a success, though there are greater hopes for the 2008 UNIDROIT *Model Law on Leasing*.⁸ The 2006 Hague *Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*,⁹ which came close to success after a mere two and a half years from start to finish, largely due to the driving force of Australian lawyer Richard Potok, came unstuck because of a significant change in approach and formulation at the diplomatic Conference, which upset the Europeans. Finally, the 2001 *United Nations Convention on the Assignment of Receivables in International Trade*¹⁰ has secured only a single ratification (by Liberia) in more than 11 years, which is perhaps because it is too wide-ranging and unfocused, though there are rumours that the US will ratify it.

So in the quarter of a century of international lawmaking in the field of secured transactions there are only two instruments that have really taken off: the Cape Town Convention and the Aircraft Protocol, with 61 ratifications of the former and 55 ratifications of the latter.¹¹

II THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL

A Genesis

Way back in 1988, a former Canadian member of the Governing Council of UNIDROIT proposed that UNIDROIT embark on a study of secured transactions

⁶ Opened for signature 28 May 1988, 2323 UNTS (entered into force 1 May 1995).

⁷ Opened for signature 28 May 1988, 2321 UNTS (entered into force 1 May 1995).

⁸ *Adopted on 13 November 2008 by the Joint Session of the UNIDROIT General Assembly and the UNIDROIT Committee of Governmental Experts for the finalisation and adoption of a draft model law on leasing (Rome, 10-13 November 2008).*

⁹ Opened for signature 5 July 2005, 46 ILM 649 (not yet in force).

¹⁰ *United Nations Convention on the Assignment of Receivables in International Trade*, GA Res 56/81, UN GAOR, 6th Comm, 56th sess, Agenda Item 161, UN Doc A/RES/56/81 (12 December 2001).

¹¹ Current as at 29 August 2014. Full details of ratifications and accessions are available on the UNIDROIT website: <www.unidroit.org>.

law with a view to producing an international convention. Following a survey and paper prepared by Professor Ron Cuming of the University of Saskatchewan, the Governing Council authorised a project for an international convention on security and related interests in mobile equipment — that is, equipment of a kind regularly crossing national borders in the course of business, or not on Earth at all — falling into three categories: aircraft objects, railway rolling stock and space assets. The project was strongly supported by the aviation industry for several reasons. First, default remedies freely available in one jurisdiction might be much more restricted in a different, debtor-oriented jurisdiction and speedy relief pending final determination of a claim might not be available. Second, the requirements for perfection of a security interest varied widely from one jurisdiction to another, and the traditional *lex situs* rule for determining the law applicable to perfection and priorities of security interests in equipment was unsuited to security interests in mobile equipment. Third, even if a uniform conflicts rule could be established, that would not address substantial differences in national legal systems. This meant that a creditor taking and perfecting a security interest in one jurisdiction might find that its interest was subordinate to an earlier, or even a later, security interest taken and perfected in another. Finally, it was not always certain that a security interest would remain effective in the event of the debtor's insolvency.

The consequent uncertainty surrounding creditors' rights resulted in increased risk, meaning that potential borrowers, particularly those in developing jurisdictions, either could not access credit for the acquisition of aircraft objects or had to pay heavily for the privilege. In addition, the cost to creditors of procuring export credit insurance could be high. By contrast, borrowers in the US, which had developed a strong creditor protection rule in insolvency under § 1110 of the federal *Bankruptcy Code*,¹² were less dependent on bank finance and could access the capital markets by the issue of enhanced equipment trust certificates.

A study undertaken for UNIDROIT by Anthony Saunders and Ingo Walter,¹³ under the auspices of INSEAD¹⁴ and the New York University Salomon Center for the Study of Financial Institutions, showed that adoption of an international instrument along the lines developed during the course of their study could be expected to lead to savings of billions of dollars per year, a prediction which proved well-founded.¹⁵ Furthermore, the importance of creditors' rights was obvious given that the two major aircraft manufacturers, Airbus and Boeing, have projected deliveries of USD3–4 trillion over the next 20 years.

¹² 11 USC § 1110 (2012).

¹³ A Saunders and I Walter, 'Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment Through the Aircraft Equipment Protocol: Economic Impact Assessment' (Research Report, September 1998).

¹⁴ Institut Européen d'Administration des Affaires (European Institute of Business Administration).

¹⁵ See, eg, Vadim Linetsky, *Economic Benefits of the Cape Town Treaty* (18 October 2009) Aviation Working Group <<http://www.awg.aero/projects/capetownconvention/>>.

B Development of the Project

The project began modestly enough with an initial draft of a mere five articles — my new definition of an optimist! The Cape Town Convention would be confined to aircraft objects, railway rolling stock and space assets. It had been hoped that it would include ships, but the Comité Maritime International opposed this, instead taking the view that existing maritime conventions were adequate. Initially the plan was to follow the functional approach to security interests embodied in art 9 of the UCC and in the Canadian Personal Property Security Acts, so that conditional sale agreements and types of leases structured to provide security would be treated as security interests. This approach was quickly abandoned in the light of opposition from participants from continental Europe. Accordingly, the Cape Town Convention adopted a threefold classification of international interests: security interests in the classical sense (mortgages, charges, etc), title reservation agreements (conditional sale agreements), and leases, with or without an option to purchase.¹⁶ The Cape Town Convention also found a neat way to accommodate the different approaches to the concept of security by providing that once an agreement was found to fall within one of the three categories as defined in the Cape Town Convention, it would be for the applicable law to determine the characterisation of the agreement. For example, a title reservation agreement governed by French law would be treated as such, while if the agreement was governed by New York law it would be characterised as a security agreement.

With the involvement of key figures in the aviation industry and the creation of the Aviation Working Group ('AWG') under the direction of UNIDROIT's consultant Jeffrey Wool, the project became increasingly ambitious, with a number of strikingly original features. The international interest as a product of a convention rather than of national law was itself unique. It could also be created with very little formality, so that most interests created under national law would meet the formal requirements for an international interest. A second point of departure was that the planned International Registry would be asset-based, not debtor-based. On the one hand, this of course meant that for the purpose of registration at least, the asset had to be uniquely identifiable, thus precluding security over classes of an asset or unidentified future assets; on the other hand, the register would show all international interests in the asset, whether given by the debtor or by anyone else.

C Unique Features

Reference has already been made to the *sui generis* nature of the international interest. Among the many other innovations introduced by the Cape Town Convention, five deserve particular mention.

¹⁶ For brevity, 'security interest' will hereafter be used to include the interests vested in a person who is a conditional seller under a title reservation agreement or a lessor under a leasing agreement. The differences in the three categories are relevant primarily to default remedies, where the rules for conditional sales and leases are much simpler, to reflect that on default the conditional seller or lessor should be free to repossess its own equipment and do what it likes with it, retaining any surplus resulting from sale.

1 *The International Registry*

The most crucial element of the whole package is the establishment of an International Registry for the registration, assignment, subordination, etc of international interests in aircraft objects. In a Contracting State, a registered interest has priority over both a subsequently registered interest and an unregistered interest. This is true even if the latter was not capable of registration because, for example, it did not fall within one of the registrable categories or because the debtor was not situated in a Contracting State at the time of the relevant agreement. So a registered international interest trumps all interests created under national law except non-consensual rights or interests covered by a declaration of a Contracting State under art 39 of the Cape Town Convention or pre-existing rights or interests, which in general fall outside the scope of the Cape Town Convention altogether.

Soon after the conclusion of the Cape Town Convention and Aircraft Protocol, the Commission of the European Community ('EC'), as it then was, initiated steps to secure ratification by the Community. Things were moving forward quite swiftly until an unexpected blockage occurred following a dispute between two EC Member States, wholly unrelated to the two instruments. This caused delay for several years until the dispute was resolved. At the time this seemed a disaster. In retrospect it proved a blessing, because the technological difficulties involved in establishing the International Registry were much greater than had been anticipated. Indeed, if the EC ratification had proceeded according to plan and Member States had in turn ratified, the Cape Town Convention and Aircraft Protocol would have become operative without the International Registry. I would love to know what the international lawyers would have made of that!¹⁷ We learnt from the experience. This problem cannot arise under either the Luxembourg¹⁸ or Space¹⁹ Protocols because both condition their coming into force on the deposit by the Supervisory Authority with the Depository (UNIDROIT) of a certificate confirming that the International Registry is fully operational.

2 *The Two-Instrument Approach*

The original plan was to have a single convention covering all three categories of equipment. However, several problems began to emerge. First, the aviation industry was well ahead of the rail and space industries and did not want to be held up by them. Second, there was concern that the drafting of the Cape Town Convention, which we wanted to be as light as possible, would be encumbered by a mass of technical details

¹⁷ Article 61(1) of the Vienna Convention on Treaties deals with the issue of temporary impossibility but it is not altogether clear how its provisions would have applied in this situation.

¹⁸ *Luxembourg Protocol to the Convention On International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock*, opened for signature 23 February 2007, 46 ILM 662.

¹⁹ *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets*, opened for signature 9 March 2012, UNIDROIT.

concerning the definitions of aircraft, airframes and helicopters, and on what these should contain to exclude light aircraft, not to mention definitions of railway rolling stock and space assets. Third, while the first two problems could be overcome by having separate conventions for each of the three categories, this itself would produce serious problems. For example, there would be significant time, labour and expense involved in the holding of three diplomatic conferences instead of one and the drafting of different instruments by different hands at different times could produce inconsistencies even in the drafting of provisions that were equipment-neutral.

These problems were brilliantly solved by Lorne Clark (then the General Counsel of the International Air Transport Association ('IATA')) who came up with the idea of a two-instrument approach. This would comprise of the Cape Town Convention, which would be equipment-neutral, and separate Protocols for each of the three categories, which would enable each industry to proceed at its own speed without being held up by the others and would allow the Cape Town Convention provisions to be modified to suit the needs of the particular industry concerned. Unusually, therefore, the Protocols do not merely supplement the Cape Town Convention, they control its coming into force and they can modify it as necessary.

Despite these obvious advantages, the two-instrument approach proved controversial and it was not until the first day of the diplomatic Conference²⁰ that it quickly became clear that it was supported by a great majority of delegates.

3 Invasion of New Areas

Certain parts of commercial law had traditionally been regarded as off-limits to private commercial law conventions, among them property rights, priority rules and the modification of national insolvency laws. All these taboos were broken by the Cape Town Convention and Protocols, which laid down rules for perfecting an international interest (primarily through registration), priority rules and rules for the protection of a creditor in the event of a debtor's insolvency.

4 Treatment of Non-Consensual Rights or Interests

The Cape Town Convention was originally conceived as applicable only to consensual interests. But most states have a battery of non-consensual rights and interests, such as legal liens, statutory mortgages, preferential claims of employees for wages and of states for taxes, judicial attachments and the like, which they would be reluctant to subordinate to a registered international interest. So art 39 of the Cape Town Convention makes provision for a Contracting State to make a declaration that categories of rights or interests which under that State's law have priority over the equivalent of registered international interests are to retain such priority without themselves having to be registered in the International Registry. In this way,

²⁰ 'Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol' held at Cape Town from 29 October to 16 November 2001 ('the diplomatic Conference').

the position of non-consensual rights or interests can be protected, while prospective creditors are alerted to the need to be aware of possible rights or interests that might trump their international interests.

5 The Declarations System

The Cape Town Convention and Aircraft Protocol are designed to provide creditors with speedy and effective remedies. However, it was felt that some of these might run counter to the long-established public policy of states and thus deter them from ratifying. This problem has been neatly overcome by a system of declarations, by which a Contracting State can opt out of certain provisions that run counter to its public policy — for example, the exercise of self-help remedies, speedy relief for the creditor pending final determination of its claim, or prorogation of jurisdiction — whilst other provisions do not apply at all in a Contracting State unless it has made a declaration opting into them — for example, choice of law or the enforcement of creditors' rights in insolvency. Thus, the declarations system follows the two-instrument approach in providing a good deal of flexibility for Contracting States.

D Some Facets of the Registration System

The Aircraft Registry has developed a highly efficient, speedy and cheap registration system. As stated earlier, the system is asset-based. It is also wholly electronic. There are tight security controls over registration, but anyone is free to search the Registry on paying the prescribed fee. The Registry is run by Aviareto, a jointly owned subsidiary of SITA²¹ and the Irish Government, and the Supervisory Authority is the Council of ICAO.²² There have been some 500,000 registrations.

On average, online registration becomes searchable within 38 seconds of the registration being effected. The fee for registration is USD100 and the fee for searches USD35. The Registrar is strictly liable for errors and omissions on the part of the Registry and for system malfunction, which did occur from time to time in the early days. But in a period of over eight years since the Registry went live, it has not received a single claim.

New regulations herald further sophistication, including an electronic closing room facility. This facility simulates a physical closing, whereby a series of prospective registrations can be marshalled and modified while the closing room is open, and after it is closed the planned registrations can be released to the Registry in the agreed sequence.

E Priorities

Leaving aside the priority rules for assignments, which are a little complex, the basic priority rules are remarkably simple and are gathered together in art 29 of the Cape Town Convention.

²¹ Société Internationale de Télécommunications Aéronautiques.

²² International Civil Aviation Organization.

First, a registered interest has priority over any subsequently registered interest and over an unregistered interest. There is an exception for an outright buyer who acquires its interest prior to registration of the international interest because under the Cape Town Convention outright sales are not registrable. However, art III of the Aircraft Protocol extends the registration system to such sales and thus removes the exemption. Second, there is also protection for conditional buyers and lessees, who are protected against registrable third-party interests that are registered after the conditional seller or lessor has registered its own interest. Third, parties may vary priorities by agreement. Finally, the priority of an international interest extends to proceeds, though these are narrowly defined as money or non-money proceeds arising from the loss or physical destruction of the object, its compulsory acquisition and the like.

These represent the totality of the priority rules, apart from non-registrable, non-consensual rights or interests covered by a Contracting State's declaration, assignments and pre-existing rights or interests.

F *Insolvency*

If the International Registry is a central plank of the Cape Town Convention, of almost equal importance are the provisions on insolvency. The Cape Town Convention itself provides in art 30(1) that an international interest is effective in the debtor's insolvency if registered prior to the commencement of insolvency proceedings. Accordingly, it is not open to a liquidator or creditors to attack a registered international interest as not duly perfected. Moreover, the only grounds of avoidance in insolvency proceedings are that the transaction was a preference or a transaction in fraud of creditors. However, the Cape Town Convention does not affect rules of procedure restricting enforcement, for example, where the property of the debtor is under the control or supervision of an insolvency administrator with a view to reorganisation.

Of much greater significance are the provisions of the Aircraft Protocol relating to insolvency. Article XI, which depends on an opt-in by the Contracting State that is the primary insolvency jurisdiction, has two alternative forms: *Alternative A* and *Alternative B*. *Alternative A* is based on § 1110 of the US federal *Bankruptcy Code*²³ and provides that unless the debtor or the insolvency administrator cures all defaults (other than the insolvency) and agrees to perform all future obligations under the agreement before the end of the waiting period, possession must be given to the creditor. There can be no judicial stay and no extension of time. Experience has shown that the availability of this powerful remedy, which significantly assists financing, has had the beneficial effect of restoring US airlines to profitable trading. In contrast, *Alternative B* leaves it to the court to determine whether to order the giving up of possession. Every Contracting State except Mexico has so far opted for *Alternative A*; however, Contracting States have an option to make no declaration and continue to apply their domestic insolvency law.

²³ 11 USC § 1110 (2012).

G Benefits of the Cape Town Convention and Aircraft Protocol

There is no doubt that airlines operating in Contracting States which have adopted *Alternative A* and have selected other appropriate declarations such as the provisions on self-help and speedy advance relief have secured substantial savings in financing costs. Meanwhile, creditors have benefited from the effect of the Cape Town discount on export credit insurance.²⁴

In addition, the existence of a central international registry, coupled with an international legal regime providing speedy advance relief on default and clear priority rules, will undoubtedly strengthen security, increase certainty and reduce the expenses involved in having to ensure perfection and priority in multiple jurisdictions.

H The Official Commentary

It is quite common to have Explanatory Reports prepared for the approval of a diplomatic Conference describing the objectives of an international convention and analysing its provisions for the benefit of delegates. However, it is less common for a diplomatic Conference to approve of the preparation of an Official Commentary by a single individual after the diplomatic Conference. Nevertheless, it was a sensible decision here because, though an Explanatory Report was prepared for the diplomatic Conference, it could not have addressed the range of issues that arose five and a half years later when the Cape Town Convention and Aircraft Protocol entered into force and the International Registry became operative. Indeed, when the first edition of the Official Commentary appeared in 2002 neither of these events had occurred, so it was very much a transitional publication. A revised edition was published in 2008 and a substantially expanded third edition in the summer of 2013,²⁵ the last of which took account of a range of issues raised by the aviation industry in light of its experiences, as well as huge advances in the registry system.²⁶

²⁴ The Cape Town discount is the discount that members of the Organisation for Economic Co-operation and Development offering export credits for civil aircraft are permitted by the Sector Understanding on Export Credits for Civil Aircraft (the ASU, September 2011). The discount allows such members to take advantage of the minimum premium rate after ratifying the Cape Town Convention and Aircraft Protocol with a specified set of qualifying declarations.

²⁵ Sir Roy Goode, *Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol Thereto on Matters Specific to Aircraft Equipment* (UNIDROIT, 3rd ed, 2013).

²⁶ A further reason for the preparation of new editions was that I was also mandated to prepare similar Official Commentaries covering the Luxembourg and Space Protocols, and each time a new Protocol was adopted, which required a new Official Commentary, it was necessary to revise the earlier publications so as to ensure that in their treatment of the Cape Town Convention provisions all the Official Commentaries said the same thing!

The Official Commentary, being of persuasive value only, is not binding on courts. However, several statutes enacting the Cape Town Convention and Aircraft Protocol expressly provide that in interpreting these instruments courts may have regard to the Official Commentary.²⁷

I Reasons for Success

The success of the Cape Town Convention and Aircraft Protocol is in large measure due to extensive consultation, a focus on clear rules uncluttered by the complexities of domestic legislation and the investment by the aviation industry of a huge amount of effort and resources to ensure a high quality product that met the industry's needs and to promote ratification of the two instruments around the world. Led by an American lawyer, Jeffrey Wool (who became UNIDROIT's consultant on the project), AWG developed into a powerful force, which with others (including IATA) contributed greatly to the shaping of these two instruments and to their adoption by states in a form that would give maximum benefits. Their work is a testament to the maxim: the more you put in, the more you get out.

J The Cape Town Convention, Aircraft Protocol and National Interests

Given the primacy of the Cape Town Convention and Aircraft Protocol over national security interests, the question has been posed whether there remains any point in taking and perfecting a security interest under national law where, at the time of the agreement, the debtor is situated in a Contracting State or the alternative connecting factor is satisfied.²⁸ If one is focusing on the particular items of equipment that are the subject of registration in the International Registry, the answer is that for the most part perfection under national law is of limited value. However, there are still uses for national security interests. One is to cover situations where there is doubt whether the requirements for the Cape Town Convention to apply have been satisfied. Another is where it is desired to take security over additional assets to which the Cape Town Convention does not apply, for example, components or after-acquired property. A third is to pick up security in general proceeds, such as proceeds of sale of an aircraft object that has been given in security, where such proceeds fall outside the Cape Town Convention definition.

The converse question relates to registration of non-Cape Town Convention interests in the International Registry. This was probably not envisaged when the Cape Town Convention was adopted; nevertheless, it is not at all uncommon for interests to

²⁷ Among the states whose implementing legislation has included such an interpretative provision are Canada, Ireland and Singapore.

²⁸ See art 3(1) of the Cape Town Convention. In order for the Cape Town Convention to apply, the debtor must be situated in a Contracting State at the time of the agreement creating or providing for the international interest. Article IV(1) of the Aircraft Protocol provides that the Cape Town Convention shall also apply in relation to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the state of registry (as defined by art I(2)(p)).

be registered that fall outside the Cape Town Convention. This could be done, for example, to play safe because of doubt as to whether the Cape Town Convention was applicable or because it was thought that registration might constitute constructive notice for the purpose of national rules on priority. For its part, the International Registry, operating an electronic system, is not equipped to investigate the validity of registrations, and, indeed, is perfectly happy to accept non-Cape Town Convention registrations anyway, since these produce additional income and help to keep down the level of fees.

III THE CAPE TOWN CONVENTION, AIRCRAFT PROTOCOL AND THE AUSTRALIAN PERSONAL PROPERTY SECURITIES ACT

I was very happy to see the Australian Government's announcement of its intention to ratify the Cape Town Convention and Aircraft Protocol in 2014.²⁹ The Australian Government released three alternative models for consultation. The first would give the Cape Town Convention and Aircraft Protocol the force of law in Australia, prevailing over the *PPSA* in case of inconsistency. The second would amend the *PPSA* to incorporate provisions corresponding to those of the Cape Town Convention and Aircraft Protocol. The third would combine the first two models, enacting parts of the Cape Town Convention while implementing the rest by amending the *PPSA*.

The Government opted for the first model for reasons of simplicity, and in my respectful view it was entirely right to do so. There is no need to trawl through all the provisions of the *PPSA*, inserting additions and amendments to an already lengthy enactment. To do so would merely cause confusion and added complexity, as well as risking error and quite possibly jeopardising the discounts and other economic benefits of ratification. Equally, there is little to be said for examining every other statute that could possibly be affected by the Cape Town Convention and Aircraft Protocol and modifying its provisions. It is much easier to do what the Government proposes, namely to provide that where they apply the Cape Town Convention and Aircraft Protocol have an overriding effect. I expect that there will be some situations where it will be found necessary or desirable to amend existing legislation, for example, in relation to aviation legislation, the operation of the Civil Aircraft Register, direct entry points, de-registration and export. However, these should be exceptional.

Of critical importance is the choice of declarations that will give maximum economic benefits. Australia will have its own experts on these, but I am sure that if called upon AWG will be happy to offer assistance.

Ratification by such a major jurisdiction as Australia gives a powerful boost to these two instruments, and I believe this move will serve Australian airlines and financiers well.

²⁹ Statement by the Australian Minister for Infrastructure, Anthony Albanese, 12 October 2012.