

# Maritime and Aviation Transport Update



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## Welcome to the second edition of the Sparke Helmore Maritime and Aviation Transport Update.

This publication offers you a variety of articles ranging from case studies to essential updates, which provide macro and micro perspectives on events, changes and challenges that shape the Maritime and Aviation Transport industry.

In this issue, we provide insight into recent and current developments including:

- decarbonisation of the aviation and maritime industries
- an overview of the main obligations for the transport sector arising out of the *Security of Critical Infrastructure Act 2018* (Cth)
- a snapshot of the amendments to the *Transport Safety Investigation Regulations 2021* (Cth)
- a guide to the terms of reference for the Commonwealth Government's Aviation White Paper
- an introduction to the *High Speed Rail Authority Bill 2022*
- consideration of recent report into endemic wage theft in Australian freight shipping, and
- a look at why foreign investment is important to the commercial aviation industry.

In addition to the feature articles, we have included a number of state-based legal developments, which may be of interest.

We hope this issue is beneficial to you and we look forward to sharing more in our next edition, available in the second half of 2023. If there are industry-related topics you would like Sparke Helmore to cover in the future, or you have specific maritime, aviation or transport queries, contact **Michelle Taylor** or **Mark Sainsbury**.



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# DECARBONISATION OF THE AVIATION INDUSTRY

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## Current Status

The aviation transport industry is an enormous and complicated connector of people, goods and services across the globe and supports approximately 5% of the world's gross domestic product. Prior to the COVID pandemic, approximately 4.5 billion passengers took flight in 2019 and the industry was a source of around 3% of global carbon dioxide emissions.

Research by Shell and Deloitte<sup>1</sup> indicates that those global emissions could be up as high as 22% by 2050 if the aviation sector fails to take appropriate action whilst other sectors actively decarbonise.

In October 2021 the world's airlines agreed to achieve net zero carbon emissions by 2050, which brought the industry in line with the Paris Accord.

Whilst both the International Air Transport Association (**IATA**) member airlines and the International Civil Aviation Organisation (**ICAO**) have adopted aspirational goals and targets for international aviation of net zero carbon emissions by 2050, there is no specific concrete plans universally adopted across nations to progress, monitor, and achieve that goal.

## Pathways to achieving net zero

The goal is to achieve "net zero" carbon emissions and not to achieve "zero" carbon emissions. This is of course a very important distinction with respect to technological changes, economic considerations and designing pathways to meet the target.

It is generally agreed within the aviation industry that a reduction in carbon emissions and carbon offsets can be achieved via:

- the widespread adoption of sustainable aviation fuel use in existing aircraft

- the development of new technology for both fuel and aircraft
- achieving infrastructure and operational efficiencies, and
- carbon capture and offsetting.

IATA is estimating that demand for air passenger travel by 2050 could exceed 10 billion person flights and the expected emissions growing on a business-as-usual trajectory to approximately 21.2 gigatons of carbon dioxide. These figures highlight the necessity of taking action now in relation to all options to primarily try and reduce carbon emissions and increase offsets.

The most readily adopted method for reducing emissions is the use of sustainable aviation fuels (**SAF**), which can reduce CO<sub>2</sub> emissions by up to 80%. SAF is typically produced from feed stock and can also be produced via waste oil and fats, green waste, and non-food crops.

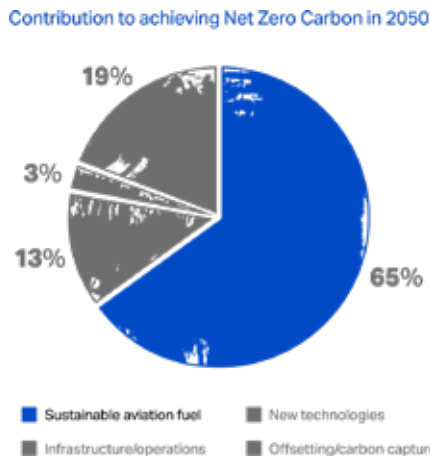
SAF is considered to be a sustainable fuel source because the raw feed stock does not compete with food crops or water supplies nor is it responsible for forest degradation. IATA estimate that SAF could contribute to approximately 65% of the reduction in emissions needed by the industry to reach the net zero target by 2050 as shown in the pie chart at **Figure 1** (produced by IATA).

However, this will require a massive increase in production of SAF in order to meet the demand of industry if it adopts the fuel on a widespread basis, due to the estimated massive increase in use from around 2030 onwards as shown in the graph at **Figure 2**, also produced by IATA<sup>2</sup>.

<sup>1</sup> Decarbonising Aviation: Cleared For Take-Off (2021) publication by Royal Dutch Shell and Deloitte.

<sup>2</sup> IATA Fact Sheet: Net Zero 2050: sustainable aviation fuels

**Figure 1**



**Figure 2**



The production and development of SAF and implementation by airlines can only occur where it is promoted and supported by governments and allied industries, such as the insurance industry that can provide risk protection for development and use of these alternative products.

It is not coincidental that the Australian Commonwealth Government has recently issued the terms of reference for a [white paper](#) focussing on the future of aviation in Australia to 2050 with a specific term of reference relating to maximising the aviation sector’s contribution to achieving net zero carbon emissions, including through SAF and emerging technology.

Similarly, governments around the world are working with aviation organisations such as IATA and ICAO to support the industry and achieve these goals. It is worth noting that there is some difference between approaches adopted in the industry by the two major global regions being the EU and the US. In the EU, a package of legislative proposals entitled “Fit for 55” aims to boost the production and uptake of SAF including mandating a blending of aviation fuels, which will start in 2025 and increase the minimum volume of SAF used by airlines entering EU and refuelling.

This is contrasted with a range of initiatives adopted in the US that include state based carbon credit schemes such as the California Low Carbon Fuel Standard and National Adoption of Renewable Fuel Standards and the implementation of the *US Sustainable Skies Act*, which provides a credit per gallon for users of SAF. More recently the Biden Administration announced a goal for SAF use to increase to at least 3 billion gallons per year by 2030.

IATA has expressed the view that it favours positive policies promoting and accelerating the commercial deployment of SAF within the industry as opposed to mandate policies that IATA considers are less likely to achieve the optimal economic outcome.

These strategies and legislation demonstrate that the primary focus for emission reduction in the industry is the development and widespread use of SAF. The graphic (**Figure 3**) from the comprehensive decarbonisation paper produced by Deloitte and Shell shows the various decarbonisation options with SAF having the greatest opportunity for impact across all flights given its ability to be used with existing aircraft.

**Figure 3**

Decarbonisation option	Description	Sector perspective on decarbonisation impact before 2050	Applicability	Sentiment (before 2050 perspective)
<b>Efficiency gains</b>	Design and operations improvements to reduce fuel burn	55% Major impact, 35% Moderate impact, 10% Limited impact	All flights	Important option but <b>impact diminishing over time</b>
<b>Sustainable Aviation Fuels (SAF)</b>	Fuels from sustainable resources to substitute fossil-based kerosene	78% Major impact, 20% Moderate impact, 2% Limited impact	All flights	<b>Main decarbonisation option</b> in the next 30 years; ability to <b>use with existing aircraft</b>
<b>Offsets</b>	Investment in out-of-sector emission reductions or removal	50% Major impact, 29% Moderate impact, 21% Limited impact	All flights	Important to bridge the timing gap as other options are scaled up
<b>H<sub>2</sub> Hydrogen</b>	Combustion of [low-emission] hydrogen and/or conversion to electricity through fuel cell	14% Major impact, 32% Moderate impact, 55% Limited impact	Short- / medium-haul	Requires cryogenic storage and new airframe designs. <b>Long time</b> to develop, ensure safety, certify and deploy at scale
<b>Battery</b>	Electric propulsion with zero emissions if charged with green electricity	12% Major impact, 14% Moderate impact, 73% Limited impact	Short-haul	Because of battery weight and size, only applicable on <b>very short-haul routes</b>
<b>Behavioural change</b>	Reduction of demand resulting from remote working and modal shift	15% Major impact, 25% Moderate impact, 60% Limited impact	All flights	<b>Any behavioural change</b> likely to be outpaced by <b>overall population and economic growth</b>

■ Major impact ■ Moderate impact ■ Limited impact

Sources: Deloitte analysis

It is widely accepted within the industry that loading alternative fuels into existing aircraft is the preferred methodology. Any option that requires significant reconfiguration of both airside and landside technology to incorporate alternative fuels into aircraft will be extremely challenging and an expensive method to pursue.

However, other efficiencies can be achieved and the airline industry is continually reassessing the technology used in its aircraft and designing for more efficient aircraft and technology associated with the transport sector to reduce emissions. This includes upgraded and alternate engine designs, air frame design changes to incorporate the use of lightweight materials that reduce drag, in flight capacity and payload, air traffic management systems and optimising ground operation processes.

Of course, achieving a goal such as net zero by 2050 requires accurate measurement of existing emissions and any changes as time passes. IATA has estimated that the increase in air traffic may in fact lead to an increase in emissions despite implementation of SAF and other changes in the short term. However, a net positive outcome should be seen in the longer term as progress to net zero by 2050 gains momentum.

IATA has developed a range of key measurement metrics with respect to tracking the evolution of CO<sub>2</sub> emissions while accounting for changes in traffic volumes and available capacity. The metrics will also measure changes via offsets and other aircraft technology including the use of hybrid electric aircraft and hydrogen aircraft.<sup>3</sup>

## Obstacles

Whilst measuring emission changes and other relevant factors is a significant challenge in its own right, many other obstacles exist within the aviation transport industry to achieving the net zero 2050 goal.

This includes issues such as:

- Immediate and long term economic considerations relating to the cost of developing and using SAF and implementing other technology into existing aircraft.
- The reluctance by end users (passengers or companies in the goods transport sector) to fund

these changes via increased cost of flights and moving goods using aviation.

- Difficulties in developing technology required to make these changes.
- Differences in attitudes and willingness to meet such targets by different nation states or regions, which could lead to malalignment of goals and disconnected global transport networks.
- Competing alternate fuels and technologies, including existing fossil fuels, leading to non compatible fuels and airlines being restricted to a specific fuel type and transport routes.
- Unpredictable global events such as war and pandemics.

## Success to date

The first test flight with bio jet fuel was performed by Virgin Atlantic in 2008. By 2015, 22 airlines had performed over 2,500 commercial passenger flights with blends of up to 50% bio jet fuel sourced from feedstock, which includes the use of cooking oil and algae.

In March 2016, United Airlines became the first airline to introduce SAF into normal business operations by commencing daily flights from Los Angeles Airport supplied by Alt Air. By November 2019, commercial flights using SAF had exceeded 250,000 with more than 45 airlines experiencing some use of SAF.

In October 2021 at the 77th IATA Annual General Meeting in Boston, a resolution was approved for the global air transport industry to achieve net zero carbon emissions by 2050 to align with the Paris Accord goal for global warming to not exceed 1.5°C by 2050.

By mid 2022, commercial flights using SAF had exceeded 450,000 and over 50 airlines were using the alternative fuel source.

Whilst aviation has regularly been seen as a slow adopter of environmental change due to varying complexities, it is clear that significant progress has been made and there is continued cooperation amongst airlines, governments and other stakeholders and a shared desire to achieve reduced emissions globally.

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<sup>3</sup> IATA Fact Sheet: Net Zero 2050 Progress Tracking Methodology

## The route ahead: what does it mean for you?

It is clear that aviation can no longer be considered immune from a decarbonisation process due to technological constraints. There is significant demand both from governments and, perhaps more importantly, from end users for concrete actions to be taken by the industry to align with global expectations regarding environment and decarbonisation.

Whilst international organisations such as IATA, ICAO and ATAG (**Air Transport Action Group**) research decarbonisation options and set challenging goals for the industry, it is the industry itself that must drive the changes, which are in turn required to be promoted and supported by government. Likewise, allied industries — including financiers and insurers — will need to provide investment and security for operators as they develop and implement new technology.

It will be interesting to watch both governments and industry grapple with these demands and expectations and to see the implementation of new technology as it is taken up by the industry.

Insurers will no doubt be called upon to underwrite new facilities, aircraft and technology as the decarbonisation process evolves.

This process will also require a willingness by consumers (of both travel and goods transportation) to pay increased costs of air transport that arise from the industry implementing these changes.

Aviation operators have always shown a willingness to adapt and push the boundaries with respect to research and development and we anticipate that this attitude will also be brought to bear in terms of SAF use and other methods for achieving the net zero target. As stated by IATA with respect to the commitment to fly net zero by 2050, to succeed *"it will require the coordinated efforts of the entire industry (airlines, airports, air navigation service providers, manufacturers) and significant government support"*.



# DECARBONISATION OF INTERNATIONAL SHIPPING: ALTERNATIVE FUELS

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*Authors: Partner Michelle Taylor and Lawyer Julia Styrylska*  
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## International shipping contribution to greenhouse gas emissions

International maritime transport is responsible for approximately 3% of global greenhouse gas (GHG) emissions.<sup>1</sup> At the same time, international shipping is vital to the global economy, constituting 80 to 90% of international trade. This demand in shipping is predicted to grow. In a business-as-usual scenario it is projected that the carbon emissions from international shipping will grow by 23% to 1090 million tonnes by 2035.<sup>2</sup>

In response to increasing negative impacts of climate change, the international community adopted the Paris Agreement in 2015, which has set a goal of minimising the increase of global average temperatures to 1.5°C above pre-industrial levels.

According to a survey carried out by Deloitte and Shell, based on more than 80 interviews across the shipping industry, 90 % of the respondents consider decarbonisation as important or 'a top priority' in their organisations.<sup>3</sup>

Shipping was not explicitly included in the Paris Agreement and because of its international character, it has not been included in the 'Nationally Determined Contributions' of signatory countries.

Emissions from international shipping are therefore regulated by International Maritime Organization (IMO) as prescribed in the Kyoto Protocol linked to the United Nations Framework Convention on Climate Change (UNFCCC).<sup>4</sup>

In its Initial Strategy on the reduction of GHG emissions from ships, the IMO has set an ambition to reduce CO2 emissions from ships by at least 50% by 2050.<sup>5</sup> The IMO expects to achieve this through its pre-existing energy efficiency measures as well as new measures described as being short, mid, and long term. The IMO's maritime emission and reduction measures are commonly divided into two main categories: technical, such as ship size, ship-port interface; and operational, such as lower-speed, waste heat recovery. The IMO also acknowledges the potential of market-based measures (MBMs), which are widely discussed, such as carbon tax or an emission trading schemes, however they have not yet been adopted.



<sup>1</sup> International Maritime Organization, Fourth IMO GHG Study 2020.

<sup>2</sup> Decarbonising Maritime Transport, Pathways to zero-carbon shipping by 2035, International Transport Forum, 2018.

<sup>3</sup> Decarbonising Shipping: All hands on deck, Industry Perspectives, prepared by Deloitte and Shell, 2020, available at: <https://www.shell.com/business-customers/marine/decarbonising.html#vanityaHR0cHM6Ly93d3cuc2h1bGwuY29tL2VuZXJneS1hbmQtaW5ub3ZhdGlvbi90aGUtZW5lcmd5LWZ1dHVyZS9kZWVhcmJvbmlzaW5nLXNoaXBwaW5nLmh0bWw>

<sup>4</sup> IMO and the UNFCCC policy framework, available at: <https://www.imo.org/en/OurWork/Environment/Pages/Historic%20Background%20GHG.aspx>

<sup>5</sup> Initial IMO Strategy of reduction of GHG Emissions from Ships, Annex 11 Resolution MEPC.304(72) (adopted on 13 April 2018).



It is generally agreed that these measures will not, of themselves, be sufficient to achieve a satisfactory reduction of GHG emissions from the shipping industry.<sup>6</sup> The International Transport Forum (ITF) in its policy analysis report has recognised that alternative fuels and renewable energy can achieve much of the GHG reduction required in the shipping industry.<sup>7</sup> This is why focus in the maritime industry is shifting to fuel availability and infrastructures that will enable changes to facilitate carbon neutral fuels.

## Marine alternative fuels

In comparison with other transport sectors, such as road and aviation, shipping relies less on refined or processed fuels. Currently, the main fuel used in shipping is heavy fuel oil. According to DNV, decarbonising shipping will predominantly require new fuels.<sup>8</sup> DNV further predicts that approximately 5.5% of the total gross tonnage of ships operating today and around 33% of the gross tonnage of new build ordered ships, are able to, or will be able to, sail on alternative fuels, including LNG carriers. While there is great potential in alternative fuels to lower emissions from shipping, it won't come without its challenges.

Below we provide a summary of alternative fuels, which have the most traction in the international shipping.



Hydrogen has a potential to be one of the cleanest alternative fuel options. However, whether it can be considered a zero-carbon fuel depends on how it is produced.<sup>9</sup> There are various ways to produce hydrogen. If it is generated from renewable energy it emits no CO<sub>2</sub>, which as a result makes it one of the cleanest alternative fuels. It is nontoxic and does not pollute the environment, nor is it harmful to humans or wildlife.

However, depending upon the chosen technology, storing of hydrogen involves approximately six to ten times more space than regular fuel oil, which may result in reduced cargo capacity. Another limiting factor is that hydrogen is highly flammable, which may necessitate special risk assessments. Due to the lack of standardised design, hydrogen also requires the adapting of bunkering infrastructure as well as fuelling procedures. Its production is also costly.

The world's first hydrogen-powered cargo ship and the first hydrogen-powered tug are scheduled to start operating within the next few years.<sup>10</sup>



Green ammonia can be obtained through electrolysis using renewable energy sources such as solar, wind or hydropower. However, due to cost-effectiveness, most ammonia is still being produced from natural gas. The benefits of ammonia are that it has the potential to be a zero-carbon fuel, it is less costly than batteries, and does not require as much storage space as hydrogen or LNG.

On the downside, ammonia is toxic and corrosive and when combusted it may emit high amounts of toxic nitrous oxide (N<sub>2</sub>O). In order to produce clean ammonia and to be able to use it on existing ships, it requires modifications to engines as well as new fuel tanks and safety systems.

In order for green ammonia to become more accessible, it must become more cost competitive in comparison to conventional ammonia, of which 90% is produced from fossil fuels such as natural gas. However, production of green ammonia has the potential to develop in regions of the world abundant in renewable energy resources and where the costs of hydro, solar and wind power are lower. According to ITF, ammonia can also provide an additional business case for renewable energies by generating a supplementary revenue stream.

It has been recently announced that Yara (one of the world's leading ammonia producers) is planning to build a green ammonia plant in Western Australia.<sup>11</sup>

<sup>6</sup> IMO. Market-Based Measures. International Maritime Organisation. 2019. Available online: <https://www.imo.org/en/OurWork/Environment/Pages/Market-Based-Measures.aspx>

<sup>7</sup> Decarbonising Maritime Transport, Pathways to zero-carbon shipping by 2035, International Transport Forum, 2018,p8.

<sup>8</sup> Maritime Forecast to 2050, Energy Transition Outlook, DNV, p 9.

<sup>9</sup> Alternative Fuel and Energy Sources, available at: <https://www.nepia.com/alternative-fuel-and-energy-sources/>.

<sup>10</sup> Decarbonization in Shipping Industry: A Review of Research, Technology Development, and Innovation Proposals, G. Mallouppas, E. Ar. Yfantis, in: Journal of Marine Science and Engineering, published: 13 April 2021

<sup>11</sup> <https://www.yara.com/news-and-media/news/archive/news-2022/yara-at-the-forefront-of-clean-ammonia-in-australia/>



## Biofuels

There are various types of biofuels, all produced from organic waste. The most well-known biofuels are vegetable oil and biodiesel, which are produced from vegetable oil crops.

Traditional biofuels include unprocessed biomass (for example, fuelwood), whereas advanced biofuels are produced by extracting fuels from materials such as wood, crops, and waste material. Presently, the majority of biofuels are derived from plant-based sugars and oils, such as palm, soybean, and rapeseed oil.

Advanced biofuels have greater potential to reduce CO<sub>2</sub> emissions. It has been estimated that depending upon the quality, type, and the way the bio feedstock is processed, biofuels may be able to reduce CO<sub>2</sub> emissions between 25% and 100%.<sup>12</sup> Additionally, biofuels have very low sulphur levels. From a technical perspective, it is feasible to produce biofuels that are suitable for existing ship engines, pipelines and bunker infrastructure, hence minimising transformation costs.

On the other hand, in order for the biofuels to be 'environmentally-friendly', they need to be sourced from sustainable feedstocks. This is challenging in circumstances where the shipping industry demand for fuel is high and there are limited natural resources.

Despite these concerns, biofuels could be the future of international shipping.

An example of a project focusing on the use of biofuels is a biodiesel powered containership (ANL's AAX1 service), which earlier this year docked in Port of Brisbane after finishing its 42-day trial voyage between south-east Asia and Australia. The trial was developed in partnership between the Queensland Government and international shipping and logistics operator, ANL. During its voyage, ANL's AAX1 service called into eight ports. Preliminary analysis indicates the voyage may potentially have reduced emissions by approximately 17%.<sup>13</sup>



## Liquefied Natural Gas (LNG)

In comparison to its gaseous state, LNG requires up to 600 times less space for storage and transportation. LNG is not explosive and does not ignite. It contains zero sulphur and reduces CO<sub>2</sub> emission by approximately 20% to 30%.<sup>14</sup> LNG is however problematic when it comes to its significant methane-slip (i.e. leaking of methane gas into the atmosphere). The amount of these methane emissions will depend on the type of engine.

As LNG carries carbon in its molecular formula, it cannot decarbonise the shipping industry. However, LNG can assist the shipping industry achieve decarbonisation as a transition fuel source.



## Methanol

Presently methanol is mainly obtained from natural gas feedstock. As a result, reduction of CO<sub>2</sub> emissions using methanol is significantly less than conventional marine fuels.

However, when produced from renewable energy sources such as industrial waste, municipal waste, or biomass, the GHG effect can be considerably lower.

The advantages of methanol are that it only requires minimal changes to bunkering infrastructure due to its similarity to fuels that are already in use. It can also be used in combustion engines, which already exist on most vessels. Other advantages are its low cost and easy storage.<sup>15</sup>

The first methanol-powered ship, "Stena Germanica", began sailing in 2021. It is a passenger and car ferry that is operating between Gothenburg in Sweden and Kiel in Germany.<sup>16</sup>

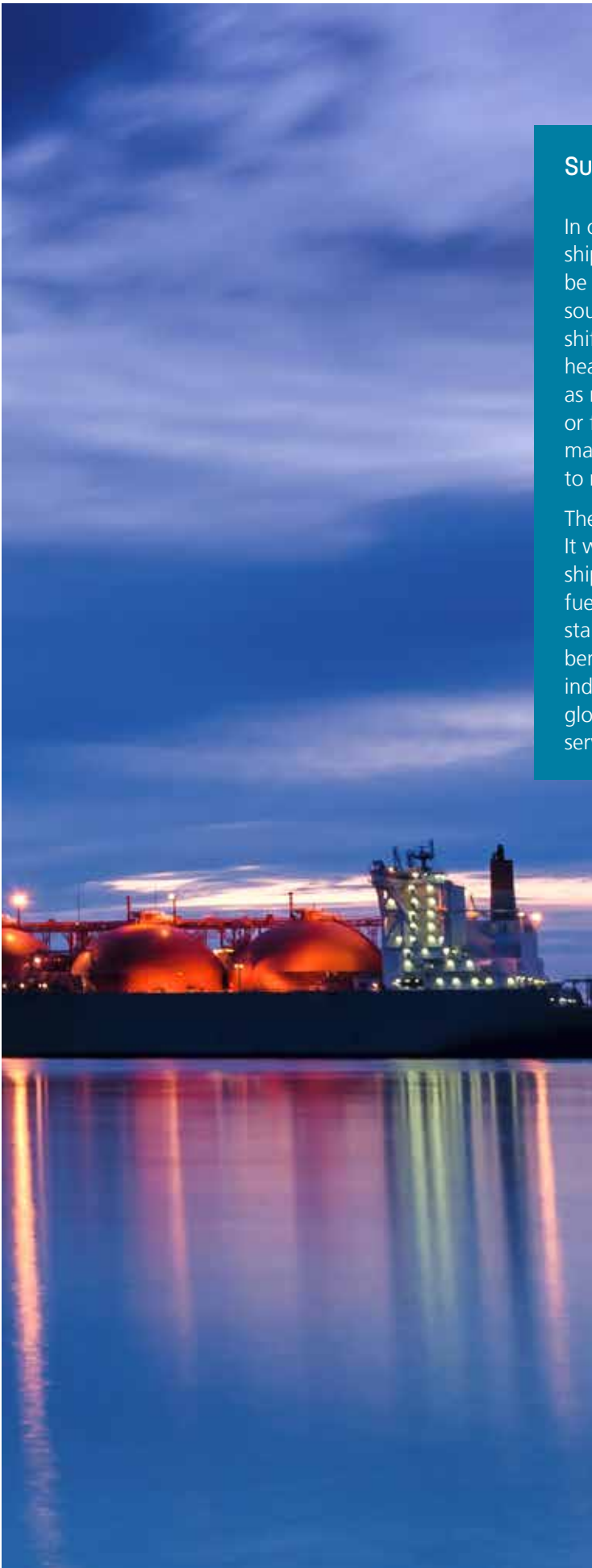
<sup>12</sup> Decarbonising Maritime Transport, p33.

<sup>13</sup> Queensland welcomes home successful biofuel shipping trial, available at: <https://www.statedevelopment.qld.gov.au/news/queensland-welcomes-home-successful-biofuel-shipping-trial>

<sup>14</sup> Decarbonization in Shipping Industry, p11.

<sup>15</sup> Decarbonization in Shipping Industry, p11.

<sup>16</sup> Decarbonising Maritime Transport, p37.



## Summary

In order to reduce emission from international shipping, numerous innovative measures need be embraced in addition to alternative energy sources, including technology and logistics. The shift towards alternative marine fuels will rely heavily on the availability of energy sources such as renewable electricity, sustainable biomass, or fossil energy and its pricing. The future of marine fuel market will be diverse and will need to rely on various energy sources.

The path to decarbonisation will require time. It will also require co-operation between shipowners, ports, shippers, energy, and fuel providers as well as policy makers. Every stakeholder has a part to play and the collective benefit will be to create a sustainable shipping industry that can respond to the increasing global demand for ocean freight and shipping services.

# DECARBONISATION: INDUSTRY COMPARISON

	Aviation	Maritime
<b>Industry</b>	Approx. 1% of volume of trade goods and 4.5 billion passenger movements in 2019.	80-90% of international trade of goods
<b>Current Emissions</b>	3% of the world's emissions.	3% of the world's emissions.
<b>Reduction Goals/Methods</b>	<p>Achieve net zero carbon emissions by 2050, by:</p> <ul style="list-style-type: none"> <li>• Sustainable aviation fuels.</li> <li>• New technology for aircraft, infrastructure, and operations.</li> <li>• Carbon capture and offset.</li> </ul>	<p>Achieve at least 40% reduction by 2030 and at least 50% by 2050, by:</p> <ul style="list-style-type: none"> <li>• Energy Efficiency Design Index for new ships and Energy Efficiency Existing Ship Index.</li> <li>• Mandatory Ship Energy Efficiency Management Plan for all ships.</li> </ul>
<b>Main Obstacles</b>	<ul style="list-style-type: none"> <li>• Cost of developing and using SAF and reluctance of users to fund changes.</li> <li>• Difficulties in developing technology.</li> <li>• Differences in attitudes by member states to meeting targets.</li> </ul>	<ul style="list-style-type: none"> <li>• Zero carbon fuels and technologies lack size and scale to achieve decarbonisation goals.</li> <li>• Long lifespan of ships (approximately 20-30 years) does not allow rapid fleet replacement.</li> <li>• Difficult to implement binding regulations on a global scale.</li> </ul>
<b>Achievements</b>	<ul style="list-style-type: none"> <li>• Increased use of SAF from introduction in 2008 to almost half a million flights by over 50 airlines using SAF in 2022.</li> <li>• Increasing development by the industry and acceptance by Governments and end users.</li> </ul>	<ul style="list-style-type: none"> <li>• IMO Data Collection System requiring ships to record and report fuel oil consumption.</li> <li>• Obligatory from 1 Jan 2023 for all ships to calculate EEXI to determine energy efficiency and annual operational CII and CII rating.</li> <li>• Further improvements to SEEMP, EEDI including adoption of EEDI phase 3 for certain ship types with up to 50% carbon intensity reduction for new build large containerships.</li> </ul>
<b>The Future</b>	<ul style="list-style-type: none"> <li>• Australian Government 2050 Aviation White Paper.</li> <li>• IATA, ACAO and ATAG continue to research decarbonisation options and set challenging goals for the industry.</li> <li>• Increased R&amp;D by main industry players.</li> <li>• Implementation of EU "Fit for 55" legislation and initiatives being implemented in the US.</li> </ul>	<ul style="list-style-type: none"> <li>• IMO GHG Strategy to be revised this year.</li> <li>• Launch of a global Green Shipping Challenge, including Australia-Singapore Green Economy Agreement to investigate green shipping corridors.</li> <li>• Provisional agreement by EU to include shipping in EU Emission Trading System.</li> <li>• EU implementing Fuel EU Maritime in 2025 to increase use of carbon neutral fuels.</li> </ul>



# JUDICIAL SALE OF THE YANGTZE FORTUNE

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Author: Partner Michelle Taylor and Lawyer Stefanie Andresek  
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**The Federal Court of Australia is currently dealing with a judicial sale of a vessel, an infrequent event in the Australian admiralty jurisdiction.**

On 2 December 2022, an Admiralty Marshal of the Federal Court of Australia arrested the Liberian-flagged vessel “Yangtze Fortune” (IMO: 9336282) for outstanding bunker debts. Yangtze Fortune was built in 2005 as a container vessel and later converted to a livestock carrier. The ship’s gross tonnage is 11,672 mt, with a length of 132.6 m and a breadth of 19.2m.

In September 2022, the ship sailed to Australia from China to load 5,200 head of breeder livestock at Portland, Victoria for carriage to China. However, while the vessel was en route, it sustained a crack to its hull and instead moved to anchorage from 27 September 2022.

On 9 November, the voyage charterer of the vessel issued a writ in Western Australian registry of the Federal Court against Yangtze Fortune Co Ltd, a Hong Kong corporation, as demise charterers of the vessel, for breach of a booking note. The voyage charterers claimed damages of US \$2.3 million plus AUD \$1 million.

On 11 November 2022, the vessel’s bunker supplier issued a writ in the New South Wales registry of the Federal Court against the vessel for US \$549,695 plus interest for bunkers supplied to the ship at Zhoushan Port, China. The bunker supplier made an application to arrest of the vessel, which was granted, and the vessel was arrested on 2 December 2022.

Following the arrest, five caveats against release were issued in the NSW proceedings, by the voyage charterer, necessities suppliers, and former technical and crew managers.

***Dan-Bunkering (Singapore) Pte Ltd v The Ship Yangtze Fortune [2022] FCA 1556***

In Justice Stewart’s first judgment of 20 December 2022, his Honour made orders for the sale of the Yangtze Fortune under rule 69(5) of the *Admiralty Rules 1988* (Cth). Rule 69(5) provides that if a ship is deteriorating in value, the Court may, at any stage of the proceeding, either with or without application, order that it be sold.

His Honour considered the interests of the Plaintiff and other creditors in the sale in having security for their claims in circumstances where there were low prospects of the owner securing the Plaintiff and creditor’s claims. A forefront consideration was the welfare of the crew, who had not been paid for six weeks, and expenditure by the Marshal, who had paid over AUD \$270,000 in bunker fuel since the arrest.

Although there was no evidence of deterioration beyond normal wear and tear, the vessel’s age, and the fact that temporary repairs to the ship’s hull would ultimately require permanent repair, were factors leading to his Honour’s conclusion that the vessel was deteriorating. As a result, it was found that there was no other available course other than to order its sale. Stewart J also considered that the deterioration of value caused by continuing costs of maintaining the arrest, as explained by Brandon J in *The Myrto [1977]* 2 Lloyd’s Rep 243, amounted to a circumstance where an order for the appraisal and sale of a ship under arrest in action *in rem* should be made *pendente lite* because deterioration of the value of vessel had occurred whilst under arrest.

On 11 January 2023, orders for the judicial sale of the vessel were put into effect by a close bid tender process, with bids closing on 10 February 2023. On 14 February, the Marshal was directed to accept the tender of the highest bidder, which was USD \$8.5 million inclusive of GST.

Under the terms of sale, the highest bidder was to pay 10% of the purchase price within five days of the orders. Within 10 days of the orders, the balance was to be paid, in addition to an adjustment for bunker fuel, lubricant and consumables.

On 23 February 2023, the Marshal was advised by the highest bidder that it could not make the deposit due to "investor delay". The Marshal advised the highest bidder that the Court was willing to extend the time for receipt of the 10% deposit to 28 February 2023 on the condition that the highest bidder provided evidence of remittance the same day. The Marshal also extended the time for receipt of the balance.

On 24 February 2023, the Marshal filed an affidavit applying for orders authorising the sale contract be terminated and seeking a direction to accept the second highest bidder. The second highest bid was only four % lower than the independent appraisal of the vessel's value. However, it was notably lower than the highest bid, albeit substantially above the average for the remaining bids.

### ***Dan-Bunkering (Singapore) Pte Ltd v The Ship Yangtze Fortune (No 2)* [2023] FCA 148**

In a further hearing on 27 February 2023, Justice Stewart noted the urgency of the matter, given the impending deadline being the time originally imposed for the Marshal to accept a bid. A failure to accept a bid by the deadline would result in the sale process having to recommence.

His Honour was most concerned about the interests of the crew on board the vessel, noting that 16 of the original 36 crew members were required to remain on board in accordance with safe manning requirements. In addition, the ongoing deterioration of the vessel was considered, along with the fact that beyond Marshal's insurance, the vessel's protection and indemnity insurance cover had expired.

His Honour directed the Marshal to terminate the contract with the highest bidder and to accept the tender of the second highest bidder on certain conditions of sale. At paragraph 13 of the judgment his Honour stated: *"No party has spoken against the orders sought by the Marshal. Everyone is desirous that the sale proceed as quickly as possible. In circumstances where the highest bidder seems to have lost interest, it is important to accept the second highest bid and move on."*



## Implications

In many jurisdictions, including Australia, once a ship is sold by way of judicial sale, the previous ownership of the vessel will cease to exist and the mortgages, maritime liens and other charges attached to the ship prior to the sale will be extinguished. The buyer of a vessel by judicial sale effectively attains a clean title to the vessel.

On 7 December 2022, the United Nations General Assembly adopted the United Nations Convention on the International Effects of Judicial Sales of Ships. The purpose of the Convention is to create a uniform regime on the international effects of judicial sale of ships, so that the clean title acquired by the purchaser of a ship will be recognised internationally. The Convention also sets out safeguards for the issuing of a certificate of judicial sale, including notification of the shipowner, creditors, and other interested parties.

Although judicial sales are rare in Australia, there exists a strong rationale in favour of unifying the recognition of foreign judicial sales of ship to ensure that in appropriate circumstances, the foreign judicial sale of ship will be recognised as having the same legal effect as a domestic judicial sale.

Australia is currently considering its response to the Convention.

**The Yangtze Fortune proceedings are ongoing. Sparke Helmore continues to act for the registered owner of the vessel.**



# THE TRANSPORT SECTOR AND SOCI: OVERVIEW OF THE MAIN OBLIGATIONS

Authors: Partner Dalvin Chien and Lawyer, Alex Bainbridge

We have seen unprecedented cyber incidents on our shores in recent years, increasing in frequency and scale. A range of laws regulates cyber incidents, including the *Security of Critical Infrastructure Act 2018 (Cth) (SOCI Act)*. This article provides guidance on the obligations arising from the SOCI Act as it relates to the transport sector, including what the sector should expect, what the sector needs to know, and how the sector can ensure compliance with the SOCI Act.

## Overview of the SOCI Act

The SOCI Act aims to manage risks, including cyber security risks, relating to Australia's critical infrastructure, including through<sup>1</sup>:

- transparency of the ownership and control of critical infrastructure
- cooperation between government, regulators and owners and operators of critical infrastructure
- the requirement for owners and operators of critical infrastructure assets to identify and manage risks relating to those assets
- cyber security obligations for systems of national significance to improve preparedness for, and ability to respond to, cyber security incidents, and
- a regime for the Commonwealth Government to respond to serious cyber security incidents.

## Does the SOCI Act apply to the transport sector?

A "critical infrastructure asset" is defined as an asset that relates to a critical infrastructure sector. There are 13 sectors covered by the SOCI Act, one of which is transport. This covers the sector of the Australian economy that involves:

- **owning** or **operating** assets that are used in connection with the transport of goods or passengers on a commercial basis, or
- the transport of goods or passengers on a commercial basis.



<sup>1</sup> SOCI Act, s3.



“Own” refers to legal ownership of an asset while “operate” refers to a level of operational control over the day to day running of the asset or the ability to influence control of the asset or part of the asset. A number of organisations could be caught by these definitions including, for example:

- road and rail networks that function as a critical corridor for transportation of goods or services
- freight services
- transporters of goods by road, rail, waters, and seas
- port operators, and
- aircraft, airport, and air services.

### What are the main obligations?



### Registration of critical infrastructure assets

Owners and operators of critical infrastructure assets are required to register their assets to the Register of Critical Infrastructure Assets (**Register**), managed by the Cyber and Infrastructure Security Centre (**CISC**). A reporting entity would be required to provide interest, control and operational information of the asset to CISC, which would include for example, operational information about the asset, interest information about the entity and the asset, and any contractual arrangements for operating the assets core functionalities.

### Notification of cyber security incidents

Owners and operators of critical infrastructure assets have a positive obligation to report cyber security incidents to the Australian Cyber Security Centre (**ACSC**). The timeframes for this notice are:

- **12 hours** of the entity becoming aware of the incident if the incident has a significant impact on the availability of the asset. That is, the incident materially disrupts the provision or availability of the asset.
- **72 hours** of the entity becoming aware of the incident if it directly or indirectly impacts the assets availability, integrity, reliability, or the confidentiality of information stored on the asset.

Reporting can be provided either by the phone or written report; if, however, it is provided by the phone, then the entity must provide a written report within **84 hours**.



## Implementing and maintaining a risk management program

An entity must adopt, maintain, and comply with a risk management program (**RMP**), which requires Board approved reporting. The RMP is a written program that adopts an all hazard based approach to the asset and aims to identify each hazard where there may be a material risk of a relevant impact, as well as minimising, mitigating, or eliminating any material risk from the hazard.

An entity has until 17 August 2023 to adopt an RMP identifying hazards to critical infrastructure assets and minimising or eliminating the risk of the occurrence of such hazards or mitigating the impact of the hazards if such hazard occurred. An entity must also provide an annual report at the end of each financial year (in an approved form), which states whether the RMP is up-to-date, provide an assessment of whether the RMP was effective, and include details of any variations.

## What are the consequences of non-compliance?

Corporations face a civil penalty of 250 penalty units (\$55,500) per day for not reporting or updating critical infrastructure asset information to the Register. They also face the same penalty for each breach of cyber security incident that they fail to report and for failing to adopt and maintain an RMP.

We hope that this article provides a timely reminder as to the extensive obligations that corporations in the transport sector have when it comes to reporting and complying with the SOCI Act. If you have any questions or need assistance in implementing the recommendations we have provided in this article, please contact Dalvin Chien.





# AMENDMENTS TO THE TRANSPORT SAFETY INVESTIGATION REGULATIONS

Author: Partner Mark Sainsbury





Following industry consultation over several years, amendments to the *Transport Safety Investigation Regulations 2021* (Cth) (TSIR) came into effect on 1 January 2023.

The TSIR provides the framework for reporting of aviation, marine and rail occurrences to the Australian Transport Safety Bureau (ATSB), including prescribing the type of matters that must be reported and those persons responsible for making such reports.

The most significant amendments (and aims) with respect to the aviation industry, are summarised below,

- Four categories (Category A, B, C and D) of aircraft operations based on the types of accident and incident to be reported have been established by the amendments. Higher categories (passenger carrying and commercial operations) have a greater reporting focus due to the greater public safety concerns and benefits that might be derived from reporting.

Broadly, the four Categories include:

			
<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>
passenger and medical transport operations	operations conducted for a commercial purpose including cargo transport (including large remotely piloted aircraft (RPA)/drones)	non-commercial operations including general aviation, recreational flights and gliding, and	primarily small to medium RPA and unmanned balloons.

A full explanation of the Categories and those aircraft included and excluded can be found on the [ATSB website](#).

- Ensure immediately reportable matters are consistent with those matters more likely to be investigated by the ATSB and reducing reporting requirements for the industry of occurrences less likely to be investigated.
- Aligning aircraft operation definitions with flight operations rules in civil aviation legislation and aligning key concepts such as aircraft accident, serious aircraft incident, aircraft incident, fatal injury and serious injury, with International Civil Aviation Organization definitions.
- Simplifying reporting requirements for industry by removing prescriptive lists of individual kinds of incidents and defining occurrence concepts more broadly.
- Clarifying that certain aircraft incidents are to be reported as serious aircraft incidents, due to the relative importance in identifying safety risks.
- Prescribing additional persons who are responsible for reporting in the aviation industry to increase the ATSB's safety information coverage, in particular, this group of "responsible persons" now includes sport aviation bodies.

It is notable that the amendments did not include adding aviation insurers to the group of "responsible persons" required to report aviation occurrences, as was foreshadowed to the industry during the consultation phase.

It is hoped that the amendments assist the industry in determining what is an "immediately reportable matter" (IRM) and what might be a "routinely reportable matter" (RRM). As expected, IRMs more commonly relate to Category A and B aircraft operations but, also include serious accidents, loss of separation events or property damage occurring across all four Categories.

A complete breakdown of IRM and RRM within each of the four Categories outlined is usefully summarised on the [ATSB website](#).

On balance, the amendments appear to be practical and aimed at assisting the industry to report relevant occurrences whilst also streamlining the ATSB response and investigation process, which is ultimately intended to boost public safety and confidence in the aviation industry.



# COMMONWEALTH GOVERNMENT: AVIATION WHITE PAPER

Author: Partner Mark Sainsbury

The Commonwealth Government has recently released its terms of reference for the Aviation White Paper (AWP), which is intended to outline governmental policies and outcomes for the future of aviation in Australia up to 2050.

The AWP was announced last year when the Government allocated a substantial budget (of \$7 million) for the project. In committing to the AWP, the Government appears to recognise the industry is heading into a period of both challenges and advancement.

The Government describes the intended outcome of the AWP as:

“The White Paper will clearly articulate the Commonwealth Government’s policies on desired aviation outcomes in relation to efficiency, safety, sustainability and competitiveness to ensure the sector is appropriately positioned to deliver aviation services for the Australian public and international visitors out to 2050.”

On 7 February 2023, the Department of Infrastructure, Transport, Regional Development Communications and the Arts (**the Department**) issued the following terms of reference to be considered:

1

Aviation’s role in economic development, trade and the visitor economy – general, domestic, regional and international aviation.

2

How to maximise the aviation sector’s contribution to achieving net zero carbon emissions including through sustainable aviation fuel and emerging technologies.

3

Changing aviation technologies and ways to position governmental policies, regulations and systems to encourage uptake and manufacturing of new, more efficient, transport technologies.

4

Airport development planning processes and consultation mechanisms that consider the impact and changing nature of aircraft noise and related expectations on the role of noise sharing and noise mitigation.

5

How to support and regenerate Australia’s general aviation sector.

6

Future industry workforce skills and training requirements.

7

Appropriate consumer protections and access to services.

8

Maintaining fit-for-purpose aviation safety, air navigation and aviation security systems and service delivery agencies.

9

The role of airlines and airports in supporting regional economies.

10

Other significant issues raised during the consultation process.

It is no doubt abundantly clear to aviation insurers that a number of the areas of interest and initiatives described in the terms of reference are underpinned by insurance. We would expect larger insurers to work hand-in-hand with the industry as those developments take place over the next decade or two (such as decarbonisation/alternate fuels, emerging technologies including remotely piloted aircraft and aviation safety).

The Department has invited submissions in response to the proposed AWP scope and terms of reference, which needed to be lodged with the Department by 10 March 2023.

We expect numerous industry groups and companies (including aviation insurers) have lodged submissions with the Department regarding the initial scope and terms of reference.

Following assessment of initial submissions, the Department aims to release a Green Paper in mid-2023. This will be followed by a second round of more detailed industry consultation during the development of the White Paper.

The Government is aiming to issue the final version of the AWP by mid-2024.

We will continue to monitor and report on the progress of the AWP during future publications.



# NATIONAL

## INTRODUCTION OF THE HIGH SPEED RAIL AUTHORITY BILL 2022

.....  
*Authors: Partner Shane Williamson and Lawyer Jessie Caracciolo*  
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**On 8 September 2022, the *High Speed Rail Authority Bill 2022 (Bill)* was introduced into the House of Representatives. The purpose of the Bill is to establish an independent statutory authority to advise on and lead the development and construction of a high speed rail network along the east coast of Australia.**

If passed, the High-Speed Rail Authority's (HSRA) functions will include:

- leading and coordinating policy development and training
- consulting, liaising and negotiating with states and territories and other relevant parties
- providing advice and recommendations to the Ministers and other relevant parties in relation to the policy and standards for efficient and effective development and construction
- constructing or extending railways for the high-speed rail or a faster rail network (where the relevant state or territory's consent has been obtained).

The Bill is comprised of five parts:

- Part 1 provides a simplified outline of the Bill and defines key terms. High speed rail is defined in this part as train services capable of travelling in excess of 250 kilometres per hour.
- Part 2 establishes the HSRA and its functions including the appointment of a Board and CEO and makes provision for the Minister to issue the HSRA with written directions in relation to the HSRA's performance of its functions.
- Part 3 sets out the terms and conditions and functions of the Board.
- Part 4 sets out the terms and conditions and functions of the CEO.
- Part 5 provides for the HSRA's corporate plan, 10 year review cycle of the Act and the Minister's powers to make rules.

The introduction of this legislation builds on the comprehensive feasibility study commenced in 2010 under the then Minister for Infrastructure. Phase 1 and 2 of the study was released in 2011 and 2013 respectively, with costs of the project estimated to be \$114 billion (equivalent to \$135 billion in 2021). Between 2013 and 2018, the Bill has been introduced into Parliament on five separate occasions but has either been removed or lapsed on those occasions.

If the Bill passes, finalising the route of the high-speed rail will likely be one of the HSRA's top priorities. Previous plans for the routes have largely focused on connecting Melbourne-Sydney-Brisbane, however Canberra is likely to also be included in the route.

The Bill is currently being considered by the Senate Standing Committee.



# NATIONAL

## WAGE THEFT ENDEMIC IN AUSTRALIAN FREIGHT SHIPPING

.....  
*Authors: Partner Shane Williamson and Lawyer Jessie Caracciolo*  
.....

**A recently released report commissioned by the Australian Shipping Inspectorate of the International Transport Workers Federation (ITF) has estimated that wage theft is costing seafarers approximately \$65 million a year in unpaid wages.**

The report has found that the wage theft is occurring through a number of distinct channels, namely:

- wage and entitlement provisions in international seafarer's employment agreements may not be adequately enforced by the Maritime Labour Convention
- foreign registered ships often ignore or delay proper application of the seafarer wage and entitlements obligations under the Seagoing Industry Award 2020
- seafarers are under educated about their rights and entitlements and have legitimate fears of making employment related complaints, and
- delays and resource constraints at the Fair Work Ombudsman often result in ships exiting Australian waters (and the jurisdiction of the Australian Maritime Safety Authority) before enforcement action can be commenced or completed.

The report examines the data on the operation of Australia's coastal trading systems collected by the Australian Shipping Inspectorate over the last 10 years and found that 70% of ships carrying imports and exports failed to meet the minimum international standards for wage payment. Despite the significant amount of ships failing to meet wage standards, the report found that the Fair Work Ombudsman and the Australian Maritime Safety Authority recovered just over \$1 million in wages on behalf of international seafarers in 2020.

The report makes a number of recommendations for reducing the incidence of wage theft from international seafarers in Australian waters including:

- amendments to the *Fair Work Act 2009* (Cth) and *Seagoing Industry Award 2020* to strengthen and regulate employment conditions for seafarers in relation to all vessels engaged in trade and commerce in Australia
- ensuring wage theft laws apply to seafarers on foreign-registered ships visiting Australian ports
- expanding and enforcing modern slavery statements
- establishing a network of regional shipping industry labour tribunals to address seafarer labour grievances, and
- enhancing information sharing and coordination among compliance bodies, including between the Australian Maritime Safety Authority, ITF and the Fair Work Ombudsman.





## NATIONAL

# WHY IS FOREIGN INVESTMENT IMPORTANT TO THE COMMERCIAL AVIATION INDUSTRY?

Authors: Partner Sally Weatherstone and Lawyer Sophie Luo

Foreign investment plays an important role for the commercial aviation industry in Australia as an alternative source of finance to domestic funding. As a medium-sized economy, Australia relies on foreign direct investment to supplement domestic capital. Historically, Australia has been an attractive destination for foreign investors with foreign direct investment inflow averaging 2.9% of gross domestic product (GDP) in the three years to 2020. In contrast the OECD and G20 averaged 1.2% and 1.3% of GDP respectively.

Recently foreign investment has also been seen to help Australian airlines get through downturn and overcome hangover losses from the pandemic. Virgin Australia Holdings Limited (**Virgin Australia**) and many of its subsidiaries entered into voluntary administration in April 2020. In November 2020, investment vehicles advised by the Boston-headquartered investment firm Bain Capital successfully completed its acquisition of Virgin Australia to enable the airline to continue to operate as Australia's second largest airline.

The injection of foreign capital in the sector is critical to enabling the purchase of new aircraft, the growth and development of new routes and services and has the potential to provide significant benefits to the population through access to lower fares (driven by increased competition in the sector) and connectivity, particularly for our regions. Job creation is also a by-product of foreign investment in the sector, not only in aviation and its supporting services but in adjacent industries that rely heavily on a strong aviation sector (for example, tourism, mining, oil and gas, construction and higher education).

Beyond injecting capital, foreign direct investment also benefits businesses with connections and technologies from different markets to provide a competitive edge. Bonza Aviation Pty Ltd (**Bonza**), the new Australian low-cost airline that operates domestic flights to regional airports across Australia, is majority owned by United States private equity firm 777 Partners. In addition to providing financial backing of over AU\$300 million, 777 Partners agreed to lease up to eight Boeing Co 737 MAX jets to Bonza in its first year of operations. 777 Partners has also invested in other budget airlines including the Canadian Flair Airline as well as an array of flying technologies including aircrafts and software solutions in inventory management, reservations and routes and fares management.



## Regulatory requirements for foreign investors

Risks to Australia's national interest, particularly national security, have increased in recent years due to rapid technological advances and changes in the international security environment. On 3 December 2021, the number of critical infrastructure assets under the *Security of Critical Infrastructure Act 2018* (Cth) was expanded to include 'critical aviation asset'. This introduced notification requirements under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) for foreign investors looking to invest in Australia's commercial aviation industry.

Currently, foreign investors are required to seek foreign investment approval prior to starting a business or acquiring a direct interest in a business that is an aircraft operator used in connection with the provision of an air service. A person acquires a direct interest when they (1) acquire an interest of over 10% in the company, or (2) acquire any percentage and are in a position to either influence or participate in the central management and control of the entity, or become able to influence, participate in or determine policy. Investors should note the aggregate foreign ownership in an Australian airline (including Qantas) remains limited to 49%, with any one foreign holding capped at 35%.

The notification requirements for foreign investors and statutory restrictions on foreign ownership is not expected to change as it provides assurance that Australia's national interest and national security is protected. However, concerns of national interest and national security are likely to be mitigated by way of conditions attached to Foreign Investment Review Board (**FIRB**) approvals, rather than a refusal of the application entirely.



## Foreign investment landscape in 2023

Global foreign direct investment is expected to continue a downward trajectory due to political uncertainty, rising inflation rates and fears of recession dampening investor sentiment. According to Deloitte, Australia's GDP growth is expected to slow to a sub-2% pace in 2023 given pressures of rising costs due to supply chain issues and rising energy costs and may create barriers to entry for greenfield investments.

Brownfield investments such as mergers and acquisitions will likely take a more cautious approach, at least in the first half of 2023. As projected by Austrade, the growth momentum observed in 2022 in domestic and international travel due to easing travel restrictions and reopening of borders is expected to wane to pre-pandemic levels. Unfavourable economic conditions and industry outlook may nevertheless create pockets of attractive investment opportunities and support foreign investors looking to capitalise on falling company valuations.

Improvements in the development of airport and air navigation infrastructure in Australia could provide Australia with a competitive advantage in securing a greater share of foreign capital in the sector. Likewise, the opening of the Western Sydney Airport (slated for 2026) may also attract foreign capital, assuming the overall investment climate in Australia is otherwise favourable and there is strong market demand for air travel in the region.

<sup>1</sup> Deloitte Media Release, "Deloitte Access Economics Business Outlook: Australians at the Reserve Bank's mercy in 2023" dated 22 January 2023, <https://www2.deloitte.com/au/en/pages/media-releases/articles/business-outlook.html>

# NEW SOUTH WALES

## THE LOCAL COURT AGAIN FACES THE ISSUE OF NEED IN HIRE CAR CLAIMS

### *ANTONIOU V JOG GROUP PTY LTD [2022]* NSWSC 1296

.....  
*Authors: Partner Adrian Kemp and Associate Maral Manoukian*  
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The New South Wales Supreme Court has recently revisited the issue of 'need' in an appeal for a hire car claim initially heard in the Local Court of New South Wales.

This follows the recent decision of the High Court in respect of a plaintiff's entitlement to an equivalent hire car.

#### Background

On 8 March 2020, Andreas Antoniou (the **Plaintiff**) collided with the rear of a 2015 Range Rover SVR, driven by Mr Bagga, a director of Jog Group. During part of the period the vehicle was at the repairer, a replacement vehicle was hired for use for a period of 77 days (the **hire period**).

Jog Group claimed it was deprived of the use of its Range Rover for a period of 77 days and claimed the sum of \$43,668.00, being the full cost of credit hire of the replacement vehicle, being a 2016 Mercedes GLE63 AMG.

The Court gave judgment for the entire sum claimed by Jog Group, with interest.

Mr Bagga, as one of two directors of Jog Group, gave evidence that he signed the hire agreement in his capacity as a director.

The basis for the appeal by the Plaintiff was that Jog Group carried the onus of establishing the need for a replacement vehicle but, failed to establish a need associated with its business. The Plaintiff also argued the Court misdirected itself as a matter of law as to what constituted 'need', and the measure of damages for the loss of use of a motor vehicle, which was stock in trade for the company.

#### Need

As to whether the vehicle was a 'stock in trade' or for 'day to day use', the Magistrate found it was both and considered that need was shown by Mr Bagga in his role as an agent of the Plaintiff company.

The Magistrate found that when Mr Bagga entered into the hire agreement, he understood that what he was entering into was consistent with his role as agent of the Plaintiff company.



### Capacity of hire

The Supreme Court found His Honour erred in making the finding for the follow reasons:

1. The hire agreement was a commercial contract. The task of construing the contract is an objective one and there was no evidence that Jog Group was a party to the contract or was intended to be bound to it. This was because:
  - a. the repair estimate was issued to Mr Bagga and addressed to his home address
  - b. the alleged hire agreement was issued to Mr Bagga and addressed to his home address, and
  - c. The Tax Invoice for the hire charge was issued to Mr Bagga personally.
2. Jog Group did not offer evidence it had accepted liability for the debt and that it had approved the terms of the alleged hire agreement.
3. No evidence was called from the other director of the company to establish acceptance of liability and no records of the company were tendered to establish that Mr Bagga had been authorised to enter into a contract on behalf of the company.

The Magistrate found the Plaintiff company was not sophisticated in its organisation or management. That observation was made without any evidential foundation and points to error in the Magistrate’s understanding of how the contract should be interpreted.

The fact the contract was made by Mr Bagga personally and given the lack of evidence that the company accepted liability for any hire charges, should have been enough for the Magistrate to dispose of the claim.

The finding by the Magistrate failed to deal with the obligation to objectively interpret the contract and ignored the distinction between the affairs of the corporation and the individual director.

The Magistrate’s decision was set aside, and the matter was remitted to the Local Court for determination according to law. An order was made for the Defendant to pay the Plaintiff’s costs.

### Impact of the decision



An individual director does not have authority by reason of that office to bind the company in contract.



It is crucial to identify who hired the replacement vehicle, and in what capacity the replacement vehicle was hired when demands for hire car claims are received. Where there are claims involving claimant companies, insurers should request evidence of authority that a rental agreement was entered into by the director as an agent for the company.



The pleadings should clearly put a claimant to proof on the assertion that it incurred hire fees.



Evidence to advance the argument that the hire fees were not incurred by a claimant should be sought by issuing a subpoena on the hire business for its records, to establish whether it relies on any representations about who it contracted with.

# NORTHERN TERRITORY

## RECENT LEGISLATION CHANGES TO MARINE, MOTOR VEHICLE AND PUBLIC TRANSPORT

Authors: Partner Garry Nutt and Partner Arelene Lowry

On 1 December 2021 the *Transport Legislation Amendment Bill 2021* (NT) (Bill) was introduced in the Legislative Assembly of the Northern Territory.

As to its intent, the explanatory statement outlined:

This legislation contributes towards a safe, efficient and sustainable transport system that meets community needs. To ensure the legislation achieves the intended outcome, amendments are required, from time to time, to resolve issues that may hinder the effective operation of the law.

The purpose of the *Transport Legislation Amendment Act 2022* (NT) (Act) is to remedy shortcomings in the existing legislation. Notable in its scope, this Act makes amendments to an extensive list of legislation:

- the *Criminal Code* (NT)
- Marine Act 1981* (NT)
- Motor Vehicles Act 1949* (NT)
- Motor Vehicles Regulations 1977* (NT)
- Ports Management Act 2015* (NT)
- Public Transport (Passenger Safety) Act 2008* (NT)
- Rail Safety (National Uniform Legislation) Act 2012* (NT)
- Rail Safety (National Uniform Legislation) Regulations 2013* (NT)
- Traffic Act 1987* (NT), and
- Traffic Regulations 1999* (NT).

Points of interest in the *Criminal Code* amendments relate to s 174F, which details the offence of culpable driving. The section is amended to close the gap between the offence of driving a motor vehicle causing death or serious harm to more simple regulatory driving offences, when that criminal threshold cannot be reached. There will now be an offence under s 30B of the *Traffic Act 1987* for driving *carelessly* causing death or serious harm when such a threshold cannot be met.

This amendment is likely in response to some high-profile incidents on Territory roads in which serious road incidents have gone often under prosecuted and will make available an alternative conviction in prosecutions.

Of interest in the *Marine Act 1981* amendments:

- Section 112 is replaced as it relates to the offence of exhibiting false distress signals.
- Section 115B is replaced as it relates to offence of obstructing or endangering safe passage (a strict liability offence).

Interestingly these offences now read that a person does not have to be in a maritime vehicle or near water to attract sanctioning under the provision. This could affect insurers who underwrite maritime operations (such as fishing, transportation and gas), could be necessary, including changes to these policies on indemnity for the above conduct. Offences range in severity from a fine of \$8,100.00 to \$16,200.00 or one-year imprisonment.

Of note in the *Motor Vehicles Act 1949* is an amendment to s 5 to reflect that:

**motor vehicle** means any vehicle for use on land that is designed to be wholly or partly self-propelled and includes any trailer attached to it but does not include any vehicle **excluded by regulation. (emphasis added)**

which in turn is affected by the *Motor Vehicles Regulations 1977* amendments:

#### 4D Excluded vehicles

For section 5(1) of the Act, definitions motorcycle and motor vehicle, the following vehicles are excluded:

- a motorised wheelchair that is not capable of travelling at a speed greater than 10 km/h;
  - a motorised scooter as defined in rule 244A(1) of the Australian Road Rules;
  - a bicycle that is designed to be propelled by pedals and an engine, motor or other device with a power output not exceeding 200 W;
  - a bicycle that meets European product safety standard EN 15194, published in 2009 and amended in 2011, entitled *Cycles - Electrically power assisted cycles - EPAC bicycle*;
- This clarification is important and will most likely effect the operation of the *Motor Accidents (Compensation) Act 1979* (NT) (**MAC Act**) in relation to the definition of a 'territory motor vehicle' as excluded vehicles (as defined above) will not be 'territory motor vehicles' for the purposes of compensation under the MAC Act.
  - This is in-turn could place additional pressures on public or workers' compensation policies.

The *Ports Management Act* has a number of updates, including:

- The powers to the port operator and the Regional Harbourmaster to direct the:
  - a. Owner
  - b. Master, and
  - c. anyone in apparent control of a vessel.

to move their vessel in circumstances, where the port operator or Regional Harbourmaster has already had to move the vessel when exercising its emergency powers.

- Section 40C is inserted, giving the power of a port operator or a Regional Harbourmaster to give a direction pay prior to an action, which include removing a vessel or wreck in an emergency.



This is of note for underwriters in the maritime sector for ships, which in an emergency might be liable to costs in moving the vessel.

Before the changes, the port operator and Regional Harbourmaster only had the power to move a vessel if it was a threat or danger to:



a. Persons



b. Other vessels and property, or



c. The environment.

While this would logically be a good temporary solution, as the Minister pointed out in her second reading of the Bill, this was removing “*any immediate threat that it poses, but sometimes find that they are left with a vessel that no-one appears to be maintaining, which is of little or no value and which is incurring ongoing mooring or storage costs*”.

The changes to the *Public Transport (Passenger Safety) Act 2008* (NT) mostly relate to powers of public transit safety officers (**PTSO**), that will now have the power to:

- issue banning notices on persons from buses and bus stations
- power to remove persons forcibly, and
- ‘deal’ with persons who have committed offences within the geographical area of a bus station/bus but have now left it.

Other matters relate to increasing the number of offences upon which a PTSO can demand a person’s name and address.

Of interest in the changes to the *Traffic Regulations 1999* (NT):

- Following the inquest into the death of a motorcyclist in 2016, based on coronial findings that the line marking and the curve of the lane switch were not in compliance with Australian Standards, under the newly inserted s 87A(2), a person commits an offence when the person erects, establishes, places, displays operates, maintains, alters or removes a worksite traffic control device and such conduct results in said device not complying with standards of that device.
- Where the “standards”, at least in relation to traffic control devices, are the ones set out in the Manual of Uniform Traffic Control Devices.

Of interest in the changes to the *Rail Safety (National Uniform Legislation) Act 2012* (NT) is the ability to conduct drug testing of railway workers.

These amendments reflect a larger and necessary shift in how many of the Territory’s legislative instruments are being updated; there are too many to update individually. As the Minister concluded in the second reading of the Bill, these amendments would better meet expectations of community justice where careless driving has resulted in death or serious harm, improve road safety for both road users and road workers, reduce antisocial behaviour on buses and in the vicinity of bus stations and enhance enforcement across our roads, bus and rail networks, and our waterways.

These may not necessitate action; however, we expect further broad reaching legislative amendments in the near future.



