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Insurance and Aviation Liability Legislation Amendment Bill 2002

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Insurance and Aviation Liability Legislation Amendment Bill
2002

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Insurance and Aviation Liability Legislation Amendment Bill 2002

Date Introduced: 25 September 2002

House: House of Representatives

Portfolio: Transport and Regional Services

Commencement: Royal Assent, apart from items 1-4 of Schedule 1 which are taken to have commenced at the same time as Schedule 4 of the *Aviation Legislation Amendment Act (No. 1) 1998*.

Purpose

The purpose of the Bill is to:

- assist the aviation industry in obtaining access to international war risk insurance
- exempt passive owners of aircraft, such as lessors and financiers, from liability for injury and damage to third parties on the ground, and
- correct a technical error in the *Civil Aviation (Carriers' Liability) Act 1959*.

Background

11 September 2001 and war risk insurance

War risk insurance is insurance covering losses arising from acts of war, including acts of terrorism, strikes, riots and sabotage. Following the 11 September 2001 terrorist events in the United States, existing aviation third party war risk insurance¹ was withdrawn from the global marketplace. To ensure continuity of airline operations, the Australian Government, like governments in many other countries, agreed to provide third party war, terrorist and hijacking indemnity cover for damage on the ground to airlines, airports and other service and facilities providers.² The Commonwealth indemnity covers the gap between the insurance available in the market and the level of insurance held prior to 11 September events and recipients of the Commonwealth indemnity are required to hold commercial war risk insurance to the extent it is available. The Commonwealth indemnity is currently

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being extended at three monthly intervals until such time as a more permanent solution is found. The Government has recently announced its intention to charge for this cover, although details of the charging are still to be finalised.³

The *Insurance Contracts Act 1984* and cancellation clauses

Aviation war risk insurance is provided by international insurance companies and in accordance with international industry practice, such insurance contracts normally include a seven day cancellation clause. This enables insurers to decrease or remove the cover in the event of a further catastrophe such as another terrorist attack.

According to the Bill's Explanatory Memorandum commercial third party war risk insurance is slowly becoming available again. However the international insurance companies providing this cover are only prepared to do so if the insurance contract contains a cancellation or variation clause that enables them to decrease or completely remove the cover in the event of further acts of terrorism. In the Australian context, this requirement conflicts with provisions of the Insurance Contracts Act (IC Act) and this is creating difficulties for the Australian aviation industry in obtaining access to the new third party war risk cover.

The IC Act limits the insurer's right to cancel a contract of general insurance to certain grounds set out in the Act. In particular, section 53 of the IC Act states that a clause in an insurance contract that permits an insurer to vary the contract to the prejudice of any other person is void. Section 63 of the IC Act prohibits the cancellation of insurance unless the insured has failed to comply with the duty of utmost good faith, or has engaged in non-disclosure, misrepresentation or fraud.

The IC Act does however contain some exemptions to this non-cancellation/variation regime and section 9 of the Act lists the types of contracts excluded from the operation of the Act. Significantly and of relevance to this Bill, subsection 9(3) excludes from the non-cancellation regime contracts of insurance against the risk of the loss of an aircraft, or damage to the hull of an aircraft, as a result of war. It is of interest that while war risk insurance cover for aircraft is already excluded from the operation of the IC Act, third party cover for the related on-the ground war risk was not included in this initial exemption. Aviation and insurance representatives have advised the Department of Transport and Regional Services that many underwriters in the international insurance market who are once again offering war risk cover are unwilling to provide cover to Australian firms.⁴ Presumably this is due to the non-cancellation regime in the IC Act.

The amendments to the IC Act proposed in the Bill are a response to this problem and are intended to remove impediments to the Australian aviation industry gaining full access to the international insurance market for third party war risk insurance. The Bill proposes to exclude aviation third party war risk insurance from the non-cancellation regime in the IC Act.

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Damage by Aircraft Act 1999 and liability

The Damage by Aircraft Act (DA Act) came into force in November 2000, its purpose being to reform the regime of liability of aircraft operators for injury, loss, damage or destruction caused to persons or property on the ground. The DA Act introduced a regime of strict and unlimited liability for injury and damage caused by aircraft coming within the jurisdiction of Australia. Strict liability means that the airline is subject to liability without the plaintiff⁵ proving fault and unlimited liability means that compensation to the parties must be at an adequate level. Of significance to this Bill, subsection 10(2) of the DA Act currently provides that operators and owners of the aircraft are held to be jointly and severally liable in respect of the injury or damage caused. There is no definition of 'owner' in the Act and it is generally recognised that 'passive owners' such as financiers or lessors would also be caught by the joint and several liability obligations imposed by subsection 10(2).

The Explanatory Memorandum states that since 11 September 2001, concerns have been raised by lessors and financiers about their potential liability in the event of an aircraft causing third party damage.⁶ It has been pointed out that Australia is one of only four countries⁷ that impose liability on passive lessor owners and international lessors have suggested that this liability could threaten operations into Australia by foreign carriers. The amendment to the DA Act proposed by the Bill is a response these concerns and is intended to remove liability for aircraft owners who are lessors and financiers.

Main Provisions

Civil Aviation (Carriers' Liability) Act 1959

Items 1-4 of Schedule 1 correct a technical error in the Civil Aviation (Carriers' Liability) Act. **Items 3-4** modify the definition of Australian international carrier in paragraphs 11A(2)(b) and 21A(2)(b) in this Act by clarifying that charter operators are only Australian international carriers if they are Australian persons. **Item 2** inserts a definition of Australian person into section 5. It is written in the same terms as the definition of Australian person in the *Air Navigation Act 1920*.

Damage by Aircraft Act 1999

As stated above, subsection 10(2) of the DA Act provides that operators and owners of the aircraft are held to be jointly and severally liable in respect of the injury, or damage caused to third parties.

Item 5 of Schedule 1 inserts **proposed subsection 10(2A)** into the Act and provides an exemption from liability for the owner of the aircraft where the owner:

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- did not have an active role in the operation of the aircraft, and
- there were leasing or financial arrangements in place under which a person other than the financier or lessor had exclusive right to use the aircraft.

Insurance Contracts Act 1984

Section 9 of the Act lists the types of contracts excluded from the operation of the IC Act. **Item 6** of Schedule 1 inserts **proposed subsection 9(4)** to provide that sections 53 and 63 of the IC Act (that deal with cancellation and variation of a contract⁸) do not apply to prescribed insurance provisions providing cover for war or terrorism risk. Passage of this provision would need to be followed by a regulation prescribing aviation third party war and terrorism risk cover. According to the Explanatory Memorandum the provision has been drafted in this way to provide scope to extend this treatment to other types of war or terrorism insurance if necessary.⁹

Concluding Comments

The proposed amendments in the Bill are only small measures aimed at assisting the aviation industry in obtaining third party war risk insurance after the events of 11 September 2001. The Commonwealth Government fully acknowledges that a longer-term solution needs to be found¹⁰ and in this regard it is relying heavily on international initiatives being developed by the International Civil Aviation Organization and major insurance brokers.¹¹ In the interim, the Government is continuing to assist the aviation industry by providing a subsidised indemnity scheme.

Endnotes

- 1 Aviation third party war risk insurance covers third parties on the ground who suffer death, personal injury, or property damage from aircraft involved in the war or terrorist activities.
- 2 Prime Minister, *Press Release*, 'Government supports airline industry against terrorism', 22 September 2001. A copy of the relevant criteria announced by the Government at the time is at Attachment A in the Bill's *Explanatory Memorandum*.
- 3 *Explanatory Memorandum*, p. 5.
- 4 *ibid.*, p. 6.
- 5 ie the person or person's family suffering the injury.
- 6 *Explanatory Memorandum*, p. 6.

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- 7 The others being Greece, Norway and Denmark.
- 8 Section 53 of the IC Act states that a clause in an insurance contract that permits an insurer to vary the contract to the prejudice of any other person is void. Section 63 of the IC Act prohibits the cancellation of insurance unless the insured has failed to comply with the duty of utmost good faith, or has engaged in non-disclosure, misrepresentation or fraud.
- 9 Explanatory Memorandum, p. 9.
- 10 *ibid.*, p. 5.
- 11 John Anderson, *Press Release*, 'Australia supports international solution for war risk insurance', 10 May 2002.

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