



## **Submission to the Aviation Safety Regulation Review**

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[Joseph Wheeler](#)  
Senior Solicitor

Shine Lawyers  
Aviation Department

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## Who we are

[Shine Lawyers](#) started in 1976 in Toowoomba, Queensland. A country lawyer by the name of Kerry Shine wanted to do things differently and believed in always putting his clients first. He went on to become Queensland's Attorney General but before he left, he made sure his vision would be carried on to help many more. Shine is an Australian owned company with local branches and local people. There are over 40 branches throughout Queensland, Victoria, New South Wales and Western Australia.

In brief Shine Lawyers is one of Australia's largest plaintiff litigation firms, and the only national plaintiff firm with a dedicated Aviation Law Department which handles regulatory, and administrative work in addition to acting for those injured or killed in aviation accidents worldwide. Shine is a values driven business which seeks to "Right Wrong".

## Our role in aviation safety and standing to contribute

The Shine Lawyers [Aviation Law Department](#) represents people from within and outside of Australia, many of whose claims or grievances fall within some or many facets of the national regulation of aviation administered by the Department of Infrastructure and Regional Development (DOIRD) and Civil Aviation Safety Authority (CASA). The firm's combined experience as aviation lawyers extends over 40 years and includes acting for families whose lives were touched by aviation accidents throughout Asia, Australia and the Pacific.

Such clients include those which have been injured on flights where relevant claims fall under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) or its state counterparts. Other clients include aviation operators or authorisation holders who are aggrieved by aspects of administrative processes and decision making by CASA.

In all instances, the clients have a direct interest in the suitability of Australia's aviation safety related regulations and an indirect interest in other safety related matters (particularly that others in future are prevented from suffering through many of the issues they have endured in their interface with the aviation laws applicable to their claims or grievances).

In light of these interests, and our regular engagement with aviation liability law as it affects Australian interests, the Shine Lawyers Aviation Law Department hopes that the following submissions will assist the Panel in forming a balanced view on some of the broad "other safety related matters" which arise in the course of the Aviation Safety Regulation Review (ASRR). An unfortunate outcome of poor or deficient aviation safety regulation in some instances is accidental injury or death with necessitates compensation for passengers. Particularly, we wish to highlight that considerations of safety cannot be solely confined to discussion on preventive schemes and regulations (such as laws which seek to prevent aviation accidents) – but that another equally significant dimension exists too: an examination of the consequences for those who must deal with accidental injury or worse, death.

## As air travel expands so do potential adverse consequences of accidents

It must be remembered that as air traffic increases within, and into and out of Australia, the (thankfully relatively low) risks inherent in air travel multiply. Air travel has never been safer largely through the international community's recognition of the need to proactively manage safety risks,<sup>1</sup> and ever-increasing aviation technology, automation, and human factors awareness.<sup>2</sup>

Commercial air transport is a major driver of economic activity in Australia and abroad, which unavoidably impacts the community. The system worldwide carried 2.9 billion passengers in 2012 and, when measured as revenue passenger kilometres (RPKs ) grew at a rate of 5.5% over the previous year. In the Asia Pacific region, airlines increased their performance by 8.6% in August 2013 as compared with August 2012. In Australia, the latest report into Domestic Aviation Activity released by the Bureau of Infrastructure, Transport and Regional Economics (BITRE) released on 28 January 2014 showed that domestic carriage of passengers was trending upwards with a 1.8% increase in passengers being carrier to 30 November 2013 than to the same date in 2012.<sup>3</sup> The International Civil Aviation Organisation (ICAO) forecasts scheduled passenger traffic and its medium term vision is that global air traffic will increase by 5.9% in 2014 and 6.3% in 2015 respectively.<sup>4</sup> The simple message is that global connectivity is reliant on aviation.

As more people and goods travel, the low risks inherent in this most highly regulated industry multiplies, in parallel with the need for accident prevention through appropriate regulation. In recognition of this, no discussion on aviation safety regulation would be complete without reference to the flipside of appropriate aviation safety regulation – ie, the law applicable to those who suffer loss, injury or death as a result of aviation accidents and incidents.

Shine Lawyers Aviation Law Department welcomes the opportunity to contribute to the ASRR, in light of the recognition set out above. The purpose of these submissions is to outline some low risk, and practically workable legislative changes which would help secure better and more certain outcomes in the event of any unfortunate future air accidents which affect Australians or travellers to Australia.

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<sup>1</sup> For example, the commencement of Annex 19 to the Chicago Convention. See <<http://www.icao.int/safety/SafetyManagement/Pages/Annex-19,-1st-Edition---Executive-summary.aspx>>, last accessed 31 January 2014.

<sup>2</sup> See, for example, the latest recommendations of the United States Federal Aviation Administration (FAA) following release of the final report on "Operational use of flight path management systems", published 5 September 2013, available at <[http://www.faa.gov/about/office\\_org/headquarters\\_offices/avs/offices/afs/afs400/parc/parc\\_reco/media/2013/130908\\_PARC\\_FltDAWG\\_Final\\_Report\\_Recommendations.pdf](http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/afs/afs400/parc/parc_reco/media/2013/130908_PARC_FltDAWG_Final_Report_Recommendations.pdf)>, last accessed 31 January 2014.

<sup>3</sup> BITRE, *Domestic aviation activity*, published 28 January 2014, available at <<http://www.bitre.gov.au/statistics/aviation/domestic.aspx#summary>>, last accessed 28 January 2014.

<sup>4</sup> ICAO, *World Passenger Traffic Forecasts*, available at <[http://www.icao.int/sustainability/pages/eap\\_fp\\_forecastmed.aspx](http://www.icao.int/sustainability/pages/eap_fp_forecastmed.aspx)>, last accessed 30 January 2014.

## Recommendations

We recommend to the ASRR Panel that it should advise the Government to:

1. Extend the concession Commonwealth employees travelling on Commonwealth business enjoy under Part III of the *Air Accidents (Commonwealth Government Liability) Act 1963* (Cth) (AACL Act) to all Australians, or repeal Part III of the AACL Act; or
2. Review the AACL Act's consistency with the policy behind the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (CACL Act), and update the AACL Act to reflect its original intent as expressed by Parliament in 1963; and
3. Remove all references to the term "personal injury" in s12 of the AACL Act (or return that term to the wording of the CACL Act for consistency); and
4. Legislate for the imposition of adherence to the IATA (or some other suitable) intercarrier agreement as a condition for non-Australian airlines which service Australia (as recommended at Preliminary Finding 4 of the 2009 DOIRD Discussion Paper).

## 1. A need to revisit policy on carriers' liability arrangements

As part of compiling suggestions for the improvement of the present air carrier liability regime in Australia, we examined the 2009 Department of Infrastructure, Transport, Regional Development and Local Government's (DOIRD) "Review of Aviation Carriers' Liability and Insurance".<sup>5</sup> This document contains a range of preliminary findings including options on improvement for the framework.

Many of the recommendations have already been implemented in part fulfilment of the previous Government's statement of policy in the "National Aviation Policy White Paper" (2009).<sup>6</sup> However, certain preliminary findings remain unaddressed and, it is submitted, those mentioned below should be implemented by Government as a priority to address serious shortcomings in the availability and uniformity of compensation available to Australian air travellers. These shortcomings have been of longstanding concern, and would increase certainty for both victims of air crashes, Australian and international air carriers, and their insurers.

## 2. Background to air carrier liability in Australia

Australia has, since 1935, been a party to the *Convention for the Unification of Certain Rules relating to International Carriage by Air*, done at Warsaw, 12 October 1929 (Warsaw Convention). The Warsaw Convention introduced a regime of strict carrier liability for international air passenger injury or death, and put in place limits on payable compensation for airlines. This was amended by the Protocol to Amend the Warsaw Convention of 1929, done at The Hague, 28 September 1955<sup>7</sup> (Hague Protocol) which came into force in Australia in 1963.<sup>8</sup> The object of the Hague Protocol was to, among other things, double the liability limit to 250,000 Poincare francs (approximately \$16,600 USD).

The regime has been further updated numerous times, and has now been largely supplanted by a new Convention of the same name (Montreal Convention).<sup>9</sup> All the Conventions could still be invoked by passengers as the rules of the "Warsaw regime" as it is known, depend ultimately on the *contract of carriage* between passengers and airlines. Liability of an air carrier could be invoked for a passenger carrying a ticket for travel on an airline which travels between two non-Montreal Convention countries, such that liability of the air carrier would be by virtue of the Warsaw Convention (only), the Warsaw Convention as amended by the Hague Protocol, or many other

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<sup>5</sup> The Discussion Paper prepared in the review is available at <<http://www.infrastructure.gov.au/aviation/international/liability.aspx>>, last accessed 31 January 2014.

<sup>6</sup> For example, the *Aviation Legislation Amendment (Liability and Insurance) Act 2012* (Cth) updated the statutory cap on damages payable by a carrier in the event of death or injury of passengers on domestic flights under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth), effective from 31 March 2013. Additionally, the amendment resulted in greater harmonisation of the domestic aviation liability regime with that under the prevailing international regime of liability conventions (ie, the "Warsaw regime" including the Convention for the Unification of Certain Rules for International Carriage, done at Montreal, 28 May 1999). This Convention is incorporated into Australian law by the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) and entered force on 24 January 2009.

<sup>7</sup> *Protocol to Amend the Warsaw Convention of 1929, done at The Hague, 28 September 1955*, (Hague Protocol).

<sup>8</sup> 1 August 1963.

<sup>9</sup> *Convention for the Unification of Certain Rules relating to International Carriage by Air*, done at Montreal, 28 May 1999, ICAO Doc 9740.

variations. The upshot of this is that it is almost impossible to say with certainty what liability laws apply to any particular flight which crashes, as the laws which apply to particular passengers depend on their itinerary of travel and the Convention ratifications (if any) of the countries listed on that itinerary.

It is not uncommon for passengers seated on the same flight to have completely different liability limits and jurisdictions available to them for claims arising out of the same aviation accident.

### 3. Fixing the holes in the system – travel on Australian airlines

Australia addressed these shortcomings of the system, in part, by legislating higher liability limits than those applicable to passengers under the Warsaw Convention as amended by the Hague Protocol, in Part II of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (CACL Act). Under s 11A of the CACL Act, Australian international carriers must cover passengers for proven losses for passenger death or injury resulting from an accident in an amount up to 260,000 Special Drawing Rights.<sup>10</sup>

While this goes some way to levelling the field such that passengers on “Australian international carriers” are covered for a higher amount of compensation when their contracts of carriage or travel itineraries incorporate the Warsaw Convention as amended by the Hague Protocol, it does not reflect *all* passenger travel. This is simply because a large proportion of people travel on non-Australian international air carriers on international flights into and out of Australia.<sup>11</sup> Thus, the provision in the CACL Act, Part II, only protects passengers who travel on “Australian” airlines, such as Qantas, or Virgin Australia.

As more and more passengers travel by air, more and more do so on non-Australian airlines, and this (together with their chosen destinations) can expose them to lower air carrier liability limits than other passengers. As Figure 1 demonstrates, the top 10 airline passenger carrying airlines operating to Australia included carriers from Singapore, United Arab Emirates, New Zealand, Hong Kong, Malaysia and Thailand, among others. Obviously, none of these airlines are Australian, meaning passengers on them whose carriage comes within Part II of the CACL Act, would be prevented from accessing the higher passenger liability limits of those travelling on Australian airlines, and can only (depending on their particular itinerary) access compensation in the event of an accident under the more restrictive Warsaw or Hague system.

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<sup>10</sup> On 31 January 2014 this amount equated to approximately \$454,400 Australian dollars: source [www.xe.com](http://www.xe.com), last accessed 31 January 2014.

<sup>11</sup> An argument that non-Australian airlines are captured by this term pursuant to ss11A(2) of the CACL Act which uses the word “authorised by Australia” under bilateral arrangements, is defeated by the fact that the term “Australian international airline” is defined by reference to “bilateral arrangement” in the *Air Navigation Act 1920* (Cth) (AN Act). In s11A of the AN Act the terms “foreign airline” and “Australian international airline” are defined with the effect that the former term only refers to actual Australian airlines designated under bilateral arrangements, not foreign airlines with an Australian presence or service offering.

Chart III International Passengers by Major Airlines - Years ended June

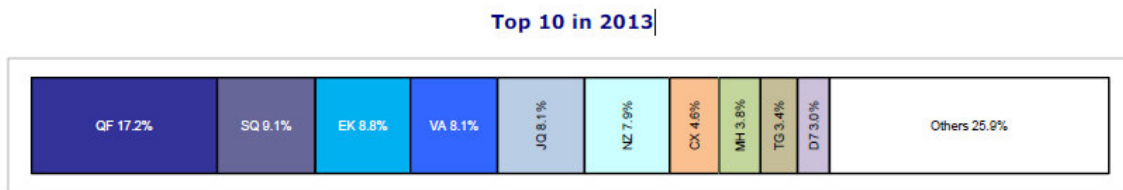


Figure 1: Source – BITRE “Aviation – International airline activity 2012-13”<sup>12</sup>

The hole in the system can be fixed by a method proposed and discussed below at section 5.

#### 4. Fixing holes in the system – Commonwealth employees and the *Air Accident (Commonwealth Government) Liability Act 1963*

In addition to the protections for passengers who travel on Australian airlines, mentioned above, a further protection is provided by statute for those travelling on Commonwealth business, as passengers for the purposes for the Commonwealth or a Commonwealth authority. The Second Reading Speech of the bill which introduced the *Air Accidents (Commonwealth Liability) Act 1963* (Cth), (AACL Act)<sup>13</sup> indicates that an *ex gratia* system of special provision had been made prior to the enactment of the CAAL Act for “the dependants of a person who is killed or injured in an air accident whilst travelling as a passenger on Commonwealth business or at Commonwealth expense”.<sup>14</sup>

The CAAL Act removed the need for such an *ex gratia* system in relation to domestic air travel, but it was thought at the time that a legislated system was needed to provide air travel cover for Commonwealth-employed travellers for “uniform cover against death or injury”.<sup>15</sup> In essence, the AACL Act provides a cause of action against the Commonwealth (similar to strict liability under the CAAL Act) for those travelling on Commonwealth aircraft and those travelling on Commonwealth business on aircraft *not operated by the Commonwealth or a Commonwealth authority*.<sup>16</sup>

The effect of the provisions is to “top up” for these Commonwealth passengers the amount of compensation they would be limited to if they suffer an accident to which the Warsaw Convention/Warsaw Convention as amended by the Hague Protocol applies, to the level of compensation Australian passengers may recover up to in the scheme in the CAAL Act which compensates *domestic* interstate airline passengers.<sup>17</sup> The top up portion of compensation is paid by the Commonwealth.<sup>18</sup>

By the operation of the legislation as in force today this means that a Commonwealth employee or other whose ticket has been purchased by the Commonwealth would be entitled to compensation

<sup>12</sup> Available at <[http://www.bitre.gov.au/publications/ongoing/files/International\\_airline\\_activity\\_FY13.pdf](http://www.bitre.gov.au/publications/ongoing/files/International_airline_activity_FY13.pdf)>, p 12, last accessed 31 January 2014. Key: Qantas (QF); SQ (Singapore Airlines); Emirates (EK); Virgin Australia (VA) – a full key is available in the BITRE report.

<sup>13</sup> House of Representatives, *Air Accidents (Commonwealth Liability) Bill 1963*, Second Reading Speech, 14 August 1963 per Mr Harold Holt MP.

<sup>14</sup> *Ibid*, at p 1.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Air Accidents (Commonwealth Liability) Act 1963* (Cth), Part III, available at <<http://www.comlaw.gov.au/Details/C2009C00058/Download>>, last accessed 31 January 2014.

<sup>17</sup> *Ibid*, at s14.

<sup>18</sup> *Ibid*.



for their losses following an air accident (for death or injury) in excess of that which other Australia passengers entitled. Furthermore, the wording of the statutory cause of action in s12 of the AACL Act means that Commonwealth passengers availing themselves of compensation under this Act may potentially recover damages for pure psychiatric injury suffered in an air accident, unaccompanied by physical injury. This is directly contrary to the policy expressed to support the amendment to the CACL Act in 2013 to remove the term “personal injury” from the statutory regime which compensates injured Australian domestic air passengers.

The implications of these inequities are manifold.

First, the concession for those travelling on Commonwealth-paid tickets is unjust. Why should a passenger travelling on Commonwealth business or service be entitled to higher compensation than any other Australian?

Second, if we assume that there is some genuine policy reason for the inequity between Commonwealth employees/passengers and other Australian passengers, then it is clear the DOIRD should increase the prescribed amount of \$500,000 in the Schedule to the *Civil Aviation (Carriers’ Liability) Regulations 1991*, to \$725,000 in line with the amendment made to s31 of the CACL Act in 2013. The reason behind this would be that, if the AACL Act continues to represent the Government’s policy behind covering Commonwealth employees for cover against international air accidents, then that policy should, for the sake of consistency be expressed to cover such employees up to the same liability limits as exist under the CACL Act for interstate passengers (as was the original intention of the Act as expressed in the Second Reading Speech).<sup>19</sup>

Third, amendments previously referred to in relation to domestic liability limits made in 2013 indicated the policy of the Government was to keep consistency between the terms in air carrier liability law as understood in jurisprudence under the Warsaw and Montreal Convention regimes, in relation to bodily vs “personal” injury.<sup>20</sup> If this is truly the case, then the statutory cause of action in the AACL Act (found in s12 of that Act) must likewise be amended to remove the term “personal injury”. Alternatively, the term “personal injury” must be returned to the CACL Act for the purposes of reinstating the same benefit Commonwealth employees enjoy, for other Australian passengers.

The 2009 DOIRD Discussion Paper<sup>21</sup> advised the Government to take action to ensure the consistency of compensation provisions as between the Montreal Convention in “all possible circumstances”. While this finding was in relation to minimising exposure to Warsaw regime compensation provisions it can arguably be said to justify the 2009 White Paper promise to increase liability caps for domestic passengers, and perhaps also justify the removal of “personal injury” from the CACL Act. If the policy is unchanged then the term “personal injury” should be replaced by “bodily injury” in the AACL Act but, more preferably, Chapter III of the AACL Act should be repealed.

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<sup>19</sup> There has been no indication to date that the policy behind the AACL Act has changed, including in the description of a bill introduced to Parliament in 1982 to amend the Act.

<sup>20</sup> For example, the replacement of “personal injury” with “bodily injury” which reflects the wording of both Articles 17 of the Warsaw and Montreal Conventions. The equivalent CACL Act wording was anomalous until the amendment which came into force on 31 March 2013. The effect of the anomaly, in principle, was to permit compensation for an Australian domestic passenger who suffered a pure psychiatric injury as a result of an accident (unaccompanied by bodily injury – such as post-traumatic stress disorder). This was not the case under the international conventions owing to several courts’ analysis of the scope of the term “bodily” injury in the Warsaw and Montreal Conventions.

<sup>21</sup> Above n 5, at p 22 (Preliminary Finding 3).

## 5. Fixing holes in the system – making Intercarrier Agreements apply

A system of airline industry “intercarrier agreements” was developed for airlines to voluntarily ensure airline passengers would be properly compensated and was something much needed before ICAO nations agreed upon the Montreal Convention (which provides, in effect, unlimited air carrier liability in certain circumstances). It is beyond the scope of this submission to describe the history and take up of these agreements.<sup>22</sup> In short, they operate by airlines amending their contract of carriage terms and conditions such that where passenger claims would be caught by the Warsaw Convention or other similarly restrictive Warsaw arrangements, the airline agrees not to be bound by the liability limits set out therein, nor rely on certain legal defences to reduce their liability. The result was fairer compensation for the dependents of those who died in international air crashes and those injured in accidents.

In circumstances where international air carriage is not covered by either the more expansive and modern Montreal Convention (see section 4.2, above), Australian passengers would benefit from the shortfall in available compensation being bridged by legislation which makes international air carriers servicing Australia adhere to one of the (several) intercarrier agreements, if it already does not. The proposal advanced in the DOIRD 2009 Discussion Paper (Preliminary Finding 4) indicates this is something the Government will consider, and we submit it should certainly implement that recommendation now.

The reason it is still needed is that at the time of writing only 104 countries have acceded to the Montreal Convention.<sup>23</sup> This does not sit well with the knowledge that 191 countries form ICAO, as signatories to the *Convention on International Civil Aviation* signed at Chicago on 7 December 1944 (Chicago Convention).<sup>24</sup> Countries have been urged by ICAO to ratify the Montreal Convention but it still has not achieved uniform accession worldwide. In these circumstances the possibility that a particular passenger will be subjected to a restrictive Warsaw-type liability limit in the event of injury or death is high. The International Air Transportation Association (IATA), the trade association for the world’s airlines<sup>25</sup> describes this situation as a “liability lottery for passengers”. This is a telling comment from the peak representative body for airlines.<sup>26</sup>

It is clear that legislative intercession to make an intercarrier agreement applicable for international carriers servicing Australia, to address situations in which the Montreal Convention does not apply, should be a priority for the Government.

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<sup>22</sup> A good summary can be found in Dempsey, Paul S, and Milde, M, *International Air Carrier Liability: The Montreal Convention of 1999*, Centre for Research in Air & Space Law, McGill University (2005), at pp 29 – 36.

<sup>23</sup> ICAO Status List for the *Montreal Convention of 1999*, available at <[http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf)>, last accessed 31 January 2014.

<sup>24</sup> *Convention on International Civil Aviation* signed at Chicago on 7 December 1944 (Chicago Convention), available at <http://www.mcgill.ca/files/iasl/chicago1944a.pdf>, last accessed 31 January 2014.

<sup>25</sup> IATA represents 240 airlines, or 84% of total air traffic: <<http://www.iata.org/about/Pages/index.aspx>>, last accessed 31 January 2014.

<sup>26</sup> See IATA, “Montreal Convention 1999 – A Roll of the Dice: Signing up to the Montreal Convention 1999 would help to bring an end to the liability lottery that passengers currently face”, available at <<http://www.iata.org/publications/airlines-international/june-2013/Pages/montreal-convention.aspx>>, last accessed 31 January 2014.

## Conclusion

All Australian air passengers should be able to access equitable compensation no matter who they work for or the purpose of their travel. It is inequitable that Commonwealth employees receive a concession others do not, and further unjust more generally that air carrier liability laws are so dependent on where one is travelling such that it is a real risk that inadequate compensation will be available to travellers in the absence of legislation mandating airline accession to an intercarrier agreement for airlines servicing Australia.

## Further Information

We would welcome the opportunity to supplement this written submission via verbal submissions to the Review Panel.

For further information regarding this submission please contact:

Maia Keerie  
Media & Communications SPA  
Shine Lawyers  
PO Box 12011, George St Qld 4003  
Tel: 07 3837 8439; Fax: 07 3229 1999  
Email: [mkeerie@shine.com.au](mailto:mkeerie@shine.com.au)

or

Joseph Wheeler  
Senior Solicitor  
Shine Lawyers  
PO Box 12011, George St Qld 4003  
Tel: 07 3837 8500; Fax: 07 3229 1999  
Email: [jwheeler@shine.com.au](mailto:jwheeler@shine.com.au)