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The Secretary
Department of Infrastructure, Transport,
Regional Development and Local Government
GPO Box 594
CANBERRA ACT 2601

Dear Sir/Madam,

RE: TOWARDS A NATIONAL AVIATION POLICY STATEMENT

Please find attached a Submission in response to the Issues Paper, April 2008.

Yours faithfully,

A handwritten signature in black ink, appearing to read "John V Buckley", written over a horizontal line.

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SUBMISSION BY QBE AUSTRALIA

Issue Paper: Towards a national Aviation Policy

This is a submission by QBE Insurance (Australia) Limited, Aviation in response to the “*Issues Paper: Towards a National Aviation Policy Statement*” dated April 2008 and in particular to section 4.5.

COMPENSATION ARRANGEMENTS IN THE EVENT OF AN ACCIDENT

1. “*Are Australia’s domestic arrangements for passenger and baggage/cargo liability appropriate in the context of international developments, including the Montreal Convention? Is there a better system or model for compensating people?*”

Passenger liability

The existing regime separates the commercial carriage of passengers by charter operators (or air taxis to adopt an American term) and airlines from non-commercial or private carriage. The former, which is subject to the *Civil Aviation (Carriers’ Liability) Act*, and State analogues, is the carriage in respect of which it is assumed that comments are invited.

Liability in respect of accidents arising out of private operations is subject to ordinary common law principles. Such carriage usually involves small aircraft in circumstances where passengers are well able to make their own insurance and contractual arrangements and where carriage is purely voluntary. There are no grounds for contending that changes are required. In fact, most carriage of this type would fall outside Commonwealth power.

Accordingly, this submission will be directed to the carriage of passengers in commercial operations pursuant to an AOC.

It is assumed that the reference to the Montreal Convention revives a question which arose when the Convention was first adopted, which is whether or not the domestic regime should mirror the Montreal Convention when the latter becomes law in Australia?

At that time there were submissions from the insurance industry against such a move and it remains the case that there are no grounds for amending Part IV of the Act to mirror the provisions of the Montreal Convention. The important reasons for not doing so are:

- (a) The domestic regime in Part IV of the Act, although based on the Warsaw Convention, has from the introduction of the Act, always contained important differences from the Convention provisions which reflected compromises between the competing views of different systems; for

example, in the Warsaw system, liability of the carrier has never been absolute nor subject to unbreakable limits. The Australian domestic regime eliminated the inconsistencies in the Warsaw system, created by the competition between different legal systems, to produce a fairer and more rational basis of compensation¹:

“Part IV of the Bill, in applying the Convention rules to domestic carriage, makes two important modifications of those rules. On the one hand, the domestic carrier is not given a defence if he proves that he has taken all possible measures to avoid the damage, and, and on the other hand, the carrier is not deprived of the limit if the damage results from an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result. I have already indicated that the two corresponding provisions of the international convention appear to have been included as concessions to States preferring a system based on fault. The advantage of omitting these expectations is to introduce complete certainty so that the carrier knows in advance the extent to which he must insure and the passenger knows how much insurance cover and above £7,500, if any, he should take out to meet his particular circumstances and family obligations. The modifications to the international rules also remove the possibility of expensive and uncertain litigation, on the one hand by the carrier, to avoid all liability, and on the other hand by the passenger, to break the limits to the carrier’s liability.”

- (b) One of the most important features of a liability system is its ability to reach finality in the compensation process without the time and extraordinary costs subsumed by liability trials. Obviously this is important to passengers and their dependants but it is also important to carriers and their insurers. Wherever fault intrudes, and with it the complications and delays of the legal process whilst the issues of negligence are litigated, a speedy resolution becomes impossible.
- (c) The Australian regime provides a higher level of no fault liability than the Montreal Convention. It is not necessary to amend the Act to increase the limit; increases can be effected by regulation. The complementary State legislation automatically increases the level of liability under the State regimes for intra-state carriage.²
- (d) The Montreal Convention will regulate the liability of large international carriers. The domestic regime also applies to small commuter carriers and charter operators who are important in regional Australia which depends upon such operators for vital air services. The cost of liability insurance for major airlines is a relatively small component of overheads. The same is not true of the smaller carriers where the cost of insurance is proportionally much higher.

¹ Second Reading Speech: Minister for Defence, 7 April 1959 (page 906)

² See for example the New South Wales *Civil Aviation (Carriers’ Liability) Act 1967* section 5

It should also be remembered that the adoption of the Montreal Convention principles to domestic carriage would leave the operator exposed to unlimited liability whilst the available insurance would of necessity be subject to policy limits.

The introduction of a Montreal second tier of fault based liability would ignore the economic consequences of diverting substantial sums into the economically sterile exercise of litigating fault. In the Second Reading Speech in the New South Wales Legislative Council when legislation to amend the *Workers' Compensation Act* was introduced, the New South Wales Special Minister of State said of the New South Wales Workers' Compensation Scheme:

"Although the seriousness and incidence of injury are decreasing, costs to the Scheme are increasing. Scheme resources are being consumed by legal fees at the expense of payment of benefits to injured workers. As at 31 December 2000 legal costs accounted for \$422 million of the Scheme's liabilities, compared with \$438 million paid as weekly benefits." (emphasis added)

This aspect was one of the factors which has led to wholesale reform of liability laws across Australia and to which the submission will return.

For these reasons, in simple terms, the present domestic regime is superior to the Montreal Convention because it provides for strict liability with a higher limit of liability in that regard, which is to the advantage of passengers, and at the same time provides an overall cap on liability which provides certainty for the industry. This regime has served both passengers and the aviation industry well since its introduction in 1959 and amendment to adhere conformity with the Montreal Convention 1999 would be contrary to the interests of both passengers and carriers.

* * *

The question posed in the issues paper also asks, *"Is there a better system or model for compensating people?"* In answering that question, it is as appropriate to have regard to the extent of liability arising from the carriage of passengers by other modes of domestic transport.

In most Australian states, statutory restrictions have been placed upon recovery of common law damages for personal injuries or death arising out of a motor vehicle accident. There are differences from State to State but the common feature of the legislation is a restriction on the levels available to plaintiffs for compensation.

The carriers, the bus companies also employ terms and conditions which, in the absence of a statutory no-fault scheme, which exist only in Victoria, Tasmania and the Northern Territory, exclude liability on the part of the operator for death, sickness or any other injury to any passenger. By contrast, Part IV of the *Civil Aviation (Carriers' Liability) Acts* expressly precludes terms in the contract of carriage which either relieve the carrier of liability or fix a lower limit of liability.

If one has regard to carriage by rail and, taking for example, the conditions of carriage for Queensland Trains, provisions such as clause 18 provide that an operator shall not be liable for death or personal injuries to a passenger except where such were caused

by a wrongful act or the wilful neglect of the carrier, that there is no liability for mental distress or suffering whether caused by neglect or default of the carrier, and no liability for indirect or consequential loss. Again, the conditions of carriage employed throughout Australia will vary but the conditions will generally introduce similar restrictions on liability which, overall, are far less advantageous to passengers than the domestic regime under Part IV of the *Civil Aviation (Carriers' Liability) Acts*.

It is also relevant to point out that since 2001, there have been a series of Acts passed by State legislatures, in response to the level of litigation and the level of verdicts in many cases, to impose restraints on the degree and cost of personal injury litigation in Australia. Civil Liability Acts of the various States have imposed restrictions on the circumstances in which damages for pain and suffering can be awarded, the amount of such damages, the amount of damages for economic loss and gratuitous services, the availability of damages for nervous shock, and in some cases on the recovery of legal costs.

The better view is that these provisions apply to the assessment of damages under the Commonwealth *Civil Aviation (Carriers' Liability) Act*.

As the Civil Liability Acts are designed to discourage frivolous and unmeritorious claims, there is no reason why this legislation should not apply to the assessment of damages under the Commonwealth Act. To eliminate any doubt, the Commonwealth Act should expressly provide that the assessment of damages is subject to the Civil Liability Acts.

There is also a related aspect in respect of which the Montreal Convention has relevance. The Convention does not permit the recovery of damages for what is sometimes described as "pure nervous shock", that is, psychological type injury or distress which is not caused or accompanied by bodily injury. The same principle should be applied to domestic carriage because the recovery of damages for pure nervous shock coupled with strict liability is an invitation for frivolous claims.

Baggage/cargo liability

There is nothing to indicate that the current provisions relating to baggage are in any way inadequate.

Whilst the Act permits provision to be made for cargo by regulations there are no regulations and they are not required because shippers are adequately covered by transit insurance.

2. ***“Are the minimum insurance standards appropriate? Should the system be extended to require insurance for third party surface damage? Does the aviation industry face any difficulties in accessing appropriate levels of insurance to cover their potential liabilities?”***

The appropriate level of compulsory insurance in aviation was raised in the respective Discussions Papers on the Montreal Convention issued in 2001 and 2005 by the Department of Transport and Regional Services (as it was then).

Commercial operators invariably carry insurance for surface damage as well as passenger liability insurance which is compulsory in the case of airlines and charter operators. It is very rare for a private operator not to carry passenger and third party liability insurance. This rare occurrence would not justify the costs and practical difficulties in extending the compulsory insurance provisions to private operations.

The more important issues which arise in connection with surface damage concern the operation of the *Damage by Aircraft Act* which provides for a regime of strict and unlimited liability for compensating third parties on the ground who suffer death, personal injury or damage from aircraft.

Following concerns by financiers and lessors that ‘passive owners’ would be liable, the Act was amended in 2002 specifically to exclude such liability. The amendment exempts an owner from liability where the owner does not have an active role in the operation of the aircraft immediately before the impact occurred.

The Act still contains a number of shortcomings. In general terms, the Act does not provide specific definitions for some key provisions which may result in some far reaching outcomes. For example, in section 8, “*personal injury*” is not defined nor is reference made to the class of person or type of injuries recoverable. Applying a common law definition of “*personal injury*”, liability may extend to a witness or group of witnesses to an impact of an aircraft who, as a result, suffer psychological injuries or nervous shock. Furthermore, the phrase, ‘*the result of such an impact*’ in section 8 is also undefined and arguably extends the liability to consequential loss or damage.

It also remains uncertain whether the assessment of damages are to made pursuant to relevant State Civil Liability regimes. This question is currently the subject of an appeal to the New South Wales Court of Appeal.³

The Act provides no defence of contributory negligence nor is there a right of contribution. This was highlighted in the District Court of New South Wales decision of *Cook v Aircare Moree Pty Ltd*⁴ which involved a claim by a power company employee (the plaintiff) who was electrocuted when attending to power lines brought

³ In the District Court of New South Wales decision of *Cook v Aircare Moree Pty Ltd* [2007] NSWDC 164, which is on appeal, the Court found that the *Civil Liability Act 2002* (NSW) applied to the Plaintiff’s claim and the recoverability of damages against the aircraft operator and aircraft owner.

⁴ [2007] NSWDC 164.

down by a light aircraft. In that case, notwithstanding a finding of contributory negligence of the plaintiff and negligence of the electricity company, the *Damage by Aircraft Act 1999* excluded the defence of contributory negligence and the right of contribution.

There is no time limit such as the two year limit under the Rome Convention on when proceedings may be brought. In the absence of a Commonwealth provision, the limitation periods would vary from State to State and would vary depending on whether the damage was a personal injury or property damage. Generally, the limitation period may range from anywhere between 3 to 6 years.

It is submitted that a review of the *Damage by Aircraft Act* is urgently required for the purpose of resolving these difficulties and anomalies by, amongst other measures, the introduction of limits of liability. Questions of insurance cover for surface damage are secondary to the difficulties created by the scope and terms of the Act.

3. ***“Is the voluntary Family Assistance Code an appropriate measure to ensure airlines meet their responsibilities in the event of an aviation accident and to what extent are airlines complying with the Code?”***

The voluntary Code applies to the major carriers and there is no reason to believe that the necessary measures for its operation in the case of an accident are not in place. If it were suggested that the Code should have a wider application there would doubtless be measures which are entirely inappropriate in the case of small commuter airlines and charter operators. The aspect which is relevant from an insurer's point of view would be a requirement for advance payments in every case covered by the *Civil Aviation (Carriers' Liability) Act*. On that aspect it is appropriate to make the following observations.

It is readily apparent that the availability of worker's compensation and other forms of insurance, especially life insurance which attaches to compulsory superannuation, provide immediate funds, in some cases in substantial amounts, following an accident. Circumstances in this country do not create an urgent need for advance payments for compensation. This is clear from the information which is ultimately provided for the assessment of damages.

One of the striking features of compensation claims is the time it takes to obtain relevant information for the assessment and settlement of such claims. It is surprising how long some lawyers retained by claimants take to provide the necessary information to permit a reasonable assessment of the quantum of a claimant's damages which is obviously necessary before the claim can be settled. In many cases, the information is not provided until after legal proceedings are commenced and the claimant's lawyers are compelled to provide the information by the rules of the Court.

This is consistent with the absence of any urgent need for advance payments. The insurance industry can provide for advance payments but all the evidence which emerges from the resolution of claims indicates there is no requirement for compulsory advance payments.