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1. Introduction – Background to Review

The Department of Infrastructure, Transport, Regional Development and Local Government ('Infrastructure') is conducting a review of Australia’s carriers’ liability and insurance arrangements. This review will form part of the Aviation White Paper, and address issues raised in submissions responding to the Aviation ‘Issues Paper’ that was released in April 2008.

This discussion paper has been prepared in consultation with other government agencies. It identifies a range of preliminary findings which are proposed to be implemented to refine and improve Australia’s system of carriers’ liability and insurance.

The Government now wishes to consult with industry and the broader Australian public to hear views and opinions on these preliminary findings and any other issues raised in the paper. These public submissions will further guide the Government’s thinking on these matters, and will ultimately inform any decisions to refine and enhance Australia’s carriers’ liability and insurance arrangements. These decisions will form part of the Aviation White Paper, which is expected to be finalised in 2009.

It is more than 10 years since the Government last undertook a comprehensive review of Australia’s carriers’ liability and insurance arrangements. During this time, there have been a range of developments which have brought aviation liability and insurance issues under scrutiny, highlighting the need to re-examine our legal and policy framework to ensure that our regulatory framework is appropriately adapted to the modern aviation and insurance environment.

Airline Incidents

For example, the Garuda incident in Indonesia and the recent Qantas flight 72 incident near Learmonth have focussed attention on victims’ access to compensation and the assistance airlines provide to victims and their families. The Government wishes to ensure that both Australians and our international visitors are afforded appropriate protection commensurate with international standards and the values we share with our major aviation partners.

Montreal Convention

In order to clarify and improve consumer protection for air travellers, the Government has brought into force in Australia the Convention for the Unification of Certain Rules relating to International Carriage by Air, done at Montreal on 28 May 1999 (the Montreal Convention). The Montreal Convention updates the rules applying to the liability of carriers for damage caused during international air carriage to and from Australia. However, as part of the legislative development process necessary to implement the Montreal Convention, the Government has identified a range of additional issues which require further consideration in the broader context of Australia’s liability and insurance framework.

Rome Convention Modernisation

Recent multilateral developments have provided further impetus for a broader review of liability arrangements. The International Civil Aviation Organisation (ICAO) has developed two Conventions which deal with compensation for third party victims of air accidents (ie people on the ground who are injured by crashing aircraft). The draft conventions are intended to replace the Rome Convention which deals with this issue. Australia will need to finalise its position in relation to the Conventions, and industry opinion will be an important factor in determining whether Australia should ultimately accede to
the Conventions. Industry stakeholders are invited to offer preliminary views on the Conventions.

**War Risk Insurance**

Finally, the Government has been closely monitoring developments in the aviation war risk insurance market. The Government is aware that a possible contraction in the availability of war risk insurance is likely to have implications for the global regulation of this issue, and it is appropriate to seek industry views on how our regulatory framework should accommodate this possibility, and to assess whether current arrangements are appropriate in the present circumstances.

**Scope of Review**

The terms of reference for the review (and associated ‘issues for consideration’ that were identified to be included as part of the review) are set out at the end of this paper. Most of the discussion relates to issues which only concern commercial air operations; however, some issues, such as mandatory third party liability insurance, will involve the broader aviation industry, including private recreational fliers.

**Outline of the Discussion Paper**

Sections 2 and 3 explain the existing framework for carriers’ liability and insurance in Australia, and provide information on comparable schemes amongst our aviation partners. Sections 4 and 5 examine the efficacy of this framework. Section 6 examines the Family Assistance Code, a voluntary industry scheme which outlines airlines’ obligations in the immediate aftermath of an air incident. Issues relating to efforts to modernise the Rome Convention are examined at Section 7.

Sections 2 and 3 are provided for background information. Legal Practitioners and industry participants who are familiar with Australia’s existing arrangements may elect not to read this portion of the paper.

**Preliminary Findings**

The discussion paper identifies a range of ‘preliminary findings’ on which industry stakeholders are invited to comment. In addition, there are a range of issues about which the Australian Government is interested to obtain further information from industry. These issues are highlighted in four ‘information sought’ boxes inserted in the text. A summary of the preliminary findings, and issues about which information is sought, is provided at Attachment D.

Responses to the Aviation Issues Paper indicated general support for the broad system of liability and insurance regulation. Consistent with this feedback, the Government is not proposing any radical changes.

However, responses to the Issues Paper identified a range of proposals to refine and enhance the framework. In addition, Government has also identified various issues which could improve the system. The breadth of refinements and enhancement that are suggested below are such that, in total, they can be seen to represent a significant overhaul of our carriers’ liability and insurance system.

**Submissions**

Submissions and comments provided to Infrastructure in response to this invitation may be published on the Department of Infrastructure, Transport, Regional Development and Local Government website.
If you believe that the information you provided in response to this invitation:

- is, or should be, confidential; or
- disclosure of this information would unreasonably affect your personal privacy; or
- disclosure of this information would unreasonably affect your business affairs;

notice is to be given at the time of delivery of your submissions or comments by clearly marking such information 'confidential' or 'commercial-in-confidence'. Insofar as its obligations under the law permit, the Department of Infrastructure, Transport, Regional Development and Local Government will give effect to your stated wish, and requests for such information will be determined under the *Freedom of Information Act 1982*.

Submissions and enquiries in relation to the discussion paper should be directed to:

Aidan Bruford  
International Aviation Industry Policy Section  
Aviation Industry Policy Branch  
Department of Infrastructure, Transport, Regional Development and Local Government  
GPO Box 594 Canberra ACT 2601

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Telephone: 02 6274 7064

Submissions will close on **26 June 2009**.
2. **Setting the Scene** – Liability Regimes: Developments in international approaches to liability regimes and in the international system of aviation liability

2.1. Introduction to Aviation Liability Frameworks

This Section will examine the development of liability regimes in three distinct areas: liability for injuries to passengers (including the Warsaw system, the 1999 Montreal Convention, the IATA intercarrier agreements, and the domestic liability systems adopted in Australia and overseas); liability arrangements for baggage and cargo; and liability for injury to third parties on the ground (including Australia’s arrangements and overseas models).

Australia’s liability arrangements for passengers, baggage and cargo are contained in the *Civil Aviation (Carriers’ Liability) Act 1959* (the ‘CACL Act’). Australia’s arrangements for third party surface damage are contained in the *Damage by Aircraft Act 1999* (the ‘DBA Act’).

2.2. Passengers

2.2.1. **International carriage – Warsaw**

The development of international law regulating carriers’ liability for passengers begins with a treaty done at Warsaw on 12 October 1929 (the Warsaw Convention), which, along with a number of subsequent Conventions and Protocols, 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. Compensation arrangements are provided for passengers, baggage and cargo affected by aircraft accidents.

The Warsaw Convention is an instrument of private international law. By signing it, countries agree to implement its self-contained legal regime governing liability for international carriage by air between Parties. The Warsaw Convention has been an outstanding success in terms of its adoption by States, with 152 Parties as at May 2009. When it originally came into force, the Warsaw Convention established a uniform regime for air carriers’ liability across all Parties. A number of attempts have been made to amend the Warsaw Convention through amending Protocols. These efforts have been less than successful, as only some States have ratified all amending Protocols, other States have ratified only a select few, while still others have ratified none. The original Warsaw Convention, together with the subsequent amending Conventions and Protocols, are known as the ‘Warsaw System’.

Today the Warsaw System comprises the 1929 Warsaw Convention, The Hague Protocol (1955), the Guadalajara Convention (1961), the Guatemala City Protocol (1971), the 1975 Additional Protocols Nos 1, 2, and 3, and Montreal Protocol No. 4 (1975). The main elements of these Conventions and Protocols are outlined below at Attachment A.

The Warsaw instruments to which Australia is party are the Warsaw Convention, the Hague Protocol, the Montreal Protocol No. 4, and the Guadalajara Convention.
Under the Warsaw Convention, an international carrier is liable for the death or injury of a passenger caused by an event that took place on board the aircraft or in the course of embarking or disembarking. 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. The Convention provides a cap on the damages that can be awarded against the carrier. However, the cap can be broken if it is proved that damage was caused intentionally or recklessly with knowledge that damage would probably result.

The cap on liability that is created under the original Warsaw Convention is set at 125,000 Poincaré gold francs.

This is a French currency no longer in circulation. Since the abandonment of the gold standard, the courts in different countries have adopted different approaches to determining the exchange rate for gold francs.

Australian Courts have referred to the current market price of gold to determine the liability cap, which (on the price of gold at May 2009) could lead to a cap of approximately $290,000. However, there is some legal uncertainty as to the correct method of converting the currency in Australia, and, due to the volatile nature of the price of gold, this cap could change rapidly.

Foreign jurisdictions have referred to the last ‘official’ price of gold. This means that Australians pursuing damages under the Warsaw Convention in foreign jurisdictions could potentially have their compensation limited to approximately US$10,000.

The later amending instruments and Conventions increased these liability limits, and, as different Warsaw Parties adopted different amending instruments, a complex array of international arrangements has resulted. Between countries and between destinations there are significant variations in the law governing air carriers’ liability.

The Warsaw System rules that apply in relation to any particular flight are those set by the instruments to which both the country of departure and the country of destination are Parties. For example, Australia is a Party to the Warsaw Convention as amended by the Hague Protocol, the Guadalajara Convention and Montreal Protocol No. 4. Fiji is a Party to the Warsaw Convention as amended by the Hague Protocol and the Guadalajara Convention. If an accident occurs on a flight for which Australia is the country of departure, and Fiji is the country of destination, the applicable international law is the Warsaw Convention as amended by the Hague Protocol and the Guadalajara Convention. However, if Australia is the country of departure, and Indonesia is the country of destination, the applicable international law is the Warsaw Convention (unamended) since this is the only instrument to which both Indonesia and Australia are Parties.

2.2.2. International carriage – Montreal


The Montreal Convention entered into force for Australia on 24 January 2009 after the Civil Aviation Amendment (Montreal Convention and Other Measures) Bill 2008 was passed by the Parliament on 26 June 2008.

The Montreal Convention modernises and improves the rules applying to the liability of air carriers. It
provides for a two-tier system of liability. Applicants will be able to claim up to 100,000 Special Drawing Rights (approximately $200,000) on a strict liability basis (i.e., there is no requirement to prove fault, only that the injury was incurred). Damages above the 100,000 Special Drawing Rights threshold are available to the claimant unless the air carrier is able to prove that the damage was not caused by the negligence or other wrongful act or omission of the carrier, its servants or agents. The Special Drawing Right is a monetary unit of the International Monetary Fund.

In addition, the Convention provides for a ‘fifth jurisdiction’ to hear claims for damages. This allows an action for damages for the death or injury of a passenger to be brought in the country where the passenger resided at the time of the accident, if the carrier operates and has premises in the country. The Convention also allows for simplified electronic records to be used for both freight and passenger air transport instead of paper-based waybills, which was the required method of record-keeping under the Warsaw system. This will allow businesses to use improved electronic billing systems, facilitating the more efficient movement of passengers and cargo.

As of May 2009, there were 91 States Party to the Convention, including most of Australia’s key aviation partners such as the United States, New Zealand, Canada, Japan, the United Arab Emirates, Singapore and the European Community and its member countries.

The Montreal Convention will apply to commercial international carriage of persons, baggage and cargo performed by aircraft for reward, between countries who have implemented the Convention. It will not apply to domestic travel or to flights to countries who have not implemented the Convention.

Consequently, the Warsaw system may still apply on flights to countries who have not implemented the new Montreal Convention, but have implemented elements of the old Warsaw system. However, the Montreal Convention is rapidly gaining wide acceptance, and the Warsaw system is expected to decline in relevance.

2.2.3. International carriage – IATA Agreements

The IATA agreements are a series of voluntary agreements developed by the International Air Transport Association (IATA) prior to the negotiation of the Montreal Convention. The Agreements sought to redress the inadequate compensation levels offered under the Warsaw System.

The agreements are possible because Article 22(1) of the Warsaw Convention permits a carrier and passenger to agree ‘by special contract’ to a higher limit of liability than that set out in the Convention.

A range of agreements (dating back to the 1960s) have been developed which take advantage of this provision, however, the most recent set of agreements were negotiated by IATA in the 1990s.

These agreements are:

- the IATA Intercarrier Agreement on Passenger Liability (IIA) of 31 October 1995; and
- the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA), 1996.

The IIA is an umbrella agreement under which the carriers Party to it agree to take action to waive the liability limitations on recoverable compensatory damages in Article 22(1) of the Warsaw Convention.

The MIA then further details what is expected of air carriers in implementing the IIA:

- The carrier shall not invoke the Warsaw Convention’s Article 22(1) liability limitation for any claim for recoverable compensatory damages under Article 17 of the Convention.
• No carrier will avail itself to any defence under Article 20(1) of the Convention with respect to any claim which does not exceed 100,000 SDR unless, at the option of the carrier, the 100,000 SDR can be raised or lowered for some routes if authorised by the relevant governments with responsibilities for the routes involved.
• The carrier reserves all defences except as expressly contained within the MIA Agreement and also reserves its right to proceed against third parties for contribution and indemnity.
• At the option of the carrier, the carrier may agree that recoverable compensatory damages may be determined by reference to the law of domicile or permanent residence of the passenger.
• Neither the waiver of the limits nor the waiver of the defences shall be applicable in respect to claims made by public social insurance or similar bodies, however asserted.

By waiving the Warsaw caps, and waiving the Warsaw defences up to a threshold of 100,000 SDR, the IATA agreements create a liability regime similar to that established by the Montreal Convention.

While a large number of air carriers have signed the IATA agreements, they are by no means universally adopted. IATA was represented at the International Conference on Air Law in May 1999 and supports the Montreal Convention.

It appears that the coverage of the agreements has declined in recent years, however, some airlines implement the agreements in their conditions of carriage, even though they are not formal signatories to the agreements. As the coverage of the Montreal Convention expands, the agreements will decline in relevance, however, they will still be important in the context of Warsaw System travel.

### 2.2.4. Domestic travel – Australia

The Warsaw System, the Montreal Convention and the IATA agreements do not apply in the context of domestic Australian travel. Instead, Part IV of the CACL Act establishes a separate system of liability, which covers carriage between States and Territories. It essentially adopts the Warsaw rules, subject to the following important modifications:

• Limits of liability are set at A$500,000. The carrier has no ‘all necessary measures’ defence. The liability limits are unbreakable and there is no capacity for a person to receive compensation in excess of the limits by establishing intentional or reckless conduct, wilful misconduct, gross negligence etc.
• Liability is strict.
• While application of the Montreal Convention is limited to bodily injury, the domestic framework extends to personal injury. Personal injury can include bodily injury, sickness, disease, fright, shock or mental anguish, and psychiatric injury.

The system is supported by complementary state government legislation, which applies Part IV of the CACL Act to intra-state travel, thereby creating a national uniform scheme.

This system of liability also applies in the rare instances of travel between Australia and countries that are not party to any of the instruments of international air law that Australia has implemented.

### 2.2.5. Domestic travel – overseas systems

Many of Australia’s aviation partners apply systems of unlimited liability to domestic travel as well as international travel. For example, the UK (along with all European countries) applies the Montreal Convention to domestic travel as well as international travel (in accordance with EC regulation 889/2002).
New Zealand has a statutory ‘no fault’ compensation scheme, which provides specified levels of compensation for all personal injuries suffered in New Zealand. This system is also extended to injuries resulting from domestic air travel (but not international travel).

There are currently no commercial domestic passenger flights operating within Singapore or the United Arab Emirates.

### 2.3. Baggage

The international agreements regulating liability for passenger death or injury also contain provisions for damage to a passenger’s baggage.

Under the benchmark Montreal Convention, airlines are liable for up to 1000 SDR (approximately $2000) per passenger for damage to baggage. This limit can be increased if the passenger makes a ‘special declaration’ at check-in regarding the value of the baggage (although the airline could consequently refuse to carry the baggage or charge a higher fee to carry the baggage). The caps do not apply if it is shown the damage was caused by the carrier’s intent or recklessness.

In relation to ‘checked in’ baggage, passengers are not required to prove that the carrier was at fault in causing the damage. However, carriers will not be liable for damage to goods caused by any ‘inherent defect, quality or vice’ of the baggage.

For ‘carry on’ baggage, carriers are only liable for damage if it is shown that the damage was due to the fault of the carrier or its agents.

This system is different to the arrangements for domestic travel, which provides for separate caps for carry on baggage ($160) and checked in baggage ($1600). The provisions relating to the onus of proof also differ. For checked in baggage, the carrier is considered liable unless the carrier proves that all necessary measures were taken to avoid the damage. For carry on baggage, passengers are required to prove that they were not responsible for causing the damage. Unlike the Montreal Convention, it is not possible to break the caps by proving that the damage was caused by the carriers’ intent or recklessness.

In all circumstances, passengers have to prove the amount of damage sustained.

A simplified summary of the liability regimes for baggage is below:
<table>
<thead>
<tr>
<th>Warsaw System</th>
<th>Montreal Convention</th>
<th>Domestic System</th>
</tr>
</thead>
<tbody>
<tr>
<td>Checked Baggage</td>
<td>Carry on</td>
<td>Checked Baggage</td>
</tr>
<tr>
<td><strong>Liability Caps</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Depends on combination of Warsaw Instruments, potentially as low as 250 francs (potentially $30-$40) per kilo unless otherwise agreed.</td>
<td>Depends on combination of Warsaw Instruments, potentially as low as 5000 francs (potentially $600 - $800) per passenger, unless otherwise agreed.</td>
<td>Combined cap of 1000 SDR (around $2000) for checked and carry on baggage, unless passenger makes declaration as to value of the goods (in which case carrier can refuse to carry goods or charge higher fee).</td>
</tr>
<tr>
<td><strong>Onus of Proof for liability/carrier defences</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Depends on combination of Warsaw Instruments, but generally the carrier will be liable, unless carrier proves all necessary measures were taken to avoid damage. Caps do not apply if passenger proves carriers’ intent or recklessness.</td>
<td>Carrier liable, except for inherent defects in goods.</td>
<td>Carrier liable if at fault.</td>
</tr>
<tr>
<td><strong>Onus of proof for extent of damage</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Passenger is always required to prove the extent of damage (ie if claiming $1000 for lost bag, the passenger must prove the bag was worth $1000)</td>
<td>Caps do not apply if passenger proves carriers’ intent or recklessness.</td>
<td></td>
</tr>
</tbody>
</table>

### 2.4. Third Parties:

#### 2.4.1. Australia – Damage by Aircraft Act 1999

In general, damage caused by aircraft to third parties on the ground is regulated separately to injuries to aircraft passengers and cargo. In Australia, third party surface damage is regulated by the *Damage by Aircraft Act 1999* (the ‘DBA Act’). Many of our aviation partners have legislated similar liability systems for surface damage caused by aircraft occurring within their jurisdiction.

Unlike passenger liability, multilateral efforts to regulate third party surface damage have been largely unsuccessful, failing to garner widespread support. The relevant international agreement is the *Rome*
Convention, which as was negotiated in 1952 and has only 49 Parties. Australia is not a Party to the Rome Convention. ICAO has recently developed two new conventions which are intended to modernise and replace the Rome Convention. The two draft conventions were considered at a diplomatic conference in April 2009. These Conventions are examined in detail at Section 7 below.

In Australia, the DBA Act imposes strict liability and unlimited liability (that is, there is no theoretical cap on the amount of damages for which defendants are potentially liable, although compensation will in practice be limited to the value of an airlines’ insurance policy combined with its total liquidated assets). Both the owner and the operator of the aircraft are potentially liable under the Act.

Prior to the DBA Act, Australia was party to the Rome Convention. However, Australia denounced the Convention in 1999 because the caps on liability were not consistent with community expectations.

The application of the DBA Act is limited in accordance with the constitutional powers of the Commonwealth, and so the Act does not apply to unincorporated intra-state operations. State Government legislation, which mostly predates the DBA Act, creates similar liability frameworks which cover these operations (see, for example, the Damage by Aircraft Act 1952 (NSW)). However, it is important to note that this legislation operates as separate stand-alone legislation, and contains important differences to the Commonwealth legislation; unlike the national uniform scheme for passenger liability and insurance, in which state government legislation directly imports the application of the CACL Act without amendment.

2.4.2. Overseas approaches

Many of Australia’s aviation partners also apply systems of strict and unlimited liability for third party surface damage. The Government has been advised that similar provisions exist in New Zealand, Singapore, and the United Kingdom, and that the United States has a system of unlimited fault based liability. The United Arab Emirates is a signatory to the Rome Convention, which provides for strict and capped airline liability.
3. Setting the Scene – Insurance requirements: Developments and trends in the aviation insurance industry

3.1. Introduction to Aviation Insurance

Aviation insurance can be split into three sub sets. These are:

- the hull of the aircraft;
- the liability of the carrier for passengers, cargo and crew; and
- liability for damage caused to third parties.

Australia requires airlines to maintain insurance for passenger liability only, although international airlines servicing Australia are required to meet a broader standard of maintaining ‘appropriate’ insurance, which may include cover for third party risks as well.

The Australian Government does not regulate insurance for Aircraft hulls, although many aviation leasing agreements will require carriers to maintain insurance against these risks.

3.2. Overview of Market

The events of 11 September 2001 highlighted the fact that when something goes wrong in the aviation industry, the financial and social implications can be (potentially) unusually large. Participants in the aviation industry are unwilling (for the most part) to assume sole responsibility for these risks for which most governments mandate minimum insurance standards regardless. The availability of affordable and comprehensive insurance is therefore a prerequisite for a healthy aviation industry, and an analysis of the regulatory arrangements relating to liability must give consideration to the insurance industry to ensure that appropriate compensation for air crash victims is available.

Evidence suggests that, for the time being, the aviation insurance industry remains profitable, and that a range of reasonably priced insurance products are available to meet the risk management and regulatory requirements of the Australian aviation industry.

In 2005, the Bureau of Transport and Regional Economics undertook a comprehensive analysis of Australia’s general aviation industry. The report examined costs associated with all aircraft that perform non-scheduled flying, including recreational and sports aviation. The report found that costs associated with this sector had been increasing. However, the report indicated that, in real terms, the cost of insurance for this sector in 2005 was relatively similar to the costs of insurance 10 years prior, notwithstanding that aircraft values had appreciated significantly in that time. Consequently, the cost of insurance as a proportion of aircraft value had actually decreased. It indicted that there had been a price spike following September 2001, but that premiums had stabilised to pre 2001 levels.

Infrastructure understands that this trend has continued across the industry in recent years. Several

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1 Available at: http://www.bitre.gov.au/publications/37/Files/btre_report111.pdf
new underwriters have entered the Australian market, leading to significant increased capacity, strong competition, and further premium reductions. It is estimated that premium revenue in the Australian market has decreased by around 20 per cent since 2001, although there are indications that a hardening in the market may be forthcoming.

It is understood that the total Australian aviation premium pool is worth around $100 million, and that the Australian market is able to provide risk coverage up to around $200 million. This allows the local market to adequately service regional airlines and the general aviation sector, however planes larger than a Boeing 737 cannot generally be insured in Australia.

In the context of Australia's larger airlines, this means it is also necessary to consider the global aviation market. Insurance industry publications indicate that decreasing insurance costs are a global trend. One market participant has suggested that 'lead' premiums collected by the industry as a whole from airlines with values over US$150 million have decreased by 40% between 2005 and 2007. However, it has been suggested that the market has bottomed out, with one industry publication suggesting that average 'lead' hull and liability premiums grew by 7% during 2008 for these carriers.

This evidence suggests that the local and global insurance industry is currently suitably equipped to help Australia's aviation industry comply with regulatory requirements and risk management demands.

The nature of this regulatory framework is considered further below, and any anticipated regulatory changes will have due regard to insurance considerations.

3.3. Australia – Passengers

In Australia, mandatory insurance for carriers against liabilities for death or injury caused to passengers commenced in early 1996. Part IVA of the CACL Act imposes mandatory non-voidable insurance requirements on air carriers flying to, from or within Australia. No operator is allowed to carry passengers for hire or reward without appropriate insurance cover.

In the case of domestic carriage, the minimum insurance level is $500,000 per passenger. International carriers, including foreign carriers serving Australia, are required to provide evidence that they are insured to a level of 260,000 SDRs per passenger. Carriers must have these levels of insurance irrespective of their potential liabilities under the Warsaw System or the Montreal Convention.

These insurance requirements are consistent with Article 50 of the Montreal Convention, which requires contracting states to ensure that carriers maintain ‘adequate’ insurance against their potential liabilities arising under the Convention.

An important feature of Australia’s mandatory insurance scheme is that it makes insurance contracts ‘non-voidable’. That is, Part IVA of the CACL Act nullifies any clause which would relieve the insurer of its obligations to meet the carrier’s liabilities. It is a standard condition in most insurance contracts that an insurer is not liable to pay compensation to a policy holder who breaches the law. However, due to the non-voidable nature of Australia’s insurance scheme, insurers are prevented from avoiding paying compensation in respect of passengers who are killed or injured because of a breach of a legal aviation safety requirement by an operator. CASA is responsible for administering these arrangements. The requirements are similar to Part 205 of the US Federal Aviation Regulations.

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The arrangements under Part IVA of the CACL Act do not apply to intrastate operations. However, state governments have adopted complementary legislation to ensure a uniform regime of carriers’ liability and mandatory non-voidable insurance in Australia.

The scheme is supplemented by provisions in the Civil Aviation Act 1988 (the ‘CA Act’), which allow CASA to enforce the requirements as part of their management of safety issues via the Air Operator’s Certificate (AOC) process.

Legislation was passed by the Parliament in September 2008 to refine and enhance the administrative processes associated with the scheme. The Aviation Legislation Amendment (International Airline Licences and Carriers’ Liability Insurance) Act 2008 (the ‘ALA Act’) will improve the ability of CASA to proactively enforce insurance requirements for air carriers.

Under the new system, carriers will no longer need to obtain a certificate of compliance from CASA before flights are operated. Instead, operators will be obliged to provide CASA with a declaration indicating that they have obtained insurance. Failure to notify CASA would incur a small administrative penalty. However, operators will continue to be authorised to operate services as long as they have an appropriate contract of insurance.

The amendments to the CA Act ensure that the authority to carry passengers under an AOC will only be valid while operators hold an appropriate contract of insurance. If an operator allows its insurance to lapse, authorisation to carry passengers will automatically lapse, but will automatically reactivate as soon as an operator secures appropriate insurance. If at any time an operator carries passengers without appropriate insurance, it will be subject to administrative and criminal sanctions.

Additional amendments to the CA Act relate to the short-term approvals for non-scheduled international flights that are granted by CASA. In the case of these special approvals, the ALA Act proposes that carriers which do not have a commercial presence in Australia will be required to prove that they have an appropriate contract of insurance before they are granted an approval to operate the service. In such cases, the carrier will not be able to make a declaration after conducting the service. This is due to the increased difficulty of auditing a carrier that does not have a commercial presence in Australia.

The ALA Act will improve carrier compliance with the insurance requirements. This is achieved by providing CASA with the necessary powers to regularly audit carriers, to ensure carriers have maintained appropriate insurance at all times. If CASA identifies an operator that has carried passengers without appropriate insurance, the carrier will be subject to a range of administrative actions and criminal penalties under the CA Act, in addition to criminal penalties that are currently imposed under the CACL Act.

3.4. Australia – Third Parties

As noted above, the DBA Act provides for strict and unlimited liability for compensating third parties on the ground suffering death, injury or damage from aircraft within the Commonwealth’s jurisdiction. Unlike the CACL Act, there are no provisions in the DBA Act which require carriers to obtain insurance against these risks.

However, international airlines operating in Australia are required to maintain ‘appropriate’ insurance, and this generally requires airlines to maintain some level of third party insurance. This assessment process is undertaken prior to the granting of an international airline licence.

Although requirements for third party insurance in Australia are minimal, the Government understands
that it is more common than not for carriers to maintain third party insurance anyway. Maintaining comprehensive insurance adequate to offset an airline’s liabilities is a commercial imperative for most major international airlines. The strict and unlimited liability of the DBA Act is a powerful incentive for carriers in this regard.

Furthermore, comprehensive insurance is generally a requirement of most leasehold arrangements, many international jurisdictions require comprehensive insurance cover; and corporate governance prevents airlines from exposing their stakeholders to uninsured liability.

In addition, aviation insurance contracts are usually structured so that airlines that have passenger liability insurance will also be covered against third party liability risks. Insurance policies are typically separated into material damage to the hull; and liabilities to passengers and third parties. These risks are usually combined into a combined single limit policy which provides for the entire gross amount of the policy to be available for any single ‘occurrence’ (accident) to cover property damage or passenger/third party injury.

It has been estimated that around 10 per cent of all aircraft in Australia are not insured at all, for either aircraft hull risks, or liability risks. It is understood that nearly all of these aircraft are privately owned recreational aircraft (that will not be caught by the mandatory passenger insurance scheme which only applies to commercial operators).

3.5. Overseas – Passengers

Australia’s requirements for passenger insurance are similar to our aviation partners.

The UK (along with all European countries) requires insurance of 250,000 SDR (approximately $500,000) per passenger, in accordance with EC Regulation 785-2004. Less stringent requirements apply to light aircraft.

The US requires insurance of US$300,000 per passenger (see 14 CFR Part 205).

Passenger insurance is also mandated in New Zealand, Singapore and the United Arab Emirates.

3.6. Overseas – Third Parties

The current Australian position in relation to insurance for third party surface damage is relatively unique.

Most of our aviation partners mandate insurance against these risks.

European Council Regulation 785-2004 mandates insurance levels which increase in accordance with the maximum take off mass of the aircraft. A minimum of 700 million SDR (approximately $1.6 billion) insurance is prescribed for the heaviest aircraft.

The USA requires insurance of US$20 million (less stringent requirements apply to small capacity aircraft).

It is understood that various forms of third party insurance are also required in Singapore, the United Arab Emirates, and New Zealand.
3.7  War Risk Insurance

One element of an aviation insurance contract—for both passenger liabilities and third party liabilities—relates to war risks.

The international insurance industry has proposed introducing changes to the aviation insurance market by excluding or restricting the availability of insurance for events involving particular weapons of mass destruction (sometimes referred to as the ‘new perils’, which includes chemical/biological warfare, ‘dirty bombs’, and electro-magnetic pulse devices).

Aviation insurance clauses exclude so-called war risks (including the ‘new perils’) under the standard War, Hijacking and Other Perils Exclusion Clause AVN48B. However, payment of an additional premium will allow most excluded risks (including the ‘new perils’) to be ‘written back’ under separate extension clauses, thereby allowing airlines to purchase cover for those risks.

It is not possible to obtain insurance (either directly, or via the use of a write back clause) for nuclear explosions. Carriers currently operate without insurance for this risk.

After agreement with the European Community in March 2005, the Aviation Committee of the Lloyd’s Market Association and the Aviation Technical Committee of the International Underwriting Association of London set up the Aviation Insurance Clauses Group (AICG). The purpose of the AICG is to consider, and where appropriate, draft, non-binding standard wordings and clauses which command support from insurers and re-insurers, brokers and clients of aviation insurance underwritten in the London market and which comply with legal and regulatory requirements.

The Aviation Insurance Clauses Group published the new exclusion clause AVN48C and complementary ‘write back’ clause AVN52H on August 8 2006, thereby allowing insurers to use the clauses to withdraw coverage against the ‘new perils’. Cover against the ‘new perils’ will be completely excluded, and will be unavailable even via the ‘write back’ clause and payment of an additional premium.

Aviation and insurance industry bodies requested and tabled an alternative war risk clause, AVN48D along with a complementary write back clause AVN52K. AVN48D and AVN52K are intended to provide limited insurance cover against some of the ‘new perils’ under certain circumstances.

It remains to be seen if and when aviation insurers will attempt to incorporate the new clauses into aviation insurance policies as they come up for renewal. Use of AVN48C would represent cessation of war risk insurance, while use of AVN48D would be a market contraction.

In Australia, Regulations made under the CACL Act regulate war risk insurance cover to the extent that the Regulations effectively void any purported exclusion clause that is not specifically allowed for in the Regulations. The Regulations recognise the existing AVN48B exclusion clause, thereby permitting its use in Australia. Carriers are not currently required to ‘write back’ risks by paying for the inclusion of the complementary AVN52D extension clause.

While the Australian Government does not currently require carriers operating in Australia to carry war risk insurance, this insurance is mandatory in many other jurisdictions, such as the European Union, and is considered a commercial imperative by airlines in order to offset potential liabilities.
4. Analysis and Options – Liability Regimes

4.1. Liability and Insurance Framework – Objectives

It is necessary to clarify the fundamental objectives of the liability and insurance framework to guide any proposed improvements to the regulatory system. The objectives should recognise the critical contribution that the aviation industry makes to the broader Australian economy, and recognise the entitlement of air incident victims to obtain fair compensation for any injuries that they sustain.

The Government contends that the objectives of the liability and insurance framework are to:

- provide prompt and equitable compensation for victims of air accidents;
- foster a productive and sustainable aviation industry;
- provide an appropriate balance between the interests of victims, carriers, insurers and governments; and
- be as simple as possible, to increase certainty for industry participants and reduce compliance costs;
- and therefore be consistent with our international obligations, yet appropriately tailored for the Australian market.

Preliminary Finding 1

The objectives of Australia’s aviation liability and insurance framework should be to:

- Provide prompt and equitable compensation to victims of air accidents;
- Foster a productive and sustainable aviation industry;
- Provide an appropriate balance between the interests of victims, carriers, insurers and governments; and
- Be as simple as possible, to increase certainty for industry participants and reduce compliance costs;
- and therefore be consistent with our international obligations, yet appropriately tailored for the Australian market.

These objectives have shaped and informed the following preliminary findings on how our aviation liability and insurance framework should be refined and enhanced.

The issues relating to international consistency and the need to tailor international agreements for the Australian market are closely related to the issue of the underlying role of the Commonwealth in this field of regulation. This issue is discussed below at Section 4.2.
4.2. The Role of Commonwealth Regulation

It is appropriate to begin an analysis of Australia’s carriers’ liability and insurance arrangements by questioning whether Commonwealth regulation of this field is appropriate in the first place.

This issue was raised in some submissions in response to the Government’s Aviation Issues Paper that was released in April 2008. These submissions questioned whether it was appropriate to regulate the insurance and liability issues that arise in the context of an air crash any differently to other transport modes. These submissions noted that the liability and insurance requirements for air carriers tended to be more onerous than the arrangements in place for other transport sectors (such as bus travel, for example).

The Government is of the firm view that Australia’s basic system of carriers’ liability and insurance, which regulates air transport separately to other transport modes, remains the most effective way of delivering the objectives of the liability and insurance framework. This is due to two reasons:

First, it is essential that Australia maintain consistency with international agreements for determining the liability of air carriers in relation to passenger death or injury. These agreements are crucial for ensuring that Australians can access adequate compensation in the event of an air incident in the context of a legal framework which provides certainty and simplicity, benefiting both carriers and passengers.

The legal morass that would result in the absence of these multilateral agreements would result in untenable legal uncertainty and delays. In the absence of multilateral agreement, extremely complicated conflict of laws issues could result if, for example, an Australian was injured having bought a ticket in New Zealand to travel from Australia to Singapore on a Middle Eastern airline. Although this scenario may be comparatively rare, even seemingly straightforward travel arrangements could result in complex legal issues. It is therefore appropriate that Australia continue to align its liability and insurance framework—for both international and domestic travel—in accordance with broader international practice.

Second, the unique risks associated with air travel require an appropriately tailored liability and insurance system. Although air travel is extremely safe (insofar as accident rates are low), this safety record is achieved in the context of extremely stringent safety regulation. There are manifold risks inherent to flying, and tight regulation of liability and insurance can be seen to assist in maintaining consumer confidence in air transport, and to help provide another incentive for industry to maintain high standards.

This approach is consistent with the majority of feedback received in response to the Government’s Issues Paper, which indicated general support for the fundamental structure of Australia’s regulatory framework for carriers’ liability and insurance.

Preliminary Finding 2

The Commonwealth should continue to regulate carriers’ liability and insurance separately to other transport modes.
4.3. International Carriage – Passenger Liability

4.3.1. Minimising the application of Warsaw

The levels of compensation offered under the outdated Warsaw system clearly do not meet community expectations. This has long been recognised by the aviation industry, which instituted the IATA agreements which minimise the circumstances in which the Warsaw caps (and defences) apply. It is also reflected in the responses to the Issues Paper, which indicated general support for the Government’s moves to implement the Montreal Convention.

The Warsaw Convention is declining in relevance as more and more countries move to implement the Montreal Convention. As at May 2009, there are 91 parties to the Montreal Convention, including Australia and most of our major aviation partners. However there are significant gaps in coverage. Countries with aviation links to Australia who have not yet implemented the Montreal Convention include:

- Argentina
- Brunei
- Indonesia
- Mauritius
- Nauru
- Papua New Guinea
- Philippines
- Samoa
- Solomon Islands
- Thailand
- Vietnam

These represent significant gaps in the Montreal Convention liability framework. Despite the almost universal agreement that the liability caps associated with the Warsaw system are inadequate, these caps may still be in operation on a range of flights operating to and from Australia.

**Preliminary Finding 3**

*In relation to international travel, Government should take further action where possible to limit the exposure of Australian travellers to the ‘Warsaw System’, and ensure that the Montreal Convention, or compensation provisions comparable to those provided under the Montreal Convention, apply in all possible circumstances.*

One option to limit the application of the Warsaw System is to link compliance with the IATA agreements to the system of international airlines licences (IALs). International airlines servicing Australia are currently required to obtain an IAL issued pursuant to the *Air Navigation Act 1920*. IALs are primarily used to regulate the economic rights that are established under Australia’s bilateral air services agreements. However, applicants for IALs are also required to demonstrate compliance with the other regulatory requirements relating to issues such as transport security and safety.

The IAL process could therefore be used to ensure that carriers incorporate the provisions of the IIA and MIA into their conditions of carriage to ensure that passengers have access to compensation of a comparable standard to that offered under the Montreal Convention. The IAL system is currently being revised to ensure that IAL conditions can be more easily updated and enforced, and by taking
advantage of the existing administrative processes associated with the IAL system there would be minimal additional administration for carriers.

There is a precedent for this approach. The US already requires carriers serving the US market to agree to the provisions of the IATA agreements.

Another option would be to utilise provisions in the Warsaw Convention which allows countries to set higher limits of liability for their own carriers. Australia already takes advantage of this provision, and the CACL Act sets a higher liability cap for Australian carriers operating under the Warsaw System of 260,000 SDR. It could be possible to devise a system whereby these provisions were used to import the relevant provisions of the Montreal Convention. However, this option is not preferred, as it would only apply to Australian carriers, and not foreign carriers serving the Australian market.

Under the proposal to require carriers to adopt the provisions of the IATA agreements as a condition of their IAL, the current higher caps applying to Australian carriers would be abandoned to ensure consistency and simplicity.

**Preliminary Finding 4**

*Government should require international carriers servicing Australia to implement the IATA agreements, whereby carriers waive the caps instituted under the Warsaw System, and waive the Warsaw defences up to a threshold of 100,000 SDR. This requirement should be implemented by linking the requirement to the system of IALs. This measure would replace the higher caps that the CACL Act currently imposes on Australian carriers operating under the Warsaw system.*

### 4.3.2. Repealing redundant legislation

As part of its analysis of the CACL Act, the Government has identified various provisions which are redundant. In order to further simplify the liability arrangements applying to international passenger travel, the Government considers it appropriate to repeal these provisions which serve no useful purpose.

In particular, the Government has identified Part IIIB of the CACL Act as being no longer required. Part IIIB of the CACL Act implements the Montreal Protocol No. 3 (MP3) on carriers’ liability which was negotiated in the 1970s. However, as MP3 never garnered sufficient international support to bring it into operation, Part IIIB has not come into operation. Now that the Montreal Convention provides the benchmark for carriers’ liability and insurance, it is extremely unlikely that MP3 will ever enter into force. Accordingly, the Government has decided to ‘tidy’ the CACL Act and repeal this part of the Act. It is expected that Part IIIB of the CACL Act will be formally removed later in the year.

**Preliminary Finding 5**

*Industry should note that the Government is repealing Part IIIB of the CACL Act which provides for the implementation of the now redundant Montreal Protocol No. 3.*
4.4. International Carriage – Flights Between Overseas Countries

The Australian Government has little capacity to regulate travel in circumstances where Australia is neither the origin nor destination of the travel. The Government's main role in relation to these flights is to ensure that Australians can access relevant information in relation to the risks involved with travel to these countries.

The main vehicle for disseminating information of this nature is the Government’s travel advisory website, <www.smartraveller.gov.au>. The website contains comprehensive information on a range of risks associated with travel to destinations across the globe, including risks associated with air travel. Where relevant, the website provides links to the EU list of “blacklisted” airlines that are banned from operating in the EU, and details on United States Federal Aviation Administration program of assessing countries’ ability to enforce safety standards.

The Government could potentially use the website to publicise further information in relation to the compensation arrangements that could apply in the context of air accidents to, from or within various countries. However, on balance, the Government does not consider this appropriate. The Government considers that the primary concern of Australians undertaking overseas travel is whether or not travel is safe. Information relating to potential compensation amounts is likely to be of little interest and of little relevance to a person’s decision on whether or not to travel.

Preliminary Finding 6

In relation to international travel where Australia is neither the origin nor destination of carriage, the Government should continue to focus on its broader policy of providing information in relation to potential air safety concerns.

4.5. Domestic Carriage – Passenger Liability

4.5.1. Application of Montreal Convention to domestic travel?

The liability regime applying to domestic Australian travel received considerable attention amongst submissions to the Issues Paper. Submissions favoured the retention of caps on liability, and there was no support for applying the provisions of the Montreal Convention to domestic travel.

The Government contends that the Montreal Convention provides the preferable balance between the interests of consumers and carriers by enabling victims to obtain compensation for the full extent of their injuries, while allowing carriers to avoid liability for claims above 100,000 SDR by proving they were not at fault. However, the Government recognises that a system of unlimited liability could have a negative impact on smaller domestic operators.

Although the existing domestic system caps overall carrier liability, the interests of victims are sufficiently balanced by imposing strict liability on carriers well beyond the Montreal Convention’s first tier strict liability threshold of 100,000 SDR (approximately $200,000). The Government therefore considers that the system of strict, capped liability should be maintained for domestic travel for the time being.
Preliminary Finding 7

The Government should not apply the Montreal Convention to domestic travel at this stage, and instead maintain a separate system of strict and capped liability.

4.5.2. Current level of caps

The current liability caps were last adjusted in 1994. Since then, the real amount of compensation available to passengers has steadily decreased, as inflation has eroded the purchasing power of the maximum possible compensation amount. It is difficult to justify this decrease in passenger protection. Although the Government is not inclined to introduce a system of unlimited liability for domestic travel at this time, it is entirely appropriate to ensure that the liability cap is adjusted to reflect changes in the cost of living. It is therefore proposed to restore value to the maximum potential compensation payment, and increase the liability cap to $725,000 (approximately reflecting an average annual inflation rate of 2.7% for 14 years).

Preliminary Finding 8

The Government should increase the domestic passenger liability cap to $725,000 to reflect changes in the cost of living.

The main impact of this proposal is expected to relate to the cost of aviation insurance to cover the increase in potential liability. This issue is discussed further below.

4.5.3. Mental injuries

One of the objectives of Australia’s liability and insurance framework is to work towards a more simple system by harmonising, where appropriate, our domestic and international liability frameworks. A significant area of inconsistency between our domestic and international liability frameworks relates to the treatment of mental injuries. A number of submissions to the Issues Paper identified this matter as an issue for further government consideration.

Article 17 of the Montreal Convention limits carriers’ liability to ‘death or bodily injury’. Courts have interpreted ‘bodily injury’ as excluding claims for purely mental injuries (although there is some legal uncertainty as to the precise definition of ‘bodily injury’ and how this relates to mental injury).

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.

The Government recognises that mental injuries can have real and profound impacts on people’s lives, and can be equally debilitating as any so-called ‘physical injury’. The Government’s proposals in relation to this matter are in no way intended to denigrate mental illness, or somehow imply that it is less deserving of compensation than physical injuries. The Government also recognises a level of artificiality in the mental/physical injury dichotomy.
However, consistent with the objective of simplifying the overall liability framework by harmonising, where appropriate, the international and domestic systems; the Government believes that there is merit in the suggestion that ‘pure mental injury’ should be excluded from the ambit of carriers’ liability under the domestic system. It is a pragmatic approach which emphasises the benefits of a streamlined and simplified regulatory framework. It should be noted 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.

Preliminary Finding 9

The Government should ensure consistency between the international and domestic passenger liability frameworks in relation to the treatment of mental injuries by limiting the domestic system to compensation for ‘bodily injuries’.

4.5.4. ‘Exclusive Remedy’

One submission to the Issues Paper expressed concern that the Part IV of the CACL Act does not expressly state that it provides the exclusive remedy for passenger victims. That is, the rights to compensation that are established under Part IV of the Act are the only rights to compensation that are available to passenger victims, such that they are prevented from bringing alternative legal action based on, for example, common law negligence, or the Trade Practices Act 1974. Whereas the international Conventions on passenger liability expressly state that they provide the exclusive remedy available to passenger victims, a similar statement is not included in Part IV of the CACL Act.

It has always been the Government’s intention that Part IV of the CACL Act, which is largely based on the Warsaw system (but with important exceptions), 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.

Infrastructure’s attention has not been drawn to any instances where this issue has complicated legal proceedings. However, consistent with the objective of establishing a simple system that provides certainty, the Government recognises that there may be value in amending the Act to clarify this issue.

Preliminary Finding 10

The Government should explore the possibility of amending the CACL 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.
4.6. Third Party Liability

If Australia decides to implement the Conventions that have been developed to modernise and replace the Rome Convention, the DBA Act will require considerable amendment, and many of the issues discussed below will be irrelevant. Issues relating to these draft Conventions are discussed below at Section 7; however the discussion below is premised on the assumption that Australia will not be implementing the Conventions in the short term.

4.6.1. Strict and unlimited?

The system of strict and unlimited liability created under the DBA Act was the source of considerable feedback to the Issues Paper. Submissions proposed a range of proposals to limit the scope of carriers’ potential liability under the DBA Act. These suggestions included:

- placing a cap on liability, or a threshold beyond which liability is fault based rather than strict;
- clarifying definitions in the Act to ensure that airlines are not liable for consequential losses, and witnesses of crashes who suffer pure mental injury;
- allowing damages to be reduced to reflect any contributory negligence by the victim;
- allowing airlines to claim a ‘right of contribution’ when other parties have contributed to the damage; and
- absolving airlines from liability in cases of terrorist attack.

The Government remains firm in its view that, in the absence of a viable international agreement to model our liability system (this issue is discussed further at Section 7 below), the two key central elements of the current system (strict liability and unlimited liability) are appropriate for the Australian aviation market.

Unlimited liability ensures that losses are fully accounted for, and strict liability minimises unnecessary legal expenditure. It is important to note that in nearly all cases, third party victims on the ground will have become involved in an air accident through no choice of their own (unlike air passengers, who can be seen to have weighed up the risks associated with air travel and chosen air transport as their preferred mode of travel). In these circumstances, it is inappropriate to require third party victims to prove fault, or to limit their ability to be fully reimbursed for their losses. This approach is consistent with many of our international aviation partners.

While this system could be seen to heavily favour the victim at the expense of the interests of carriers, there was no evidence presented in submissions that indicated that the current legislation was restraining aviation activity or that it was leading to unsustainably high insurance premiums for operators.

Preliminary Finding 11

The Government should maintain the system of strict and unlimited liability for carriers who cause damage to third parties on the surface.
4.6.2. ‘Contributory Negligence’ and ‘Rights of Contribution’

However, the Government recognises that a range of refinements are necessary to fine-tune the operation of the Act, particularly following the outcome of *Cook v Aircar Moree*.

In this case, the victim was employed by an electricity company (Northpower) and was electrocuted while repairing powerlines. The powerlines had been felled by an aircraft that had been conducting agricultural spraying on a nearby cotton farm. The victim sued his employer for negligence, and also sought compensation from the aircraft owner (ACQ Pty Ltd) and operator (Aircar Moree Pty Ltd) under the DBA Act.

The Court at first instance found that the claim of negligence against Northpower had been proved, but that the amount of damages should be reduced because the victim was partly to blame by having stood too close to the powerlines.

However, when the Court considered the claims against ACQ and Aircar Moree under the DBA Act, the Court declined to similarly reduce the amount for which they were liable. That is, the compensation amount that they had to pay was not reduced, even though the victim was partly to blame.

The matter was appealed to the NSW Court of Appeal, which upheld the finding at first instance that the partial defence of contributory negligence was unavailable for claims brought under the DBA Act, thereby preventing ACQ and Aircair from reducing their liability on these grounds.

The Government understands that the High Court has granted leave to hear the matter on a further appeal.

The Government notes that it would only be in very rare occasions that a third party victim on the ground could be considered to have been partly negligent in causing the damage that they suffered as a result of an air crash. However, following the outcome of *Cook v Aircar Moree*, the Government recognises that it may be appropriate to allow defendants an opportunity to argue that their liability should be appropriately reduced if they can show that the victim was partly negligent in causing the damage.

Preliminary Finding 12

*The Government should explore the possibility of amending the DBA Act to recognise contributory negligence, allowing compensation payments to be reduced when victims are partly responsible for their losses.*

Similarly, the case highlighted the fact that the DBA Act does not make express provision for defendants to a claim under the Act to seek contribution from other parties who may have contributed to the damage suffered by the person bringing the claim. That is, a person who is liable for damage under the DBA Act has no express avenue under that Act for seeking any form of re-imbursement of the compensation costs for which they are responsible from parties (other than the victim) whose actions were also found to have contributed to the damage in question.

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3 ACQ v Cook; Aircar Moree v Cook; Cook v Country Energy; Country Energy v Cook [2008] NSWCA 161
The Government recognises that it may be appropriate to allow defendants the opportunity to seek contribution towards the damages for which they are found liable from other parties who are found to have contributed to the damage claimed under the DBA Act. However, this interest would need to be carefully balanced against the need to ensure that compensation payments to victims were not unnecessarily delayed.

**Preliminary Finding 13**

*The Government should explore the possibility of amending the DBA Act to provide a ‘right of contribution’, allowing compensation payments to be appropriately apportioned between those who have contributed to the cause of an air crash.*

4.6.3. ‘Exclusive Remedy’

One submission to the Issues Paper expressed concern that the DBA Act does not expressly state that it provides the exclusive remedy for third party victims. That is, the rights to compensation that are established under Act are the only rights to compensation that are available to passenger victims, such that they are prevented from bringing alternative legal action based on, for example, common law negligence or the Trade Practices Act 1974. A similar concern was raised in relation to Part IV of the CACL Act.

It has always been the Government’s intention that DBA Act should provide the exclusive remedy available to third party victims. The system of strict and unlimited 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.

The Government is unaware of any instances where this issue has complicated legal proceedings. However, consistent with the objective of establishing a simple system that provides certainty, the Government recognises that there may be value in amending the Act to clarify this issue.

**Preliminary Finding 14**

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

4.6.4. *Should witnesses be able to claim for mental injuries?*

Another issue that was raised in submissions, which the Government recognises as a legitimate concern, relates to whether people who have suffered purely mental injuries as a result of witnessing an air accident, but who have not suffered any other personal/property damage, should be able to claim compensation.

While the Government fully recognises the seriousness of mental injuries (as noted above), submissions noted that this could potentially expose carriers to an extremely large group of claimants, and that is extremely difficult to calculate the magnitude of this type of liability.
On balance, the Government is inclined to agree that it is not appropriate to expose carriers to this type of liability, especially on a strict liability basis. The DBA Act is primarily intended to provide protection for those who have a more direct link with the air crash, having either suffered loss of life, physical/bodily damage, and/or property damage. The Government contends that this group of people should be allowed full protection, including access to compensation for mental injury. However, the Act is not intended to extend to those who have witnessed an air crash from afar, and, except for issues triggered by the trauma associated with the observance of the event, not otherwise suffered any damage.

**Preliminary Finding 15**

The Government should consider amending the DBA Act to disallow claims for compensation for mental injury suffered by air crash witnesses.

### 4.6.5. Consequential damages

One submission suggested that there was uncertainty as to whether the compensation available under the DBA Act extended to ‘indirect’ or ‘consequential’ damages, suggesting that the Act should be amended to ensure they are excluded. These are damages for things such as loss of profit (for example, the profit that would have been produced from a factory had it not been damaged in an air crash), and are potentially far larger in scope than ‘direct’ damages (such as the cost of rebuilding the factory).

This issue was addressed by the Court of Appeal in the case of *ACQ v Cook*. The Court found that there was no basis for adopting a narrow construction section 10 (1) of the DBA Act to exclude liability in respect of indirect or consequential damages. Rather, the Court of Appeal in that case accepted that it is not only the direct consequences of an impact that attract liability, but also the indirect or consequential result of such an impact.

The Government is unaware of any instances where this issue has complicated legal proceedings. However, consistent with the objective of establishing a simple system that provides certainty, the Government recognises that there may be value in amending the Act to clarify this issue.

The Government is reluctant to make amendments which could prevent victims from pursuing legitimate compensation claims under the DBA, particularly when the DBA provides the only recourse for compensation. However, the Government is willing to consider amendments of this nature if evidence is presented indicating that the amendments are consistent with the objectives of the liability and insurance framework outlined above.

**Preliminary Finding 16**

The Government should consider amending the DBA Act to clarify whether consequential damages are available under the Act, noting the overall objectives of the carriers’ liability and insurance framework.
4.6.6. **Time limits on actions**

One submission to the Issues Paper noted that the DBA Act does not contain a provision specifying a time limit by which actions must be brought, suggesting that, as a consequence, the ‘cut off’ for bringing actions under the DBA Act is determined in accordance with state laws, which vary significantly.

This is in contrast to the CACL Act, which provides that claims must be commenced within two years of the incident.

The remainder of submissions did not raise concerns in relation to this issue, and the Government is unaware of any particular instance where this issue has proved to be problematic.

The Government sees no reason for Commonwealth intervention on this issue. Similar to the way damages are assessed (see below), the Government is comfortable with the current interaction between state and Commonwealth government laws relating to this issue.

**Preliminary Finding 17**

*The Government should preserve the current arrangements in relation to time limits on actions brought under the DBA Act.*

4.6.7. **State legislation harmonisation**

Unlike passenger liability, there is no uniform scheme governing third party surface damage. Each state has its own laws on the matter, which apply to carriage that is beyond the Constitutional powers of the Commonwealth. Although largely consistent with Commonwealth legislation, there are a range of variations in the state government laws.

This unnecessarily complicates the overall legal framework for aviation liability. Consistent with the objective of simplifying the aviation liability framework, the Government contends that there would be value in harmonising Commonwealth and state government laws on this issue.

**Preliminary Finding 18**

*The Government should work with state governments to harmonise the liability framework for third party surface damage.*

4.7. **Interaction with State Civil Liability Laws**

Earlier this decade, many state governments pursued ‘tort law reform’ schemes, and introduced legislation to counter the perceived ‘Americanisation’ of liability claims. The schemes sought to respond to community perceptions that inappropriately large compensation payouts were being awarded to unmeritorious plaintiffs.

The laws deal with a range of issues relating to how damages are assessed (specifying, for example,
how to calculate damages to reflect projected lost wages), and often impose thresholds (so that no compensation is available if the damage suffered is below the threshold) aimed at weeding out nominal or frivolous claims.

Several submissions to the Issues Paper noted that there was uncertainty as to whether these state government Acts applied in the context of damages assessed under both the DBA Act and the CACL Act.

This issue was considered by the District Court of NSW in the case of Arefin v Thai Airways International Public Company Limited, which involved a claim for damages for personal injuries suffered by the plaintiff on a flight between Thailand and Australia. Justice Sorby accepted that the Warsaw Convention, as adopted by the CACL Act, applied and further determined that the Convention and hence the CACL Act does not set out how damages are to be assessed. Having reached this conclusion, Justice Sorby determined that the current laws of New South Wales, including the Civil Liability Act 2002, applied (by virtue of the Federal Judiciary Act 1903) to the assessment of the plaintiff's damages. Presently, the findings of the District Court have not been the subject of any final appeal or reconsideration by a differently constituted Court.

If the state government legislation did not apply, damages would be assessed in accordance with the common law, potentially leading to significantly larger compensation payouts. The submissions argued that the Commonwealth should amend the CACL and DBA Acts to clarify that the state government civil liability laws are applicable to claims brought under the Commonwealth Acts.

An alternative would be to clarify that claims are to be assessed in accordance with the common law, or to develop Commonwealth laws relating to the assessment of damages under the DBA and CACL Acts.

The Government recognises that there is value in clarifying this issue one way or another. Applying common law rules on this issue risks re-introducing outmoded and outdated principles relating to damages assessment, and may do little to provide greater certainty. Developing Commonwealth laws on this issue would ensure a consistent national framework for the assessment of damages under the CACL and DBA Acts, but could be seen to complicate the broader laws on the assessment of damages by adding another framework with limited application.

The Government's preferred option is to ensure that damages are assessed in accordance with the state government legislation dealing with this issue. Although this will lead to variability in compensation levels depending on where in Australia the case is heard, the approach will ensure greater consistency with the broader laws relating to the assessment of damages.

**Preliminary Finding 19**

*The Government should amend the CACL Act and the DBA Act to ensure that damages are assessed in accordance with state government civil liability regimes.*

### 4.8. Liability for Baggage

A summary of the baggage liability provisions is reproduced below for information:
<table>
<thead>
<tr>
<th></th>
<th>Montreal Convention</th>
<th>Domestic System</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Checked Baggage</td>
<td>Checked Baggage</td>
</tr>
<tr>
<td></td>
<td>Carry on</td>
<td>Carry on</td>
</tr>
<tr>
<td><strong>Liability Caps</strong></td>
<td>Combined cap of 1000 SDR (around $2000) for checked and carry on baggage, unless</td>
<td>$1600</td>
</tr>
<tr>
<td></td>
<td>passenger makes declaration as to value of the goods (in which case carrier can refuse</td>
<td>$160</td>
</tr>
<tr>
<td></td>
<td>to carry goods or charge higher fee).</td>
<td></td>
</tr>
<tr>
<td>**Onus of Proof for liability/carrier</td>
<td>Carrier liable, except for inherent defects in goods.</td>
<td>Passenger required to</td>
</tr>
<tr>
<td>defences</td>
<td>Carrier liable, if at fault.</td>
<td>prove they were not</td>
</tr>
<tr>
<td></td>
<td>Caps do not apply if passenger proves carrier's intent or recklessness.</td>
<td>responsible for damage.</td>
</tr>
<tr>
<td><strong>Onus of proof for extent of damage</strong></td>
<td>The Passenger is always required to prove the extent of damage</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(ie if claiming $1000 for lost bag, the passenger must prove the bag was worth $1000)</td>
<td></td>
</tr>
</tbody>
</table>

Many of the differences between the Montreal Convention and the domestic system relating to liability for passengers’ baggage are relatively technical and minor. The liability caps are similar, and the provisions relating to the onus of proof and the potential carrier defences also have parallels. The harmonisation of these provisions would simplify the system considerably and would have little impact on consumers and carriers.

The only significant difference is that the Montreal caps can be broken if it is proved that the damage was due to the carrier’s intent or recklessness. The domestic system caps are unbreakable. Consequently, the protection for passengers’ baggage under the domestic system is significantly less than the protection offered under the Montreal Convention.

The Government contends that the domestic system may not appropriately balance the interests of carriers and passengers. It seems inequitable to prevent passengers from being able to claim compensation for the full extent of their damaged baggage in circumstances where it can be proved that the carrier acted with intent or recklessness.

The Government recognises that this represents a departure from the approach in relation to passenger death or injury, in which the domestic system does not apply a system of unlimited liability and instead establishes an unbreakable cap. However, the ‘trade off’ for domestic passengers not accessing the unlimited liability created under the Montreal Convention is that they can access a greater portion of compensation on a strict liability basis. There is no comparable trade off in relation...
to baggage. The cap amounts are similar; however there is no trade off for being unable to break the caps in instances of carrier intent or recklessness.

The domestic liability regime for baggage could therefore be made more equitable by instead applying the relevant provisions of the Montreal Convention, which would also considerably simplify the overall liability framework for baggage liability.

**Preliminary Finding 20**

*The Government should amend the CACL Act to harmonise the domestic travel baggage liability provisions with the baggage liability provisions of the Montreal Convention.*

### 4.9. Liability for Cargo

The Government does not currently regulate air carriers’ liability for damage to cargo on domestic carriage. This is in contrast to the Warsaw System and the Montreal Convention, which establishes weight based liability caps, which apply in Australia for international air cargo transport.

This issue was not raised in submissions to the Issues Paper, and the Government has received no indication that government regulation of domestic air cargo liability is required. The Government is not proposing to enter this field at this time.

However, section 41 of the CACL Act currently allows Regulations to be developed to import the provisions of the Montreal Protocol No. 4 that relate to cargo liability and apply them to domestic carriage. No Regulations have been developed using this power.

However, it is proposed to amend section 41 to replace references to the Montreal Protocol No. 4 with references to the Montreal Convention. Although the cargo provisions of the Montreal Convention largely replicate the cargo provisions of Montreal Protocol No. 4, it is preferable for any future Government regulation of this issue to draw on and make explicit reference to the most modern and comprehensive international liability agreement.

**Preliminary Finding 21**

*The Government should amend the CACL Act to allow Regulations to apply the cargo provisions of the Montreal Convention to domestic carriage (replacing existing references to the Montreal Protocol No. 4), noting that it is not proposed to develop Regulations of this nature at this time.*

### 4.10. Delay

A further variation between the domestic liability system and the Montreal Convention is that the domestic liability system does not contain provisions relating to liability for delayed flights.

The Montreal Convention allows damages of up to 4150 SDR (approximately $9300) for damages caused by delayed flights. The cap is breakable if the passenger can show that the carrier acted with intent to cause damage, or acted recklessly and with knowledge that damage would probably result.
The Government notes the declining on time performance of Australian domestic carriers. For the year ended 30 June 2008 airline on time performance over all routes operated by participating airlines averaged 80.6 per cent in terms of on time departures and 78.8 per cent for on time arrivals. The equivalent figures for the previous financial year were 86.9 per cent for departures and 85.6 per cent for arrivals. However, recently released figures for the month of March 2009 indicate a significant improvement in that month, with an average of 86.9 per cent on time departures, and 86.0 per cent on time arrivals.

On balance, the Government does not consider it appropriate to regulate this area at this time. The provisions of the Montreal Convention relating to delay could have an unduly negative impact on smaller operators, and the Government has not received sufficient representations from consumers which would justify regulation of this issue at this time.

However, it is appropriate for Government to continue to monitor this issue.

**Preliminary Finding 22**

The Government should monitor the on-time performance of domestic carriers, leaving open the option of establishing compensation arrangements for delay that are similar to the relevant provisions of the Montreal Convention.
5. Analysis and Options – Insurance Regimes

5.1. Introduction

The available evidence suggests that the insurance market is operating efficiently and is meeting the needs of the aviation industry. Submissions to the Issues Paper were generally comfortable with the compulsory passenger insurance scheme. The Government has identified three issues in relation to aviation insurance that require further consideration. These issues relate to increasing mandatory passenger insurance commensurately with any increase in passenger liability, whether insurance should be made compulsory for third party surface risks, and the minimum level of insurance for war risks.

5.2. Mandatory Passenger Insurance

In the context of a strict liability regime, it is difficult to argue that adequate funds should not be made available for the provision of compensation to victims. Accepting that government regulation in this field is appropriate, it appears clear that a system mandating commercial insurance (rather than allowing forms of self insurance) is the most efficient regulatory system.

Mandatory passenger insurance was introduced in 1995 in response to the Monarch Airlines crash in Young, which prompted the Government to require airlines to obtain insurance against the full extent of potential liability under the CACL Act for domestic travel. The Government does not propose a departure from this position.

Therefore, the Government proposes to increase the level of mandatory passenger insurance for domestic travel to $725,000 per passenger, commensurate with the proposed increase in the passenger liability cap (discussed above).

It is not proposed to change the requirement for international carriers, who are currently required to provide evidence that they are insured to a level of 260,000 SDRs (around A$520,000) per passenger. This is because there are no changes to the liability arrangements for international travel.

The Government is mindful that premium increases may impact on the thin operating margins of some airlines, particularly smaller operators. However, the Government understands that insurance represents only a small component of an airline's overall cost base. Insurance may represent only 2 or 3 per cent of total costs for smaller operators, and significantly less for larger operators. For smaller aircraft, the majority of the premium relates to the cost of insuring the aircraft hull, rather than liability risks. Indicative estimates suggest that, for a Cessna 172 (carrying 3 passengers), up to 70 per cent of a total premium may relate to the insuring of the aircraft hull. For these reasons, it is expected that increasing the mandatory passenger insurance requirements to $725,000 per passenger would have a relatively modest impact on insurance premiums.

Rough estimates suggest that increasing the level of mandatory passenger insurance to $725,000 would have the following impact on total insurance premiums (covering hull, passenger and liability) for the following aircraft:

- Cessna 172 (3 passengers): increase of around 9.5 per cent (less than $500 per year)
- Dash 8 (36 Passengers): increase of around 13 per cent (around $4200 per year)
- Boeing 737 (115 Passengers): increase of around 16 per cent (around $11,000 per year)

It should be noted that there is uncertainty in relation to these estimates.

These changes will also impact on consumers, as it is expected that operators will seek to recoup these additional costs by passing them to consumers via increased ticket costs. Preliminary estimates suggest that the insurance cost component of ticket prices could increase to about 0.465 per cent for major airlines and around 2.8 per cent for smaller carriers. This could increase the ticket price of a $200 flight provided by a major airline by about $0.13 and that provided by a smaller regional carrier by about $0.63.

Again, there are uncertainties regarding these estimates and the impact on ticket prices would depend on a range of market factors and the individual circumstances of the airline.

The Government suggests that it is appropriate for these costs to be absorbed by the market, noting that these potential premium increases have essentially been deferred until now as liability exposure has not been adjusted to reflect inflation. The Government would work closely with industry to ensure that the timing and implementation of this proposal minimises adverse impacts on industry.

**Preliminary Finding 23**

The Government should increase the level of mandatory passenger insurance for domestic travel to $725,000 per passenger, in line with the proposed increase to the cap on liability.

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5.3. Third Party Surface Damage Insurance

5.3.1. A mandatory scheme?

A range of views were expressed in responses to the Issues Paper in relation to whether third party surface damage insurance should be made mandatory. Some submissions supported mandatory insurance, and some larger carriers indicated that it would not present any problems for them, noting that they already carried insurance against these risks. Other submissions opposed the measure, arguing that it would impose unnecessary costs on industry.

It would be grossly unfair if a third party victim of an air crash was unable to obtain compensation because the carrier did not have appropriate insurance in place, and the liquidated value of the company did not cover the cost of the damage it had caused.

However, there is no evidence that Australian surface victims have had difficulty in accessing compensation due to lack of insurance. As was noted in some submissions to the Issues Paper, many carriers take out insurance irrespective of government regulation in order to manage their business risks. This is appropriate and sound business practice. In addition, operators who obtain passenger insurance as part of the mandatory scheme will generally also have some level of cover for third party liabilities as well, as insurance contracts usually group these risks together.

Nevertheless, there are a range of reasons why it may be appropriate for this type of insurance to be compulsory. Some industry sources have suggested that as many as 10 per cent of all aircraft in
Australia are completely uninsured. While the uncertainty associated with this figure is recognised, the statistic is nevertheless concerning and it is not a situation that the Government considers acceptable. It is understood that nearly all of these uninsured aircraft are privately owned, recreational aircraft.

In addition to the concerning indications of relatively widespread non-insurance, there are several other considerations favouring the introduction of a compulsory scheme.

A mandatory third party insurance scheme could ensure a ‘level playing field’ for aircraft operators who responsibly manage their risks (thereby increasing the prospects of victims attempting to access compensation). Mandatory insurance could ensure that these operators are not penalised and do not suffer a competitive disadvantage compared to those operators who do not take out insurance.

It would also formalise and codify the existing arrangement for IAL applicants, who are currently required to demonstrate (in accordance with the IAL guidelines) that they hold ‘appropriate’ insurance. Infrastructure makes an assessment as to whether the insurance held by the international airline is ‘appropriate’.

Finally, mandatory third party insurance would bring Australia into line with the majority of our aviation partners, most of whom mandate insurance against third party surface damage.

The Government notes the argument that the additional costs and regulation of a comprehensive scheme are inappropriate when weighed against the likely risks associated with smaller operators, who often operate in relatively unpopulated areas, in small aircraft that are incapable of causing extremely large amounts of damage.

However, the insurance industry is extremely skilled at assessing risks and pricing it accordingly. Furthermore, a mandatory insurance scheme could link the minimum level of insurance to the Maximum Take Off Mass (MTOM) of the aircraft, to ensure that the minimum insurance standards appropriately reflect the potential risks associated with each aircraft. Possible regulatory structures are discussed below.

The Government contends that the balance of these considerations may favour the introduction of a mandatory insurance scheme although additional data from industry relating to the impact of mandatory third party insurance will be an important consideration leading to any final decision on whether to proceed with the proposal. Insurance costs are discussed below.

### 5.3.2. Possible regulatory structures

There are a range of successful regulatory models on which the requirements could be based. A recent review of the minimum insurance standards in the EC found that their regulatory framework was operating successfully, although it should be noted that most operators carried insurance above and beyond the minimum requirements. It is proposed that these regulations could provide an appropriate model for an Australian regulatory scheme.

The European model creates a minimum third party liability insurance standard that is linked to aircraft MTOM. The Government recognises that it would not be appropriate (or possible) to require airlines to carry insurance against the full extent of (unlimited) liability imposed by the DBA Act, however the European model could ensure both a minimum amount of compensation was available to victims, and a more level playing field for carriers.

If any decision is made to proceed with a mandatory third party insurance scheme, the Government will need to work further with industry and insurers to establish appropriate MTOM thresholds and
associated minimum insurance standards. However the Government does not anticipate, at this stage, imposing insurance requirements in excess of the levels currently obtained by the majority of the industry on a voluntary basis.

The Government recognises that a mandatory insurance scheme could be unwarranted if it were to result in significant compliance costs over and above the cost of the insurance itself. However, there are already a range of administrative processes managed by CASA in which management and enforcement of a mandatory third party insurance scheme could be incorporated.

For example, an element of the Australian regulatory framework could involve linking third party insurance requirements to AOCs in a similar way to which the mandatory passenger insurance scheme is managed. However, it would be necessary to supplement this framework with additional measures, as the Government proposes mandating third party liability insurance for all aircraft beyond a specified MTOM (including aircraft not requiring an AOC).

If any decision to proceed with a mandatory third party insurance scheme is made, the Government will work closely with industry to develop a framework which is appropriately adapted to the Australian industry and minimises compliance costs.

5.3.3. Costs to industry

The Government notes the concerns expressed in some quarters that compulsory third party insurance could place unsustainable costs on smaller operators. A recent EC analysis of the impact of their mandatory insurance provisions identified significant cost increases for some operators from some countries (although other EC countries already imposed mandatory insurance schemes that were more stringent than the EC minimum requirements).

Noting the majority of Australian aircraft that do not currently hold this type of insurance are private, recreational aircraft, it could be expected that a mandatory scheme would have the biggest impact on this sector of the industry. The Government understands that the minimum premium for insurance (including third party liability cover) for a non-commercial, private aircraft is around $4000 per year. However, it is understood that recreational aviation clubs offer insurance (including third party liability) as part of their membership fees, which can be as low as $200 per year.

The Government suggests that the costs associated with third party insurance are not prohibitive, and that there appear to be a range of insurance options available to industry that incorporate third party liability cover that are reasonably priced. These industry costs need to be weighed against the serious damage that could be suffered by entirely innocent third parties on the ground, who, in many instances, would have extremely limited opportunities to pursue compensation. In this context, the Government is not currently persuaded that the costs to industry of maintaining third party liability insurance should prevent the introduction of a mandatory scheme.

However, the Government welcomes further input and data from industry on these matters. This information will inform any final decision on whether to proceed with a mandatory scheme. If any decision to proceed with a mandatory third party insurance scheme is made, the Government will liaise closely with industry to develop an appropriate structure that minimises costs.
Preliminary Finding 24

The Government should give consideration to working closely with industry to develop a system of mandatory insurance for third party surface damage, modelled on the minimum insurance standards required in the EC.

Information sought – third party insurance

Of operators’ total aircraft insurance costs (hull, passenger and third party), what proportion of the cost is for third party damage? For operators who do not currently insure against these risks, how much might insurance costs rise (as a proportion of total insurance costs)?

5.4. War Risk Insurance

5.4.1. Scope of insurance

Australia does not currently require carriers to hold war risk insurance for either passenger liability or third party surface liability. The CAACL Act permits carriers and insurers to utilise the AVN48B exclusion clause, which deals with a wide range of risks associated with war and civil unrest. Carriers are not required to write back these risks by using the complementary AVN52D extension clause.

This represents a significant gap in insurance coverage. The AVN48B clause is broad in its scope, excluding coverage for damage caused by a wide range of military and terrorist actions, as well as strikes, labour disturbances and any ‘malicious act or act of sabotage’.

The Government understands that the complementary write back clause, which enables carriers to obtain insurance against these risks, is widely available and is relatively affordable. The Government understands that cover of up to $50 million is available at low (and sometimes no) additional cost. It is understood that a typical premium for war risk liability would be around 0.025 per cent of the aircraft’s market value.

The Government contends that allowing carriers to avoid obtaining insurance for the breadth of risks contained in the AVN48B exclusion does not meet the objective of ensuring that prompt and equitable compensation is available for victims of air accidents; nor does it provide an appropriate balance between the interests of victims, carriers, insurers and governments.

Consistent with the approach to third party insurance, the government considers that, in most cases, it is commercially responsible—and, from the point of view of victims, desirable—for carriers to obtain insurance with as broad a scope of coverage as is commercially available. In order to ensure that carriers who manage their risks responsibly are not commercially disadvantaged, and to maximise the likelihood of air crash victims having access to prompt and comprehensive compensation, it may be appropriate for the Government to mandate the use of the AVN52D write back clause in conjunction with the AVN48B exclusion clause. Additional data from industry relating to the impact of mandatory war risk insurance will be an important consideration leading to any final decision on whether to proceed with the proposal.

Similar to the implementation of compulsory third party insurance, the Government considers that this
change can be implemented with minimal compliance costs over and above the cost of the additional insurance.

The Government recognises that this type of insurance may not necessarily be appropriate in the context of recreational aviation, and the Government will consider regulatory models similar to the EU framework which exempts non-commercial aircraft of less than 500kg from the requirement to hold war risk insurance.

The Government welcomes further input and data from industry on these matters. This information will inform any final decision on whether to proceed with a mandatory war risk insurance scheme. If any decision to proceed with a mandatory system is made, the Government will liaise closely with industry to develop an appropriate framework that minimises costs.

**Preliminary Finding 25**

The Government should give consideration to working closely with industry to develop a system that requires operators to obtain insurance with coverage scope that is as broad as possible, by mandating the use of the AVN52E write back clause in conjunction with the AVN48B exclusion clause.

**Information sought – war risk insurance**

Are war risks commonly insured in the Australian aviation market? Of operators’ total aircraft insurance costs (hull, passenger and third party), what proportion is for additional war risks insurance? For operators who do not currently insure against these risks, how much might insurance costs rise (as a proportion of total insurance costs)?

**5.4.2. Market developments**

The Government is monitoring market developments related to the scope of war risk insurance that is available on the commercial market. The Government is of the firm view that the cost of meeting the ‘new perils’ risks should be borne by industry, and that it is for industry to develop solutions to these insurance challenges.

However, the Government recognises that requiring carriers to obtain insurance that does not exist does not assist in fostering a productive and sustainable aviation industry. It is therefore appropriate for the Government to continue to monitor the situation and respond to market developments in accordance with the broader objectives of the liability and insurance framework.

**Preliminary Finding 26**

The Government should monitor the aviation war risk insurance market and respond to market developments in accordance with the broader objectives of the liability and insurance framework.

6.1. Background


Adoption of the Code is voluntary; however the Department advocates its use by airlines and requested a written assurance indicating compliance at the time the Code was launched. The Government has previously indicated that if compliance with the voluntary Code is unsatisfactory, moving to a mandatory system could be considered. This possibility was canvassed in the Aviation Issues Paper that was released in April 2008.

A number of new carriers are operating to, from and within Australia since the Department conducted that compliance process. Some of Australia’s regional airlines have not yet agreed to comply with the Code.

International airlines flying to the United States are required by law to maintain a family assistance plan that includes many of the elements of Australia’s voluntary Family Assistance Code. Critical coverage of airlines’ dealings with victims or their surviving family following high profile air accidents have heightened the commercial necessity to ensure that airlines are ready to respond with compassionate and sustained support in the event of an air accident.

6.2. What are the Carriers’ Obligations?

The Code sets out a range of procedures, principles and obligations which airlines are expected to incorporate in their Family Assistance Plans. Key standards that are expected to be included in an airline’s family assistance plan include:

- the appointment of a Family Support Coordinator;
- establishment of a Crisis Management Centre and a Family Support Centre; and
- the provision of counselling services and ‘up-front’ compensation payments in advance of final legal settlement of compensation amounts.

The Code also outlines important airline obligations relating to issues such as information management and the provision of counselling services.

The amount of compensation to be offered as the up-front advance payment is not specified, although an amount of $30,000 is suggested in the event of passenger death.

This is consistent with the flexible nature of the Code, which enables airlines to tailor a Family Assistance Plan that is appropriate to its circumstances. This is particularly relevant for smaller
regional operators, who are also expected to comply with the Code.

The Government understands that carriers are able to purchase insurance products to cover many of the costs associated with the obligations arising under the Code (such as the cost of transporting family members).

6.3. International Standards

The Family Assistance Code draws heavily on the procedures and processes established by our aviation partners. The EC mandates upfront payments of 16,000 SDR (approximately $32,000 per passenger in the event of death), payable to the person entitled to compensation under the Montreal Convention.4

However, the EC has not mandated detailed procedures relating to how an airline should respond to an accident, in terms of providing other forms of support for families and linking with government agencies.

This is in contrast to the US, which mandates a range of detailed requirements for airlines responding to air accidents without mandating an amount to be offered as upfront payments. The US requirements are outlined in the Aviation Disaster Family Assistance Act 1996 and the Foreign Air Carrier Family Support Act 1997. Similar to the Australian Family Assistance Code, the US requires the development of a Family Assistance Plan.

6.4. Analysis and Options

Responses to the Issues Paper presented a range of views in relation to the Code.

One major airline indicated that the Government should consider a similar legislative framework to the US, whereby adoption of the code is made mandatory. Other major airlines indicated that they would be comfortable with the mandatory application of the code, noting that they were already compliant.

However, other submissions, including submissions on behalf of smaller operators, opposed the Code altogether (on both a voluntary and mandatory basis) because the broader system of welfare payments ensures that adequate financial assistance is available to air crash victims.

Some submissions highlighted some of the practical challenges that could be encountered by airlines that apply the Code.

6.4.1. Utility of the Code

The Government is not convinced by arguments that the Code is unnecessary and should be abolished. Suggestions that existing welfare systems (presumably offered by Government) provide adequate support for air crash victims do not properly reflect the purpose of the Code.

The obligations that flow from the Code extend well beyond purely financial issues. It sets out protocols covering a range of administrative issues; such as how to convey news to family members, what to do with family members who gather at an airport following an air crash, and how to handle the personal belongings of air crash victims. Airlines unavoidably have a central role in these processes, and it is inadequate for industry to absolve itself of all responsibility for ensuring that these matters are

4 See EC Regulation No 889/2002 of the European Parliament and Council of 13 May 2002
handled appropriately.

Furthermore, the Code serves an important purpose related to the need to ensure that the overall response to an aviation disaster is coordinated and efficient. This issue is discussed further below.

**Preliminary Finding 27**

*The Family Assistance Code continues to serve a useful purpose and should not be abandoned.*

### 6.4.2. ‘Up-front’ payments

Similarly, the Government is unconvinced that the provisions in the Code which provide for immediate up-front payments should be abolished. Due to the principle of strict liability, it is almost certain that an airline will be liable to pay a significant amount of compensation in the event of a passenger death. In this context, the Government sees no reason to abandon the principle that a small portion of this compensation should be paid to a victim’s family in advance of final legal settlement, irrespective of the availability of financial assistance from other sources.

The Government recognises the potential difficulties that could be confronted by an airline considering making advance payments. For example, the process of identifying which family members should be eligible for compensation is potentially problematic. However the Government notes that the provisions of the Code relating to the provision of advance payments afford airlines considerable flexibility and discretion, which should enable airlines to deal with these issues appropriately.

**Preliminary Finding 28**

*The Family Assistance Code should continue to oblige airlines to make an ‘advance payment’ to family members in the event of a passenger death.*

### 6.4.3. Mandatory or voluntary?

The Government currently has insufficient information to make an informed decision on whether the Code is most appropriately applied on a compulsory or mandatory basis.

The Government is not disposed towards imposing a mandatory regulatory compliance framework in the absence of any evidence to suggest that the voluntary system is ineffective. However, the Government does not maintain data on current compliance levels with the Code. Airlines were last contacted in 2002 in relation to the Code, and airlines provided assurances that they complied with the Code.

The Government intends to write to airlines in due course to re-assess current levels of compliance with the Code.

In the meantime, data is sought from industry to gauge the potential impact of making compliance with the Code compulsory. This information will be a central consideration if current compliance levels require the Government to assess alternative regulatory options.
It is anticipated that any move to a mandatory scheme would involve minimal administrative costs arising from the process of satisfying Government of compliance with the Code, and information is not sought in relation to the impact of various administrative frameworks for a mandatory scheme at this time. Rather, information is required relating to the cost of complying with the Code itself, the development of a family assistance plan, and the costs of insurance against the obligations established in the Code.

The Government emphasises that the Code specifically allows smaller operators to tailor a family assistance code that is appropriate to its circumstances. To this end, the Government recognises that it is necessary to take a flexible approach in ensuring that airlines are appropriately prepared for a disaster, noting that smaller operators have no less a responsibility towards the victims of an accident.

### Preliminary Finding 29

If it is necessary to consider alternatives to the voluntary Family Assistance Code, the Government should give careful consideration to data from industry in relation to the impact of making compliance with the Code mandatory.

### Information sought – Family Assistance Code

What will be the costs to industry of making compliance with the Code mandatory? Are these costs likely to be mainly ‘one off’ establishment costs associated with developing procedures and protocols, or ongoing insurance costs?

#### 6.4.4. Links to broader disaster planning

Another important purpose of the Code is to articulate and clarify the roles and responsibilities of an airline in what is invariably an emotional, stressful and complex situation. A wide range of Government agencies and a potentially large number of victims (and families) will be involved in a response to an air crash. Governments (state and Commonwealth) have a range of plans and protocols intended to facilitate a coordinated and efficient response to an aviation disaster. The Family Assistance Code forms an important element of this coordinated effort; and in this context it is important that the role of an airline in providing appropriate support to crash victims be clearly understood and agreed to by all airlines.

One response to the Issues Paper indicated that there was scope for greater coordination between Government agencies and airlines in the event of an air accident. In particular, the submission suggested that a government exercise designed to test the Government’s response to an aviation incident highlighted deficiencies in this area which remain unaddressed.

The Commonwealth is currently reviewing its processes and procedures in the event of a major aviation accident. This review process is managed by Emergency Management Australia. Particular concerns with the Government’s procedures in the event of an aviation accident should be addressed through this process.
Preliminary Finding 30

*Emergency Management Australia should continue to work closely with industry to address issues related to the Government's preparedness for an aviation disaster.*
7. Modernisation of the Rome Convention

The Government is interested in stakeholder views relating to two Conventions which have recently been developed by ICAO. These conventions deal with third party liability, and attempt to modernise the Rome Convention which covers this issue. The Conventions are available for download from the ICAO website at <http://www.icao.int/cgi/airlaw.pl>.

The Conventions were finalised at a diplomatic conference in April 2009. At this stage, preliminary feedback from industry is sought in relation the issues associated with the Conventions to guide the Government's future approach to the Conventions. The Conventions create separate liability regimes, so that liability for terrorist attacks is dealt with separately to other incidents. The Government's preliminary view is that a unified liability regime that does not distinguish between the causes of aircraft damage is preferable, although some submissions to the Issues Paper advocated separate liability regimes. The Government is particularly interested in further views on this matter in light of the settled texts of the Conventions.

It should be noted that any decision to accede to these Conventions would have major implications for the DBA Act. The issues raised at 4.6 (above) are premised on the assumption that Australia will not be acceding to the draft Conventions discussed below, although the Government has not made any final decision on this matter.

7.1. Background

In 2000, in response to State Party requests, ICAO commenced developing proposals to modernise the Rome Convention. In 2004, ICAO established a Special Group (SG) to progress matters, especially in relation to catastrophic accidents as a result of 'unlawful interferences' with aircraft.

The events of 11 September 2001 caused an interim collapse in the aviation war risk insurance market. This event created havoc for the aviation industry and required governments to provide interim indemnity cover for air carriers. The aviation war risk insurance market has since recovered, however, ICAO saw that there remained a need to mitigate against the risks to the aviation insurance market in the event of further terrorism related events.

Consequently, the SG proposed two separate Conventions to replace the Rome Convention:

- one dealing with the liability of carriers for death, injury and property to those on the ground arising from terrorism-related incidents (the 'Unlawful Interferences Convention'), and
- one dealing with the liability of carriers for death, injury and property damage to those on the ground arising from other aviation incidents (the 'General Risks Convention').

The draft Conventions were considered by ICAO’s legal committee in May 2008, and were finalised at a diplomatic conference held in April 2009.

7.2. The Unlawful Interferences Convention - Summary

The key elements of the proposed Unlawful Interferences Convention are:
a) Liability for the carrier would be strict and capped. The maximum liability (for the heaviest aircraft) would be SDR 700 million (approximately $1.4 billion). The cap could be broken in exceptional circumstances only.

b) A ‘supplementary compensation mechanism’ (SCM) would be created to compensate victims in the event that damage exceeded a carrier’s capped liability. The maximum amount of additional compensation available to victims via the SCM would be SDR 3 billion (approximately $6 billion) per event.

c) Liability is ‘channelled’ through the operator, so that victims are prevented from pursuing claims against other potential defendants. A limited ‘right of recourse’ is provided to carriers and the SCM, so that it could be possible for them to re-coup losses from entities who have contributed to the damage.

d) The SCM would be funded by a levy placed on passengers and cargo. The quantum of the levy will be set so as to raise SDR 3 billion (approximately $6 billion) within 4 years. The maximum total collection will not exceed SDR 9 billion (approximately $18 billion) over 2 consecutive years.

e) The Convention would apply to damage occurring in Party States caused by international flights, regardless of whether the carrier was domiciled in a Party State. In addition, in the event of damage in a non-party state, which was caused by a carrier domiciled in a party state, a special ‘conference of parties’ could decide to provide financial support (from the SCM) to the liable carrier.

f) Party states could decide to apply the Convention to domestic flights as well, in which case the SCM levies would also become payable on domestic passengers/cargo.

g) The Convention is also designed to respond to a potential contraction in the aviation war risk insurance market. In this scenario, the SCM would, in exchange for a fee from the carrier, agree to extend financial support to the carrier in the event of an incident up to the level of their capped liability, essentially stepping in as an insurer if commercial operators vacate the market. This feature of the Convention is referred to as the ‘drop down’.

7.3. The General Risks Convention - Summary

The draft General Risks Convention proposes a system similar to the Montreal Convention (which deals with passenger injuries). It proposes strict liability for the carrier to a threshold proportional to the aircraft’s maximum take-off mass. Beyond this threshold, the carrier would be liable for all losses unless the carrier proves that they were not negligent, or that losses were solely due to the negligence of another party. No equivalent to the SCM would be established.

The threshold ranges from SDR 750,000 (approximately $1.5 million) for the lightest aircraft to SDR 700 million (approximately $1.4 billion) for the heaviest aircraft.

7.4. Analysis and Discussion- Unlawful Interferences Convention

7.4.1. Liability caps

In Australia, carrier liability for third party surface damage is strict and uncapped. Third party victims of an aircraft accident are able to seek unlimited compensation from an aircraft operator without having to prove negligence. However, in practice, the amount of compensation available will be limited to the value of an airline’s insurance policy combined with the value of its liquidated assets.
The draft Convention proposes to introduce a capped liability (breakable in exceptional circumstances only), which would limit the amount of compensation obtainable from the carrier and the SCM. This could be considered a retrograde step for the protection of Australian victims.

However, in a practical sense, the Convention may provide more protection for Australian consumers than the current arrangements. Although liability is currently uncapped, obtaining timely compensation for damage beyond the terms of the carrier’s insurance could be problematic. The liability caps under the draft Convention equate to the minimum insurance requirements of the European Union (noting that Australia does not impose minimum insurance standards for third party losses). Therefore, although the draft Convention would cap liability, the creation of the SCM could in effect extend the amount of compensation that would be readily available to victims.

The diagram below assists in understanding the difference between Australia’s third party liability arrangements and that proposed by the Unlawful Interference Convention.

<table>
<thead>
<tr>
<th>Scheme</th>
<th>Damage By Aircraft Act 1999</th>
<th>Unlawful Interference Convention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis of air carrier liability</td>
<td>Statutory strict liability</td>
<td>Statutory strict liability</td>
</tr>
<tr>
<td>Aircraft operator liability caps:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total (aggregate) liability cap</td>
<td>None</td>
<td>Max. of SDR 0.750m to SDR 700m, depending on aircraft weight.</td>
</tr>
<tr>
<td>Damages in excess of aircraft carrier’s insurance or liability cap?</td>
<td>Victims may be able to obtain compensation for damages exceeding aircraft carriers insurance – likely to be the subject of protracted legal proceedings.</td>
<td>Paid for by Supplementary Compensation Mechanism (unless fund exhausted)</td>
</tr>
<tr>
<td>Financing Method</td>
<td>Insurance (noting current Australian requirements are minimal) and (if necessary) liquidated assets of aircraft operator.</td>
<td>Compulsory private insurance up to limit of liability; damages in excess of liabilities met by Supplementary Compensation Mechanism which is funded through a tax on passengers and freight users.</td>
</tr>
</tbody>
</table>

7.4.2. War risk insurance contraction issues

The Convention has the potential to accommodate a contraction in the war risk insurance market. In this scenario, the SCM would, in exchange for a fee from the aircraft carrier, agree to extend financial support to the carrier in the event of an incident, up to the level of their capped liability. Essentially the SCM would act as an insurer if commercial operators vacate the market.

This outcome is far preferable to the outcome of the last insurance market contraction (following 11 September 2001) in which governments around the world offered indemnities to their airlines. This action occurred so that airlines were able to meet minimum insurance requirements and continue their operations.
A coordinated multilateral approach such as the SCM could potentially offer a sustainable long-term solution to the issue, which would be preferable to a patchwork of Government indemnities that could potentially distort the market.

It would also be preferable to the regional insurance proposals (such as the ‘Eurotime’ scheme) which emerged when the aviation insurance markets last contracted. Australia would not have been able to access these schemes, which was one of the reasons which led the former Government to strongly support an alternative ICAO insurance scheme called ‘Globaltime’. The ‘Globaltime’ proposal ultimately failed to gain widespread support, but it was this commitment to multilateral solutions which has underpinned Australian Government engagement in the modernisation of the Rome convention.

7.4.3. The SCM and its fundraising model.

There is currently limited information available regarding the likely financial and administrative impost associated with the SCM. Fundraising targets have been identified, but due to the uncertainty as to how widely the Convention will be implemented, it is difficult to gauge the likely financial impact of the scheme upon Australian consumers. However, this will be a central consideration when ultimately deciding whether it is in Australia’s interest to implement the scheme.

Administrative complexity will also be a central consideration. It is proposed that carriers be responsible for collecting and remitting to the levy directly to the SCM. The impact of this on carriers’ operations will need further consideration, although the draft text explicitly states that the process for collection and remittal should not impose undue burdens.

Some countries have indicated that the basis for collecting the levy (on a per passenger/cargo tonne basis) is not the most appropriate. It has been suggested that a more equitable scheme would link the amount of the levy to the aircraft’s maximum take-off mass to more closely link the amount of the levy to the amount of risk and the amount of potential damage.

7.4.4. The SCM’s investment mechanism

Article 17 of the Convention states that SCM will be managed ‘with the highest degree of prudence’, foreshadowing investment guidelines to be developed by a later ‘Conference of Parties’. However, there is a risk that pressure will mount for the funds generated by the SCM to be managed as a general ‘public good’ investment vehicle. Close attention will need to be paid to the investment guidelines to ensure that the SCM is appropriately managed.

7.5. Analysis and Discussion - General Risks Convention

The current proposal represents reduction in protection for Australian consumers, insofar as it moves away from the system of purely strict liability currently contained in the DBA Act, to a two tier system similar to that contained in the Montreal Convention.

It may nevertheless be appropriate for Australia to give consideration to a proposal of this nature in order to achieve international consistency in this field.

7.6. Next Steps

Any decision to accede to the Conventions will follow detailed consultation with industry. At this stage, preliminary impressions from industry are sought in relation to the Conventions, which will inform Australia’s consideration of the Conventions.
It is recognised that one of the critical factors that will be relevant to any final decision for Australia to accede to the Convention will be the level of support amongst our aviation partners. It is unlikely that it will be in Australia’s interests to accede to the Conventions if they are not widely implemented, and it will not be possible to gain a clearer perspective on this issue until our aviation partners have had ample time to consider the finalised texts. At this stage, comments are sought in relation to the basic structure of the draft Conventions.

**Information sought – Rome Convention modernisation**

*What are the aviation industry’s views on the Conventions that are proposed to replace the Rome Convention?*
Attachment A: Summary of Warsaw System

The ICAO Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (the Warsaw Convention) limited the potential liability of the (then) fledgling air carrier industry in accidents involving personal injury or death to passengers in exchange for limiting the carriers' defences. The Warsaw System comprises the Warsaw Convention together with the following legal instruments that amend and update the Warsaw Convention:

- Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (the Guadalajara Convention).
- Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971 (Guatemala City Protocol).
- Additional Protocols, No.1, 2, 3, and Montreal Protocol No. 4, signed at Montreal on 25 September 1975 (the Montreal Protocols).

These Conventions and Protocols provide for arrangements relating to air carrier compensation and liability limits in the event of death or bodily injury to a passenger, damage or loss to baggage or cargo, and documentation for passengers, baggage and cargo. The main features of each of these legal instruments are outlined below:

The Warsaw Convention (1929)


Entered into force: 13 February 1933
Australia signed: 12 October 1929
Total ratifications: 152
Australia ratified: 1 August 1935

- Imposes strict liability on carriers for death or bodily injury to passengers; destruction or damage to cargo and baggage; and damage caused by delay in the carriage of passengers, cargo and baggage.
- Limits the liability of carriers to:
  - 125,000 francs Poincaré for the death or bodily injury of a passenger,
  - 250 francs Poincaré per kilogram for loss of or damage to registered baggage and cargo, and
  - 5,000 francs Poincaré per passenger for loss or damage to unregistered baggage which the passenger takes charge of himself.
- Permits a claimant to recover amounts in excess of the liability limits if he or she proves that the damage was caused by the carrier's wilful misconduct.
- Permits several contractual methods by which a passenger or air cargo consignor can contract with a carrier for higher liability limits, but prevents contractual lowering of the limit or altering the rules of liability.
- Permits a carrier to absolve itself of liability if it proves that it has taken all necessary measures to avoid the damage or delay or if it proves contributory negligence.
- Imposes requirements on carriers and air cargo consignors in relation to the provision of
documentation for passengers, baggage and cargo.

The Hague Protocol (1955)

Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, signed at The Hague on 28 September 1955.

Entered into force: 1 August 1963
Australia signed: 1956
Total ratifications: 137
Australia ratified: 23 June 1959

The main amendments were:

- Increased the limitation of carriers' liability in the event of death or bodily injury to a passenger to 250,000 francs Poincaré per passenger.
- Extended the definition of 'wilful misconduct' which allows for plaintiffs to 'break' the limit of liability set out in the Warsaw Convention.

Other amendments were:

- Simplifying the requirements for passenger tickets and baggage checks.
- Enabling a carrier to contract out of the strict liability provisions in relation to carriage of cargo to the extent that damage caused to goods or baggage is caused by 'the inherent defect, quality or vice' of the cargo carried.
- Extending the liability limits to cover the employees and agents of the carriers.
- Extending the time in which claims for damage to cargo and baggage must be made from 7 days to 14 days and from 3 days to 7 days, respectively.
- Extending the time in which claims for delay must be made from 14 days to 21 days.

States which are not a Party to the Warsaw Convention but which sign up to this Protocol are considered to be a Party to the Warsaw Convention as modified by The Hague Protocol. Together these are referred to as the Warsaw – Hague Convention.

The Guadalajara Convention (1961)

Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961.

Entered into force: 1 May 1964
Australia signed: 19 June 1962
Total ratifications: 85
Australia ratified: 1 May 1964

- Distinguishes between the actual and contracting carrier, and provides that both are liable to the passenger as if they were the contracting carrier for the purposes of the Warsaw Convention. The passenger is entitled to claim against either or both the actual or contracting carrier for bodily injury, loss or damage to baggage and cargo or for delay. The Convention aims to cover such arrangements as leasing, chartering, code-sharing and interlining, commercial practices which have come into prominence since the Warsaw Convention was developed in the late 1920s.
Guatemala City Protocol (1971)

Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971.

Entered into force: unlikely
Australia signed: No
Total ratifications: 12
Australia ratified: No

- Imposed absolute or ‘risk’ liability on carriers, that is, carriers were unable to disavow responsibility to compensate passengers where they were without fault.
- The liability limit was increased to 1,500,000 francs Poincaré.
- Contained a facility for periodic review of the limits.
- A carrier could reduce its liability if it could establish that a passenger’s injuries were the result of the passenger’s health, as well as establishing contributory negligence.
- States were permitted to establish supplementary compensation schemes to ‘top up’ the 1,500,000 francs Poincaré available to passengers, although the costs of those schemes could not be charged to carriers.
- Permitted a passenger to institute proceedings in the courts of the State of his or her domicile or permanent residence, provided the defendant carrier has a place of business in that State (known as the ‘fifth jurisdiction”).

Even though the Protocol was largely engineered by the US and contained many reforms the United States had been seeking for over a decade, this Protocol is inoperative largely because the United States’ Senate refused to ratify it.

Additional Protocols Nos 1, 2 and 3, signed in Montreal on 25 September 1975

Nos 1 & 2
Entered into force: 15 February 1996
Australia signed: No
Australia ratified: No
Total ratifications:
No.1 49
No.2 50

No. 3
Entered into force: unlikely
Australia signed: No
Total ratifications: 21
Australia ratified: No

Protocol No. 1 amended the Warsaw Convention
Protocol No. 2 amended The Hague Protocol
Protocol No. 3 amended the Guatemala City Protocol

- ICAO adopted these Protocols in 1975 to replace the francs Poincaré with the IMF Special Drawing Rights (SDR) unit, in order to eliminate the problems associated with the difficulty of valuing the outdated francs Poincaré.
- By ratifying the Protocol, the State becomes a Party to the instrument which the Protocol amended if the State was not already a Party.
The Montreal Protocols Nos. 1 and 2 did not come into force until 15 February 1996, with the majority of supporting States being European. Montreal Protocol No. 3 is unlikely to come into force as the US refused to ratify the Guatemala City Protocol.

**Montreal Protocol No. 4, signed at Montreal on 25 September 1975**

- Entered into force: 14 June 1998
- Australia signed: 24 April 1991
- Total ratifications: 57
- Australia ratified: 14 June 1998

- This Protocol covers cargo compensation arrangements. Liability is absolute and unbreakable (17 SDRs per kilogram), unless the consignor makes a ‘special declaration’ notifying the carrier of the particular value of the cargo. The Protocol replicates the rules relating to carriers’ liability set out in the Guatemala City Protocol in respect of loss of or damage to cargo.
- Eliminated the outmoded cargo documentation provision of the Warsaw Convention, thereby facilitating the use of electronic records for international air cargo commerce.
- By ratifying the Protocol, the State becomes a Party to the instrument which the Protocol amended if the State was not already a Party.

**Comment**

Most States operate under the Warsaw Convention amended by The Hague Protocol and Montreal Protocol No. 4.

**Summary of Australian position**

Australia has ratified the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, and Protocol No. 4.
Attachment B: Glossary

- **Air waybill**: Air cargo receipt; a list of goods sent by common air carrier.
- **AOC**: Air Operating Certificate.
- **ATA**: (American) Air Transport Association.
- **CA Act**: Refers to the Civil Aviation Act 1988.
- **CACL Act**: Refers to the Civil Aviation (Carriers’ Liability) Act 1959.
- **CASA**: Civil Aviation Safety Authority.
- **Code sharing**: Agreement between two or more airlines allowing an airlines to sell tickets and market flights on a flight operated by another carrier.
- **DBA Act**: Refers to the Damage by Aircraft Act 1999.
- **exemplary damages**: Australian legal term for punitive damages. Damages over and above compulsory damages, sometimes awarded to a plaintiff as a mark of disapproval of the defendant’s conduct.
- **francs Poincaré**: Currency referred to in Warsaw System instruments, consisting of equals 65½ milligrams of gold of millesimal fineness 900. SDRs are now widely used instead.
- **Guadalajara Convention**: Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carriers, signed at Guadalajara on 18 September 1961.
- **Guatemala City Protocol**: Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971.
- **IATA**: International Air Transport Association – worldwide trade association of international airlines.
- **ICAO**: International Civil Aviation Organization.
- **IMF**: International Monetary Fund.
- **liability**: A person’s present or prospective legal responsibility, obligation or duty.
- **limited liability**: Liability restricted by law or contract.
- **liability insurance**: A form of general insurance providing the insured with protection against the consequences of being held legally liable for damage or injury to another person.
- **MTOM**: Maximum Take-Off Mass (of an aircraft).
- **mental injury**: Shock, mental anguish and psychiatric injury.
- **MP3**: Refers to the Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocols done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971.
- **MP4**: Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971.
nervous shock  Psychiatric illness as a result of the immediate emotional shock caused by the defendant’s act.
non-voidable  Mandatory.
personal injury  Any disease or injury sustained by an individual to his or her person, including broken limbs, for which another is legally liable. It may destroy or impair, whether permanently or temporarily, a person’s existing physical or mental condition or produce pain and suffering.
punitive damages  A US term. Exemplary damages, damages over and above compulsory damages, sometimes awarded to a plaintiff as a mark of disapproval of the defendant’s conduct. These are excluded by Article 29 of the Montreal Convention.
Rome Convention  Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome, on 7 October 1952.
SDRs  Special Drawing Rights - an artificial ‘basket’ of currency developed by the International Monetary Fund for international accounting purposes to replace gold as a world monetary standard. As at 15 May 2009, A$1 = SDR 0.5003, although this figure fluctuates significantly in accordance with exchange rate movements.
strict liability  Does not depend on actual negligence or intent to cause harm but is based on the breach of an absolute duty to make something safe.
Warsaw Convention  Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929
Warsaw System  The 1929 Warsaw Convention and subsequent amending Conventions and Protocols.
Attachment C: Review of Air Carriers’ Liability Arrangements - Terms of Reference and Issues for Consideration

The review of Australia’s air carriers’ liability arrangements will evaluate:

1) The effectiveness, efficiency and impact on competition of the regulation of air carriers’ liability;

2) The effectiveness, efficiency and impact on competition of the regulation of liability for third party damage to people or property on the ground caused by aircraft;

3) The state of the current aviation insurance market;

4) The Commonwealth’s regulation of aviation insurance requirements; and

5) The effectiveness, efficiency and impact on competition of non-legislative measures designed to provide consumer protection for air travellers in Australia, including the Australian Family Assistance Code.

The review of Australia’s air carriers’ liability arrangements should be done in accordance with the following principles:

i. Maintaining consistency across Australia’s legal jurisdictions;

ii. Facilitating the growth of efficient, competitive and sustainable air transport services in Australia and internationally;

iii. Ensuring the appropriate management and distribution of risk between the aviation industry, the insurance industry and consumers;

iv. Minimising the exposure of Government and Australian taxpayers to financial risk;

v. Minimising compliance costs to industry, to the greatest extent possible;

vi. Maintaining the private sector provision of aviation liability insurance, to the greatest extent possible;

vii. Ensuring compliance with Australia's international obligations; and

viii. Ensuring a range of options are identified to address any problem with existing arrangements, including the recommendation of a preferred option.

Issues for Consideration

In developing options for Ministerial consideration, the following areas will be addressed:

A) Developments and trends in the aviation insurance industry

1. The state of the aviation insurance market and the availability of insurance cover for aviation insureds;

2. The insurance and liability system applying to the growing recreational aviation industry;

3. Insurance requirements for intrastate aviation; and

4. The application of liability regimes for code sharing and multimodal arrangements within Australia and internationally.

B) Developments in international approaches to liability regimes and in the international system of aviation liability

1. The approach taken by our major aviation partners to regulating liability and insurance requirements for air travel;

2. Developments in multilateral approaches to carriers’ liability and compensating victims of air accidents; and

3. The application of private, voluntary agreements undertaken by international airlines affecting their liability.

C) The operation and adequacy of liability arrangements for domestic flights, and Australian
**international carriers**

1. The legislation regulating air carriers’ liability in Australia;
2. How Australia’s system of air carriers’ liability compares with the approach taken by our major aviation partners; and
3. The effectiveness of CASA’s regulation of Australia’s requirements.

**D) Consumer protection measures for Australians flying to and from Australia on foreign carriers, or on overseas domestic flights**

1. The liability framework that applies to international flights to and from Australia; and
2. The options available to the Australian Government regarding consumer protection afforded to Australians flying on domestic flights overseas.

**E) The effectiveness of the Australian Family Assistance Code in providing consumer protection for air travellers in Australia.**

1. The extent of compliance with the voluntary regime established by the Australian Family Assistance Code;
2. A comparison of Australia’s voluntary system with approaches taken by our major aviation partners; and
3. The application of the statute of limitations and the scope of injuries covered (i.e. bodily vs. personal injury) by Australia’s air carriers’ liability regime.

**F) The regulation of insurance for war and terrorism and systems of protection for potential victims of acts of unlawful interference involving aviation.**

1. Regulatory approaches to war risk insurance by our aviation partners;
2. The viability of multilateral solutions to compensating victims of unlawful interference with aviation;
3. The current regulatory framework of aviation insurance in Australia.
Attachment D: Summary of Preliminary Findings and Information Sought

Preliminary Finding 1. The objectives of Australia’s aviation liability and insurance framework should be to:

- Provide prompt and equitable compensation to victims of air accidents;
- Foster a productive and sustainable aviation industry;
- Provide an appropriate balance between the interests of victims, carriers, insurers and governments; and
- Be as simple as possible, to increase certainty for industry participants and reduce compliance costs;
  - and therefore be consistent with our international obligations, yet appropriately tailored for the Australian market.

Preliminary Finding 2. The Commonwealth should continue to regulate carriers’ liability and insurance separately to other transport modes.

Preliminary Finding 3. In relation to international travel, Government should take further action where possible to limit the exposure of Australian travellers to the ‘Warsaw System’, and ensure that the Montreal Convention, or compensation provisions comparable to those provided under the Montreal Convention, apply in all possible circumstances.

Preliminary Finding 4. Government should require international carriers servicing Australia to implement the IATA agreements, whereby carriers waive the caps instituted under the Warsaw System, and to waive the Warsaw defences up to a threshold of 100,000 SDR. This requirement should be implemented by linking the requirement to the system of IALs. This measure would replace the higher caps that CACL currently imposes on Australian carriers operating under the Warsaw system.

Preliminary Finding 5. Industry should note that the Government is repealing Part IIIB of the CACL Act which provides for the implementation of the now redundant Montreal Protocol No. 3.

Preliminary Finding 6. In relation to international travel where Australia is neither the origin nor destination of carriage, the Government should continue to focus on its broader policy of providing information in relation to potential air safety concerns.

Preliminary Finding 7. The Government should not apply the Montreal Convention to domestic travel at this stage, and instead maintain a separate system of strict and capped liability.

Preliminary Finding 8. The Government should increase the domestic passenger liability cap to $725,000 to reflect changes in the cost of living.

Preliminary Finding 9. The Government should ensure consistency between the international and domestic passenger liability frameworks in relation to the treatment of mental injuries by limiting the domestic system to compensation for ‘bodily injuries’.

Preliminary Finding 10. The Government should explore the possibility of amending the CACL 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.

Preliminary Finding 11. The Government should maintain the system of strict and unlimited liability for carriers who cause damage to third parties on the surface.
Preliminary Finding 12. The Government should explore the possibility of amending the DBA Act to recognise contributory negligence, allowing compensation payments to be reduced when victims are partly responsible for their losses.

Preliminary Finding 13. The Government should explore the possibility of amending the DBA Act to provide a 'right of contribution', allowing compensation payments to be appropriately apportioned between those who have contributed to the cause of an air crash.

Preliminary Finding 14. The Government should explore the possibility of amending the DBA Act to clarify that it provides the exclusive remedy available to third party victims, so that they are prevented from mounting legal proceedings based on alternative areas of law.

Preliminary Finding 15. The Government should consider amending the DBA Act to disallow claims for compensation for mental injury suffered by air crash witnesses.

Preliminary Finding 16. The Government should consider amending the DBA Act to clarify whether consequential damages are available under the Act, noting the overall objectives of the carriers' liability and insurance framework.

Preliminary Finding 17. The Government should preserve the current arrangements in relation to time limits on actions brought under the DBA Act.

Preliminary Finding 18. The Government should work with state governments to harmonise the liability framework for third party surface damage.

Preliminary Finding 19. The Government should amend the CACL Act and the DBA Act to ensure that damages are assessed in accordance with state government civil liability regimes.

Preliminary Finding 20. The Government should amend the CACL Act to harmonise the domestic travel baggage liability provisions with the baggage liability provisions of the Montreal Convention.

Preliminary Finding 21. The Government should amend the CACL Act to allow Regulations to apply the cargo provisions of the Montreal Convention to domestic carriage (replacing existing references to the Montreal Protocol No. 4), noting that it is not proposed to develop Regulations of this nature at this time.

Preliminary Finding 22. The Government should monitor the on-time performance of domestic carriers, leaving open the option of establishing compensation arrangements for delay that are similar to the relevant provisions of the Montreal Convention.

Preliminary Finding 23. The Government should increase the level of mandatory passenger insurance for domestic travel to $725,000 per passenger, in line with the proposed increase to the cap on liability.

Preliminary Finding 24. The Government should give consideration to working closely with industry to develop a system of mandatory insurance for third party surface damage, modelled on the minimum insurance standards required in the EC.

Preliminary Finding 25. The Government should give consideration to working closely with industry to develop a system that requires carriers to obtain insurance with coverage scope that is as broad as possible, by mandating the use of the AVN52E write back clause in conjunction with the AVN48B exclusion clause.
Preliminary Finding 26. The Government should monitor the aviation war risk insurance market and respond to market developments in accordance with the broader objectives of the liability and insurance framework.

Preliminary Finding 27. The Family Assistance Code continues to serve a useful purpose and should not be abandoned.

Preliminary Finding 28. The Family Assistance Code should continue to oblige airlines to make an ‘advance payment’ to family members in the event of a passenger death.

Preliminary Finding 29. If it is necessary to consider alternatives to the voluntary Family Assistance Code, the Government should give careful consideration to data from industry in relation to the impact of making compliance with the Code mandatory.

Preliminary Finding 30. Emergency Management Australia should continue to work closely with industry to address issues related to the Government’s preparedness for an aviation disaster.

Information Sought:

Third party insurance
Of operators’ total aircraft insurance costs (hull, passenger and third party), what proportion of the cost is for third party damage? For operators who do not currently insure against these risks, how much might insurance costs rise (as a proportion of total insurance costs)?

War risk insurance
Are war risks commonly insured in the Australian aviation market? Of carriers’ total aircraft insurance costs (hull, passenger and third party), what proportion is for additional war risks insurance? For carriers who do not currently insure these risks, how much might insurance costs rise (as a proportion of total insurance costs)?

Family Assistance Code
What will be the costs to industry of making compliance with the Code mandatory? Are these costs likely to be mainly ‘one off’ establishment costs associated with developing procedures and protocols, or ongoing insurance costs?

Rome Convention Modernisation
What are the aviation industry’s views on the Conventions that are proposed to replace the Rome Convention?