Part C: Carriage by air – airline liability

1. Parts 9A and 9B of the Civil Aviation Act 1990 contain provisions relating to airline liability for international and domestic carriage by air of passengers, baggage, and cargo.

2. International airline liability provisions are based on the Convention for the Unification of Certain Rules for International Carriage by Air (the 1999 Montreal Convention). Just over half of the States who are members of the International Civil Aviation Organization (ICAO) have signed and adopted the 1999 Montreal Convention. New Zealand is a party to the Convention.

3. Domestic airline liability provisions were included in the Civil Aviation Act via a Civil Aviation Act amendment in 2004, which:
   3.1. repealed the provisions of the Carriage of Air Act 1967 relating to civil liability for mental injury resulting from a domestic air accident
   3.2. re-enacted provisions similar to those in the Carriage of Air Act relating to liability for passenger delay in a domestic air service.

Objectives and criteria

4. The following objectives were established at the outset of the Review to assess the Civil Aviation Act’s airline liability provisions:
   4.1. to confirm that New Zealand’s international carriage by air provisions are still relevant to international convention requirements
   4.2. to ensure that the current domestic carriage by air provisions fairly balance the interests of passengers (consumers) and airlines.

5. In assessing the provisions, the following criteria were used to determine whether these objectives were met:
   5.1. consistency with international convention requirements
   5.2. alignment with New Zealand’s consumer protection framework
   5.3. flexibility and durability
   5.4. striking an appropriate balance between the rights of airlines and passengers
   5.5. providing net benefits.

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1 103 of the 191 ICAO Member States have ratified the 1999 Montreal Convention.
2 The ACC regime in New Zealand covers passengers in the event of a personal injury or death in a domestic air accident.
Overall assessment

International airline liability provisions

6. The international airline liability provisions in the Civil Aviation Act are focused on liability in the event of injury to, or death of, a passenger; damage or delay of baggage and cargo; and delay of passengers.

7. These provisions have been reviewed in their entirety as part of the present Review. The Review has confirmed that these provisions are still necessary, relevant, and appropriate to give effect to New Zealand’s international convention requirements.3

Advance payments

8. Sections 91T(1)(a) and (b) of the Civil Aviation Act allow the Governor-General to make regulations to prescribe advance payments for compensation, or arrangements for making advance payments for compensation, to relatives of passengers injured or killed during international air carriage.4 To date, no regulations have been made under section 91T(1).

9. Work to assess whether regulations for advance payments should be made is not currently on the Ministry of Transport’s work programme. Any future work can occur outside of this Review.

Domestic airline liability provisions

10. The domestic airline liability provisions in the Civil Aviation Act relate to passenger delay. Some key provisions are:

10.1. Liability of a carrier in situations of delay (section 91Z) — carriers are liable for damage caused by delay, except in situations where they can prove that the delay was a result of matters outside of their control (such as meteorological conditions) or was necessary to save life.

10.2. Limitation on liability (section 91ZC) — carriers are liable for the lesser of the amount of damage proved to have been sustained as a result of the delay, or an amount representing 10 times the sum paid for the carriage.5

10.3. Limitation of actions (section 91ZL) — passengers are limited from taking an action against a carrier after two years from the date the aeroplane arrived at its destination or, if it didn’t arrive, the date on which it should have arrived or the date carriage stopped, whichever is later.

3 The Warsaw Convention, the Guadalajara Convention, and the Montreal Convention.

4 Article 28 of the Montreal Convention provides for air carriers to make advance compensation payments in accordance with national law to relatives of passengers injured or killed during carriage to which the Convention applies.

5 The Act does not prevent carriers from contracting to increase the amount of liability.
11. Compensation for serious injury and/or death sustained by a passenger as a result of an accident occurring on a domestic air service is governed by the ACC regime, except where the passenger is on the domestic leg of an international flight that he or she has travelled on (in which case Part 9A of the Act applies). Damage to baggage or cargo is addressed under the Carriage of Goods Act 1979. There may also be residual situations in which it is appropriate to take action under the Consumer Guarantees Act 1993 and the Fair Trading Act 1986.

12. Three airline liability matters are addressed in the following section:

   12.1. the necessity of specific domestic airline liability provisions
   12.2. the effectiveness of specific domestic airline liability provisions
   12.3. the limit on liability for damage caused by delay.
Items

Item C1: The necessity of specific domestic airline liability provisions

Background

13. Circumstances in which air carriers may avoid liability are contained in sections 91Z(2) and 91ZA of the Civil Aviation Act and section 33 of the Consumer Guarantees Act.

14. In the context of Part 9B of the Civil Aviation Act, ‘limitation’ is concerned with the quantum of damages and the time for bringing any action. Under the Consumer Guarantees Act, there are no specific limits on liability. The courts or dispute tribunal would decide the quantum. The time for bringing proceedings under the Consumer Guarantees Act could be decided under the Limitation Act 2010.

15. Both Part 9B of the Civil Aviation Act, and the Consumer Guarantees Act govern matters of private law; therefore, it is the responsibility of the passenger to seek compensation for delay.

Are the domestic airline liability provisions in the Civil Aviation Act necessary?

Exemptions to liability

16. Under Part 9B, section 91Z of the Civil Aviation Act, a carrier is not liable for damage by delay if the carrier can prove that the delay:

   16.1. arose by reason of meteorological conditions; compliance with instructions, advice, or information given by an air traffic control service; or obedience to orders or directions given by a lawful authority

   16.2. was made necessary by force majeure

   16.3. was necessary for the purpose of saving or attempting to save life.

17. If Part 9B were removed from the Civil Aviation Act, air carriers would have greater scope to argue against liability. For example, under section 33 of the Consumer Guarantees Act, there is no right of redress against the supplier of a service if the service is provided in breach of the specified guarantees because of:

   17.1. an act or default or omission of, or any representation made by any person other than the supplier or a servant or agent of the supplier; or

   17.2. a cause independent of human control.

Onus of proof

18. A key difference between the Consumer Guarantees Act and the Civil Aviation Act is the burden of proof.

19. Under the Civil Aviation Act, the onus is on the carrier to prove that the delay was a result of matters outside the carrier’s control.
Part C: Carriage by air – airline liability

20. However, under section 28 of the Consumer Guarantees Act, the onus is on the consumer to show that the carrier did not use reasonable skill and care in providing its services and that consumers have suffered a loss as a result. Under section 30 of the Consumer Guarantees Act, the onus is on the consumer to show that the services were not completed within a ‘reasonable’ time.

21. Therefore, it is easier for a consumer to claim compensation for delay under the Civil Aviation Act.

Business travellers

22. While the Consumer Guarantees Act provides protection for individuals, it does not provide protection for business travellers, as carriers can and have opted out of providing cover under that Act. However, business travellers are covered under provisions in the Civil Aviation Act.

23. On 18 June 2014, the Consumer Guarantees Amendment Act 2013 introduced a new criterion for contracting out — that it must be “fair and reasonable” for the parties to be bound by such a provision. This is a higher test for contracting out than in the current law and carriers will need to work out how to meet the criterion.

Distinction between other modes of transport

24. For passengers travelling on other forms of scheduled public transport such as buses, trains and ferries, liability for delay is determined by common law in accordance with the Consumer Guarantees Act. Some have argued that air travel should be treated in a similar way to other forms of scheduled public transport. Historically, likely because of the cost involved, the approach to air travel has been somewhat different.

25. International air travel is governed by international conventions, which include liability for, among other things, delay of passengers, baggage and cargo. This has an impact on the approach taken to domestic air travel liability.

26. However, an aircraft that is delayed or overbooked is likely to have a higher impact on passengers than a delayed bus. In New Zealand, the time taken or distance travelled is often longer, and the cost higher. The provisions in the Civil Aviation Act give passengers quick and easy access to compensation when faced with unforeseen or inconvenient circumstances, such as missing a connecting flight or being stranded overnight.

Recommendation

27. We consider that the domestic airline liability provisions in Part 9B of the Civil Aviation Act are still necessary because:

27.1. without them, passengers may be deterred from seeking compensation because of court costs and the shift in the burden of proof

27.2. the cap on liability provides air carriers with greater certainty about what compensation they may be obliged to provide in certain circumstances

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7 See section 13 of the Consumer Guarantees Amendment Act 2013.
Part C: Carriage by air – airline liability

27.3. they provide less scope to avoid liability than the Consumer Guarantees Act

27.4. they align with the approach taken to liability for delay in international air carriage.

Question C1a: Should air carriers continue to be presumed liable for loss caused by delay in exchange for a limit on that liability? Please state your reasons.

Question C1b: The Civil Aviation Act delay provisions relate to passenger delay. Should there be a presumption of fault for delay in the carriage of baggage as well?\(^8\)

\(^8\) Note that the Carriage of Goods Act appears to cover the loss of or damage to baggage but not losses/damages resulting from delayed baggage. So the passenger would need to seek redress under the Consumer Guarantees Act.
Part C: Carriage by air – airline liability

Item C2: The effectiveness of specific domestic airline liability provisions

What is the problem?

28. We have no data to confirm how often section 9B provisions are referred to by delayed passengers, and we are not aware of any specific examples of passengers seeking compensation under these provisions. This may be because consumers are not well informed of these provisions and/or because carriers have generally been proactive in offering compensation.

29. To the extent that the latter is occurring, it may be the case that the Civil Aviation Act’s provisions are incentivising carriers to ensure that dissatisfied passengers are compensated. Moreover, even if the provisions have not been explicitly relied upon to date, the protections may be important with the possibility of additional “no frills” air carriers entering the market.

Option 1: Status quo and potential educational measures developed (Ministry of Transport preferred option)

30. To date, we have not identified fundamental problems with the provisions in Part 9B of the Civil Aviation Act. While it seems that these provisions have been seldom referred to, they may be providing an incentive for carriers to compensate consumers because the onus of proof is on the carrier to prove that they have not caused damage by delay.

31. As part of this Review we have discovered that some smaller domestic carriers are still referencing the repealed Carriage by Air Act 1967, rather than Part 9B of the Civil Aviation Act or other consumer legislation, in their conditions of carriage. We are contacting carriers about this issue.

32. Given this situation, as well as passengers’ lack of knowledge and awareness about the provisions in the Civil Aviation Act, further educational measures (such as guidelines or information on consumers’ rights) to better inform passengers and carriers could be explored. This issue is examined further below, as are some other issues that have been raised if the status quo continues.

What educational measures could be developed?

33. A range of non-regulatory measures could be developed to better inform consumers of their rights. These could include:

33.1. information on the provisions in the Civil Aviation Act displayed online

33.2. a ‘Know Your Rights’ pamphlet for passengers, with information on the provisions in the Civil Aviation Act and the Consumer Guarantees Act — working in conjunction with carriers and the Ministry of Business, Innovation and Employment

33.3. adopting an approach similar to one used in Australia, working with carriers to introduce a ‘Customers Charter’ or something similar, which could outline each carrier’s policies on responding to passenger complaints.

34. Departments that administer legislation in New Zealand are responsible for the provisions contained in that legislation. The Ministry of Transport, as the department
that administers transport legislation, would be responsible for developing educational measures.

35. We will explore the option of educational measures outside of the Review, and in liaison with industry stakeholders as appropriate. Our initial view is that basic guidance (that could be displayed on the Ministry of Transport website) about the international as well as domestic provisions contained in the Civil Aviation Act would be sufficient.

Conclusion

36. The status quo is our preferred option. This would mean Part 9B of the Civil Aviation Act remains and sits alongside generic consumer law. This option would also include considering educational measures that could be developed to inform consumers of their rights. This could happen separately from this Review.

Option 2: Strengthen the consumer protection provisions in the Civil Aviation Act

37. Option 2 would result in stronger provisions to protect passengers’ rights in situations of delay and/or cancellation.

38. A number of different approaches could be adopted to strengthen the consumer protection provisions in the Civil Aviation Act. One provision would be to adopt a definition of ‘delay’ in Part 9B of the Civil Aviation Act to provide clarity about the timeframe that constitutes a delay — for example, three hours.

39. European Union Regulation 261/2004\(^9\) has defined ‘delay’ according to distance travelled and when the passenger was delayed and/or their flight cancelled. New Zealand could adopt a similar approach that could be tailored towards our domestic market (for example, distance travelled).

<table>
<thead>
<tr>
<th>Benefits</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Could strengthen consumers’ rights of redress against carriers.</td>
<td>• Could impose unreasonable costs on carriers without justification for doing so.</td>
</tr>
<tr>
<td>• Clarifies uncertainty in legislation that does not define what delay means</td>
<td>• Could create perverse incentives such as in the United States where carriers now cancel flights instead of delaying them as it means they do not have to pay compensation.</td>
</tr>
</tbody>
</table>

40. We note that other jurisdictions, for example Canada, the United States, and the United Kingdom provide additional aviation industry-specific protections.\(^{10}\)

Conclusion

41. At this stage we have not identified significant problems for consumers with the current provisions in the Civil Aviation Act. The main problem appears to be with whether passengers and carriers are aware of the current consumer protections available. In our initial view, the scale of the problem is not large enough in New Zealand to necessitate strengthening the provisions in the Act at this time.

\(^9\) [http://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC_1&format=PDF)

\(^{10}\) Appendix C1 outlines developments within the international aviation community and other states.
Question C2a: Which is your preferred option? Please state your reasons.

Question C2b: Do you think that educational measures are necessary? If so, what should they be?

Question C2c: Do you think that stronger protection provisions are necessary in the Civil Aviation Act?

Question C2d: If you answered yes to question C2c, what do you think should be included in the Act?
Part C: Carriage by air – airline liability

Item C3: The limit on liability for damage caused by delay

42. Given our preferred option, retaining the existing domestic airline liability provisions, we have considered the current liability limits as set out in the Civil Aviation Act.

43. Section 91ZC of the Civil Aviation Act limits liability of the carrier for damage caused by delay to the lesser of the amount of the damage sustained, or an amount representing 10 times the sum paid for the carriage. This section of the Civil Aviation Act was carried over from the Carriage by Air Act 1967. The sufficiency or appropriateness of the value was not assessed at that time.

44. The inclusion of the liability amount representing 10 times the sum paid for the carriage responded to Article 19 of the English Non-International Carriage Order 1952, where compensation for delay was set at a minimum of double the sum paid for the carriage but with no limit on liability. Ten times the sum paid for the carriage was considered to be a compromise — double the sum was too low for passengers, and no limit on liability did not provide certainty for carriers.

Options

Option 1: Status quo

45. If feedback from the consultation shows that the limit of 10 times the sum paid for domestic air carriage is adequate to compensate passengers and gives carriers appropriate certainty, then the status quo may be preferable.

Option 2: Revise the domestic liability limit for damage caused by delay

46. Given the current liability limit was set in 1967 — when the costs of air travel were quite different from today — we are interested to hear about the liability limit and whether 10 times the sum paid for domestic air carriage is still fair and reasonable.

47. The table below illustrates the domestic liability limit — 10 times the sum paid — based on two regional air fares sourced on-line.

<table>
<thead>
<tr>
<th>Flight</th>
<th>Airfare</th>
<th>Liability Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invercargill – Kaitaia</td>
<td>$680 – $900</td>
<td>$6,800 – $9,000 (10 x amount paid)</td>
</tr>
<tr>
<td>Wellington – Auckland</td>
<td>$50 – $364</td>
<td>$500 – $3,640 (10 x amount paid)</td>
</tr>
</tbody>
</table>

as a comparison

Liability limit for international air carriage | $NZ 8,722.7111

11 The limit for international carriage is 4,694 special drawing rights, which equates to approximately $US7,242.49 or $NZ8,722.71.
Question C3a: Which is your preferred option? Please state your reasons.

Question C3b: If you selected Option 2 for Question C3, what do you consider would be an appropriate liability limit for domestic air carriage and why?
Appendix C1

International environment

48. At the ICAO Worldwide Air Transport Conference in Montreal in March 2013, one of the agenda items was international and domestic carriage by air. The ICAO Secretariat and other member States presented papers on the effectiveness of consumer protection regulations.

49. The conference noted the importance of protecting the interests of consumers and the need for more convergence and compatibility between different member States’ domestic consumer protection provisions. It was recommended that ICAO establish an ad hoc group to develop some high level, non-prescriptive core principles on consumer protection that strike an appropriate balance between the protection of consumers and industry competitiveness.

50. At the Twelfth Meeting of the ICAO Air Transport Regulation Panel in May 2014, the Panel considered a core set of non-binding principles on consumer protection. The Panel was asked to consider if and how the core principles on consumer protection, and related future developments, should be incorporated into existing ICAO material.

51. The International Air Transport Association (IATA), a representative group of 240 carriers around the world, released its own core principles for passenger rights regulation at its annual meeting in June 2013.12 These principles were developed in response to concerns about the complex web of consumer protection laws in different countries and calls for more unification of these laws across countries.

Approaches other countries have taken

52. A range of approaches has been adopted in overseas countries to consumer protection for domestic carriage by air. Most countries have their own generic consumer law (similar to New Zealand), and some like Australia and Singapore rely mainly on that to cover passenger rights for carriage by air. Other countries like the United Kingdom, the European Union, and the United States take a stronger regulatory approach to consumer protection with aviation-specific provisions.

53. International experience has been that strengthening consumer protection provisions has developed as a result of one-off incidents. For example, in 2007 in United States passengers were stranded on the tarmac because of a blizzard, without access to food, water and lavatories. As a result, the United States Congress put in place a law prohibiting carriers operating domestic and international flights from allowing an aircraft to remain on the tarmac for more than three hours, with exceptions for safety, security and air traffic control related-reasons. The law also requires United States carriers to provide basic services such as access to lavatories and water in the event of extended tarmac delays.

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54. In Europe, European Union Regulation (EC 261/2004) establishes minimum rights for passengers in cases of denied boarding, denied flights, and cancelled flights; as well as automatic compensation to passengers. Additionally, a recent decision in the European Union Court of Justice has meant that delay has been defined as three hours or longer, enabling consumers to claim for compensation in these instances.

55. As well as regulation, countries like Canada, Australia and the United Kingdom have developed non-regulatory initiatives to strengthen consumer protection in their respective countries. The European Commission has also launched a free app for smart phones that details passengers’ rights for air and rail transport when delayed or when baggage is lost.

**Case study: Australia**

The Australian government has worked with airlines to establish the ‘Airline Customer Advocate’ — an independent complaints handling body, funded by participating airlines, that acts as a facilitator between passengers and airlines to resolve complaints within 20 days. It is an alternative option available to any customer who has been unable to resolve a complaint directly with an airline. If customers are not satisfied with the outcome, they can still take action under Australian consumer law.

In addition, the government has also worked with airlines to introduce a ‘Customers Charter’, which outlines each airline’s service commitment and complaint handling procedure to provide greater transparency for customers when choosing between airlines and the various fare types on offer.

56. Initiatives such as these are positive non-regulatory tools that can strengthen consumers’ knowledge about their rights as well as provide information to businesses on the relevant regulations that need to be followed.

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13 Compensation depends on the distance of the delayed/cancelled flight and when the flight has been delayed/cancelled. The maximum amount of monetary compensation is €600 for a delay of more than four hours and a flight length of over 3,500km.