Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Civil Aviation Carriers' Liability Discussion Paper on Australia's Aviation Liability and Insurance Legal Framework

Submission to Department of Infrastructure, Regional Development and Cities

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CONTENTS

Who we are 3

Introduction 4

Summary of evaluation of options 4

- Option One: Maintain a capped liability framework 4
- Option Two: Align with the Montreal Convention’s (MC99) two-tier system 4
- Option Three: Remove all liability limits 5

Removing the capped liability framework 5

Expanding the scope of liability to include mental injuries 6

Recommendations 6

Conclusion 7

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]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to respond to the Department of Infrastructure, Regional Development and Cities' Discussion Paper (DP) on Australia's Aviation Liability and Insurance Legal Framework.

2. Compensation is one of the ALA's core federal policy focus areas for 2018. It is for this reason, along with the ALA's primary commitment to protecting the rights of ordinary people, that the ALA's submission will focus on aspects of the DP that relate to damages claims for personal injury and death under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (CACL Act), as opposed to other matters including cargo claims.

3. The ALA notes that two options are presented in the DP as alternative methods of amending the capped liability system. We have responded to these and, in addition, propose a third option.

Summary of evaluation of options

Option One: Maintain a capped liability framework

4. In the ALA's view, this option punishes both passengers and their dependants in a unique manner that other kinds of tort claims in Australia do not. It is also not sustainable in the context of the high confidence and safety levels now realised in the modern air transport industry. The ALA therefore does not endorse continuing this capped system.

Option Two: Align with the Montreal Convention's (MC99)[2] two-tier system

5. This is preferable to Option One in the ALA's view. It ensures an element of strict liability, which is fundamental for holding air carriers responsible to passengers and is particularly important given the inequity of power and responsibility for safety. Simultaneously it enables passengers to recover proven damages to an (effectively) unlimited amount (in the absence of the air carrier making out defences under Article 21 of MC99).

[2] *The Convention for the Unification of Certain Rules for International Carriage by Air*, adopted 28 May 1999, entered into force 4 November 2003.

Option Three: Remove all liability limits

6. The MC99 two-tier system was reached as part of an international compromise between states. It does not represent optimal practice now, nearly 20 years after that compromise was made diplomatically. Australia has an opportunity to implement a best practice liability framework that better reflects the low-risk environment of modern air transport, and which can also serve to reflect passengers' rights along the lines of other kinds of claims in personal injury law.

Removing the capped liability framework

7. From a tort law perspective, where damages are awarded to put the plaintiff back to their pre-accident position, arbitrary liability caps only serve to protect those that cause the damage: the air carriers. Especially when these caps are allowed at a time when air travel is considered to be very safe (measured in any of the several ways this is monitored) and where it is always preferable as a matter of policy for air carriers to be focused on their obligations to passengers, be it under legislative liability frameworks or otherwise.

8. Passengers' rights to recover damages should enable a process through which they can prove losses without the arbitrary hindrance of monetary caps. Removing artificial barriers to genuine cases of compensation for passengers should be a clear and achievable aim of this review.

9. A review of aviation cases of injury and death claims in Australia shows that damages suffered can extend well beyond the limitation caps.[3] Factors that may incur greater damages will be dependent on individual cases. For example, where a deceased person has multiple dependants, or where injuries incurred require extensive and ongoing care, it is foreseeable that damages would reach and surpass $1 million. Limiting such claims in genuine circumstances gives no benefit to the Australian community. . The monetary amount of damages should be assessed by courts without artificial legislative restriction.

[3] See *Thornton v Lessbrook Pty Ltd* [2010] QSC 308; *Emily Kepa, for and on behalf of the estate and dependants of Frank Billy, deceased & Ors v Lessbrook Pty Ltd (In Liq)* [2012] QSC 311.

Expanding the scope of liability to include mental injuries

10. While the ALA understands that the issue of 'bodily injury' is not the primary focus of the Department's current review, it would be remiss to not address the quasi-discriminatory effect of the present legislation, which excludes compensation for 'pure' psychological injuries resulting from aviation accidents.

11. In the NSW Court of Appeal's examination in *Pel-Air Aviation Pty Ltd v Casey*[4] the Court found that post-traumatic stress disorder was not a compensable injury under the MC99 system. While it is understood that the Court's decision in *Casey*[5] is broadly in line with international state practice arising from the predecessor to the MC99 (the various 'Warsaw' instruments), the ALA submits that Australia could reasonably and cogently expand this aspect of the MC99 system by amending the Civil Aviation Carriers' Liability (CACL) framework.

12. Whether or not the exclusion which arose out of the Warsaw Convention 1929 was intentional, in order to promote prejudice against mental health injuries, is a matter best confined to the depths of history. However, it remains that the exclusion harks back to a time when prejudice surrounded mental health and there was a general lack of understanding about psychiatric illnesses within both the medical profession and the community.

13. The ALA acknowledges the benefits that this exclusion provides to airlines and their insurers, yet maintains that this does not remain a valid reason why psychiatric illnesses should be excluded from genuine compensable damages cases under the CACL. This is an important and valid area of aviation compensation that is being neglected and the ALA submits that this should be addressed, even if it requires a separate review.

Recommendations

14. We respectfully recommend the Department should:

    a. Amend the CACL framework to provide for unlimited liability in respect of the death or injury of a passenger in both international and domestic charter and airline carriage.

[4] [2017] NSWCA 32.

[5] [2017] NSWCA 32.

b. In the alternative to point a, amend the CACL framework to align with the MC99's two tier system of liability.

c. Legislatively amend the definition of 'bodily injury' to include 'recognised [or recognisable] psychiatric illness' which is the most common form of description for these types of injuries in civil liability legislation in Australia.

Conclusion

15. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Department of Infrastructure, Regional Development and Cities' Discussion Paper on Australia's Aviation Liability and Insurance Legal Framework. We hope this submission has been of assistance and would be glad to discuss it further if required.

Joseph Wheeler

On behalf of the Australian Lawyers Alliance