Papua New Guinea

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Part 1

1. LIENS

What is a lien under PNG law?

PNG 1 Generally, a lien constitutes the right of a creditor to retain the goods or property of a debtor until the creditor's claim for payment has been satisfied.

A lien may arise under common law or in equity or may be created by statute.

In legal parlance, a legal lien includes a lien arising under common law or created by statute whereas an equitable lien is an equitable right conferred by equity upon one or more persons, to a charge upon the real or personal property of another person, until certain specific claims have been satisfied.

In Papua New Guinea (PNG) the term "lien" is usually employed to cover any security interest which is deemed to arise by implication or express statement of law and independently of any purported act of creation by the parties.

Although "lien" in its proper sense is a right which the law gives, it is usual in PNG to speak of lien by contract though such a "lien" is more in the nature of an agreement for a pledge.

It seems likely that the PNG courts will recognise the traditional distinction under English law between common law liens and equitable liens. An equitable lien differs from a common law lien in that a common law lien is founded on possession and, except as modified by statute, merely confers a right to detain the property until payment is made whereas an equitable lien exists quite independently of possession and confers on the holder of the equitable lien the right to a judicial sale.[2]

It is important to note that PNG adopted the common law of England as in force on Independence Date (16 September 1975) as part of the law of PNG. The principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England have been adopted, and are applied and enforced, as part of the underlying law of PNG, except if, and to the extent that:

- they are inconsistent with a PNG Constitutional Law or statute; or
- they are inapplicable or inappropriate to the circumstances of PNG from time to time; or
- in their application to any particular matter, they are inconsistent with custom as adopted by the PNG Constitution.[3]

The principles and rules of common law and equity have been adopted notwithstanding any revision of them by any statute of England that does not apply in PNG by virtue of Sch.2.24 (adoption of pre-Independence laws) of the PNG Constitution.[4]

Concerning any particular question before a court, the applicability or appropriateness of a particular rule of English common law or equity is determined by reference, among other

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The law in this chapter is up to date as at June, 2025.

[2] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.262 p.143.

[3] PNG Constitution Sch.2.2.

[4] PNG Constitution Sch.2.2 and Sch.2.4.

things, to the circumstances of the case, including the time and place of any relevant transaction, act or event.

2. Aircraft Liens

What aircraft liens exist under PNG law? What are their essential characteristics?

PNG 2 For the purpose of this chapter "aircraft" comprise all types of aeroplanes, whether jet or propeller and whether land or sea planes. Also, all types of helicopters.

Although not specifically tested in the PNG courts it is likely that only the following aircraft liens exist under PNG law:

- seller's lien;
- salvage lien;
- possessory lien;
- Contractual lien (including a pledge); and
- Statutory lien in particular, the lien created by the Goods Act 1951 (Ch.251 of the Revised Laws) (Goods Act) and by the Civil Aviation Act 2000 (Civil Aviation Act) Pt VII Division 6.

Certain maritime liens that apply to vessels under PNG law do not apply to aircraft (see PNG 8). The PNG courts are likely to interpret the prerequisites for aircraft liens strictly.

In this chapter, particular attention is paid to the statutory lien created by the Civil Aviation Act and the associated rights of detention and sale conferred by the Civil Aviation Act.

3. Registration of Aircraft Liens

Can aircraft liens be registered in PNG's Register of Civil Aircraft? Or in any other public register? What is the effect of registration?

PNG 3 The Director[5] must enter in the register of PNG aircraft (Register of PNG Aircraft) established under Civil Aviation Act s.65 and held at the office of the Civil Aviation Safety Authority (CASA), particulars of every lien created under Civil Aviation Act Pt VII Division 6.[6]

Details of other liens (legal and equitable) may, at the discretion of the Director be registered in the Register of PNG Aircraft.

Before dealing with the statutory lien created by the Civil Aviation Act, we deal with the seller's lien, salvage lien, possessory lien and contractual lien which arise under common law and in equity.

4. Seller's Lien

What is a seller's lien? When will it arise in the case of aircraft?

Under Statute

PNG 4 PNG has specific sale of goods legislation being the Goods Act and accordingly the statutory lien created by sale of goods legislation in many other jurisdictions also applies in PNG. Notwithstanding that the property in the aircraft (for the purposes of the Goods Act, the term "goods" includes aircraft) has passed to the buyer the unpaid seller of goods as such has:

- while he is in possession of the goods, a lien on them for the price; and

[5] "Director" means the person who is for the time being the Director of Civil Aviation appointed under Civil Aviation Act 2000 s.37.

[6] Civil Aviation Act s.65(3).

- in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with their possession; and
- a right of re-sale as provided by Part II, Division 4 of the Goods Act.[7]

Where the property in the goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right to withhold delivery similar to and co-extensive with his rights of lien and stoppage in transitu in a case where the property has passed to the buyer.[8]

Subject to the Goods Act Pt II, the unpaid seller of an aircraft who is in possession of the aircraft is entitled to retain possession until payment or tender of the price where:

- the aircraft has been sold without any stipulation as to credit; or
- the aircraft has been sold on credit, but the term of credit has expired; or
- the buyer becomes insolvent.[9]

The seller may exercise his right of lien notwithstanding that he is in possession of the aircraft as agent or bailee for the buyer.[10]

Where an unpaid seller has made part delivery of an aircraft, the seller may exercise the seller's right of lien on the remainder unless the part delivery has been made under such circumstances as to show an agreement to waive the lien.[11]

The unpaid seller of an aircraft loses the seller's lien on the aircraft:

- when, without reserving the right of disposal of the goods, he delivers the goods to a carrier or bailee for transmission to the buyer; or
- when the buyer or his agent lawfully obtains possession of the goods; or
- by waiver.[12]

The unpaid seller of an aircraft having a lien on the aircraft does not lose his lien by reason only of the fact that he has obtained judgment for the price of the aircraft.[13]

In Equity

In equity, a seller of property (both real and personal) has a lien for the unpaid whole or part of the purchase money which lien subsists until actual payment is made even where a transfer of the property has been executed and the purchase money is expressed in the transfer or other relevant documentation to have been paid and received. It is immaterial to the lien whether the purchase money is a sum in gross or an annuity for a specified period or is payable by instalments unless a contrary intention is shown by the parties. The lien may arise although the purchase money is not payable until a future date and the lien is not defeated by any agreement that the purchaser must not, without the consent of the seller, lease or assign the property until the purchase price has been paid. The seller's lien is not impliedly excluded by conditions of sale providing the seller with alternative specific remedies on the purchaser's default.[14]

Although not tested in the PNG courts, there is no reason why these general equitable principles in relation to a seller's lien should not apply in PNG in relation to aircraft.

The Personal Property Security Act 2011 (PPS Act) contains specific provisions dealing with the priority of equitable and other liens.[15]

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[7] Goods Act s.39(1).
[8] Goods Act s.39(2).
[9] Goods Act s.40(1).
[10] Goods Act s.40(2).
[11] Goods Act s.41.
[12] Goods Act s.42(1).
[13] Goods Act s.42(2).
[14] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.289 p.156.
[15] PPS Act s.53.

5. Salvage Lien

What is a salvage lien? When will it arise in the case of aircraft?

PNG 5 Except as outlined below, PNG statute law does not provide specifically for salvage liens in relation to aircraft.

The salvage lien under PNG law is based on English common law.

A person who expends money for the benefit of another or on the property of another generally does not acquire a lien from the mere fact of having made that expenditure even though the person making the expenditure may have some benefit in the property. There are, however, a number of exceptions to this general rule. Cases of salvage comprise one such exception. Where persons make payments to save property (including aircraft) from destruction and for the benefit of those persons interested in the preservation of the property, a lien against the property arises in favour of the person making the payment for the amount of the expenditure.[16]

It is arguable that the Merchant Shipping Act 1975 Pt XIA (Wreck and Salvage) may apply to an aircraft wreck found in water on or near the coast or in tidal water. This is because of the broad wording of para.(a) of the definition of the word "wreck" in s.263A of that Act. If this argument is accepted, then the liens for salvage in respect of saving life and property described in ss.263R and 263S and the rights of detention on Merchant Shipping Act s.263W(1)(b) would apply to the aircraft.

PNG has not adopted the International Convention on Salvage 1989.

6. Possessory Lien

What is a possessory lien? When will it arise in the case of aircraft?

PNG 6 Like English law, PNG law is likely to treat a possessory lien as a common law legal lien. If a person has in its lawful and continuous possession an aircraft on which it has bestowed labour, enhancing the aircraft's value, that person will have a lien on the aircraft to the extent it remains unpaid for its labour. By reference to English case-law, there are a number of pre-requisites for such a lien to exist:

- there must be possession by the lienholder, which possession has been *lawfully* acquired[17] ;
- possession must be continuous. This will depend on the particular circumstances of the case[18] ;
- the labour bestowed on the aircraft must improve it in some way. Merely maintaining the aircraft is not enough[19] ;
- the labour must be authorised by the owner[20] ; and
- the labour must be completed and the debt due.[21]

If the work is for a stipulated price, then a lienholder may not set up a lien inconsistent with the contract sum (or a reasonable sum if there is no stipulated amount). No lien arises until work has been completed, but if completion is prevented by the owner, the lien arises for the work actually done.[22]

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[16] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.308 p.164.
[17] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.268 p.146.
[18] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.269 p.147.
[19] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.281 p.152.
[20] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.282 p.152.
[21] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.283 p.153.
[22] *Sae Sadelmi v Morgan Equipment Pty Ltd* [1990] PNGLR 187 para.14.

A possessory lien may arise even if expressly prohibited by the owner, if its creation was a reasonable incident of its use and the lienholder is unaware of the prohibition.

The common law possessory lien may take one of two forms, a general lien or a particular lien.

A general lien is the right to hold any goods until any debt or obligations, however arising, is paid or discharged.

A particular lien is the right to hold particular goods until an obligation or debt, in respect of those goods only, is discharged. It may arise where the person in possession has worked on the goods, or where a person is compelled to accept and maintain goods on behalf of the debtor.

The law tends to favour the creation of particular liens and disfavour general liens. If, however, a general lien is clearly established, then it will be enforced.

An aircraft possessory lien is a particular lien relating to the specific aircraft (or parts) in question, since there is no general lien for repairs at common law. Thus, the aircraft cannot be retained for all debts due to the repairer, but only for the cost of unpaid repairs to the specific aircraft in question. The lien will give a creditor a right to retain the aircraft until payment but not, generally, to sell it without judicial intervention. It seems that a possessory lien will survive a change of ownership.

While in possession of the aircraft the lienholder (as bailee) will owe a duty of care to the owner, including a duty to exercise reasonable care in the safekeeping and management of the aircraft, and to answer for the deliberate wrongs of those to whom the lienholder has entrusted the aircraft and delegated any part of its duty of care. However, while an aircraft is subject to a possessory lien, it would appear that the lienholder cannot claim expenses incurred in keeping it (such as for warehousing it, preventing its deterioration etc). There is no PNG decision on this issue, but it is possible that a PNG court would allow a claim for reasonable expenses.

On the enforcement of possessory liens, see PNG 13.

Among other situations a possessory lien will be lost:

- when possession is lost:
- when the amount due is tendered; or
- or where security is provided in substitution for the lien.

7. Contractual Lien

What is a contractual lien? When will it arise in the case of aircraft?

PNG 7 Regardless of whether a possessory lien exists at common law, in equity or pursuant to a statute, parties may create a lien by contract.[23] Thus, the owner of an aircraft may pledge it to a creditor as security for a debt. Alternatively, a lien may arise as a result of a person expending labour on an aircraft that improves its value in some way in accordance with a contractual agreement (such as frequently occurs in respect of aircraft repairs). A contractual salvage lien may also arise. These forms of contractual lien are now considered.

To establish a lien by contract, the contract must be certain and, to the extent the contractual lien covers the same ground as the maritime or possessory lien (for salvage, repairs etc), it will discharge or supersede the former. A contractual lien can be more extensive than a possessory lien. For example, it could provide for the sale of the aircraft in the event of non-payment or for the lien to continue in the absence of possession. The nature and extent of this lien will be governed by the terms of the contract.[24]

Most aircraft (and their parts) are repaired or refurbished in accordance with the terms of a contract with the repairer or refurbisher. The contract will generally specify in

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[23] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.264 and para.275 pp.144 and 150.

[24] *Halsbury's Laws of England*, 3rd edn, Vol.24 para.275 p.150.

detail the work to be undertaken, the payment terms and, possibly, the level of duty of care owed by the repairer. Also, the action that can be taken by the repairer/refurbisher in the event of a default in payment. This will usually include a right to default interest, as well as to retain possession of the aircraft until payment is made.

Often a repair contract will not provide for PNG law as the governing law even in the case where the repairs or other improvements are to be carried out in PNG (for foreign liens, see PNG 16). Such a clause will probably be upheld by the PNG courts, with limited exceptions.

Most aircraft leases and other financing documents prohibit aircraft operators from creating liens over the aircraft save for certain "permitted liens". These liens are often defined to include repairer's liens and similar liens arising in the ordinary course of business where payment is either not yet due (or is otherwise being disputed or contested in good faith).

In the case of liens other than permitted liens the operator usually covenants, as a term of the document, not to create them. Further, it is often an event of default if the covenant is breached and not remedied within a stipulated period of time. Where liens are created by the aircraft operator in breach of the covenant, the owner should not be bound by the lien unless the lienholder can establish that the owner knew the aircraft would be delivered to a third party and/or the owner's conduct gave rise to an ostensible authority to the operator to incur the lien.

8. Other Types of Aircraft Lien

Are there any other types of aircraft lien? Or similar rights that do not give rise to a lien?

PNG 8 Like English law, PNG law recognises various liens and other rights that have developed as a matter of custom or practice.

The most important type of lien not covered by PNG 4, PNG 5, PNG 6 and PNG 7 above is the statutory lien (Airport Charges Lien) created by the Civil Aviation Act Pt VII Division 6. In summary, the Civil Aviation Act provides for liens and rights of detention and sale in favour of third party airport service providers where certain charges are not paid.

The Civil Aviation Act Pt VII only applies to the airport charges liens, not to other types of aircraft lien covered by PNG 4, PNG 5, PNG 6 and PNG 7 above.

Key definitions

The following definitions are key to an understanding of Airport Charges, Liens and rights of detention under the Civil Aviation Act Pt VII:

- "airport authority" means (a) a Provincial Government for the time being established under s.133 to establish, maintain, operate or manage an airport; and (b) a person or association of persons authorised under under s.132(6) to exercise the powers of an airport authority; and an airport company; and, National Airports Corporation Limited (NAC).
- "airport company" means a company established under s. 132 of the Civil Aviation Act;
- "aviation service provider" means CASA, Niusky Pacific Limited (NSPL), NAC, or any airport authority or an airport company;
- "charge" means the amount payable to an aviation service provider under Civil Aviation Act Pt VII for a service or the use or availability of any service or facility provided by the aviation service provider and does not include any amount payable under a contract, agreement or any other Act;
- "claimant" means an aviation service provider to whom an owner owes an outstanding amount; and
- "owner", in respect of an aircraft, includes:

- the person in whose name the aircraft is registered;
- the operator of the aircraft;
- a person in possession of an aircraft as purchaser under a conditional sale or hire-purchase agreement that reserves to the vendor the title to the aircraft until payment of the purchase price or the performance of certain conditions;
- a person in possession of the aircraft as chattel mortgagor under a chattel mortgage; and
- a person in possession of the aircraft under a bona fide lease or agreement of hire.[25]

Claimant May Claim Lien on Aircraft

Where a default is made by an owner or operator of an aircraft in the payment to the claimant of any charge, the claimant may, subject to the provisions of the Civil Aviation Act Pt VII, take such steps as are necessary to detain, pending payment, either:

- the aircraft in respect of which the charge was incurred (whether or not it was incurred by the person who is the owner or operator of the aircraft at the time when the detention begins); or
- any other aircraft of which the person in default is the owner or operator at the time when the detention begins.[26]

The claimant must not detain, or continue to detain, an aircraft by reason of any alleged default in the payment of any charge payable to the claimant under Civil Aviation Act s.109(1) where the owner or operator of the aircraft or any other person claiming an interest therein:

- disputes that the charge is due or, where the aircraft is detained, that the charge was incurred in respect of that aircraft; and
- gives to the claimant, pending the determination of the dispute, sufficient security for the payment of the charge which is alleged to be due.[27]

Notification of Lien

Where the claimant detains an aircraft under the Civil Aviation Act s.109(1), the claimant must notify the Director and the Director must :

- forthwith thereafter make an entry in the Register of PNG Aircraft; and
- take all reasonable steps to give notice of detention to each of the following persons namely:
  - (A) owner;
  - (B) operator;
  - (C) lessee;
  - (D) hirer;
  - (E) charterer or pilot-in-command,

of the aircraft; and such persons as, in the opinion of the Director, have a security interest in the aircraft.[28]

[25] Civil Aviation Act s.80.
[26] Civil Aviation Act s.109(1).
[27] Civil Aviation Act s.109(2).
[28] Civil Aviation Act s.110.

Director to Enter Lien in Register of PNG Aircraft

The Director must enter in the Register of PNG Aircraft:

- the description and amount of the charge due to the claimant and from whom it is due;
- the name and address for service of the claimant;
- the date on which and the time at which the aircraft was detained by the claimant; and
- the date on which and the time at which the entry is made.[29]

Effect of Lien

Where the Director enters details of a lien in the Register of PNG Aircraft, an Airport Charges Lien is vested in the claimant and the claimant may keep possession of the aircraft until all outstanding amounts are paid.[30]

An Airport Charges Lien vested in the claimant secures:

- the unpaid charge; and
- any penalty that is or becomes payable in respect of the unpaid charge; and
- any further outstanding amounts in respect of the aircraft.[31]

Right of Sale

Where an outstanding amount secured by an Airport Charges Lien is unpaid at the end of one month after the date on which the aircraft lien was registered, the claimant may at any time, with the leave of the National Court, sell the aircraft.[32]

No leave will be granted by the National Court for the sale of the aircraft except on proof that:

- a sum is due to the claimant for charges;
- default has been made in the payment thereof;
- the claimant has complied with the Civil Aviation Act (Procedure Before Sale) s.115.[33]

9. Priority of Aircraft Liens Generally

What is the priority of aircraft liens under PNG law?

PNG 9 PNG law recognises aircraft liens however there is no specific law which confers recognition and priority of liens in PNG. PNG case law is also silent on the priority of aircraft liens in PNG. However, it is believed that the priority of aircraft liens and detention rights will be as follows:

- statutory lien and detention rights (including Airport Charges Lien);
- salvage lien;
- possessory lien;
- security interest;
- unperfected security interests; and

[29] Civil Aviation Act s.111.
[30] Civil Aviation Act s.112(1).
[31] Civil Aviation Act s.112(2).
[32] Civil Aviation Act s.114(1).
[33] Civil Aviation Act s.114(2).

- foreign aircraft liens

10. RIGHTS OF OWNER OR LESSOR V LIENHOLDER

What are the rights of the owner or a lessor of an aircraft against a lienholder?

PNG 10 The owner of an aircraft (which may have a legal or an equitable interest under PNG law) generally has the greatest "right" to the aircraft as against third parties. However, this right is not wholly unqualified.

Salvage lien

If the aircraft has incurred such a lien, the lienholder (the salvagor) has a right to claim its salvage expenses against the owner.

The salvagor may bring an action in personam against the owner or an action in rem against the aircraft. The salvagor's right is not dependent on possession of the aircraft.

Possessory or contractual lien

The owner may be subject to this lien, even though the owner may have expressly prohibited the operator of the aircraft from creating such a lien, unless the lienholder was aware of this prohibition.

Seller's lien

The owner (as the purchaser of the aircraft) will be subject to a *seller's lien* to the extent the owner failed to pay the aircraft's purchase price and the seller still retains possession of the aircraft.

Airport Charges Lien

Where a default is made by an owner or operator of an aircraft in the payment to the claimant of any charge pursuant to Civil Aviation Act Pt VII, the claimant may, subject to the provisions of that part, take such steps as are necessary to detain, pending payment, either:

- the aircraft in respect of which the charge was incurred (whether or not it was incurred by the person who is the owner or operator of the aircraft at the time when the detention begins); or
- any other aircraft of which the person in default is the owner or operator at the time when the detention begins.

Where an entry is made by the Director under Civil Aviation Act s.111, an Airport Charges Lien is vested in the claimant and the claimant may keep possession of the aircraft until all outstanding amounts are paid.[34]

Where an outstanding amount secured by an Airport Charges Lien is unpaid at the end of one month after the date on which the particular lien was registered, the claimant may at any time, with the leave of the National Court, sell the aircraft.[35]

11. RIGHTS OF MORTGAGEE V LIENHOLDER

What are the rights of the mortgagee of an aircraft against a lienholder?

PNG 11 A security interest in an aircraft created by a mortgage of that aircraft (being a security interest which has attached to the aircraft) may be perfected by registering a notice in respect of that security interest under the PPS Act.

[34] Civil Aviation Act s.112(1).
[35] Civil Aviation Act s.114(1).

Under the PPS Act, a perfected security interest has priority over an unperfected security interest. Priority between conflicting unperfected security interests is determined by the order of attachment of the security interests. It is important to note that while filing in respect of both new security interests and pre-existing security interests is voluntary, the consequences of not filing a security notice may be dire. The main consequence of not filing is that security interests which are registered take priority over other interests. The responsibility to file is with the secured party. The secured party may elect to do this through an agent.

It is also very important to realise that a security interest in an aircraft notified under the PPS Act, whether or not it is perfected, is subordinate to a mortgage, charge lien or other interest registered with respect to that aircraft under the Civil Aviation Act.[36] Accordingly registration under the Civil Aviation Act is more important than registering a notice in respect of the security interest under the PPS Act.

The PPS Act specifically provides that where a person in the ordinary course of business furnishes materials or services with respect to goods (which term would include an aircraft) that are subject to a security interest (which term includes a charge or mortgage over an aircraft), a lien that a person has with respect to those materials or services has priority over a perfected security interest while the goods are in the person s possession unless the lien is given by an act that provides that the lien does not have the priority.[37]

In the case of possessory or contractual liens, although the mortgage may prohibit the owner (and any user) of the aircraft from creating such a lien, a lien can still arise in practice and take precedence over the mortgagee's interest where the lienholder is unaware of such a prohibition.

A mortgagee of an aircraft which is subject to an Airport Charges Lien will have to pay the charges and any penalties in relation to those charges secured by the lien in order to repossess the aircraft.

12. Rights of Lessee v Lienholder

What are the rights of the lessee of an aircraft against a lienholder?

PNG 12 Common law liens over aircraft will take precedence over the right of a lessee (such as an airline). A lessee will usually be aware of the creation of aircraft liens, since it will be using the aircraft. Thus, in respect of a:

- salvage lien: the lessee will be aware of this. In any case, the loss of the aircraft will likely have the effect of terminating the lease;
- possessory lien (whether common law or contractual): the lessee will usually have incurred these with the authority of the owner, whether express, implied or ostensible authority;
- pledge over the aircraft: the lessee will be subject to this. That said, the pledge of an aircraft would be rare and could only be created by the owner, as the party with title to the aircraft;
- seller's lien: it will normally be a lease term that the owner (as lessor) warrants it has created no such lien and that if it arises, the owner will indemnify the lessee;
- Airport Charges Lien: the lessee of an aircraft will operate the aircraft subject to any Airport Charges Lien that applies in respect of the aircraft. If the aircraft is detained under the Civil Aviation Act Division VII Pt 6 because of the lien, the lessee will be unable operate the aircraft irrespective of its rights under the lease.

[36] PPS Act s.75.

[37] PPS Act s.53.

13. Enforcement of Aircraft Liens

How does an aircraft lienholder enforce its lien under PNG law? What PNG court will have jurisdiction?

PNG 13 Generally, an aircraft lienholder will not have to apply to the PNG courts to enforce its lien (and, if necessary, to sell the aircraft) since it will have an implied right, or one arising by way of contract or statute, to undertake such actions. An exception is a possessory lien where the lienholder has no general right to sell an aircraft without the consent of the court.

Seller's lien

An unpaid seller with a lien need not apply to the PNG courts for permission to re-sell the aircraft. However, if the unpaid seller has given up possession of the aircraft, the seller may need to apply to the PNG courts for an order granting the seller possession of the aircraft. Where an unpaid seller has exercised its right of lien (or stoppage in transit) in respect of an aircraft it may resell the aircraft, in which case the new buyer will acquire good title as against the original buyer. Usually the aircraft sale contract will, in any case, specify a right of re-sale in the event of buyer default. Where the seller resells the aircraft, the original sale contract will be rescinded without prejudice to any claim the unpaid seller may have for damages. The unpaid seller will also have a right of resale if it has given notice to the buyer that it intends to resell the aircraft and the buyer does not pay (or tender) the outstanding purchase price within a reasonable time thereafter.

Salvage lien

PNG's National Court has jurisdiction over any aircraft salvage claim.

The National Court jurisdiction applies whether or not the aircraft is in PNG and whether or not it is registered on PNG's Register of PNG Aircraft provided that the salvage operation occurred in PNG.

In respect of an aircraft salvage claim an action may be brought in personam against the aircraft's owner or in rem against the aircraft.

Possessory lien

A party with the benefit of a lien must either claim it for a definite amount or give the owner particulars from which the amount can be calculated. The owner must tender this without any set off or deduction.

Importantly, the lienholder has no general right to sell the aircraft and can be liable for wrongful interference with the aircraft should it attempt to do so.

Contractual lien

A *pledge* carries with it an implied right to sell the property pledged in default of payment. Thus, recourse to the PNG courts will not be necessary

The permission of the PNG courts will not usually be required under the contract to resell the aircraft. In any case the National Court has jurisdiction over proceedings for the sale and distribution of the proceeds of any property subject to a lien.

Airport Charges Lien

The intervention of the National Court will be required if the claimant wants to sell an aircraft subject to an airport charges lien.

Where an outstanding amount secured by an airport charge is unpaid at the end of one month after the date on which the lien was registered, the claimant may at any time, with the leave of the National Court, sell the aircraft.[38]

No leave will be granted by the National Court for the sale of the aircraft except on proof that:

- a sum is due to the claimant for charges;
- default has been made in the payment thereof; and
- the claimant has complied with Civil Aviation Act s.115 (Procedure Before Sale).[39]

14. Rights in Rem Against Aircraft

Is there a right in rem against an aircraft under PNG law?

PNG 14 There are no rights in rem against an aircraft under PNG law except in the case of an Airport Charges Lien.

15. International Conventions and Liens

Is PNG party to any international Conventions that relate to aircraft liens? How do these Conventions apply?

1948 Geneva Convention on Rights in Aircraft

PNG 15 PNG has not ratified the 1948 Geneva Convention on the International Recognition of Rights in Aircraft. As a result, that Convention does not apply under PNG law.

1933 Rome Convention on Precautionary Arrest

PNG has not ratified the 1933 Rome Convention on precautionary Arrest. As a result, that Convention does not apply under PNG law.

Cape Town Convention on International Interests in Mobile Equipment

PNG has not ratified the Cape Town Convention on International Interests in Mobile Equipment. As a result, that Convention does not apply under PNG law.

16. Recognition and Priority of Foreign Aircraft Liens

Would a PNG court recognise foreign aircraft liens? What priority would it give them?

PNG 16 At the outset it should be noted that this area of law is complex and that much will depend on the specific fact situation arising and whether the basic nature of the claim is founded in tort (for example, wrongful interference with goods) or contract. A PNG court may distinguish between the validity of a foreign aircraft lien and its priority. Most of these issues have not been determined by the PNG courts so far.

Recognition of foreign aircraft liens

A PNG court will almost certainly recognise a foreign aircraft lien providing it is valid under the governing law of the contract pursuant to which the lien arises.

[38] Civil Aviation Act s.114(1).

[39] Civil Aviation Act s.114(2).

Priority of foreign aircraft liens

The priority of foreign aircraft liens as against other liens and interests in the property will be determined by PNG law given that priority is a procedural rather than a substantive issue under PNG conflicts of law rules.

A foreign aircraft lien will almost certainly rank behind a lien created by PNG statute (for example, an Airport Charges Lien). However, the priority of a foreign lien as against other liens arising under PNG law is less clear and so far, has not been determined by the PNG courts. In general terms, it is believed that the priority of aircraft liens and detention rights under PNG law will be as follows:

- statutory liens and detention rights (including Airport Charges Lien);
- salvage liens;
- possessory liens;
- security interests;
- unperfected security interest; and
- foreign aircraft liens.

Part 2

17. Rights of Detention and Sale

What rights of detention and sale may be exercised against aircraft in PNG?

Detention

PNG 17 Except in the case of an Airport Charges Lien, there are no PNG laws detailing the specific judicial procedures for taking possession of an aircraft in respect of which money is owing.

In the case of prescribed airport charges, where a default is made by an owner or operator of an aircraft in the payment to the claimant of the charge, the claimant may, subject to the provisions of Pt VII of the Civil Aviation Act, take such steps as are necessary to detain, pending payment, either:

- the aircraft in respect of which the charge was incurred (whether or not it was incurred by the person who is the owner or operator of the aircraft at the time when the detention begins); or
- any other aircraft of which the person in default is the owner or operator at the time when the detention begins.[40]

The claimant must not detain, or continue to detain, an aircraft by reason of any alleged default in the payment of any charge payable to the claimant under the Civil Aviation Act s.109(1) where the owner or operator of the aircraft or any other person claiming an interest therein:

- disputes that the charge is due or, where the aircraft is detained, that the charge was incurred in respect of that aircraft; and
- gives to the claimant, pending the determination of the dispute, sufficient security for the payment of the charge which is alleged to be due.

In addition to the above, however, the Civil Aviation Act provides for a variety of circumstances in which an aircraft may be detained and for reasons quite unrelated to the existence or otherwise of an airport charge or other type of lien.

[40] Civil Aviation Act s.109(1).

The Civil Aviation Act provides that where the Director believes on reasonable grounds that the operation or the use of an aircraft or aeronautical product or a class of aircraft or aeronautical product may endanger persons or property, the Director may, where authorised by a warrant given by a judicial officer on written application on oath, do all or any of the following:

- detain the aircraft or aircraft of that class;
- seize the aeronautical product or any aeronautical products of that class;
- destroy any aeronautical product or any products of that class; or
- prohibit or impose conditions on the operation of the aircraft or aircraft of that class or on the use of any aeronautical products of that class.[41]

Further to this, where the Director believes on reasonable grounds that the operation or use of an aircraft or aeronautical product or a class of aircraft or aeronautical product may endanger persons or property and that prompt action is necessary to prevent the danger, the Director may do all or any of the following:

- prohibit or impose conditions on the operation of the aircraft or all aircrafts of that class;
- prohibit or impose conditions on the use of the aeronautical product or aeronautical products of that class; and
- detain particular aircraft or seize particular aeronautical products where necessary in order to prevent their operation or use.[42]

The term "aeronautical product" means anything that comprises or is intended to comprise any part of an aircraft or that is intended to be installed in or fitted or supplied to an aircraft and includes fuel and other similar consumable items necessary for the operation of the aircraft.[43]

A detention or seizure as detailed above will be maintained only for such time as is necessary in the interests of safety.[44] The Director must where requested by the owner or the person for the time being in charge of an aircraft detained or an aeronautical product seized in the circumstance above give to the owner, where known, 21 days' notice of his intention to destroy the aeronautical product.[45] The Director is not liable to pay compensation to a person for an aviation product destroyed under the Civil Aviation Act.[46] A person in respect of whom a decision is taken under the Civil Aviation Act may appeal against that decision to the National Court in accordance with the Civil Aviation Act s.310.[47]

The Director must notify any prohibitions or conditions to such person as he considers necessary by such means of communication, whether or not of a permanent nature, as the Director considers appropriate in the circumstances.[48] Concerning detention of an aircraft, the Civil Aviation Regulations provide that where it appears to the Controller (that an aircraft is intended or likely to be flown in such circumstances that the flight would involve an offence against this Regulation or be a cause of danger to persons in the aircraft or to persons or property on the ground, he may take such action by way of detention of the aircraft or such other action as is necessary for the purpose of causing the circumstances relating to the flight to be investigated or the aircraft to be inspected.

Where an aircraft has been detained the aircraft must not be used until the Controller, being satisfied that the Civil Aviation Regulations are being complied with, approves, or until

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[41] Civil Aviation Act s.57(1).
[42] Civil Aviation Act s.57(2).
[43] Civil Aviation Act s.3.
[44] Civil Aviation Act s.57(3).
[45] Civil Aviation Act s.57(5).
[46] Civil Aviation Act s.57(6).
[47] Civil Aviation Act s.57(7).
[48] Civil Aviation Act s.57(8).

such alterations or repairs as the Controller thinks necessary to make the aircraft fit for flight have been made.

Sale

In the case of an Airport Charges Lien, the Civil Aviation Act details how the aircraft may be sold.

Where an outstanding amount secured by an Airport Charges Lien is unpaid at the end of one month after the date on which the Airport Charges Lien is registered, the claimant may at any time, with the leave of the National Court, sell the aircraft[49].

No leave will be granted by the National Court for the sale of the aircraft except on proof that:

- a sum is due to the claimant for charges;
- default has been made in the payment thereof; and
- the claimant has complied with Civil Aviation Act s.115 (Procedure Before Sale).[50]

Most aircraft operators pay the charges due in respect of the aircraft, however, where an outstanding amount secured by an aircraft lien is unpaid at the end of one month after the date on which the aircraft lien was registered, the claimant may at any time, with the leave of the National Court, sell the aircraft and this does happen in practice.

At least 21 days before applying to the National Court to sell an aircraft subject to an Airport Charges Lien, the claimant must publish in one or more national newspapers circulating in Port Moresby a notice stating:

- the nationality and registration marks of the aircraft;
- the type of aircraft;
- that by reason of default in payment of a sum due to the claimant, the claimant on a date which must be specified in the notice, detained the aircraft under s.109 of the Act and, unless payment of the sum so due is made within a period of 60 days from the date when the detention began, or within 21 days of the date of service of the notice, whichever is the later, will apply to the National Court for leave to sell the aircraft; and
- inviting the person to whom the notice is given to inform the claimant within 14 days of the service of the notice if he wishes to become a party to the proceedings on the application.[51]

The claimant must also, unless in each case it is impracticable to do so, serve a copy of the notice on each of the following persons:

- the owner of the aircraft as specified in the Register of PNG Aircraft;
- the person who appears to the Director to be the operator of the aircraft;
- the person who appears to the Director to be a charterer or hirer of the aircraft;
- any person who is registered as a mortgagee of the aircraft under the Register of PNG Aircraft; and
- any other person who appears to the Director to have a priority interest in the aircraft.[52]

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[49] Civil Aviation Act s. 114(1)

[50] Civil Aviation Act s.114(2).

[51] Civil Aviation Act s.115(2) and (3).

[52] Civil Aviation Act s.115(2).

A sale of any aircraft pursuant to a leave given by the National Court is further subject to such conditions as the National Court may, as it thinks just, impose.[53]

The power of detention and sale conferred by the provisions of Civil Aviation Act Pt VII in respect of an aircraft subject to an Airport Charges Lien extends to:

- the aircraft equipment and any stores for use in connection with its operation (being equipment and stores carried in the aircraft) whether or not the property of the person who is its operator, and references to the aircraft in Civil Aviation Act ss.109–124 include, except where the context otherwise requires, references to any such equipment and stores; and
- any aircraft document carried in it or associated with it, and any such documents may, where the aircraft is sold under these provisions, be transferred by the claimant to the purchaser.[54]

18. Airport Charges

Under PNG law, can an aircraft be detained and sold for unpaid airport charges? In what circumstances?

PNG 18 Yes, under PNG law an aircraft can be detained and sold for unpaid airport charges. See discussion of Airport Charges Lien in PNG 8 above.

19. Air Navigation Charges

Under PNG law, can an aircraft be detained and sold for the non- payment of air navigation charges? In what circumstances?

PNG 19 Yes, an aircraft may be detained and sold in PNG for the non-payment of charges in relation to air navigation services provided in PNG.

The procedure for detaining and selling an aircraft in these circumstances is that outlined above in relation to enforcement of Airport Charges Liens.

20. International Air Navigation Charges, Including Eurocontrol

Under PNG law, can an aircraft be sold for the non-payment of international air navigation charges, such as Eurocontrol charges? In what circumstances?

PNG 20 There is no procedure under PNG law for selling an aircraft for the non-payment of international air navigation charges in respect of airport services provided outside of PNG such as Euro control charges.

A PNG court has jurisdiction to hear and determine claims for these air navigation charges even though the defendant is not resident within the court's jurisdiction.

21. Licensing Contraventions

Under PNG law, can an aircraft be detained and sold for contraventions of PNG licensing requirements? In what circumstances?

PNG 21 In brief, under PNG law, aircraft may be detained, but not sold, for contravention of PNG's licensing requirements. PNG law imposes various licensing requirements on aircraft operators. In particular, PNG registered aircraft must have a valid Certificate of Airworthiness and a Certificate of Registration under the Civil Aviation Act and CASA Civil Aviation Rules

If the Director believes on reasonable grounds that the operator's use of any aircraft or any class of aircraft may endanger persons or property, the Director may, if authorised by

[53] Civil Aviation Act s.116(2).
[54] Civil Aviation Act s.118.

a warrant given by a judicial officer, detain the aircraft or otherwise prohibit, or impose conditions on the operation of the aircraft or aircraft of that class.[55]

Any detention of an aircraft may be maintained for only such time as is necessary in the interest of safety. However, if aircraft or parts thereof are required for the purpose of evidence in any prosecution under the Civil Aviation Act those aircraft or parts may be detained by the Director for such period as the Director considers necessary for that purpose.[56]

In addition, a person duly authorised by the Director may at any reasonable time, enter any aircraft and temporarily detain that aircraft for the purposes of carrying out any inspection to determine whether or not any breach of the Civil Aviation Act, Civil Aviation Regulations, any rule or any conditions imposed upon any civil aviation document has occurred.[57]

22. Air Navigation Contraventions

Under PNG law, can an aircraft be detained and sold for contraventions of Air Navigation regulations? In what circumstances?

PNG 22 No specific statutory rights exist to detain and/or sell an aircraft for the contravention of air navigation regulations. However, see PNG 21 on the broad rights of detention for public safety reasons.

23. Customs Contraventions

Under PNG law, can an aircraft be detained and sold for contraventions of Customs requirements? In what circumstances?

PNG 23 In brief, under PNG law (the Customs Act 1951, related legislation and regulations) (Customs Act), aircraft may be detained, and in some cases forfeited, for breaches of Customs legislation.

Customs airports

PNG legislation provides that an aircraft entering PNG from abroad or departing PNG for abroad must land at, or depart from, a customs controlled airport unless it is prevented from doing so by an unavoidable cause or if granted authorisation.[58] Customs officers or the police may detain any aircraft which intends (or is likely) to depart from a place other than a Customs controlled airport or from a Customs controlled airport but without due clearance from Customs[59].

Imported uncleaned cargo

Goods imported into PNG which are required to be cleared through Customs must be cleared within a stipulated period of time. Customs officers may detain an aircraft in respect of uncleaned imported cargo where it remains on board the aircraft after a stipulated period of time until certain expenses for the safeguarding and removal of the goods have been paid.

Duty constitutes a charge on goods

There are two situations where the non-payment of duty may lead to an aircraft being detained; these are where:

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[55] Civil Aviation Act s.57(1).
[56] Civil Aviation Act s.57(3).
[57] Civil Aviation Act s.58.
[58] Customs Act s.25(1) and (2).
[59] Customs Act s.25(7).

- an aircraft itself is imported into or exported from PNG; or
- an aircraft carries goods imported into or exported from PNG.

To the extent that an aircraft is permanently imported into PNG for use in PNG, the duty payable in respect of that aircraft constitutes a lien on that aircraft until fully paid.

To the extent that any duty on an aircraft is due but unpaid the PNG Customs authorities may, whether or not the property in the aircraft has passed to a third party, take possession of the aircraft and sell it (or any part of it) in satisfaction or part satisfaction of the unpaid duty. However, the right to take possession of an aircraft and sell it does not apply as against the purchaser of the aircraft for valuable consideration and without knowledge that the duty was owing and has not been paid. For this purpose, a "purchaser" means a person (other than a person liable to pay the duty) who acquired the aircraft from a person liable to pay the duty or a subsequent purchaser from that person.

If a third party claims (whether at or before the taking of possession of the goods by the PNG Customs Services) that he or she is a purchaser without notice of the unpaid duty and there is a dispute as to whether or not that third party is such a purchaser, Customs can, if the goods are in possession of the importer, take and retain possession (but not sell the goods until the dispute is resolved) or, if the goods are in the possession of the third party purchaser, require that purchaser to retain possession and not sell the goods until the dispute is resolved.

In the case of an individual made bankrupt or a company in respect of which a liquidator or receiver has been appointed, Customs can serve notice on the liquidator, or receiver or official assignee as to the existence of unpaid duty and confirming that the unpaid duty constitutes a lien on the aircraft. Any notice must be served within 60 days of the notice in the National Gazette of bankruptcy (in the case of an individual) or the notice in the National Gazette of the commencement of liquidation or the appointment of a receiver (in the case of a company). In a bankruptcy, liquidation or receivership, Customs may sell the aircraft subject to a statutory lien for unpaid customs duty as if it were a secured creditor.

Ranking of statutory lien for unpaid duty

Where unpaid duty constitutes a statutory lien over an aircraft, its ranking or priority order is as follows. In the case of:

- An individual who has been declared bankrupt the amount of the duty is to be paid in accordance with the requirements of the Insolvency Act.
- A company in liquidation, the amount of any duty which constitutes a statutory lien must be paid in accordance with the requirements of the Companies Act.

Any aircraft in respect of which a statutory lien has been created will not be released from control of PNG Customs until the sum payable by way of duty on that aircraft is paid in full. No action or other proceedings may be instituted against the State, the PNG Customs Service, or any Customs officer in respect of the detention of any aircraft during any period before the payment in full of unpaid duty. However, the Chief Executive Officer of the PNG Customs Service can, where he or she considers an undue hardship would result from the payment of duty under the Customs Act, under any conditions as he thinks fit to impose, direct the release of the aircraft and accept payment of duty by instalment over a specified period.

Detention of aircraft

Any Customs officer who has reasonable cause to believe that an offence against the Customs Act has been, is being, or is about to be committed on or in respect of an aircraft while that aircraft was or is within PNG, may direct the aircraft to:

- to proceed to the nearest customs place or such other place as the Customs officer considers appropriate; or
- to remain where it is;

and in either case, may detain the aircraft for such time and for such purposes as are reasonably necessary to carry out an investigation into the commission of the offence.

If a person in charge of an aircraft attempts or threatens to cause the aircraft to depart from any place where that aircraft has been directed to proceed or in which that aircraft has been directed to remain in circumstances where a certificate of clearance has not been issued for that aircraft, then a Customs officer may (in addition to any power of seizure referred to below) seize and detain that aircraft until a certificate of clearance has been obtained.

Forfeiture of aircraft

The circumstances in which an aircraft may be forfeited for breach of the terms of the Customs Act are extensive. This is primarily because an aircraft can be seized in circumstances where goods on that aircraft are transported in breach of the Customs Act. For example, a craft is technically forfeited to the State if it is being or has been used for the carriage, handling, deposit, or concealment of:

- counterfeit goods;
- goods bought into PNG which have not been properly entered for customs purposes;
- goods wrongly declared; and
- goods imported into PNG that are acquired in a country outside PNG by an act which done in PNG would constitute a crime whether at or after the time of any alleged offence in relation to those goods. These are just a few of a wide range of offences.

An aircraft is also forfeited to the State if:

- the aircraft is one in respect of which an offence of arriving in PNG in an unlawful manner has been committed; and
- Where an aircraft has entered PNG and a Collector[60] has reasonable grounds to believe that the aircraft might have been imported into PNG.[61]
- the offence was committed to facilitate non-compliance with certain requirements which relate to the arrival of persons by a person or persons who arrived in PNG having been brought (in that aircraft or in any other aircraft) from a point outside PNG.

Any customs officer or member of the Papua New Guinea Royal Constabulary may seize any forfeited goods or any goods which they have reasonable cause to suspect are forfeited. However, goods can only be seized in the two-year period after the right of forfeiture arises (unless the goods are prohibited goods under the PNG law in which case they can be seized at any time). Where goods, including any aircraft, have been seized, Customs may leave those goods in the custody of either the person from whom the goods have been seized or any other person authorised by the customs officer and who consents to having such custody.

Until such time as a final decision is made as to whether or not the goods remain forfeit, the person holding the goods must hold them on such reasonable conditions as are imposed by Customs, must make the goods available to Customs on request, may not alter or dispose or remove the goods from PNG unless authorised to do so and must return the goods to Customs on demand.

As soon as reasonably practical after seizure occurs, Customs must give notice in writing of the seizure and the reasons for the seizure (in a prescribed form) to any person known or believed to have an interest in the goods, or where that person is overseas, to his or

[60] Defined by s.1 of the Customs Act and includes Custom agents.

[61] Customs Act s.25A(1).

her agent in PNG[62]. However, the seizure of the aircraft will not be deemed invalid soley because of any error contained in the form of notice[63].

Where any goods have been seized, Customs may, at any time before these goods are condemned, deliver the goods to the owner or other person from whom they were received, on deposit with Customs of a cash sum determined in accordance with the formula set out in the Customs Act together with any duty to which the goods may be liable. The money deposited is deemed to be substituted for the goods seized pursuant to the provisions of the Customs Act.

Right of sale in respect of forfeited goods

PNG Customs have a limited right of sale of goods which are seized. This right only applies where, in the opinion of the Customs, the aircraft is likely to deteriorate or diminish in value by not selling it or it is otherwise desirable to sell the aircraft. In normal circumstances, Customs will condemn goods which will then be destroyed. However, this would most probably not be applicable in the case of an aircraft, and it is likely that Customs would exercise its right to sell the goods.

Application for review of seizure

Any person who has an interest in goods that have been seized may apply in writing to Customs for a review of the seizure within:

- 20 working days after the date on which the notice of seizure is given to the applicant: or
- any further time allowed by the Chief Executive if satisfied that the applicant did not receive the notice of seizure or that a further period is otherwise required in the interests of justice.

The applicant must establish, on the balance of probabilities, that the applicant has an interest in the seized goods and acquired that interest in good faith. The Chief Executive must make his or her decision on the application within 20 working days after the day on which the application is received or, if in the opinion of the Chief Executive the circumstances of the case do not permit a decision to be made within this period, the Chief Executive may extend that period by a further period that is reasonable in the circumstances. Similar circumstances are applicable where a claimant of a seized aircraft refuses to give security as required by the Chief Commissioner or Collector under the provisions of s.127 Customs Act.If there is no security, the Chief Commissioner may sell the seized aircraft by public auction[64]. Applicants who are dissatisfied with a decision are able to appeal that decision to the Customs Appeal Authority.

Where no application for a review of seizure is made, or an application is discontinued or dismissed, the seized goods are condemned to the State. After their condemnation, the goods may be sold, used, destroyed, or otherwise disposed of as the Chief Commissioner may direct.

24. Noise and Emissions Contraventions

Under PNG law, can an aircraft be detained and sold for contraventions of noise and emissions requirements? In what circumstances?

PNG 24 The Civil Aviation Act does not contain any specific provisions relating to the detention and/or sale of an aircraft that contravenes applicable noise and emission requirements.

[62] Customs Act s.126(1).

[63] Customs Act s. 126(4).

[64] Customs Act s.127A(1).

However, see PNG 21 on the broad rights of detention for public safety reasons under the Civil Aviation Act.

In PNG, the Environment Act 2000 (Environment Act) imposes a general environmental duty (General Environmental Duty) on all persons prohibiting them from carrying out in PNG an activity that causes or is likely to cause an environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the environmental harm.[65]

For the purposes of the Environment Act, the term "environmental harm" means any change to the environment or any part of the environment, which has a detrimental effect on any beneficial value relating to the environment, and may be caused by an act or omission whether the harm is a direct or indirect result of the act or omission, or results from the act or omission alone or from the combined effects of the act or omission and any other act or omission.[66] In addition, CASA Rule Part 93 (Special Aerodrome Traffic Rues and Noise Abatement Procedures) prescribes noise abatement procedures for pilots in command of an aircraft which is operating in the vicinity of an aerodrome.

It is believed that the General Environmental Duty can extend to aircraft noise.

Failure to comply with the General Environmental Duty does not constitute an offence or give rise of itself to a right to civil remedy, but compliance with the duty may be enforced by:

- an Environment Protection Order;
- a Clean-up Order; or
- an Emergency Direction.[67]

Where in a proceeding it is alleged that a person has failed to comply with the General Environmental Duty by causing environmental harm, it will be a defence if the harm is caused in the course of complying with an Environmental Code of Practice or authorised to be caused under:

- an Environment Policy;
- a condition of an environment permit;
- an approved environmental improvement plan;
- an Environment Protection Order; or
- an Emergency Authorisation.[68]

Concerning noise specifically, a person who unlawfully causes an environmental harm by, amongst other things, noise, is guilty of an offence.

Penalty:	A fine not exceeding K20, 000.
Default penalty:	A fine not exceeding K2, 000.[69]

In proceedings for such an offence, there is no requirement to prove that the person intended to cause the unlawful environmental harm.[70]

The Environment Act provides for the Head of State to make a variety of regulations including regulations which, in relation to noise (including aircraft noise):

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[65] Environment Act s.7(1).
[66] Environment Act s.2.
[67] Environment Act s.7(3).
[68] Environment Act s.7(4).
[69] Environment Act s.13(1).
[70] Environment Act s.13(2).

- prescribe standards or levels for emission of various types of noise and the procedure by which
- they are to be tested or ascertained;
- prohibit the use of any equipment, facility, instrument, device, vehicle or ship capable
- of emitting noise that does not meet a prescribed standard, and regulating the construction, installation or operation of any of them so as to prevent or minimise the emission of noise;
- provide for the delegation of power to Provincial Governments and Local-level

Governments to make laws or rules consistent with the Environment Act, to deal with

- noise in their respective areas; and
- make provision for officers of other governmental authorities including Provincial

  Governments and Local-level Governments, to enforce provisions of the Environment Act
- in relation to noise; and
- prescribe the circumstances in which emission of noise amounts to unreasonable noise under the

Environment Act;

- provide for the issue of noise abatement notices; and
- mandate offences in relation to noise emission; and
- prescribe penalties or fines not exceeding K20,000 (and default penalties not exceeding
- K2,000) or imprisonment for a term not exceeding one year, or both, for offences
- against the provisions of the Regulations.[71]

So far, however, no specific regulations have been made covering aircraft noise.

Noise which when released into the environment causes or is likely to cause environmental harm is a contaminant for the purposes of the Environment Act.[72]

The Environment Act does not give any person the power to seize or detain an aircraft.

25. Patent Infringements

Under PNG law, can an aircraft be detained and sold for patent infringements? In what circumstances?

PNG 25 Under PNG law an aircraft may not be detained and sold for patent infringement. However, the Patents and Industrial Designs Act 2000 (s.29(3)) does provide that where a court finds that a patent has been infringed, or is likely to be infringed, the court may on the application of the owner of the patent or any other interested person, make an order for the inspection of anything in or on any vehicle, vessel, aircraft, building or premises, and may impose such terms and give such directions, if any, in relation to the inspection, as the court thinks fit.[73]

The Civil Aviation Regulation 1975 (Chapter 239) implements Article 27 of the 1944 Convention on International Civil Aviation (Chicago Convention), of which PNG is a signatory. Although the Civil Aviation Regulation was repealed by the Civil Aviation Act, s. 325 of the Civil Aviation Act states that all orders, notices, requirements, circulars, and other publications issued under the Civil Aviation Regulation have not been repealed.

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[71] Environment Act s.133(3).

[72] Environment Act s.2.

[73] Patents and Industrial Designs Act s.29(3)(b).

The Civil Aviation Regulation (s.334(1)) provides that the lawful entry into PNG territory, or the lawful transit across PNG territory, with or without landings, of an aircraft in relation to which this section applies will not entail:

- the seizure or detention of the aircraft;
- the bringing of proceedings against the owner or operator of the aircraft; or
- any other interference with the aircraft,

by or on behalf of the State or any person in Papua New Guinea territory on the ground that the construction, mechanism, parts, accessories or operation of the aircraft is or are an infringement of Letters Patent or any equivalent right or privilege granted in Papua New Guinea.[74]

The Civil Aviation Regulations (s.334(2)) also provide that the importation to, and storage in, Papua New Guinea territory of spare parts and spare equipment for an aircraft will not entail:

- the seizure or detention of the aircraft or of the spare parts or spare equipment;
- the bringing of proceedings against the owner or operator of the aircraft or against the owner of the spare parts or spare equipment; or
- any other interference with the aircraft, or with the spare parts or spare equipment,

by or on behalf of the State or any person in Papua New Guinea territory on the ground that the spare parts or the spare equipment or their installation are or is an infringement of Letters Patent or any equivalent right or privilege granted in Papua New Guinea.[75] However this does not apply in relation to spare parts or spare equipment that are sold or distributed in Papua New Guinea or are exported from Papua New Guinea for sale or distribution.[76]

26. Public Health Requirements

Under PNG law, can an aircraft be detained and sold for breaches of public health requirements? In what circumstances?

PNG 26 There is no specific legislation in PNG dealing with the detention and or sale of aircraft because of an actual or suspected breach of health laws or regulations.

However, the general powers of detention contained in the Civil Aviation Act s.57(1) and (2) could be used by the Director of Civil Aviation to detain or impose conditions on the use or operation of an aircraft that endangers public health.

27. Tax Law Contraventions

Under PNG law, can an aircraft be detained and sold for contravention of PNG tax laws? In what circumstances?

PNG taxes

PNG 27 In general PNG's Internal Revenue Commission has priority for income tax owed by a taxpayer. For example, an amount payable to the Commissioner General pursuant to the Income Tax Act 1959 s.299K has priority over all other debts (other than an amount payable under Income Tax Act ss.285(1) and 311K(1)(a), whether preferential, secured or unsecured.

The paying authority may sue for and recover from the payee as a debt due to him any amount referred to in (a) above paid to or recovered by the Commissioner General.

A charge on all the real and personal property of a taxpayer (including an aircraft) will arise for the failure to deduct and pay certain withholding taxes including:

- pay (pay as you earn) on salary, wages and withholding payments; and
- resident withholding tax on interest and dividends.

This charge will rank behind existing charges but in priority to future charges. The National Court may make an order for the sale of the property in satisfaction of the charge. The Commissioner General has no right to detain an aircraft as such. Where however an aircraft forms part of the assets of a delinquent tax paper and the Commissioner General is able to satisfy the court that the taxpayer intends to remove the aircraft from PNG for the purpose of defeating the Commissioner General's charge, the Commissioner General may obtain an order from the National Court preventing the departure of the aircraft.

Foreign taxes

Generally speaking, it is not possible for foreign tax authorities, or PNG tax authorities acting on behalf of foreign tax authorities, to enforce tax liabilities imposed by jurisdictions outside PNG. There is an exception for Australia, and Australian judgments relating to Australian taxation can be enforced in PNG.

28. CRIMES

Under PNG law can aircraft be detained and sold in connection with crimes? In particular, offences relating to terrorism and drug trafficking?

PNG 28 In brief, under PNG law, aircraft may be detained and, in some cases, forfeited under the criminal law. In particular, forfeiture of an aircraft may occur in respect of drug trafficking offences. While it is unusual for aircraft to be involved in crimes, among other things, aircraft may be detained in connection with offences relating to terrorism, theft and drug trafficking.[77]

Any member of the police who has reasonable grounds to believe that any property in or on any aircraft has been stolen or unlawfully obtained in or on an aircraft may detain the aircraft for the purpose of search.[78]

29. WAR OR NATIONAL EMERGENCY

Under PNG law, can aircraft be detained and sold by reason of war or other national emergency? In what circumstances?

PNG 29 In brief, in time of war or national emergency, the PNG Government may requisition aircraft.[79] However, compensation is payable, through the relevant Minister, in connection with the actual or imminent emergency involving the employment outside PNG of any part of the armed forces, where the Minister is satisfied that such requisition is necessary. Any person who suffers direct injury or loss owing to the operation of such an order is entitled to receive compensation from the Minister.[80]

There are a number of relevant statutory provisions.

Defence Act

Provision is made in the Defence Act 1974 (Chapter 74 of the Revised Laws) for regulations to be made authorising an officer in charge of any defence area or any member of the Defence Force duly authorised by that officer to search any person in or about to enter the area and detain for the purposes of search any aircraft under the control of that person.[81]

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[77] Criminal Law (Miscellaneous Provisions) Act 1975 ss.11 and 12.
[78] Criminal Law (Miscellaneous Provisions) Act s.9.
[79] Defence Act s.70(1).
[80] Defence Act s.70(2).
[81] Defence Act s.72(4).

Defence Regulations

The Defence Act confers on the Head of State the power to make Regulations allowing any officer or any authorised person to detain and search any aircraft in the possession of any person in or about to enter a defence area.

30. Other Aircraft Detention and Sale Rights

PNG 30 The main statutory rights to detain aircraft are set out above. Detention and sale of an aircraft may also arise:

- in accordance with the terms of a contract between the parties;
- pursuant to a charging order obtained by a creditor prior to judgment. In particular, a creditor may obtain a charging order over a debtor's goods prior to obtaining judgment where the debtor intends to defeat creditors by making away with his property or is absent from or about to quit PNG;
- pursuant to the seizure of an owner's assets to satisfy a judgment debt. In particular, where a judgment debt has not been met, the creditor may have it enforced against the debtor by issuing a writ of possession and writ of sale. These instruments empower a court officer to seize and sell such of the debtors goods as are necessary to meet the debt;
- on the liquidation or insolvency of the company that owned it, to pay its creditors; and
- in the case of detention alone, in accordance with an injunction (including a Mareva injunction) granted by the court.

31. Priority of Aircraft Detention Rights

What is the priority of aircraft detention rights? In particular, what is their priority over aircraft liens?

PNG 31 This section deals with the priority of detention rights among themselves, as well as their priority over aircraft liens.

Competing detention rights

It is possible that under PNG law more than one detention right may exist over an aircraft at the same time. As to the priority of rights of detention inter se, they would seem to rank by reference to the precise terms of the right to detain and the time of detention. For other detention rights (for example, those arising as result of the contravention of licensing or air navigation requirements etc) as noted previously these will involve the temporary detention of the aircraft only. Further, their priority will likely be determined according to the time each contravention occurred.

Detention rights and liens

In the case of statutory detention rights versus other rights to detain aircraft the statutory right to detain an aircraft will take priority over a mortgage even though the airport operator was aware of the existence of the mortgage prior to exercising its right to detain. It is believed the same position will apply in the case of air navigation charges (see PNG 19 and PNG 20).

Further, it seems that statutory detention rights will take priority over aircraft liens, even where the lien arose prior to the detention right. However, there is no PNG case-law on this issue.

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