



ALA Submission: Aviation Green Paper

To the Department of Infrastructure, Transport,
Regional Development, Communications and the Arts

29 November 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹ The ALA office is located on the land of the Gadigal of the Eora Nation.

This submission was prepared by the ALA's Travel Law Special Interest Group.

We acknowledge and thank the following members for their contributions:

- Victoria Roy, Chair of ALA Travel Law SIG (Principal Solicitor, Victory Travel & Cruise Lawyers)
- Christopher Barry KC (Barrister at Law, 5 Selborne)
- Peter Carter (Legal Practice Director, Carter Capner Law)
- Nadia Elads (ALA Policy and Advocacy Officer)
- Richard Royle (Barrister at Law, Sir Owen Dixon Chambers)
- Anna Tunbridge (Legal Personal Assistant, Avant Mutual)

¹ www.lawyersalliance.com.au.

Endorsements



The Public Interest Advocacy Centre ('PIAC') has provided their endorsement of this submission. The ALA also endorses the submission by PIAC in relation to matters outlined in section 3.3 of the Green Paper on Disability Access. The ALA is greatly concerned by the reported negative experiences of people with disability when they seek to access air travel.



The Sexual Assault Support Service has provided its endorsement of sections in our submission. In particular, our response to Question 3 detailing psychiatric injury in aircraft accidents and sexual assault on aircrafts.

Recommendations

RECOMMENDATION 1: THE AUSTRALIAN GOVERNMENT SHOULD REVISE CURRENT CONSUMER PROTECTION ARRANGEMENTS INCLUDING CLOSING THE GAP IN THE ACL WHEN IT COMES TO AIR PASSENGERS.

RECOMMENDATION 2: THE AUSTRALIAN GOVERNMENT SHOULD CREATE NEW AVIATION-SPECIFIC CONSUMER PROTECTION LAWS IN THE FORM OF A PASSENGER BILL OF RIGHTS.

RECOMMENDATION 3: THE AUSTRALIAN GOVERNMENT SHOULD COMMIT TO CREATING AN AUSTRALIAN FLIGHT DELAY COMPENSATION SCHEME WITHIN A PASSENGER BILL OF RIGHTS AND CONDUCT TARGETED CONSULTATIONS ON THE FEATURES OF SUCH A SCHEME TAILORED FOR OUR MARKET.

RECOMMENDATION 4: THE AUSTRALIAN GOVERNMENT SHOULD CREATE A REGULATOR SUCH AS AN OMBUDSMAN TO ENFORCE A PASSENGER BILL OF RIGHTS AND ALLOW ACCESS TO JUSTICE FOR CONSUMERS TO ENFORCE THOSE RIGHTS.

RECOMMENDATION 5: THE AUSTRALIAN GOVERNMENT SHOULD CREATE NEW AVIATION-SPECIFIC LEGAL ENTITLEMENTS IN THE FORM OF A PASSENGER BILL OF RIGHTS ALONG WITH AN INDEPENDENT DECISION-MAKING BODY SUCH AS AN OMBUDSMAN TO ENFORCE THOSE RIGHTS, RATHER THAN PRIORITISE THE EDUCATION OF CONSUMERS ON THEIR CURRENT LEGAL ENTITLEMENTS.

RECOMMENDATION 6: THE AUSTRALIAN GOVERNMENT SHOULD AMEND SECTION 28 OF THE CACLA TO COMPENSATE 'PERSONAL INJURY' RATHER THAN 'BODILY INJURY'.

RECOMMENDATION 7: THE AUSTRALIAN GOVERNMENT SHOULD AMEND THE CACLA TO MAKE PURE PSYCHOLOGICAL INJURY COMPENSABLE FOR WARSAW CONVENTION AND MONTREAL CONVENTION CLAIMS BROUGHT IN AUSTRALIA.

RECOMMENDATION 8: THE AUSTRALIAN GOVERNMENT SHOULD EXTEND THE CACLA TO SPECIFICALLY COMPENSATE PHYSICAL AND PSYCHOLOGICAL INJURY ARISING FROM SEXUAL ASSAULT ON BOARD AIRCRAFT ON DOMESTIC FLIGHTS.

RECOMMENDATION 9: THE AUSTRALIAN GOVERNMENT SHOULD COMMIT TO LEGISLATION FORMALLY INTERPRETATING THE WARSAW AND MONTREAL CONVENTIONS AS SPECIFICALLY INCLUDING COMPENSATION FOR PHYSICAL AND PSYCHOLOGICAL INJURY ARISING FROM SEXUAL ASSAULT DURING INTERNATIONAL AIR CARRIAGE.

RECOMMENDATION 10: THE AUSTRALIAN GOVERNMENT SHOULD USE THE WHITE PAPER AS AN OPPORTUNITY TO MAKE BROADER POLICY DECISIONS BEYOND THE LIABILITY REGIME REGARDING THE PREVENTION AND TREATMENT OF SEXUAL ASSAULT ON FLIGHTS.

RECOMMENDATION 11: THE AUSTRALIAN GOVERNMENT AMEND SECTION 35 OF THE CACLA TO CLARIFY THAT THE DAMAGES AVAILABLE TO THIRD PARTIES (I.E. FAMILY MEMBERS) ARISING OUT OF THE DEATH OR INJURY OF A PASSENGER INCLUDES PSYCHIATRIC HARM.

RECOMMENDATION 12: THE AUSTRALIAN GOVERNMENT BROKER A CONSENSUS WITH NEW SOUTH WALES, QUEENSLAND, WESTERN AUSTRALIA, AND TASMANIA THAT THE FLYING OF LIGHT AIRCRAFT SHOULD NOT BE DEEMED PER SE DANGEROUS FOR THE PURPOSE OF THAT STATES' CIVIL LIABILITY LEGISLATION.

RECOMMENDATION 13: THE AUSTRALIAN GOVERNMENT SHOULD AMEND THE DEFINITION OF "CONTRACT OF INSURANCE" IN SECTION 41B OF CACLA SO THAT IT REFERS TO LIABILITY VIS A VIS PASSENGERS AND NON-PASSENGERS.

RECOMMENDATION 14: THE AUSTRALIAN GOVERNMENT SHOULD MANDATE LEGAL LIABILITY INSURANCE TO PASSENGERS INDEMNIFYING PSYCHIATRIC INJURY AS WELL AS BODILY INJURY.

Introduction

1. The ALA welcomes the opportunity to provide feedback on the Aviation Green Paper (Towards 2050) ('the Green Paper').
2. The ALA's submission will focus on section 3.2 of the Green Paper: 'Consumer Protections'. The ALA commends the Australian Government's intention to strengthen consumer protections in the airline sector. We acknowledge that the forthcoming Aviation White Paper will set the policy direction for the aviation sector out to 2050. We strongly submit that the status quo cannot remain until 2050 when it comes to consumer protections.
3. We therefore urge the Australian Government to give serious consideration to the recommendations made in this submission. The White Paper must ensure that individual rights of passengers are protected and balanced against the interests of private sector aviation now and towards 2050.

QUESTION 1 (a) Should the Australian Government look to revise current consumer protection arrangements?

The problem

4. The ALA believes that Australian consumers are being let down by airlines and Australian consumer protection laws. BITRE statistics² show that on time domestic arrivals and departures continue to be significantly lower than the long-term average. The rate of domestic cancellations is also higher than the long-term average.
5. Whilst statistics on the cause of delay and cancellation are not published, it is clear that the reason is often within the airline's control. The Select Committee on Commonwealth Bilateral Air Service Agreements heard that on a given day, cancellation rates vary significantly between airlines despite flights being subject to the same weather conditions and air traffic control.³ At the Australian Airports Association national conference on 15 November 2023, Sydney airport CEO Geoff Culbert highlighted that in September 2023 there was almost zero correlation between cancellations and external factors like weather or air traffic control issues⁴. The ALA is concerned that this suggests that some cancellations are due to operational reasons.
6. Media reports also identify cancellations and delays within airlines' control from low crew numbers affecting the reliability of routes in regional Western Australia⁵, to a major error by

² Australian Government, Department of Infrastructure, Transport, Regional Development, Communication and the Arts, 'Airline on Time Performance Statistics, *Aviation Statistics* (Web Page, September 2023) <https://www.bitre.gov.au/statistics/aviation/otp_month>.

³ The Senate, Select Committee on Commonwealth Bilateral Air Service Agreements, Commonwealth Bilateral Air Service Agreements (Report, October 2023) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000238/toc_pdf/CommonwealthBilateralAirServiceAgreements.pdf>.

⁴ Elias Visontay, *The Guardian*, 'Sydney airport CEO accuses Qantas of strategically cancelling flights to block competition' (News article, 15 November 2023) <<https://www.theguardian.com/business/2023/nov/15/sydney-airport-ceo-geoff-culbert-accuses-qantas-strategic-cancelling-flights-to-block-competition-slot-hoarding>>.

⁵ John Dobson, *ABC News*, 'Airlines apologise for major regional flight delays for Albany, Esperance passengers' (News article, 11 August 2023) <<https://www.abc.net.au/news/2023-08-11/regional-wa-passengers-flight-delays-cancellations-rex-virgin/102712156>>.

Jetstar forcing flight JQ35 on 27 December 2022 from Melbourne to Bali to be turned back four hours into the flight, after an already five-hour delay.⁶

Rights under Australian law

7. The ALA identifies a weakness of Australian law is that there is no single framework setting out passengers' rights to a refund or compensation if a flight is cancelled or delayed. We note that passengers have limited rights found in:
 - i. the airline's conditions of carriage,
 - ii. the Australian Consumer Law (ACL) found in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*, and
 - iii. for international air carriage only, the *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention)⁷ which is incorporated into Australian Law by the *Civil Aviation (Carriers' Liability) Act 1959 (Cth)*.

8. The result is that passengers' rights are found in a complex web of legislation which is hard for consumers to understand. As we will set out further below, these sources only grant passengers limited and vague rights and are difficult and costly for consumers to enforce.

ACL

9. Airline terms and conditions are subject to the ACL. However, there are significant gaps in the ACL. It is generically worded; it does not specifically deal with aviation related consumer issues and uses nebulous expressions such as 'reasonable time' as the criteria by which a determination is made as to whether there has been a breach.

10. The most relevant statutory guarantee under the ACL for air passengers is the section 62 guarantee to supply services in a reasonable time. However, there is no guidance or definition

⁶ Elias Visontay, *The Guardian*, 'Jetstar flight to Bali forced to make U-turn after last-minute plane swap "miscommunication"' (News article, 28 December 2022)
<<https://www.theguardian.com/world/2022/dec/28/jetstar-flight-to-bali-forced-to-make-u-turn-after-last-minute-plane-swap-miscommunication>>.

⁷ *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention), signed on 28 May 1999 (entered into force 4 November 2003).

of what a 'reasonable' time is when it comes to time sensitive services such as flights. The ALA believes that this statutory guarantee is therefore too vague, particularly for passengers travelling for time critical events like a medical appointment, business meeting, or funeral.

11. The ALA contends that the remedies available to consumers when the section 62 guarantee is breached are also vague and complex. The remedies found in section 267 of the ACL depend on whether the breach of statutory guarantee was a 'major failure' or not. 'Major failure' has its own definition under section 268 of the ACL and its own complications for consumers to understand. If a flight delay was not a 'major failure', the airline must remedy the failure in a 'reasonable time' under section 267(2)(a). However, given that the consumer is seeking a remedy against an airline that has already failed to provide its service in a 'reasonable time', the ALA contends that this remedy is not helpful to air passengers.
12. While a delayed passenger could remedy a breach of the section 62 guarantee under section 267 by booking a different flight and recovering the cost from the airline, this requires the consumer to spend time and money on finding a new flight and recovering their costs.
13. A further remedy available under section 267(4) of the ACL for all failures is that a consumer may recover damages for reasonably foreseeable 'loss or damage'. Similarly, under section 236 of the ACL, a consumer can recover the amount of 'loss or damage' caused by a breach of statutory guarantee. However, it is a complex and grey area as to whether 'loss or damage' includes inconvenience and distress and if so, how this is quantified.
14. The ALA submits that a final key failure of the ACL for travelling consumers is the section 267(1)(c) exclusion which was heavily relied on during the Covid pandemic. This excludes remedies for breaches of the ACL caused by an act by a third party or a cause independent of human control after services were supplied. This exclusion impacted travellers during the pandemic because services were not being supplied due to government travel bans rather than the conduct of airlines. The ALA believes that this highlights a significant gap in the ACL.
15. As a result of flight cancellations during the pandemic not being subject to the ACL consumer guarantees, passenger rights fell back to airlines' terms and conditions including 'force majeure' clauses. This caused many consumers to be subjected to cancellation fees and issued with travel credits rather than cash refunds. The ALA notes that travel credits are unregulated and have caused further passenger frustrations such as expiry periods and inability to use on preferred routes.

Montreal Convention 1999

16. Australian consumers flying internationally have rights under the Montreal Convention.

Under Article 19:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

17. However, these rights are also limited. In particular, the Montreal Convention only applies to flights between signatory states and therefore not all international carriage from or to Australia. 'Damage' is open to interpretation and again it is a complex and grey area as to whether 'damage' extends beyond monetary loss to emotional damage for inconvenience.

18. A further limitation for consumers under the Montreal Convention is the exclusion if the airline *took all measures that could reasonably be required to avoid the damage*. It is complex legally and factually for an individual consumer to rebut an airline's use of this exclusion.

19. Moreover, if a passenger does successfully apply to an airline for compensation under the Montreal Convention, no matter how great the loss, there is a maximum limit of 4,150 SDR which is equivalent to approximately \$8,000 AUD.

20. Finally, there is a two-year limitation period which is shorter than most limitation periods for consumer or contractual claims under Australian law and which many consumers may not be aware of.

Procedure and enforcement

21. The ALA stresses that a common problem with the ACL and Montreal Convention is the lack of a set procedure or timescale that airlines must follow when a claim is made against them. When consumers make a complaint or compensation claim against an airline, there is no

regulatory framework for how that complaint is dealt with, such as how long an airline must respond. Ultimately consumers must litigate to enforce their rights.

22. Presently, the Aviation Consumer Advocate (ACA) is the primary mechanism to assist customers with their complaints in relation to aviation issues, such as obtaining refunds for cancelled or delayed flights. Whilst the ACA exists, consumers must go through an airline's internal complaints process before they can access it. Consumers are often required to complete online forms and do not have direct email addresses or phone numbers for the people who are handling their complaint. As the Select Committee on Commonwealth Bilateral Air Service Agreements heard, complaint fatigue sets in and consumers give up⁸.
23. The ACA also only applies to four airlines (Jetstar, Qantas, Rex and Virgin Australia). In respect of Jetstar, it only applies to domestic flights provided by Jetstar Airways Pty Limited and not Jetstar Asia Airways, Jetstar Japan or Jetstar Pacific Airlines. As a result, many customers who have faced issues on flights operated by other airlines both domestically and internationally are not eligible for ACA assistance if approaching the airline directly proves to be fruitless for them. Indeed, in the 2021 reporting period, the ACA found only one eligible complaint for 40,000 passenger flights⁹.
24. As the Green Paper sets out, the ACA cannot make binding decisions in cases. The ACA, upon receipt of a complaint, forwards this to the relevant airline who prepares a written response to the customer. While the ACA reviews the response prior to the customer receiving it, the ACA cannot make binding determinations itself. In the 2022 reporting period, only 43% of complaints were resolved to the consumer's satisfaction¹⁰.

⁸ The Senate, Select Committee on Commonwealth Bilateral Air Service Agreements, *Commonwealth Bilateral Air Service Agreements* (Report, October 2023) paragraph 3.43
<https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000238/toc_pdf/CommonwealthBilateralAirServiceAgreements.pdf>.

⁹ The ACA received 599 eligible complaints out of 24,877,400 individual passenger flights across its four participating airlines. SOURCE: Airline Customer Advocate, Annual Report 2021 (Report 1 January – 31 December 2021) 3
<https://www.airlinecustomeradvocate.com.au/_lib/Docs/AnnualReport/Annual_Report_2021.pdf>.

¹⁰ Airline Customer Advocate, Annual Report 2022 (Report, October 2023) 4
<https://www.airlinecustomeradvocate.com.au/_lib/Docs/AnnualReport/Annual_Report_2022.pdf>.

25. The ACA's independence is criticised as it is funded by participating airlines and reports to a committee of airline representatives¹¹. In its 2022 Annual Report published in November 2023, 53% of consumers disagreed or strongly disagreed that the Airline Consumer Advocate was independent in all its interactions with them¹².
26. In respect of the ACCC, the ALA notes that the ACCC does not resolve individual complaints about delayed or cancelled travel services. Rather its focus is on enforcing compliance with the ACL in relation to issues which can lead to widespread harm. If consumers are not satisfied with the response they receive from the airline, the only recourse is litigation. To enforce their limited rights, consumers therefore have the David v Goliath task of litigating against an airline themselves or pay for legal representation which is usually not financially viable when seeking delay or cancellation compensation.
27. Therefore, the ALA strongly recommends that the Australian Government urgently revise current consumer protection arrangements for air passengers. We agree with the Select Committee on Commonwealth Bilateral Air Service Agreements' recommendation that the Australian Government develop and implement consumer protection reforms as soon as reasonably practicable to address significant delays, cancellations, lost baggage and devaluation of loyalty programs¹³. The ALA submits that the Government should also use the Aviation White Paper as an opportunity to close the gap in the ACL when it comes to air passengers.

RECOMMENDATION 1: THE AUSTRALIAN GOVERNMENT SHOULD REVISE CURRENT CONSUMER PROTECTION ARRANGEMENTS INCLUDING CLOSING THE GAP IN THE ACL WHEN IT COMES TO AIR PASSENGERS.

¹¹ Kendall Hall, *Escape*, 'After 122 days, here's what I learnt about Australia's Airline Customer Advocate' (News article, 19 January 2023) <<https://www.escape.com.au/news/after-122-days-heres-what-i-learnt-about-australias-airline-customer-advocate/news-story/1d0c99b3951e83956981db0d0a748a4d>>.

¹² Airline Customer Advocate, Annual Report 2022 (Report, October 2023) 6 <https://www.airlinecustomeradvocate.com.au/_lib/Docs/AnnualReport/Annual_Report_2022.pdf>.

¹³ The Senate, Select Committee on Commonwealth Bilateral Air Service Agreements, *Commonwealth Bilateral Air Service Agreements* (Report, October 2023) Recommendation 6 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000238/toc_pdf/CommonwealthBilateralAirServiceAgreements.pdf>.

QUESTION 1(b) If so, through existing or new mechanisms?

Need for a new mechanism

28. The ALA submits that the existing consumer protection mechanisms described above are complex and limited when it comes to air passenger protections. Rather than extending or amending existing legislation, which is already complex, the ALA believes that the Australian Government should create new aviation-specific consumer protection laws in the form of a Passenger Bill of Rights.

RECOMMENDATION 2: THE AUSTRALIAN GOVERNMENT SHOULD CREATE NEW AVIATION-SPECIFIC CONSUMER PROTECTION LAWS IN THE FORM OF A PASSENGER BILL OF RIGHTS.

Recommended features of a new mechanism

29. The ALA submits that a Passenger Bill of Rights should apply to all Australian domestic flights as well as international flights to and from Australia. It should include the following features:

- a) Communication requirements for airlines to inform passengers electronically by SMS or email in a timely manner as soon as it is feasible to do so that there is a flight delay, cancellation, or a denial of boarding in respect of a flight on which they have a ticket.
- b) Communication requirements once on board, to inform passengers of the reason for any tarmac delay or disruption and estimated length of the delay or disruption when it is feasible to do so. This information should be updated no later than every 30 minutes.
- c) Care standards in the event of airport delays, including provision free of charge of food and drink in reasonable quantities considering the length of delay, Wi-Fi, access to a means of communication and device charging.
- d) Care standards in the event of tarmac delays including access to working lavatories, proper ventilation, heating and cooling on the aircraft, provision of free food and drink in reasonable quantities considering the length of delay, free access to a means of communication, and regulated maximum time limit before returning to the gate for disembarkation.

- e) A legal requirement for airlines to provide appropriate accommodation to passengers in the event of significant delay, and certain passenger groups in the event of moderate delay (such as passengers with disability, and pregnant and breastfeeding women);
- f) Flight delay compensation scheme providing passengers with monetary compensation in the event of cancellation, delayed arrival and denied boarding unless the reason is outside the airline's control;
- g) Standardised claims process and timescale for complaints and compensation claims;
- h) Legal requirement for air passengers to have the choice between a refund, travel credit or seat on the next available flight on that or a competitor's airline at no additional cost to the passenger in the event of cancelled flights no matter what the cause;
- i) Regulation of denied booking for overbooking whereby the airline should seek volunteers for the next available flight and offer inducements to volunteers. If passengers are still denied boarding, they should be treated as if it were a flight cancellation;
- j) Regulation of cabin class ticket downgrading by airlines including a legal requirement for passengers to have a choice to fly in their booked class on the next available flight with delay compensation, or compensation for inconvenience and diminution in value of the ticket;
- k) Standardised regulation of lost or damaged baggage entitlements;
- l) Staff training requirements on passengers' rights;
- m) Communication requirements for airlines to inform passengers of their rights on ticket documentation and by email / SMS in the event of flight cancellation, delay or denied boarding;
- n) Minimum requirements for travel credits including regulated expiry dates of at least 3 years, ability for consumers to exchange for cash upon expiry, and minimum seat guarantees on the same route at the same cost.

30. The above is a high-level summary of the ALA's recommended features of a Passenger Bill of Rights when it comes to consumer protection. We would welcome the opportunity to be part of further government consultations in this regard.

31. In the meantime, we have provided a focused submission below on the requirement of a flight delay compensation scheme as we submit that this is urgently required in Australia.

Focus on flight delay compensation scheme

32. The ALA submits that passengers should be compensated for disruption, inconvenience or loss occasioned by delayed flights, cancelled flights, denied boarding or tarmac delays under a flight delay compensation scheme unless these are caused by circumstances outside the control of the airline.

Cash compensation for consumers

33. The ALA believes passengers should be entitled to compensation for delayed flights with the amount of the compensation varying in accordance with the length of the delay. Flight delay compensation schemes in jurisdictions such as the United Kingdom¹⁴, European Union¹⁵ and Canada¹⁶ entitle passengers to a set scale of compensation for inconvenience depending on the length of delay that is within an airline's control. The UK and EU models also factor in the length of the journey, whereas the Canadian model factors in whether the airline was large or small. Beyond those jurisdictions, Malaysia, Brazil, Thailand, Ukraine, and India also have schemes that provide compensation to delayed passengers.

34. The consumer protective measures under Canadian, UK, and EU law are a stark contrast to the limited rights in Australia under the Australian Consumer Law as described above. Australia is the only country that covers an entire continent making air travel essential, and yet air passenger rights are archaic compared to other jurisdictions. We strongly urge the

¹⁴ Regulation (EC) No 261/2004 (as amended by The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019).

¹⁵ Regulation (EC) No 261 / 2004.

¹⁶ Air Passenger Protection Regulations (SOR/2019-150) Canada Transportation Act.

government to take initiative and develop a compensation regime that is, at least, equal to the protections offered in so many other jurisdictions.

35. By way of illustration, Canadian passengers are entitled to the following amounts of compensation (in Canadian dollars):

Large airlines must pay:

- \$400 if the passenger arrives three or more hours late, but less than six hours;
- \$700 if the passenger arrives six or more hours late, but less than nine hours; and
- \$1,000 if the passenger arrives nine or more hours late.

Small airlines must pay:

- \$125 if the passenger arrives three or more hours late, but less than six hours;
- \$250 if the passenger arrives six or more hours late, but less than nine hours; and
- \$500 if the passenger arrives nine or more hours late.

36. The ALA has considered overseas jurisdictions' flight delay compensation schemes. We call for an Australian scheme with a simple scale for calculating delay inconvenience compensation which consumers can navigate themselves similar to those found in Canada, the UK and the EU which is tailored to the conditions of the market in Australia.

37. The ALA acknowledges there are market specific issues in each jurisdiction. We submit that the Australian Government should therefore consult with stakeholders on the specific features of an Australian flight delay compensation scheme that would work in our unique market.

Recommended features of a flight delay compensation scheme

38. We submit that an Australian model should have the following features:

- a. APPLY TO ALL DELAYS, CANCELLATIONS AND DENIED BOARDING UNLESS THEY ARE CAUSED BY CIRCUMSTANCES OUTSIDE THE AIRLINE'S CONTROL.

We contend that regulations should identify the matters which constitute circumstances outside the control of the airline to avoid inaccurate or misleading representations. This should be the subject of in-depth stakeholder consultation. The

following are examples of circumstances which could be considered outside the control of the airline and therefore could be relied upon to avoid compensation being payable to passengers:

- Unforeseeable mechanical malfunction
- Safety decisions by the pilot
- Instructions from air traffic controllers
- War
- Political instability
- Unforeseeable medical emergency
- Instructions from an official of the state or a law enforcement agency
- Natural disasters
- Weather circumstances, identified with precision e.g. volcanic ash cloud, which the airline cannot respond to without causing a delay to its service.
- Exceptional circumstances specifically identified with an explanation as to why the exceptional circumstance was outside the control of the airline.

- b. INCLUDE A PRESUMPTION THAT THE CANCELLATION OR DELAY HAS BEEN CAUSED BY CIRCUMSTANCES WITHIN THE AIRLINE'S CONTROL UNLESS THE AIRLINE PROVES OTHERWISE.
- c. IF THE DELAY IS OUTSIDE THE AIRLINE'S CONTROL, PASSENGERS SHOULD BE TOLD THE SPECIFIC REASON. IT SHOULD BE AN OFFENCE FOR AN AIRLINE TO MISREPRESENT THE TRUE REASON FOR A DELAY.
- d. SET A SIMPLE SCALE FOR CALCULATING DELAY INCONVENIENCE COMPENSATION WHICH CONSUMERS CAN APPLY FOR THEMSELVES.
- e. ENTITLE CONSUMERS TO COMPENSATION FOR DIRECT LOSSES (SUCH AS MISSED THEATRE AND SPORTS MATCH TICKETS, HOTEL ACCOMMODATION ETC) AS WELL AS THE DELAY INCONVENIENCE COMPENSATION MENTIONED AT (D);
- f. FOR SIGNIFICANT DELAYS OF SAY MORE THAN 9 HOURS, THE DELAY SHOULD BE TREATED AS A CANCELLATION AND ENTITLE THE PASSENGER TO A FULL REFUND AS WELL AS THE SCALED INCONVENIENCE COMPENSATION.

Counter arguments to industry concern

39. The ALA acknowledges industry concerns that a flight delay compensation scheme will not always fix the cause of the delay problem, such as a shortage of pilots. However, we submit that domestic on time performance figures show that airlines need an incentive to organise their operations so that flights run on time and have a means of accountability when there are delays within their control.

40. In respect of pilot shortages specifically, we submit that if there are insufficient pilots to run a particular schedule in a reliable manner, a flight delay compensation scheme will incentivise airlines to:

- a. change that schedule to one that passengers can rely on; and
- b. recruit and train more pilots.

This is particularly important for passengers travelling from remote areas for medical appointments.

41. A flight delay compensation scheme will also hold airlines accountable for cancelling flights due to 'slot hoarding' and where there are insufficient passenger numbers to make a flight commercially viable.

42. The ALA also acknowledge industry concerns that a flight delay compensation scheme will increase fares for passengers. However, we submit that where a scheme only entitles passengers to compensation for delay that is within an airline's control, the requirement to pay passengers compensation is also entirely within its control. Furthermore, it should be noted that generous consumer protection schemes exist in jurisdictions such as the European Union where low-cost carriers continue to operate successfully.

43. We submit that the validity of a complaint regarding increase in fares will be relatively easy to ascertain by an empirical analysis of what has happened in other jurisdictions when consumer rights have been enhanced. It would be relatively easy to conduct an examination by appropriately qualified auditors of the differences in airfares before and after the introduction of enhanced consumer protection in a sample of jurisdictions which have introduced flight delay compensation schemes. The ALA strongly believes this is another important reason for conducting further targeted consultations on the viability and features of the scheme proposed.

Fixed payout type insurance proposal

44. In response to the Green Paper's suggestion of working with industry to introduce 'fixed payout' type insurance products which provide more certain compensation arrangements, we vehemently oppose this solution. This proposed solution burdens consumers with additional cost on already high airfares whilst not providing airlines with an incentive or accountability regarding on time performance. In contrast, we submit that an insurance product would in fact reduce the incentive for airlines to run on time than there is currently.

Current applicability of foreign schemes to Australian flights

45. The ALA notes that Australian carriers are already obliged to pay flight delay compensation under foreign schemes in some circumstances. This is therefore a cost risk that Australian carriers are already carrying, as are international carriers who fly into Australia. Examples of when airlines are already required to pay flight delay compensation in Australia under foreign schemes are as follows:

- a) Delays caused by overbooking on flights from the US to Australia on any airline¹⁷;
- b) Flights between Australia and Canada on any airline¹⁸;
- c) Flights from Australia to the EU on EU airlines¹⁹;
- d) Flights from the EU to Australia on any airline²⁰;
- e) Connecting domestic flights in Australia on return from the EU when sold under one ticket, even when the international and domestic legs are operated by different airlines following the extension of EU261 rights by the Court of Justice of the European Union in *Flightright v American Airlines*²¹;
- f) Flights from Australia to the UK on EU or UK airlines²²;

¹⁷ Office of the Secretary (Aviation Proceedings), Department of Transportation Involuntarily Denied Boarding Rules, Title 14 Chapter II Subchapter A Part 250.

¹⁸ *Air Passenger Protection Regulations*, SOR/2019-150, Canada Transportation Act 1996.

¹⁹ Regulation (EC) No 261 / 2004 'EU261'.

²⁰ Regulation (EC) No 261 / 2004 'EU261'.

²¹ *Case C-436/21 (CJEU)*.

²² Regulation (EC) No 261/2004 (as amended by The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019) 'UK261'.

- g) Flights from Australia to the EU on UK airlines²³;
- h) Flights from the UK to Australia on any airline²⁴.

46. The fact that the UK and EU have schemes but Australia does not leads to inconsistent rights for Australian consumers. For example, a delayed flight from London or Paris to Sydney qualifies passengers to compensation regardless of the airline. However, in the opposite direction a delayed flight from Sydney to London or Paris will entitle passengers flying with flights operated by UK or EU airlines such as British Airways or KLM with compensation whilst passengers on flights operated by non-UK or EU carriers such as Qantas, Emirates or Qatar will not fall under a flight delay compensation scheme.

47. The *Flightright v American Airlines* decision has relevance to domestic Australian air passengers. Following this decision, the situation could easily arise where two passengers are sitting next to each other on a delayed domestic flight but have different rights depending on whether they are connecting from Europe or on standalone domestic flight²⁵.

48. The ALA therefore submits that rather than Australian passengers having to jump through legal loopholes to receive flight delay compensation in the rare instances where it is available, it is time for Australia to have its own flight delay compensation regime.

RECOMMENDATION 3: THE AUSTRALIAN GOVERNMENT SHOULD COMMIT TO CREATING AN AUSTRALIAN FLIGHT DELAY COMPENSATION SCHEME WITHIN A PASSENGER BILL OF RIGHTS AND CONDUCT TARGETED CONSULTATIONS ON THE FEATURES OF SUCH A SCHEME TAILORED FOR OUR MARKET.

Enforcement of rights granted under new mechanism

49. The ALA refers to the shortcomings of the ACA and ACCC when it comes to individual passenger complaints highlighted above. We submit that an Australian Passenger Bill of Rights and in particular a flight delay compensation scheme should be simple enough for individual consumers to navigate themselves.

²³ UK261

²⁴ UK261

²⁵ The connecting passenger having rights under EU261, but the standalone domestic passenger having no flight delay compensation scheme rights.

50. The ALA proposes a standardised claims process across all airlines with set timescales for airlines to make decisions and obligations to give information and reasons in support of their decisions. For example, under the Canadian scheme, an airline has 30 days to respond to a compensation request by either making the payment or saying why it believes compensation is not owed.
51. We also submit that an independent regulator or ombudsman should be created to make binding decisions on air passenger consumer complaints including compensation claims where a resolution is not possible between the consumer and airline. The ALA believes that with a simple and transparent flight delay compensation scheme, a decision maker will predominantly be making decisions on questions of fact rather than law, making an ombudsman an appropriate model. We believe the creation of a specific regulator or ombudsman will entitle consumers to access justice to enforce their rights without the cost and complexity of litigation or the involvement of lawyers.
52. We also submit that an ombudsman should have the power to make penalty sanctions on an airline that does not comply with the Passenger Bill of Rights. It should also have the power to refer complaints to the ACCC for further action by the ACCC if it deemed such action necessary and appropriate for the protection of consumer rights.

RECOMMENDATION 4: THE AUSTRALIAN GOVERNMENT SHOULD CREATE A REGULATOR SUCH AS AN OMBUDSMAN TO ENFORCE A PASSENGER BILL OF RIGHTS AND ALLOW ACCESS TO JUSTICE FOR CONSUMERS TO ENFORCE THOSE RIGHTS.

Conclusion on current Consumer Protection arrangements

53. The Aviation White Paper will set out policy direction including consumer rights issues out to 2050. It would be a failure by the Australian Government if Australia's aviation policy leading all the way to 2050 failed to include an overhaul of consumer rights including the establishment of a long overdue flight delay compensation scheme.

QUESTION 2: Would an expanded remit for the Airline Customer Advocate to educating customers on their legal entitlements be useful?

54. Whilst the ALA acknowledges that the Australian Government wants to improve complaint handling processes and strengthen consumer protections in the airline sector, we submit that an expanded remit for the ACA to educate customers on their legal entitlements would be of no use to achieving this goal.
55. We have set out on pages 9 - 11 the current legal entitlements of Australian air passengers. We have addressed their limitations and complexity which is particularly caused by the fact that Australia has no single framework for air passenger consumer issues. As a result, it proves to be difficult for customers to obtain remedies through their current legal entitlements, irrespective of whether they have been educated on their rights.
56. We therefore submit that education of air passengers on their current rights by the ACA or any other institution is not an appropriate solution. Instead, the Australian Government should create new aviation-specific consumer protection laws in the form of a Passenger Bill of Rights as described on pages 14 to 16 above along with an independent decision-making body such as an ombudsman to enforce those rights.

RECOMMENDATION 5: THE AUSTRALIAN GOVERNMENT SHOULD CREATE NEW AVIATION-SPECIFIC LEGAL ENTITLEMENTS IN THE FORM OF A PASSENGER BILL OF RIGHTS ALONG WITH AN INDEPENDENT DECISION-MAKING BODY SUCH AS AN OMBUDSMAN TO ENFORCE THOSE RIGHTS, RATHER THAN PRIORITISE THE EDUCATION OF CONSUMERS ON THEIR CURRENT LEGAL ENTITLEMENTS.

QUESTION 3: Previous consultation processes have explored options to refine the passenger liability and insurance framework under the Civil Aviation (Carriers' Liability) Act 1959 – do stakeholders still consider amendments to this framework are needed?

Overview of the problems

57. The ALA submits that various amendments to the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ('CACL') are required to protect individuals' rights. The current state of the law under CACL leaves several cohorts of air passengers without rights including:

- Passengers who have sustained a psychiatric injury;
- Passenger victims of sexual assault;
- Family members of deceased passengers;
- Passengers in light aircraft on private, recreational or business flights.

58. When the CACL was amended by *the Aviation Legislation Amendment (Liability and Insurance) Act 2012*, air passengers' rights to claim compensation for pure psychiatric injury were taken away. This particularly affects air passengers who suffer from PTSD from a traumatic event onboard such as a near death experience or sexual assault.

59. More broadly, the CACL does not provide an adequate liability framework for sexual assault on flights.

60. There is also no clear legal authority as to whether a claim can be brought by third parties to aviation accidents (generally family members) under the general law of tort for damages for nervous shock consequent upon the death of a passenger during an aircraft accident.

61. The ALA strongly encourages urgent amendment of the CACL to protect the psychiatric integrity of passengers, their families and victims of sexual assault on aircraft.

62. The ALA also notes that there is not a uniform approach across the states and territories to liability for injury caused during private, recreational or business aviation. The 'dangerous

recreational activity’ provisions in the Civil Liability Acts of some (but not all) Australian jurisdictions mean that a pilot or other defendant in any such flight is likely to avoid liability, even if they were negligent and this resulted in serious injury or death. This leads to injustice to those whose accidents fall under ‘dangerous recreational activity’ provisions and needs urgent reform.

Psychiatric injury in aircraft accidents

Original wording of section 28 of the CACLA

63. When originally enacted, section 28 of the CACLA made carriers liable for damage sustained by reason of the death of a passenger or any ‘personal injury’ suffered by a passenger on domestic flights. This was different wording to the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (Warsaw Convention)²⁶ and *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention)²⁷ that govern international flights. These liability regimes compensate ‘bodily injury’ to passengers rather than ‘personal injury’.
64. ‘Bodily injury’ under the Warsaw and Montreal Conventions has a longstanding interpretation by courts worldwide including in the United States²⁸, United Kingdom²⁹ and Australia³⁰ as not covering pure psychological injury. However, the Australian courts interpreted ‘personal injury’ as including injuries that were psychiatric and independent of any physical injury³¹. This therefore made pure psychiatric injury on domestic flights compensable. This was a progressive development of air passenger rights by Australia. It protected the integrity of

²⁶ Signed at Warsaw on 12 October 1929 (entered into force 13 February 1933).

²⁷ Signed at Montreal on 28 May 1999 (entered into force 4 November 2003).

²⁸ *Eastern Airlines v Floyd* (1991) 1 S&B AvR VII/633.

²⁹ *Kotsambasis v Singapore Airlines Ltd* (1997) 148 ALR 498 and *King v Bristow Helicopters; Re M* (2002) 2 WLR 258.

³⁰ *American Airlines Inc v Georgeopolous* [No 2] [1998] NSWCA 273.

³¹ *South Pacific Air Motive Pty Ltd & Anor v Kenneth Magnus & Ors* [1998] FCA 1107.

Australian domestic air passengers' mental health and recognised the impact of psychiatric injury as well as physical injury.

Amendment to section 28 of the CACLA

65. This progressive protection of mental health rights in Australia was unfortunately short lived. The *Aviation Legislation Amendment (Liability and Insurance) Act 2012* changed 'personal injury' in section 28 of the CACLA to 'bodily injury'. This made the wording for domestic air passenger liability consistent with the Montreal Convention which applies to international air carriage. However, it was criticised at the time because "*this bill actually takes away common law rights to domestic passengers for any claims of mental injury*"³².

66. As a result, psychiatric injury suffered in domestic flights is now treated in the same way as international flights: there must be 'bodily injury'. This makes psychiatric claims complex and costly for passengers to pursue and unlikely to succeed.

Current state of the law in Australia

67. The current state of the law in Australia since *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 3 is that mental injuries are only compensable as 'bodily injury' if:

- they are a manifestation of physical injuries; or
- they result from physical injuries (including physical injuries to the brain)

68. This means that mental health disorders that flow from physical injuries, such as depression flowing from pain and incapacity from physical injuries, are compensable. However, where there is no link with a physical injury, for example if a plaintiff suffers PTSD after a plane ditches in the ocean as Ms. Casey suffered in *Pel-Air Aviation Pty Ltd v Casey*, the psychiatric

³² Senator Xenophon, Hansard, 27/11/12.

injury is not compensable unless the plaintiff can prove that it has caused actual physical damage to the brain.

69. The ALA submits that this is an extraordinarily, unjustifiably high burden to meet. We would also submit that this is a superficial burden as mental health disorders can be debilitating to a plaintiff's quality of life whether a plaintiff can show physical damage to their brain or not. To show physical damage to the brain requires costly expert medical evidence, which the ALA contends is an unjust barrier to accessing justice.
70. Furthermore, the Court of Appeal in *Pel-Air Aviation Pty Ltd v Casey* found that evidence of abnormal brain functioning, and chemical imbalance is insufficient to prove a bodily injury. This suggests that evidence of physical damage on a scan is required, which would presumably require before injury brain scans to compare to. It is highly unlikely that plaintiffs would have such scans.
71. Another factual example of an aircraft accident that caused pure psychiatric injury unlinked to physical injury is flight QF32 from London to Sydney via Singapore which suffered engine failure and yet remarkably landed safely. The passengers suffered a near death experience and were able to successfully claim compensation for their pure psychological injury in a class action negligence claim against the engine manufacturer Rolls Royce. This is because a claim against Rolls Royce fell outside the Montreal Convention (and similarly would fall outside section 28 of the CACLA). However, had the accident been caused by Qantas, such as pilot error or maintenance issues, rather than Rolls Royce, passengers would need to prove 'bodily injury' and likely be precluded from compensation.
72. The ALA points out that the legal and medical complexities in pure psychological cases under section 28 of the CACLA also increase legal costs for plaintiffs bringing claims and carriers / insurers defending them. This bears the risk of making legal costs for plaintiffs disproportionate to the compensation that they are seeking and prohibiting their access to justice.
73. The amended wording of section 28 of the CACLA therefore makes it difficult if not impossible for plaintiffs who suffer pure psychiatric injury in an aircraft accident to recover compensation.

74. Further injustice is caused because under section 36 of the CACLA, the CACLA provides the only liability regime against carriers for passenger injury. The limited liability of airlines for psychiatric injury leads to two significantly unfair consequences as follows:

- a) Passengers have different rights for the same traumatic event depending on whether the carrier or a third party was at fault, such as flight QF32 referred to above.
- b) Passengers on the same flight have different compensation entitlements depending on whether they suffered physical or purely psychological injury in an event.

75. As an illustration of point b above; let us consider that a flight takes off, suffers left engine failure, and makes an emergency landing. As passengers disembark, there is a jet blast from the right engine which had not been shut down³³. This hurls one passenger through the air who suffers an orthopaedic injury and needs treatment and time off work. A nearby passenger is not physically injured but suffers PTSD from the second engine blast, thinking that the second engine is exploding, and they will perish. The PTSD victim in this scenario also requires treatment and time off work. However, under section 28 of the CACLA, without expensive and potentially unavailable medical evidence and expert legal representation, the PTSD victim will not be compensated whilst the passenger with the orthopaedic injury has strict liability rights against the carrier.

The need for change

76. It is unfortunate that the progressive wording of section 28 of the CACLA when it compensated 'personal injury' reverted to the outdated approach of only compensating 'bodily injury'. The ALA strongly contends that the current liability regime needs urgent amendment to reinstate compensation for personal injury to include pure psychological injury for a number of reasons:

- a) 'Bodily injury' is based on the Warsaw Convention of 1929 when the recovery of psychological conditions was not as accepted in most jurisdictions as it is today;

³³ The facts of *BT v Laudamotion GmbH (C-111/21)*.

- b) There is less stigma for mental health issues now than in 1929;
- c) The safety of air travel today compared to 1929 means that a modern aircraft is more likely to land safely after experiencing difficulties and avoid physical injury to passengers but may still be a traumatic event causing psychological injury;
- d) Passengers who sustain pure psychological injury are not treated equally as those who suffer a physical injury of the same severity and the same losses;
- e) Passengers have different rights for the same traumatic event depending on whether the carrier or a third party was at fault;
- f) The legal and medical complexities of pure psychiatric claims under section 28 of the CACLA make them expensive for plaintiffs and can be a barrier to air passengers suffering psychiatric injury from accessing justice.
- g) The Australian government claims that ‘the importance of good mental health, and its impact on Australians, has long been recognised by Australian governments’³⁴ and yet the current air passenger liability regime does not recognise the impact of pure psychiatric injury by not making it compensable.
- h) There is inconsistency between the rights of passengers flying commercially under a contract for carriage who are subject to the CACLA, and passengers flying privately for recreation or business. The latter are not subject to the CACLA but rather each State or Territory’s civil liability legislation which do not preclude damages for psychiatric injury.

77. For the reasons set out above, we urge the government to use the Aviation White Paper as an opportunity to amend the CACLA to compensate air passengers for pure psychological injury by making ‘personal injury’ rather than ‘bodily injury’ compensable once more.

78. The Aviation White Paper provides the government with an opportunity to be a proactive supporter of Australians’ mental health and give air passengers who suffer psychiatric injury

³⁴ Australian Institute of Health and Welfare website <<https://www.aihw.gov.au/mental-health/overview/australias-mental-health-services>>.

certainty by changing the CACLA now rather than wait for Australian case law to develop in this area as it has in the European Union as explained below.

79. The Aviation White Paper will set out policy direction out to 2050. We submit that it would be a failure for the government if Australia's aviation policy to 2050 failed to recognise the impacts of psychiatric injury on air passengers by not making it compensable.

RECOMMENDATION 6: THE AUSTRALIAN GOVERNMENT SHOULD AMEND SECTION 28 OF THE CACLA TO COMPENSATE 'PERSONAL INJURY' RATHER THAN 'BODILY INJURY'.

Psychiatric injury during international carriage

80. The Court of Justice of the European Union has recently interpreted 'bodily injury' under the Montreal Convention as including pure psychological injury. It found in *BT v Laudamotion GmbH (C-111/21)* that pure psychological injury is 'bodily injury' when a passenger can simply prove an adverse effect on their psychological integrity.

81. This is a welcome interpretation for passengers injured during international air carriage to which the Montreal Convention applies. However, it not binding on Australian courts.

82. We therefore also urge the government to use the Aviation White Paper as an opportunity to be a proactive supporter of Australians' mental health by amending the CACLA to make personal injury including pure psychological injury compensable for Warsaw Convention and Montreal Convention claims brought in Australia. This will give air passengers who suffer psychiatric injury certainty rather than wait for Australian case law to develop in this area as it has in the European Union.

RECOMMENDATION 7: THE AUSTRALIAN GOVERNMENT SHOULD AMEND THE CACLA TO MAKE PURE PSYCHOLOGICAL INJURY COMPENSABLE FOR WARSAW CONVENTION AND MONTREAL CONVENTION CLAIMS BROUGHT IN AUSTRALIA.

Sexual assault on aircraft

The problem

83. The alleged sexual assault of passengers on a Delta Airlines flight from New York to Athens made media headlines in July 2023³⁵ but sexual assault during air travel is not a new or isolated occurrence. For example:

- In 2014, Australian Laura Bushney came forward alleging that she had been assaulted by a Malaysian Airlines steward³⁶.
- In 2018, the Transport Workers' Union of Australia conducted a survey of 400 cabin crew working for major airlines and found that sexual harassment including assault was rife across the industry³⁷.
- In the northern hemisphere summer of 2023, reports of sexual assault on planes have been on a rise across the United States³⁸.

84. Air travel has its own characteristics that can make passengers vulnerable to sexual assault, especially on long haul or overnight flights including:

- a. Allocated seating;
- b. Sitting in close proximity to strangers for prolonged periods;
- c. Separation of groups and families;

³⁵ Chris Pandolfo, 'Drunk Delta Airlines passenger downs 11 drinks, sexually assaults minor and her mum, lawsuit claims', News.com.au (Online Article, 30 July 2023) <<https://www.news.com.au/travel/travel-updates/incidents/drunken-delta-airlines-passenger-downs-11-drinks-sexually-assaults-minor-and-her-mum-lawsuit-claims/news-story/df01aa556574f572f890d7c90748456d>>.

³⁶ Agence France-Presse, 'Australian woman tells of alleged sexual assault by Malaysia Airlines steward', *The Guardian* (Online article, 25 August 2014) <<https://www.theguardian.com/world/2014/aug/25/malaysia-airlines-steward-accused-sexually-assaulting-australian-passenger>>.

³⁷ Submission to the Australian Human Rights Commission national inquiry into sexual harassment in Australian workplaces, 28 February 2019, page 2 <<http://twunational.wpengine.com/wp-content/uploads/2019/06/TWU-submission-AHRC-sexual-harassment2.pdf>>.

³⁸ United States Attorney's Office – Western District of Washington, 'Federal Prosecutors, FBI, and Port of Seattle detail disturbing increase of sexual assaults on aircraft', (Press release, 9 August 2023) <<https://www.justice.gov/usao-wdwa/pr/federal-prosecutors-fbi-and-port-seattle-detail-disturbing-increase-sexual-assaults>>.

- d. Vulnerability of persons with disabilities from manual handling by strangers;
- e. Vulnerable unaccompanied minors seated next to strangers;
- f. Limited freedom to move around the cabin such as when seat belt sign is on, trolleys are in the aisle, and aisle passengers are sleeping;
- g. Dim lighting;
- h. Provision of blankets concealing activity;
- i. Limited ability to oversee passengers down each row;
- j. Service of alcohol.

85. Whilst sexual assault can occur between passengers as well as from cabin crew to passengers, the ALA submits that the above factors often make sexual assault between passengers within an airline's control. However, the CACLA does not have specific provisions that apply to sexual assault of air passengers.

86. We submit that this is a major failure of the CACLA liability regime.

Treatment of sexual assault under the CACLA

87. As noted above, a carrier's liability for injury to passengers is governed by section 28 of the CACLA. Accordingly on domestic flights, a carrier is liable for damage sustained by reason of any 'bodily injury' suffered by the passenger resulting from an 'accident' which took place on board the aircraft.

88. Under section 36 of the CACLA, liability against the carrier for passenger injury claims under section 28 is in substitution for any civil liability against the carrier under any other law. This therefore precludes negligence claims.

89. As submitted above, the limitation on compensation to bodily injury rather than personal injury makes claims for pure psychiatric injury by passengers to be difficult if not impossible. This is particularly relevant to victims of sexual assault who may have been the victim of unwanted touching but not have a bodily injury.

90. Legal arguments can be made that touching without consent amounts to a criminal offence (such as common assault under section 61 of the *Crimes Act 1900* (NSW) or sexual assault under s61KC of the *Crimes Act 1900* (NSW) and that criminal interference with the body amounts to 'bodily injury'. However, whether the courts would accept this is unclear.

91. A further uncertainty for air passenger victims of sexual assault is whether their psychological injury flows from the bodily injury or more generally from the act of violation. This has potential consequences on recoverability of damages in light of *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 3 as explained above.
92. The United States Court of Appeals, Sixth Circuit decision of *Jane Doe v. Etihad Airways* 870 F.3d 406 (6th Cir. 2017) is helpful to passengers as it found that passengers can recover for emotional damages which are unconnected to a bodily injury under the Montreal Convention. However, this is not binding in Australia.
93. Air passengers face further difficulty in obtaining compensation for sexual assault due to the requirement under section 28 of the CACLA that there be an 'accident'. The meaning of 'accident' which has been accepted in Australia is that a passenger's injury is caused by an accident only if 'caused by an unexpected or unusual event or happening that is external to the passenger'³⁹.
94. An 'accident' must also relate to the operation of the aircraft or be a characteristic of air travel⁴⁰. This creates a difficulty for air passenger victims of sexual assault and the success of claims will be fact specific. For example, an assault that occurred in cramped seating conditions which placed a young girl in close proximity to a strange man for an extended period of time who fondled her has been found to be an 'accident'⁴¹. However, there is a real risk that sexual assaults on board aircraft would not have the correct factual matrix to be an 'accident.' If a plaintiff does not fulfill the criteria of section 28 of the CACLA, they have no other recourse against the carrier⁴².

Conclusion on sexual assault

95. The past decade has seen overdue improvements in the awareness and treatment of sexual assault in the workplace such as the #MeToo movement and the Australian Human Rights Commission *Set the Standard: Report on the Independent Review into Commonwealth*

³⁹ *Povey v Qantas Airways Limited* [2005] HCA 33, 23 June 2005.

⁴⁰ *Povey v Qantas Airways Limited* [2005] HCA 33, 23 June 2005.

⁴¹ House of Lords in *Morris v KLM* [2003] 3 ALL ER 126.

⁴² Section 36 CACLA.

Parliamentary Workplaces of November 2021. However, when it comes to air passengers, victims of sexual assault are being let down by the liability framework of the CACLA.

96. We therefore submit that the CACLA should be extended to include provisions that specifically compensate physical and psychological injury arising from sexual assault on board aircraft on domestic flights.

RECOMMENDATION 8: THE AUSTRALIAN GOVERNMENT SHOULD EXTEND THE CACLA TO SPECIFICALLY COMPENSATE PHYSICAL AND PSYCHOLOGICAL INJURY ARISING FROM SEXUAL ASSAULT ON BOARD AIRCRAFT ON DOMESTIC FLIGHTS.

97. We also submit that Australia should lead the way internationally by committing to legislation formally interpreting the Warsaw and Montreal Conventions as specifically including compensation for physical and psychological injury arising from sexual assault during international air carriage.

RECOMMENDATION 9: THE AUSTRALIAN GOVERNMENT SHOULD COMMIT TO LEGISLATION FORMALLY INTERPRETING THE WARSAW AND MONTREAL CONVENTIONS AS SPECIFICALLY INCLUDING COMPENSATION FOR PHYSICAL AND PSYCHOLOGICAL INJURY ARISING FROM SEXUAL ASSAULT DURING INTERNATIONAL AIR CARRIAGE.

98. As noted above, many of the factors leading to passenger-on-passenger sexual assault are within an airline's control. In other circumstances we submit that absence of a contributing factor from an airline should not be a reason to exclude them from a strict liability regime for sexual assault. This is because one of the objects of the Montreal Convention is to provide compensation for injured passengers without the need to prove fault on the part of the air carrier⁴³.

99. Finally, we submit that sexual assault during air travel is an area that the government should look at more broadly in its Aviation White Paper than just the CACLA regime. Whilst this submission only addresses amendments that should be made to the CACLA to compensate victims in response to the Green Paper question, other areas that the government should develop policy on are:

⁴³ *Povey v Qantas Airways Limited* [2005] HCA 33, 23 June 2005 at [68] – [70].

- Prevention (such as regulations on seating of unaccompanied minors, passenger education and cabin crew training);
- Airline response on board;
- Reporting; and
- Aftercare by airlines to victims.

RECOMMENDATION 10: THE AUSTRALIAN GOVERNMENT SHOULD USE THE WHITE PAPER AS AN OPPORTUNITY TO MAKE BROADER POLICY DECISIONS BEYOND THE LIABILITY REGIME REGARDING THE PREVENTION AND TREATMENT OF SEXUAL ASSAULT ON FLIGHTS.

Psychiatric Harm for Third Parties in Aviation Accidents

100. There is no clear legal authority as to whether a claim can be brought by third parties to aviation accidents (generally family members) under the general law of tort for damages for nervous shock consequent upon the death of a passenger during an aircraft accident.

Statutory Scheme

101. It is established Australian and international law under the Warsaw and Montreal Conventions that a passenger on an aircraft cannot claim personal injury damages for pure psychiatric harm arising from an accident within the meaning of the Conventions.

102. Part IV of the CACLA deals with liability for domestic travellers (interstate and intrastate) and whereas parts of the Conventions are adopted, the right to claim damages departs from the terms used under the Montreal Convention. As parliaments and the courts have stated, Part IV of the CACLA “extends the principles of the amended Convention to all domestic carriage by air within federal competence but with certain modifications which are considered more appropriate for domestic purposes”.

103. What is left unclear is whether a claim for nervous shock or pure psychiatric harm can be made by a passenger in an aircraft to which Part IV of the CACLA applies.

104. Under Part IV of the CACLA section 28 states the carrier is liable for damage sustained by reason of the death of the passenger or any bodily injury suffered by the passenger resulting

from an aircraft accident. However, as noted above, it is limited to 'bodily injuries' and it has been held that 'bodily injury' does not include pure psychiatric injuries.

105. Section 35(3) of the CACLA provides that the carrier's liability in respect of the death of a passenger is enforceable for the benefit of the passenger's family members. Section 35(2) of the CACLA provides that the liabilities that are enforceable for the family members of a deceased passenger are in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger.

Cases

106. The issue of whether family members of deceased passengers can bring a nervous shock claim under tort arose in *Parkes Shire Council v South West Helicopters Pty Ltd* [2019] HCA 14 when family members of a passenger killed in a helicopter crash brought claims against both the appellant and respondent for their psychiatric harm. Kiefel CJ, Bell, Keane and Edelman JJ, with whom Gordon J agreed, held the family was entitled to a claim under s 28 of the CACLA (however the appeal was dismissed as proceedings were brought outside the limitation period). The obiter decision of Gordon J was that psychiatric harm for family members was available under s 35 of the CACLA:

"Thus, given that the connection sought to be made is between the civil liability of the carrier and, in this case, the death of the passenger, the liabilities caught by s 35(2) are intended to, and do, extend to liabilities to non-passengers including a claim by them under the Compensation to Relatives Act, for loss of consortium and for solatium. In addition, a claim by an employer for loss of an employee's services, a Lord Campbell's Act claim, and a claim for nervous shock suffered on learning of the death of the passenger under the Civil Liability Act would fall within s 35(2), with the central element in each claim being the death of the passenger." [98]

107. It was held that mental harm of the family members following the death entitled them to claims, despite the absence of a direct contractual relationship between the non-passenger plaintiffs and the carrier. The Court held that s 35(2) of the CACLA substituted CACLA rights for nervous shock compensation suffered for those rights that would otherwise apply under the *Civil Liability Act*.

108. In *Jones v Airlines of Tasmania Pty Ltd* [2023] TASSC 36, a light aircraft operated by the defendant crashed, resulting in the death of the pilot and only passenger, Mr Timothy Jones.

Mr Jones' three adult children brought an action against the defendant for damages for nervous shock under the general law of tort, as modified by the *Civil Liability Act 2002* (TAS). The Court held the terms of s 35 of the CACLA do not suggest that damages for psychiatric harm are excluded. The plain meaning of the words encompasses psychiatric harm for non-passengers.

109. The above authorities and a fair reading of s 35 of the CACLA would support the proposition that the section permits third parties to make a claim for nervous shock. The question has been considered with conflicting outcomes but not settled in a number of authorities and warrants greater clarity in the statute.

The need for change

110. In order to give the families of deceased and injured passengers certainty, the ALA, therefore, recommends that section 35 of the CACLA be amended to clarify that the damages available to third parties (i.e. family members) arising out of the death or injury of a passenger includes psychiatric harm.

RECOMMENDATION 11: THE AUSTRALIAN GOVERNMENT AMEND SECTION 35 OF THE CACLA TO CLARIFY THAT THE DAMAGES AVAILABLE TO THIRD PARTIES (I.E. FAMILY MEMBERS) ARISING OUT OF THE DEATH OR INJURY OF A PASSENGER INCLUDES PSYCHIATRIC HARM.

Dangerous Recreational Activity

The problem

111. The ALA is concerned by the injustice to individuals caused by the obvious risks of a dangerous recreational activity provisions in state legislation.

112. By way of background, general aircraft flights which are private, recreational or business that are not commercial transport for paying passengers, are not subject to state or federal civil aviation carriers' liability legislation. Current state law in NSW, Queensland, Tasmania, and Western Australia may preclude passengers injured by the negligence or recklessness of their pilot recovering injury compensation because flying a light aircraft is considered to be a *per se* 'dangerous recreational activity'. Thus, the pilot and his insurer may be afforded complete immunity from the consequences of such negligence or reckless flying even in respect of injuries to persons in another aircraft with which it might have collided.

113. This is certainly the case in NSW and will also occur in the other states (except Victoria) if NSW case law is followed.

114. The following sections of civil liability acts of the various states apply:

- s 5L of the *Civil Liability Act 2002* (New South Wales)
- s 19 of the *Civil Liability Act 2003* (Queensland)
- s 5H of the *Civil Liability Act 2002* (Western Australia)
- s 20 of the *Civil Liability Act 2002* (Tasmania)

115. The following provisions relate only to there being no liability for obvious risks, as these states do not have provisions relating to dangerous recreational activities:

- s 53 of the *Wrongs Act 1958* (Victoria)
- s 38 of the *Civil Liability Act 1936* (South Australia)

116. The territories do not have provisions relating to obvious risk or dangerous recreational activities in the *Civil Law (Wrongs) Act 2002* (Australian Capital Territory) and the *Personal Injuries (Liabilities and Damages) Act 2003* (Northern Territory).

117. In *Campbell v Hay* [2014] NSWCA 129, the appellant Mr Campbell was injured in a light aircraft flown by the respondent Mr Hay. Mr Campbell was on a flying lesson with Mr Hay when an engine problem arose and Mr Hay had to make an emergency landing. Mr Campbell was injured during the course of this landing. Ward JA (with whom Meagher and Barrett JJA agreed), held at [137] that flying a light aircraft for recreational purposes constituted a dangerous recreational activity. Her reasoning stated at [141] was:

“...if there were to be a problem with the single engine (which could not be discounted as a trivial risk), it might be one that the flying instructor would not be able to rectify such that, even without any negligence on the part of the flying instructor, a forced landing might have to be made, carrying with it the obvious risk of death or serious injury.”

118. This decision has been applied in later decisions. It should be noted that there is no 'dangerous recreational activity' legislation in existence in Victoria, South Australia and the territories, with no apparent consequences for insurance or indemnity.

119. The ALA notes that 'obvious risk' for the purpose of civil liability legislation has been broadly interpreted. In *Campbell v Hay*, it was found that it must have been obvious to the person in the aircraft that if the plane were to experience problems such as issues with the engine, there is a risk of physical harm arising from, for example, an inability to land the plane safely. In *Kempsey Shire Council v Five Star Medical Centre Pty Ltd* [2018] NSWCA 308, the risk of colliding with kangaroos on the airstrip was considered 'obvious'.

The need for change

120. On the road, an insurer for an at-fault driver must pay fair compensation to occupants of the driver's vehicle and other cars who are injured as a result of the driver's dangerous or negligent driving. But when it comes to light aircraft, an at-fault pilot (and their insurer) get a free pass and the pilot's passengers or people in another aircraft injured by the pilot's dangerous or negligent flying have to live with their injuries with the insurer not having to pay out compensation to the victims.

121. The ALA submits that there is no need for the per se qualification of general aviation being dangerous. Courts are well capable of determining fault. Responsibility for car accidents is attributed by a judge after listening to all investigative and expert evidence. The same should occur with aircraft accidents.

122. Effectively, the state of the law as interpreted by the courts in the abovementioned states means that a pilot or other defendant in any flight in a (non-commercial) general aviation aircraft is likely to avoid liability, even if they were negligent and this resulted in serious injury or death. Individuals should be able to recover for injuries arising out of negligent or reckless flying. There is no public policy reason against such principle.

123. The current state of the law means that unlike with commercial flight operations, the rights of passengers on private, recreational or business flights are treated differently across Australia. This leads to injustice if a passenger happens to be injured on a flight in a jurisdiction with dangerous recreational activity provisions.

124. Australia is a vast nation and light aircraft travel is the lifeblood of remote and rural communities. Persons necessarily engaged in this means of travel should not be required to do so absent the rights that road travellers take for granted.
125. The areas of light aircraft flying that might justifiably be subject to the per se qualification of “dangerous” should be reserved for aerobatics; air shows; crocodile egg harvesting and the like.
126. The ALA believes that the aviation insurance industry does not have any valid objection to this proposed change.
127. The ALA therefore submits that the flying of light aircraft should not be deemed per se dangerous for the purpose of the relevant states’ civil liability legislation.

RECOMMENDATION 12: THE AUSTRALIAN GOVERNMENT BROKER A CONSENSUS WITH NEW SOUTH WALES, QUEENSLAND, WESTERN AUSTRALIA, AND TASMANIA THAT THE FLYING OF LIGHT AIRCRAFT SHOULD NOT BE DEEMED PER SE DANGEROUS FOR THE PURPOSE OF THAT STATES’ CIVIL LIABILITY LEGISLATION.

Insurance considerations

128. Australian aviation insurers do not extend third party injury compensation cover to nervous shock claims by third parties (i.e. family members). This applies equally to commercial carriage insurance (ie under the CACLA or the state analogues) and to non-commercial and general aviation flying.
129. The situation derives in part from Part IVA of the CACLA, the section of the Act that mandates liability insurance for commercial carriers. Those provisions require commercial carriers to effect insurance indemnifying the carrier against personal injury liability in respect of passengers only.
130. It is highly undesirable on a public policy point of view that insurers restrict the type of third-party injury they are prepared to cover under their policies. The practice exposes injury victims to an unwarranted lacuna in indemnity and the policyholder to the likelihood of facing direct lawsuits for risks they likely believed were met by their insurance policy.

RECOMMENDATION 13: THE AUSTRALIAN GOVERNMENT SHOULD AMEND THE DEFINITION OF "CONTRACT OF INSURANCE" IN SECTION 41B OF CACLA SO THAT IT REFERS TO LIABILITY VIS A VIS PASSENGERS AND NON-PASSENGERS.

131. Section 41E of the CACLA requires carriers to be covered by acceptable insurance. Section 41C of the CACLA regulates the level of indemnity of the carrier against personal injury liability for passengers. However, in practice aircraft insurance policy wording mirrors section 28 of the CACLA and often indemnifies for 'bodily injury' rather than 'personal injury'. As seen on page 26 above onwards, 'bodily injury' is a phrase interpreted as excluding pure psychological injury.
132. Furthermore, in some policies for private operations (not commercial carriage) the insurer only indemnifies for 'bodily injury' rather than 'personal injury' As explained above, such flights are subject to state civil liability legislation which recognise recovery of psychiatric injury as opposed to s28 of the CACLA. However, if a passenger suffers a psychiatric injury from such a flight, they are similarly exposed to a lacuna in indemnity.
133. The ALA therefore calls for this gap to be filled. There would quite rightly be uproar if a CTP insurer purported to exclude indemnity for psychiatric injury caused by death or injury on the road. Air passengers should not be left uncompensated when they have legal rights because an insurer has excluded indemnity. This change is required now and will be crucial if 'personal injury' becomes compensable under an amendment to s28 of the CACLA as we have called for in Recommendation 6.

RECOMMENDATION 14: THE AUSTRALIAN GOVERNMENT SHOULD MANDATE LEGAL LIABILITY INSURANCE TO PASSENGERS INDEMNIFYING PSYCHIATRIC INJURY AS WELL AS BODILY INJURY.

QUESTION 4: Would policies pursued in other jurisdictions – such as a Passenger Bill of Rights or a stronger ombudsmen model – deliver benefits in Australia's aviation sector?

134. As noted previously, Australia lacks aviation specific consumer protection laws. The airlines have set their own rules and there is no effective means of protecting passengers' rights.
135. Therefore, the ALA submits that there should be a Passenger Bill of Rights as set out on pages 14 - 15 above.
136. The ALA also submits that an independent regulator or ombudsman should be created as set out on pages 21 - 22 above.

Conclusion

137. The ALA is grateful for this opportunity to provide feedback on the Aviation Green Paper.

138. The Australian Government intends to shape aviation policy to 2050 in its forthcoming Aviation White Paper. Consumer protection arrangements for air passengers and their families are in need of urgent reform as this submission has highlighted.

139. It is imperative that due consideration and action be taken in respect of the above submissions to ensure that the status quo does not remain. Should the Australian Government not use the White Paper to significantly improve consumer rights before 2050, it will have failed Australian air passengers.

140. The ALA is available to provide further assistance on the issues raised in this submission.



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