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## International Air Transport Association

Washington Office

Montreal / Geneva

August 9, 1995

Mr. Don Horn  
Assistant General Counsel  
for International Law  
U.S. Department of Transportation  
400 Seventh Street, S.W.  
Room 10105  
Washington, D.C. 20590

OST-95-232-6

Re: IATA Conference on Airline Liability, Dkt. 49152

Dear Mr. Horn:

With reference to DOT order 95-7-15 issued 12 July 1995, IATA is pleased to file with the Department a report of the Airline Liability Conference Joint Working Group Meeting held in London, 25-26 July 1995.

The Report of the London meeting, attached together with its three Annexes, serves as an accurate **summary** of the discussions.

Should any additional information be required by the Department, IATA is prepared to provide it as expeditiously as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "David M. O'Connor".

David M. O'Connor  
Regional Director, US

cc: Mr. Lorne Clark, General Counsel, IATA

46 pgs

**ALC Working Groups**  
**London, 25-26 July 1995**  
**ATTENDANCE LIST**

ANNEX 1

Airline/Organisation	Name	First Name	Title
Air Canada/AC	DesBois	Cameron	VP & General Counsel
Air Malta/KM	Spiteri	Christopher	Advocate in Legal Office
Air Malta/KM	Fenech	Tonio	Legal Consultant
American Airlines/AA	McNamara	Anne	Snr VP Administration & General Counsel
American Airlines/AA	Brashear	James	Senior Attorney
American Airlines/AA	Alpert	Robert	President, ICALM
Air New Zealand/NZ	Mercer	Anthony	Company Solicitor
Avianca/AV	Dueri	Eduardo	Insurance & Fuel Director
British Airways/BA	Walder	Ken	Legal Director
British Airways/BA	Boone	Caroline	Legal Adviser
British Airways/BA	Lerwill	Peter	General Mgr Risk Management
Cathay Pacific/CX	Bass	Phil	Legal Adviser
Delta Airlines/DL	Parkerson	John	Attorney
Delta Airlines/DL	Mayo	Gerald	Counsel for DL
Egyptair/MS	Sherif	Hussein	Head Int'l Organisations & Government Affairs
Japan Airlines/JL	Abe	Tomoo	Manager, Legal Affairs
Japan Airlines/JL	Tompkins	George	Legal Advisor
<i>vers</i>			
ATA	Warren	Robert	General Counsel & Secretary
EC Commission	Colucci	Anne	Administrator
<i>Insurance reps:</i>			
Bowring Aviation Ltd.	Viccars	Peter	Joint Deputy Chief Executive
Nicholson Leslie Aviation	Palmer-Brown	Jonathan	Chairman
Sedgwick Aviation Ltd.	Trezies	D.P.	Chairman
Sedgwick Aviation Ltd.	McGloin	Patrick	
<i>IATA</i>			
IATA	Clark	Lorne	GC&CS
IATA	Weber	Ludwig	Legal Counsel
IATA	Weinstein	Marla	Legal Counsel
IATA	O' Connor	David	Regional Director - U.S.
IATA	Kelly	Tony	Director - IMA
IATA	Viggers		Insurance Adviser
<i>Outside Counsel</i>			
Wiley, Rein & Fielding	Rein	Bert	IATA Washington Counsel
Frere Cholmeley Bischoff	Franklin	Mark	IATA London Counsel
Beaumont & Son	Gates	Sean	Solicitor - Insurance Expert
<i>AACO</i>			
AACO	Kadoura	Najeh	Assistant VP Insurance/RJ
Air Mauritius/MK	Poonoosamy	Vijay	Director Legal & International Affairs
KLM/KL	Mooyart	Leslie	Snr VP & General Counsel
Philippines Airlines/PR	Rebanal	Levi	VP Risk & Insurance
Qantas/QF	Nearhos	Michael	Senior Solicitor
South African Airways/SA	Orrie	Gasant	Div. Secretary & Legal Adviser
TACA/TA	De Montenegro	Ana	Corp. Director Insurance & Contracts

## **Report of IATA Airline Liability Conference Joint Working Group Meeting London 25-26 July 1995**

In accordance with the decisions of the Airlines Liability Conference Session held in Washington DC 19-23 June, two Working Groups were established on:

- a) the cost impact on airlines of the recommended enhanced liability package; and
- b) appropriate and effective means to secure complete compensation for passengers where circumstances require.

A meeting of the Working Groups was convened in London 25-26 July, attended by representatives of 10 airlines, the European Union and the ATA, as well as 3 insurance brokerage houses (for part of the meeting). The list of participants is set out in Annex 1.

The Members of the Working Groups decided that, due to the significant inter-relationship between the subject matters of the two Groups and their common interest in both Working Group mandates, the two bodies should meet jointly. It was also agreed that the Airline Liability Conference Chairman, Lorne S. Clark, General Counsel and Corporate Secretary of IATA, should chair the Joint Working Group meeting.

The meeting Agenda is attached at Annex 2, and the Working Group Documents at Annex 3.

The Joint Working Group reaffirmed the overriding need to preserve the Warsaw Convention System and to work to help ensure that all existing Parties to the Warsaw treaties remain within the System.

Reacting to a request to review the possibility of adopting a limit lower than the SDR 250,000 tentatively agreed at Washington, the Joint Working Group generally accepted that, taking into account the inflationary impact on Warsaw/Hague/Montreal Agreement limits and the demands of governments, the proposed intercarrier agreement should increase limits worldwide to **no less** than that amount. The non-US airline representatives present reaffirmed their opposition to any mechanism that would compel their financial support for the unlimited liability coverage of US citizens and permanent residents travelling by air on services operated solely between points outside the US.

Much of the meeting was directed to exploring how medium- and small-sized carriers could accept and implement increased liability limits, and the most effective means of providing for unlimited liability for US ticketed passengers.

Discussions mainly centered on:

- a) additional cost of higher limits, especially to medium- and small-sized airlines
- b) whether unlimited liability would cost substantially more than an increase to SDR 250,000
- c) how any increased insurance costs resulting from higher or unspecified liability limits might be minimized
- d) the availability and cost of “pooled” insurance coverage
- e) the viability of a Supplemental Compensation Plan (SCP) for US passengers, with, or without, a per passenger surcharge
- f) whether the Japanese approach could be modified to make it more acceptable to the US government and to a broader segment of the industry
- g) the time frame for giving effect to a new liability regime, and
- h) the need to meet the concerns of the EU and certain governments for coverage above SDR 250,000.

As a result of a question-and-answer period with the insurance industry representatives and vigorous debate among Members of the Joint Working Group, it was noted that, despite potential support on the part of the US authorities and some carriers for an SCP, some participants expressed continuing reservations to the Plan approach in the absence of the “unbreakable cap” on liability which would have been provided by Montreal Aviation Protocol 3. In their view, the SCP option was legally and administratively complicated, and potentially more expensive than other alternatives. Accordingly, participants turned to consideration of insurance-based solutions, possibly passenger funded, for unlimited liability above SDR 250,000, the elements of which could include:

- a worldwide minimum SDR 250,000 liability limit effected by conditions of carriage and applicable tariffs
- for the US (and possibly applicable elsewhere as required), unlimited liability through individual insurance or a “pooled” policy negotiated on behalf of carriers, with a deductible of SDR 250,000 to be covered by individual airline policies
- any “pooled” coverage to be set out in individual policies taken out by each participating carrier, common rated on a per-capita basis (e.g. USD 2.00-3.00 per passenger).

A suggestion to revise the 1966 Montreal intercarrier agreement and waive the liability limits that apply to all passengers travelling to, from and through the US was reserved for further discussion. (It was noted that this could go a long way to meeting the desire of the US authorities to provide full protection in relation to

tickets purchased by US nationals and permanent residents abroad.) In addition, the Joint Working Group noted that the extent of carriers' willingness to waive the Warsaw/Hague defences needed to be further reviewed.

Many members of the Working Group expressed their reluctance to commit to a liability regime that was both "strict" and "unlimited."

The Joint Working Group also received advice from the insurance brokers that "pooled" coverage for risks above SDR 250,000 was likely to result in increased costs for all airlines because of the negative consequences of "splitting" the unitary insurance coverage of carriers' current policies. This information was a major factor in dissuading the Working Group from pursuing "pooled" coverage.

The Joint Working Group agreed to reconvene in Washington 7-8 August to continue its deliberations and to try to finalize its proposals. Meanwhile, the Secretariat undertook to make further enquiries concerning the relevant insurance issues and the US carriers are informing DOT on the details of the London meeting and the elements of what could be included in an eventual package.

A further report will be filed with the US DOT concerning the 7-8 August meeting in Washington, D.C.

8/9/95-[1175388]

# **AGENDA**

## **ALC Working Groups**

*London, 25-26 July 1995*

- 1. Review of Extension of Immunity Order**
- 2. Decision on Joint Meeting of two Working Groups**
- 3. Chairmanship of Meeting**
- 4. Discussion with Insurance Brokers**
  - (i) Introduction by Tony Kelly
  - (ii) Individual Statements by:
    - a) Mr Sean Gates (Beaumont & Son)
    - b) Mr Peter- Viccars (Bowring Aviation)
    - c) Mr Jonathan Palmer-Brown (Nicholson Leslie Group)
- 5. Introduction of Draft Proposals of “Mechanisms” for Unlimited Liability (Beyond SDR 250,000)**
  - a) Supplemental Compensation Plan (U.S. carriers)
  - b) Japanese Initiative (JAL)
  - c) No Limit Insurance Plan (IATA Secretariat)
- 6. Discussion and Debate**
- 7. Elements of Reports of Working Groups**
- 8. Further Action**

**Documentation**  
**ALC WORKING GROUPS**  
*London, 25-26 July 1995*

Final Report of the Airline Liability Conference Session - Washington, 19-23 June 1993	WP 1
U.S. DOT Order 95-7-1 5 extending antitrust immunity	WP 2
Memorandum on Mechanism Options	WP 3
Memorandum on SCP Model Mechanism Options	WP4
Information Paper on the Expeditious Settlement of Airline Passenger Claims	WP 5
Memorandum on insurance Cost Assessment	WP6
Qantas Airways' Submission to Insurance Working Group *	WP7
Qantas Airways' information re Australian Transport Legislation Amendment Bills *	WP 8
Qantas Airways' Submission to Working Group on Complete (or unlimited) Compensation to Passengers''	WP9
Background Memorandum on Double Recovery (Collateral Source Rule)*	WP 10
Cubana De Aviación's Submission*	WP 11
Outline of Agreement between Carriers Operating to and from the United States to Apply a New Special Contract *	WP12



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**FINAL REPORT OF THE  
CONFERENCE SESSION  
19-23 JUNE 1995, WASHINGTON, D. C.**

The Conference session was attended by 67 airlines, 6 regional airline associations, 3 other industry associations and observers from ICAO, ECAC, EU and the Government of the U.S. (Attendance List attached as Annex 1).

The Conference elected the following Conference officers:

<i>Chairman:</i>	Lorne S. Clark (IATA General Counsel & Corporate Secretary)
<i>Vice-Chairman:</i>	Vijay Poonosamy (Director Legal & International Affairs, Air Mauritius)
<i>Rapporteur:</i>	Ana de Montenegro (Corporate Director Insurance & Contracts, TACA International)
<i>Chairing the Drafting Committee:</i>	Leslie Mooyaart (Senior Vice-President & General Counsel, KLM)

The Conference Agenda and Rules of Procedure, as adopted, are attached as Annexes 2 and 3, respectively.

To supplement discussion in Plenary, the Conference established two Working Groups, one on the Supplemental Compensation Plan, under the chairmanship of Mr Gerald Mayo (Counsel to Delta Air Lines), the other on the Japanese Initiative, under the chairmanship of Mr Koichi Abe (Vice-President, Legal Affairs Department, Japan Air Lines).

I. Following extensive debate in Plenary and taking into consideration proposals by a number of delegates and the results of the discussion in the Working Groups, the Conference concluded that:

1. The Warsaw Convention System must be preserved. However, the existing passenger liability limits for international carriage by air are

grossly inadequate in many jurisdictions and should be revised as a matter of urgency.

2. Governments, through ICAO, and in consultation with airlines, should act urgently to update the Warsaw Convention System and to address liability issues.
3. Governments should act expeditiously to bring into force Montreal Protocol No. 4 (Cargo) independently of their consideration of Montreal Additional Protocol No. 3.
4. The conditions and expectations for the Conference set out in U.S. DOT Order 95-2-44 of 22 February 1995 (Annex 4) restricted the ability of participating airlines to reach agreement at this session on the enhancement of compensation for passengers under the Warsaw Convention System.
5. In particular, the Conference objected to the U.S. expectation that the results of the Conference would ensure full compensatory damages for claims by all U.S. citizens and permanent residents traveling between countries outside the U.S., as it would discriminate among passenger nationalities and would impose on airlines an unreasonable responsibility that should be borne by the U.S. Government.

II. In light of the foregoing and subject to the conclusions of the working groups mentioned below, and in order to receive government approvals as required, the Conference agreed to recommend that a new enhanced liability package should be adopted by airlines, as quickly as possible, to include:

- (a) an updated liability limit of 250,000 SDRs, taking into account the effects of inflation on the limits in the 1966 Montreal Agreement, the 1971 Guatemala City Protocol and the 1975 Montreal Additional Protocol No. 3, as well as limits proposed by governments;

- (b) periodic updating of liability limits to reflect the effects of inflation;
- (c) standards and procedures for up-front payments to meet claimants' immediate needs, in accordance with established local customs, practices and applicable local law;
- (d) the retention of the defenses under Article 21 of the instruments of the Warsaw Convention System;
- (e) where circumstances so require, a waiver up to 250,000 SDRs of the defenses under Article 20, paragraph (1) of the instruments of the Warsaw Convention System;
- (f) where circumstances so require, recovery of proven compensatory damages beyond 250,000 SDRs through appropriate and effective means; and
- (g) complete compensation as allowed by and in accordance with applicable law.

III. Taking into account, and in an effort to meet, the needs and desires of various government authorities, the Conference agreed that:

1. The Conference Chairman should appoint a working group to urgently assess and report on the cost impact on airlines of the recommended enhanced liability package and, as a matter of urgency, make specific proposals as to how small and medium-size airlines can be assisted to meet additional costs resulting from possible increased liability.
2. The Conference Chairman should appoint a second working group to further consider and report on appropriate and effective means to secure complete compensation for passengers, including the Japanese Initiative and the U.S. Supplemental Compensation Plan, in light of discussions at the Conference, and taking particular account of the

circumstances of small and medium-size airlines and any submissions made to that working group by 31 July 1995.

3. The IATA Secretariat should prepare as a matter of urgency and circulate to airlines by 31 August 1995 an information paper on expeditious settlement of airline passenger liability claims.
4. The IATA Secretariat, in consultation with the Legal Advisory Group, should prepare draft texts of an intercarrier agreement, a plan for an appropriate and effective means to secure complete compensation, and circulate them and related documents by 31 August 1995, including the reports mentioned in paragraphs 111.1. and 2.
5. The IATA Secretariat should immediately seek an extension of antitrust immunity from the U.S. authorities to permit and facilitate all further discussions by airlines necessary to complete the work of the Conference.
6. The IATA Secretariat, upon approval by and acting in accordance with any decision of the 1995 IATA Annual General Meeting, scheduled for 30-31 October 1995, should submit the texts of the intercarrier agreement, the plan for an appropriate and effective means to secure complete compensation and related documents for requisite governmental approval.

The Conference expressed its appreciation to IATA for the efficient organization of the Conference and congratulated the Conference officers and the Working Group Chairmen for their valuable contributions to its deliberations and its results to date.

The Conference Plenary session adopted this Report and adjourned on 23 June 1995, subject to the call of the Chairman.

Order 95-7-15



UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Issued by the Department of Transportation  
on the 12th day of July, 1995

International Air Transport Association  
**AGREEMENT RELATING TO LIABILITY  
LIMITATIONS OF THE WARSAW CONVENTION**

Docket OST-95-232  
(49152)

**ORDER EXTENDING DISCUSSION AUTHORITY**

By Order 95-2-44 the Department granted discussion authority and antitrust immunity to IATA for the purpose of reaching an Agreement among carriers to waive the liability limits of the Warsaw Convention, pending the entry into force of amendments to the Convention to establish an acceptable level and regime of Liability for airline passengers. Our Order set forth guidelines as to the expectation of the Department as to the nature of passenger liability coverage.<sup>1</sup>

IATA convened an Airline Liability Conference in Washington, D.C. from June 19-23, 1995. The Report of the Conference proposes the establishment of two working groups to further study and prepare drafts for a proposed intercarrier agreement, as follows:

1. To urgently assess and report on the cost impact on airlines of the recommended enhanced liability package and, as a matter of urgency, make specific proposals as to how small and medium size airlines can be assisted to meet additional costs resulting from possible increased liability.

<sup>1</sup> Order 95-2-44, at p. 3.

2. To further consider and report on appropriate and effective means to secure complete compensation for passengers, including the Japanese Initiative and the U.S. Supplemental Compensation Plan, in light of discussions at the Conference, and taking particular account of the circumstances of small and medium-size airlines and any submissions made to the working group by 31 July 1995.

The IATA Secretariat, in consultation with the Legal Advisory Group, and taking account of the Reports of the Working Groups, is to prepare and circulate draft texts of an intercarrier agreement and a plan for an appropriate and effective means to secure complete compensation by August 31, 1995, for consideration at the 1995 IATA Annual General Meeting scheduled for October 30-31, 1995, in Kuala Lumpur.

The discussion authority and anti-trust immunity granted by Order 95-2-44 expired July 6, 1995. By application filed June 26, IATA requests extension of the discussion authority and antitrust immunity to December 31, 1995. IATA also requests that the conditions of Order 95-2-44 be modified to permit meetings at locations other than Washington, D.C., with the assurance that: a U.S. carrier would be included in each working group, and that an advance notice of the discussions would be furnished to DOT and DOJ. However, IATA requests that it be relieved of the burden of continuing notice to all air carriers\* and foreign air carriers, because the notice already given, the further distribution of its Report, and the widespread publicity given the Airline Liability Conference, suffice to give any interested airline the opportunity to be heard in the ongoing agreement process.

No answers to IATA's Petition have been filed.<sup>2</sup>

We have decided to grant IATA's petition for extension of discussion authority and antitrust immunity, and for modifications of the conditions of Order 95-2-44, to the extent noted below.

The Report of the IATA Conference indicates that IATA will be able to formulate agreements that will be consistent with the Guidelines specified in Order 95-2-44. However, in order to be able to formulate such agreements: present them for consideration at the IATA General Meeting in

<sup>2</sup> By Notice dated and served June 28, 1999, the Department shortened the period for answers to IATA's extension Petition to five days after the date of the Notice (July 8).

**October; and, if successful, to submit such agreement% Ear consideration and approval by Governments, IATA requires an extension of discussion authority and antitrust immunity to December 31, 1995.**

We are somewhat concerned as to the request for modification of the conditions to permit discussions outside Washington, D.C., since we believe close monitoring of these discussions is important to avoid significant deviation from our guidelines. However, we believe that we can rely on U.S. carrier participants to report fully to us on the progress and direction of the discussions prior to completion of the draft for presentation to the IATA annual, general membership meeting in October. In this respect, we will require that a U.S. carrier be included in all working groups, drafting sessions, or other discussions, and be authorized to report: fully on the progress of such discussions, including the transmittal of preliminary drafts or working paper-e, and we will anticipate that the U.S. carriers will so report. We believe this notification will be sufficient to protect U.S. Government-interests. Therefore, we will grant IATA's request to modify the conditions, to the extent set forth in this order. Moreover, in order to help enhance the development of a liability scheme which can be accepted by the U.S. Government, without substantial modification, we will reserve the right to modify this order, and its conditions, at any time as may be required in the public interest.

**ACCORDINGLY:**

1. The Department approves, under section 41308 of Title 49 of the United States Code, until December 31, 1995, to the extent indicated, the request filed by IATA in this docket for extension of discussion authority directed toward producing an acceptable passenger liability regime under the Warsaw Convention, subject to the restrictions listed below;

2. The Department: exempts persons participating in the discussions approved by this order from the operation of the antitrust laws under section 41309 of Title 49 of the United States Code;



(if ' The Department: retains jurisdiction over the discussions to take such further action at any time, without a hearing, as it may deem appropriate; and

5. We will serve a copy of this order un all parties in this proceeding, and on the Departments of State and Justice:

By:

PATRICK V. MURPHY  
Acting Assistant Secretary for  
Aviation a n d International Affairs

(SEAL)

**SERVICE LIST**  
**IATA DISCUSSION AUTHORITY ON**  
**LIMITATIONS OF LIABILITY OF THE WARSAW CONVENTION**  
**DOCKET OST-95-232**  
**(49152)**

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General Secretary  
International Union of Aviation Insurers  
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MEMORANDUM

TO: ALC Working Group - Mechanism  
FROM: Bert W. Rein *BR*  
DATE: July 14, 1995  
RE: Mechanism Options

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Pursuant to Paragraph II(e) of the Final Report of the Conference Session, the Working Group is to "consider and report on appropriate and effective means to secure complete compensation for passengers, including the Japanese Initiative and the U.S. Supplemental Compensation Plan." As a threshold matter, the Working Group therefore must determine whether to pursue a tariff-revision based ("Japanese Model") option for providing "proven compensatory damages beyond 250,000 SDRs" where circumstances so require or to pursue a tariff-revision/plan based ("SCP Model") option. These options, and certain sub-variants are described in this paper.

I. Japanese Model/Tariff-Revision Options

A. Pure Tariff Revision

Under this option, carriers would subscribe to an intercarrier agreement identifying the ticketing points/routes/passengers where circumstances require waiving Article 22 limits beyond 250,000 SDRs. The intercarrier agreement would also establish any additional required waivers of Article 20.1 defenses. The intercarrier agreement would

commit each participating carrier to revise its relevant tariffs appropriately and thus create a binding "special contract." Each carrier would be responsible for securing the insurance necessary to support its revised tariff.

The advantage of this approach is that it is simple to draft -- apart from the determination where "circumstances so require" which is a common problem for all options -- meets most USG requirements, requires no industry administration, and permits carriers to control their own liability administration. Its disadvantages are that small and medium size carriers may find it difficult or impossible to insure, that it provides no common base for a surcharge, that it cannot deal with the U.S. Government's demand that U.S. nationals on non-U.S. routes be covered, that it leaves carrier assets ultimately at risk for an insurance failure and that it continues the current high-cost litigation system for compensation determination.

B. Tariff Revision/Group Insurance

Under this option, carriers would expand option IA. by agreeing to negotiate jointly a common-rated group policy for liability in excess of 250,000 SDRs. Under such a policy, each carrier would be entitled and required to purchase this coverage at the same rate (e.g., \$\_\_\_ per passenger covered). However, there would be no collective responsibility for premium payment and no joint claims administration.

This option has most of the advantages and disadvantages of Option IA except that it is somewhat more complex administratively (for negotiating the group coverage) and potentially more attractive to small and medium size carriers who would avoid the risk of competitive dislocation.

C. Tariff Revision/Group Insurance/Surcharge

Under this option, carriers would expand Option IB by agreeing to include in their relevant tariffs a surcharge equal to the per-passenger insurance cost of the excess-of-250,000 SDR cover. This surcharge would be an element of carrier revenue and government approval would be sought consistently with approvals previously sought for fuel surcharges and other cost-based surcharges subject to variation. The amount of the surcharge would be varied to track actual per-passenger insurance costs.

This option has most of the advantages and disadvantages of Option IB, except that it could help reduce cost burdens on all carriers and further alleviate concerns of competitive dislocation. A surcharge covering a long-term carrier cost, however, might trouble regulatory authorities. Also, any surcharge raises the possibility that a passenger could claim insurance proceeds to be a "collateral source" payment not foreclosing a duplicative Article 25 recovery.

## II. SCP Model/Tariff Revision/Plan Options

### A. Definition

Under all SCP Model options, a passenger seeking compensation in excess of the generally-available limit (independent of Article 25 litigation) would be required to follow different procedures from a passenger whose compensation demand did not exceed the generally-available limit. These procedures could involve: foreclosure of Article 25 claims; subrogation of claims-over against manufacturers/ air traffic control authorities; resolution of disputes through a defined settlement process/arbitration mechanism and acceptance of specific choice-of-law rules for compensation measurement. SCP Model options may or may not include collective insurance negotiation, collective funding, an independent legal entity administering a "plan" or a surcharge. For this reason, the advantages and disadvantages of SCP Model options are addressed separately in the attached paper. The options are briefly described below.

### B. Pure Tariff Revision/Plan

Under this option, carriers would subscribe to an intercarrier agreement of the type described in Option IA. Carriers would further agree that their implementing tariffs would require passengers seeking to benefit from the Article 25 waiver (or that portion of the waiver exceeding 250,000 SDRs) to follow prescribed procedures including appropriate releases.

subrogations and dispute resolution provisions. Passengers would then elect between pursuing Warsaw rights (including any first level Article 22 Waiver) and the plan track.

C. Tariff Revision/Plan/Group Insurance

Under this option, carriers would expand Option IIB to include group insurance as set forth in Option IB.

D. Tariff Revision/Plan/Joint Airline Cover

Under this option, carriers would expand Option IIB to include an agreement to develop a single mechanism for funding liabilities in excess of 250,000 SDRs. This option would require carriers to take joint responsibility for purchasing the necessary insurance and thus to develop administrative machinery for dealing with the insurance industry and monitoring carrier contribution obligations.

E. Tariff Revision/Plan/Supplemental Compensation Entity

Under this option, carriers would agree to waive Article 22 limits up to 250,000 SDRs. They would further agree to participate in the creation and funding of a supplemental entity which would take responsibility for funding compensation in excess of 250,000 SDRs. This option would require the entity to be a legal personality with independent responsibilities and interests.

F. Tariff Revision/Plan/Surcharge

Under this option, options IIC, IID and IIE would be complemented by a relevant surcharge. This surcharge could be

of sufficient magnitude to provide benefits to passengers other than those upon whom the surcharge was imposed (e.g., U.S. national passengers on non-U.S. routes).

## MEMORANDUM

To: ALC Working Group -- Mechanism  
From: Warren L. Dean  
Date: July 19, 1995  
Re: SCP Model Option

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This paper describes the advantages and disadvantages of pursuing a tariff revision/plan-based. ("SCP model") option, as described in the main paper. In fashioning a resolution that will achieve the broadest acceptance, the Working Group should keep in mind that the breadth of the final package will influence how decisionmakers view the advantages and disadvantages of each option. Changes in claims procedures will be viewed against the backdrop of preexisting national judicial remedies.

Airlines currently bear the entire burden of compensation with respect to claims brought under Warsaw/Hague, including those brought under Article 25 on a wilful misconduct theory to break the current treaty limits. A critical difference between the current Warsaw/Hague regime and a SCP model option is that the SCP model could permit a claimant to recover proven damages in excess of the airline's liability limit without bringing an Article 25 wilful misconduct suit.

Airlines can set up a plan through an intercarrier agreement. To obtain payment from a plan a claimant should, at minimum, be required to forego judicial remedies whether under Article 25 or otherwise, and to assign to the plan or the airline paying the compensation the claimant's rights to recover damages from third parties to the extent of their culpability.

The SCP model options, which are more fully described in the main paper, include:

Option IIB. Pure Tariff Revision/Plan

This option requires carriers to agree that a passenger seeking to recover proven damages that exceed 250,000 SDRs (or that portion of the claim exceeding 250,000 SDRs) must elect between pursuing Warsaw rights and receiving compensation under the plan. The advantages and disadvantages are similar to those of Option 1 A, except that this option provides an incentive to passengers not to pursue Article 25 wilful misconduct claims by providing a method for recovering all proven damages. The intercarrier agreement could require the passenger to make elections at one of two times: when a settlement offer is made (Later Settlement Election) or prior to instituting any judicial procedure (Alternative Claim Procedure).

(1) **Later Settlement Election.** Claimants would be permitted to pursue judicial remedies concurrently with seeking plan compensation; the intercarrier agreement would call for a settlement offer to be made to the claimant within **some** reasonable period (perhaps six months) of the filing of a **claim**. The claimant would have to forego further judicial remedies to receive **compensation** under the **plan**. The chief advantage of the Inter settlement election is that a reasonable settlement offer **will** have the **greatest** chance of success since claimants will by then be able **realistically** to weigh **the** risks of litigation against **the** certainty of the **settlement** offer. A **disadvantage** is that some initial litigation costs will be incurred, but these could be **minimized** by keeping the time periods for filing a claim and making an offer **short**. A **factor** that cannot be evaluated in advance **is** that discovery conducted prior to a settlement offer may expose to each side the strength of **the** other's case.

(2) **Alternative Claim Procedure,** The **intercarrier** agreement **would** require election prior to **pursuing** judicial remedies, whether for the whole **claim** or **for the part** that exceeds **the** liability **limit**. **The** claimant would receive **in** return the promise of a quick, fair compensation for proven damages. If the passenger is dissatisfied with the settlement **offer**, **alternative** dispute resolution mechanisms such as **arbitration** can apply. **Limited** judicial review may be available. The chief advantage **of** this **approach** is that it avoids **litigation** costs entirely (although it may **impose other** costs **such** as paying experts or arbitrators). However, critics may claim that the airline is **overreaching** by presenting claimants **with** an election that requires them to forego all **judicial** remedies without giving them a firm offer, *which may* engender government resistance. Moreover, until the public gains **confidence** in the fairness of the settlements under the **claims** procedure, **claimants** may resist it.

In these circumstances, the **Working** Group should consider ways to enhance the attractiveness of the overall proposal. if it wishes to choose this procedure. The Working Group may also wish to consider building in additional fair incentives to choose the alternative claim procedure.. In this context, the **EU and ECAC** proposals of an **upfront** payment may present an opportunity to **meet claimants immediate** needs **in** a way that also promotes **airline** interests. **Another** possibility is to include an **assurance that** the compensation package will **meet** the **prevailing** compensation **standards** in the passenger's place of domicile.

### Option IIC. Tariff Revision/Plan/Group Insurance

Under this option, in addition to agreeing to set up a claim procedure as in Option **IIB**, airlines **would** jointly negotiate a **common-rated group** policy as in **Option IB**. Like **Option IB**, negotiating the **group** coverage complicates **the situation**, **but** it could help small and medium-size **carriers lower** their costs. Like all **SCP** model options, it could avoid the **expense of** burdensome litigation, and raises **issues** regarding **the timing** of the **claimant's** election.

### Option IID. Tariff Revision/Plan/Joint Airline Cover

This option would require airlines to expand Option IIB to develop a single mechanism to fund liabilities in excess of 250,000 SDRs. Airlines would jointly buy the necessary insurance, and would have to develop administrative machinery for dealing with the insurance industry and monitoring carrier contribution obligations. This option would differ from the previous Option UC in that there would only be one policy to which all airlines contribute a portion of the premiums. This option has most of the advantages and disadvantages of Option IIC. Under a joint cover system, carriers would be jointly liable for the premiums. Accordingly, if any airline failed to pay (e.g., as a result of bankruptcy), the others would have to increase their contributions to keep up the policy. This system would also require considerable ongoing effort to keep a group as large and diverse as IATA's membership together. Other disadvantages include complexity of administration, and a need to have an ongoing administrative apparatus.

### Option IIE. Tariff Revision/Plan/Supplemental Compensation Entity

This is the traditional supplemental compensation plan option, under which airlines would set up an independent entity to assume all liability above 250,000 SDRs. The entity would administer the plan, collect contributions and make settlements. The key advantage of this option is that it could make the airline liability limit effectively unbreakable, since Mines would waive their liability up to a limit, and the plan would be liable for proven damages above the airlines' limit (assuming most claimants can be induced to settle). This option has most of the advantages and disadvantages of Option IID above but, in addition, could incur substantial start-up costs, since it requires creation of an independent entity. Like Option IID, airlines could ultimately be called on to increase their contributions if some airline participants default.

This option may also raise a question about whether payments under the plan should be viewed as airline compensation for damages, or as payments from a collateral source, such as life insurance. If a court considered that the payments were from a source independent of the airline, it could refuse to offset payments under the plan against damages for which the airline is liable, enabling the claimant to get a double recovery. This risk can be minimized by structuring the airline-entity relationship so that it is clear that the airlines have set up this plan to respond to their legal Liability. At the same time, however, the structure must avoid the risk that the airlines could be held liable for the entity's act or omissions. The documents instituting the plan should also carefully spell out the plan's purpose.

### Option IIF. Tariff Revision/Plan/Surcharge

The costs of implementing any assumption of liability above 250,000 SDRs can be offset by a ticket surcharge set at a standard level for all participating airlines for Options IIC, IID and IIE. To meet USG concerns, the surcharge could also be set at a level sufficient to provide benefits to passengers other than those on whom the surcharge is imposed (e.g., U.S. national passengers). An inter-passenger cross-subsidy, however, could raise concerns in countries where

a plan does not operate. Like **all SCP model** options, it could avoid **the** expense of burdensome litigation, and raises issues regarding the **timing** of the **claimant's** election.

This option **raises** a question about whether the surcharge should be **separately** stated on the ticket, like U.S. ticket taxes, or included in the price of **transportation, like** security and **fuel** surcharges have been. Separately stated surcharges would be easier to track and pay over. However, like Options IC and **III**, such surcharges could support a possible argument that compensation available under the plan is a **source** of compensation **separate** from **the** airline (like life **insurance**) and **therefore**, may not be offset against damages. Moreover, some critics would **argue that** airlines are **shirking their** responsibilities and imposing them on passengers. Finally, separately stated surcharges may **require** a redesign of ticket stock.

**Including** the surcharge in the ticket charge would strengthen the legal **argument** that the surcharge: merely **reflects** an increase **in** airline costs of providing **all** the amenities of air service and is not an insurance payment. Including the surcharge **in** the ticket price could deflect arguments that airlines are not shouldering their responsibility. Although a plan surcharge would be similar to surcharges **imposed** for sudden **increases in fuel** or security costs, a **surcharge** covering a long-term carrier cost might trouble regulatory authorities. **Finally**, before adopting **this** approach, the **clearinghouse's** ability to track and pay over **the** surcharges collected should be **examined**.

**INFORMATION PAPER ON THE EXPEDITIOUS SETTLEMENT  
OF AIRLINE PASSENGER CLAIMS**

A review of the claims handling experience of the airline industry and its insurers reveals the existence of well developed, but generally unwritten, procedures for the discharge of the responsibilities imposed by law on airlines to compensate passengers killed or injured as a result of an accident.

This paper is for information purposes only. It aims to do no more than improve airlines' general understanding of the best practice of the industry in the handling of claims. In seeking to do no more, it recognises the practical difficulties of trying to develop a single set of procedures to cover every possible eventuality.

**Gather Information** - -

In every case claims handling begins with the identification of the names and addresses of passengers potentially entitled to compensation and, where appropriate, their legal next of kin. In practice, it is often difficult for an airline to complete this task without external assistance. This is because the details recorded in tick&s/passenger lists are usually limited in nature and unverified at the time of completion/compilation. Therefore, the necessary information is usually gathered from a combination of external sources which are cross referenced with each other to ensure accuracy.

Apart from the passenger himself, typical sources are police, authorities, hospital authorities (for injured passengers) and telephone calls/correspondence received by the airline through its emergency procedures information systems. In the case of fatal injury, longer delays can arise in relation to formalisation of the position of legal heirs and/or guardians of minors.

Once the necessary information has been gathered, it is usual practice for an airline to send letters to passengers or their next of kin inviting claims and giving details of the person or organisation to whom claims should be directed.

**Assessing Applicable Scheme[s] of Liability**

The existence of the instruments of the Warsaw Convention system (which in many countries apply in a modified form to flights which would otherwise fall outside of their application) means that whenever an air accident occurs one or more of several possible schemes of passenger liability will be applicable to the airline. The operation of those schemes is such that one single regime seldom applies universally to all passengers aboard an aircraft.

The determining factor in assessing the applicable scheme of liability for individual passengers will usually be whether the passenger was engaged in international travel at the time of the

accident. **This** is assessed principally by reference to the place of original departure **and** ultimate destination recorded in the passenger's ticket rather than just by reference to the point of departure and destination of **the** flight during which the accident occurred.

The nature of **the** Warsaw system, and the special contracts between airlines **and** passengers which form **part** of it, is such that the various **schemes** of potentially applicable liability are essentially **similar** with the most **notable** exception being limits of **liability**, where significant **differences** exist.

### Evaluating Airline Liability

By reference to the applicable scheme or schemes of liability, it is necessary to determine whether actual liability exists for an airline in relation to an accident. **To** some extent **this** can be **done** by reference to an **internal** investigation of the **cause** of the accident. **Often**, however, **the** airline will need to wait **for** details of **the** results of the official **investigation** conducted by the state in which the accident **occurred**. It is well known that **such** results frequently take a considerable period of **time** to **become** available.

In the absence of such information it can be difficult (**sometimes impossible**) for **an** airline to determine whether it is eligible to **the** benefit of available **defences** to liability **or** whether **the** **limits** which normally apply to **restrict** its maximum per passenger liability do **or** do not apply. Similarly, it may prevent it from evaluating the potential liability of third parties and the **extent** to which passengers and/or the airline may **have** rights of recovery against such **parties**.

### Interim Aid and Advance Payments

While the aforementioned procedures are being carried out - which for reasons usually beyond **an** airline's control sometimes take **months** rather than weeks to complete - there may be persons with particular needs or anxieties caused by the accident who can be aided by **the** airline by means **of** an emergency aid payment, a guarantee of payment of **some** necessary expense, or some **simple** practical assistance. For example, taking on responsibility for **medical expenses**; arranging transportation **of** close relatives for hospital visits or funeral services; payment of lump sums for **the** **immediate** relief **of** distress caused by loss of **financial** support.

Such payments and/or assistance can be made **ex-gratia** or **on the** basis that they are capable of being brought into **account** on final settlement of a claim. In any event, they are, by their nature, usually non-refundable.

The diverse nature of local tradition and **religious** customs and **the** possible availability of aid from national social **security** authorities, combined **with** the fact **that** the **circumstances** of individual passengers and their **close** relatives inevitably vary considerably from **case** to case, means that **the** policy of an

airline and its **insurers** in relation to **immediate** aid given in advance of final **settlement** of claims seldom follows the **same pattern**.

Soon after claimants have been properly identified, **their claims** notified to an airline, and an evaluation made of **the** airline's liability, it is often the **case that** a **sizeable** portion of most claims is capable of **relatively quick** assessment **and** agreement by the airline without much **collection** of **supporting** information. As a **result**, airlines are often able to further alleviate financial distress resulting from **an** accident (in advance of concluding a final **settlement** of a claim) by offering to pay a claimant the uncontested part of his claim against execution by **him** of a suitable document **evidencing** the partial settlement.

### Assessing Quantum of Claims

If an airline decides not to contest liability it will start the **claims** settlement process by assessing the quantum of damages each **claimant** is **entitled** to receive by reference to the **relevant rules** of the jurisdiction in which the claimant has elected (from his available **choices**) to pursue his **claim**.

The claimant will need to arrange for all necessary supporting evidence to be supplied to the airline so that **it** may calculate the proper value of **the** claim. **By way of** illustration, documents typically required will comprise expenses receipts: pay slips for past loss of earnings and evidence of future career prospects; medical reports detailing injuries, recovery and prognosis.

**Other factors** may also need to be considered by an airline **such as** **the** rights of social security authorities and other **third** parties in respect of recovery from the airline of compensation payments already made .by such parties to the claimant.

Typically the **process of** gathering **information/documents** by a claimant and their analysis by **an** airline is a painstaking one which can **take** months rather than weeks for the **parties** to **complete**. Once completed, however, the airline will be in a position to **formulate** and deliver a settlement offer to a claimant.

### Final Settlement of Claims

The settlement process **is** normally started by an airline making an offer to a **claimant**. **This** will always be subject to the **requirement** that the claimant executes a suitable document evidencing the settlement (see further below).

If the value of a **claim** is quantified by an airline as being in excess of **any** applicable limit of liability imposed by the Instruments of **the** Warsaw system (or any other applicable **law**) **the** **airline** may offer the claimant no more than an amount equivalent to **such** limit. Likewise an **airline** may make an offer on the condition that, in accordance with applicable rules, an amount is 'to be deducted from it and **retained** by the airline to **take** account

of potential subrogation claims of third parties **such as social security** authorities.

If an offer of settlement **is rejected by** a claimant a process of negotiation often follows. If such a process is not begun, or if it fails to produce a mutually satisfactory compromise, **litigation** may be instigated against an airline **(alone or with other parties)** by the claimant so that he **may** seek to secure full recovery of the amount he regards as proper compensation.

Where a claimant is unfamiliar **with the** Warsaw system an offer capped at an applicable limit may be received with considerable **disappointment** which, in turn, **may** result in the immediate instigation of litigation **against the airline to break the limit** and obtain a full recovery of proven damages. Mindful of **this** possibility it: is the practice **of many airlines** to provide to claimants at **as** early an opportunity as possible details of the basis **on which** their **claims** will be handled,

#### Attending to Settlement Formalities

Once a settlement has been agreed in principle **With a claimant**, a document **evidencing** its terms and the release **of the airline** from further liability **will need to be prepared** by the airline and executed by the **parties**. In some jurisdictions local formalities (such as court approval) **may need to be observed to ensure the** enforceability by the parties of such document: **this is almost** invariably so where a settlement involves a minor.

It is regular practice for a receipt and release **document** to include **(as released from liability)** **all other parties** who may have a **potential** legal liability in relation to the cause of an accident. This is done to simplify the position **of** the airline in relation to pursuit of **rights of contribution** it may have against third **parties for** the cost of settlements it has concluded with claimants.

MEMORANDUM

TO: ALC Working Group Insurance Advisors  
FROM: ALC Working Group  
DATE: July 13, 1995  
RE: Insurance Cost Assessment

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In order to assist the Working Group in its assessment of the additional costs resulting from possible changes in the airline liability system, you are requested to give us your best estimate of the impact on insurance premiums of each of the liability scenarios outlined below. For this purpose, you should consider the impact of each scenario on 5 indicative carriers:

- Carrier A -- A small/medium size non-U.S., non-European carrier conducting operations to/from the U. S. and to/from EC points.
- Carrier B -- A small/medium size non-U.S., non-European carrier conducting operations to/from points EC points but not operating to/from the U.S. or having any U.S. presence.
- Carrier C -- A small/medium size non-U.S., non-European carrier not operating to/from EC points and not having any EC presence and not operating to/from the U.S. or having any U.S. presence.
- Carrier D -- A large European carrier serving worldwide destinations including the U.S.
- Carrier E -- A large U.S. carrier serving worldwide destinations.

For each carrier considered you should assume a current total liability insurance cost of 100 (i.e., an index value of 100). You should then estimate cost under each scenario as a percentage above or below current cost (e.g., a 10% increase would give an index value of 110; a 15% decrease would give an index value of 85). In making your estimate, you should take into account changes in individual rates

- 2 -

(e.g., rate per rpk or rate per million dollars of coverage); prudent changes in per event limits; and the effect of industry-wide change in liability system on capacity and costs in the world insurance market.

The scenarios to be estimated are:

Scenario I -- U. a. denunciation of the Warsaw Convention. U.S. courts adjudicate airline liability under U.S. domestic liability regime, including punitive damages where appropriate and U.S. state-based U.S. compensation standards. U.S. courts take jurisdiction over all cases involving carriers with U.S. presence subject only to forum non conveniens challenge. EC requires all carriers operating to/from EC to increase limits of liability to 500,000 SDRs with first 250,000 not subject to non-negligence defense. Australia requires 260,000 SDR limit with no non-negligence defense on all to/from Australia operations. All other nations continue to adhere to current limits.

scenario. II -- Current international legal regime is maintained in all nations. Carriers universally waive all limit of liability and all non-negligence defenses on operations to/from/through the U.S. Carriers waive limit of liability up to 500,000 SDRs on all (non-U.S.) operations to/from/through EC points and waive non-negligence defense up to 250,000 SDRs. Carriers waive limit of liability and non-negligence defenses up to 250,000 SDRs on all (non-U.S. /non-EC) to/from/through Australia operations.

III Scenario - Current international legal regime is maintained in all nations. Carriers universally waive limit of liability and non-negligence defenses up to 250,000 SDRs on all international operations. Carriers develop a plan to provide additional compensation without limit and not subject to non-negligence defense to all passengers ticketed in U.S. and to all other U.S. national passengers. Carriers seek to insure plan liabilities in world market. Carriers develop a second plan to provide 250,000 SDRs of additional compensation subject to non-negligence defense to passengers ticketed in EC. Carriers seek to insure plan liabilities in world market. Carriers waive limit of liability and non-negligence defenses up to 260,000 SDRs on to/from Australia operations. Carriers not liable if plans fail to pay.

Scenario XV -- Same as Scenario III except that carriers are secondarily liability if plans fail to pay.

Scenario V -- Current international legal regime is maintained in all nations. Carriers universally waive limit

of liability and non-negligence defenses up to 250,000 SDR on all international routes. Carriers develop a plan to provide additional compensation without limit and not subject to non-negligence defense to all passengers moving to/from/through U.S. but not to other U.S. nationals. Passenger access to plan benefits, however, is conditioned upon passenger acceptance of: (a) determination of additional compensation award under law of passenger's domicile; and (b) determination of additional compensation award is made through binding arbitration subject only to traditionally limited judicial review. Carriers develop a second plan to provide 250,000 SDRs of additional compensation subject to non-negligence defense to passengers ticketed in EC. Carriers seek to insure plan liabilities in world market. Carriers waive limit of liability and non-negligence defenses up to 250,000 SDRs on to/from Australia operations. Carriers not liable if plan fails to pay.

Scenario VI -- Same as Scenario V except; that carriers are secondarily liable if plans fail to pay.

Scenario VII -- Same as Scenario VI except that carriers maintain all current limits of liability in U.S. and elsewhere unless passenger elects to go under plan and have all compensation determined under law of domicile through binding arbitration.

Please provide your estimates by completing the attached table.

	Scenario I	Scenario II	Scenario III	Scenario IV	Scenario V	Scenario VI	Scenario VII
Carrier A (index = 100)							
Carrier B {index = 100}							
Carrier C (index = 100)							
Carrier D {index = 100}							
Carrier E {index = 100}							

 **QANTAS AIRWAYS LIMITED****IATA CONFERENCE ON AIRLINE LIABILITY  
SUBMISSION TO INSURANCE WORKING GROUP****1. PREMIUMS**

Qantas considers that the airline industry as a whole should emphasise to the insurance industry that we do not accept that a substantial increase in premiums is warranted as a result of the lift in liability limits or the removal of limits.

**2. ASSISTANCE TO SMALL TO MEDIUM SIZED CARRIERS**

After careful consideration, Qantas is unable to support any move to provide financial assistance to carriers to assist in any increase in premiums associated with or alleged to be associated with the increase in liability limits. Qantas is, however, able to support IATA-sponsored moves to share skills, combine negotiating strengths and coordinate communications with the insurance industry.

Qantas is unable to support financial assistance because:

- Any such support would be anti-competitive and would be retrograde in terms of industry moves towards deregulation, greater competition and free markets.
- It does not accept that substantial increases in premiums necessarily result from the lift in limits.
- Such assistance does not apply domestically in Australia and its international application would discriminate against smaller Australian carriers who have for some time been subject to the lift in limits and any alleged consequential increases in premiums.
- Any such support or subsidy could operate, and be perceived to operate, as a disincentive for small to medium carriers, particularly those with a poor claims history, from taking meaningful steps to reduce claims, modernise fleets or review maintenance and flight operations. Conversely, it-lines with a better claims history are already de facto subsidising airlines with a poorer claims history through the payment of premiums.

**MICHAEL NEARHOS**  
**Senior Solicitor**  
**Qantas Airways Limited**  
**Sydney, 24 July 1995**

**FACSIMILE TRANSMISSION**

**SUBJECT: AUSTRALIAN UPDATE**

**DATE: 24 July 1995**

<i>TO</i>	<i>FROM</i>
FAX NO: 514 844 6834	FAX NO: 61 2 691 4165
ATTN: Lorne Clarke General Counsel and Corporate Secretary	NAME: Michael Nearhos Senior Solicitor
COMPANY: IATA - Montreal	ADDRESS: Qantas - Legal Dept
PHONE: 514 844 6311	PHONE: 61 2 691 4164
CC: Tony Mercer Air New Zealand CI- Kensington Park Hotel London 44 171 937 7616	REF NO: T692.95F

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LORNE - OUR SUBMISSIONS ARRIVING  
TOMORROW.*

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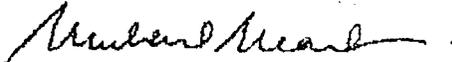
There have been recent developments in Australia in relation to the Warsaw System.

Transport Legislation Amendment Bills ("TLAB") Nos. 1 and 2 were passed by the Commonwealth Parliament on 30 June 1995. The Bills amend the Civil Aviation (Carriers' Liability) Act 1959.

TLAB No. 1 deals with the increase to 260,000 SDR's per passenger in the liability limit for Australia's international airlines. The Bill also amends the act formally to lift the domestic liability limit to AUD500,000 per passenger. This was originally implemented (by regulation) in October 1994. I understand that the amendments received Royal Assent and became law on 20 or 21 July 1995.

TLAB No. 2 contained the amendments on mandatory insurance for passenger carriers' liability. This Bill has not yet received Royal Assent. The Department of Transport currently intends for the arrangements to take effect on 1 January 1996. This is subject to Ministerial discretion and requires the States of Australia to enact complimentary legislative amendments in relation to intra-state travel. Also, regulations are yet to be promulgated for the mandatory insurance arrangements. These are currently being drafted and will be sent to certain industry participants for comment.

Regards,



**MICHAEL NEARHOS**  
Corporate Solicitor



## IATA CONFERENCE ON AIRLINE LIABILITY

### SUBMISSION TO WORKING GROUP ON COMPLETE (OR UNLIMITED) COMPENSATION TO PASSENGERS

1. Qantas endorses the principle of fair and equitable compensation for all passengers and accepts that the current limits under the Warsaw System are inadequate.
2. Qantas accepts the principle of strict liability for the carriage of passengers and as a quid pro quo considers liability should be limited. In that respect, it agrees that a limit of 250,000SDRs (indexed) is fair and equitable.
3. Qantas nevertheless recognises that there may be a need to establish a mechanism or mechanisms enabling the complete compensation of passengers where:
  - Airlines choose to have unlimited liability; or
  - Governments require it for their citizens.
4. In that respect, Qantas supports a flexible approach, namely, if a carrier adopts unlimited liability and insures for it (the Japanese Initiative) it should not be obliged also to be a party to a Supplemental Compensation Plan ("SCP").
5. Qantas currently regards the Japanese Initiative as a preferred option to an SCP mainly because of the administrative burden and cost an SCP would impose on airlines and the public.
6. Where an SCP is to be implemented, including the collection of a surcharge, Qantas submits that airlines who have undertaken the Japanese approach must be entitled to a refund of the surcharge at least for on-line carriage.
7. Qantas is unable to support an SCP which requires complete compensation for the citizens (or permanent residents) of a jurisdiction travelling outside of and not ticketed within that jurisdiction. This is discriminatory. Qantas accepts that, where the government of the relevant jurisdiction pays that passenger's contribution to the SCP, then the proposal would be less discriminatory.

MICHAEL NEARHOS  
Senior Solicitor  
Qantas Airways Limited  
Sydney, 24 July 1995

**BACKGROUND MEMORANDUM ON  
DOUBLE RECOVERY  
(COLLATERAL SOURCE RULE)**

**SUMMARY**

All proposed versions of the airline industry supplemental compensation plan (SCP) have required a claimant to settle and release other responsible parties (including the carrier) from liability to the extent of amounts recovered from the plan. This avoids unwanted "double recovery" of proven damages. Critics of the plan have argued, however, that plaintiffs could get double recovery under the so-called "collateral source" rule, particularly if the passenger pays the plan surcharge directly. This argument, however, is based upon a profound misunderstanding of the collateral source rule, which is a rule of evidence applied where a claimant has a cause of action against a tort-feasor and also has access to a source of funds to compensate for losses. The rule does not give a claimant an additional cause of action.

When a contract of insurance or other indemnity by its terms does not require a release and subrogation, and the claimant preserves his cause of action for damages against tort-feasors, the collateral source rule prevents the availability of an independent insurance fund from being offered as evidence to reduce the tort-feasor's liability. The rule has been described therefore as preventing unjust enrichment of a tort-feasor. Obviously, when the insured has acquired the right to recover from the tort-feasor by release and subrogation, the tort-feasor remains fully liable for the damage. The collateral source rule does not apply where a contract of insurance or other indemnity requires a release and subrogation with respect to other parties that may be potentially liable for the damage. Nor will the rule apply where the recovery is designed specifically to supplement the liability of the tort-feasor or other parties.

These matters are explained in more detail below.

**COLLATERAL SOURCE RULE**

The collateral source rule is a common-law evidentiary rule for determining the correct level of damages, and therefore would only apply if a claimant's release is adjudged ineffective and the claimant retains a cause of action against them. Generally, the collateral source rule precludes a court from reducing damages by the amount of payments a tort-victim receives from sources independent of the tort-feasor. For example, life insurance payments are generally not offset against damages for which airlines are liable in wrongful death actions. See Leeper v. U.S., 756 F.2d 300 (3d Cir. 1985); William Z. Salcerer v. Invic Equities Corp., 744 F.2d 935 (2d Cir. 1984), vacated on other grounds, 478 U.S. 1015 (1986). In Salcerer the court determined the rule prohibited the consideration of benefits received by third parties as a result of wholly separate and distinct transactions. Id. at 941,

The collateral source rule does not apply when the collateral source of benefits is the defendant. Smith v. Office of Personnel Management, 778 F.2d 258, 263 (5th Cir. 1985);

Barkanic v. CAAC, 923 F.2d 957, n.8 (2d Cir. 1990). See Yost v. American Overseas Marine Corp., 793 F. Supp. 313, 319 (E.D. Va. 1992). Restatement (Second) of Torts § 920A(2) comment b., which states, “[t]he law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him.” If under a “third-tier” system, funds are segregated from the carrier, the safest course would be; to set the system up so that it is clear that any fund manager or contractor is acting on behalf of the carrier.

The collateral source rule allows a tort victim to be overcompensated but is not intended to make the tort-feasor pay twice because, *inter alia*, it is thought that making the tort-feasor pay twice would result in overdeterrence. Thomas v. Shelton, 740 F.2d 478, 484-85 (7th Cir. 1984). There is little justification for making the tort-feasor pay again for the same wrong, and doing so could deter offers of full compensation. See Molzof v. U.S., 6 F.3d 461 (7th Cir. 1993). Moreover, where subrogation is involved, the entity paying the compensation and getting the subrogation and release accedes to the tort victim's rights. Thomas v. Shelton, 740 F.2d at 484-85.

Funds available under a mechanism set up by a person to respond to his legal liability, such as the SCP, are generally not considered a collateral source. In Burlington Northern R.R. Co. v. Strong the court held that an employer could set off damages paid to the plaintiff under the employer's supplemental sickness benefit plan, funded by the employer, because the plan was designed to supplement payments to which the employees were entitled under the Federal Employers Liability Act, and were not bargained-for “fringe benefits” or wage equivalents, Burlington Northern R.R. Co. v. Strong, 907 F.2d 787, 713-14 (7th Cir. 1990). In one case, express language evidencing an intent to offset damages was enough to insulate direct medical payments by the employer, provided to the plaintiff through a collective bargaining agreement, from the collateral source rule. Clark v. National R.R. Passenger Corp., 654 F. Supp. 376 (D.D.C. 1987) See also Davis v. Odeco, Inc., 18 F.3d 1237 (5th Cir. 1994) (employing a balancing test to distinguish fringe benefit plans from benefit plans intended to respond to legal liability).

Questions regarding application of the collateral source rule have arisen where passengers contribute to a fund set aside to compensate them. For example, in Poole v. Baltimore and Ohio Ry. Co., 657 F. Supp. 1 (D. Md. 1985), the court determined that the medical insurance plan offered pursuant to a collective bargaining agreement was a fringe benefit given in part consideration for employee services, and thus was a collateral source. *Id.* at 2. Therefore, compensation received by the plaintiff under the medical insurance plan could not be subtracted from the employer's liability. The court reasoned that there would be no double recovery so long as the plaintiff had contributed to the original source of payments received.

Berg v. U.S. illustrates another line of cases bearing facial similarity to the SCP, but which are readily distinguishable. In Berg v. U.S., the Tenth Circuit held that for a plaintiff to invoke the collateral source rule against the United States government, plaintiff need only show that he or she contributed to special funds separate and distinct from the general

Government revenues, and that funds received came from that special fund. 806 F.2d 778 (10th Cir. 1986). In Berg the United States government attempted to deduct payments the plaintiff had received from Medicare from an award for malpractice under the Federal Tort Claims Act. The court held that Medicare benefits are a collateral source which could not be used to offset the government's liability because the plaintiff had paid Social Security taxes that fund Medicare, and are segregated from general government revenues. Id. at 985. The Tenth Circuit reasoned that the proper test to be applied to hospital insurance benefits, such as Medicare, focused on whether the Injured party had contributed to the fund from which he or she collected. Id.

Berg can be distinguished from any SCP because: (i) Medicare is not designed to respond to the government's legal liability while a SCP is explicitly designed to supplement a carrier's legal liability exposure; and (ii) Medicare represents a special context for the purposes of the collateral source rule as it involves the relationship among the federal government and its various entities. Accord, Phillips v. Western Co. of North America, 953 F.2d 923, 931 (5th Cir. 1992).

# CUBANA DE AVIACION

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DATE: 24 JULY/95

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REFERENCE: AIRLINE LIABILITY CONFERENCE.

**PAGES INCLUDING THIS ONE: 1**

MANY THANKS FOR YOUR PREVIOUS MESSAGES ABOUT THE MATTER OF REFERENCE THE CONTENT OF WHICH WE HAVE DULY NOTED.

REGARDING OUR POSITION IN RESPECT OF THIS TOPIC WE CONSIDER THAT THE LIMITS IN THE WARSAW CONVENTION ARE TODAY INSUFFICIENTS TAKING INTO CONSIDERATION THE CURRENT INFLATION AND THE COST AND LEVEL OF LIFE, NEVERTHELESS THESE LIMITS WOULD BE TOO HIGH FOR OUR COMPANY ACCORDING TO THE OPERATION COSTS AND THE INSURANCE PREMIUMS, WHICH, WITHOUT ANY DOUBT, WILL BE INCREASED, AS COULD BE APPRECIATED DURING THE DISCUSSION AT THE CONFERENCE AND AS PER THE UNDERWRITER'S OPINION. THEREFORE WE ARE CARRYING OUT AN EXHAUSTIVE STUDY IN ORDER TO ADOPT OR NOT ANY FUTURE AGREEMENT,

OUR APOLOGIES FOR OUR DELAY IN SENDING YOU THE COMMENTS ACCORDINGLY, AS WE HAVE RECENTLY BEEN AWAY FROM THE OFFICE.

BEST REGARDS



FRANCISCO MARQUÉS

OUTLINE OF AGREEMENT BETWEEN CARRIERS  
OPERATING TO AND FROM THE UNITED STATES  
TO APPLY A NEW SPECIAL CONTRACT

ALC-WG  
WP 12

1. Carriers operating to and from the United States agree to enter into a new special contract pursuant to Article 22( 1) of the Convention (“NSC”) with all passengers ticketed in and whose international transportation by air commences in the United States (“US Passenger”).
2. The NSC will contain the following elements:
  - a) Each Carrier agrees to waive entirely the applicable Convention limit in respect of its liability for the death of or bodily injury to US passengers occurring on its services (“an injury”);
  - b) Each Carrier agrees to waive the defences available to it under Article 20( 1) of the Convention in respect of an injury.
  - c) In consideration of 2(a) and (b) each Carrier will collect from each US passenger at the time of issue of their ticket or authorisation for free or reduced rate transportation, (“a ticket”) the amount specified in Appendix A (“the surcharge”).
  - d) “The Carriers undertake and agree with each other that in respect of an injury the liability of each Carrier for provable damages will be considered to be divided into two separate parts as follows:
    - i) Provable damages up to 250,000 SDRS (“the Carrier limit”); and
    - ii) Provable damages in excess of the Carrier limit (“the Carrier limit excess”).”
3. Each Carrier will maintain its own aviation liability insurances that will continue to insure the Carrier’s liability under the NSC up to the amount of the Carrier limit.
4. a) Each Carrier will pay the surcharges collected by it under 2(c) to the administrator (“the administrator”) of a fund (“the supplementary insurance fund”). The supplementary insurance fund will be liable to the Carriers for the Carrier limit excess and for this purpose the administrator will purchase, maintain and administer liability insurance to protect its liability to each Carrier for the Carrier limit excess in respect of an injury. (“Supplementary insurance”).
  - b) The Supplementary Insurance
    - i) Will be in an amount not less than (figure) Billion United States Dollars;
    - ii) Will name all Carriers party to this agreement and the administrator as insureds for their respective rights and interests under this agreement and under the NSC;

- iii) Be of the type and in the form usually carried by major international airlines owning and operating similar aircraft, and covering risks of the kind customarily insured against by such airlines.
  - iv) Be primary and without right of contribution from other insurance which may be available to each Carrier;
  - v) Provide that the insurers waive any rights of set-off, recoupment, counterclaim, deduction or subrogation against any Carrier;
  - vi) Provide that the Carriers shall have no liability for premiums, commissions, calls or assessments with respect to such policies **other** than to pay to the administrator the surcharges collected by them.
  - vii) Provide that no cancellation or lapse of coverage or substantial change of coverage which adversely affects the Carriers shall be effective until thirty (30) days after receipt by the administrator of written notice from the insurers of such cancellation, lapse or change.
5. The administrator will apply the surcharges to purchase supplementary insurance to protect the liability hereunder of the supplementary insurance fund to reimburse the Carrier in respect of the Carrier limit excess.
  6. Each Carrier will agree to consider and in appropriate circumstances make prompt **upfront** payment of claims for provable damages in respect of an injury up to the **Carrier limit**.
  7. Each Carrier will advise the administrator and the underwriters of the supplementary insurance (“the Supplementary underwriters”) of all claims for provable damages in respect of an injury within (Y) days of its receipt of such claims.
  8. Within (M) days of the **expiry** of the period referred to in 7. above, the administrator will advise the Carrier as to whether the Supplementary underwriters intend to refuse to pay the Carrier any part of the Carrier limit excess and give their reasons for such refusal.
  9. If the administrator does not give the Carrier advice pursuant to 8. above, the administrator of the supplementary insurance fund will pay or arrange for payment to the Carrier the Carrier limit excess within (O) days of the expiry of the period in 8. above.
  10. The **Carrier** and representatives of the Supplementary underwriters will commence settlement negotiations with the claimants within (N) days of the administrator’s advice under 8. above.
  11. If the claimant, the Carrier and representatives of the Supplementary Underwriters are unable to achieve settlement of a claim within (P) days of commencement of their negotiations the Carrier will offer the claimant as an alternative to judicial determination a dispute resolution process for determination of the quantum of provable damages to be paid as compensation for the injury.

12. There shall be no rights of recovery or contribution as between the underwriters of each Carriers' own aviation liability insurance and the supplementary underwriters.
13. To obviate any possibility that a Carrier may refuse to accept any claim for an amount in excess of the Carrier limit or to otherwise co-operate in resolution of a claim as contemplated above a "cut through clause" allowing the claimant the right to proceed directly against the supplementary insurance fund will be inserted in the NSC.
14. No Carrier party hereto nor the administrator shall have any rights of recourse against another Carrier party in respect of any part of that other Carrier's Carrier limit excess that is protected or paid by the supplementary insurance.
15. Claims settlements and releases and discharges shall be in such form and content as shall be agreed between the Carrier and the supplementary underwriters.
16. No Carrier that is not in receipt of a claim in respect of an injury to a US passenger arising out of the same accident involving another Carrier, shall be entitled to intervene, or participate in or influence the negotiation, settlement or compromise between that other Carrier, the administrator,, the supplementary underwriter and the claimant(s).
17. If and when it is agreed appropriate and upon consultation with interested Governments and intergovernmental organisations, the parties to this agreement may by further agreement extend the application of this agreement to claims for death of or bodily injury to persons other than US passengers arising out of international air transportation.
18.
  - a) Any Carrier party to this agreement may elect, by in-evocable notice to the administrator, to have its own liability insurances protect its liability for the Carrier limit excess and will thereupon waive its right to recovery of the Carrier limit excess from the supplementary insurance fund.
  - b) A Carrier giving notice pursuant to 17 (a) will nevertheless continue to be obliged to collect the surcharge pursuant to 2 (c) and pay the same to the administrator pursuant to 4 (a). Provided however the administrator will refund or arrange for refund to such Carrier of the 'amount of all surcharges collected and paid in respect of tickets issued by or on behalf of the Carrier for international transportation by air which commences in the United States and is performed solely on the services of that Carrier.