



Australian Government

Department of Transport and Regional Services

**Convention for the Unification of Certain Rules for International Carriage by Air,
done at Montreal on 28 May 1999 (Montreal Convention) [1999] ATSD 4713**

Regulatory Impact Statement

RIS ID 6182

Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999

REGULATORY IMPACT STATEMENT

1. Problem

- 1.1. The rules applying in relation to the liability of carriers for damage caused during international air carriage to and from Australia, are complicated, unwieldy and out-of-date. They can result in unacceptably low amounts of damages being payable to victims of air accidents and their families, and in relation to damage to cargo and baggage. They impose outdated and inefficient requirements in relation to documentation for the movement of passengers, baggage and cargo.

The Warsaw System

- 1.2. The *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, done at Warsaw on 12 October 1929 (the Warsaw Convention) was negotiated during the early years of the aviation industry. It provided a uniform international treaty framework for liability rules governing commercial international aviation, and for documentation such as tickets and air waybills. It capped air carriers' liability at limits that were appropriate for that era and that would protect the fledgling industry from potentially ruinous claims for compensation. In return, it provided passengers with reasonable certainty that they would recover a basic level of compensation.
- 1.3. Under the Warsaw Convention an international carrier is liable for the death or injury of a passenger, caused by an the event that took place on board the aircraft or in the course of embarking or disembarking. It is liable for damage to cargo and registered baggage caused by an occurrence during international carriage. It is not necessary for the plaintiff to prove fault, such as negligence. However, the carrier is not liable if it can prove that it took all necessary measures to avoid the damage or that it was impossible to take such measures.
- 1.4. The Convention limits the damages that a court can award against a carrier. The limits are specified in Poincaré gold francs. Since the abandonment of the gold standard, the courts in different countries have adopted different approaches to determining the exchange rate for gold francs, the Australian courts favouring the use of the daily market price of gold. The exchange rate will therefore vary according to the country in which the action for damages is brought.
- 1.5. For the death of, or injury to, a passenger, under the Warsaw Convention the maximum damages that a court can award against the carrier are 125,000 gold francs (of the order of A\$16,000 - \$20,000). For cargo and registered baggage, the Warsaw Convention fixes the maximum damages at 250 gold francs per kilogram (approximately A\$30 - \$40).

- 1.6. However, the liability limits do not apply if the carrier is proved to have acted with intent to cause damage, or recklessly knowing that the damage would result.
- 1.7. The Warsaw Convention attracted wide adherence (151 Parties), but the liability limits were soon considered by many countries to be unacceptably low. Many amendments to the Warsaw Convention were negotiated over the years in an attempt to update it and raise liability limits. These resulted in a 'Warsaw System' comprising the 1929 Warsaw Convention, and the following amending instruments: The Hague Protocol (1955), the Guadalajara Convention (1961), the Guatemala City Protocol (1971), the 1975 Additional (Montreal) Protocols Nos 1, 2, and 3, and Montreal Protocol No. 4 (1975). The most successful of them (135 Parties), was The Hague Protocol, which doubled the liability limits for injury and death. Some later amendments provided for further increases in the liability limits, but they failed to attract broad adherence.
- 1.8. Different Warsaw Parties adopted different amending instruments, resulting in a complex array of international arrangements. The Warsaw System rules that apply in relation to any particular flight are those set by the instruments to which both the country of departure and the country of destination are Parties. For example, Australia is a Party to the Warsaw Convention as amended by The Hague Protocol, the Guadalajara Convention and Montreal Protocol No. 4. Indonesia is a Party to the Warsaw Convention as amended by the Guadalajara Convention. If an accident occurs on a flight for which Australia is the country of departure, and Indonesia is the country of destination, the applicable international law is the Warsaw Convention as amended by the Guadalajara Convention (the liability limits being those in the Warsaw Convention). However, if Australia is the country of departure, and France is the country of destination, the applicable international law is the Warsaw Convention as amended by The Hague Protocol, and the Guadalajara Convention (the liability limits being those in The Hague Protocol), since those are the instruments to which both France and Australia are Parties.
- 1.9. Dissatisfaction with the low liability limits set by the Warsaw Convention and The Hague Protocol, and the inability of the international community to agree on higher ones, led to various measures to 'get round' those limits.
- 1.10. Relying on a provision of the Warsaw Convention that permits a carrier and passenger to agree 'by special contract' to a higher limit of liability, many carriers agreed among themselves to apply an increased liability limit, or to waive liability limits. To this end, private agreements and voluntary arrangements among air carriers were developed, notably within the International Air Transport Association (IATA). Japanese airlines also abandoned liability limits.
- 1.11. Some countries took action in relation to their own airlines. For example, Australia imposed higher liability limits on Australian carriers, although its obligations under the Warsaw System prevented it from imposing the same limits

on foreign carriers. In 1997, the European Council issued a regulation providing for that EC carriers would be subject to a presumptive liability for death or injury up to 100,000 SDRs, and to unlimited liability above that unless the carrier proved it had taken 'all necessary measures' to prevent the damage.

- 1.12. In addition, there has been a tendency for some courts (especially in the USA) to interpret the Warsaw Convention in such a way as to avoid the application of its liability limits where possible, eg by finding that the carrier was guilty of 'wilful misconduct'.
- 1.13. These responses increased the amount of compensation available to many passengers. However, they further complicated the international system. Far from providing the uniformity originally intended by the Warsaw Convention, the rules became fragmented and unpredictable. Determining the amount of damages payable for the death of a particular passenger is likely to depend on which Warsaw instruments apply, national laws or voluntary agreements applying to the particular carrier, and the approach of the courts in the country where the action for damages is brought.
- 1.14. In addition, the obligations imposed by the Warsaw System in relation to tickets and other documentation are now outdated. Although in practice, electronic documentation is already being widely used by the aviation industry for both passenger ticketing and cargo movement, it does not meet the requirements of the Warsaw Convention.
- 1.15. In 1999, the *Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999* (the Montreal Convention) was concluded. It updates, and is intended eventually to replace, the Warsaw Convention and all of its previous amendments.

2. Objectives

Objective of government action

- 2.1. The objective is:
 - to provide for equitable compensation for death or injury to passengers, and damage to baggage and cargo, that occur in international air carriage;
 - to facilitate the efficient operation of international carriage by air of passengers, baggage and cargo.

Existing regulation

- 2.2. The *Civil Aviation (Carriers' Liability) Act 1959* (Carriers' Liability Act) gives the force of law to the Warsaw System instruments to which Australia is a Party:

the Warsaw Convention, The Hague Protocol, the Guadalajara Convention and Montreal Protocol No. 4.¹

- 2.3. The Carriers' Liability Act also includes provisions that apply to inter-State carriage within Australia, and to international carriage that is not covered by the Warsaw System (Part IV), and provisions requiring carriers to have insurance (Part IVA). Complementary State Acts apply Parts IV and IVA of the Commonwealth Act to intra-State travel. However, the legislative provisions relating to purely domestic carriage are independent Australia's obligations under international law.
- 2.4. While the Carriers' Liability Act is based on the Warsaw System, it also introduces some significant improvements. Importantly the Act sets higher liability limits for Australian international carriers than those provided for under the Warsaw system, being:
 - 260,000 SDRs² (approximately A\$550,000) for passenger death or personal injury; and
 - A\$1600 for registered baggage, and A\$160 for hand luggage.
- 2.5. These limits do not apply to foreign carriers, since it would be contrary to Australia's treaty obligations to impose higher liability limits on foreign carriers than are provided for in the applicable international instruments. However, in practice, under the IATA agreements, many foreign carriers entering Australia have already voluntarily waived liability limits or accepted limits that are higher than those applying under the Warsaw System.
- 2.6. Part IVA of the Carriers' Liability Act stipulates mandatory non-voidable insurance for all air operators carrying fare-paying passengers, including foreign carriers providing services to and from Australia, with the minimum insurance level being 260,000 SDRs per passenger.

Existing voluntary code

- 2.7. In addition to the Carriers' Liability Act, a voluntary industry code (the Code for the Preparation of Airline Family Assistance Plans) sets out minimum standards for airlines operating to and from Australia, in giving assistance to victims, and the families of victims, in the event of a major civil aircraft accident involving loss of life or serious injury. Among other things, the Code provides that in the event of the death of a passenger, airlines should offer an advance payment to the family as soon as practicable after the event. It does not stipulate a particular

¹ It also includes provisions that would give effect to other Warsaw System instruments, if Australia were to become a Party to them and if they were to enter into force, eg Montreal Protocol No.3, the Guatemala Convention.

² SDR means Special Drawing Right of the IMF. On 21 June 2004 the SDR rate was A\$0.4707 as published by the Reserve Bank of Australia

limit, but mentions the example of the European Community minimum advance payment, in the event of death, of approximately A\$30,000.

Existing policy

- 2.8. In June 1999, the Minister for Transport approved the commencement of a consultation process with a view to ratification of the Montreal Convention.

3. Options

Option 1

- 3.1. Option (1) involves Australia acceding to, and implementing, the Montreal Convention.

The Montreal Convention

- 3.2. The Montreal Convention was concluded in 1999. It modernises the international air carriers' liability framework and provides measures such as electronic documentation to assist the smooth movement of air passengers, baggage and cargo.
- 3.3. The Montreal Convention incorporates most of the provisions of the earlier Warsaw System instruments, but combines them as a single package that States must either accept or reject. States will no longer be able to ratify some Protocols and not others. For the Montreal Convention to be effective, it is essential that a large number of States adhere to it, particularly the major aviation nations. As more and more States become Parties to the Montreal Convention, the older Warsaw System instruments will become increasingly redundant and there will be increasing pressure on non-Parties to join the new Convention. In time, it is intended that the Montreal Convention will completely replace the Warsaw System.
- 3.4. The Montreal Convention entered into force on 4 November 2003. As at 22 June 2004, 53 States and one Regional Organisation (the European Community) had adhered to it. The Parties include the European Community and its member countries, which ratified on 29 April 2004, the United States, New Zealand, Canada, and Japan.
- 3.5. The Montreal Convention goes further than consolidating existing Warsaw System instruments. There are a number of refinements and reforms in the Convention. It substantially improves consumer protection in international carriage by air and modernises the smooth flow of passengers, baggage and cargo. Most importantly it improves the international regime for air carriers' liability, particularly in relation to injury or death.

Main features of the Montreal Convention

Two tier liability for death or injury

- 3.6. Article 21 provides for two tiers of liability for the death of, or bodily injury to, an aircraft passenger:
- The first tier - up to 100,000 SDRs (approx. A\$212,000) - is on the basis of strict (no-fault) liability, and can be reduced or excluded only in the case of contributory negligence of the passenger or person claiming compensation;
 - The second tier (ie, for claims in excess of 100,000 SDRs) is unlimited in amount, but this liability is fault-based. However, the plaintiff is not required to prove fault. The carrier is liable unless it proves either that the damage was not due to negligence or any other wrongful act or omission, or that the damage was solely due to the negligence or the wrongful act or omission of a third party.

Proven damages rather than punitive damages compensation

- 3.7. Article 29 expressly provides that punitive, exemplary or other non-compensatory damages may not be recovered in any claim arising from international carriage by air.

Updated liability limits for baggage, cargo and delay

- 3.8. Article 22 of the Montreal Convention provides for liability of the air carrier for baggage (either accompanied or unaccompanied) up to a limit of 1,000 SDRs (\$A2,120) for each passenger, unless a special declaration is made to the carrier by the passenger. If the carrier admits loss of checked baggage or checked baggage has not arrived after 21 days, a passenger may make a claim. The liability limit for cargo is 17 SDRs (\$A36) per kilogram. Where damage is caused by delay, the carrier is liable up to a limit for each person of 4,150 SDRs (\$A8810), unless it proves it took all reasonable measures to avoid the damage. Court costs may also be awarded to the claimant. These provisions represent substantial improvements on the current Warsaw System arrangements.

Regular revision of liability limits

- 3.9. Article 24 provides for a regular review of carriers' liability limits every five years to take account of inflation. The International Civil Aviation Organization (ICAO) must measure the accumulated inflation over the review period, and if it exceeds 10% must notify the Parties of a revision of the limits of liability. The revision takes effect 6 months later, unless a majority of Parties register their disapproval, in which case the matter is referred to a meeting of Parties.

SDRs

- 3.10. The Montreal Convention uses the International Monetary Fund's Special Drawing Right (SDR) as the monetary unit rather than the obsolete Poincaré gold

francs of the Warsaw Convention. On 21 June 2004 the SDR rate, as published by the Reserve Bank of Australia, was A\$ 0.4707.

Advance payments

- 3.11. Article 28 allows States to require their carriers to make advance payments without delay following aircraft accidents, to assist victims or their relatives to meet their immediate economic needs. These payments are not to constitute recognition of liability, and may be offset against any amounts subsequently paid as damages by the carrier. The Convention does not permit Australia to subject foreign carriers to this requirement.

Insurance

- 3.12. Article 50 the Convention obliges States to ensure their air carriers maintain adequate insurance to cover their liability under the Convention. A carrier may be required by the State into which it operates to furnish evidence that it maintains adequate coverage for its liability.

Fifth jurisdiction

- 3.13. Under the (pre-Montreal Convention) Warsaw System, claims for damages can be heard in one of four jurisdictions:
- a court in the State where the carrier is ordinarily resident;
 - a court in the State where the carrier has its principal place of business;
 - a court in the State where the carrier has an establishment by which the ticket was purchased or contract was made; and
 - a court in the State of the passenger's destination.
- 3.14. Article 33 of the Montreal Convention provides for a 'fifth jurisdiction'. It allows an action for damages for the death or injury of a passenger to be brought in the country where the passenger had his or her principal and permanent residence at the time of the accident, if it is a country to or from which the carrier operates and where it has premises.

Simplified documentation/electronic ticketing

- 3.15. The Montreal Convention provides for simplified documentation. It eliminates the need for cargo consignors to complete detailed paper-based air waybills, and so allows simplified electronic records to be used. As long as the passenger or consignee has adequate evidence of the contract and provided it is in a form that meets the requirements of border control agencies, there is no reason why documentation should not be electronic.

Implementation of the Montreal Convention

- 3.16. Amendment of the Carriers' Liability Act will be required to provide for compliance with the Montreal Convention, if Australia accedes to it. The Act would be amended to give the force of law to the Montreal Convention in Australia, in relation to air carriage to which the Convention applies as international law. This will require Australian courts to apply the terms of the Convention in actions for damages arising out of flights to which the Montreal Convention applies.
- 3.17. Consequential amendment of the *Air Accidents (Commonwealth Government Liability) Act 1963* will be required. The Air Accidents Act applies to persons travelling on Commonwealth-operated aircraft, or travelling on Commonwealth business on commercial airlines. It provides for the Commonwealth to 'top-up' damages to the level that applies to domestic travel, in cases where lower Warsaw limits apply. Minor amendment is necessary to prevent Commonwealth liability under the Air Accidents Act from being substituted for its liability under the Montreal Convention.
- 3.18. The provisions of the Carriers' Liability Act applying to non-Montreal Convention international flights (ie between Australia and a country that is not a Party to the Montreal Convention) would remain unchanged. The provisions of the Act applying to domestic flights would also remain unchanged.
- 3.19. As already mentioned, the Carriers' Liability Act currently imposes on Australian international carriers a higher liability limit (260,000 SDRs or around A\$552,000), for death or injury, than applies under the Warsaw System. If Australia accedes to the Montreal Convention and amends the Carriers' Liability Act to give effect to it, the 260,000 SDR limit will continue to apply to Australian carriers in relation to non-Montreal Convention carriage. However, for carriage to which the Montreal Convention applies, both Australian and foreign carriers will be subject to a first tier strict liability limit of 100,000 SDRs, and a second tier of unlimited fault-based liability (with the airline bearing the burden of proving absence of fault), for death or injury. It is not proposed, under Option 1, to impose on Australia carriers first tier liability of 260,000 SDRs. The application of the levels as set out in the Montreal Convention is preferred, in order to maintain the integrity of the international system established by that Convention. Further, the limit of 260,000 SDRs in the current Act is an overall liability limit. Under the Montreal Convention, on the other hand, 100 000 SDR is not a cap on liability, but the level at which a change in the basis of liability occurs (from strict liability, to liability that can be excluded by proving absence of fault). The Montreal Convention limits in relation to delay, baggage and cargo will also apply.
- 3.20. Any inflation-linked updating of the Montreal Convention limits, under Article 24, will apply automatically under Australian law.

- 3.21. Under Option 1, it is proposed that, for Montreal Convention carriage, the amount of compulsory insurance against event of death or injury remain unchanged at 260,000 SDRs per passenger. This is considered to be 'adequate insurance' as required by Article 50.
- 3.22. It is proposed that advances of damages would remain subject to the voluntary industry code mentioned above, rather than being required by law.

Option 2

- 3.23. Option 2 is not to become a Party to the Montreal Convention but to attempt to improve the situation, so far as concerns Australia, by unilateral action.
- 3.24. The Warsaw Convention, The Hague Protocol, the Guadalajara Convention and Montreal Protocol No. 4 would continue to apply to carriage between Australia and Parties to any of those instruments (including Montreal Convention Parties). Those agreements severely limit the Australian Government's ability to legislate, or take administrative action, in relation to the matters dealt with in them, without contravening Australia's international obligations. For example, Australia has already imposed a higher liability limit on Australian international carriers than on foreign carriers. To impose a higher limit on foreign carriers than is provided for under the relevant Warsaw System instruments, without acceding to the Montreal Convention, would contravene Australia's international obligations.
- 3.25. The applicable international provisions in relation to documentation would remain unchanged.

Option 3

- 3.26. Option 3 is to delay acceding to and implementing the Montreal Convention until it has a very large number of Parties, so that when Australia accedes it will be joining a uniform world-wide system.

4. Impact Analysis

Those affected

- 4.1. The problem affects international carriers, their passengers and those sending cargo overseas by air. It particularly affects passengers who suffer injury, the families of passengers who are killed, and the owners of baggage and cargo that is delayed or damaged, in the course of international carriage.

Option 1

Effect on existing regulation

- 4.2. Amendment of the Carriers' Liability Act to give effect to the Montreal Convention, and consequential amendment of the Air Accidents Act, would be needed. No other legislation, or regulations would be affected. The provisions of the Carriers' Liability Act and of State and Territory legislation relating to domestic air carriage would not be affected.
- 4.3. Neither would option 1 affect the rules applying to international carriage between Australia and a country that is not a Party to the Montreal Convention.
- 4.4. However, accession to the Montreal Convention would change the rules applying to carriage between Australia and another Montreal Convention Party. For example, currently carriage between Australia and the United Kingdom is subject to the rules in the Warsaw Convention as amended by The Hague Convention, Guadalajara Convention and Protocol No 4. Upon Australia becoming a Party to the Montreal Convention carriage between Australia and the UK would be covered by the Montreal Convention.
- 4.5. Most of Australia's major aviation partners are now Parties to the Montreal Convention, and others such as Singapore and Hong Kong are working towards becoming Parties. If Australia becomes a Party to the Montreal Convention, that Convention will apply to carriage between Australia and those partners. This means that entry into force of the Montreal Convention for Australia will have the effect of immediately applying the its provisions to a large number of passengers and a large volume of cargo.

Liability limits

- 4.6. In relation to carriage covered by the Montreal Convention, consumers - passengers and those sending cargo - who suffer damage would potentially benefit from changes in the law relating to liability limits. In particular, passengers who are injured, and the families of passengers who are killed, are likely to benefit from removal of any overall limit on the liability of the carrier. Further, the provision for strict liability up to 100,000 SDRs means that compensation up to that level is payable, even if the carrier can prove that it took all necessary measures to prevent the damage.
- 4.7. In many cases, already, the liability limits provided for under the Warsaw System do not affect the award of damages in practice. Most international carriers operating into Australia are parties to inter-carrier agreements under which they do not rely on the Warsaw Convention limits or defences. It therefore cannot be claimed that all consumers suffering damage resulting from carriage between Australia and another Montreal Convention Party will receive greater compensation as a result of Australian accession to, and implementation of, the

Montreal Convention. However, at the least, option 1 will provide considerably more certainty as to the availability of compensation.

- 4.8. In addition, consumers in the future will benefit from regular updating of liability limits in line with inflation.
- 4.9. Australian and foreign international carriers are already subject to the Montreal Convention in relation to carriage between two Parties to that Convention. Further, Qantas and most foreign carriers operating into Australia, are parties to inter-carrier agreements under which they already agree to waive liability limits and defences available under the Warsaw System. The increased liability limits under the Montreal Convention would not result in any further burden on those carriers.
- 4.10. Adoption of the Montreal Convention provisions is not expected to increase insurance premiums for Australian international carriers or foreign international carriers. Apart from the effect of the inter-carrier agreements, insurers, in setting premiums for carriers that operate into the USA, already factor in the possibility of US courts deciding that the carrier or its agents have engaged in wilful misconduct and that liability limits therefore do not apply.
- 4.11. Carriers and consumers will also benefit from the fact that the Montreal Convention expresses liability limits in SDRs. This removes existing uncertainty about the values to be applied, resulting from disagreement on the way in which the obsolete gold franc amounts in the Warsaw System instruments are to be converted.

Fifth jurisdiction

- 4.12. Consumers who seek damages from carriers will also benefit from the provision in the Montreal Convention for a 'fifth jurisdiction'. This would give most Australian citizens access to Australian courts to pursue claims in relation to flights to which the Montreal Convention applies.
- 4.13. The 'fifth jurisdiction' provision also means that Australian carriers may potentially be exposed more often to litigation in courts such as those of the United States. However, Australian airlines that fly to the US are required by US law to have appropriate liability insurance to cover awards by US courts. Carriers sued in US courts and other foreign courts will also potentially benefit from the Montreal Convention's prohibition of punitive or exemplary damages.

Documentation

- 4.14. Australian carriers and consumers would benefit from the provision in the Montreal Convention for simplified documentation, which allows the use of electronic ticketing. This is in keeping with practices being adopted in relation to

other modes of transport, and in commerce generally. Australia has been at the forefront of international initiatives to simplify and speed up the process of movement across borders by using electronic methods. While electronic documentation is already being used in practice by international air carriers under *ad hoc* arrangements, the Montreal Convention provides the added benefits of a standardised international system.

International uniformity

- 4.15. Australian accession to the Montreal Convention would be a step towards the uniformity of international rules relating to carriage by air. Uniformity will remove uncertainty as to the rules that apply in any particular case. It will also remove inconsistency between rules applying at different stages of international carriage, or to different passengers or cargo on the same flight (eg where the original departure and/or ultimate destination are different). This is expected to provide the benefit to both consumers and carriers of improving efficiency and reducing litigation.

Small Business

- 4.16. Option 1 would create no significant burdens on small business. It would create benefits for freight forwarders through increased efficiency and certainty about liability limits. It would potentially create benefits to small businesses sending cargo internationally by more efficient documentation, a more certain legal regime and increased liability limits. Small travel agents may benefit from the increased efficiency of a standardised electronic ticketing system.

Domestic carriers

- 4.17. There would be no effect on purely domestic carriers, including rural and regional carriers. The Montreal Convention applies only to international carriage.

Option 2

- 4.18. Option 2 would have no benefits or costs to consumers or carriers, as compared to the existing situation, so far as concerns the recovery of damages.
- 4.19. Under option 2, difficulties in the use of electronic ticketing would persist and perhaps increase as technology develops, and as the standardised system between the Montreal Convention Parties becomes more widely used.
- 4.20. Option (2) would not contribute to the development of a uniform international framework for liability and documentation for international civil aviation. Australia would be out of step with other developed countries, such as the US, the countries of the European Community, Canada, New Zealand and Japan. By remaining part of the outdated Warsaw System, rather than assisting with the establishment of a modern, uniform system by becoming a Party to the Montreal

Convention, Australia would be seen as part of the problem, rather than part of the solution, from an international perspective.

Option 3

- 4.21. Option 3 would have the same consequences as Option 2, until Australian accession to, and implementation of, the Montreal Convention. Thereafter it would have the same consequences as Option 1, subject to the following.
- 4.22. Carriers and consumers would have the benefit that, upon Australian accession, there would be greater certainty about the applicable rules and liability limits. All (or nearly all) international carriage by air would be subject to the Montreal Convention, and Australia would be joining a uniform international system.
- 4.23. However, in the meantime, consumers and carriers would be subject both to the existing inconsistencies and uncertainties of the Warsaw System, and to uncertainty as to when Australia will accede to the Montreal Convention. It is not possible to predict when the Montreal Convention will have so many Parties as to constitute a world-wide uniform system, replacing the Warsaw System instruments. It may well take some years.
- 4.24. At the stage when the Montreal Convention had only a few Parties, and especially before it entered into force, the benefits of waiting to see whether it would attract a sufficient number of Parties to create a viable international system outweighed the disadvantages of not being a Party. A number of earlier instruments in the Warsaw System had failed to attract sufficiently broad adherence, resulting in the excessive complication of that System.
- 4.25. However, the Montreal Convention is now in force. Further, most of Australia's major aviation partners are already Parties to the Montreal Convention, and the others are expected to become Parties soon. Waiting for a greater number of Parties, therefore, may make little difference to the ultimate benefits to consumers and carriers in relation to carriage to and from Australia.
- 4.26. A disadvantage of Option 2 is that delaying accession may harm Australia's standing as a lead nation in international aviation reform. Traditionally, Australia has promoted reform in the aviation industry, and has one of the most liberal regulatory regimes in the world. Following the adherence of the European Community and its Member States in April 2004, the Montreal Convention has now gained such international 'weight' that it is inappropriate for Australia not to accede.

5. Consultation

- 5.1. A Discussion Paper was issued in January 2001, which invited comment on the questions whether Australia should become a Party to the Montreal Convention,

and whether features of the Montreal Convention should be applied to Australia's domestic carriers. As well as publishing the Discussion Paper on its website, the Department wrote to the States and Territories and industry stakeholders with a copy of the Discussion Paper, and faxed a media release to other relevant organisations, in February 2001. Submissions were requested by 20 April 2001 but the deadline was extended to allow for additional comment. The Discussion Paper is still accessible on the Department's website.

- 5.2. Thirty-one submissions were received in response to the discussion paper. Eighteen of those responses directly addressed Australia's ratification of the Montreal Convention and seventeen of those were in favour of ratification³ and implementation of the Montreal Convention for international air travel. These included Australian and overseas international airlines, aviation associations, representatives of the aviation insurance industry, members of the airfreight industry, IATA, a pilots' association, an airline passenger safety organisation, relatives of individuals killed or injured in an airline accident, State and Territory governments, a Commonwealth Department (Defence) and the Government of Papua New Guinea.
- 5.3. A major air transport association summed up the general attitude to the Montreal Convention as follows:

Early ratification by States and coming into force of the Montreal Convention would result in the accrual of significant benefit to consumers and to the air transport industry generally, through the advancement of increased efficiencies and uniformity of law.
- 5.4. Both Australian and overseas international airlines responded positively to the Discussion Paper. The Virgin Blue group, which has a New Zealand subsidiary engaged in Trans-Tasman carriage, was not in existence when the Discussion Paper was issued. The Department contacted that group in June 2004 for comment on proposed accession to the Montreal Convention, and Virgin Blue did not object to the Department's proposal to accede to the Montreal Convention. Qantas was contacted again in June 2004 and it reaffirmed its support for the accession to the Montreal Convention. Qantas did not see the accession to the Montreal Convention as imposing any additional burdens on it, given its voluntary assumption of standards higher than those in the current Warsaw system.
- 5.5. The aviation insurance industry responded positively to the proposal to ratify the Montreal Convention and did not see any increase in insurance premiums resulting from the implementation of the Montreal Convention on an international level.

³ At the time the Discussion Paper was issued, the Montreal Convention was open for signature, which would be followed by ratification, as the means of becoming a Party. Since its entry into force, the Convention is no longer open for signature. Now, the appropriate means for Australia, which did not sign the Convention, to become a Party, is by accession.

- 5.6. The international airfreight industry were particularly in favour of early accession to the Montreal Convention as they argued that the Montreal Convention would eliminate the existing conflict of liability provisions when cargo is carried between States which have ratified none, one or more of the Warsaw Protocols. They expressed concern that the existing conflict has caused much unnecessary litigation.
- 5.7. Consultation with the States and Territories has been undertaken through the Treaties Schedule, as well as through the Discussion Paper. The Queensland and Norfolk Island Governments commented on the Discussion Paper and were supportive of the approach taken.
- 5.8. Relevant Commonwealth agencies were also sent the Discussion Paper, and the Department of Defence provided positive comments.
- 5.9. The only negative response in relation to the Montreal Convention, from two members of the public, was that Australia should push for an even better Convention even though they thought the Montreal Convention was a major step forward. This view was taken at a time when few States were a Party to the Montreal Convention. Attempting to start negotiations for another international convention does not appear to be a real possibility now that most key international aviation States have signed up to the Montreal Convention.
- 5.10. The Department also gave a presentation - 'Reforming Aviation Insurance and Carriers' Liability' - to the Aviation Law Association of Australia and New Zealand in Sydney on 19 June 2001, outlining the proposed changes to be brought about by the Montreal Convention.

6. Conclusion and recommended option

- 6.1. Option 2 would leave the existing problem essentially unchanged. Option 3 would leave the existing problem unchanged for an unpredictable length of time, while Australia waited for other countries to become parties to the Montreal Convention. Upon Australian accession to the Montreal Convention, Option 3 would bring essentially the same benefits and costs as Option 1, but with the additional benefit that Australia would be joining an international system that was already uniform. This benefit would not compensate for the disadvantages of persisting in the present situation for a number of years, particularly from the point of view of Australia's international standing as a modern aviation nation.
- 6.2. The preferred option is Option 1, namely for Australia to accede to the Montreal Convention, and for the Carriers' Liability Act to be amended to give effect to it. The problem of inconsistent and unsatisfactory rules on international air carriers' liability was created at the international level, and can only be effectively solved at that level. The Montreal Convention is the solution negotiated by the

international community. For carriage to and from Australia to benefit from the solution, Australia must accede to, and implement, the Montreal Convention.

7. Implementation and review

- 7.1. The Department of Transport and Regional Services will have responsibility for the steps leading to accession to the Convention and administration of the amended legislation.