

Montreal Convention on International Carriage by Air

- 5.1 The *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montreal on 28 May 1999 (the Montreal Convention), updates and will eventually replace the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, done at Warsaw on 12 October 1929 (the Warsaw Convention) and a number of subsequent Conventions and Protocols, which together form the ‘Warsaw system’. This system provides an international treaty framework for liability rules governing commercial international aviation travel, and for documentation such as tickets and air waybills.¹
- 5.2 The Montreal Convention will provide a new uniform code that modernises the international air carrier’s liability framework and will provide measures such as electronic documentation to assist the smooth movement of air passengers, baggage and cargo.²

1 National Interest Analysis (NIA), paras. 3-6.

2 NIA, para. 4.

Background

The Warsaw System before the Montreal Convention

- 5.3 Under the Warsaw system, an international carrier is liable for the death or injury of a passenger caused by an event that occurs on board the carrier's aircraft or in the course of embarking or disembarking. The carrier is also liable for damage to cargo and registered baggage caused by an occurrence on their aircraft during international carriage. It is not necessary for the plaintiff to prove fault, such as negligence. However, the carrier is not liable if it can prove that it took all necessary measures to avoid the damage or that it was impossible to take such measures.³
- 5.4 The Warsaw Convention was negotiated during the early years of the aviation industry and, as such, it capped air carriers' liability limits at a level appropriate for that era. Those limits are now out of date and unreasonably low.⁴
- 5.5 Over the years, there have been several amendments to the Warsaw Convention which have attempted to update and raise liability limits. Some of these failed to attract broad adherence, and different Warsaw Parties adopted different amending instruments, resulting in a complex and confusing array of international arrangements.⁵
- 5.6 In addition, a number of international agreements and private voluntary arrangements among air carriers have been developed, particularly by the International Air Transport Association (IATA) and the European Union. Many carriers agreed among themselves to apply an increased liability limit, or to waive liability limits. These voluntary arrangements increased the amount of compensation available to passengers of certain carriers in certain circumstances but further complicated the international system.⁶

The Montreal Convention

- 5.7 The Montreal Convention was concluded in 1999, and, according to the Department of Transport and Regional Services (DoTARS):

3 Regulation Impact Statement (RIS), para. 1.3.

4 NIA, paras 3 & 6.

5 NIA, paras 3 & 7.

6 NIA, para. 8.

Is widely regarded as a major achievement in reaching a compromise between countries with disparate views on the nature of the aviation industry and on appropriate amounts of compensation for injury or death as a result of aviation accidents.⁷

5.8 The primary objectives of the Montreal Convention are:

- to provide for equitable compensation for death or injury to passengers, and damage to baggage and cargo, that occur in international air carriage
- to facilitate the efficient operation of international carriage by air of passengers, baggage and cargo.⁸

5.9 The Montreal Convention incorporates most of the provisions of existing instruments, combining them into a single package that States must either accept or reject. As more States accept it, the Montreal Convention will eventually replace the Warsaw Convention.⁹ Mr Samuel Lucas from DoTARS advised the Committee that:

With the accession the year before last of the United States and now by members of the European Union, all our key routes, such as New Zealand, the United States, Europe and Japan, are covered.¹⁰

5.10 Other major partners of Australia, such as Singapore, are known to be considering accession.¹¹

Features of the Convention

5.11 The Montreal Convention substantially improves consumer protection in international carriage by air and modernises the smooth flow of passengers, baggage and cargo.¹² Mr Stephen Bogiatzis from DoTARS advised the Committee that:

7 Mr Stephen Bogiatzis, *Transcript of Evidence*, 7 March 2005, p. 4.

8 RIS, para. 2.1.

9 NIA, para. 11.

10 Mr Samuel Lucas, *Transcript of Evidence*, 7 March 2005, p. 6.

11 NIA, para. 12 and Ms Elisabeth Welch, *Transcript of Evidence*, 7 March 2005, p. 6.

12 NIA, para. 13.

The most practical effect of accession to the Montreal Convention is the increase in compensation limits for victims of air accidents.¹³

5.12 As identified in the National Interest Analysis (NIA), the key features of the Montreal Convention are:

- the use of the International Monetary Fund's Special Drawing Right (SDR) as the monetary unit rather than the now obsolete Poincaré gold francs used by the Warsaw system
- a two-tiered system of liability for the death of, or bodily injury to, an aircraft passenger. The first tier, for claims of up to 100,000 SDRs (\$A212,000), is based on strict, or no-fault, liability, and cannot be reduced or excluded except in the case of contributory negligence of the passenger. The second tier, for claims in excess of 100,000 SDRs, is unlimited in amount but is fault-based. However, the plaintiff is not required to prove fault; the carrier is liable unless it proves that the damage was not due to negligence or any other wrongful act or omission of the carrier (Article 21)
- additional updated liability limits: for damaged or delayed baggage up to a limit of 1,000 SDRs (\$A2,123) for each passenger; for damaged or delayed cargo up to 17 SDRs (\$A36) per kilogram; and for delay of passengers up to 4,150 SDRs (\$A8809) (Article 22)
- provision for review of carriers' liability limits every five years to take account of inflation. If the accumulated inflation over the review period exceeds 10 per cent the limits of liability will be revised and the revision takes effect six months later (Article 24)
- provision that States may require their own carriers to make advance payments following aircraft accidents to assist victims or their relatives meet their immediate economic needs. These payments do not constitute recognition of liability (Article 28)
- provision that punitive, exemplary or other non-compensatory damages may not be recovered in any claim arising from international carriage by air (Article 29)
- the addition of a 'fifth jurisdiction' in which a damages claim can be heard. An action for damages for the death or injury of a passenger may be brought in the State where the passenger resided

13 Mr Stephen Bogiatzis, *Transcript of Evidence*, 7 March 2005, p. 5.

at the time of the accident, if it is a country to or from which the carrier operates and where it has premises (Article 33)

- provision that States must ensure their air carriers maintain adequate insurance to cover their liability under the Convention (Article 50)
- provision for simplified documentation, eliminating the need for cargo consignors to complete detailed paper-based air waybills, allowing simplified electronic records to be used.

5.13 Ms Elisabeth Welch from DoTARS provided an example to explain the addition of a fifth jurisdiction:

An example of the fifth jurisdiction being used would be of an Australian who wished to bring an action in a country where liability limits are significantly lower than they are in Australia. That person would have an opportunity to bring an action in Australia rather than in the country where the accident occurred.¹⁴

5.14 If Australia accedes to the Montreal Convention, whether an Australian carrier would be subject to the new liability limits under the Montreal Convention (listed above) or under the earlier Warsaw limits is dependent on the country to which the carrier is flying, *not* the nationality of the carrier. If the country to which the carrier is flying is a signatory to the Montreal Convention, then the airline and passengers on that flight would be covered by the Montreal provisions. However, if the country is not yet a signatory, the airline and passengers would be covered by the Warsaw provisions. This would be considered non-Montreal Convention carriage for an Australian carrier. Ms Welch stated, by way of example:

Indonesia ... is a party to the Warsaw Convention of 1929 and to the Guadalajara Convention of about midway through last century. In that case, when Qantas flies to Indonesia it would be covered by the Warsaw Convention and the Guadalajara protocols.¹⁵

14 Ms Elisabeth Welch, *Transcript of Evidence*, 7 March 2005, p. 7.

15 Ms Elisabeth Welch, *Transcript of Evidence*, 7 March 2005, p. 6.

Entry into force

- 5.15 The Montreal Convention entered into force generally on 4 November 2003 and, as at 7 March 2005, there were 63 Parties to the Convention,¹⁶ including the United States, New Zealand, Canada, Japan, and the European Community and its member countries.¹⁷ Pursuant to Article 53(7), the Montreal Convention will enter into force for Australia on the sixtieth day following the date of deposit of an instrument of accession with the International Civil Aviation Organisation (ICAO).

Implementation

- 5.16 Australia will need to amend the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ('the Carriers' Liability Act') to give force to the international air carriage laws under the Montreal Convention.¹⁸
- 5.17 The Carriers' Liability Act currently imposes on Australian international carriers a higher liability limit (260,000 SDRs or around \$A552,000) for death or injury than applies under the Warsaw system.¹⁹ If Australia accedes to the Montreal Convention and consequently amends the Carriers' Liability Act, the current higher limit will continue to apply to Australian carriers, but only in relation to non-Montreal Convention carriage.²⁰ For carriage covered by the Montreal Convention, both Australian and foreign carriers will be subject to a first tier strict liability limit of 100,000 SDRs, and a second tier of unlimited fault-based liability.²¹
- 5.18 Minor consequential amendment of the *Air Accidents (Commonwealth Government Liability) Act 1963* (Cth) ('the Air Accidents Act') will also be required. This Act provides for the Commonwealth to 'top-up' damages to the level that applies to domestic travel in cases where the lower Warsaw limits apply. The minor amendment will deal with the relationship between the Commonwealth liability under the Air

16 Ms Elisabeth Welch, *Transcript of Evidence*, 7 March 2005, p. 6.

17 NIA, para. 12.

18 NIA, para. 25.

19 NIA, para. 26.

20 NIA, para. 27.

21 NIA, para. 27.

Accidents Act and its liability under the Carriers' Liability Act, where the Montreal Convention applies.²²

Costs

- 5.19 There will be no financial implications for the Commonwealth or State and Territory Governments as a result of accession to the Convention.²³
- 5.20 The implications for business and the aviation industry will be positive, in that most international carriers operating into Australia already subject themselves voluntarily to higher liability limits than apply under the Warsaw system, and they do not expect to have higher insurance costs.²⁴ Carriers, particularly the cargo freight industry, will also benefit from the simplified documentation procedures.²⁵

Consultation

- 5.21 Consultations were conducted with relevant federal and state government departments and agencies, aviation industry stakeholders and various community organisations during early 2001. The NIA states that the comments on accession to the Montreal Convention from all major stakeholders, including Qantas, were positive.²⁶
- 5.22 The only negative response, from two members of the public, was that Australia should seek an even better international regime.²⁷ As advised by Mr Lucas:

... the two people who argued for a better system had been hoping that Australia would have tackled some of the more contentious issues that almost caused the negotiations to

22 NIA, para. 30.

23 NIA, para. 31.

24 NIA, para. 32.

25 NIA, para. 33.

26 NIA, para. 35 and Consultations Annex, pp. 1-2. See also Ms Elisabeth Welch, *Transcript of Evidence*, 7 March 2005, p. 7.

27 NIA, para. 35 and Consultations Annex, pp. 1-2.

break down ... I have now been informed verbally by the two lawyers in person in my conversations with them that they now feel that we are better off moving to accede to Montreal. They have, to a certain extent, changed their opinion on that in the time since the extensive consultation process.²⁸

- 5.23 Comments on revision of the law applying to domestic flights, in line with the Montreal Convention, were mixed. Responses revealed substantial concern in relation to the application of some Montreal Convention principles to domestic flights, particularly with regard to unlimited liability and the cost of insurance.²⁹ Currently, the legislative provisions relating to purely domestic carriage are independent of Australia's obligations under international law.³⁰

Future treaty action

- 5.24 The Montreal Convention requires review of the liability limits at five-year intervals by reference to an inflation factor, which corresponds to the accumulated rate of inflation since entry into force or since the previous revision. If the review concludes that the inflation factor has exceeded 10 per cent, the State Parties must be notified of a revision of the limits of liability. Any such revision becomes effective automatically six months after its notification to the State Parties, unless a majority of the State Parties register their disapproval within three months of notification. In this case, the matter will be referred to a meeting of the State Parties.³¹
- 5.25 The liability limits must also be reviewed at any time that one-third of the State Parties express a desire to that effect, if the inflation factor has exceeded 30 per cent since the previous revision.³²
- 5.26 Any amendment of the Montreal Convention, other than changes to the liability limits, is subject to the normal Australian treaty process.³³

28 Mr Samuel Lucas, *Transcript of Evidence*, 7 March 2005, pp. 7-8.

29 NIA, Consultations Annex, p. 2.

30 RIS, para. 2.3.

31 NIA, para. 37.

32 NIA, para. 37.

33 NIA, para. 38.

Conclusion and recommendation

- 5.27 The Committee appreciates the benefits the Montreal Convention will generate by providing legal certainty and consistency for international carriage by air. The Committee agrees with DoTARS that delaying accession and implementation of the Montreal Convention, or failing to become a Party altogether, would be detrimental to Australia.

Recommendation 4

The Committee supports the *Montreal Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999) and recommends that binding treaty action be taken.

