



Australian Government

Department of Infrastructure,
Regional Development and Cities



DISCUSSION PAPER

CIVIL AVIATION CARRIERS' LIABILITY

July 2018



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Director - Publishing and Communications
Communications Branch
Department of Infrastructure, Regional Development and Cities
GPO Box 594
Canberra ACT 2601
Australia

Email: publishing@infrastructure.gov.au

Website: www.infrastructure.gov.au

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Chapter 1: Introduction

1.1 Purpose and Process

The Department of Infrastructure, Regional Development and Cities (the Department) is currently reviewing several key aspects of Australia's aviation insurance and liability framework under the *Civil Aviation (Carriers' Liability) Act 1959* (CACL Act) and *Damage by Aircraft Act 1999* (DBA Act). The review is an important part of keeping Australia's aviation regulatory framework up-to-date. The main focus of this discussion paper is on Civil Aviation Carriers' Liability, particularly:

1. updating liability thresholds under the CACL Act;
2. reviewing the Civil Aviation (Carriers' Liability) Regulations 1991 (the CACLR); and
3. reviewing current insurance exclusions, particularly War Risk.

Respondents are also invited to raise any other issues they consider relevant to aviation liability and insurance. The discussion paper will be used to collect feedback on current arrangements, identify issues for further consideration and explore options for future reform.

1.1.1 Who should respond to this discussion paper?

The main focus of this discussion paper is on those most affected by civil aviation carriers' liability and insurance – primarily, aviation industry members, insurance providers, passenger groups and the legal profession. However, nearly every person in Australia has the potential to be affected by Australia's aviation liability and insurance framework – carriers' liability arrangements affect providers and consumers of aviation (airlines and passengers), as well as insurers and associated professional service providers. Stakeholders in each of these groups should consider responding to this paper.

This discussion paper has been divided into a series of chapters. In responding, you can choose to consider the whole paper, or just a selection of chapters.

1.1.2 How do I respond to the discussion paper?

The preferred method for receiving submissions is electronically via email. Submissions may also be made in hard copy at the address provided. Your submission may consider some or all of this paper.

The closing date for submissions is 31 August 2018. If you would like to respond but will be unable to do so by this date, please contact the Department to discuss your options.

If you have any questions about responding to the discussion paper, please contact the Department (see below).

Responding to this Discussion Paper

Email:

CACL@infrastructure.gov.au

Mail:

Att: Trade and Aviation Market Policy

GPO Box 594

CANBERRA ACT 2601

Questions?

If you have questions about this discussion paper, or how to respond, please contact the Department of Infrastructure, Regional Development and Cities email to:

CACL@infrastructure.gov.au

or

02 6274 8137 or 02 6274 7064

Don't Forget:

Please provide your contact details so the Department can follow up on any issues raised.

Closing Date: All submissions should be provided by 31 August 2018

1.1.3 Data Collection

In responding to this discussion paper, please identify any data you have available that may assist in analysing the comparative merits of different policy options. Detailed, evidence-based analysis of policy options forms the basis of good regulatory practice. Any evidence you can provide may assist the analysis of aviation liability and insurance policy settings, and help ensure the best possible outcomes are achieved for stakeholders. At this stage, you only need to provide an indication of what information you may hold, and the Department will follow up as needed.

1.1.4 Privacy Statement

Any personal information supplied in your submission is collected by the Department of Infrastructure, Regional Development and Cities, in accordance with the *Privacy Act 1988* (the Privacy Act), for the following purposes relating to the Department's functions and activities:

- Analysing the policy and regulatory settings of the aviation liability and insurance policy and regulatory framework.
- Assessing regulatory impacts of that framework.
- Implementing framework changes to that framework.
- Ongoing regulatory management of that framework.
- Assessing the future performance of that framework.

The Department will use this information for each of these processes.

Your personal information will be stored securely by the Department. It may be used by the Department to make further contact with you about the consultation process. Your personal information will not be disclosed to any other parties, except in the circumstances outlined below

Submissions, in part or full, including the name of the author may be published on the Department's website or in the Government's response, unless the submission is confidential. Confidential submissions (including author name) will not be published. Private addresses and contact details will not be published or disclosed to any third parties unless required by law.

Submissions will be treated as confidential only if they are expressly stated to be confidential. Automatically generated confidentiality statements or disclaimers appended to an email do not suffice for this purpose. If you wish to make a confidential submission, you should indicate this by ensuring your submission is marked confidential.

Confidential submissions will be kept securely and will only be disclosed in the following circumstances:

- in response to a request by a Commonwealth Minister;
- where required by a House or a Committee of the Parliament of the Commonwealth of Australia; or
- where required by law.

The Department may also disclose confidential submissions within the Commonwealth of Australia, including with other Commonwealth agencies, where necessary in the public interest.

Please note that in order to protect the personal privacy of individuals in accordance with the Privacy Act any submissions containing sensitive information, personal information or information which may reasonably be used to identify a person or group of people may not be published, even if not marked as confidential.

The Department's privacy policy contains information regarding complaint handling processes and how to access and/or seek correction of personal information held by the Department. The Privacy Officer can be contacted on (02) 6274 6495.

1.1.5 Once I have made a submission, what happens then?

You are invited to provide your contact details so the Department can follow up as needed to discuss any further issues raised by your submission. Once the discussion paper process and any follow-up activities are completed, it is expected the Department will make a summary of findings available for all discussion paper respondents. If needed, the Department may also undertake additional consultation to explore issues raised through this process. Once the review is completed, findings and recommendations will be provided to Government for consideration.

If you have any questions following your submission, or wish to provide further information, please contact the Department at the address provided.

1.2 Aviation Liability and Insurance Context

Aviation is a complex, dynamic and competitive industry, critical to the functioning of the Australian and global economy. The rules governing the aviation sector directly affect passenger experiences and the success of the aviation industry. The Australian Government supports a competitive and sustainable aviation industry by maintaining a legal and policy framework for aviation focused on balancing competing needs. Civil aviation insurance and liability arrangements are an important part of this framework.

1.2.1 Aviation Regulation

Globally, aviation is a highly regulated industry, reflecting the importance of ensuring aviation services continue to be safe and reliable. The International Civil Aviation Organisation (ICAO) establishes globally-recognised standards and recommended practices for aviation under the *Convention on International Civil Aviation* (the Chicago Convention)¹ and other relevant multilateral and bilateral treaties.² This international framework is complemented by national laws giving effect to international obligations, as well as establishing rules to manage local market issues. These arrangements provide consistency and structure for the aviation industry, ensure markets operate appropriately and reduce the incidence of undesirable outcomes (such as accidents). These structures have facilitated the aviation industry's growth into a global, competitive industry with high standards of safety and security.

While regulation has been a fundamental enabling factor for the growth and development of aviation, regulation also risks creating negative effects for industry and/or consumers, particularly when regulation is inefficient, incorrectly designed and/or outdated. Regulators must periodically review and maintain regulatory frameworks to ensure they remain current, achieve balance, and weigh the needs of stakeholders, both in the short term and into the future. This review is part of this ongoing process.

¹ *Convention on International Civil Aviation*, opened for signature 7 December 1944, 102 UNTS 15 (entered into force 4 April 1947).

² For more information, see the ICAO Treaty Collection web page: <https://www.icao.int/Secretariat/Legal/Pages/TreatyCollection.aspx>

1.2.2 Aviation Liability

In aviation, accidents resulting in death, injury or loss are rare; however, as with any industry, sometimes things go wrong. While aviation safety and security arrangements aim to prevent these incidents, it is important to ensure there are appropriate and equitable arrangements in place when they do occur. Importantly, suitable liability and insurance arrangements facilitate the timely resolution of liability issues and minimise the risk of protracted litigation for both airlines and victims when things do go wrong.

Dedicated aviation liability arrangements are implemented in most countries in recognition of the unique risks associated with aviation, and the complex task of awarding damages under civil liability frameworks. Aviation liability frameworks typically impose strict liability on the aircraft operator or owner for loss, injury or death arising from accidents on aircraft. That is, the operator is liable for such damage regardless of any fault, negligence or intention of the operator. This simplifies the claims process for victims and minimises complex litigation. This structure reflects the responsibility placed on carriers and the high standard of systems and controls needed to ensure the safety of passengers and third parties. The aviation liability framework reinforces the Government's focus on ensuring robust safety arrangements are in place for aviation.

1.2.3 Carriers' Liability

Carriers' liability arrangements establish a uniform structure within the aviation industry for determining damages in the event of death, or injury for aviation passengers, and loss and damage to baggage and cargo. In Australia, these arrangements are prescribed through the CACL Act.

For airlines, carriers' liability arrangements provide a measure of certainty needed to allow adequate insurance to be obtained at a reasonable price. The framework provides the structure needed for an aviation insurance market to operate effectively, where risks can be understood and premiums compared on a competitive basis.

1.2.4 Aviation Insurance

Like all enterprises, airlines and aviation businesses manage risk by purchasing insurance or bearing some risks directly. Insurance policies are typically separated into two classes of risks:

- Material damage to the hull – Hull insurance covers against the risks of physical loss of or damage to the aircraft (often including its spare parts).
- Liabilities to passengers and third parties – Liability insurance protects against liability resulting from loss or damage, including injury or death, to passengers or third parties.

Normally, an airline's coverage is packaged together into a single policy covering loss or damage to the aircraft in its fleet (at an agreed book value) and its legal liability to passengers and third parties. This provides for the entire gross amount of the policy to be available for any single 'occurrence' (accident).

See Attachment A for a detailed summary of domestic and international carriers' liability arrangements

Chapter 2: Domestic Carriers' Liability

Australia has a carriers' liability framework for domestic flights based on capped strict liability. The maximum damages payable in relation to the death or injury of a passenger, or loss, damage or injury of baggage are set out in Part IV of the CACL Act and the CACLR.

2.1 This Chapter

This chapter discusses two main options for future domestic carriers' liability: to maintain a capped liability system, or to mirror *The Convention for the Unification of Certain Rules for International Carriage by Air* (the MC99 – also known as the Montreal Convention) in some form.³ Within these options, there are further alternatives for:

- liability threshold settings; and
- the mechanism for updating these thresholds over time.

Note: Part IV of the CACL Act also sets out liability arrangements for international travel involving economies that are not parties to either the MC99 or the Warsaw System. These provisions effectively copy domestic arrangements (with some minor modifications). It is assumed any change to domestic arrangements would also be reflected in the requirements for these flights.

Any changes to domestic liability arrangements would be reflected in an update to relevant minimum insurance requirements under the CACL Act and CACLR. The objective of any such update would be to ensure the required insurance levels adequately cover the full amount of liabilities that could be expected in the majority of circumstances.

2.2 Option One – Maintain a Capped Liability Framework

Under this option, Australia would continue to maintain a capped liability framework. The liability caps would be adjusted to bring them up-to-date, and then maintained via one of the models outlined in this paper. In each case, an update to current liability caps is proposed.

2.2.1 Updating Thresholds

An update to current liability caps is considered appropriate, to adjust for inflation and to keep settings in line with community expectations. The most direct model for updating caps is to make an adjustment using a direct inflation model based on the Consumer Price Index (CPI) published by the Australian Bureau of Statistics (ABS). An alternative approach is also outlined, which applies the same direct inflation model for death and injury caps, but makes a larger adjustment for baggage.

³ *Convention for the Unification for Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999.*

It is worth noting domestic liability limits for death or injury were most recently adjusted in 2012, following a 2009 review which included extensive consultation. Prior to this, limits were most recently adjusted in 1994.

Baggage liability limits were not adjusted in 2012. The nature, value and composition of an airline passenger’s bag is likely to have changed significantly since baggage liability limits were last changed. To assist in considering baggage liability limits, respondents may wish to recommend specific evidence or methodology available that could be used to determine an appropriate cap. It should be noted actual damages payable for a particular incident depend on the level of actual damage – caps only become relevant when total damage exceeds the cap level.

2.2.1.1 Direct Inflation Adjustment

The table below outlines proposed liability caps using a direct CPI-based inflation model, adjusted to 2018. The proposed figures are based on inflation statistics generated by the Australian Bureau of Statistics, and have been rounded as follows:

Proposed Liability Limits

Liability Type	Current Cap	Adjusted Cap	Inflation period
Death/Injury	\$725,000	\$925,000	2008 ⁴ -2018
Baggage (registered)	\$1,600	\$3,000	1994-2018
Baggage (other)	\$160	\$300	1994-2018

2.2.1.2 Inflation and MC99 Adjustment

An alternative approach would be to adjust death and injury limits based on inflation (as above), but to change baggage limits to bring them in line with the MC99. This recognises the significant difference in thresholds between the MC99 and domestic arrangements, and brings Australian domestic arrangements closer in line with arrangements for international flights. The proposed limits would be as follows under this approach:

Alternative Model for Liability Limits, considering MC99

Liability Type	Current Limit	Revised Limit
Death/Injury	\$725,000	\$925,000
Baggage (registered)	\$1,600	\$9,000
Baggage (other)	\$160	\$2,000

⁴ Note: While the \$725,000 cap came into effect in 2013, it was based on an inflation calculation from 2008.

2.2.1.3 Insurance Implications

An update to liability thresholds would be accompanied by an equivalent increase in minimum insurance requirements under the CACL Act and CACLR. Under current arrangements, paragraph 41C(3)(a) of the CACL Act requires a domestic carrier to have insurance providing at least \$725,000 cover for each passenger carried. This figure would be adjusted to reflect any increases in liability caps.

2.2.2 Questions

Respondents are asked to consider the following questions in preparing a submission.

Questions

Do you support either of the proposed liability cap structures? Which one? Why?

Would you suggest any amendments to these options?

Are there any further implications of these options that should be considered?

Please identify any evidence you can provide to assist in determining appropriate baggage liability caps.

Note: The Department may follow up with you to seek access to evidence on costs/benefits cited.

2.2.3 Domestic Threshold Maintenance

How liability caps are managed into the future will directly affect the compensation available in the event of an incident. This section considers three alternatives for updating and maintaining domestic civil aviation liability caps, being:

- a one-off adjustment;
- a review clause; or
- indexation.

2.2.3.1 Alternative One – A One-Off Adjustment

This proposal minimises regulatory change by maintaining the current carriers' liability framework and making a one-off change to update liability limits and insurance levels. Any future adjustments would be considered following a similar review process. This option is consistent with previous practice.



While some limits have not been adjusted for some time, it is less likely this would be the case into the future. Under arrangements implemented through the *Legislation Act 2003* (Cth) (Legislation Act), the majority of legislative instruments are subject to ‘sunsetting’ every ten years – this includes the CACLR.⁵ This means instruments cease to have effect, and must be remade if their requirements are to continue. In remaking legislative instruments, rule makers are required to complete a review of the instrument to evaluate its currency and appropriateness. This provides a mechanism for reviewing liability caps at least every ten years.

2.2.3.2 Alternative Two – Establish a Review Clause

This approach is similar to the previous alternative, but would also involve introducing a provision requiring a periodic review of liability limits in between sunsetting reviews. This would provide a level of assurance that liability limits will be reviewed more regularly, but unlike indexation models, allows consideration of other factors such as community expectations and the state of the aviation industry prior to making changes.

Under the proposed review clause option, the CACL Act would be amended to require the Secretary of the Department (or Delegate) to conduct a review of liability caps periodically, in line with a fixed schedule (e.g. by a fixed date every three years). The Secretary would then be obliged to publish any proposed adjustment to caps, with a minimum period for public consultation and comment. At the completion of this period, the Secretary would establish new limits and associated insurance requirements through a new legislative instrument mechanism. This instrument would be subject to Parliamentary scrutiny by the Senate Standing Committee on Regulations and Ordinances, and potential disallowance of the instrument in accordance with the process established under the Legislation Act.

2.2.3.3 Alternative Three – Establish an Indexation Clause

Under this approach, an indexation clause would be introduced to adjust liability limits periodically. An initial adjustment would be made to limits (in-line with one of the models outlined previously), and a clause established to automatically adjust limits in line with a fixed schedule (e.g. by a fixed date every three years).

Indexation rates would be calculated using the Consumer Price Index published by the Australian Bureau of Statistics. This option would provide assurance that liability limits will automatically keep pace with inflation. The proposed formula for indexation is as follows:

⁵ See Chapter 3, Part 4 of the *Legislation Act 2003*. Note there are exemptions to the sunsetting framework that apply to certain instruments and classes of instruments listed in Part 5 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Example indexation formula

Proposed indexation model

Indexation would occur on a fixed schedule using the following model.

$$100 \times \left(\frac{\text{Recent index number} - \text{Base index number}}{\text{Base index number}} \right) + 1$$

Index number, in relation to a quarter, means the All Groups Consumer Price Index number that is the weighted average of the 8 capital cities and is published by the Australian Statistician in respect of that quarter.

Recent index number means the index number for the second last quarter before the day on which indexation is to occur.

Base index number the index number for the same quarter for the preceding indexation day (five years previous).

The proposed indexation model could be supported by a provision requiring the Secretary of the Department to publish a notice of indexation adjustments. This publication would be for information only, and any associated error or failure to adequately make such a notification would not affect actual liabilities or damages payable.

It should be noted a liability cap indexation model would also be accompanied by an arrangement to index minimum insurance levels by an equivalent amount.

2.3 Option Two – Align with the Montreal Convention

This option involves replacing the current domestic carriers' liability framework with one resembling the arrangements applying to international carriage under the MC99, which are given effect in Australian domestic law by Part 1A of the CACL Act. Similar arrangements are in place within the European Union and in India.

The MC99 arrangements provide for a two-tier system of liability, with claims up to an initial level on a strict liability basis, and damages above this threshold possible unless the air carrier is able to prove the damage was not caused by the negligence or other wrongful act or omission of the carrier, its servants or agents, or that the damage was solely due to the negligence or other wrongful act of a third party. The concept of liability limits would be discarded. More detail on the MC99 is provided at Attachment A.

Indexation would be pegged to the MC99, which considers inflation across a range of economies. This would provide for the automatic adjustment of domestic thresholds when the international MC99 thresholds are updated. In line with Section (9) of the CACL Act, conversions from Special



Drawing Rights (SDRs) to Australian Dollars would be based on the day on which the court's judgment is given.⁶

This approach provides for greater consistency between domestic and international arrangements but introduces a range of international variables into domestic liability arrangements. If global growth is significantly slower or faster than domestic growth (as was recently the case with the Global Financial Crisis and subsequent recovery), liability thresholds could reduce or grow in real terms, potentially creating inconsistency with domestic expectations.

It should be noted the indexation method under MC99 could cause delays in updating thresholds, particularly when global growth is slow. The MC99 requires reviews of liability limits to be conducted every five years through a single international process. The reviews consider the preceding five years. If inflation for a five-year period is less than ten percent, liability thresholds are not updated. When the next review is conducted, inflation over the preceding ten-year period is then taken into consideration (and so on thereafter). This means indexation could be delayed significantly (e.g. ten years), which has the potential to hinder the ability of claimants to obtain adequate compensation.

Any changes made to the domestic carriers' liability arrangements in Part IV of the CACL Act would flow through to intra-state travel, except in relation to cargo. Each state has enacted legislation that applies Parts IV and IVA of the CACL Act and the CALCR, other than provisions relating to cargo, to intra state travel not covered by the CALC Act. This creates a uniform national system.

2.3.1.1 Insurance Implications

Aligning domestic arrangements with the MC99 would be accompanied by a change to minimum insurance requirements under the CACL Act and CALCR. Under current arrangements, paragraph 41C(3)(aa) of the CACL Act requires an international carrier to have insurance providing at-least 260,000 SDRs cover for each passenger carried. This arrangement would be applied to domestic operations also.

2.3.1.2 Cargo

One of the key considerations in a proposal to align the regulation of domestic operations with the MC99 is how to deal with cargo liabilities. The MC99 sets out a range of requirements for cargo, including setting liability arrangements for destruction, loss or damage to cargo. Section 41 of the CACL Act provides for making regulations to apply some, or all, aspects of the MC99 cargo arrangements to domestic operations, either directly, or with whatever exceptions, adaptations and modifications are necessary. The current domestic framework does not prescribe cargo liability.

The MC99 sets a liability limit for the destruction, loss, damage or delay of cargo at 17 SDRs (approximately \$30) per kilogram, unless other arrangements are provided for. This limit is reviewed from time-to-time in line with the review and adjustment arrangements provided for under

⁶ The Special Drawing Right is a monetary unit of the International Monetary Fund.



the MC99. These arrangements also apply to the destruction, loss, damage or delay of part of a cargo.

The MC99 also sets out requirements for cargo documentation, including air waybills. It is understood cargo documentation practices can vary significantly between domestic and international movements, and as such, the MC99 air waybill arrangements have not been prescribed for domestic cargo to-date.

Respondents are asked to comment on what, if any aspects of the MC99 should be applied to domestic cargo movements.

2.4 Questions

Respondents are asked to consider the following questions in preparing a submission.

Questions

Which option or options do you consider the most appropriate? Why?

Would you suggest any amendments to these options?

Are there any further implications of any of these options that should be considered?

What aspects of the MC99 should be applied to domestic cargo movements? Why?

Note: The Department may follow up with you to seek access to evidence on costs/benefits cited.

Chapter 3: The Civil Aviation (Carriers' Liability Regulations) 1991

This chapter discusses the Civil Aviation (Carriers' Liability) Regulations 1991 (the CACLR), with a view to remaking them. Under arrangements implemented through the *Legislation Act 2003* (Cth) (Legislation Act), the majority of legislative instruments are subject to 'sunsetting' every ten years. This means instruments cease to have effect, and must be remade if their requirements are to continue. In remaking legislative instruments, rule makers are required to complete a review of the instrument to evaluate its currency and appropriateness. The CACLR is scheduled to sunset on 1 October 2018.

The CACL Act provides authority for a range of matters to be dealt with in the CACLR. In their current form, the CACLR primarily sets out arrangements for compulsory insurance. However, the CACL provides authority for further matters to be addressed, as needed. This chapter focuses on current provisions.

Respondents are invited to make comment on both the CACLR in its current form, and any desirable amendments. However, in responding, it should be noted the CACLR will be subject to significant revisions to bring it up-to-date and more effectively support Australia's carriers' liability framework.

3.1 Current Provisions

Respondents are invited to consider each of the matters currently addressed in the CACLR and provide feedback on their appropriateness, form and content. Discussion of current regulations has been grouped based on issue/theme rather than the numerical order of provisions.

3.1.1 Insurer requirements

Regulations seven (7) and eight (8) establish a requirement directed at ensuring insurance for air carriers is only provided by appropriate parties. Regulation seven (7) requires an insurer to be appropriately authorised under the *Insurance Act 1973*, or appropriately permitted or authorised under a law of a foreign country that imposes similar to or consistent requirements. To support these arrangements, the Minister may determine by notice in the Gazette that the law of a particular country does not meet this description.

Currently, these arrangements allow carriers to obtain insurance both from Australian insurers, and appropriate foreign providers. Seeking insurance from foreign providers is a normal part of the operation of the Australian market, given the limited capacity for the Australian market to insure large risks.

It should be noted it is expected this provision would be updated, at least to modernise the notice-making arrangements.

3.1.2 Mandatory continuation

Regulations 10 and 11 operate together to mandate that insurance policy coverage continues for a period of up to three months after the cessation of a carrier's contract of insurance. For the insurance to cease earlier, the insurer must provide formal notice to government within prescribed timeframes. This allows appropriate action to be taken should a carrier attempt to operate without adequate insurance. It should be noted intentionally engaging in the carriage of passengers without adequate insurance (other than as an agent of the Crown) is an offence, subject to a penalty of two years imprisonment (or \$126,000 for a body corporate).

3.1.3 Insurance exclusions and limitations

An important feature of Australia's mandatory carriers' liability insurance scheme is that it makes insurance contracts 'non-voidable'. That is, an insurer's liability under a contract of insurance is not affected by any warranty or exclusion in the contract of insurance, or by any breach of the contract of insurance by the carrier. As such insurance contracts made for the purposes of the CALC Act cannot include an ability for insurers to avoid paying compensation in respect of passengers who are killed or injured as a result of a breach of a legal aviation safety requirement by an operator.

Certain exclusions and limitations are however permitted in insurance contracts, including limitations to specific aircraft, and for standard insurance exclusions.

3.1.3.1 Insurance limitations

Subregulations 9(4)&(5) provide for the cover given by an insurance policy to be limited to certain notified types of aircraft. This allows an insurer to manage risk by controlling the scope of their cover. Any operations using aircraft other than those provided for in the contract would need to be separately insured.

3.1.3.2 Standard exclusions

While the CACL Act requires air carriers to have insurance, the CACLR permits certain exclusions within insurance contracts. Other than changes relating to War Risk (see Chapter Four), no changes to exclusions are proposed. The following may be excluded from contracts of insurance:

- liability in respect of an employee of the carrier who is travelling in the course of his or her duties as an employee. These matters may be addressed separately under other legislation (e.g. Workers compensation frameworks).
- Internationally recognised standard exclusion clauses.

The internationally recognised standard exclusion clauses are:

- Aviation Radioactive Contamination Exclusion Clause (General) (also called Aviation 38)
- Nuclear Risks Exclusion Clause (also called AVN. 38B)
- Noise and Pollution and Other Perils Exclusion Clause (also called AVN. 46B)
- War, Hijacking and Other Perils Exclusion Clause (Aviation) (also called AVN. 48B)

Details of these clauses are attached to this discussion paper (see Attachment C).



It should be noted war risk coverage is not currently required for carriers' liability insurance. However, there has been a significant move globally towards requiring this type of cover, and the Department understands the cost of obtaining this cover has reduced significantly in recent years. If it is possible and reasonable to require cover for these risks, the overall risk to aviation and the public is reduced. Chapter Four considers war risk cover further, for both passengers and third parties.

3.1.4 Note: Liability limits

It should be noted regulation four (4) and the schedule to the CACLR detail limits for domestic carriers' liability. For death and injury, the amounts listed in the CACLR are below those currently prescribed in the CACL Act, and so do not have effect. For baggage, the values prescribed in the CACLR exceed those in the Act, and so have effect. An amendment to this regulation could provide for death and injury liability limits to be increased above those currently provided for in the CACL Act, and/or for baggage liability limit increases, should this be considered appropriate. Chapter Two outlines options for domestic liability limits.

3.2 Compliance Processes

New provisions will be established as part of remaking the CACLR for carriers' liability insurance compliance processes. A clear obligation to hold adequate insurance when operating aircraft will remain, supported by provisions to:

- allow CASA to require evidence of insurance from aircraft owners and operators, as well as from insurance providers and brokers;
- require notification of the cessation of insurance coverage within prescribed timeframes;
- require evidence of insurance to be submitted when registering an aircraft, or renewing aircraft registration and as part of International Airline Licence approvals;
- require evidence of insurance as part of non-scheduled flight approvals; and
- require evidence of insurance as part of international flight approvals.

3.3 Questions

Respondents are asked to consider the following questions in preparing a submission.

Questions

Which of these regulations remains current and appropriate? Which ones would be amended? How should these provisions be amended?

Which provisions should not be remade?

What updates to the recognised standard insurance exclusion clauses are required?

Note: The Department may follow up with you to seek access to evidence on costs/benefits cited.

Chapter 4: War Risk Insurance

This chapter outlines a proposal to require insurance coverage for the risks of war, hijacking, terrorism and related perils. While there are internationally recognised aviation insurance exceptions relating to these matters, many countries require the majority of these risks to be covered. This is done through the use of standard extension clauses.

There has been a significant move globally towards requiring this type of cover, and the Department understands the cost of obtaining this cover has reduced significantly in recent years. If it is possible, and reasonable, to require cover for these risks, the overall risk to aviation and the public is reduced.

4.1 Proposed Framework

It is proposed the CACL be amended (or associated instruments) to require war risks to be covered under carriers' liability insurance. It is expected this would be done via standard write-back clauses. There would be associated penalties for failing to comply.

4.1.1 Exemptions

Unlike the majority of aviation insurance, particularly carriers' liability insurance, war risk coverage can typically be revoked by insurers, often with as little as 48 hours' notice. While this can often be reinstated through negotiation, it nonetheless creates the potential for an operator to be exposed to a risk they have attempted to obtain appropriate cover for. To remove the right for insurers to rapidly revoke cover would likely increase premiums significantly, and is considered impractical. Instead, it is proposed an exemption power be available for these unforeseen circumstances.

It is proposed the Secretary of the Department of Infrastructure, Regional Development and Cities (the Secretary) and their Delegates be given a specific power to exempt aircraft owners and operators, from this requirement. This is intended to provide for unforeseen circumstances where war risk coverage is not available or appropriate. This power would be able to be used for individual owners or operators, or classes, or kinds thereof.

4.1.2 Insurance levels

There would be no changes to required insurance levels as a result of introducing war risk insurance requirements.

4.2 Background

Proper insurance coverage for the risks of war, hijacking, terrorism and related perils is critical to the operation of major airlines. While aviation insurance clauses exclude war risks under a standard exclusion clause (for example, AVN48B covering war, hijacking and other perils), most of these risks can be 'written back' into airlines insurance coverage under separate extension



clauses. Separate write backs are normally required to reinstate war insurance for both the aircraft hull and liabilities to passengers and third parties. However, it is typically not possible to obtain insurance — either directly, or through a write back clause — for some war risks such as nuclear explosions. Carriers therefore operate without insurance for these particular risks.

War risk insurance covering hulls and carriers' liability is generally held by major carriers and is typically a requirement to operate internationally. Smaller airlines and charter businesses operating to overseas jurisdictions also typically purchase war risk insurance. The rate of war risk insurance adoption is also boosted by current aircraft leasing arrangements (both operating and finance leases), which usually require airlines to carry a comprehensive range of insurance coverage, including for war risk liabilities.

However, it appears that war risk cover for small regional operators and the general aviation sector is very limited. A mandatory war risk insurance requirement would aim to address this current gap.

4.3 Questions

Respondents are asked to consider the following questions in preparing a submission.

Questions

Do you support the proposed framework? Why?

Would you suggest any amendments to these options?

Are there any further implications of any of these options that should be considered?

What aspects of the MC99 should be applied to domestic cargo movements? Why?

Note: The Department may follow up with you to seek access to evidence on costs/benefits cited.

Attachment A –Carriers’ Liability Background

Australia’s carriers’ liability framework is divided into separate domestic and international arrangements. For international travel, liability arrangements reflect a series of international carriers’ liability agreements to which Australia has acceded, and are also determined by the international agreements to which the originating or destination jurisdiction has acceded (e.g. MC99, the Warsaw Convention, or nothing at all). However, in respect of most domestic air travel, Australia has greater freedom to establish a framework which is tailored to our own circumstances. As a result, domestic arrangements have traditionally been different to international requirements.

International Arrangements

Both domestic and international carriers’ liability arrangements are prescribed by the the CACL Act, which gives effect in Australian domestic law to a series of multilateral international agreements.

The Montreal Convention (MC99) is the most modern international multilateral convention in effect governing carriers’ liability, preceded by a series of agreements known as the Warsaw System. There are currently 126 signatories to the MC99⁷ and 152 to the Warsaw Convention.⁸

The MC99 applies in relation to travel between countries who have implemented the Convention. It does not apply to domestic travel within Australia, or flights to countries who have not implemented the Convention. Consequently, the Warsaw system may still apply on flights to countries that have not implemented the MC99, but have implemented elements of the old Warsaw system (approximately 33 nations).

The Montreal Convention

Most of Australia’s key aviation partners have acceded to the MC99, including the United States, New Zealand, Canada, Japan, the United Arab Emirates, Singapore, and members of the European Union.

The MC99 applies to the commercial international carriage of persons, baggage and cargo. It provides for a two-tier system of liability for death and injury. Applicants can be awarded up to 113,100 Special Drawing Rights (approximately \$200,000)⁹ on a strict liability basis (i.e. there is no requirement to prove fault, only that the injury was incurred). Damages above the 113,100 Special Drawing Rights threshold are available to the claimant – however if the air carrier is able to prove the damage was not caused by the negligence or other wrongful act or omission of the carrier, its servants or agents, or that the damage was solely due to the negligence or other wrongful act or

⁷ A list of signatories to MC99 can be found on the International Civil Aviation Organisation website: https://www.icao.int/secretariat/legal/List%20of%20Parties/MtI99_EN.pdf

⁸ A list of signatories to the Warsaw Convention can be found on the International Civil Aviation Organisation website: https://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf

⁹ As of March 2017



omission of a third party, the carrier is not liable for damages above 113,100 SDR. This provides limited circumstances where liability can be reduced.

Note 1: The Special Drawing Right is a monetary unit of the International Monetary Fund.

Note 2: The Montreal Convention provides for the review and indexation of the strict liability threshold on a five-yearly schedule.

The Warsaw System

The first multilateral international agreement regulating carriers' liability was done at Warsaw on 12 October 1929 (the Warsaw Convention). This Convention along with a number of subsequent associated Conventions and Protocols together form the 'Warsaw System'. This system provides an international treaty framework for liability rules describing strict liability compensation arrangements for passengers, baggage and cargo affected by aircraft accidents. Australia has implemented the following components of the Warsaw System:

- The Warsaw Convention¹⁰
- The Hague Protocol¹¹
- The Montreal Protocol No. 4;¹² and
- The Guadalajara Convention.¹³

The Convention limits the damages that can be awarded against a carrier. However, the limit does not apply if it is proved that damage was caused intentionally or recklessly with knowledge damage would probably result.

Non-Signatory States

Some states have chosen not to accede to any of the international multilateral agreements governing carriers' liability. Part IV of the CACL Act prescribes the liability arrangements in relation to loss to a passenger travelling between Australia and a country that is not party to any of these international agreements. These arrangements are similar to Australia's domestic arrangements, but with a liability limit of 260,000 Special Drawing Rights for death or injury of a passenger. Baggage liability limits are the same as for domestic operations. Cargo liability limits are not prescribed, and relevant civil liability frameworks would apply in these cases.

¹⁰ *Convention for the Unification of Certain Rules Relating to International Carriage By Air*, signed 12 October 1929, 137 LNTS 3145 (entered into force 13 February 1933).

¹¹ *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, signed 28 September 1955, 478 UNTS 6943 (entered into force 1 August 1963).

¹² *Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955*, opened for signature 25 September 1975, 2145 UNTS 6943 (entered into force 14 June 1998).

¹³ *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*, signed 18 September 1961, 500 UNTS 7305 (entered into force 1 May 1964).

Domestic Arrangements

Australia has a carriers' liability framework for domestic flights based on capped strict liability, much like the Warsaw System, but with higher caps.

Framework Outline

Part IV of the CACL Act outlines arrangements for passengers travelling between destinations within Australia, and for international travel where no relevant international carriers' liability agreement applies. Part IV details arrangements for both death and injury of passengers, as well as arrangements for baggage.

The CACL Act mandates that personal injury claims made in relation to passengers against carriers must not be made under any other law. This ensures the rights and responsibilities of passengers and carriers are clearly defined. It also prevents disagreement over which framework should apply in the event of an accident. Importantly, state legislation applies provisions of the CACL Act for any such claims made relating to intrastate commercial aviation. This creates a nationally consistent framework for domestic carriers' liability, and a single national market for insurance.

It should be noted workers' compensation claims are not excluded by the CACL framework, but the liability of an air carrier in respect of an employee that is a passenger may be limited depending on the circumstances of the case. It should also be noted liabilities are not affected by monies paid to passengers under insurance policies and the like.

Death and injury

The domestic carriers' liability framework provides for claims to be made by passengers and/or family members for death or injury resulting from accidents occurring in the course of commercial aviation transport operations. It applies to death and injury occurring on board the aircraft, or in the course of embarking or disembarking. The framework provides for claims to be made for both death and bodily injury but does not provide for claims associated purely with psychological harm.

The issue of claims for purely psychological harm have attracted significant attention and debate in the past. The CACL Act was amended in 2013 to amend liability provisions to narrow the scope of claims from 'personal injury' to 'bodily injury', effectively excluding purely psychological harms. This brought Australia's domestic framework in line with international practice under international conventions.¹⁴ This also helped ensure Australian airlines, particularly smaller, regional airlines, could obtain insurance at a reasonable premium.

¹⁴ For a discussion of the policy rationale informing this amendment, please see the Explanatory Memorandum for the *Aviation Legislation Amendment (Liability and Insurance) Act 2012*: <www.legislation.gov.au/Details/C2012B00138/Explanatory%20Memorandum/Text>



The body of case law continues to grow on the issue of what constitutes purely psychological harm, including high profile cases such as *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 32.¹⁵ The growing body of case law can be expected to build greater certainty as to the application of these provisions.

Whether the CACL Act should apply to bodily injury versus personal injury is not the primary focus of this review. However, if you wish to provide comment or feedback on this issue, you should include this in your submission.

In Australia, as with many jurisdictions, strict liability for damages applies to the aircraft operator for claims of death or injury of a passenger. This means there is no requirement to prove fault; only that harm occurred. This not only ensures victims and their families are suitably compensated, but also ensures all stakeholders have certainty about their rights and obligations.

While Part IV of the CACL Act provides for strict liability claims for death and injury, the amount of damages available is limited to the amount specified in s 31. This liability cap cannot be exceeded, unless regulations provide for increased caps (which they currently do not) or the contract of carriage between the passenger and carrier specifies a higher amount (e.g. through ticketing conditions). The caps limit the level of liability risk domestic aviation operators are exposed to, providing greater commercial certainty and an opportunity to obtain adequate insurance at a reasonable premium. For claimants, the caps are a trade-off for the simplified process of claiming damages under a strict liability framework.

The CACL Act also stipulates claims for damages must be made within a two-year period from the death or injury (the claim window). This encourages claims to be made within a reasonable period, ensuring liability risks are dealt with in an appropriate timeframe. The issue of claims windows is not the primary focus of this review. However, if you wish to provide comment or feedback on this issue, you should include this in your submission.

Baggage

In addition to arrangements for death and injury, the CACL Act provides for claims for destruction, loss or injury to passenger baggage. The framework provides for claims to be made for different classes of baggage, with different prescribed liability limits. Carriers are liable for these claims unless they can prove they took all necessary measures to avoid the destruction, loss or injury of the bag, or that it was impossible to take such measures.

These arrangements for baggage provide greater opportunity for carriers to limit their liability. The framework provides for carriers to argue they undertook all necessary measures to avoid the destruction, loss or injury, or that it was impossible to take such measures. Determining whether ‘all necessary measures’ were taken, or that it was ‘impossible’ to take such measures, is a matter to be determined based on the facts of each case.

¹⁵ The New South Wales Court of Appeal found, in relation to an appeal by Pel-Air, that Ms Casey’s Post-Traumatic Stress Disorder did not constitute a ‘bodily injury’ and therefore was not compensable under the *Civil Aviation (Carrier’s Liability) Act 1959*. While ‘bodily injury’ may include damage to a person’s brain, evidence must be provided of actual physical damage to the brain. Evidence of abnormal brain function or chemical imbalances will not be considered sufficient to prove a bodily injury. Future developments in medical research may see further development of the law in this area.



The different liability structure for baggage, compared to death or injury, reflects the greater importance of preventing injury or death of passengers. It also reflects the higher likelihood of baggage destruction, loss or injury as an inherent risk of aviation operations. This arrangement strikes a reasonable balance between protection of passenger goods, and the need for carriers to manage risk and obtain insurance at a reasonable rate.

As with death and injury, time limits apply for making a claim. For baggage, these timeframes vary depending on the type of baggage but typically range from between 3 - 21 days of the date of the damage, loss or destruction of the baggage.

Cargo

The CACL Act does not prescribe liability arrangements for domestic cargo. The CACL does provide for making regulations prescribing cargo liability arrangements, should this be considered appropriate. Respondents are invited to consider whether domestic cargo liability provisions are needed, and what form these should take.

What are the thresholds and how are they set?

For domestic civil aviation, and a limited number of international operations, Part IV of the CACL Act sets out the maximum damages payable in relation to each passenger or bag (i.e. liability caps). The CACL Act allows the CACLR to prescribe caps above these amounts, should they be needed. The caps for death and injury are currently specified in the CACL Act, while baggage caps are prescribed by the CACLR.

The caps on damages payable to a person resulting from a domestic civil aviation accident are set at:

- for injury or death of a passenger – \$725,000;
- destruction, loss of, or injury to, a registered (checked) bag – \$1,600; and
- destruction, loss of, or injury to, any other bag (i.e. carry-on) – \$160.

The liability caps are reviewed on a periodic basis. An update of caps is usually preceded by industry consultation and analysis, to determine the appropriateness of a change and the amount by which they are updated. Currently, there is no mechanism for automatically updating caps.

Caps require updating from time-to-time to reflect the change in the value of money with inflation. Without periodic updates, the civil aviation liability framework would, over time, increasingly benefit carriers over claimants as caps become lower in real terms (assuming long-term growth).

Damages claims

Damages associated with death, injury or loss for aviation passengers, or baggage loss/damage may be claimed through direct agreement between parties or via formal legal processes (e.g. court proceedings). Under the CACL Act, damages are determined based on the actual loss incurred. Liability caps only limit claims when the level of loss/damage exceeds the cap amount.

Overseas Domestic Arrangements

Unlike Australia's limited liability framework, many of Australia's aviation partners apply systems of unlimited liability to domestic travel. For example, all European Union members apply the Montreal Convention to domestic travel as well as international travel.¹⁶

New Zealand has a statutory 'no fault' compensation scheme, which provides specified levels of compensation for all personal injuries suffered in New Zealand. This system extends to injuries resulting from domestic air travel (but not international travel).

Related Requirements

While the CACL Act deals with domestic and international carriers' liability, other legislation addresses associated arrangements. In particular:

- the recovery of damages for injury, loss, damage or destruction caused to third parties by flying aircraft, or things falling from aircraft (i.e. damage on the ground) is dealt with by the *Damage by Aircraft Act 1999* and associated State legislation;
- the recovery of damages for death or personal injury suffered by a person resulting from an accident that took place on board an aircraft operated by the Commonwealth is dealt with by the *Air Accidents (Commonwealth Government Liability) Act 1963*;
- further liability arrangements for the carriage of Commonwealth employees and its agents are also set out in the *Air Accidents (Commonwealth Government Liability) Act 1963*; and
- the recovery of damages for accidents associated with certain other types of aircraft (e.g. some air work operations) is not dealt with under the CACL Act.

¹⁶ See EC regulation 889/2002

Attachment B – CACL Act Liability Thresholds for Death and Injury

Act Reference	Relevant Convention	Description	CACL Act Value	Notes
9(c)	MC99	Providing for a strict liability threshold above the value in the CACL Act	Currently 113,100 SDR	This figure relates to the limit of strict liability claims rather than a damages limit. The limit is reviewed every five years through an international process.
11A(1)	Warsaw Convention and Hague Protocol (part of the Warsaw System)	Providing for a liability limit above the value in the CACL Act	260,000 SDR	Applies to flights where one party has not signed the MC99 but has implemented the Warsaw Convention and Hague protocol (part of the Warsaw System).
21A(1)	Warsaw Convention without the Hague Protocol (part of the Warsaw System)	Providing for a liability limit above the value in the CACL Act	260,000 SDR	Applies to flights where one party has not signed the MC99 or the Hague protocol but has implemented the Warsaw Convention. (part of the Warsaw System).
31(1)	Nil – Domestic	Providing for a liability limit above the value in the CACL Act	\$725,000 (≈ 374,000 SDR)	Applies to domestic flights
31(1A)	Nil - International	Providing for a liability limit above the value in the CACL Act	260,000 SDR	Applies to international flights where no relevant convention applies.

Attachment C: Current Standard Insurance Exclusions

The following standard carriers' liability insurance exclusions are provided for under the CACLR.

Aviation Radioactive Contamination Exclusion Clause (General) (Aviation 38)

- (1) The contract of insurance does not cover:
 - (a) loss or destruction of, or damage to, any property or any loss or expense resulting therefrom;
 - (b) any legal liability of whatsoever nature; directly or indirectly caused or contributed to by or arising from ionising radiations or contamination by radioactivity from any source whatsoever.
- (2) Loss, destruction, damage, expense or legal liability which, but for the provisions of paragraph (1) of this Clause, would be covered by this policy, and is directly or indirectly caused or contributed to by or arising from ionising radiations or contamination by radioactivity from any radioactive materials in course of carriage as cargo under International Air Transport Association regulations, shall (subject to all the other provisions of this policy) be covered, provided that:
 - (a) it shall be a condition precedent to the liability of the Underwriters that the carriage of any radioactive materials shall in all respects comply with the current regulations issued by the International Air Transport Association relating to the carriage of restricted articles by air;
 - (b) the loss, destruction, damage, expense or legal liability shall have occurred or arisen during the period of this policy, and any claim by the Assured against the Underwriters or by any claimant against the Assured shall have been made within three years after the date of the occurrence giving rise to the claim;
 - (c) in the case of any claim by virtue of this paragraph (2) under the Hull section of this policy, the level of contamination shall have exceeded the maximum permissible level set out in the following scale:

Emitter	Maximum permissible level of non-fixed radioactive surface contamination (Averaged over 300cm²)
Alpha emitters in Group 1 of the IAEA list of radio isotopes (IAEA Health and Safety Series No. 6)	Not exceeding 10 ⁻⁵ microcuries per cm ²
All other substances	Not exceeding 10 ⁻⁴ microcuries per cm ²

and

- (d) the cover afforded by this paragraph (2) may be cancelled at any time by the Underwriters giving seven days' notice of cancellation.

Nuclear Risks Exclusion Clause (Avn. 38B)

- (1) This Policy does not cover:
 - (a) loss of or destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss;
 - (b) any legal liability of whatsoever nature;
directly or indirectly caused by or contributed to by or arising from:
 - (c) the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
 - (d) the radioactive properties of, or a combination of radioactive properties with toxic, explosive or other hazardous properties of, any other radioactive material in the course of carriage as cargo, including storage or handling incidental thereto;
 - (e) ionizing radiations or contamination by radioactivity from, or the toxic, explosive or other hazardous properties of, any radioactive source whatsoever.
- (2) It is understood and agreed that such radioactive material or other radioactive source in paragraph (1) (d) and (e) above shall not include:
 - (a) depleted uranium and natural uranium in any form;
 - (b) radioisotopes which have reached the final stage of fabrication so as to be usable for any scientific, medical, agricultural, commercial, educational or industrial purpose.
- (3) This Policy, however, does not cover loss of or destruction of or damage to any property or any consequential loss or any legal liability of whatsoever nature with respect to which:
 - (a) the Insured under this Policy is also an insured or an additional insured under any other insurance policy, including any nuclear energy liability policy; or
 - (b) any person or organization is required to maintain financial protection pursuant to legislation in any country; or
 - (c) the Insured under this Policy is, or had this Policy not been issued would be, entitled to indemnification from any government or agency thereof.
- (4) Loss, destruction, damage, expense or legal liability in respect of the nuclear risks not excluded by reason of paragraph (2) shall (subject to all other terms, conditions, limitations, warranties and exclusions of this Policy) be covered, provided that:
 - (a) in the case of any claim in respect of radioactive material in the course of carriage as cargo, including storage or handling incidental thereto, such carriage shall in all respects have complied with the full International Civil Aviation Organization 'Technical Instructions for the Safe Transport of Dangerous Goods by Air', unless the carriage shall have been subject to any more restrictive legislation, when it shall in all respects have complied with such legislation;
 - (b) this Policy shall only apply to an incident happening during the period of this Policy and where any claim by the Insured against the Insurers or by any claimant against the Insured arising out of such incident shall have been made within three years after the date thereof;
 - (c) in the case of any claim for the loss of or destruction of or damage to or loss of use of an aircraft caused by or contributed to by radioactive contamination, the level of such

contamination shall have exceeded the maximum permissible level set out in the following scale:

Emitter (IAEA Health and Safety Regulations)	Maximum permissible level of non-fixed radioactive surface contamination (averaged over 300 cm²)
Beta, gamma and low toxicity alpha emitters	Not exceeding 4 Bequerels/cm ² 10 ⁻⁴ microcuries/cm ²)
All other emitters	Not exceeding 0.4 Bequerels/cm ² (10 ⁻⁵ microcuries/cm ²)

- (d) the cover afforded hereby may be cancelled at any time by the Insurers giving seven days' notice of cancellation.

Noise and Pollution and other Perils Exclusion Clause (Avn. 46B)

- (1) This Policy does not cover claims directly or indirectly occasioned by, happening through, or in consequence of:
 - (a) noise (whether audible to the human ear or not), vibration, sonic boom and any phenomena associated therewith;
 - (b) pollution and contamination of any kind whatsoever;
 - (c) electrical and electromagnetic interference;
 - (d) interference with the use of property;unless caused by or resulting in a crash fire explosion or collision or a recorded in-flight emergency causing abnormal aircraft operation.
- (2) With respect to any provision in the Policy concerning any duty of Underwriters to investigate or defend claims, such provision shall not apply and Underwriters shall not be required to defend:
 - (a) claims excluded by Paragraph 1; or
 - (b) a claim or claims covered by the Policy when combined with any claims excluded by Paragraph 1 (referred to below as *Combined Claims*).
- (3) In respect of any Combined Claims, Underwriters shall (subject to proof of loss and the limits of the Policy) reimburse the Insured for that portion of the following items which may be allocated to the claims covered by the Policy:
 - (a) damages awarded against the Insured; and
 - (b) defence fees and expenses incurred by the Insured.
- (4) Nothing in this clause shall override any radioactive contamination or other exclusion clause attached to or forming part of this Policy.

War, Hijacking and other Perils Exclusion Clause Aviation) (Avn. 48B)

- (1) This Policy does not cover claims caused by:
 - (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power;
 - (b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter;
 - (c) Strikes, riots, civil commotions or labour disturbances;
 - (d) Any act of one or more persons, whether or not agents of a sovereign Power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional;
 - (e) Any malicious act or act of sabotage;
 - (f) Confiscation, nationalisation seizure, restraint, detention, appropriation, requisition for title, or use by or under the order of any Government (whether civil military or de facto) or public or local authority;
 - (g) Hijacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured.

Further this policy does not cover claims arising whilst the Aircraft is outside the control of the Insured by reason of any of the above perils. The Aircraft shall be deemed to have been restored to the control of the Insured on the safe return of the Aircraft to the Insured at an airfield not excluded by the geographical limits of this Policy, and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked with engines shut down and under no duress).