VII AVIATION AND SPACE LAW

Air law – civil aviation agreements – air links between Australia and Taiwan

On 26 March 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, issued a news release which read in part:

> The Minister for Foreign Affairs and Trade, Senator Gareth Evans, today confirmed the signing in Taiwan yesterday of a commercial aviation understanding which provides a framework for establishing Australia–Taiwan air services.
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> The understanding was signed by the Australian Commerce and Industry Office, the Taipei office of the Australian Chamber of Commerce, on behalf of the Qantas subsidiary Australia Asia Airlines, and Taipei officials.
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> "Air links between Australia and Taiwan will significantly assist the development of commercial ties, including tourism, with Taiwan and we have been looking forward for some time to this breakthrough", Senator Evans said.
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> ...
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> Senator Evans said that Australia's acceptance of the PRC as the sole legal government of China, and acknowledgement of Taiwan as a province of China, meant that Australia could not conclude a government–to–government air services agreement with Taiwan.
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> Moreover, in accordance with Australia's one–China policy, the Government had stipulated that neither the Australian flag carrier Qantas nor Taiwan's flag carrier China Airlines would themselves be permitted to operate the route.

On 5 September 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in the course of an answer to a question without notice (Sen Deb 1991, pp 1198–9):

> Last night in Taipei the technical annex to the airline services understanding between Australian and Taiwanese commercial interests was signed, thus enabling airlines from both sides to now lodge applications for operating approvals, the last stage of the process of establishing air links. Those remaining technical procedures could take a few weeks and I will make a formal announcement when a precise date for the commencement of services is known.

On 4 October 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, issued a news release which read as follows:

> The Minister for Foreign Affairs and Trade, Senator Gareth Evans, welcomed the announcement today by Australia Asia Airlines that it would begin direct flights to Taipei from 11 October.

A Taiwan company, Mandarin Airlines, will begin direct flights to Australia on 16 October.

"Direct airlinks will boost two-way trade with one of Australia's most important trading partners in the region", Senator Evans said.

"They will eliminate the complications of having to off-load and re-load goods, especially perishable products, at destinations in between", Senator Evans said.

"Two-way tourism and business travel also will be boosted."

Senator Evans said that in accordance with Australia's one-China policy, which recognised the Government of the People's Republic of China as the sole legal Government of China, and acknowledged the position of the Chinese Government that Taiwan was a province of the People's Republic of China, the Australian Government had kept the Government of the People's Republic of China informed of the commercial negotiations leading up to the establishment of Australia-Taiwan airlinks.

Senator Evans said further that in accordance with the 1972 agreement, which established diplomatic relations between Australia and the People's Republic of China, and following consultations with the PRC Government, the Australian Government had agreed that the Australia-Taiwan air route would be operated by airlines which were not official carriers (Qantas or China Airlines).

As a result, aircraft flying on the route would not bear the flags, insignia or liveries normally associated with an official carrier.

The services would be conducted under commercial transportation arrangements negotiated between Australia Asia Airlines and private Taiwan airlines in Taiwan. In accordance with its one-China policy, Senator Evans said, Australia did not maintain official contact with Taiwan. These air service arrangements were thus of an unofficial nature.

Air law - carriage of dangerous goods on aircraft

On 22 August 1991 the Minister for Shipping and Aviation Support, Senator Collins, said in the course of an answer to a question without notice (Sen Deb 1991, p 930):

Regrettably, there has been a rapidly increasing incidence of dangerous goods being carried on aircraft. That is of great concern to the aviation industry and to the Government. As a result of that, this morning in Melbourne I launched a public awareness campaign on the carriage of dangerous goods on aircraft. The aviation industry and the CAA are becoming increasingly concerned that a growing number of passengers are not aware of, or are ignoring, the laws relating to carriage of dangerous goods on aircraft.

Air law – crimes against aircraft – international conventions – Australian legislation

On 3 September 1991 the Attorney–General, Mr Duffy, introduced the Crimes (Aviation) Bill 1991 into Parliament, and explained the purpose of the Bill in part as follows (HR Deb 1991, pp 504–5):

> The Crimes (Aviation) Bill 1991 consolidates the provisions of the four Acts forming the current aviation crimes legislative package. Three of these Acts, that is, the Crimes (Hijacking of Aircraft) Act 1972, the Civil Aviation (Offenders on International Aircraft) Act 1970, and the Crimes (Protection of Aircraft) Act 1973 implement international conventions to which the Commonwealth is a party. Those conventions are incorporated in four schedules to the Bill. The fourth Act, the Crimes (Aircraft) Act 1963, is domestic oriented legislation governing the law applying on board certain aircraft and prescribing offences in relation to aircraft. All four of these Acts are repealed by the Bill.
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> With the exception of the Crimes (Aircraft) Act 1963, the Acts have been enacted on a convention by convention basis so that four specialised Acts cover different aspects of crimes, all involving aircraft. This consolidation has allowed the provisions of all four Acts to be reviewed. As a result the jurisdictional and procedural requirements have been rationalised and law applying in relation to crimes involving aircraft has been vastly simplified. All aircraft over which the Commonwealth has jurisdiction are covered by the Bill.
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> The Bill contains no new offences, but simply re–enacts offences in the existing Acts. These offences, created in part 2 of the Bill, relate to aircraft, aerodromes, airports and air navigation facilities. In the light of the Director of Public Prosecutions Act 1983 the requirements in the existing Acts that the Attorney–General, or a person authorised by the Attorney–General, consent to each prosecution has not been re–enacted.
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> In conjunction with the Acts Interpretation Act 1901, the Bill ensures that a person who commits an act before its commencement may be prosecuted under the current aviation crimes legislative package to which I have referred. While preserving the effect of State and Territory laws, the Bill ensures that no person may be punished under the separate legal regimes for the same conduct; that is, double jeopardy is prohibited.
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> The traditional, and necessary, authority of the aircraft commander in relation to acts done on board an aircraft is preserved. Where the commander of an aircraft suspects a person of committing an offence, or believes it is necessary in order to prevent the commission of an offence, the commander may disembark that person and have him or her dealt with under provisions of the Bill.

Air law – international civil aviation – carriers' liability

On 17 October 1991 the Parliamentary Secretary to the Minister for Transport and Communications, Mr Snowdon, introduced the Civil Aviation (Carriers' Liability) Amendment Bill 1991 into Parliament, and explained the purpose of the Bill as follows (HR Deb 1991, pp 2201–2):

> This Bill amends the Civil Aviation (Carriers' Liability) Act 1959. The main purpose of the amendments is: to enable ratification of Additional Protocol No. 3 – Montreal Protocol No. 3 – and Montreal Protocol No. 4; to ensure that the Montreal Protocol No. 3 passenger limit applies immediately to Australian international air carriers engaged in carriage to which the Warsaw Convention and Hague Protocol apply; and, to convert the Poincare gold franc limits of the Warsaw Convention and the Hague Protocol to Australian dollars through the medium of the International Monetary Fund's Special Drawing Right, SDR.
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> The major reasons for amending the Act are twofold. Firstly, it is considered that the carriers' liability limits currently applying to the international carriage of passengers by air are insufficient. These are currently around $14,000 to $28,000 depending on whether carriage is covered by the Warsaw Convention or the Hague Protocol. The proposal to ratify Montreal Protocol No. 3 and immediately apply its 100,000 SDR passenger limit to Australia's international airlines will go some way to redress this situation. One hundred thousand SDRs, when converted to Australian dollars, is consistent with the domestic carriers' liability limit of $180,000. Australia has international obligations under the Warsaw Convention and is only able to increase passenger liability limits, without dissociating itself from the international aviation community, that is, by denouncing the Warsaw Convention, by ratifying Montreal Protocol No. 3.
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> Secondly, since the abandonment of the internationally set price of gold in 1973 and the introduction of a fluctuating market price, there has been no agreed means of determining the Australian dollar equivalent of the Poincare gold franc and the courts have often called on the Government to resolve the problem. The conversion of the gold franc limits to SDR equivalents resolves this problem.
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> Given that the amount of passenger compensation encompassed by the 100,000 SDR limit may be considered insufficient, the Government is examining other options to provide equitable compensation to international airline passengers which will not affect the carriers' liability limits fixed by international instrument. This includes examination of the feasibility of a supplemental compensation scheme, perhaps similar to one under consideration in the United States.
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> Montreal Protocol No. 4 is specifically cargo oriented and introduces more modern cargo handling terminology and procedures, including the use of electronic data interchange, EDI. While the passenger limit of Montreal Protocol No. 3 will be applicable immediately to Australian international

carriers, the Protocols will only become generally applicable to airlines engaged in carriage to which they apply when they enter into force internationally.

It is my understanding that should the United States Senate accept the supplemental compensation scheme – called the S–Plan – referred to earlier, then it will support United States ratification of Montreal Protocols No. 3 and No. 4 by the President. It is also my understanding that this ratification may be accompanied by a denunciation of the Warsaw Convention. Unless Australia also ratifies the Montreal Protocols, this action could expose Australian carriers, particularly Qantas, to unlimited liability in the United States.

Since it is our firm belief that US ratification of the two Protocols will lead to their early entry into force, they will in the not too distant future apply to carriage between Australia and the majority of countries. I understand that the US Senate may be voting on the Protocols in the near future.

I turn now to a brief description of the Bill. Since the Warsaw Convention and Hague Protocol will no doubt continue to apply to certain international carriage even after entry into force of the two Protocols, the Bill fixes their Poincare gold franc liability limits in SDRs. The Reserve Bank provides a SDR/Australian dollar conversion rate on a daily basis so enabling the courts to easily convert the limits at the time of judgement. The gold franc limits will have the following SDR equivalents:

Warsaw Convention

Passenger death/injury:

125,000 francs = 8300 SDR

Registered baggage/cargo:

250 francs/kg = 17 SDR/kg

Personal cabin baggage:

5000 francs = 330 SDR

Hague Protocol

Passenger death/injury:

250,000 francs = 16,600 SDR

The registered baggage and cargo and personal cabin baggage limits were not changed by the Hague Protocol. The limits as fixed by the Bill in SDRs are consistent with the move to ratify Montreal Protocols No. 3 and No. 4 with their SDR limits. The SDR equivalents of the Warsaw Convention and the Hague Protocol liability limits will apply to actions involving international carriers which occur on or after the date the Bill receives royal assent. Actions pre–dating this will still be covered by the

current Warsaw Convention and Hague Protocol gold franc limits, irrespective of the date of judgement.

Next, the Bill specifies that for Australian carriers engaged in carriage to which the Warsaw Convention and the Hague Protocol apply, the Montreal Protocol No. 3 passenger liability limit of 100,000 SDR will apply. This is consistent with Article 22 of the Warsaw Convention which permits the voluntary increase of liability limits.

Finally, the Bill inserts two new parts IIIB and IIIC into the Act covering carriage to which Montreal Protocol No. 3 and Montreal Protocol No. 4 respectively apply. These parts will become law on dates no earlier than the entry into force of the Protocols. For ease of reading, consolidations of the convention as amended by successive protocols have been prepared and included as schedules. The amendments will have no effect on government revenue or expenditure. I commend the Bill to the House and present the explanatory memorandum for the Bill.