



Consideration of  
The Ratification by Australia of the  
*Convention for the Unification of Certain Rules for  
International Carriage by Air*  
done at Montreal on 28 May 1999  
(The Montreal Convention)  
and  
Related Aviation Insurance Matters

# Discussion Paper



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# Purpose

**T**HE PRIMARY PURPOSE of this paper is to seek views on whether Australia should ratify the Montreal Convention, an international legal instrument updating air carriers' liability and other consumer protection arrangements. Ratification of the Convention will modernise the international air carriers' liability framework and provide measures such as electronic documentation to assist the smooth movement of air passengers, baggage and cargo. At present varying arrangements are provided for under the 1929 Warsaw Convention and an array of related subsequent international instruments.

At the same time views are sought on whether relevant features of the Montreal Convention should be applied to Australia's domestic carriers' liability provisions.

The Department of Transport and Regional Services (DoTRS) will use responses to advance Government consideration of the ratification of the Montreal Convention.

**Part I** of the paper first addresses the issues relating to Australia's ratification of the Montreal Convention and accompanying amendments to the *Civil Aviation (Carriers' Liability) Act 1959* (in this paper 'Carriers' Liability Act' refers to the 1959 Act, including proposed amendments, or a replacement new Act). If ratified, the Convention will apply to Australian registered international carriers and foreign carriers in Australia's jurisdiction whose Governments are a Party to the Montreal Convention.

The second section of Part II addresses measures in the Montreal Convention that do not currently apply to Australian domestic aviation but which, if they were applied to domestic aviation, would improve domestic carriers' liability arrangements.

**Part II** raises a number of matters concerning aviation third party insurance and aircraft registration. These issues are not related, per se, to the question of Australia's ratification of the Montreal Convention, but the Department considers that it is an opportune time to seek public comment on these matters.

Additional copies of this paper and the 1999 Montreal Convention may be downloaded from the internet at: [www.dotrs.gov.au/aviation](http://www.dotrs.gov.au/aviation).

# Part I

## The Montreal Convention

*(Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999)*

*The average passenger and consignor using international air travel is almost certainly ignorant of the limitations on recovery which are imposed and the uncertainties and possible injustices involved in the limitations provided by the Warsaw-Hague Convention.*

*Kirby, P. in S.S. Pharmaceutical v. Qantas [1991] 1 Lloyd's Rep 288 at 306.*

### Introduction

**I**N May 1999, the International Civil Aviation Organization (ICAO) held an International Conference on Air Law in Montreal, Canada, to consider updating the Warsaw System of carriers' liability. The outcome was the Montreal Convention. The Convention deals principally with the liability rules governing international carriage of persons, baggage or cargo performed by aircraft for reward. The new Convention has a number of advantages over the existing Warsaw System which include the following:

- two tier system of liability for death and injuries to passengers with absolute liability up to 100,000 SDRs<sup>1</sup> (approx. \$A242,000), and then unlimited negligence/fault based liability;
- other liability limits updated, with a mechanism to review all limits for inflation every 5 years;
- exclusion of punitive damages;
- States may require advance payments and mandatory insurance under their national law;
- passengers able to bring an action in their principal State of residence; and
- facilitation of electronic ticketing.

### The Existing System

#### Warsaw Convention and amending Protocols

The Montreal Convention updates and will eventually replace the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, done at Warsaw on 12 October 1929 (the Warsaw Convention) and a number of subsequent Conventions and Protocols, which together form the 'Warsaw System'. This system provides an international treaty framework for liability rules

governing commercial international aviation travel, and for documentation such as tickets and air waybills. Compensation arrangements are provided for passengers, baggage and cargo affected by aircraft accidents.

At the time of its negotiation in the 1920s, the aviation industry was in its early years, struggling to compete with the rail and shipping industries. Consequently the liability limits for air carriers were capped at limits that were appropriate for that era and for an infant industry. The focus for policy makers at the time was on protecting a fledgling industry from potentially ruinous claims for compensation, while at the same time providing a basic level of protection for passengers.

Today the aviation industry is operating in a very different environment—aviation, particularly international aviation, is a very safe means of transport and public perceptions have changed so that unreasonably low limits on carrier liability are no longer acceptable.

Despite strenuous efforts over many years to update the Warsaw System, compensation limits have remained low for victims of air accidents, and the provisions for regulating the movement of passengers, baggage and cargo are now outdated. Some of the protocols which update the Warsaw Convention have not been widely adopted. A complicated, unwieldy and out of date system for international carriers' liability has resulted.

Today the Warsaw System comprises the 1929 Warsaw Convention, The Hague Protocol (1955), the Guadalajara Convention (1961), the Guatemala City Protocol (1971), the 1975 Additional Protocols Nos 1, 2, and 3, and Montreal Protocol No. 4 (1975). The main elements of these Conventions and Protocols are outlined in **Attachment A**.

<sup>1</sup> Special Drawing Right (SDR) of the International Monetary Fund. For the current value of the SDR against the Australian dollar, see [http://www.rba.gov.au/bulletin/bulletin\\_database/F09hist.xls](http://www.rba.gov.au/bulletin/bulletin_database/F09hist.xls). In this paper, one SDR equals A\$2.42.

## What is the Warsaw Convention?

The Warsaw Convention is an instrument of private international law. By signing it, countries agree to implement its self-contained legal regime governing liability for international carriage by air between Parties. The Warsaw Convention has been an outstanding success in terms of its adoption by States, with 149 Parties as at 30 June 2000. When it originally came into force, the Warsaw Convention established a uniform regime for air carriers' liability across all Parties. As noted, a number of attempts have been made to amend the Warsaw Convention through amending Protocols. These efforts have been less than successful, as only some States have ratified all amending Protocols, other States have ratified only a select few, while still others have ratified none.

This means that four possible scenarios can govern carriage between countries:

- the Warsaw Convention;
- the Warsaw Convention as amended by The Hague Protocol;
- the Warsaw Convention as amended by the Montreal Protocol No.1;
- the Warsaw Convention as amended by The Hague Protocol as amended by the Montreal Protocol No. 2.

Each of these has a different liability limit. Additionally, as the limits in the first two instruments rely on a superseded currency, national practice on the conversion to national currency varies considerably.

A number of States have also implemented other supplementary arrangements through their domestic laws that require carriers to enter into special contracts or which prevent carriers from arguing any defences up to a particular limit of liability. The arrangements apply to the carriers of these States and to foreign carriers that operate to or from their territory. As a result, between countries and between destinations there are significant variations in the law governing air carriers' liability. This breakdown in uniformity has meant that relatives of passengers who are killed in the same aircraft accident may receive vastly different amounts of compensation. This is illustrated by the analysis of the July 2000 Air France Concorde crash.

### Other carriers' liability instruments

In addition, a number of international agreements and private voluntary arrangements among air carriers dealing with carriers' liability have been developed, largely in response to the failure to effectively reform the Warsaw System.

**Attachment B** outlines the most important of these arrangements, including those provided for under the International Air Transport Association (IATA) agreements and for the European Union.

At present there is a very fragmented and patchwork-like international legal system covering carriers' liability. It fails to provide a harmonised regime that adequately and appropriately addresses carriers' liability issues for both air carriers and their customers.

### The Warsaw System in Australian law—*Civil Aviation (Carriers' Liability) Act 1959*

Australia has ratified the Warsaw Convention, The Hague Protocol, the Guadalajara Convention and Protocol No. 4. These instruments are adopted into

Australian law through the *Civil Aviation (Carriers' Liability) Act 1959* (Carriers' Liability Act).

The Carriers' Liability Act, together with complementary State Acts, governs Australian liability law. While based on the Warsaw instruments, there are significant improvements. Importantly the Act sets higher liability limits than those provided for under the Warsaw system, being:

- A\$500,000 for domestic carriers and 260,000 SDRs for international carriers covering passenger death or personal injury; and
- A\$1600 for registered baggage, and A\$160 for hand luggage.

The Carriers' Liability Act also stipulates mandatory non-voidable insurance for all air operators carrying fare-paying passengers, including foreign carriers providing services to and from Australia, with the minimum insurance level being A\$500,000 per passenger.

Further details of the Carriers' Liability Act and current carriers' liability arrangements in Australia are at **Attachment C**.

## The 1999 Montreal Convention

The 1999 Montreal Convention is widely regarded as a major achievement in reaching a compromise between representatives of countries with disparate views on the nature of the aviation industry and appropriate methods and amounts of compensation for injury or death as a result of aviation accidents. It is considered to be a fair and reasonable compromise that offers the best chance yet to achieve a global solution to the problem of updating the Warsaw System. To be effective, it is essential that a majority of States ratify the Convention, particularly the major aviation nations, so that in time it will completely replace the Warsaw system.

The Montreal Convention introduces a number of improvements which modernise and consolidate the Warsaw system, including measures that had been proposed previously but not effectively adopted. It is based on a composite text of the Warsaw Convention, major elements of The Hague Protocol, Montreal Protocol No.4, and elements of the Guatemala City Protocol and Additional Protocol No. 3. It also includes provisions of the Guadalajara Convention. As a result, it substantially improves consumer protection in international carriage by air and modernises the smooth flow of passengers, baggage and cargo. Most importantly it improves the international regime for air carriers' liability by providing a form of unlimited and more equitable passenger compensation governing injury or death.

A key reform is that it consolidates these features into one complete package that States must either accept or reject. States will no longer be able to ratify some Protocols and not others. As more and more States ratify the new Montreal Convention, the Warsaw System will become increasingly redundant and there will be increasing pressure on non-parties to sign on to the new Convention.

### Main features

The concept of unlimited liability for death or injury to an aircraft passenger is a major development from the Warsaw System. For passengers, liability is based on a two-tier approach. The first tier provides for strict liability up to 100,000 SDRs (approx. A\$242,000) for proven damages irrespective of the carrier's fault – only in the case of contributory negligence of the passenger or person claiming compensation could the carrier be partly or wholly exonerated.<sup>2</sup> There is no limit of liability in the second tier (ie, for proven damages claims in excess of

100,000 SDRs) where there is a presumption of fault of the air carrier. Thus the carrier, rather than the claimant, bears the burden of proof. This represents an important compromise between the more advanced aviation States that favour no limits on liability, and the bulk of the World's aviation States that wish to retain some protection for their carriers.

Another important achievement, and one that was a cause of much dispute during previous attempts to update the Warsaw System, is the introduction of the 'fifth' jurisdiction. This means legal action for damages from the death or injury of a passenger may be filed in the country where the passenger had his or her principal and permanent residence at the time of the accident, subject to certain conditions. This reform broadens the scope for passengers to pursue damages against a carrier, strengthening the right to bring an action in the passenger's home jurisdiction.

The Convention also includes the following features:

- updated liability limits for baggage, cargo and delay;
- provision for the International Monetary Fund's Special Drawing Right (SDR) as the monetary unit;
- liability limits to be revised every five years to take account of inflation;
- advance payments by air carriers may be required by national law without delay in cases of aircraft accidents, to assist entitled persons to meet their immediate economic needs (payments will be deductible from the final settlement);
- air carriers must maintain adequate insurance to guarantee financial resources following aircraft accidents, and must submit proof of this when required by national law;
- proven damages, not punitive damages, are to be the basis of claims; and
- the simplification and modernisation of documentation related to passengers, baggage and cargo (providing for electronic ticketing and air waybills).

The text of the Montreal Convention is at [www.dotr.gov.au/aviation](http://www.dotr.gov.au/aviation). A guide to and analysis of the Convention, focussing on the provisions of interest to Australia, is at **Attachment D**.

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### Question for comment

1. ***Should Australia ratify the 1999 Montreal Convention?***
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<sup>2</sup> This liability limit is the same amount as provided for in the IATA MIA agreement and the European Union's Regulation No. 2027/97.

## The Concorde crash— an application of the Warsaw system



On 25 July 2000, in a widely publicised accident, an Air France Concorde, registered F-BTSC, Flight 4590 to New York, crashed shortly after take-off from Charles de Gaulle airport into a small hotel in the nearby village of Gonesse. The preliminary report from the French accident investigation team established that during take-off the front right tyre of the left main landing gear was destroyed, very probably because it ran over a 43cm twisted strip of metal on the runway. The destruction of the tyre had catastrophic consequences, being followed by a punctured fuel tank with a major fuel leak, ignition of the leaking fuel and an intense fire and two engine failures—contributing to the Concorde crashing less than a minute and a half after the destruction of the tyre.

The flight was carrying 100 passengers (96 Germans, one Dane, one Austrian and one American) and nine crew. The relatives of the crew of the aircraft are not covered by the Warsaw regime, but would probably receive compensation from the employer under workers' compensation arrangements.

The aircraft crashed during an international flight between Paris and New York, whilst on charter to a German tour operator, Peter Deilmann Cruises. The passengers were flying to join a cruise on the *MV Deutschland* that would take them to Ecuador, from where they could either fly home or continue to Sydney for the Olympics. For the purposes of this analysis, it has been assumed that the passengers flew to Paris on scheduled flights.

Between France, as the place of departure, and the United States, as the place of destination, the Warsaw Convention is the only relevant Convention. This is because the US has not ratified the Guadalajara Convention or any amending Protocols to the Warsaw Convention that France (or Germany) have ratified.

Under Article 28 of the Warsaw Convention, the passengers' relatives could bring an action in several different locations. Since the German tour operator was the carrier with whom the passengers entered into contract of carriage, the Convention would allow an action to be brought in a German Court. Under Article 22 the maximum liability per passenger would be 125,000 francs Poincaré which under German law is 12,666 Euros (approx. A\$20,200). To recover more, the relatives of the passenger would need to prove that the German tour operator, through its subcontractor, Air France, had committed wilful misconduct.

As the USA was the destination, the passengers' relatives could also bring an action in a US Court. Similarly, liability would be limited to 125,000 francs Poincaré, which under US practice would be US\$10,000 (approx. A\$19,200). Carriers that operate to the US are required to set a higher limit in their contracts of US\$75,000 (approx. A\$144,200) or US\$58,000 (approx. A\$111,500) in legal systems which have separate awards for legal costs.

Nevertheless, carriers that have entered into the 1995-96 IATA Inter-carrier Agreements, such as Air France, have agreed to a higher limit of 100,000 SDRs (approx. A\$242,000). Additionally carriers agree not to argue any defences under Article 20 of the Warsaw Convention. The German tour operator is not, however, a Party to these agreements. So, unless the tour operator had similarly waived the liability limit in its contracts with the passengers, these agreements would not benefit the victims' families in this instance. As in Germany, the relatives of the passengers would need to prove wilful misconduct to recover greater damages. US Courts, faced with the original low limits of liability, have tended to be more willing to explore the bounds of wilful misconduct, so the relatives' legal representatives may encourage them to pursue an action in a US Court. Also, US Courts allow juries to hear civil cases and it is generally accepted that juries are more willing to award higher damages.

Finally, the passengers' relatives could bring an action in the country in which the passengers purchased their tickets. If we assume the passengers purchased their tickets in the country of their nationality, their relatives could bring an action in Austria or Denmark, although this would depend on whether the German tour operator had a presence in those countries. If this were the case, the relatives would have the convenience of bringing an action in their home courts.

France, Germany, Denmark and Austria, as members of the European Union, are subject to EC Regulation No. 2027/1997. This regulation applies to all European air carriers, including airlines operating charter flights. This regulation imposes unlimited liability on air carriers and requires them not to argue any defences up to an amount of 100,000 SDR (approx. A\$242,000). It also requires the air carrier to make an advance payment to the passengers' relatives of 15,000 SDRs (approx. A\$36,300). Air France would be liable to the families of the passengers under this regulation, despite the silence of the Warsaw Convention on the liability of a charter airline.

If there had been an Australian on the flight, that person's rights would depend on where he or she bought his or her ticket. If the package was purchased in Australia through an agent, that person's relatives would probably not be able to bring an action in Australia since the German group does not do business here. Instead they would have to sue in German or US Courts. However, if the Concorde had been on a scheduled flight and if the ticket was purchased in Australia as part of a round the world fare then relatives could bring an action under the *Civil Aviation (Carriers' Liability) Act 1959*. Australia is a party to the Warsaw Convention as amended by The Hague Protocol, so this regime would apply. The Australian court decision would interpret the liability limit applied to the market price of gold formula. Under this method the maximum amount payable would be approximately A\$242,000, unless the relatives could prove the carrier was reckless. In comparison, an Australian carrier would face a limit of 260,000 SDRs (approx. A\$629,200).

In summary, it can be seen that with the various amending Protocols and other instruments, there is considerable diversity in the applicable law. It should be noted that this example is relatively straightforward. A more common scenario would involve a large wide bodied jet carrying hundreds of passengers travelling under tickets issued by a number of code share partners, with a multitude of places of departure and destinations.

In comparison, if the new Montreal Convention were in force and governed carriage, the relatives of the passengers would face a uniform system. They would not need to consider differing liability limits as Parties would have the same two tier system of 100,000 SDRs without fault and unlimited fault liability beyond that. They could sue both the tour operator, as charterer, and Air France, as the actual carrier. They could choose to bring their action in the passenger's home State, and if they wanted to argue the carrier was negligent, they could bring that action in the forum where it was easiest to present the evidence.

### The ratification process

The Montreal Convention was signed by 52 States at the end of the International Conference on Air Law in May 1999. The large number of signatures to the Convention indicates a very broad acceptance of the final text and augers well for it coming into force and, even more importantly, for its success as a replacement of the Warsaw System. The Convention comes into force once 30 States have ratified it.

The Department is seeking the views of interested parties on whether Australia should ratify the Convention. There has already been substantial industry consultation during Australia's consideration of the draft Convention, and prior to the introduction of the current liability limits and mandatory insurance provisions under the Carriers' Liability Act. The treaty ratification process requires further consultation with industry, relevant government agencies, and State and Territory governments. The Convention, together with a National Interest Analysis, will be tabled in Parliament and considered by the Joint Standing Committee on Treaties, prior to seeking Executive Council agreement to Australia ratifying the Convention.

The process will also require either amending the *Civil Aviation (Carriers' Liability) Act 1959*, which gives force of law to the Warsaw System and the air carriers' liability regime in Australia, or the drafting of a new Act. To maintain a harmonious regime in Australia, this legislation would most likely need to be supported by Australian State governments enacting complementary legislation to cover intrastate aviation activity.

As noted above, Australia has incorporated in its law higher carriers' liability limits than both the Warsaw System and the Montreal Convention for Australian carriers and it also mandates compulsory non-voidable insurance for commercial air carriers. The Department proposes that these provisions continue to apply.

While not a part of the ratification process, the Department proposes to maintain close contact with the relevant authorities in New Zealand and Singapore, and other countries in the Asia-Pacific Region, with a view to exploring the prospects for a harmonised approach on the application of the Montreal Convention to international air carriers.

### Carriers' liability for domestic carriage

As mentioned above, the Carriers' Liability Act, together with complementary State Acts, governs Australian liability law for domestic carriage. (See **Attachment C** for current carriers' liability arrangements in Australia.)

The adoption of the Montreal Convention by Australia, without any other action, would mean that the liability limit for domestic carriage would be A\$500,000, while a two tier system would operate for Australian registered international carriers and foreign carriers in Australia's jurisdiction (with an absolute liability up to 100,000 SDRs (approx. A\$242,000) for the first tier, and no limit for the second tier if damages are proven in excess of 100,000 SDRs).

There are a number of features of the Montreal Convention that Australia should seriously consider incorporating into its legislation regulating domestic carriage. If these provisions are not applied, international passengers will have benefits which are denied to domestic passengers. Amongst these provisions are:

- a second tier liability for passenger death and bodily/personal injury, providing for unlimited liability where there is a presumption of fault of the air carrier;
- regular reviews of liability limits to take account of inflation;
- advance payments for accident victims and their relatives to help meet their immediate economic needs;
- proven damages rather than exemplary damages as the basis for compensation claims;
- clarification of responsibilities between contracting and actual carriers, for code-sharing arrangements etc.; and
- modernisation of documentation relating to passengers, baggage and cargo to provide for electronic commerce.

These features of the Montreal Convention are outlined and discussed further in **Attachment D**.

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#### Question for comment

2. ***Should Australia adopt relevant provisions of the Montreal Convention for domestic carriage?***
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## Part II

# Other Aviation Insurance Issues

### Introduction

**T**HE Department has decided to take the opportunity of releasing this Discussion Paper to seek views on a number of other aviation insurance matters, particularly whether:

1. the mandatory requirement to hold non-voidable insurance covering liability for passengers should be extended to include all aircraft carrying passengers, whether fare-paying or not;
2. compulsory insurance should be required to cover damage by aircraft to third parties and property on the ground; and
3. certain administrative issues associated with insurance and aircraft ownership/registration should deserve further consideration – particularly if the above two ideas are implemented.

To some extent, these issues flow from consideration of the adoption of the Montreal Convention, although the connection is not direct. However, a central objective of each initiative is to better protect consumer interests.

### Compulsory non-voidable passenger liability insurance

Compulsory non-voidable carriers' liability insurance was introduced from January 1996, following the 1994 Monarch plane crash, to ensure that fare-paying passengers and their relatives are adequately compensated in the event of an aircraft accident. Part IVA of the *Civil Aviation (Carriers' Liability) Act 1959* (Carriers' Liability Act) requires that compulsory and non-voidable carriers' liability insurance is held by all operators of regular public transport and charter operators that carry passengers for hire or reward—that is, fare-paying passengers. The insurance requirement covers the operator's liability against claims for passenger death or personal injury from an aircraft accident.

**Jurisdiction:** The Carriers' Liability Act applies to all Australian operators falling under the Commonwealth's jurisdiction. It applies to interstate carriage, carriage within a Territory and between that Territory and another place in Australia, and to Australian international carriage. Aircraft operators involved in purely intrastate activity are covered by complementary State carriers' liability legislation, providing a nationally uniform carriers' liability regime.

**Non-voidable:** The Carriers' Liability Act requires non-voidable insurance to ensure that insurance companies cannot annul the insurance contract if the owner, operator or pilot fails to meet safety-related requirements; which is likely to have occurred in the case of most air accidents. These arrangements are modelled on those applying to the United States.

**Value:** Insurance must provide coverage for a minimum of A\$500,000 per domestic passenger, or 260,000 SDRs per international passenger. Foreign international operators serving Australia must demonstrate that they have adequate insurance cover, which is defined so that it equates to the requirement placed on Australian international carriers.

**Regular review of limit:** There is currently no provision to review the limit of liability to maintain parity with inflation.

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### Question for comment

3. *Should there be provision for reviewing the minimum passenger insurance coverage at regular intervals?*
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**Advance payments:** There is currently no requirement for carriers to make advance payments to accident victims to enable them to meet their immediate economic needs, as is provided for in Article 28 of the Montreal Convention. Article 28 provides for a carrier to make advance payments without delay following aircraft accidents, where required by the carrier's national law. If it is decided to apply this provision to Australian international carriers, it would be appropriate to also apply the provision to Australian domestic carriers, especially in view of the increasing awareness of the value and importance of mandated support to persons and their families entitled to claim compensation following a n aircraft accident.

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### Question for comment

4. *Should advance payments be made to persons and their families entitled to claim compensation following a domestic aircraft accident?*
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**Non fare-paying passengers:** Private operators carrying non fare-paying passengers, particularly general aviation aircraft carrying friends and relatives, are not covered by the current carriers' liability legislation. Passengers in cost sharing private operations, as defined in the civil aviation regulations, are also not covered by any compulsory insurance arrangements.

In practice, most owners and operators do have appropriate insurance, but there is no legal requirement to do so. In addition, there is currently no mechanism to ensure that passengers in private aircraft are made aware of the insurance cover of the pilot or owner of the aircraft. Consequently there have been a number of cases where a passenger involved in an accident has not received appropriate compensation following an aircraft accident, even though the courts found the person should have received compensation.

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#### Question for comment

5. ***Should non-voidable insurance be required for all passengers, whether fare paying or non fare-paying?***

**Crew, including airfreight and airwork crew:** Protection under the Carriers' Liability Act does not extend to crew, employees who are non fare-paying passengers and employees involved in freight or airwork operations. Employees should be covered by workers' compensation arrangements, but the question does arise, given developments in the law relating to passenger liability, whether this is sufficient.

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#### Question for comment

6. ***Should there be compulsory non-voidable insurance for aircrew, including airfreight crew and other personnel engaged in airwork, such as agricultural activities?***

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### Compulsory insurance for damage by aircraft to third parties on the ground

The *Damage by Aircraft Act 1999* was proclaimed on 8 November 2000, the day Australia's denunciation of the 1952 *Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface* (the Rome Convention) came into force. The *Damage by Aircraft Act* replaces the *Civil Aviation (Damage by Aircraft) Act 1958* which gave the Rome Convention force of law in Australia. The new regime provides for strict and unlimited liability<sup>3</sup> for compensating third parties on the ground suffering death, injury or damage from aircraft within the

Commonwealth's jurisdiction. It applies to all aircraft within Australia's territory that cause damage on the ground. Complementary State legislation covers intrastate operations, except for Queensland which is still working through the process of developing and enacting legislation. Once Queensland has its legislation in place, there will be a uniform strict and unlimited liability regime within Australia's jurisdiction covering all aircraft.

The Australian Government denounced the Rome Convention because it was markedly out of date. The limits on liability are low and quite inadequate, and there is little prospect of them being increased to a reasonable level under the Convention. Very few of our major aviation partners are adherents to the Convention. It has failed to provide international uniformity in the treatment of claims by third parties on the ground.

Incidents of aircraft causing damage to persons or property on the ground are rare, but there is potential for significant damage and, therefore, liability. For instance, if a B747 crashed in an inner city area, compensation claims for the death and injury of many people plus the destruction of buildings could be substantial. It is understood that most, if not all, commercial operators have adequate insurance and that many other operators also have cover for this type of eventuality.

However, at present there is no legal requirement for compulsory, non-voidable insurance to cover damage caused by aircraft to third parties and property on the ground. Consultation with industry during the preparation of the *Damage by Aircraft Act* showed support for the national introduction of mandatory insurance for third party on the ground liabilities.

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#### Question for comment

7. ***Should compulsory non-voidable insurance for damage by aircraft to third parties and property on the ground be compulsory for all operators?***

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### Administrative issues

#### Aircraft or owner/operator based insurance

At present in the aviation industry, insurance is authorised against the operator's Air Operators Certificate (AOC). Prior to the introduction of compulsory carriers' liability insurance in 1996, only the general type of aircraft was identified on the operator's AOC and there was no requirement for compulsory insurance. Since compulsory carriers' liability has been introduced, RPT aircraft have been identified on AOCs by the aircraft's serial number

<sup>3</sup> Strict liability does not depend on actual negligence or intent to cause harm but is based on the breach of an absolute duty to make something safe, whereas limited liability is liability restricted by law or contract.

and/or registration marks, but a charter aircraft operator's AOC still authorises the use of generic aircraft types and models, not individual aircraft.

This approach has created significant uncertainties over the risk exposure for the major Australian insurers, as they have had to provide insurance for an operator rather than cover for a particular aircraft. There is now frequent cross hiring of aircraft, regular code-sharing and other schemes where the owner or principal operator of the aircraft may not be the actual operator of the aircraft. This creates significant uncertainties in regard to the airworthiness of the aircraft being insured, and may potentially undermine compensation for injured parties in the event of an accident. Major Australian insurers have requested the carriers' liability insurance scheme be transformed into an aircraft based scheme.

The Civil Aviation Safety Authority's (CASA's) current regulatory review includes a review of standards for commercial air transport operations. This would remove the distinction between RPT and charter aircraft. It may be appropriate to move from operator-based to aircraft-based certification and insurance at the same time as the new classification is introduced.

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### Question for comment

#### 8. *Should insurance arrangements be linked to the aircraft or to the owner/operator?*

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#### **Annual aircraft registration**

The Department is also seeking views on whether the adoption of compulsory third party insurance for all aircraft, covering full passenger liability and liabilities for damage to third parties on the ground, would be facilitated by a national aircraft-based registration scheme, similar to the road transport industry. The concept could involve the use of stickers or labels which indicate that registration and insurances are current.

The following additional points are offered:

- annual registration under this proposal could require evidence of appropriate insurance cover and, perhaps, payment of a registration fee (to cover administrative expenses, including the costs of CASA oversight/regulation) before the registration is renewed. The fee could take account of aircraft size, weight, specifications, usage (passenger, cargo, or airwork), and geographic operating locations (eg. controlled/

uncontrolled/remote areas);

- it may be considered desirable to also build into the annual registration scheme notification of financial encumbrances on aircraft – implementing the scheme envisaged by Parliament in the recent addition of s.27A to the *Air Navigation Act 1920*;
- the registration scheme could be administered by CASA or, alternatively, contracted out;
- insurance companies would be required to provide CASA or the scheme administrator with details of insurances held by aircraft owners/operators, or this could be the responsibility of the owner;
- labels affixed to aircraft could provide evidence to passengers and CASA inspectors that appropriate insurances are held;
- a label or notice could be fixed inside an aircraft to advise non fare-paying passengers that the owner/operator does not carry appropriate insurance.

The introduction of a scheme with some or all of the features mentioned above would clearly require substantial industry consultation and, most likely, major legislative changes.

A Sub-committee under CASA's Standards Consultative Committee has been established to develop a Discussion Paper on a new aircraft registration system in consultation with the aviation industry. The aim is to develop a robust and simple system for allocating, amending, transferring and cancelling aircraft registrations; to identify who is responsible for making decisions about the maintenance of an aircraft; and be consistent with Australia's obligations under the Chicago Convention. Consideration is also being given to whether a register of encumbered aircraft should be part of the scheme, or the registration system be upgraded so aircraft owners can use it as proof of ownership. The Sub-committee is to report to CASA's Director of Aviation Safety by 27 April 2001. A Discussion Paper should be released for public comment soon thereafter.

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### Questions for comment

9. *Should there be an annual aircraft registration scheme, linked to compulsory third party insurance ?*
  10. *Should there be a requirement for aircraft engaged in non-RPT/charter operations to display a notice in the aircraft advising passengers of the insurance cover provided?*
-

## Part III

# Questions for Comment

The Department would welcome your comments and views on whether Australia should ratify the 1999 Montreal Convention, your views on any or all of the issues raised in this paper, and any other relevant comments or information you may care to submit. The Discussion Paper and Montreal Convention may be downloaded from the Department's web site at: [www.dotrs.gov.au/aviation](http://www.dotrs.gov.au/aviation).

### The Montreal Convention

1. Should Australia ratify the 1999 Montreal Convention?
2. Should Australia adopt relevant provisions of the Montreal Convention for domestic carriage?

### Other aviation insurance issues

3. Should there be provision for reviewing the minimum passenger insurance coverage at regular intervals?
4. Should advance payments be made to persons and their families entitled to claim compensation following a domestic aircraft accident?
5. Should non-voidable insurance be required to cover all passengers, whether paying or non fare-paying?
6. Should there be compulsory non-voidable insurance for aircrew, including airfreight crew and for other personnel engaged in airwork, such as agricultural activities?
7. Should compulsory non-voidable insurance for damage by aircraft to third parties and property on the ground be compulsory for all operators?
8. Should insurance arrangements be linked to the aircraft or to the owner/operator?
9. Should there be an annual aircraft registration scheme, linked to compulsory third party insurance?
10. Should there be a requirement for aircraft engaged in non-RPT/charter operations to display a notice in the aircraft advising passengers of the insurance cover provided?

### Submissions

Submissions should be sent by 20 April 2001 to:

Aviation Industry Policy

Aviation

Department of Transport and Regional Services

GPO Box 594

CANBERRA ACT 2601

Phone: 02 6274 7454

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# International Air Carriers' Liability— The Warsaw System

The *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, done at Warsaw on 12 October 1929 (the Warsaw Convention) agreed to limit the potential liability of the fledgling air carrier industry in accidents involving personal injury or death to passengers in exchange for limiting the carriers' defences. The Warsaw System comprises the Warsaw Convention together with the following legal instruments that amend and update the Warsaw Convention:

- *Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929*, done at The Hague on 28 September 1955 (The Hague Protocol).
- *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, done at Guadalajara on 18 September 1961 (the Guadalajara Convention).
- *Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955*, done at Guatemala City on 8 March 1971 (Guatemala City Protocol).
- Additional Protocols, No.1, 2, 3, and Montreal Protocol No. 4, done at Montreal on 25 September 1975 (the Montreal Protocols).

These Conventions and Protocols provide for arrangements relating to air carrier compensation and liability limits in the event of death or bodily injury to a passenger, and damage or loss to baggage or cargo, and documentation for passengers, baggage and cargo. The main features of each of these legal instruments are outlined below:

## The Warsaw Convention (1929)

*The Convention for the Unification of Certain Rules Relating to International Carriage by Air*, done at Warsaw on 12 October 1929.

Entered into force: 13 February 1933

Australia signed: 12 October 1929

Total ratifications: 149

Australia ratified: 1 August 1935

- Imposes strict liability on carriers for death or bodily injury to passengers; destruction or damage to cargo and baggage; and damage caused by delay in the carriage of passengers, cargo and baggage.
- Limits the liability of carriers to:
  - 125,000 francs Poincaré for the death or bodily injury of a passengers (approx. US\$8,300)<sup>1</sup>,
  - 250 francs Poincaré per kilogram for loss or damage to registered baggage and of cargo, and
  - 5,000 francs Poincaré per passenger for loss or damage to unregistered baggage which the passenger takes charge of himself.
- Under special contract the carrier and passenger may agree on a higher limit of liability, but not a lower limit.
- Permits a claimant to recover amounts in excess of the liability limits if he or she proves that the damage was caused by the carrier's wilful misconduct.
- Permits several contractual methods by which a passenger or air cargo consignor can contract with a carrier for higher liability limits, but prevents contractual lowering of the limit or altering the rules of liability.
- Permits a carrier to absolve itself of liability if it proves that it has taken all necessary measures to avoid the damage or delay or if it proves contributory negligence.
- Imposes requirements on carriers and air cargo consignors in relation to the provision of documentation for passengers, baggage and cargo.

<sup>1</sup> One francs Poincaré equals 65 ½ milligrams of gold of millesimal fineness 900—as defined in Article 22 of the Warsaw Convention.

## The Hague Protocol (1955)

*Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955.*

Entered into force: 1 August 1963

Australia signed: 1956

Total ratifications: 131

Australia ratified: 23 June 1959

The main amendments were:

- Increased the limitation of carriers' liability in the event of death or bodily injury to a passenger to 250,000 francs Poincaré per passenger (approx. US\$16,600).
- Provided for plaintiffs to 'break' the limit of liability set out in the Warsaw Convention, if damage is caused by the carrier's 'wilful misconduct'.

Other amendments were:

- Simplifying the requirements for passenger tickets and baggage checks.
- Enabling a carrier to contract out of the strict liability provisions in relation to carriage of cargo to the extent that damage caused to goods or baggage is caused by 'the inherent defect, quality or vice' of the cargo carried.
- Extending the liability limits to cover the employees and agents of the carriers.
- Extending the time in which claims for damage to cargo and baggage must be made from 7 days to 14 days and from 3 days to 7 days, respectively.
- Extending the time in which claims for delay must be made from 14 days to 21 days.

States which are not a Party to the Warsaw Convention but which sign up to this Protocol are considered to be a Party to the Warsaw Convention as modified by The Hague Protocol. Together these are referred to as the Warsaw–Hague Convention.

## The Guadalajara Convention (1961)

*Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, done at Guadalajara on 18 September 1961.*

Entered into force: 1 May 1964

Australia signed: 19 June 1962

Total ratifications: 82

Australia ratified: 1 May 1964

- Distinguishes between the actual and contracting carrier, and provides that *both* are liable to the passenger, as if they were the contracting carrier for the purposes of the Warsaw Convention. The passenger is entitled to claim against either or both the actual or contracting carrier for bodily injury, loss or damage to baggage and cargo or for delay. The Convention aims to cover such arrangements as leasing, chartering, code-sharing and interlining; commercial practices which have come into prominence since the Warsaw Convention was developed in the late 1920s.

## Guatemala City Protocol (1971)

*Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, done at Guatemala City on 8 March 1971.*

Entered into force: unlikely

Australia signed: No

Total ratifications/accessions: 12

Australia ratified: No

- Imposed absolute or 'risk' liability on carriers, that is, carriers were unable to disavow responsibility to compensate passengers where they were without fault.
- The liability limit was increased to 1,500,000 francs Poincaré (approx. US\$100,000).
- Contained a facility for periodic review of the limits.
- A carrier could reduce its liability if it could establish that a passenger's injuries were the result of the passenger's health, as well as establishing contributory negligence.
- Permitted a passenger to institute proceedings in the courts of the State of his or her domicile or permanent residence, provided the defendant carrier has a place of business in that State (known as the 'fifth jurisdiction').

Even though the Protocol was largely engineered by the United States and contained many reforms the US had been seeking for over a decade, this Protocol is inoperative largely because the US Senate refused to ratify it.

### Additional Protocols Nos 1, 2 and 3, done in Montreal on 25 September 1975

Protocol No. 1 amended the Warsaw Convention  
 Protocol No. 2 amended The Hague Protocol  
 Protocol No. 3 amended the Guatemala City Protocol

#### Nos 1 & 2

Entered into force: 15 February 1996

Australia signed: No

Total ratifications: No.1 46  
 No.2 48

Australia ratified: No

#### No. 3

Entered into force. unlikely

Australia signed: No

Total ratifications: 24

Australia ratified: No

- ICAO adopted these Protocols in 1975 to replace the francs Poincaré with the IMF Special Drawing Rights (SDR) unit, in order to eliminate the problems associated with the difficulty of valuing the outdated francs Poincaré. (One SDR is approx. A\$2.42.)
- By ratifying the Protocol, the State becomes a Party to the instrument which the Protocol amended if the State was not already a Party.

The Montreal Protocols Nos 1 and 2 did not come into force until 15 February 1996, with the majority of supporting States being European. Montreal Protocol No. 3 is unlikely to come into force as the US refused to ratify the Guatemala City Protocol.

### Montreal Protocol No 4., done at Montreal on 25 September 1975

Entered into force: 14 June 1998

Australia signed: 24 April 1991

Total ratifications: 49

Australia ratified: 14 June 1998

- This Protocol covers cargo compensation arrangements. Liability is absolute and unbreakable (17 SDRs per kilogram), unless the consignor makes a 'special declaration' notifying the carrier of the particular value of the cargo. The Protocol replicates the rules relating to carriers' liability set out in the Guatemala City Protocol in respect of loss of or damage to cargo.
- Eliminated the outmoded cargo documentation provision of the Warsaw Convention, thereby facilitating the use of electronic records for international air cargo commerce.
- By ratifying the Protocol, the State becomes a Party to the instrument which the Protocol amended if the State was not already a Party.

#### Comment

Most States operate under the Warsaw Convention amended by The Hague Protocol and Montreal Protocol No. 4. However, the United States considered the limits of The Hague Protocol were too low and so has never ratified the Protocol.

#### *Summary of Australian position*

Australia has ratified the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, and Protocol No. 4.

# International Air Carriers' Liability— Non-Warsaw System Arrangements

In the absence of international agreement on the manner of reforming and modernising the Warsaw System for air carriers' liability, major aviation countries have achieved improvements through a number of unilateral, multilateral or regional arrangements. These efforts at reform have been primarily directed at redressing the inadequate compensation available to passengers for death or bodily injury, a problem exacerbated by high inflation during the 1970s and 80s. The International Air Transportation Association (IATA) has played a key role in these initiatives.

## Montreal Inter-carrier Agreement, 1966

In response to the failure of the International Civil Aviation Organization (ICAO) to gain agreement of States to increase the liability limits of carriers under the Warsaw System in the 1960s, IATA took matters into its own hands and member carriers developed an agreement to increase limits on international flights to, from or with an agreed stopping point in the United States. The Agreement relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (Montreal Inter-carrier Agreement) was approved by IATA on 13 May 1966. It was initiated by the US to protect the interests of American travellers in the short term, as the US considered The Hague Protocol was inadequate, and had not ratified it. The agreement was possible because Article 22(1) of the Warsaw Convention permits a carrier and passenger to agree 'by special contract' to a higher limit of liability than that set out in the Convention. The main features of the agreement are:

- It is a private agreement between international airlines, rather than an international treaty between States, but operates within the Warsaw framework.
- It provides that IATA member carriers will enter into special contracts with passengers on international flights to, from or with an agreed stopping place in the US, which impose a strict liability on the carriers up to US\$75,000 inclusive

of legal fees and costs, or US\$58,000 net of legal fees and costs. In time, all foreign carriers operating services to or from the US accepted the terms of this Agreement.

- Carriers agree to waive the 'all necessary measures' defence in Article 20 of the Warsaw Convention up to these limits.

## Malta Agreement

The Governments of some west European countries decided in 1974 to press their national airlines to adhere to an informal agreement similar to the 1966 Montreal Inter-carrier Agreement. The Malta Agreement resulted in some European flag carriers waiving the liability limits set out in the Warsaw System and imposing a limit of US\$58,000 net of legal fees and costs, similar to the 1966 Montreal Agreement. However, carriers adhering to the Malta Agreement, unlike those following the Montreal Agreement, did not waive the 'all necessary measures' defence in Article 20 of the Convention.

## Japanese carriers' conditions of carriage and advice on waiver of liability limits

In November 1992, the Japanese airlines broke ranks with the rest of the world's airlines, and abandoned liability limits wholesale. The move was not entirely unexpected; in light of Japan's culture of social responsibility and mutual obligation. Adherence to the liability rules of the Warsaw Convention placed Japanese airlines in a 'shameful' position *vis-à-vis* their Japanese customers. The 1985 crash of a Japan Air Lines B747 on a domestic flight, in which 529 passengers died, had resulted in compensation payouts well in excess of those prescribed by the Warsaw System. It seemed illogical that passengers on a domestic flight would have access to appropriate compensation, whereas passengers on the same plane but on an international flight would not. As with the Montreal Agreement and the Malta Agreement, Japanese airlines took advantage of the 'special contracts' clause in Article 22(1) of the Warsaw Convention, and agreed that their liability for passenger death or bodily injury

would be unlimited. They also waived the Article 20 'all reasonable measures' defence for the first 100,000 SDRs of any claim. The reform was gratifying for passengers of Japanese airlines. However, as Japan is not a party to the Guadalajara Convention, passengers on a Japanese airline's aircraft who have contracted with a non-Japanese airline (e.g. because the two airlines code-share on the service) may not be able to take advantage of Japanese airlines' unlimited liability.

### **European Union Council Regulation No. 2027/97 on air carrier liability**

In late 1995 the European Union (EU) followed the Japanese initiative, proposing that air carriers of its member States should have unlimited liability; absolute for the first 100,000 SDRs (subject to contributory negligence), and subject to the Article 20 'all reasonable measures' defence for so much of a claim that exceeds 100,000 SDRs. Carriers are required to have adequate insurance. In addition, carriers of EU member States are required to make advance payments to passengers or their relatives within 15 days of them becoming aware of a compensable injury. The Regulation applies to intranational travel, as well as international travel. The proposal became concrete on 9 October 1997, with the making of European Council Regulation No. 2027/97. The Commission is currently amending the regulation to bring it in line with the provisions of the Montreal Convention, to ensure that there is a uniform system of liability for international and national air transport within the European Community. The European Commission is also proposing the Community approve the Montreal Convention.

### **The IATA and ATA Inter-carrier Agreements (1995-1997)**

At the same time as the European Union was reviewing the compensation limits for its carriers, IATA was looking at replacing the 1966 Montreal Agreement with a new multi-carrier agreement to enter into special contracts with passengers. This new agreement in fact took the form of three private agreements between IATA and ATA member airlines:

- The IATA Inter-carrier Agreement on Passenger Liability (IIA) of 31 October 1995.
- Agreement on Measures to Implement the IATA Inter-carrier Agreement (MIA), 1996.
- The (American) Air Transport Association's

Provisions Implementing the IATA Inter-carriage Agreement to be Included in Conditions of Carriage and Tariffs (IPA), 1997.

The IIA is an umbrella agreement under which the carriers Party to it agree to take action to waive the liability limitations on recoverable compensatory damages in Article 22(1) of the Warsaw Convention.

The MIA then further details what is expected of air carriers in implementing the IIA:

- The carrier shall not invoke the Warsaw Convention's Article 22(1) liability limitation for any claim for recoverable compensatory damages under Article 17 of the Convention.
- No carrier will avail itself of any defence under Article 20(1) of the Convention with respect to any claim which does not exceed 100,000 SDRs unless, at the option of the carrier, the 100,000 SDRs can be raised or lowered for some routes if authorised by the relevant governments with responsibilities for the routes involved.
- The carrier reserves all defences except, as expressly contained within the MIA Agreement, and also reserves its right to proceed against third parties for contribution and indemnity.
- At the option of the carrier, the carrier may agree that recoverable compensatory damages may be determined by reference to the law of domicile or permanent residence of the passenger.
- Neither the waiver of the limits nor the waiver of the defences shall be applicable in respect to claims made by public social insurance or similar bodies, however asserted.

While a large number of air carriers have signed the IATA agreements, it is by no means universally adopted. IATA was represented at the International Conference on Air Law in May 1999 and supports the Montreal Convention.

The Air Transport Association of America reinforces the IATA agreements by detailing how the IIA and the MIA are to be implemented in relation to the US, including advice to international passengers. The IPA applies to US carriers worldwide, and specifies the terms and conditions relating to liability for passenger death or bodily injury which are to be included in contracts for carriage by air. The US Department of Transportation approved the IIA, MIA and IPA on 8 January 1997 subject to the

following conditions:

1. The MIA option for less than 100,000 SDRs would not apply in the US.
2. The optional inapplicability for social agencies of the waivers of the limit and Article 20(1) carrier defence of proof of non-negligence would not apply to US agencies.

### **Comment**

Today the rules relating to liability for carriage by air are fractured into dozens of regimes around the world, differing principally in relation to the measure of compensation a passenger would be awarded for death or bodily injury, and under what circumstances. Passengers flying on air carriers party to IATA's

IIA agreement are subject to one set of rules, passengers on Japanese airlines are subject to another set of rules, passengers flying on EU carriers are subject to a yet another different set of rules, and passengers flying on Australian carriers are subject to further modified rules. Behind all of these industry-inspired or unilateral government initiatives remain the Warsaw Conventions and Protocols, as applied and interpreted by domestic courts throughout the world. Carriers (and their passengers) are subject to vastly different regimes depending upon which treaties their government are parties to and which intercarrier agreements they have signed.

# Current Air Carriers' Liability Arrangements in Australia

The *Civil Aviation (Carriers' Liability) Act 1959* (Carriers' Liability Act) gives force of law to the Warsaw System in Australia, enacting as the law of Australia those components of the Warsaw System which have been signed and ratified by Australia; that is the Warsaw Convention, The Hague Convention, the Guadalajara Convention and Montreal Protocol No. 4. The Warsaw System imposes strict but limited liability on international air carriers for the carriage of passengers, baggage and cargo by air.

However, Australia has unilaterally taken a number of steps to address the deficiencies of the Warsaw System. Since 1996, the Carriers' Liability Act has provided a A\$500,000 liability limit for Australian domestic carriers and 260,000 Special Drawing Rights (SDRs) for Australia's international carriers. Mandatory non-voidable insurance is required for all domestic carriage and most international carriage of passengers for hire or reward. It is not required for private aircraft operations. This is to ensure that insurance companies are not able to avoid payments following an accident because safety regulations were not adhered to.

The Carriers' Liability Act was adopted in 1959 to give effect to the Warsaw Convention as amended by The Hague Protocol (Warsaw-Hague Convention). The Act comprises the following Parts, which recognise instruments of the Warsaw System and provide for Australia's higher liability limits and mandatory insurance for commercial passenger carriers.

Part II enacts the 1929 Warsaw Convention as amended by The Hague Protocol 1955 (text at Schedule 2). It applies to carriage between Australia and a foreign country that adheres to the two agreements.

Part III of the Carriers' Liability Act gives force of law to the 1929 Warsaw Convention (text at Schedule 1 of the Act). This part applies to carriage between Australia and a foreign country that is only a Party to the Warsaw Convention.

Part IIIA of the Act enacts the 1961 Guadalajara Convention as a law of Australia (Schedule 3). The Guadalajara Convention distinguishes between the actual and contracting carrier (i.e. it deals with code share, charter and interlining arrangements), and provides that both are liable to the passenger as if they were the contracting carrier for the purposes of the Warsaw Convention. The passenger is entitled to claim against either or both the actual or contracting carrier for bodily injury, loss or damage to baggage and cargo or delay depending on the circumstances.

Part IIIB provides for enacting into law the Guatemala City Protocol of 1971 and Montreal Protocol No. 3 (Schedule 4). The Part is not yet in force, and is unlikely to be enacted as law of Australia as the two instruments have been superseded and are unlikely to come into force.

Part IIIC covers air carriage to which Montreal Protocol No. 4 applies; that is the Warsaw Convention as amended at The Hague

in 1955 and by Protocol No 4 of Montreal in 1975 (Schedule 5).

Part IV of the Act sets the rules for carriers' liability for the carriage of passengers, baggage and cargo both domestically and between Australia and countries that are not party to the Warsaw Convention, The Hague Protocol, the Montreal Protocol No. 4 or the Guadalajara Convention. It covers carriage between States and Territories. It essentially adopts the Warsaw rules, subject to the following important modifications:

Limits of liability are set at A\$500,000 for domestic carriers and 260,000 SDRs for international carriers for passenger death or personal injury, A\$1600 for registered baggage, and A\$160 for hand luggage.

Liability for domestic carriage is absolute. The carrier has no 'all necessary measures' defence. The liability limits are unbreakable and there is no capacity for a person to receive compensation in excess of the limits by establishing intentional or reckless conduct, wilful misconduct, gross negligence etc.

While application of the Montreal Convention is limited to bodily injury, under the Carriers' Liability Act carrier liability and mandatory insurance extends to personal injury. Personal injury can include bodily injury, sickness, disease, fright, shock or mental anguish, and psychiatric injury.

Part IVA: Mandatory insurance for air operators against liabilities for death or injury caused to passengers carried under the Carriers' Liability Act commenced in early 1996. Part IVA imposes mandatory non-voidable insurance requirements on air carriers flying to, from, or within Australia. No operator is allowed to carry passengers for hire or reward without appropriate insurance cover. In the case of domestic carriage, the minimum insurance level is \$500,000 per passenger. International carriers, including foreign carriers serving Australia, are required to provide evidence that they are insured to a level of 260,000 SDRs per passenger. Carriers must have these levels of insurance irrespective of their liabilities under Warsaw or Warsaw-Hague, and include liabilities under Guadalajara and Montreal Protocols Nos 3 and 4.

It is a standard condition in most insurance contracts that an insurer is not liable to pay compensation to a policy holder who breaches the law. Mandatory non-voidable insurance prevents insurers avoiding paying compensation in respect of passengers who are killed or injured because of a breach of a legal aviation safety requirement by an operator. The requirements are similar to Part 205 of the US Federal Aviation Regulations. CASA is responsible for administering these arrangements.

The arrangements under the Commonwealth Carriers' Liability Act do not apply to intrastate operations by licensed Regular Public Transport operators. However, the States have adopted complementary legislation to ensure a uniform regime of carriers' liability and mandatory non-voidable insurance in Australia.

*Convention for the Unification of Certain Rules for  
International Carriage by Air,*  
done at Montreal on 28 May 1999 (Montreal Convention)<sup>1</sup>  
—Analysis

### Background

While efforts to revise the Warsaw Convention first began in 1935, the origins of the *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention) can be said to date from the 31<sup>st</sup> session of the International Civil Aviation Organization (ICAO) Assembly in 1995. The Assembly mandated the Council of ICAO to continue its efforts to revise the Warsaw System. An ICAO Secretariat Study Group was set up to assist the Legal Bureau, and this group recommended a new Convention with a two-tier liability regime. In March 1996, the Council requested the Legal Bureau to prepare a draft instrument. ICAO's Legal Committee considered the resultant draft from 28 April - 9 May 1997, and the Legal Committee's draft was further refined in April 1998 by a Special Group on the Modernisation and Consolidation of the 'Warsaw System'. The Special Group's report formed the basis of the draft Convention considered by the International Conference on Air Law, 10-29 May 1999. The Conference was attended by 121 ICAO Contracting States, one non-Contracting State and 11 international organisations. The Convention produced by the Conference was signed by 52 States and the Final Act of the Conference was signed by 107 States, including Australia. To date (January 2000) seven States (Belize, Macedonia, Japan, United Arab Emirates, Slovakia, the Czech Republic and Mexico) have deposited instruments of ratification with ICAO.

### The Montreal Convention— an outline of its key provisions and reforms

The new Montreal Convention incorporates most of the provisions of existing instruments but combines them as a single package. However, the Montreal Convention goes further than consolidating existing texts. There are a number of innovative mechanisms, refinements and reforms in the new Convention. A summary and comment on the main provisions of the Montreal Convention follows:

### Chapter I—General Provisions

#### Article 1—Scope of Application

The Montreal Convention applies to commercial international carriage of persons, baggage and cargo performed by aircraft for reward. It includes flights between two States Party to the Convention or a round trip from a State Party to the Convention, with an agreed stopping point in another States, regardless of whether the State is a Party to the Convention. This includes several successive carriers when regarded as a single operation by the parties involved. It includes contracting and actual carriers as covered in Chapter V (see below).

#### Article 2—Carriage Performed by State and Carriage of Postal Items

The Convention applies to carriage performed by governments and public bodies, as well as private bodies.

Article 2 provides that the Convention shall not apply to postal items, except in so far as clarifying that international air carriers shall only be liable to the relevant postal administration in accordance with the rules applicable to the relationship between carriers and postal administrations.

### Chapter II—Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

#### *Electronic commerce—ticketing and air waybills*

This Chapter provides for documentation for the international movement of passengers, baggage and cargo, opening the way for electronic tickets and air waybills. It covers the description of the content of passenger tickets and air waybills, processes to be followed, responsibilities of the parties, and enforcement provisions.

This is a key provision of the Montreal Convention, as it provides for the simplification and modernisation of documentation relating to passengers, baggage and cargo, enabling ticketless travel using electronic

<sup>1</sup> The text of the Montreal Convention is available at: [www.dotrs.gov.au/aviation](http://www.dotrs.gov.au/aviation)

documentation. Such documentation is already being widely used by the aviation industry for both passenger ticketing and cargo movement, while acknowledging that this does not meet the requirements of Article 4 of the 1929 Warsaw Convention. Significantly, it eliminates the need for cargo consignors to complete detailed paper-based air waybills so that simplified electronic records can be used.

As long as the passenger or consignee has adequate evidence of the contract and provided it is in a form that meets the requirements of border control agencies, there is no reason why documentation should not be electronic. This is in keeping with practices being adopted in other transport modes and commerce generally. Australia has been at the forefront of international initiatives to simplify and speed-up the process of movement across borders by using electronic methods.

### **Chapter III—Liability of the Carrier and Extent of Compensation for Damage**

This Chapter covers the liability framework for passengers, baggage and cargo including for delay.

#### **Article 17—Death and Injury of Passengers—Damage to Baggage**

The carrier is liable for damage sustained in the case of death or bodily injury of a passenger and for damage sustained to checked baggage after twenty-one days and to unchecked baggage.

#### *Mental injury*

There was considerable debate prior and during the May 1999 diplomatic conference on whether the Montreal Convention should include compensation for mental injury following an aircraft accident. In the end mental injury was excluded and injury was confined to bodily injury.

In September 1998, the Full Federal Court concluded that carriers subject to Part IV of the Carriers' Liability Act have absolute liability in respect of mental injuries sustained by passengers; that is, personal injury extends to mental health as well as bodily harm. Despite absolute liability, a passenger must still establish that he or she has suffered a mental injury on board the aircraft or in the course of any of the operations of embarking or disembarking.<sup>2</sup> This means that Australian domestic passengers can claim mental injury, but Australian international passengers cannot.

The Department would be interested to have the views of the industry regarding the treatment of mental injury, but it is currently inclined to the view that there are distinct advantages to be gained from introducing uniformity between Australian international and domestic carriage. Thus, whatever construction is adopted—whether it be 'personal injury' as in Part IV of the Carriers' Liability Act or 'bodily injury' as in the Montreal Convention—it should apply to all Australian carriage.

#### **Article 18—Damage to Cargo**

The carrier is liable for damage sustained from the destruction or loss of or damage to cargo, unless it is defective. It preserves the significant advances achieved by Montreal Protocol No.4.

#### **Article 19—Delay**

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. But the carrier is not liable if it proves that it and its employees and agents took all reasonable measures or it was impossible to take such measures. This is a long standing provision of the Warsaw System, but there is no equivalent provision in Australian legislation with regard to domestic carriage.

#### **Article 20—Exoneration**

This article details the conditions under which a carrier can be exonerated from liability, if it proves the damage was caused by the negligence of the person claiming compensation.

#### **Article 21—Compensation in Case of Death or Injury of Passengers**

##### *Two-tier liability system for passenger death or bodily injury*

This article is central to the Montreal Convention. The concept of unlimited liability for death or injury to a passenger is the major development from the Warsaw system. For passengers, liability is based on a two-tier approach. The first tier provides for strict liability up to 100,000 SDRs (approx. A\$242,000) of proven damages irrespective of the carrier's fault—only in the case of contributory negligence of the passenger or person claiming compensation can the carrier be partly or wholly exonerated. There is no limit of liability in the second tier (i.e., for proven damages claims in excess of 100,000 SDRs), where there is a presumption of

<sup>2</sup> *South Pacific Air Motive Pty Ltd & Anor v Magnus & Ors* (1998) 157 ALR 443.

fault of the air carrier. Thus the carrier, rather than the claimant, bears the burden of proof. This represents an important compromise between the more advanced aviation States that favour no limits on liability and the bulk of the aviation States that wish to retain some protection for their carriers.

In practice, many foreign carriers entering Australia have already voluntarily accepted the liability limits under the IATA agreements that are higher than those applying under the Warsaw System.

Australian international carriers are currently subject to a higher liability limit (260,000 SDRs or around A\$500,000) than applies under the Warsaw System. The first tier limit of 100,000 SDRs set by the Montreal Convention could not be exceeded, with respect to foreign carriers, by Australian law. However, there is no bar to Australia continuing to apply higher limits of liability to its own carriers and the Department proposes that Australian carriers be subject to a first tier limit of 260,000 SDRs.

#### **Article 22—Liability Limits in Relation to Delay, Baggage and Cargo**

Article 22 of the Montreal Convention provides for liability of the air carrier for baggage (either accompanied or unaccompanied) up to a limit of 1,000 SDRs for each passenger, unless a special declaration is made to the carrier by the passenger. If the carrier admits loss of checked baggage or checked baggage has not arrived after 21 days a passenger may make a claim. The liability limit for cargo is 17 SDRs per kilogram. Where damage is caused by delay the liability of a carrier for each person is 4,150 SDRs. But this does not apply if the carrier can prove it and its employees took reasonable care to avoid the damage. Court costs may also be awarded to the claimant.

These provisions represent substantial improvements on the current Warsaw System arrangements.

#### **Article 23—Convention of Monetary Units**

##### *Special Drawing Right (SDR)*

Article 23(1) of the Montreal Convention provides for compensation limits to be expressed in SDRs rather than gold—the obsolete francs Poincaré of the Warsaw Convention. The Montreal Protocols Nos 1–3 were also intended to replace the francs Poincaré measure with SDRs. The use of SDRs will remove potential legal arguments over the method of converting the francs Poincaré to Australian currency, which are very

uncertain. The majority of ICAO's member States are members of the International Monetary Fund (IMF), making the SDR widely acceptable as the reference currency. For those States not member of the IMF, the Montreal Convention provides that reference can be made to the equivalent US\$.

The Carriers' Liability Act already specifies compensation in SDRs.

Article 23 (2) provides for States which are not members of the IMF to use monetary units based on sixty-five and a half milligrammes of gold of millesimal fineness nine hundred (an equivalent to the francs Poincaré). The unit may be converted into national currency. It is not considered necessary to adopt this measure into Australian legislation.

#### **Article 24—Review of Limits**

##### *Regular review of liability limits (escalator clause)*

Article 24 provides for a quasi-automatic review mechanism, with a regular review of carriers' liability limits every five years to take account of inflation. This should help to ensure that the limits specified in the Convention remain at realistic levels. It was deemed necessary in order to maintain the credibility of the new Convention. A major problem with the Warsaw System has been the low level of limits, exacerbated over time by inflation.

#### **Article 25—Stipulation on Limits**

This article provides for carriers stipulating that the contract of carriage may be subject to higher limits of liability than those provided for under the Convention, or for no limits at all. This article provides the legal basis for Australia adopting higher limits for the first tier for its carriers.

#### **Article 26—Invalidity of Contractual Provisions**

Carriers cannot fix a lower limit of liability or other measure to relieve the carrier of its liability.

#### **Article 28—Advance Payments**

Provision is made under Article 28 for States to make laws to require their carriers to make advance payments without delay following aircraft accidents, to assist victims or their relatives meet their immediate economic needs. These payments are not to constitute recognition of liability, and may be offset against any amounts of compensation subsequently paid as damages by the carrier. Note the Article does not permit Australia to subject foreign carriers to this requirement.

The provision for advance payments is consistent with law and practice in Europe and the United States. The Department proposes that Australian international carriers be required to make advance payments, in the event of the death of a passenger, to the family of the victim. An amount of A\$50,000 is suggested.

### **Article 29—Basis of Claims**

#### *Proven damages rather than punitive damages compensation*

Article 29 expressly provides that punitive, exemplary or other non-compensatory damages may not be recovered in any claim arising from international carriage by air.

### **Article 30—Servants, Agents—Aggregation of Claims**

If employees or agents act within the scope of their employment, they are entitled to avail themselves of the conditions and limits of liability the carrier is entitled to under the Convention.

### **Article 33—Jurisdiction**

#### *Fifth Jurisdiction*

A significant addition to the Convention is Article 33 which provides for a fifth jurisdiction, based on the passenger's principal and permanent residence, in which a plaintiff can bring forward legal action. Under the Warsaw System there are four jurisdictions:

- a court in the State where the carrier is ordinarily resident;
- a court in the State where the carrier has its principal place of business;
- a court in the State where the carrier has an establishment by which the ticket was purchased or contract was made; and
- a court in the State of the passenger's destination.

The Convention adds a fifth jurisdiction whereby legal action may be filed in the passenger's domicile State. To apply, the following criteria must be met:

- the State must be the principal or permanent residence of the passenger; and
- the State must be one to or which the carrier operates, either on his own aircraft or on another aircraft on the basis of a commercial agreement (code share arrangements etc.); and
- the State must also be one in which the carrier, or another carrier with which it has a commercial agreement, has leased or owned premises from which it conducts its business.

Under this article, most Australian citizens will have access to Australian courts to pursue claims under the Convention.

However, Australian carriers may potentially be exposed to litigation in courts such as those of the United States. But, Australia's international carriers already fly to the US and have insurance to cover claims in US courts. They, together with most major airlines, have also signed the IATA Intercarrier Agreement on passenger liability, which essentially provides for unlimited liability. In addition, Article 29 of the Montreal Convention introduces a further protection for carriers by limiting claims for damages to proven (i.e. no punitive, exemplary or any other non-compensatory) damages only.

## **Chapter IV—Combined Carriage**

### **Article 38—Combined Carriage**

Where the carriage was partly by air and partly by another transport mode, this Convention all apply only to the carriage by air portion.

## **Chapter V—Carriage by Air Performed by a Person other than the Contracting Carrier**

#### *Contracting vs. actual carrier responsibilities (code sharing arrangements)*

Chapter V of the Montreal Convention clarifies the relationships between and the responsibilities of a contracting carrier and the actual carrier, including their liabilities. This is similar to the provisions of the 1961 Guadalajara Convention and ensures that there is adequate protection for passengers travelling under code sharing and other similar arrangements involving more than one carrier during a single operation.

## **Chapter VI—Other Provisions**

### **Article 49—Mandatory Application**

The Article provides that any contractual clauses or special agreements entered into between the parties to the contract before the relevant damage occurred which infringe upon the terms of the Convention, whether by deciding the law to be applied, or by altering the rules on jurisdiction, are null and void.

### **Article 50—Compulsory Insurance**

Article 50 the Convention obliges States to ensure their air carriers maintain adequate insurance to cover their liability under the Convention. A carrier may

be required by the State into which it operates to furnish evidence that it maintains adequate coverage for its liability. This measure is to ensure a carrier has the financial resources to meet any claims in the case of aircraft accidents and to ensure that claimants are sufficiently protected against a carrier being bankrupt or the like. This provision was supported by the vast majority of States considering the new Convention. To be operative, States must pass appropriate legislation.

Under the current carriers' liability legislation, Australia already requires all commercial airlines to have non-voidable liability insurance for each passenger (to the amount of A\$500,000 for domestic carriers and 260,000 SDRs for Australian and foreign international carriers) and it is proposed that this practice continue.

#### *Impact on insurance premiums*

The Department is seeking advice on what effects the proposed changes will have on insurance premiums paid by air carriers. It is understood that for carriers with good safety records which already fly to the US increases are likely to be marginal; insurers having already factored in the possibility of US courts deciding that the carrier or its agents have engaged in wilful misconduct and therefore awarding substantial damages. The Department understands that adoption of the Montreal Convention provisions will not significantly increase insurance premiums for Australian international carriers or foreign international carriers.

#### *Social security claims*

Australian Social Security policy is that social security payments made to victims of accidents are recoverable from the insurers when the compensation is finalised. There is nothing in the Montreal Convention that will prevent Centrelink or any other social security agency obtaining a refund from insurers for social security entitlements received by the victim due to the time gap between the accident and the date compensation is received.

## **Chapter VI—Other Provisions**

### **Article 53—Signature Ratification and Entry into Force**

The Convention requires 30 signatures for ratification and will come into force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. ICAO is the depository of the Convention.

### **Article 54—Denunciation**

A State may denounce the Convention by written notification to the Depository. Denunciation takes effect 180 days following receipt of the notification by the Depository.

### **Article 55—Relationship with other Warsaw Convention Instruments**

The Montreal Convention takes precedence over the Warsaw System Conventions and Protocols.

# Glossary

<b>Air waybill</b>	Air cargo receipt; a list of goods sent by common air carrier.
<b>AOC</b>	Air Operator's Certificate.
<b>ATA</b>	(American) Air Transport Association.
<b>Carriers' Liability Act</b>	Refers to the <i>Civil Aviation (Carriers' Liability) Act 1959</i> and/or a new replacement Act.
<b>CASA</b>	Civil Aviation Safety Authority.
<b>Code sharing</b>	Agreement between two or more airlines to use the same airlines identification code when flights are displayed on a computer screen.
<b>exemplary damages</b>	Australian legal term for punitive damages. Damages over and above compulsory damages, sometimes awarded to a plaintiff as a mark of disapproval of the defendant's conduct.
<b>francs Poicaré</b>	Basis for gold standard: equals 64½ milligrams of gold of millesimal fineness 900.
<b>Guadalajara Convention</b>	<i>Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carriers</i> , done at Guadalajara on 18 September 1961.
<b>Guatemala City Protocol</b>	<i>Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955</i> , done at Guatemala City on 8 March 1971.
<b>IATA</b>	International Air Transport Association—worldwide trade association of international airlines.
<b>ICAO</b>	International Civil Aviation Organization.
<b>IMF</b>	International Monetary Fund.
<b>liability</b>	A person's present and prospective legal responsibility, obligation or duty.
<b>limited liability</b>	Liability restricted by law or contract.
<b>liability insurance</b>	A form of general insurance providing the insured with protection against the consequences of being held legally liable for damage or injury to another person.
<b>mandatory</b>	Compulsory, obligatory, permitting no option, a rule or law which imposes an obligation requiring absolute compliance.
<b>mental injury</b>	Shock, mental anguish and psychiatric injury.
<b>Montreal Convention</b>	<i>Convention for the Unification of Certain Rules for International Carriage by Air</i> , done at Montreal on 28 May 1999.

<b>nervous shock</b>	Psychiatric illness as a result of the immediate emotional shock caused by the defendant's act.
<b>non-voidable</b>	Mandatory.
<b>personal injury</b>	Any disease or injury sustained by an individual to his or her person, including broken limbs, for which another is legally liable. It may destroy or impair, whether permanently or temporarily, a person's existing physical or mental condition or produce pain and suffering.
<b>proven damages</b>	Any action for damages can only be taken subject to the conditions and liability limits set out in the Montreal Convention.
<b>punitive damages</b>	Exemplary damages, damages over and above compulsory damages, sometimes awarded to a plaintiff as a mark of disapproval of the defendant's conduct. These are excluded by the Montreal Convention, put beyond doubt by Article 29. A US term.
<b>RPT</b>	Regular Public Transport.
<b>SDRs</b>	Special Drawing Rights—an artificial 'basket' of currency developed by the International Monetary Fund for international accounting purposes to replace gold as a world monetary standard.
<b>Strict liability</b>	Does not depend on actual negligence or intent to cause harm but is based on the breach of an absolute duty to make something safe.
<b>The Hague Protocol</b>	<i>Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955.</i>
<b>Warsaw Convention</b>	<i>Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Warsaw on 12 October 1929.</i>
<b>Warsaw System</b>	The 1929 Warsaw Convention and subsequent amending Conventions and Protocols.