



Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008

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Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008

Date introduced: 20 March 2008

House: House of Representatives

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Commencement: Sections 1 to 3 commence on Royal Assent. Schedules 1 and 2 commence on a date to be fixed by proclamation. However, they cannot commence before the Montreal Convention itself comes into force.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The main purpose of the Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008 ('the Bill') is to amend various pieces of Commonwealth legislation to implement the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. Along with other provisions in the Bill, this creates a two-tier system of liability designed to ensure that more equitable compensation is available to injured passengers.

Background

Currently, the liability regime that applies to international air carriers is based on the 'Warsaw Convention', as amended. The compensation cap applied under the Warsaw system is outdated:¹

The cap has not been adjusted for inflation, and is set in a currency that no longer exists—that being the franc poincare, consisting of 65.5 milligrams of gold of millesimal fineness 900.

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1. Anthony Albanese, Minister for Infrastructure, Transport, Regional Development and Local Government, 'Second Reading Speech: Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008' House of Representatives, *Debates*, 20 March 2008, p. 1.

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The Montreal Convention revises the arrangements applying to the air carrier's liability during international carriage of passengers and cargo in several ways.

First, the Montreal Convention introduces a two-tier system of insurance liability for international air carriers. Eligible applicants will be able to claim up to 100,000 special drawing rights, equivalent to around \$A172,000, as at 25 February 2008, on a strict liability basis. This means, in respect of the strict liability cap, the applicant will not need to prove that the carrier was at fault.² Damages greater than 100,000 special drawing rights would be available to eligible applicants unless the air carrier proves that the damage was not caused by the negligence or other wrongful act or omission of the carrier, its servants or agents.³

Second, the Montreal Convention also provides consumers with the advantage of a 'fifth jurisdiction' to hear claims for damages, thus potentially providing potentially Australians with the choice and convenience of enforcing their legal rights in Australia. This is because consumers will be able to bring an action for damages in the country that they resided in at the time of the accident, so long as it is a country that is serviced by the carrier, and the carrier has a premises in that country.

This Bill implements the Montreal Convention's requirements in respect of liability arrangements for:⁴

- the death or injury of a passenger;
- the loss or damage to a passenger's baggage;
- the loss or damage to a freight shipment; as well as
- delays to the scheduled arrival of a passenger, baggage or freight.

In addition, the updated definition of 'family' will have the effect of expanding the list of persons who are eligible to enforce liability.

Businesses may also benefit from the changes to the current regime through streamlining of the paperwork associated with the transportation of passengers and cargo. The Bill also allows simplified electronic records to be used for both freight and passenger air transport.

Note, however, that the Bill does not propose amendments to implement those provisions of the Montreal Convention which apply to domestic carriage within Australia. Domestic

2. Explanatory Memorandum, p. 1.

3. *ibid.*

4. Anthony Albanese, *op. cit.*, p. 1.

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carriers will continue to be governed by Part IV of the Carriers' Liability Act.⁵ This provides for liability limits of AUS\$500,000.⁶

Financial implications

The Government's position

The Explanatory Memorandum states that minimal financial implications are expected to flow for the Australian Government from the proposed amendments in the Bill. However, where the Commonwealth is the operator of an aircraft, liability arising out of an accident or death of a passenger may be higher under the Montreal Convention than it would be under current international obligations.⁷

Committee consideration

The Joint Standing Committee on Treaties (the Committee) supported accession to the Montreal Convention and recommended binding treaty action be taken in its [report No. 65](#), tabled on 20 June 2005.⁸ The implementation of the provisions of the Montreal Convention by this Bill is a step towards this.

The Committee also took the view that there will be no financial implications for the Commonwealth or State and Territory Governments as a result of accession to the Montreal Convention.⁹

Main provisions

Schedule 1—*Civil Aviation (Carriers' Liability) Act 1959*

Item 1 of Schedule 1 of the Bill proposes to amend **subsection 5(1)** of the Carriers' Liability Act by inserting the definition of the 1999 Montreal Convention.

5. *ibid.*, p. 2. See also Explanatory Memorandum, p. 13.

6. Anthony Albanese, *op cit.*; Explanatory Memorandum, *op. cit.*, p. 13. See also paragraph 31(1)(a) *Civil Aviation (Carriers' Liability) Act 1959*.

7. Explanatory Memorandum, *op. cit.*, p. 3.

8. Joint Standing Committee on Treaties, *Report 65: Treaties Tabled on 7 December 2004 (3) and 8 February 2005*, Parliament of the Commonwealth of Australia, Canberra, May 2005, p. 31.

9. *ibid.*, p. 29.

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Implementing the Montreal Convention

Item 3 of Schedule 1 of the Bill proposes to insert a **new Part IA** into the Carriers' Liability Act, which would contain provisions implementing the Montreal Convention. Some of the key provisions are as follows.

Liability for death

Clause 9D imposes liability in respect of death on an international air carrier in the following way. Liability for death occurs in respect of the death of a passenger or in respect of an injury that results in the death of a passenger.

Liability under the Convention is in substitution for any civil liability of the carrier under any other law in respect of a passenger's death or injury resulting in death.

Liability is enforceable for the benefit of any of the passenger's family members who sustained 'damage' because of the passenger's death.

Liability is also enforceable for the benefit of the passenger's personal representative to the extent that damages recoverable include:

- loss of earnings or profits up to the date of death of the passenger
- funeral, medical or hospital expenses paid or incurred by the passenger prior to death or by the passenger's personal representative.

In general, damages recoverable in a claim include:

- loss of earnings or profits up to the date of the passenger's death
- reasonable funeral expenses, and
- reasonable medical or hospital expenses incurred that relates to the injury resulting in the passenger's death.

Notwithstanding that certain types of damages may not be recoverable under Article 29 of the Montreal Convention¹⁰, in awarding damages, the court is not limited to the financial loss resulting from the death of a passenger.

10. See **item 10** of Schedule 1 of the Bill. Article 29 of the Montreal Convention states that:

“In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable”.

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Liability for injury

Clause 9E provides that a carrier's liability under the Montreal Convention for personal injury to a passenger is in substitution of any civil liability under any other law in respect of the injury, subject to the exclusion stated in **clause 9F**.

Liabilities that are not excluded

Clause 9F affirms that the Montreal Convention and this Bill do not exclude a carrier's liability to indemnify an employer of a passenger in respect of workers' compensation payments, or to pay contributions to a tortfeasor¹¹ who is liable in respect of the death of, or injury to, the passenger.

Proceeds of insurance policies, superannuation etc

Clause 9G states that in assessing liability, the items that cannot be taken into account to reduce damages are the claimant's receipt or possible receipt of money from other sources, including:

- insurance
- superannuation
- inheritance, and
- social security benefits.

Contributory negligence

Clause 9H provides that damages payable to a claimant are to be reduced in cases of contributory negligence.

Increasing insurance levels by regulation

Item 8 of Schedule 1 of the Bill proposes to insert a **new paragraph 41C(3)(aa)** into the Carriers' Liability Act. The amendment proposes that insurance liability levels for Australian international carriers can be increased by regulation. Note that Article 24 of the Convention¹² provides for five-yearly reviews of liability limits to account for inflation.

The proposed regulation changes can be disallowed, ensuring that Parliament retains oversight of such amendments.

11. A tortfeasor is a party who has participated in the commission of a civil wrong.

12. See **item 10** of Schedule 1 of the Bill.

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Schedule 2—Other Amendments

Part 1 - Amendments relating to family members

Expanding the family definition

Item 3 of Schedule 2 of the Bill proposes to **amend section 5** of the Carriers' Liability Act by inserting a definition of 'family member', which includes a passenger's:

spouse, de facto spouse; parent, step-parent, grandparent; child, step-child, ward, grandchild; sibling, step-brother or step-sister, half brother or half-sister; or a person who is wholly or partly dependent on the passenger for financial support and is a foster-sibling, foster-child or guardian.

Note that the proposed definition allows for ex-nuptial and adoption relationships. However, the Bill is silent on the issues of same sex relationships.

Also, additional classes of persons may be prescribed by regulation.

Providing for family members

Item 7 of Schedule 2 of the Bill proposes to **substitute paragraph 15(d)** of the Carriers' Liability Act. The proposed provision provides that all of a deceased passenger's family members benefit from provisions of the Carrier's Liability Act, and that the amount of damages payable in respect of death are not reduced by considerations of interest gained in a home or a contents of a home because of a passenger's death.

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