RAAA
REGIONAL AVIATION ASSOCIATION OF AUSTRALIA

RAAA Response To

Department of Infrastructure, Transport, Regional Development and Local Government

Discussion Paper

Review of Carriers' Liability Insurance

July 2009

Serving regional aviation, and through it, the people and businesses of regional Australia
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The RAAA and its Members

The Regional Aviation Association of Australia (RAAA) was formed in 1980 as the Regional Airlines Association of Australia to protect, represent and promote the combined interests of its regional airline members and regional aviation throughout Australia.

The Association changed its name in July 2001 to the Regional Aviation Association of Australia and widened its charter to include a range of membership, including regional airlines, charter and aerial work operators, and the businesses that support them.

The RAAA has 24 Ordinary Members (AOC holders) and 47 Associate/Affiliate Members. The RAAA's AOC members directly employ over 2,500 Australians, many in regional areas. On an annual basis, the RAAA's AOC members jointly turnover more than $1b, carry well in excess of 2 million passengers and move over 23 million kilograms of freight .

RAAA members operate in all States and Territories and include airlines, airports, engineering and flight training companies, finance and insurance companies and government entities. Many of RAAA's members operate successful and growing businesses providing employment and economic sustainability within regional areas.

Some examples of RAAA members' significant presence in regional Australia is the REX hub in Wagga Wagga, Sharp Aviation in Hamilton, Australian Wings Academy at Gunnedah, Airnorth's Northern Territory network, West Wing Aviation in Mt Isa and Skytrans operations from Cairns, to name a few.

Many of the fly in/fly out operations for the mining sector are flown by RAAA members. These members are providing a vital service to an industry sector that still underpins the Australian economy.

Members such as Basair, Australian Wings Academy, Sharp Aviation, Rex and Brindabella Airlines have established flying schools to cater for increasing demand for commercial pilots. Other members, such as Aviation Australia and Alliance Airlines have first-rate apprenticeship programmes and are continuously developing their engineering training courses to ensure that their new engineers receive up to the minute training.

RAAA Charter

The RAAA's Charter is to promote asafe and viable regional aviation industry. To meet this goal the RAAA:

- promotes the regional aviation industry and its benefits to Australian transport, tourism and the economy among government and regulatory policy makers;
- lobbies on behalf of the regional aviation industry and its members;
- contributes to government and regulatory authority policy processes and formulation to enable its members to have input into policies and decisions that may affect their businesses;
- encourages high standards of professional conduct by its members; and
- provides a forum for formal and informal professional development and information sharing.

The RAAA provides wide representation for the regional aviation industry by direct lobbying of Ministers and senior officials, through parliamentary submissions, personal contact and by ongoing, active participation in a number of consultative forums.

Responses to Discussion Paper

4. Liability Regimes

4.1. Liability and Insurance Framework – Objectives

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

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

The RAAA endorses these objectives. In particular it is vital that any liability regime that is in place, in addition to providing equitable compensation to victims, does not jeopardise the sustainability of the regional aviation industry. The RAAA's view is that these objectives can best be achieved using the current liability model based on strict liability, but with a cap on the maximum compensation payable.

4.2. The Role of Commonwealth Regulation

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

The RAAA repeats its earlier submission that compensation regimes should achieve consistent outcomes for victims of transport accidents irrespective of which mode of transport is being used. It is recognised that if the Government is minded to separately regulate air carrier liability, the other preliminary findings outlined the Department's discussion paper do go some way to alleviating the RAAA's concerns regarding inconsistent treatment of air transport operators compared to operators of other modes of transport.

4.3. International Carriage – Passenger Liability

Preliminary Finding 3. In relation to international travel, Government should take further action where possible to limit the exposure of Australian travellers to the 'Warsaw System', and ensure that the Montreal Convention 1999, or compensation provisions comparable to those provided under the Montreal Convention 1999, apply in all possible circumstances.

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

RAAA Response: Exposing Australian passengers to the Warsaw system must be avoided and any proposed changes should be framed with this in mind.

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

4.4. International Carriage – Flights Between Overseas Countries

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

The RAAA does not propose to make any further comments other than to indicate that the preliminary finding is consistent with the decision of the New South Wales Court of Appeal in *Gulf Air Company GSC v Fattouh* [2008] NSWCA 225.

4.5. *Domestic Carriage – Passenger Liability*

Preliminary Finding 7. The Government should not apply the Montreal Convention 1999 to domestic travel at this stage, and instead maintain a separate system of strict and capped liability.

The RAAA supports this finding.

The question of whether the Montreal Convention 1999 should be applied to the domestic liability regime arose when the Australian Government first considered the adoption of the Montreal Convention 1999. At that time there was an extensive consultation process that lead to the conclusion that such a change was not appropriate and it remains the case that there are no grounds for amending Part IV of the CACL Act to mirror the provisions of the Montreal Convention 1999. The RAAA repeats its earlier submissions but in addition makes the following points in opposition to implementation of a Montreal Convention type regime for domestic liability:

i. Many features of the Montreal Convention 1999, such as the imposition of liability (above a certain limit) based on a determination of fault, are inconsistent with the stated objectives of the Government in Preliminary Finding 1. These features of the Montreal Convention 1999 were only included in the Convention due to compromises that are so often features of international treaties. There is no similar impediment on the formulation of the domestic regime.

ii. The principles behind the current domestic liability regime have worked well for a considerable period of time providing a prompt, equitable and efficient means of compensation.

iii. Change to a Montreal Convention style regime for domestic liability will cause uncertainty and increase costs at a time when the sustainability of regional aviation is at risk.

iv. Irrespective of the current economic cycle, regional aviation in Australia, whilst considered essential to the communities that it services, is of marginable profitability and any increase the cost of operating particular routes may make the difference between the route being viable and not viable.

v. The discussion paper estimates the increase in costs of insurance if the maximum limit of liability was increased to from $500,000 to $725,000 per passenger. Whilst the RAAA does not dispute that in the current insurance market such a cost increase would not be significant, it is submitted that the cost increase would be substantial if carriers are exposed to unlimited liability under a Montreal Convention type regime for domestic carriage.

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

The RAAA accepts this finding. Adjusting the limit of liability in accordance with changes in the costs of living is fair and equitable. This approach is consistent with the method of adjusting general damages amounts under the State civil liability regimes to reflect current living conditions and costs.

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

The RAAA supports this preliminary finding which is consistent with submissions made by the RAAA in response to the Issue Paper of April 2008.

Allowing passengers to claim for purely mental injury under a regime that imposes strict liability on an airline is not fair and equitable. The primary obligation of the airline is safety and imposing strict liability for a fear of flying or other mental anguish without a related physical injury would impose an unreasonable burden on the airline and its insurers. Whilst it is relatively simple to substantiate the existence of physical injury, verification of mental injuries is far more complex. Unlike bodily injury, mental injury cannot be easily objectively tested. Recovery for pure mental injury would also widen the pool of potential claimants in relation to events that may be no fault of the airline.

It is submitted that for these good reasons, Courts around the world have recognised that stand alone mental injury should not be recoverable in relation to international passenger flights. For the same reasons it is submitted that airlines should not be liable to domestic passengers for stand alone mental injury.

Preliminary Finding 10. The Government should explore the possibility of amending the CACL Act to clarify that it provides the exclusive remedy available to passenger victims, so that they are prevented from mounting legal proceedings based on alternative areas of law.

The RAAA supports this finding.

An exclusive remedy provision in which all actions of compensation are channelled exclusively towards the carrier is supported.

As the discussion paper rightly recognises, a pillar of the Civil Aviation (Carriers' Liability) Act is that it should provide the exclusive remedy available to passengers. Without that certainty, the benefits to both victims and carriers of the liability regime fall away.

4.6. *Third Party Liability*

Preliminary Finding 11. The Government should maintain the system of strict and unlimited liability for carriers who cause damage to third parties on the surface.

The RAAA does not support this finding because imposing strict and unlimited liability on airlines is excessive and inappropriate.

The *Damage by Aircraft Act 1999* does not distinguish between the size of aircraft, the nature or risk factor of the airline operation or the geographical operation of the aircraft. It is axiomatic that the larger the aircraft, the greater the potential of damage caused to third parties on the ground. For these reasons, the RAAA submits that a regime of unlimited liability is unnecessary and inequitable and proposes the introduction of regime of limited liability based upon the maximum takeoff weight of the aircraft in line with the minimum insurance standards under Regulation (EC) No 785/2004, but subject to our submissions on that matter, which is the subject of Preliminary Finding 24.

Under the current system of strict and unlimited liability, if there is an accident over a highly populated area involving a large passenger aircraft, it is likely that the airline's liability will exceed the available cover under its policy of insurance.

Likewise, if minimum insurance standards, similar to those required for airlines operating within and into and out of the EU under Regulation (EC) No 785/2004, are introduced without capping liability, when the value of the claim exceeds the policy limit, the airline will again be exposed to uninsured losses which would likely lead to financial ruin.

Of those few countries which have domestic liability regimes for surface damage, Argentina, Chile, German, Italy and Spain impose strict but limited liability based upon the aircraft's maximum takeoff weight.

Moreover, providing a regime of strict and unlimited liability is contrary to the objective of fostering a sustainable aviation industry and unfairly balances the interest of the claimants against the airlines.

Preliminary Finding 12. The Government should explore the possibility of amending the DBA Act to recognise contributory negligence, allowing compensation payments to be reduced when victims are partly responsible for their losses.

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

The RAAA support these findings as they seek to resolve some of the current shortcomings under the DBA Act regime. These shortcomings were exemplified in the Court of Appeal decision of *Cook v Aircare Moree* [1] in which the aircraft owner and operator were denied the defence of contributory negligence and the right to claim contribution from a joint tortfeasor.

The absence of a right of recourse against a third party is contrary to current position under international law and prevailing view of most states which have domestic surface damage legislation (for example, see China, France and the United Kingdom). In particular, see Article 10 of the Rome Convention 1952, Article 11 of the *Convention on Compensation for Damage Caused by Aircraft to Third Parties* ("General Risks Convention") and Article 24 of the *Convention on Compensation for Damage to Third Parties*, Resulting from *Acts of Unlawful Interference Involving Aircraft the General Risks Convention* ("Unlawful Interference Convention").

Article 10 of the Rome Convention 1952 has been mirrored in the *Damage by Aircraft Act 1952* (NSW) and section 76 of the *Civil Aviation Act 1982* (United Kingdom). The RAAA submits that these provisions provide the model text for the necessary amendment to the DBA Act. Relevantly, section 2(2) of the *Damage by Aircraft Act 1952* (NSW) provides:

"Where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft:

Provided that where material loss or damage is caused as aforesaid in circumstances in which:

1 [2008] NSWCA 161.

a. damages are recoverable in respect of the said loss or damage by virtue only of the foregoing provisions of this subsection, and

b. a legal liability is created in some person other than the owner to pay damages in respect of the said loss or damage,

the owner shall be entitled to be indemnified by that other person against any claim in respect of the said loss or damage."

Contrary to preliminary finding 1, the current provisions of the DBA Act do not provide an appropriate balance between the interests of carriers and insurers on the one hand and victims on the other hand, especially were the victim has contributed to his or her own damages or injuries.

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

The RAAA endorses this finding. This is consistent with the position adopted under Article 13 of the General Risk Convention and Article 29 of the Unlawful Interference Convention.

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

RAAA Response: For the reasons stated in response to Preliminary Finding 9 above and in keeping with the principles under the CACL Act, the Montreal Convention 1999 and the Warsaw Convention, damages for mental injury should be expressly excluded under the DBA Act.

The RAAA considers that persons on the ground should be treated no more favourably than those entitled to damages under the CACL Act. Accordingly, persons on the ground who suffer alleged mental injuries absent any physical injury should not be entitled to compensation. Under the current liability arrangement, in the same aircraft accident, the witnesses on the ground **may** be entitled to compensation for pure mental injuries but the family members of the passengers on board the aircraft **may not** be entitled to compensation for pure mental injuries. An equitable liability regime should treat all victims of an aircraft accident equally.

Furthermore, the potential scope of witnesses to an air crash is limitless, especially if an accident were to occur over a city or over a highly populated venue, for example, an aircraft flying over Sydney harbour or over a sports stadium. To allow compensation to witnesses in such circumstances would lead to an absurd outcome contrary to public policy.

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

The RAAA endorses this finding as it would provide certainty for carriers and insurers.

Prior to the introduction of the DBA Act, under Article 1 of the Rome Convention 1952 there was no right to compensation *"if the damage is not a direct consequence of the incident giving rise thereto"*. Without reason, no similar provision was introduced into the DBA Act. In the judgment of Campbell JA in *ACQ v Cook; Aircair Moree v Cook; Cook v Country Energy; Country Energy v Cook* [2], his honour considered that section 10(1)(d) of the DBA Act aims to alter this aspect of the previous law, and *"makes clear that it is not only the direct consequences of an impact that attract limited liability, but also indirect or consequential results of an impact. Such a construction is consistent with the language, the legislative history, and the purpose of [DBA Act]."*

The position under the Rome Convention 1952 has been maintained in Articles 3.3 in the General Risks and Unlawful Interference Conventions which was viewed by the majority of states to be in the interest of those victims properly entitled to compensation. The DBA Act should be amended to reflect this position.

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

The RAAA submits that a 2 year limitation period should be expressly made in the DBA Act. This would bring the limitation period under the DBA Act in line with the limitation period under the CACL Act. Also, this submission is consistent with the approach advanced by the Australian Government at the recent diplomatic *Conference on Compensation for Damage Caused by Aircraft Arising from Acts of Unlawful Interference Arsing from Acts of Unlawful Interference or from General Risks* ("DCCD"), ICAO Headquarters, Montreal, Canada, 20 April – 2 May 2009. In particular, on day 6 of the plenary session of the Commission, Australia supported the view first expressed by Malaysia that the limitation period in Article 35 of the General Risk Convention should be changed from 3 years to 2 years so that it could be in-line with the Montreal Convention 1999. The majority of States supported this position.

2 [2008] NSWCA 161 (16 July 2008) at [136]

In addition, the 2 year limitation period is the common limitation period in the legal systems of most ICAO member States, and the two year limitation period is firmly established in the *Warsaw system*, the *Montreal Convention 1999* and the *Rome Convention 1952*[3] ; and applying the same limitation period for the DBA Act is consistent with the objections expressed by the Australian Government in Preliminary Finding 1.

Currently there is no time limit stipulated in the DBA Act. In the absence of a Commonwealth provision, the limitation periods would vary from State to State and would vary depending on whether the damage was a personal injury or property damage.

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

The RAAA endorses this finding but subject to the resolution of the current problems under the DBA Act. The RAAA submits that the liability frameworks should be harmonized in the same way that the CACL Act has been harmonized with the relevant state legislation.

4.7. Interaction with State Civil Liability Laws

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

The RAAA supports this finding.

The RAAA has previously submitted that there is no reason why the more modern controls on compensation should not apply in relation to aviation. The reforms to state civil liability legislation following the Ipp Report in 2002, and also reforms made in response to law reform commission inquiries in some states, were perceived as necessary to maintain affordable insurance in Australia, to avoid excessive awards of damages and also to bring certainty to some circumstances in which the common law position was ambiguous. The measures contained in the civil liability legislation which reflect these changes should apply to compensation of air travellers.

3 See DCCD Doc No.17 at [2.3(h)]

Lower courts in New South Wales have found that under the DBA Act[4] and CACL Act the state Civil Liability Acts apply to the assessment of damages. In respect of the CACL Act[5]. Likewise, in respect of the DBA Act *see Cook v Aircare Pty Ltd*. The RAAA submits that these decisions are correct. However, to remove any doubt, the CACL Act and DBA Act should be amended to make express reference to the respective state civil liability regimes.

In the same regard, there is an aspect of section 38 of the CACL Act which calls for consideration. The section provides:

> *"In assessing damages in respect of liability under this Part there shall not be taken into account by way of reduction of the damages:*
>
> *a. a sum paid or payable on the death of, or injury to, a passenger under a contract of insurance; or*
>
> *b. a sum paid or payable out of a superannuation, provident or like fund, or by way of benefit from a friendly society, benefit society or trade union; or*
>
> *c. any sum in respect of a pension, social service benefit or repatriation benefit paid or payable, consequent upon the death or injury, by any government or person; or*
>
> *d. in the case of the death of a passenger, any amount in respect of the acquisition by a family member of the passenger, consequent upon the passenger's death, of, or of an interest in, a dwelling used at any time as the home of that family member, or of, or of an interest in, the household contents of any such dwelling; or*
>
> *e. a premium that would have become payable under a contract of insurance in respect of the life of a deceased passenger if he or she had lived beyond the time at which he or she died."*

4 [2007] NSWDC 164 at [36]-[37] This part of the judgment was not disturbed by the Court of Appeal in *ACQ v Cook; Aircair Moree v Cook; Cook v Country Energy; Country Energy v Cook* [2008] NSWCA 161 (16 July 2008) and is not the subject of the appeal to the High Court: see *ACQ Pty Limited v Cook Anor; Aircair Moree Pty Limited v Cook Anor* [2009] HCATrans 134 (17 June 2009).

5 *Arefin v Thai Airways International Public Company Limited* District Court of New South Wales, Unreported Judge R.A. Sorby, 21 August 2007.

The application of section 38 is largely uncontroversial in the sense that it would not be suggested that damages verdicts should be reduced by the total sum recovered by the dependents in the form of insurance, worker's compensation, superannuation etc. However, when assessing future economic loss, it should be made clear that income from any amounts received, such as interest, dividends, rental, from such amounts must be taken into account. To do otherwise would be to ignore the practical reality of the situation. Further, if amounts are not invested or invested in a way that does not produce any immediate return, the calculation should include notional income capable of being earned. Otherwise, claimants may arrange their affairs to defer this income from being received.

The operation of section 38 is probably consistent with the approach advocated. However, the position should be expressly clarified.

4.8. Liability for Baggage

Preliminary Finding 20. The Government should amend the CACL Act to harmonise the domestic travel baggage liability provisions with the baggage liability provisions of the Montreal Convention 1999.

The RAAA submits that the current liability provisions under Part IV of the CACL Act, in respect of baggage liability, have provided an efficient means of handling baggage claims. There is no evidence to support the proposition that the baggage provision of the Montreal Convention 1999 should be introduced for domestic carriage.

4.9. Liability for Cargo

Preliminary Finding 21. The Government should amend the CACL Act to allow Regulations to apply the cargo provisions of the Montreal Convention 1999 to domestic carriage (replacing existing references to the Montreal Protocol No. 4), noting that it is not proposed to develop Regulations of this nature at this time.

Whilst no Regulations are proposed at this stage, the RAAA submits that nature of domestic air cargo market in Australia does not justify the making of specific regulations now or in the future.

The carriage of cargo in Australia is usually arranged by freight forwarders and may involve the various methods of transportation: road, rail, air or sea. The carriage of cargo in those circumstances is subject to the limits provided in the standard terms and conditions of carriage of the particular freight forwarder.

4.10. Delay

Preliminary Finding 22. The Government should monitor the on-time performance of domestic carriers, leaving open the option of establishing compensation arrangements for delay that are similar to the relevant provisions of the Montreal Convention 1999.

RAAA Response: The Bureau of Infrastructure, Transport and Regional Economics (BITRE) currently only monitors on-time performance of major domestic airlines operating between Australian airports and not the majority of the member airlines of the RAAA.

RAAA member airlines operate both regular public transport and chart flights into remote airports and communities across Australia. The facilities and maintenance and support staff at these locations are often limited.

In view of the nature of the operation of the member airlines, implementation of any delay penalties is likely to place unnecessary costs on the RAAA member airlines in the form high premiums and complaints handling costs and is not supported.

5. Analysis and Options – Insurance Regimes

5.2. Mandatory Passenger Insurance

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

This finding is supported by the RAAA.

5.3. Third Party Surface Damage Insurance

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

In principle, the RAAA supports a system of mandatory insurance based up the maximum takeoff weight.

However, economic analysis and modelling is required to determine whether the 10 categories and corresponding minimum insurance requirements in Article 7.1 of Regulation (EC) No 785/2004 are relevant in Australia.

Air transportation in Europe involves flight operations over many highly populated cities and the air travel networks are highly congested. Furthermore, over the last 10 years Europe has experience unprecedented growth in operations of aircraft in uncontrolled airspace. In Europe, there is a planned 41% increase in airport capacity between 2007 and 2030, including new airports, 29 new runways and new air- and ground-side infrastructure. There is also projected to be, by 2030, an increase between 1.7 and 2.2 times the number of flights in Europe seen in 2007[6].

In view of these matters, it should be expected that the minimum insurance requirements for European carriers or carriers operating in Europe should be greater than that required of airline operating in Australian. In the case of the RAAA member airlines, the majority of aircraft operations involve flights into uncongested airports and flight paths over undeveloped and isolated areas. These factors should be considered when determining the level of minimum insurance.

5.4. War Risk Insurance

Preliminary Finding 25. The Government should give consideration to working closely with industry to develop a system that requires carriers to obtain insurance with coverage scope that is as broad as possible, by mandating the use of the AVN52E write back clause in conjunction with the AVN48B exclusion clause.

RAAA Response: The war risk market is understood to be a very small market and the RAAA has been advised that should another terrorism event occur, the cost of cover could increase by 25% - 100%. Bearing in mind terrorism is a threat to Australia, not just the aviation industry, it would be unfair to mandate that such insurance cover be taken out by airlines.

Preliminary Finding 26. The Government should monitor the aviation war risk insurance market and respond to market developments in accordance with the broader objectives of the liability and insurance framework.

The RAAA endorses the idea of Government monitoring and involvement with this issue as it is a national rather than an industry specific issue.

6 Eurocontrol, "Challenges of Growth 2008 – Summary Report", at page 1.

6.4 Delivering Consumer Protection – the Family Assistance Code

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

No RAAA member has had a fatal or serious accident since the Voluntary Code was introduced but the RAAA's submission is that the Voluntary Code is unnecessary and passengers are adequately protected by existing welfare systems in Australia.

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

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

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

RAAA Response: Whilst the concept of advanced payments is attractive, there is no evidence of any need for legislation to require advance payments.

Furthermore, there are practical problems in administering advance payments.

In those cases involving claims for advance payments by family members of passengers who have died or were injured, the airline would be required to determine whether the person claiming the advanced payment has an entitlement to receive such a payment, that is, whether the family member has a need or dependency on the deceased or injured person at the time of the accident. Determining the rate of need or dependency requires the provision of certain information before a view can be formed. This will involve incurring legal costs and will require the utmost cooperation from the claimant.

If the Government maintains the view that a system of advance payments be mandated and that such payments be made within a certain amount of time after the accident, there must be:

- A requirement upon the claimant to provide a minimal amount of relevant information so that the insurer or airline can determine an entitlement to an advanced payment; and

- ✈ A mechanism which would allow the insurer or airline to be reimbursed for any payments made which, after proper forensic analysis it is determined that the recipient was not entitled to.

This approach is consistent with Regulation (EC) No 889/2002 which amended Council Regulation (EC) No 2027/97.

7 Rome Convention Modernisation

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

RAAA Response: General Risks Convention

The RAAA submits that, if the foreshadowed amendments outlined above are made to the DBA Act, there is no need for Australia to adopt the General Risks Convention.

The nature of third party surface damage is different to that involving passenger liability because the victims of surface damage are, in most circumstances, domiciled in the place where the damage occurs. The only instances where third party damage may involve multiple jurisdictions are where the damage occurs on national borders or on the high seas. In view of the geographical isolation of Australia, these instances are mostly improbable.

The domestic laws of ICAO Member States have adequately dealt with major aviation incidents involving damage to third party victims on the ground. Aviation insurance for this type of damage has always been available, and the insurance industry has no record of leaving such claims uncompensated. Furthermore, the casualty rate as a result of third party damages has historically been extremely low.

The Rome Convention 1952 / Protocol 1978 has not come into play or been involved on resolving ground damage claims, whether in relation to persons or property, in any of the major commercial aircraft accidents that have occurred thought the world in the last 60 years; all claims of damage arising out of those accidents have been resolved on the basis of applicable local law being the place of the accident[7].

7 See George Tompkins, "Who bears the cost of terrorism?"

There is no practical experience or events which validate any need for the adoption of a new instrument that would attempt to improve the Rome Convention 1952 or that Convention as amended at Montreal by the 1978 Protocol. The General Risk Convention unnecessarily interferes with domestic laws which have proven to respond adequately to the issues created by third part surface damage, subject to the current . The impetus for this convention has been driven primarily by a rather large number of African and Latin American States to fill the gap of inadequate domestic legislation addressing third party risks. However, this Convention is not based on any perceived need of the international community.

Furthermore, there was no economic data or statistics to support the proposed limits of liability and no estimates of the insurance costs were presented to the Diplomatic Conference.

In addition, the RAAA takes issue with some of the principles underlying the convention. For example, although the Convention is presented as being a limited liability regime, it is in fact a two-tier liability system based upon the same principles in the Montreal Convention 1999. Curiously, the limits of liability based upon MTOW only apply if the airline can prove that it was "not negligent".

The purpose of insurance is to provide cover in circumstances where a negligent act has caused damage. Therefore, even if an airline was only 1% responsible for the incident causing the surface damage, the limits do not apply.

In a catastrophic crash, the operator will likely not have evidence to sustain either that it was not negligent, or that a third party's acts were the sole cause of the damage. In all mass disaster litigation, the airline will have an insurmountable burden of proof, and find itself absolutely liable without fault to the full measure of the damages of all aboard. It will concede liability and proceed to the issue of plaintiffs' damages. This thwarts one of the Convention's major goals – to enhance predictability of damages so as to facilitate the ability of the industry to secure insurance at affordable levels.

RAAA Response: Unlawful Interference Convention

The RAAA considers that the underlying intention of the Unlawful Interference Convention is noble and agrees that victims of terrorism should be adequately compensated. However, it should be borne in mind that airlines and the aviation industry are also victims of terrorism.

Terrorism by its very nature is directed at States, and the costs of terrorism are usually borne by those States in whose territories the acts of terrorism take place. This was explicitly recognized by the United States following the attacks of 11 September 2001 in the emergency retrospective legislation in the form of the Air Transportation Safety and System Stabilization Act, enacted by Congress on 22 September 2001.

In Australia, victims of crimes legislation has been enacted to enable appropriate compensation for those who may not have adequate civil recourse.

The RAAA submits that terrorism, like other crimes, should be compensated by either the criminal perpetrating the act or the State against who the action is directed, not the innocent airline.

The RAAA makes the additional observations:

1. Under the Unlawful Interference Convention it is contemplated that the costs of funding compensation of victims be borne by the airlines, in the form of insurance premiums, and if the compensation exceeds the insured amount, through the International Civil Aviation Compensation Fund ("the ICACF"). The ICACF is funded by passengers based on a per journey SDR charge and cargo operators, from an SDR charge based on each tonne of cargo carried. The amounts of these charges will be fixed by the Conference of Parties.

2. Therefore, the costs to the airline will not only be in the form of higher fees but also in the costs of administering the collection of these fees. In addition, the airline will incur the costs of the SDR charge where the elasticity of demand for the route being flown is very low, that is, on price sensitive routes.

3. It is acknowledged that it is possible that individuals within the air transport industry could be complicit in terrorist crimes. If so, such individuals would be open to criminal penalties, and might be ordered to pay compensation. But there is no universally-accepted principle of law which would make the employer vicariously liable for criminal acts outside the scope of an individual's employment. To invoke an employer's criminal liability it would be necessary to find a corporate intention to commit a crime, or a systemic failure to adhere to security regulations, or something similar. It is considered extremely unlikely that airline would, from the management level, launch a criminal attack on itself or others. If the airline or industry participant was found to have been involved, that would likely activate an exclusion under its policy of insurance.

4. In addition, the RAAA submits that the Unlawful Risks Convention is premature given that ICAO is still in the process on consulting on current "New and Emerging Risks", which will be examined further at the 34th Session of the ICAO Legal Committee Meeting. The Legal Committee will be considering amendments to Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention of 1970) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention of 1971 as amended by the Airports Protocol of 1988).

5. There has been no explanation why the innocent aviation industry has been singled out to pay for the actions of terrorists. There are no other proposals for operators of cruise ships, public rail or bus services, night clubs or restaurants – all of which have been notorious terrorist targets.

6. Since the 9/11 attacks, the aviation industry has invested enormous time and resources into implementing procedures and infrastructure into the prevention of unlawful acts against aviation, notwithstanding that such acts are usually direct at the States. The RAAA submits that the aviation industry should be focused on investment into the prevention of these unlawful acts.

Paul Tyrrell
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