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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DAMAGE BY AIRCRAFT BILL 1999

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Minister for Transport and Regional Services, the Hon John Anderson MP)

Damage by Aircraft Bill 1999

OUTLINE

The purpose of the Bill is to improve compensation arrangements for third parties on the ground suffering death, injury or damage from aircraft that come within Commonwealth jurisdiction. Once the Bill is enacted, all such aircraft will be subject to strict and unlimited liability for any injury or damage caused to members of the non-flying public during an air accident, in their capacity as third parties on the ground.

Currently, due to Australia's adherence to the **Rome Convention** (Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface 1952), foreign aircraft coming under the Convention are subject to only limited (although strict) liability, which would result in inadequate levels of compensation. Foreign aircraft that do not come under the Rome Convention, the great majority of those serving the Australian market, are subject to unlimited (and strict) liability. Detail on the shortcomings of the Rome Convention is included in the Regulatory Impact Statement.

To effect improvement in the compensation regime by overcoming these shortcomings in access to compensation and its levels, the Bill repeals and replaces the current Act, the *Civil Aviation (Damage by Aircraft) Act 1958*, which gives effect to the Rome Convention. The Convention will then be denounced to coincide with the commencement of this Bill.

In the interests of national uniformity, the Bill provides a liability regime closely aligned with those that have existed in the majority of Australian States since the 1950's. These generally make all aircraft operators in those States subject to strict and unlimited liability for third party on the ground damage.

However, as the Bill is intended to provide members of the public with compensation that is as prompt, as adequate, and as comprehensive as practicable, it modernises and strengthens the provisions of relevant State legislation, where clear public gains have been possible. The Bill also retains concepts from the Rome Convention regime, where they will be of advantage to the plaintiff.

The Territories (and South Australia and Queensland) have no legislation covering air operators' third party on the ground liabilities and compensation, and leave proof of damage and level of compensation to common law. Under common law, members of the public suffering damage by aircraft must first prove negligence in the courts, before any amount of compensation is considered. The Bill when enacted will apply in all the Territories, including Norfolk Island. The Government will also urge the South Australian and Queensland Governments to introduce legislation very similar to the proposed new Commonwealth Act.

Financial Impact Statement

The Damage by Aircraft Bill 1999 will have no financial impact on the Budget.

Regulatory Impact Statement

Problem

Air accidents may cause injury, death, and damage not only to passengers but also to members of the non-flying public (third parties on the ground). For example, during one recent air accident in Australia, six houses were damaged and a resident injured, and in another, five members of the public were killed; while, in Amsterdam in 1989, 43 members of the public were killed and two apartment blocks effectively destroyed by an El Al Boeing 747.

However, there are differing regimes applying in Australia to compensation arrangements for third parties on the ground. The various regimes impose differing burdens of proof on injured parties and differing compensation outcomes. This lack of national uniformity in what are meant to be public protection measures is unsatisfactory from the point of view of social justice, and inconsistent with the concept of a single national market for aviation services.

The amount of compensation is the area of most concern. This differs according to whether the operator of the aircraft is engaged in domestic or international operations, and, in the case of international aircraft, whether or not an aircraft's country of registration is a signatory to the Rome Convention.

Most significantly, the Rome Convention limits the amount payable, by carriers subject to it, to an inadequate level.

For example, the total liability limit for a Boeing 747 aircraft is about $A36 million, on the most favourable interpretation of the gold conversion mechanisms allowed under the Convention. This is clearly insufficient to cover the full compensation required in the event of a major air crash in a populated area, similar to the 1989 El Al B747 crash in Amsterdam.

The Rome Convention is given force of law in Australia by the *Civil Aviation (Damage by Aircraft) Act 1958* (the Act). The Convention was developed with the intention of achieving international harmony in compensation arrangements for damage caused by international aircraft to parties on the ground. However, the Convention has failed to achieve its objective of international uniformity because only 38 countries are parties to it. In addition, aircraft from only seven countries party to it have been licensed to operate over Australian territory at any one time. Countries that are not parties to the Convention, with aircraft serving the Australian market, include the United States, Japan, China, and major countries in South-east Asia, such as Thailand, Malaysia and Indonesia, and in Europe including the United

Kingdom. Most foreign international carriers operating in Australia are not subject to the Rome Convention.
The aims of the Convention (in 1952) were well intentioned. Based on strict but limited liability, the Convention establishes principles that provide a high degree of certainty of compensation for injured parties. Only the amount of damages needs to be settled in a court. These vary in proportion to the weight of the aircraft involved, the number of persons suffering damage, and other circumstances. However, as outlined above, there is still the problem of interpreting the gold conversion mechanisms.

The limitation on liability was mainly due to a survival of the infant industry argument into the 1950's when the Convention was drawn up. This argument is no longer valid, and especially inappropriate, when prompt and adequate compensation for the innocent victims of air accidents is being considered. The involvement of members of the non-flying public who are injured as third parties on the ground in an air accident is generally not by choice or by any action of their own. In the great majority of cases, they will not have contributed in any way to the accident eg. by contributory negligence or by choosing aviation as a mode of transport.

This situation contrasts sharply with that applying to operators of aircraft registered in non-Convention countries (such as those listed above) when they fly over Australian territory. While these operators are also subject to strict liability, there is no statutory limit to the compensation payable by them. Similarly, operators of Australian registered aircraft engaged in domestic operations in New South Wales, Victoria, Western Australia, and Tasmania are subject to strict and unlimited liability legislation. Common law remedies apply in the Territories (and South Australia and Queensland) meaning that injured third parties first have to prove negligence or fault through a court, before any consideration is given to the level of any compensation. There is no legislative requirement in Australia for owner/operators to carry insurance against their third party on the ground liabilities.

In addition, as a consequence of Australia's adherence to the Rome Convention, damages received by victims of an accident caused by an Australian-registered aircraft on an international flight (currently one involving Qantas or Ansett) are likely to be substantially less than if an aircraft of a non-Convention country such as Japan, the United Kingdom, or the United States was involved.

This variation in the levels of compensation creates unwarranted uncertainty for the plaintiff and can increase the costs on the judicial system and the plaintiff through the increased levels of litigation necessary to obtain better compensation, or any.

Government Action

The Government will, through the present Bill, make all aircraft coming within its jurisdiction subject to strict and unlimited liability. This will bring them into line with the great majority of foreign carriers serving the Australian market and aircraft in the majority of Australian States.

As this will require repealing the current legislation, which gives effect to the Rome Convention in Australia, Australia's participation in the Convention will be formally denounced on a timing consistent with the new Act coming into force.

Objectives

The objectives of the proposal are to ensure that members of the non-flying public in Australia, as third parties on the ground, have ready and equal access to adequate compensation where they suffer death or injury or property damage resulting from an air accident. This public protection measure is intended to complement the recent reform in aviation consumer protection, where the Commonwealth Government considerably improved the air passenger liability regime by making it mandatory for air carriers to carry non-voidable insurance of $500,000 per passenger to cover their liabilities to passengers.

Policy/ Regulations

The present Commonwealth compensation regime is contained in the current *Civil Aviation (Damage by Aircraft) Act 1958* (the Act). This Act gives force of law to the Rome Convention in Australia, and consequently the Convention's low levels of compensation. The Act is administered by the Department of Transport and Regional Services.

Options

The main option is to denounce the Rome Convention and repeal the *Civil Aviation (Damage by Aircraft) Act 1958* (the Act), which gives force of law to the Convention in Australia. The present Bill will introduce a new Act to replace it.

Non-regulatory options for Rome Convention aircraft that were considered at the beginning of the process included negotiations with the relevant airlines and countries subject to the Convention to voluntarily raise their compensation levels, or renegotiating the Rome Convention itself.

Other options which were considered in the Departmental discussion paper widely distributed throughout the aviation and aviation insurance industries and the aviation legal community were legislative, including leaving the matter entirely to common law. However, there was overwhelming support from those consulted for the legislative option of denouncing the Rome Convention, and introducing a uniform regime of strict and unlimited liability nationally.

Another option would be for Australia to consider unilaterally imposing a higher liability limit through legislation.

Constraints

There is no possibility of renegotiating the Convention to achieve higher compensation limits. This would in any case result only in an increase in the compensation levels, not an abolition of the limited liability regime it imposes. The whole purpose of the Convention was to impose limited liability.

Negotiations with the individual overseas airlines subject to the Convention, and their insurers and governments, would be a protracted process with no guarantee of any success or uniformity of outcome. Their response would be unlikely to match the support of Ansett and Qantas, both subject to the Rome Convention on their international flights, for unlimited and strict liability.

One of the principal aims of the Commonwealth's proposal, uniformity of access to and level of compensation, would therefore not be achieved.

Unilaterally raising the limit through Australian legislation is also not an option while Australia remains a signatory to the Rome Convention. The Convention would still need to be denounced. In any case, any raising of the Convention limit would still result in two different levels of compensation: unlimited liability for the great majority of foreign carriers serving the Australian market, and some increased but not equivalent level for the small number of carriers subject to the Convention. This would defeat the uniformity objective.

Most importantly, only legislation can establish a new regime with strict and unlimited liability that will provide the courts with the power to settle disputed cases quickly and adequately to the benefit of the plaintiff. It will considerably lessen the costs and length of litigation involved for private citizens, where airline companies and their insurers decide to attempt to defend a case themselves, or where they attempt to pass negligence on to aircraft manufacturers or air controllers and others. Claims arising from the El Al crash in Amsterdam of 1989 are still awaiting settlement, mainly due to the lack of specific liability legislation in the Netherlands.

Voluntary agreements and undertakings by the airlines have significant drawbacks. They can easily be reviewed by their insurers and legal representatives on a case by case basis, especially when a large accident occurs.

The other legislative option such as leaving the matter to common law would require the majority of States to repeal legislation they have had in place since the 1950's. Common law remedies would also be a regressive step, as far as an equitable public protection measure is concerned: they give no assurance of adequate compensation to the victim, who in any case has to prove negligence before any amount of compensation is considered. The costs to the plaintiff, if a private householder, can be prohibitive.

In summary, the options considered included the proposed option of repealing and replacing current legislation (and as a result denouncing the Rome Convention) and non-regulatory options. Non-regulatory options included renegotiating the Convention, negotiating voluntary raising of limits, and leaving the matter to common law. These are not feasible for the reasons detailed above and do not achieve the stated objectives of the proposal. In addition, the extensive consultation on the proposal showed overwhelming support from all sections of the industry for a regime of legislated strict and unlimited liability.

Impact Analysis

The present Bill, when enacted, will ensure that all aircraft coming within Commonwealth jurisdiction will be subject to a regime of strict and unlimited liability similar to that in force in the majority of Australian States. This is the least complex way of moving toward national uniformity. This involves repealing current legislation, which gives force of law to the Rome Convention in Australia.

As a consequence, Australia will denounce the Rome Convention. The denunciation of the Convention will not be without precedent. Canada denounced it in 1976, citing similar problems with the Convention. The Department of Foreign Affairs and Trade supports withdrawal. The Attorney-General's Department advises that this would not be contrary to Australia's international obligations.

The following groups will be affected by the new legislation: the non-flying public, the aviation insurance industry in Australia and overseas, the aviation industry in Australia (including the small number of foreign carriers subject to the Convention operating in the market), and private owner/operators of aircraft.

For the great majority of the industry, the option taken is a minor adjustment to the existing legislative regime. It will not substantially alter the existing arrangements for domestic or international carriers, or owner/operators of private aircraft in the majority of States. The Department of Transport and Regional Services will continue to administer the legislation.

For the non-flying public, there is the benefit of uniform access to ready and increased compensation from the courts. This is an optimum outcome from the point of view of social justice. For those coming under Commonwealth jurisdiction, there is an immediate benefit of increased levels of compensation.

According to aviation insurance sources and the two major domestic airlines, the impact on business, including small business, will be minimal or nil. Aviation insurance sources advise that the great majority of owner/operators, commercial or private, already carry adequate insurance to cover their third party on ground liabilities. The new Act will affect the small minority of smaller operators and private owner/operators, who have not carried insurance for these liabilities in the past and may now consider taking out insurance in light of the new regime. If they choose to do so, the cost will vary according to each owner's profile and needs, and an operator's fleet, safety record, accident profile, area of operation, and insurer. Where the operator is different from the owner, coverage of their joint and several liabilities under the new Act will be a matter of commercial agreement between the two.

In particular, Australia's largest aviation insurance pool has advised that coverage for third party on the ground liabilities is the smallest of the cost components in aviation insurance. Within a combined single limit cover, which most private owner/operators and commercial operators take out, the ratio of the cost of covering passenger and third party liabilities is approximately 70% to 30%. A private owner/operator would be paying approximately $400 as an annual premium for the third party on the ground liabilities on an aircraft valued at $100,000 (the middle of the range). Hull insurance on the same aircraft would be $2,750, and the premium for (private) passengers would be $750 per annum (say 3 at $250,000 each). Smaller charter operators generally use aircraft within the same range, and so the impact on them would be within similar

parameters. (These figures are indicative only. They will vary according to a number of variables, mainly the sum at which the hull is insured. It is open to any owner to take a calculated risk and underinsure an aircraft. The insurance on the liabilities will then reduce in proportion. Quotation will also vary from insurer to insurer.)

In the case of international operations, Lloyd's of London have advised that they do not foresee any significant increases in insurance costs resulting from the proposed new arrangements. Australia's international operators, Qantas and Ansett, have also indicated that they expect no cost impact on their companies from the new arrangements.

Consultation

The main affected parties are the non-flying public, the aviation insurance industry in Australia and overseas, the aviation industry in Australia (including foreign carriers operating in the market), and private owner/operators of aircraft.

There has been extensive consultation with these parties on the proposal to reform current arrangements by introducing a national regime of strict and unlimited liability. The proposal has strong support from the aviation industry in Australia, the aviation insurance industry, all States and Territories, and from those consulted in the aviation legal community. Qantas and Ansett, who will be most affected by the new arrangements, have advised that they agree with the national introduction of strict and unlimited liability, and the consequent denunciation of the Rome Convention.

Strict and unlimited liability already applies to intrastate operators in the majority of States, and to the majority of foreign operators serving Australia.

Conclusion

The option chosen is preferred as the simplest means of attaining a national uniform regime based on legislation, with improved levels of compensation and ready access to them.

The non-regulatory options discussed under "Options" are unrealistic given that the number of different jurisdictions in Australia and overseas involved, and the number of airlines and countries involved, would make a uniform outcome within a reasonable timeframe very unlikely. The voluntary and non-legislative nature of any agreements achieved would also forego the advantage to the plaintiff of judicial determination, if required.

The minor adjustment of the existing legislation, which the Bill represents, is the most efficient and effective option, given the Government's objectives above.

Implementation and Review

The preferred option will be implemented by the present Bill.

The option is clear, comprehensible, and accessible to users. The Bill is short, simple, and clearly worded, making the responsibilities of aircraft operators and their liabilities easily understood, by the operators, by the owners and their insurers, and by the public and the courts.

Damage by Aircraft Bill 1999

Clause 1 - Short title

Clause 1 provides that the Bill, once enacted, may be cited as the *Damage by Aircraft Act 1999.*

Clause 2 - Commencement

This clause provides that the Act will commence on a day to be fixed by Proclamation, provided that the day does not fall before the day that Australia's denunciation of the Rome Convention takes effect. According to article 35 of the Rome Convention, this will take place 6 months after the instrument of denunciation is received by the International Civil Aviation Organisation (ICAO). The instrument will be deposited with ICAO only after this Bill has been enacted.

Clause 3 – Object of Act

This clause provides that the main object of the Bill is to facilitate the recovery of certain damages for injury, loss, damage or destruction caused by aircraft or objects falling from aircraft in flight.

Clause 4 - Definitions

This clause provides that the following definitions will apply for the purposes of the Act:
aircraft has the same meaning as in the *Civil Aviation Act 1988*, except that model aircraft are excluded;
Australian territory has the same meaning as in the *Air Navigation Act 1920*, which includes Australia's territorial waters;
Commonwealth aircraft means an aircraft, other than a Defence Force aircraft, which is in the possession or control of the Commonwealth, or being used wholly or principally for Commonwealth purposes;
Defence Force aircraft means an aircraft of any part of the Defence Force or any aircraft commanded by a member of the Defence Force carrying out duties as a member of the Force;
in flight is defined under section 5 of the Bill; and
operator is defined under section 6 of the Bill.

Clause 5 – Meaning of *in flight*

This clause provides that the meaning of "*in flight*" varies according to the type of aircraft involved:

- if lighter than air (eg. a balloon or airship), the aircraft will be taken to be in flight from the moment it becomes detached from the earth's surface until the moment it again becomes attached to the earth's surface;

- if heavier than air and power-driven (eg. propeller or jet driven), the aircraft will be taken to be in flight from the moment when power is applied for the purpose of take-off until the moment when its landing run ends;

- if heavier than air but not power-driven (eg. a glider), the aircraft will be taken to be in flight from the moment it becomes airborne (whether or not then attached to another machine or aircraft) until the moment its landing run ends.

Aircraft frequently exit runways without stopping and then taxi directly to a hard stand. It is not intended that the Act apply to this sort of normal manoeuvre that occurs directly after the aircraft has landed and slowed to a speed where it could stop if the pilot wished. It is intended to apply to crash landings and to landings where the aircraft may have landed normally but has caused damage in the process of landing. This would include overshooting or leaving a runway at an aerodrome. It would also include damage that arose from the use of a taxiway, road, field or other area as an emergency landing strip.

Clause 6 – Meaning of *operator*

This clause provides that the operator of an aircraft will be taken to be the person using the aircraft except where another person retains control of its navigation, after authorising its use. In this case, the person retaining control of the aircraft's navigation will be taken to be the operator. This means in practical terms that when use and control of an aircraft are not exercised by the same person (eg a "wet" lease or charter), the person who supplies the aircraft and crew is the one who would be liable as the operator.

Clause 7 – Use of an aircraft by employees

This clause provides that where an employee uses an aircraft in the course of his or her employment (eg. a pilot) then the employer is taken to use the aircraft, not the employee (whether the use is authorised or not).

Clause 8 – Act binds the Crown

This clause provides that the Act will bind the Crown in each of its capacities.

Clause 9 – Application of Act

This clause provides that the Act will extend to each external Territory, and applies to acts, omissions, matters and things within Australian Territory.

The Act will apply to the full extent of Commonwealth powers under *The Constitution*. It therefore applies to Commonwealth aircraft (except Defence Force aircraft), aircraft owned by foreign corporations or corporations formed within Australia, and other aircraft (including foreign aircraft), which are engaged in international and interstate flights, flights within and to and from the Territories, flights conducted by foreign corporations or corporations formed within Australia, and flights landing at or taking off from places acquired by the Commonwealth for public purposes.

Clause 10 – Liability for injury, loss etc

This clause provides under subclause 10(1) that liability for any injury or damage will exist where caused by impact with an aircraft in flight or in flight immediately before the impact, or from contact with an object which has fallen from the aircraft in flight or on impact, including part of an aircraft. This will include damage caused, which is the result of the impact (for example, by fire).

Subclause 10(2) provides that the operator and the owner of the aircraft involved are **jointly and severally liable**.

In addition to the operator and owner of the aircraft, two additional parties are potentially liable on a joint and several basis:

- where an authorised operator did not have the exclusive right to use the aircraft for more than 14 consecutive days, then the person who authorised its use is also liable.
- where an operator was using the aircraft without the authority of the person entitled to control its navigation, (for example because the person had stolen it or hijacked it) the person entitled to control the navigation is also liable. However, under clause 10 (3), where the person entitled to control the navigation of the aircraft has taken all reasonable steps to prevent the unauthorised use of the aircraft, he or she will not be liable.

Where damage or injury results from the collision or interference of two or more aircraft, or where two or more aircraft have jointly caused the damage, subclause 10(4) provides that each aircraft is to be considered liable.

Clause 11 – Recovery of damages without proof of intention, negligence etc

This clause provides that damages described under clause 10 can be recovered in a~~n Australian~~ court in Australian territory against all or any of the persons listed under clause 10, without having to prove negligence on their part.

Clause 12 – Repeal of *Civil Aviation (Damage by Aircraft) Act 1958*

This clause provides for the repeal of the present Act, the *Civil Aviation (Damage by Aircraft) Act 1958.*

Clause 13 - Regulations

This clause provides that regulations may be made to give effect to the Act.