Aviation Legislation Amendment (Liability and Insurance) Bill 2012

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Law and Bills Digest Section

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Aviation Legislation Amendment (Liability and Insurance) Bill 2012

Date introduced: 22 August 2012

House: House of Representatives

Portfolio: Infrastructure and Transport

Commencement: Sections 1 to 3 commence on Royal Assent; Schedule 1 commences on a single day to be fixed by Proclamation, or six months after Royal Assent, whichever occurs first.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Aviation Legislation Amendment (Liability and Insurance) Bill 2012 (the Bill) is to amend the Civil Aviation Carriers (Liability and Insurance) Act 1959 (Carriers' Liability Act)\(^1\) to:

- increase the cap on carriers’ liability for death or injury of passengers on domestic flights, as well as the corresponding level of insurance required, to reflect the rate of inflation and
- narrow the scope of carriers’ liability by limiting liability to death and bodily injury rather than personal injury and thus effectively excluding compensation for purely mental injuries arising on domestic flights.\(^2\)

The Bill will also amend the Damage by Aircraft Act 1999 (Damage by Aircraft Act)\(^3\) to:

- narrow the scope of carriers’ liability by excluding claims for compensation of mental injuries where the claimant has not suffered additional personal or property damage and
- allow defendants to seek contribution from other parties who may have contributed to the damage suffered by the person bringing the claim and allow defendants to reduce their liability where the victim was partially responsible for the damage.\(^4\)

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Background

Aviation Liability Frameworks

In Australia, the liability of aircraft carriers’ can be categorised under three separate areas:

- liability for the hull of the aircraft
- liability of the carrier for passengers, cargo and crew and
- liability of the carrier with respect to third party surface damage.\(^5\)

Currently, there is no legislative requirement for aircraft carriers in Australia to have insurance for aircraft hulls, although many aviation leasing agreements will require carriers to maintain insurance against these risks.\(^6\)

The Carriers’ Liability Act sets out Australia’s liability arrangements for passengers, baggage and cargo, and covers both international and domestic travel. Australia’s arrangements for third party surface damage are contained in the Damage by Aircraft Act. This Act also covers international and domestic air travel.

Liability for passenger injury and death

Australian air carriers’ liability for passenger injury and death is based on a series of international treaties, which Australia has both signed and implemented.\(^7\) Under these treaties carriers are liable in respect of passenger death or injury, so far as it is caused by an accident taking place on board an aircraft, or in the course of embarkation or disembarkation.\(^8\) The Carriers’ Liability Act sets out the compensation arrangements for passengers, baggage and cargo affected by aircraft accidents, and ensures that air operators are adequately insured with respect to these liabilities.\(^9\)

However, different liability frameworks apply depending on the origin and destination of travel.

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6. Ibid.
7. Other agreements, such as the International Air Transport Association agreements, were never adopted by Australia.

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International Travel

Warsaw Convention

The genesis of the Carriers’ Liability Act was the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on the 12 October 1929 (the Warsaw Convention). This convention signified the commencement of an international framework for the rules of liability governing international carriage of persons, baggage and cargo by aircraft.\(^\text{10}\) Two main features of the Warsaw Convention were:

- strict liability on carriers for death or bodily injury to passengers\(^\text{11}\) and
- monetary caps on the liability of carriers.\(^\text{12}\)

Essentially, a passenger who suffered bodily injury on a flight to which the Warsaw Convention applied did not have to prove that the carrier was at fault; but could only recover damages up to the capped amount.

As the Warsaw Convention has been amended numerous times since its introduction, variations have occurred between countries in determining liability.\(^\text{13}\) In particular, the compensation cap applied has become extremely out-dated:

The cap has not been adjusted for inflation, and is set in a currency that no longer exists— that being the franc poincaré, consisting of 65.5 milligrams of gold of millesimal fineness 900.\(^\text{14}\)

Montreal Convention

In response to the limitations of the Warsaw Convention, the rules governing the liability of air carriers were improved by the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999 (the Montreal Convention).\(^\text{15}\)

Significant changes arising out of the Montreal Convention include, but are not limited to:

\(^{10}\) The text of the original Warsaw Convention is set out under Schedule 1 to the Carriers’ Liability Act. Schedule 2 sets out the Warsaw Convention as amended at The Hague and Schedule 3 to the Carriers’ Liability Act sets out the Guadalajara Convention, which is supplementary to the Warsaw Convention.

\(^{11}\) Article 17 of the Warsaw Convention.

\(^{12}\) Article 21 of the Warsaw Convention.

\(^{13}\) Department of Infrastructure, Review of Carriers’ Liability and Insurance, Discussion Paper, op. cit., pp. 8-9.


\(^{15}\) The text of the Montreal Convention is set out in Schedule 5 to the Carriers’ Liability Act.

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• the introduction of a two-tier system of liability
• the use of Special Drawing Rights (SDRs)\textsuperscript{16} when determining damages and
• allowing victims to bring a claim for damages in their own country, when the airline carrier operates and has premises in that country.\textsuperscript{17}

Under the updated system of liability, a first tier of strict carrier liability for damages of up to 100 000 SDRs applies. If a passenger wishes to claim more, they must then claim under the second tier where there is no strict liability and no cap. Under the second tier the burden of proof rests with the carrier to prove that it is not at fault.

Operation of the Conventions

The Montreal Convention applies to \textit{commercial international carriage} of persons, baggage and cargo performed by aircraft for reward, between countries which have implemented the Convention.\textsuperscript{18}

It does not apply to domestic travel, or to flights to countries which have not implemented the Convention.

While the Warsaw Convention may still apply to flights to countries which have yet to sign the Montreal Convention, it is expected that the Warsaw system will eventually be phased out.\textsuperscript{19}

The Montreal Convention was implemented in Australia by the \textit{Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Act 2008} and came into effect on the 24 January 2009.\textsuperscript{20}

\textsuperscript{16} The Special Drawing Right (SDR) is a monetary unit of the International Monetary Fund, which replaced the now obsolete Poincaré gold francs used by the Warsaw system. Section 9 of the Carriers’ Liability Act provides that an Australian court must convert all relevant SDR amounts into Australian dollars, using the exchange rate published by the Reserve Bank of Australia. The value of the Special Drawing Right is calculated by the International Monetary Fund on the basis of a weighted basket of four currencies—US dollar, European euro, Japanese yen and UK pound. The Fund publishes the value of the SDR each day in terms of US dollars; the latest available rate is crossed with the 4.00 pm A$/US$ rate. Source: Reserve Bank of Australia website, viewed 4 October 2012, http://www.rba.gov.au/statistics/frequency/definitions-sources.html

\textsuperscript{17} Department of Infrastructure, \textit{Review of Carriers’ Liability and Insurance}, Discussion paper, op. cit., pp. 9-10.

\textsuperscript{18} Where a country has not adopted the Montreal Convention, those elements of the Warsaw system which have been adopted will apply.

\textsuperscript{19} Department of Infrastructure, \textit{Review of Carriers’ Liability and Insurance}, Discussion paper, op. cit., p. 10.


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Domestic Travel

Part IV of the Carriers’ Liability Act covers liability for passenger injury and death, as well as damage to baggage and air cargo in respect of travel between the states and territories of Australia.\(^{21}\)

Each of the states has enacted complementary legislation which applies Part IV of the Carriers’ Liability Act to travel within the states. Together, the Commonwealth and state enactments create a national uniform scheme with regard to domestic carriers’ liability.\(^{22}\)

While Australia’s domestic provisions are similar to those established under the Warsaw convention, two important differences exist:

- instead of the two-tier liability system, liability is strict (that is, it is not necessary to prove fault)\(^{23}\) with payments capped at $500,000 and
- while application of the Montreal Convention provides only for bodily injury, the domestic framework extends to personal injury (that is, both physical and psychiatric injuries).\(^{24}\)

Third party surface damage

The Carriers’ Liability Act does not apply to damages suffered by third parties on the ground.

Instead, this is the jurisdiction of the Damage by Aircraft Act which sets out the relevant arrangements for third party (surface) damage with regard to both domestic and international flights. The Damage by Aircraft Act applies where a person or property on, in or under land or water suffers personal injury, loss of life, material loss, damage or destruction caused by an impact with an aircraft, part of an aircraft or something dropped from an aircraft.\(^{25}\) Unlike the Carriers’ Liability Act, the Damage by Aircraft Act does not provide for a national uniform scheme for intrastate operations.

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21. Part IV also covers international airline travel where the Montreal Convention, the Warsaw Convention, the Hague Protocol, the Montreal Protocol No. 4 or the Guadalajara Convention does not apply.
25. Section 10 of the Damage by Aircraft Act.

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which fall outside of the constitutional powers of the Commonwealth. Instead separate state and territory Acts which do not directly reflect the provisions of the Damage by Aircraft Act apply.\(^{26}\)

**Rome Convention**

While the international community has been successful in establishing a liability regime for damage caused to passengers, baggage and cargo, any attempts to regulate in respect of third party damage have failed to gather significant support.\(^{27}\)

The *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952 (the Rome Convention), which was established in 1952 with the aim of clarifying the rules with regard to third party damage, has only been signed by 49 parties.\(^{28}\) Part of the problem with the Rome Convention was that it was perceived as a ‘real risk for the airlines and the aviation insurance industry’ in terms of the level of third party liability created.\(^{29}\)

Australia was originally a signatory, but denounced the Convention in 1999 upon the establishment of the Damage by Aircraft Act.\(^{30}\)

**Review of Carriers’ Liability and Insurance**

The Australian Government has recently undergone an extensive review of Australia’s Aviation framework, culminating in the release of the National Aviation Policy White Paper (the Aviation White Paper) in December 2009.\(^{31}\)

As part of this review, the then Department of Infrastructure, Transport, Regional Development and Local Government (Department of Infrastructure) published:

- an issues paper entitled *Towards a National Aviation Policy Statement* in April 2008 (the Issues Paper)\(^{32}\) and

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• a discussion paper specifically relating to Australia’s carriers’ liability and insurance arrangements (the Discussion Paper).\textsuperscript{33}

Insurance issues

Australian commercial aviation operators that require aviation hull and liability insurance policies covering all risks must insure to the limits of liability imposed in the Carriers’ Liability Act.\textsuperscript{34} This is currently set at $500 000 per passenger.\textsuperscript{35} The issue for commercial aviation operators is that if the level of liability increases, it is likely that insurance premiums will also increase.

The Aviation White Paper sums up the problem as follows:

The legal framework governing insurance arrangements to cover a serious aviation accident requires a sensitive policy balance for governments. On the one hand, it is desirable for the innocent victims of air tragedies to have speedy access to appropriate compensation. On the other hand, there are limits to the capacity of the aviation industry to generate the economic resources necessary to cover the potentially vast sums involved.\textsuperscript{36}

Outcome of the review

The Discussion Paper contained 30 preliminary findings on the existing liability and insurance framework\textsuperscript{37}, including:

• not applying the Montreal Convention but instead maintaining a system of strict and capped liability
• increasing the liability cap to $725 000
• ensuring consistency between the international and domestic frameworks by limiting compensation to bodily injuries (rather than personal injuries) and
• maintaining a system of strict and unlimited liability with regard to damages suffered by third parties.\textsuperscript{38}

\begin{itemize}
\item 33. Department of Infrastructure, Review of Carriers’ Liability and Insurance, Discussion paper, op. cit.
\item 35. Section 31 of the Carriers’ Liability Act.
\item 38. Ibid., p. 24-27.
\end{itemize}

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The Discussion Paper also recommended that the Government should explore the possibility of amending both the Carriers’ Liability Act and the Damage by Aircraft Act to clarify that they contain the exclusive remedies that parties are able to claim against air carriers.\(^{39}\)

As part of the review, public submissions were invited.\(^{40}\) As a result of this consultation process, some of the preliminary findings from the Discussion Paper were included as recommendations in the Aviation White Paper.\(^ {41}\) Specifically, the Government announced that it would increase the domestic liability cap and implement a mandatory third party insurance scheme.\(^ {42}\) In addition, the Government committed to introducing legislation responding to technical issues about the way damages are awarded which were raised in the Discussion Paper and in submissions.\(^ {43}\)

**Basis of policy commitment**

On behalf of the Government, the Minister for Infrastructure and Transport, Anthony Albanese, stated:

> The Bill will deliver on one of the key commitments announced in the Government’s Aviation White Paper by significantly increasing the outdated cap on carriers’ liability for domestic travel and the level of mandatory insurance required by air carriers. In addition, the Bill will update technical provisions relating to the scope of liability for air operators.\(^ {44}\)

While the Aviation White Paper does not specifically refer to an increase in the level of mandatory passenger insurance required by aircraft carriers, it would appear that this corresponds with the increase in the liability cap.\(^ {45}\) The Aviation White Paper does refer to the introduction of a mandatory third party insurance scheme; however this has yet to be announced.\(^ {46}\)

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39. Ibid., pp. 26 and 29.
40. Submissions included:
42. Ibid.
43. Ibid., p. 89.
46. Ibid., pp. 17-18. As both Virgin Blue and Qantas already have third party insurance, this recommendation may not be considered necessary.

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Regulatory Impact Statement

A Regulatory Impact Statement (RIS) was prepared by the Department of Infrastructure with respect to this Bill. The purpose of the RIS was to examine whether the liability cap needed to be adjusted to reflect the increase in the Consumer Price Index (CPI).

According to the RIS:

The cap on liability was last adjusted in 1994. From 1994, inflation has increased the cost of living by approximately 2.7 per cent each year. The cost of a ‘basket’ of goods and services increased by over 47 per cent since 1994.

In making its determination, the Department of Infrastructure considered the following four options:

1. continue with the current arrangements, with the liability cap and level of insurance set at $500 000
2. remove the separate liability and insurance framework set out under the Carriers’ Liability Act, with claims for compensation for air accidents to be pursued under the current state liability schemes
3. apply the Montreal Convention to domestic travel, as well as international travel or
4. increase the current liability cap and level of insurance to reflect the increase in inflation.

In examining these four options, the Department of Infrastructure focused on what impact each option would have on two main groups of stakeholders:

- commercial air operators and
- the general public.

The idea of removing the separate liability and insurance framework, as well as the option of applying the Montreal Convention to domestic travel, was not recommended. It was felt that both options would result in significant uncertainty to air carriers, due to the lack of limit on the liability cap and would also result in similar uncertainty to passengers. The RIS further stated that continuing with the existing limit on the liability cap would result in a failure to compensate victims of air accidents appropriately. While the RIS acknowledged the effect that increasing the cap would have on airline insurance costs, especially smaller airlines, it was noted that insurance costs

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48. Ibid., p. 4.
49. Ibid.
50. Ibid., pp. 5-6.
51. Ibid., p. 6.
52. Ibid., pp. 7-8.
53. Ibid.
54. Ibid., p. 6.

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represent a small component of an airline’s overall cost base and the increase would only have a modest impact on insurance premiums.\(^{55}\)

In examining the impact on passengers, the RIS considered the possibility of airlines increasing their ticket costs in order to offset the increase in their insurance.\(^{56}\) While this is a likely possibility, estimates suggest that the impact on ticket prices will be fairly insignificant, provided the costs are passed on appropriately.\(^{57}\) After balancing all of these factors, it was concluded that the most appropriate option would be to increase the liability cap.\(^{58}\)

**Committee consideration**

**Selection of Bills**

At its meeting on 28 June 2012, the Senate Selection of Bills Committee determined that the Bill not be referred to any committee for inquiry and report.\(^{59}\)

**Scrutiny of Bills**

In its Alert Digest released on the 12 September 2012, the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) examined the provisions of the Bill.\(^{60}\) The Scrutiny of Bills Committee took particular note of items 1 and 5 of the Bill, which amend the Carriers’ Liability Act and the Damage by Aircraft Act respectively to limit the circumstances when persons can recover for mental injuries.\(^{61}\)

In considering these amendments, the Scrutiny of Bills Committee referred to the Statement of Compatibility with Human Rights, as set out in the Explanatory Memorandum to the Bill, which concluded that while the amendments contained in the Bill engage a number of human rights, the amendments are consistent with these rights as they ‘aim to contain a legitimate objective and are reasonable, objective and proportionate to that objective’.\(^{62}\)

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55. Ibid., pp. 8-9.
56. Ibid., p. 9.
57. Ibid.
58. Ibid., p. 11.
61. Ibid., p. 11.
62. Ibid., pp. 11-12.
In acknowledging the conclusions drawn in the Statement of Compatibility with Human Rights the Scrutiny of Bills Committee made the following comment:

The Committee draws the attention of the Senators to the explanation for this conclusion outlined at pages 14 to 15 of the explanatory memorandum, and leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.  

**Joint Committee on Human Rights**

In its September 2012 report, the Parliamentary Joint Committee on Human Rights (the Joint Committee on Human Rights) examined all bills introduced in the 14–23 August 2012 period, which included this Bill.  

In determining whether the Bill sufficiently complied with the Human Rights (Parliamentary Scrutiny) Act 2011, the Committee noted that while the Bill did engage Human Rights, as correctly identified in the Explanatory Memorandum, the amendments proposed were compatible with these rights.  

As noted by the Joint Committee on Human Rights:

The committee notes that the bill engages the right to equality and non-discrimination in article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the Convention on the Rights of Persons with Disabilities (CRPD). The committee considers that the Minister for Infrastructure and Transport appears to have discharged the burden of demonstrating that the removal of compensation for purely mental injuries involved in items 1 and 5 of the bill is, in the circumstances, justified and therefore consistent with article 26 of the ICCPR and article 5 of the CRPD.

**Policy position of the Opposition**

The Shadow Minister for Tourism and Regional Development, Bob Baldwin, acknowledged the Opposition’s support for the Bill:

This is a bill that the coalition supports, despite having many reservations regarding the government’s stewardship of the aviation sector more generally. This bill has common-sense

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63. Ibid., p. 12.  
67. Ibid.
provisions that have received wide support from the industry, for we recognise that there are some shortcomings in the current legislation that need to be rectified... 68

He further commented that while the Opposition has opposed the imposition of additional costs on aircraft carriers, such as the carbon tax 69, the measures imposed in this Bill are not unreasonable:

The regulatory impact statement indicates that this increase will be very small, estimating that the cost of the insurance component per ticket would increase by about 0.465 per cent for major airlines and around 2.8 per cent for smaller carriers. This would increase the ticket price of a $200 flight provided by a major airline by about 13c or one provided by a smaller airline by around 63c per ticket. With the industry having been heavily consulted by the government and given an opportunity to comment on the reforms through the discussion paper process, and there having been no increase in the cap for carriers liability for some time, I do not think that these imposts are unreasonable given the potential benefit to the passenger. However, as I have said, many of this government’s aviation policies have been unreasonable and a burden to both passengers and carriers alike. 70

Position of major interest groups

Commercial airline operators

The two main commercial airline operators in Australia, Qantas and Virgin Blue, included in their submissions comments on the existing compensation and insurance arrangements. 71 Both indicated that the current domestic arrangements are appropriate, so far as not implementing the Montreal
Convention domestically. They were also in agreement over not increasing the cap on liability and insurance.

In its submission, Qantas also recommended that the Carriers’ Liability Act be amended to:

- specify that state civil liability regimes are applicable to assessing domestic passenger claims
- exclude pure nervous shock claims and
- clarify that the Act provides exclusive remedies for the carriage of passengers, baggage and cargo.

Qantas also recommended that a cap be imposed in respect of claims brought under the Damage by Aircraft Act.

Airline industry groups

In its submission, the Australian Airports Association argued that no third party or additional liability insurance be contemplated at this time.

The Regional Aviation Association of Australia commented that:

Subject to minor improvements, the current domestic regime for compensation of passengers and cargo shippers is an appropriate compensation regime and the Montreal Convention should not be adopted for domestic carriage.

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76. Ibid., pp. 119-120.


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Insurance industry

QBE Insurance, which is the largest aviation insurer in Australasia, was the only insurance company to provide a submission with regard to the review.79 Some of the recommendations that it proposed included:

- that the Government expressly provide that the assessment of damages is subject to the state liability Acts
- exclude pure nervous shock claims and
- provide for the right of contribution80 and the defence of contributory negligence.81

Financial implications

According to the Explanatory Memorandum, the proposed amendments will have no financial impact.82

Main issues

Calculating damages

Qantas and QBE raised concerns in their submissions on the Issues Paper regarding the assessment of damages for claims brought under the Carriers’ Liability Act and the Damage by Aircraft Act as neither Act appears to prescribe the process that should be followed.83

In the absence of any process there is uncertainty as to whether the various state and territory civil liability Acts apply in the context of the assessment of damages under both the Carriers’ Liability Act and the Damage by Aircraft Act. If the state and territory government legislation does not apply, the question arises as to whether claims should be assessed in accordance with the common law.84

80. Right of contribution is the right of an insurer, where an insured has double insurance on a risk, to proportional contribution from the other insurer: Butterworths Concise Australian Legal Dictionary, op. cit., p. 381.
82. Explanatory Memorandum, Aviation Legislation Amendment (Liability and Insurance) Bill 2012, op. cit., p. 3.

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common law were to apply, then a plaintiff could potentially receive greater compensation payments than those allowed under the state and territory liability schemes (though any payment would still have to fall within the liability cap).  

The state and territory liability Acts arose from the insurance crisis caused by the collapse of HIH Insurance. The Review of the Law of Negligence (known as the Ipp report), published in October 2002, made a number of recommendations for tort law reform, including legislating for proportionate liability and setting caps on damages.

In November 2002 an in-principle agreement on nationally consistent legislation was reached. Subsequently each of the states introduced legislation that picked up the wording of the key recommendations of the Ipp report. However as the recommendations were not drafted in legislative form, the legislative changes were not uniform across the states.

This issue of the assessment of damages arose in the NSW District Court case of *Arefin v Thai Airways International Public Company Limited*, where the plaintiff claimed damages for injuries suffered on a flight between Thailand and Australia. While this case involved an international flight, the Warsaw Convention, as adopted by the Carriers’ Liability Act, applied. Justice Sorby noted that the Carriers’ Liability Act does not contain any provisions about the process to be followed in assessing damages. That being the case, it was decided that the current civil liability laws of New South Wales were the correct laws to be applied.

In the Discussion Paper, the Government confirmed that its preferred option is to ensure damages are assessed in accordance with the civil liability schemes and that the Carriers’ Liability Act and the Damage by Aircraft Act should be amended to reflect this. However, the Bill does not implement this preliminary finding.

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89. Ibid.
Bodily injury—not personal injury

In Australia, the Federal Court has interpreted the term ‘personal injury’ to include claims for purely mental injuries.\(^91\) The issue that arises is whether the proposed amendment to refer to ‘bodily injury’, rather than ‘personal injury’ will operate so that passengers who are injured as a result of domestic aircraft accidents will be limited to claiming in respect of only physical injuries.\(^92\) Much will depend on the Australian courts’ interpretation of the term ‘bodily injury’.

The Discussion Paper states that:

This change would still allow for the compensation of mental injuries in many instances, and there have been many cases where mental injuries have been compensated by Courts applying the ‘bodily injury test’ under the Warsaw/Montreal system.

It is recognised that deleting the reference to ‘personal injury’ and substituting ‘bodily injury’ will not remove all uncertainty in relation to this issue. This is because there remains ongoing legal conjecture as to how ‘bodily injury’ should be interpreted. However, limiting carriers’ liability under the domestic system to ‘bodily injury’ will ensure that the issue is treated consistently across the domestic and international frameworks and remove unnecessary complexity from the overall liability structure.\(^93\)

The Explanatory Memorandum to the Bill reinforces this approach:

The Bill will limit carriers’ liability under the domestic system to ‘bodily injury’ with the intention of ensuring that this issue is treated consistently across domestic and international frameworks.\(^94\)

It would appear that the courts in the United States and the United Kingdom have interpreted the term ‘bodily injury’ to include claims for mental injuries in some circumstances where physical injuries have also been incurred.

UK interpretation

The House of Lords considered the phrase ‘bodily injury’ when handing down its decision in the matters of King v Bristow Helicopters and In Re M.\(^95\) These were two separate appeals involving different factual circumstances, though both appeals involved claims for psychiatric injuries.

In the case of In Re M\(^96\), the House of Lords dismissed the claim of a fifteen year old girl who suffered clinical depression as a result of being sexually assaulted by the passenger sitting next to her. As

\(^91\) South Pacific Air Motive and Anor v Magnus & Ors [1998] FCA 1107.
\(^92\) Section 28 of the Carriers’ Liability Act.
\(^94\) Explanatory Memorandum, Aviation Legislation Amendment (Liability and Insurance) Bill 2012, op. cit., p. 2.
\(^95\) King v Bristow Helicopters Ltd. (Scotland); In Re M [2002] UKHL 7, (28th February 2002), viewed 23 October 2012, http://www.bailii.org/cgi-bin/markup.cgi?doc=uk/cases/UKHL/2002/7.html&query=&method=boolean

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there was no assertion of physical injuries, the Court dismissed her appeal on the basis that the plaintiff had sustained a mental injury only which fell outside of Article 17 of the Montreal Convention.\(^97\)

However, in the case of *King v Bristow Helicopters*\(^98\), the Court allowed the plaintiff’s appeal. In this matter the plaintiff had developed post-traumatic stress disorder (PTSD) as the result of being in a helicopter that had safely crash landed, and then developed an ulcer as a result of the PTSD. In allowing the plaintiff’s appeal the Court stated that ‘damages for the physical manifestations of a mental injury will be recoverable’.\(^99\)

As a result of the House of Lords’ decision in these cases, it would appear that the position in the UK is that the Montreal Convention does not allow for claims for purely psychiatric injury.

**US interpretation**

Other jurisdictions which apply the Montreal Convention have also considered whether a person can recover for psychological injuries where they have arisen out of physical injuries, or vice versa. In the United States case of *Jack v TWA*\(^100\), a District Court in California decided that a person could only recover for a psychological injury where such an injury was caused by a physical injury, as opposed to being merely suffered at the same time as the physical injury.\(^101\) In that case, the plane experienced an aborted take-off, crash and fire that completely destroyed the aircraft. Fortunately, all passengers survived, but some suffered minor physical injuries and many were traumatized by the accident. The Court stated that a causal connection between the bodily injury and the emotional harm was required so as not to cause inequity amongst complainants.\(^102\) *Jack v TWA* has since been subsequently followed by a number of United States courts, as well as having been cited internationally.\(^103\)

A number of United States and United Kingdom decisions have also held that PTSD could be considered a physical injury to the brain, and would therefore give rise to a claim for compensation under the Montreal Convention.\(^104\)

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96. Ibid.
97. Ibid.
98. Ibid.
99. Ibid., paragraph 129.
102. Ibid.
103. Ibid.

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Whether these are ‘exclusive remedies’

There has been some debate as to whether the Carriers’ Liability Act provides an exclusive remedy to passengers. Notably, the Montreal Convention expressly states that it provides the exclusive remedy, while the Carriers’ Liability Act provides that:

...the liability under this Part is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger.

According to the Discussion Paper it has always been the Government’s intention that Part IV of the Carriers’ Liability Act should provide the exclusive remedy available to passengers:

The system of strict and capped liability has always been intended to provide simplicity and certainty to all parties, and this is undermined if plaintiffs are able to bring an alternative cause of action based on another area of law.

Accordingly, it was recommended in the Discussion Paper that:

The Government should explore the possibility of amending the CAACL Act to clarify that it provides the exclusive remedy available to passenger victims, so that they are prevented from mounting legal proceedings based on alternative areas of law.

While it was suggested in the Discussion Paper that the Damage by Aircraft Act was also intended to set out the exclusive remedies available to third parties, there does not appear to be any provision in that Act which would give rise to such an intention. Instead, the Explanatory Memorandum makes clear that the Damage by Aircraft Act, unlike the Carriers’ Liability Act:

... does not have an ‘exclusive remedy’ provision. This means that [third parties] who do suffer ‘pure’ mental injury will not be prevented from seeking compensation through a fault based negligence claim.

106. Article 29 of the Montreal Convention. This was also stated in the United Kingdom case of Sidhu v British Airways [1997] 1 All ER 193.
107. Subsection 35(2) of the Carriers’ Liability Act.
109. Ibid.
111. Explanatory Memorandum, Aviation Legislation Amendment (Liability and Insurance) Bill 2012, op. cit., p. 3.

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Key provisions

Carriers’ Liability Act

Increasing the cap on liability and insurance

Item 2 of the Bill amends paragraphs 31(1)(a), (b) and (c) of the Carriers’ Liability Act to increase the cap on liability from $500,000 to $725,000. Under Item 4 of the Bill, the acceptable level of insurance provided for under paragraph 41C(3)(a) is correspondingly raised from $500,000 to $725,000.

This increase in the cap on liability and level of mandatory insurance reflects the Government’s commitment in the Aviation White Paper to safeguard the interests of consumers within the aviation industry.112

Replacing ‘personal’ injury with ‘bodily’ injury

Item 1 of the Bill amends section 28 of the Carriers’ Liability Act to replace the reference to ‘personal injury’ with that of ‘bodily injury’. This will align Australia’s domestic and international liability frameworks with the Montreal Convention, which refers to ‘bodily injury’113 and excludes compensation for purely mental injuries.114

The Explanatory Memorandum states that:

Courts have interpreted ‘bodily injury’ as excluding claims for purely mental injuries. This is in contrast to the domestic system which allows compensation for ‘personal injury’. Courts have interpreted this provision as allowing claims for mental injuries, irrespective of whether other ‘physical injuries’ have also been incurred.115

However, it is unclear what approach the Australian courts will adopt in determining what constitutes ‘bodily injury’. In addition, the Explanatory Memorandum does not address the situation of an aircraft carrier’s liability under the Act when a mental injury is suffered as a result of or in connection with a physical injury.

113. Article 17 of the Montreal Convention.
115. Ibid., p. 2.

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How the changes work

Passenger who suffers physical injuries

Under proposed section 28 of the Carriers’ Liability Act, the airline carrier will be liable in respect of any physical injuries suffered by the passenger. For example where a passenger is physically injured by unsecured items in the cabin during turbulence the passenger will be able to claim compensation up to the cap amount of $750,000.

Passenger who suffers purely mental injuries

Whether or not the airline carrier will be liable where a passenger has suffered mental injuries will depend on how the Australian courts interpret the term ‘bodily injury’, as set out under proposed section 28 of the Carriers’ Liability Act. It would appear from international case law that the airline carrier will not be liable in respect of any mental injuries suffered by the passenger, where the passenger has suffered no physical injuries. However, as noted above, a number of United States and United Kingdom decisions have also held that PTSD could be considered a physical injury to the brain and would therefore come under the definition of ‘bodily injury’.

Passenger who suffers both mental and physical injuries

Under proposed section 28 of the Carriers’ Liability Act, the airline carrier will be liable in respect of any physical injuries suffered by the passenger.

In this circumstance, it is unclear to what extent an airline carrier will be liable with regard to the mental injuries incurred. For example, where a passenger involved in a crash landing suffers severe lacerations and develops a psychiatric illness as a result of the scarring. It is likely that an Australian court will be left to determine whether there is a sufficient causal connection between the injuries (as in the United States case of Jack v TWA) to allow the claim under the Carriers’ Liability Act.

Passenger who suffers property damage

Under section 29 of the Carriers’ Liability Act, the airline carrier will be liable for the destruction or loss of, or injury to, a passenger’s baggage unless the airline carrier can prove that it took all necessary measures to prevent the damage incurred, or that it was impossible to take such measures. For example where checked in baggage is lost or stolen whilst it is in the hands of the airline carrier, the passenger can claim compensation for the baggage up to a capped amount.
Damage by Aircraft Act

Exclusion of mental injuries in relation to third parties

Section 10 of the Damage by Aircraft Act provides for the payment of compensation for injuries suffered by third parties arising from an aircraft impact. Item 5 of the Bill inserts proposed subsection 10(1A) into the Damage by Aircraft Act so that a carrier is not liable where a third party has only suffered mental injuries. However, where the claimant has suffered personal injury, property damage or material loss, as well as mental injury, then the complainant will also be able to claim in respect of the mental injury incurred. Proposed subsection 10(1A) can be distinguished from the provisions set out under the Carriers’ Liability Act, which do not expressly provide for mental injury claims where physical injuries have also occurred.

The purpose of this amendment is to address concerns raised by airline operators regarding the wide number of classes of plaintiffs that can currently claim under the Damage by Aircraft Act.116 As the Damage by Aircraft Act provides for a strict liability compensation scheme with no cap, it would be considered to be unreasonable to expose carriers to this kind of liability. While carriers such as Qantas and Virgin Blue already have third party insurance117, it is not possible to purchase insurance for an unlimited amount and having such a wide class of plaintiffs makes it extremely difficult to calculate what an appropriate level of insurance would be.118

While the High Court has previously commented that the legislative purpose of the Damage by Aircraft Act was intended to go beyond the Rome Convention which limited damages to ‘direct’ consequences of an aircraft accident119, it would appear that this is no longer the Government’s intention. As stated in the Explanatory Memorandum:

...the primary purpose of the DBA Act is to provide protection for those who have a relatively direct link with the air crash, having either suffered loss of life, physical/bodily damage, and/or property damage.120

That said, and as noted above under the discussion of ‘exclusive remedies’, third parties who suffer purely mental injuries will not be precluded from bringing a negligence claim under the relevant state or territory civil liability framework or the common law.

120. Explanatory Memorandum, Aviation Legislation Amendment (Liability and Insurance) Bill 2012, op. cit., p. 3.
Contributory negligence and the right of contribution

Item 6 of the Bill inserts proposed sections 11A and 11B into the Damage by Aircraft Act. Proposed section 11A of the Damage by Aircraft Act provides that where the defendant can establish that the negligence of the injured person has caused, or contributed to, the damage that they suffered, the amount of damages must first be calculated as if there had been no negligence; and then reduced to the extent that the court thinks is just and equitable given the injured person’s share of the responsibility for their own loss or injury.

This amendment has arisen out of the High Court decision of ACQ Pty Limited v Cook and Aircair Moree Pty Limited v Cook (Cook v Aircare Moree).\(^{121}\) This was the first time that the High Court considered the provisions of the Damage by Aircraft Act. In this case, Mr Cook, who was employed by an electricity company, was conducting repairs on power lines when he was electrocuted. The power lines had previously been felled by an aircraft while spraying crops on a nearby farm. The aircraft was owned by ACQ Pty Limited and operated by Aircare Moree Pty Limited. When considering Mr Cook’s claim in relation to the Damage by Aircraft Act, the originating court found that even though Mr Cook had contributed to his injuries by standing too close to the power lines, there was to be no reduction in the amount of compensation owed to him.\(^{122}\) His decision was upheld by both the NSW Court of Appeal\(^{123}\), and the High Court, which confirmed that the defence of contributory negligence is not available in respect of claims brought under the Damage by Aircraft Act.\(^{124}\) As a result of the High Court’s decision in this case, the Damage by Aircraft Act will now be amended to provide for the defence of contributory negligence and the right of contribution.

Proposed section 11B of the Damage by Aircraft Act provides that where an amount of damages is paid by a person in respect of an injury, loss damage or destruction under the Damage by Aircraft Act, that person may recover by way of contribution an amount that the Court considers just and equitable from:

- any other person jointly and severally liable under section 10 of the Damage by Aircraft Act and
- any other person who caused or contributed to the injury, loss, damage or destruction.

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124. Ibid.

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The effect of this provision would be, using the example of Mr Cook, that if a carrier paid for Mr Cook’s injury they could seek a contribution to the amount paid from any other party who might have also been responsible for the injury.

How the changes work

Third party who suffers physical injuries or damage

Under section 10(1) of the Damage by Aircraft Act, an airline carrier will be liable in respect of any physical injuries or damage suffered by a person. For example if a plane crashes into a person’s house and the homeowner is showered with debris, the person will be able to claim compensation in respect of the damage to the house and any physical injuries they suffered.

Third party who suffers purely mental injuries

From the discussion above, it appears that under proposed subsection 10(1A) of the Act the airline carrier will not be liable in respect of any mental injuries suffered by the person, where the person has suffered no physical injuries. For example, where a person suffers psychiatric injuries that have arisen out of witnessing the crash of a plane carrying a loved one. Whilst the person will not be able to claim for compensation under the Damage by Aircraft Act they may be successful in a claim for compensation under a state or territory civil liability scheme or under the common law.

Third party contribution to damage suffered

Where an airline carrier is deemed to be liable in respect of any physical injuries or damage suffered by a person on the ground caused by the aircraft (see Cook v Aircair Moree) the carrier will be able to claim a contribution to the amount paid from any other persons who may be liable for the damage under proposed section 11B of the Damage by Aircraft Act.

Concluding Comments

One of the aims of this Bill is to align Australia’s domestic and international liability frameworks with the Montreal Convention, by replacing the term ‘personal injury’ with ‘bodily injury’, in order to remove any existing confusion. However, this amendment may cause further confusion due to the uncertainty surrounding the definition of ‘bodily injury’ and whether a plaintiff is able to claim in respect of any mental injuries suffered as a result of physical injuries. Until this issue is decided by the Australian courts, uncertainty will continue to exist.

The amendments proposed in the Bill also promote further inconsistencies between the Carriers’ Liability and the Damage to Aircraft Act, especially in relation to when a plaintiff can claim in respect of mental injuries. It is also remains unclear whether the remedies contained in the Carriers’ Liability

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Act and the Damage by Aircraft Act are the exclusive remedies available to plaintiffs. Whether or not the Government will seek to clarify this by further implementing some of the preliminary findings from the Discussion Paper remains to be seen.