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CIVIL AVIATION (CARRIERS' LIABILITY) AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Minister for Transport
and Communications, the Hon. Kim Beazley, MP)



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CIVIL AVIATION (CARRIERS' LIABILITY) AMENDMENT BILL 1991

1. GENERAL OUTLINE AND FINANCIAL IMPACT

General outline

1.1 The Civil Aviation (Carriers' Liability) Amendment Bill 1991 (the Bill) will amend the Civil Aviation (Carriers' Liability) Act 1959 (the Principal Act) to:

- . enable ratification of Additional Protocol No. 3 of Montreal 1975, which increases international carriers' liability limits and establishes limits in terms of the International Monetary Fund's Special Drawing Rights (SDR), and Montreal Protocol No. 4 1975, which introduces modern cargo handling terminology;
- . apply, with immediate effect, the increased liability limits for passenger death and injury to Australia's international airlines; and
- . convert the Warsaw Convention and Hague Protocol Poincare gold franc liability limits to SDR.

1.2 The Bill also replaces the existing Schedules to the Principal Act with consolidations of the operative provisions of the Warsaw Convention as amended by the Hague Protocol; the Warsaw Convention as amended by the Hague, Guatemala City and Montreal No. 3 Protocols; and the Warsaw Convention as amended by the Hague and Montreal No. 4 Protocols.

Financial impact

1.3 The Bill will have no effect on Commonwealth expenditure or revenue.

2. OVERVIEW OF EXISTING LAW

Introduction

2.1 Briefly, the Principal Act regulates the liability of commercial airlines (hereinafter referred to as "carriers") in respect of death or injury to passengers and for loss or damage to goods. It does this by adopting the provisions of the so-called "Warsaw rules" in respect of international carriage. The Principal Act also applies liability limits in respect of domestic and international non-Convention carriage.

2.2 In so far as Australia is concerned, the "Warsaw rules" currently comprise:

- . the Warsaw Convention of 1929;
- . the Hague Protocol of 1955, which amends the Warsaw Convention of 1929; and
- . the Guadalajara Convention of 1961, supplementary to the Warsaw Convention of 1929.

2.3 Australia is a party to both the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol. Consequently, two different sets of rules may apply to international carriage to and from Australia:

- . the Warsaw Convention applies to carriage between Australia and any other country which is a party to the Warsaw Convention but which has not become a party to the Hague Protocol; and
- . the Warsaw Convention as amended by the Hague Protocol applies to carriage between Australia and any other country which has become a party to the Hague Protocol.

2.4 The "Warsaw rules" have been modified by the following Protocols which have not received the requisite number of ratifications and therefore have not entered into force internationally:

- . the Guatemala City Protocol of 1971, which amends the Warsaw Convention as amended by the Hague Protocol;
- . the Additional Protocol No. 3 of Montreal 1975, which amends the Warsaw Convention as amended by the Hague and Guatemala City Protocols and which therefore supersedes the Guatemala City Protocol; and
- . Protocol No. 4 of Montreal 1975, which amends the Warsaw Convention as amended by the Hague Protocol.

2.5 The Principal Act, which gives the "Warsaw rules" the force of law in Australia, is structured as follows:

- . Part I contains preliminary or introductory provisions
- . Part II gives effect to the Warsaw Convention as amended by the Hague Protocol;
- . Part III gives effect to the Warsaw Convention;
- . Part IIIA gives effect to the Guadalajara Convention;
- . Part IV deals with certain categories of domestic carriage and international carriage to and from Australia which is not within the scope of the "Warsaw rules";
- . Part V deals with miscellaneous matters such as stowaways and regulation-making power; and
- . the Schedules contain the texts of the Warsaw Convention, the Hague Protocol and the Guadalajara Convention.

The Warsaw Convention of 1929

2.6 The Warsaw Convention applies to the international carriage by air and for reward of persons, baggage or cargo. "International carriage" is defined as a contract of carriage where the places of departure and destination are situated within the territories of two contracting parties or within the territory of a single contracting party if there is an agreed stopping place within a territory of another country whether a party to the Convention or not.

2.7 Chapter III of the Warsaw Convention deals with the liability of the carrier. The carrier is liable for damage occasioned by:

- . death or injury of a passenger caused by an accident on board the aircraft or in the course of embarking or disembarking (Article 17);
- . destruction or loss of, or damage to, registered baggage or cargo (Article 18); and
- . delay in the carriage of passengers, baggage or cargo (Article 19).

2.8 The carrier will be exonerated, wholly or partly, from liability if s/he proves that:

- . s/he and his/her servants and agents have taken all necessary measures to avoid the damage or that it was impossible to take such measures (Article 20.1);
- . the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, s/he and his/her agents have taken all necessary measures to avoid the damage (Article 20.2); or
- . the damage was caused by or contributed to by the negligence of the injured person (Article 21).

2.9 The Warsaw Convention therefore places the onus of proof on the carrier.

2.10 In return for this shift in the onus of proof, Article 22 limits the liability of the carrier as follows:

- . in the carriage of passengers - 125,000 Poincare gold francs
- . in the carriage of registered baggage and of cargo - 250 Poincare gold francs per kilogram (the consignor may make a special declaration of the value of the baggage or cargo and, if required, pay a supplementary

sum, in which case the carrier will be liable to pay a sum not exceeding that declared value)

- . objects of which the passenger takes personal charge - 5,000 Poincare gold francs per passenger

2.11 Article 25 enables these limits to be "broken" in the event of wilful misconduct, or by such default amounting to wilful misconduct, on the part of either the carrier or his/her servant or agent acting within the scope of their employment. In these circumstances the onus of proof shifts back to the plaintiff and the carrier is exposed to unlimited liability.

2.12 Part III of the Principal Act gives the Warsaw Convention the force of law in Australia.

The Hague Protocol of 1955

2.13 The Hague Protocol amended the Warsaw Convention principally by doubling to 250,000 Poincare gold francs the limit of liability for death or injury of a passenger.

2.14 The Hague Protocol also replaced the wilful misconduct test (see paragraph 2.11 above) with that of intention to cause damage or recklessness with knowledge that damage would probably result.

2.15 Part II of the Principal Act gives the Warsaw Convention as amended by the Hague Protocol the force of law in Australia.

The Guadalajara Convention of 1961

2.16 The Guadalajara Convention supplements the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol by providing that where a contract for international carriage by air is made by one carrier but actually performed, wholly or partly, by another carrier, both the actual carrier and the contracting carrier are to be subject to the rules of the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol.

2.17 Part IIIA of the Principal Act gives the Guadalajara Convention the force of law in Australia.

Part IV of the Principal Act

2.18 Part IV of the Principal Act applies to:

- . contracts for interstate and territorial carriage by commercial airlines;
- . intrastate carriage by Australian Airlines; and

- . international carriage to which the Warsaw Convention, the Warsaw Convention as amended by the Hague Protocol or the Guadalajara Convention do not apply.

2.19 The limited liability scheme in Part IV of the Principal Act differs in a number of respects from the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol.

2.20 Under Part IV, the carrier is liable for damage occasioned by:

- . death or injury of a passenger caused by an accident on board the aircraft or in the course of embarking or disembarking (Section 28); and
- . destruction or loss of, or injury to, baggage including registered baggage (Section 29).

2.21 By virtue of regulations made on 15 January 1991, section 31 of the Act limits the liability of the carrier as follows:

- . in the carriage of passengers - \$180,000;
- . in the carriage of registered baggage - \$1,600; and
- . in the carriage of baggage other than registered baggage - \$160.

2.22 These limits are broadly consistent with those provided by the Montreal Additional Protocol No. 3.

2.23 Liability to a passenger under Part IV is expressed to be in substitution for civil liability under any other law (section 35). In the absence of any contractual provision to the contrary, the liability limits cannot be broken by a plaintiff. Liability limits in the case of baggage, however, may be broken.

2.24 Unlike carriage to which the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol applies, the carrier does not have the defence that s/he took all necessary measures to avoid the damage. However, the carrier can raise the defence of contributory negligence in order to avoid liability or to restrict the amount of damages otherwise payable (section 39).

2.25 Part IV of the Principal Act does not deal expressly with the carriage of cargo, but enables regulations to be made applying the provisions of the Warsaw Convention and the Hague Protocol to the carriage of cargo (Section 41). To date, no regulations have been made.

3. BACKGROUND TO THE AMENDMENTS

The Montreal Protocols

3.1 The Montreal Protocols, which were concluded on 25 September 1975, amend the "Warsaw rules" in the manner set out below.

(a) Additional Protocol No. 3 of Montreal, 1975

3.2 The Montreal Additional Protocol No. 3 amends the Warsaw Convention as amended by the Hague and Guatemala City Protocols. It effectively embodies and supersedes the Guatemala City Protocol which has not entered into force.

3.3 Most significantly, the Montreal Additional Protocol No. 3 amends Article 22 of the Warsaw Convention System by increasing liability limits as follows:

- . in the case of passenger death or personal injury - 100,000 SDR;
- . in the case of passenger delay - 4150 SDR;
- . in the case of destruction, loss, damage or delay to baggage - 1000 SDR; and
- . in the case of loss, damage or delay to cargo - 17 SDR per kilogram (the consignor may make a special declaration of the value of the cargo and, if required, pay a supplementary sum, in which case the carrier will be liable to pay a sum not exceeding that declared value).

3.4 The Montreal Additional Protocol No. 3 departs from the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol in providing that the liability limits in respect of passengers and baggage are unbreakable (Article 24).

3.5 The liability limits in respect of cargo, however, may be broken if it is proved that damage resulted from an act or omission of the carrier or his/her servants or agents, acting within the scope of their employment, done with the intent to cause damage or recklessly and with the knowledge that damage would probably result (Article 25).

3.6 The Montreal Additional Protocol No. 3 replaces the Poincare gold franc with the SDR for the purposes of determining liability limits (see paragraphs 3.13-15 below).

3.7 Finally, the scheme proposed by the Montreal Additional Protocol No. 3 differs from the schemes

contained in the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol in the following ways:

- . the carrier is not liable for passenger death or injury which results solely from the state of health of the passenger or for damage to baggage which results solely from the inherent defect, quality or vice of the baggage (Article 17);
- . although generally increasing liability limits, the Montreal Additional Protocol No. 3 in fact reduces liability limits in respect of passenger delay which, under the Warsaw Convention and Warsaw Convention as amended by the Hague Protocol, is subject to the liability limits applying to the carriage of passengers generally;
- . the carrier is not liable for damage occasioned by passenger and baggage delay, or damage to cargo, if s/he proves that s/he, or his/her servants or agents, have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures (Article 20);
- . a distinction is drawn between baggage, which is subject to global limits, and cargo, which is subject to a per kilogram limit; and
- . the distinctions drawn between registered and unregistered baggage and checked baggage and objects carried by the passenger have been removed.

(b) Protocol No. 4 of Montreal, 1975

3.8 The Montreal Protocol No. 4 amends the Warsaw Convention as amended by the Hague Protocol in respect of the carriage of cargo only.

3.9 The Montreal Protocol No. 4 replaces the 250 Poincare gold franc per kilogram limit in relation to cargo with the 17 SDR per kilogram limit. However, it retains the Poincare gold franc liability limits of the Warsaw Convention as amended by the Hague Protocol in relation to passengers, registered baggage, and objects of which the passenger takes charge.

3.10 The Montreal Protocol No. 4 departs from the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol in providing that the liability limits for cargo are unbreakable (Article 24). The liability limits for passengers and baggage, however, can be broken if it is proved that damage resulted from an act or omission of the carrier or his/her servants or agents, acting within the scope of their employment, done with the intent to cause

damage or recklessly and with the knowledge that damage would probably result (Article 25).

3.11 Finally, the scheme proposed by Montreal Protocol No. 4 differs from the scheme contained in the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol in the following ways:

- . the carrier is not liable for damage to or loss of cargo which results solely from the inherent defect, quality or vice of the cargo; defective packing of the cargo performed by a person other than the carrier or his/her servants or agents; an act of war or an armed conflict; or an act of public authority carried out in connexion with the entry, exit or transit of the cargo (Article 18); and
- . in the case of damage occasioned by delay in the carriage of cargo, the Warsaw Convention as amended by the Hague Protocol rules apply, viz, the carrier is not liable if s/he proves that s/he or his/her servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures (Article 20).

Conversion of the Poincare gold franc to \$A values

3.12 Both the Warsaw Convention and the Hague Protocol set liability limits in Poincare gold francs which were, until the early 1970s, easily converted to Australian currency via the official price of gold. With the abandonment of the official price of gold in the early 1970s there has been uncertainty as to the appropriate basis for calculating the Australian currency equivalents of the gold franc limits, with judicial interpretation varying between the last official price of gold and the free market price which fluctuates widely.

3.13 The Additional Protocol No. 3 of Montreal 1975 sought to remove this uncertainty by substituting the International Monetary Fund's Special Drawing Right (SDR) for the gold franc in the "Warsaw rules".

3.14 As the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol will remain in force after the Montreal Protocols have been ratified the Government decided to fix a conversion for the Poincare gold franc to SDRs as notified by the Reserve Bank on a daily basis. This establishes a more certain liability limit in respect of carriage covered by contracts to which the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol applies.

4. NOTES ON CLAUSES

Clause 1 - Short title etc.

4.1 This clause provides for the proposed Act to be cited as the *Civil Aviation (Carriers' Liability) Amendment Act 1991* and provides that, in the amending Act, "Principal Act" means the *Civil Aviation (Carriers' Liability) Act 1959*.

Clause 2 - Commencement

4.2 This clause provides that, with some exceptions, the amending provisions will commence on the day the proposed Act receives the Royal Assent. The provisions which commence on other dates, and the reasons for this, are explained in the notes on those provisions.

Clause 3 - Interpretation

4.3 Section 5 of the Principal Act provides definitions of terms used in, and rules for the interpretation of, the Principal Act.

4.4 This clause inserts a number of new definitions in section 5 of the Principal Act.

Clause 4 - Repeal of sections 8 and 9 and substitution of new sections

4.5 This clause repeals sections 8 and 9 of the Principal Act and substitutes new sections.

4.6 Section 8 of the Principal Act provides that approval is given to ratification by Australia of the Hague Protocol. This is a mechanical provision which has no continued application now that the Hague Protocol has been ratified. Accordingly, it has been repealed.

4.7 Section 9 of the Principal Act provides that, for the purposes of the Act, the texts of the Warsaw Convention, the Hague Protocol and the Guadalajara Convention are the texts set out in schedules 1, 2 and 3 respectively. The section also provides that, in the event of an inconsistency between the texts set out in schedules and the authentic French language texts, the latter are to prevail. Finally, the section enables the Minister of State for Foreign Affairs to certify a true copy of the authentic French text of the Warsaw Convention, the Hague Protocol or the Guadalajara Convention, and provides that such certification is evidence that the document is such a true copy.

4.8 Section 9 of the Principal Act is replaced by new section 8. The two provisions are substantially identical except that:

- . the Schedules contain consolidations of the operative provisions of the various amendments to the Warsaw Convention; and
- . the evidentiary certificates may be signed by the Secretary to the Department of Foreign Affairs and Trade.

4.9 New section 9 contains a mechanism for converting liability limits from SDR to \$A values. In assessing damages under the Act, a court is required to convert all relevant SDR amounts into \$A by reference to the exchange rate published by the Reserve Bank of Australia as at the date on which the court's judgment is given. This mechanism is consistent with the requirements of paragraph 4 of Article 22 as amended by the Additional Protocol No. 3 of Montreal, 1975.

**Clause 5 - Repeal of section 10 and
substitution of new section**

4.10 This clause repeals section 10 of the Principal Act and replaces it with a new section 10. The new section, when read in conjunction with the amendments to section 5 of the Principal Act, simplifies the definition of the Warsaw Convention as amended at The Hague.

**Clause 6 - Repeal of section 17 and
substitution of new sections**

4.11 This clause repeals the existing section 17 and replaces it with new sections 17 and 17A.

4.12 Section 17 of the Principal Act provides that a Party to the Convention which has not availed itself of the provisions of the Additional Protocol to the Warsaw Convention (conferring immunity in respect of international carriage performed by State aircraft) shall, for the purposes of an action under the Warsaw Convention brought in a court in Australia, be deemed to have submitted to the jurisdiction of that court. The need for such a deeming provision has been superseded by the *Foreign States Immunities Act 1985* and accordingly has been repealed.

4.13 New Section 17 provides SDR equivalents to the Poincare gold franc limits in the Warsaw Convention as amended by The Hague Protocol.

4.14 New Section 17A increases the liability limits applicable to Australian carriers in respect of passenger death and injury. The effect of this provision is that Australian carriers engaged in carriage to which the Warsaw

Convention as amended by The Hague Protocol applies are subject to the increased Montreal Additional Protocol No. 3 limits of 100,000 SDR.

Clause 7 - Repeal of section 23 and substitution of new sections

4.15 This clause repeals the existing section 23 and replaces it with new sections 23 and 23A.

4.16 Section 23 of the Principal Act provides that any sum in francs mentioned in Article 22 of the Convention shall, for the purposes of an action against a carrier, be converted into Australian currency at the rate of exchange prevailing on the date on which the amount of any damages to be paid by the carrier is ascertained by the court or jury.

4.17 New Section 23 provides SDR equivalents to the Poincare gold franc limits in the Warsaw Convention.

4.18 New Section 23A increases the liability limits applicable to Australian carriers in respect of passenger death and injury. The effect of this provision is that Australian carriers engaged in carriage to which the Warsaw Convention would normally apply are subject to the increased Montreal Additional Protocol No. 3 limits of 100,000 SDR.

Clause 8 - New section 24A

4.19 This clause inserts a new section 24A into the Principal Act. The new section essentially repeats the requirements of section 19 of the Principal Act in relation to an action under the Warsaw Convention by preserving the jurisdiction of State courts in relation to a claim.

Clause 9 - Effect of Convention in Australia

4.20 This clause amends section 25A of the Principal Act in consequence of the Montreal Additional Protocol No. 3 and Montreal Protocol No. 4 entering into force. These amendments insert references to new Parts IIIB and IIIC giving effect to the Montreal Additional Protocol No. 3 and the Montreal Protocol No. 4 respectively.

4.21 Clause 9 addresses three possibilities for the commencement of these provisions:

- . subclause 9(1) deals with the case of the two Protocols commencing on the same day;
- . subclause 9(2) deals with the case of Montreal Additional Protocol No. 3 entering into force on a day before Montreal Protocol No. 4; and

- subclause 9(3) deals with the case of Montreal Protocol No. 4 entering into force on a day before Montreal Additional Protocol No. 3.

Clause 10 - Modification of other Parts

4.22 This clause amends section 25B of the Principal Act in consequence of the Montreal Additional Protocol No. 3 and Montreal Protocol No. 4 entering into force. These amendments insert references to new Parts IIIB and IIIC giving effect to the Montreal Additional Protocol No. 3 and the Montreal Protocol No. 4 respectively.

4.23 Clause 10 addresses three possibilities for the commencement of these provisions:

- subclause 10(1) deals with the case of the two Protocols commencing on the same day;
- subclause 10(2) deals with the case of Montreal Additional Protocol No. 3 entering into force on a day before Montreal Protocol No. 4; and
- subclause 10(3) deals with the case of Montreal Protocol No. 4 entering into force on a day before Montreal Additional Protocol No. 3.

Clause 11 - New Part IIIB

4.24 This clause inserts a new Part IIIB into the Principal Act giving the force of law to the Montreal Additional Protocol No. 3. This clause is to commence on a date to be fixed by Proclamation, being a day not earlier than that on which the Montreal Additional Protocol No. 3 enters into force for Australia.

4.25 New section 25D defines "the Convention" for the purposes of the Part.

4.26 New section 25E provides that the Convention has the force of law in Australia in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.

4.27 New section 25F applies sections 35 to 39, inclusive, to carriage to which the new Part IIIB applies.

4.28 New section 25G preserves the jurisdiction of State courts in relation to any action under the Convention.

4.29 New section 25H empowers the Minister to declare, by notice published in the Gazette, certain factual matters relating to the Convention and provides that such notice is evidence of the matters declared.

Clause 12 - New Part IIIC

4.30 This clause inserts a new Part IIIC into the Principal Act giving the force of law to the Montreal Protocol No. 4. This clause is to commence on a date to be fixed by Proclamation, being a day not earlier than that on which the Montreal Protocol No. 4 enters into force for Australia.

4.31 New section 25J defines "the Convention" for the purposes of the Part.

4.32 New section 25K provides that the Convention has the force of law in Australia in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.

4.33 New section 25L provides SDR equivalents to the Poincare gold franc limits in the Warsaw Convention as amended by the Hague Protocol which the Convention retains for passengers, registered baggage and objects of which the passenger takes charge.

4.34 New section 25M increases the liability limits applicable to Australian carriers in respect of passenger death and injury. The effect of this provision is that Australian carriers engaged in carriage to which the Warsaw Convention as amended by the Hague and Montreal No. 4 Protocols applies are subject to the increased Montreal Additional Protocol No. 3 limits of 100,000 SDR.

4.35 New section 25N applies sections 35 to 39, inclusive, to carriage to which the new Part IIIC applies.

4.36 New section 25P preserves the jurisdiction of State courts in relation to any action under the Convention.

4.37 New section 25Q empowers the Minister to declare, by notice published in the Gazette, certain factual matters relating to the Convention and provides that such notice is evidence of the matters declared.

Clause 13 - Application of Part

4.38 This clause amends subsection 27(1) of the Principal Act by adding references to the Montreal Additional Protocol No. 3 and the Montreal Protocol No. 4. Subclause 14(1) adds the reference to the Montreal Additional Protocol No. 3 and commences on the date upon which that Protocol enters into force in Australia. Subclause 14(2) adds the reference to the Montreal Protocol No. 4 and commences on the date upon which that Protocol enters into force in Australia.

Clause 14 - Application of Part to cargo

4.39 This clause amends Section 41 of the Principal Act by replacing the references to Warsaw Convention and the Hague Protocol with references to the Montreal No. 4 Convention. This amendment will enable regulations to be made to apply the provisions of Montreal Protocol No. 4 which relate to the carriage of cargo to domestic carriage and such international carriage which is not subject to the Warsaw rules.

Clause 15 - Stowaways

4.40 This clause amends section 42 of the Principal Act by adding references to new Parts IIIB and IIIC. Subclause 15(1) adds the reference to Part IIIB and commences on the date upon which the Montreal Additional Protocol No. 3 enters into force in Australia. Subclause 15(2) adds the reference to Part IIIC and commences on the date upon which the Montreal Protocol No. 4 enters into force in Australia.

Clause 16 - Regulations

4.41 This clause amends section 43 of the Principal Act by omitting the references to the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol.

clause 17 - Schedules

4.42 Subclause 18(1) repeals schedule 2 of the Principal Act, which contains the text of the Hague Protocol, and substitutes a new Schedule containing the consolidated text of the Warsaw Convention as amended by the Hague Protocol.

4.42 Subclause 18(2) adds two new schedules containing the consolidated texts of:

- . the Warsaw Convention as amended by the Hague, Guatemala City and Montreal No. 3 Protocols; and
- . the Warsaw Convention as amended by the Hague and Montreal No. 4 Protocols.

