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**CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA –  
THE ATHENS CONVENTION: A DISCUSSION PAPER**

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## 1 Introduction

In November 2017, the Australian Government Department of Infrastructure and Regional Development (DIR) released a Discussion Paper, 'Carriage of Passengers and their Luggage by Sea: the Athens Convention' (Discussion Paper).<sup>1</sup> DIR implemented a consultation process on the possible ratification of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the 2002 Protocol (Athens 2002).

The Discussion Paper noted the growth in the cruise industry, particularly amongst Australian passengers and with many more cruise ships visiting Australian ports. Athens 2002 is a regime that offered passengers and operators greater legal certainty, particularly where claims arise out of shipping accidents.

The Discussion Paper lays out the challenges posed by the current legal framework in Australia.<sup>2</sup> In particular, it noted the many issues, such as:

- The use of exclusive jurisdiction clauses and choice of law clauses in favour of a country other than Australia, even when the cruise contract has been entered in Australia, by an Australian, departing from Australia
- The onus on passengers to prove negligence on the part of the shipowner or carrier in the event of any injury, even arising from a shipping incident
- The absence of a requirement for ships to carry insurance for passenger claims, or to have a legal presence in Australia, and the fact that there is no mechanism for passengers to sue any insurer directly.
- The fact that the rights of cruise passengers appeared inconsistent with the rights of aviation passengers – given that Australia had ratified the equivalent aviation carriage conventions.

Further, particular complexities arise from Australia's own consumer and tort laws. The Discussion Paper alluded to these without exploring them.

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<sup>1</sup> Available at:  
<[https://infrastructure.gov.au/maritime/business/liability/files/athens\\_convention\\_discussion\\_paper.pdf](https://infrastructure.gov.au/maritime/business/liability/files/athens_convention_discussion_paper.pdf)>.

<sup>2</sup> Ibid, 12.

To a large extent, many of these difficulties could be improved by introducing the Athens Convention 2002. If that Convention were to be ratified and implemented in Australia, the relationship between it and the general shipowner limitation conventions must be worked out and explicitly stated. The Discussion Paper sought submissions on this point. It also sought submissions on whether Australia should raise the limitation amounts set some 16 years ago in the 2002 Protocol amending the Athens Convention 1974. By its terms, the Athens Convention 2002 permits the raising of limits, and even the removal of limits.<sup>3</sup> The Discussion Paper set out four different options for dealing with liability limits. It also sought responses to a series of questions.<sup>4</sup>

I responded to the Discussion Paper. My response is attached.<sup>5</sup> I am in favour of the implementation of the Athens Convention 2002. Indeed, I have been lobbying for the Government to consider ratification for some time. I also argue in favour of increasing the limitation amounts from the base level set in the Athens Convention 2002.

## **2 Position in Singapore**

Singapore, like Australia, is currently not a party to any iteration of the Athens Convention. Like Australia, Singapore is also experiencing a rapid increase in cruise ship visits. Like Australia, Singapore has adopted international Conventions concerning the carriage of passengers by air.

Singapore's consumer protection laws are also strained in their application to passenger claims. Under Singapore consumer protection provisions, a defendant cannot exclude nor limit liability for personal injury resulting from negligence.<sup>6</sup> Notably, there is no express provision requiring a supplier of services to exercise due care and skill in the Supply of Goods and Services Act 1982 – unlike the UK equivalent Act. Consumers who are not Singapore residents enjoy even less protection.<sup>7</sup>

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<sup>3</sup> Athens Convention 2002, Article 7.

<sup>4</sup> Set out at page 18 of the Discussion Paper.

<sup>5</sup> See below, pp 5-20.

<sup>6</sup> Section 2, Unfair Contract Terms Act 1977, cap 396. However, note s.28.

<sup>7</sup> See Kate Lewins, *International Carriage of Passengers by Sea* (Sweet & Maxwell 2016) 4-069 – 4-077.

In Australia, the Athens Convention 1974 was viewed as being 'shipowner friendly' (because of the ability to cap liability for personal injury claims, and the relatively low quantum cap. By contrast, in Asia the Athens Convention limitation amounts have usually been viewed as overly generous – particularly those contained in the 1990 and 2002 Protocols. Throughout Asia, no country has become a party to the Athens Convention 2002. The Special Administrative Region of Hong Kong is a party to the Athens Convention 1974, as is PRC. Those countries therefore impose on claims a quantum cap originally fixed over 45 years ago. Unsurprisingly, those limitation amounts are extremely low today (for example, approx. S\$90,000 limit per passenger for any personal injury claim.)

The Athens Convention 2002 regime does offer benefits to shipowners and their insurers, as well as passengers: amongst other things, legal certainty and a right to limit even against a claim by a single plaintiff. Now the quantum limits set by the Athens Convention 2002 are over 15 years old, they might be considered less problematic. However, there is no sign (as yet) that there is any appetite to adopt the Athens Convention 2002 in Singapore. Perhaps in the future, that appetite might be piqued.

**CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA:  
THE ATHENS CONVENTION DISCUSSION PAPER**

I am a maritime law academic specialising in maritime law and in particular the law relating to carriage of passengers by sea. I attach a brief biography. I have made submissions to Government concerning the passenger liability regime in Australia, both on my own account and (together with my colleague Professor Nick Gaskell) on behalf of MLAANZ. I make this submission in my personal capacity.

More than a million Australians are embarking on cruises each year, and cruise lines are increasing their visits to Australia. Therefore I welcome the Australian Government's decision to consider ratification of the Athens Convention 2002, a regime governing the liability to passengers for personal injury and property damage whilst travelling on a seagoing ship on an international voyage.

The summary at 2.1 of the Discussion Paper usefully outlines the shortcomings of the current position under Australian law. In Australia, cases concerning passenger claims and travel claims face issues such as:

- incorporation of terms and interpretation of terms (so called 'ticket' issues),
- the extent to which Australian law applies to the contract or governs the conduct of foreign cruise operators, especially if the cruise is to be performed overseas; the contract was entered over the internet; or the contract stipulates the law of some other country applies ('applicable law' issues)
- challenges to jurisdiction of Australian courts, often around the right to proceed in Australia, given exclusive jurisdiction clauses (EJC) contained in carriage contracts nominating a foreign court. Such clauses exist even in contracts entered by Australians whilst in Australia for a cruise to be fully performed in Australia. Although such a clause would be unlikely to be enforced by Australian courts, an Australian consumer may not realise that is the case.

- the impact of domestic legislation such as the state based Civil Liability Acts and the federal Australian Consumer Law, and the interplay between the two: which is unsettled and extremely complex.<sup>8</sup> Added to that, the state based CLAs are notably different from one another (in their treatment, for example, of extraterritorial application, contracting out, waivers, recreational activities, and quantum thresholds/limits). It is to be expected that a case decided in NSW could be demonstrably different to a case decided in Victoria, for example. Accordingly there is now the additional and real complication of interstate conflict of laws.<sup>9</sup> This creates disparity and uncertainty, which in turn inhibits predictability of outcome. Certainty and predictability are critical, because they encourage parties to settle disputes.

The implementation of the Athens Convention will dispose of many of these arguments, particularly if the relationship with Civil Liability Acts is explicitly laid out.

Athens Convention 2002 represents an international agreement. There are many benefits to Australian passengers and our cruise industry in implementing the regime. It will ensure passengers have:

- A right to bring proceedings in places designated by the Convention;
- The security of compulsory insurance, and the right to claim directly against the insurer if necessary;
- The protection of strict liability for injuries or death sustained in shipping accidents such as grounding, sinking or fire;
- The ability to call on caselaw from other jurisdictions as an aid to interpretation;
- Recognition and enforcement of judgments by other State parties.

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<sup>8</sup> See these papers for a discussion of some of the issues: 'Cruise Ship Operators, their Passengers, Australian Consumer Law and State Civil Liability Acts – Part 1' (2015) 29 ANZ Maritime Law Journal 93; 'Cruise Ship Operators, their Passengers, Australian Consumer Law and State Civil Liability Acts – Part 2' (2016) 30 ANZ Maritime Law Journal 12.

<sup>9</sup> See *Correa v Carnival Plc* [2015] VSC 718: where the court refused a carrier's application to transfer the case from a Victorian court to NSW in accordance with the NSW EJC in the contract.

Notably, the carrier cannot exclude liability for injuries and property damage under the provisions of the Athens Convention 2002.

If a ship tragedy were to occur under current Australian law, Australian passengers on board a vessel would be at a significant disadvantage as regards liability, onus of proof, procedure, evidence, insurance and enforcement compared to other passengers on board the same ship whose contracts are subject to the Athens Convention.

The Athens Convention will increase certainty, and expedite resolution of claims. It is, necessarily, a compromise. However, it has support from various quarters of the international community, including shipowners (International Chamber of Shipping) maritime lawyers (CMI, of which MLAANZ is a national member) and the EU, renowned for its focus on consumer protection particularly in travel.

**(1) Do you think the Australian Government should ratify the Athens Convention? What are your reasons for this view? Where possible, please provide reference to the costs, impacts and benefits associated with the possible implementation of the Athens Convention.**

**Yes. See above.**

The discussion paper mentions the increased jurisdictional certainty that would result from the adoption of the Athens Convention. Put simply, much of the initial jurisdictional skirmish will disappear. Further, if Australia adopts the Athens Convention, the consistency of legal regime (if not outcome<sup>10</sup>) neutralises the impetus to forum shop.

While researching my book on international carriage of passengers by sea, it was apparent to me that once England enacted the Athens Convention in 1981, there was a significant drop in reported English cases dealing with jurisdictional issues (ie where was the contract made,

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<sup>10</sup> Many matters remain subject to domestic law, including assessment of damages. Differences in limitation framework may also account for differing approaches.

what terms were incorporated, what was the proper law of the contract, which court had jurisdiction). By contrast, Australia has had some very well known cases find their way through to courts of appeal and the High Court on precisely these issues;<sup>11</sup> and there has been a constant trickle of cases ever since.<sup>12</sup>

**(2) If Australia were to ratify the Athens Convention, which of the options listed in paragraph 5.2 of this paper do you consider would be most appropriate and why?**

The aim of any limitation regime is to control the liability of shipowners to a manageable (insurable) degree. There are two such regimes applicable to passengers.

The LLMC regime applies to set an overarching limit on the sum total of all passenger claims against the carrier arising on any distinct occasion. As the LLMC limit is based on numbers of passengers a ship is registered to carry, for large ships the limit will not come into play unless there are many claims of a serious nature arising from a casualty. However, a small passenger craft carrying relatively few passengers may only need an incident causing catastrophic injuries to a few passengers for the LLMC limit to come into play. The LLMC applies to 'seagoing' ships but the ship need not be on an international voyage.

The Athens Convention limit, on the other hand, is a 'per passenger' limit. The carrier can rely on that limit to cap its liability to each passenger separately, even if only a single passenger has been injured. The caps under Athens 2002 are reasonably generous: at the time of writing, the limit is approximately \$723,000 if negligence can be proven.<sup>13</sup> One would expect that most claims would be unaffected by the cap. However, unavoidably, such a cap will occasionally deny a plaintiff the full amount of their assessed damage. For that to be the case, the plaintiff must have been badly injured. Limiting such a claim might be seen as unpalatable,

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<sup>11</sup> *Oceanic Sun Line v Fay* [1988] HCA 32, (1988) 165 CLR 197 (High Court); *Dillon v Baltic Shipping* (1991) 22 NSWLR 1 (NSWCA); which went on appeal to the High Court on different grounds. In *Oceanic v Fay*, Deane J formulated the 'clearly inappropriate forum' test later adopted by the High Court in *Voth v Manildra Flour Mills* (1990) 171 CLR 538.

<sup>12</sup> Eg *Gill v Charter Travel Co* (QSC, 16 February 1996); *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861; *Mody v South Seas Cruises* [2008] NSWSC 1261; *Wilson v Addu Investments* [2014] NSWSC 381. This list does not include the many applications for leave to serve the carrier out of the jurisdiction.

<sup>13</sup> The cap being 400,000 SDRs. As at 17 January 2018 (1 SDR + AUD\$1.80) so that would be approximately AUD \$723,400.



particularly if only a single plaintiff has been injured and the ship has extensive insurance covering passenger liabilities.

I have had the advantage of reading Professor Gaskell's submissions to the Department dated 22 December. I endorse and agree with his explanation and summary of the shortcomings and compromises involved in shipowner limitations. I restrict myself to considering the options in the discussion paper.

Turning then to consider the options posed by the Discussion Paper at 5.2.

Option 1: Implement both liability regimes. I am not in favour of this option. I consider the claims of passengers against their carrier should be subject to quantum limitation only once.

Option 2: retain LLMC Article 7 limits and opt out of Athens limits. I note that the passenger limits under Article 7 of LLMC were unchanged by the recent 2015 amendment. The limit remains a total amount calculated based on 175,000 SDR per passenger, as per the 1996 Protocol. That limit was set over 20 years ago and is now quite out of date. It is lower than the 'per passenger' limit set under Athens 2002 (250,000/400, 000 SDR), (although noting that calculation and operation of the limits under each Convention is different). I would only be in favour of this option if Australia exercised its right<sup>14</sup> to increase the LLMC limit in Article 7 to the equivalent of 250,000 SDR per registered passenger.

Option 3: Enact Athens limits and opt out of Article 7 LLMC. The UK has chosen this option. (It is relevant to note that, under the Athens Convention 2002, the claims against insurers are capped at 250,000 SDR per passenger, although higher claims may still be recoverable against the carrier.) I would expect that this will be the most palatable option for industry as it harmonises with the UK approach. The LLMC opt out should only apply where the Athens Convention is applicable. However, the

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<sup>14</sup> Under Art 15.3bis.

Athens limits were themselves adopted 15 years ago. If this option is selected, there ought to be a power in the Minister to update those limits by regulation, as suggested by Professor Gaskell.

My preferred variation to this option is to renounce the LLMC Article 7 limits and retain Athens limits (subject to the right to increase those limits by regulation). However, an exception to the Athens Convention limits should be made for cases of catastrophic injury. In the event that the passenger has sustained a catastrophic injury, there should be unlimited liability if negligence can be proven. A definition of catastrophic injury has been agreed by State governments in the context of motor vehicle accidents. It includes spinal cord injury, traumatic brain injury, multiple amputations, severe burns and permanent traumatic blindness.<sup>15</sup> Such cases would be very rare, but are an example of a situation where the 'per passenger' limit of Athens would work a real and enduring injustice against a single passenger. A modest increase in cruise cost may result from implementing this option. I believe that insurers would prefer the per capita limit of Athens (rather than LLMC) because it enables them to set a certain reserve for each passenger claim. I think that this option, with unlimited liability for catastrophic injury, would be more palatable to insurers and carriers than the LLMC option.

Option 4: renounce LLMC Article 7 limits and set higher limits under Athens. This would be an option favouring passengers; and other jurisdictions have done this. I would certainly be in favour of reserving a right to increase the limits by way of regulation. As outlined in the previous paragraph, I would still be inclined to permit unlimited liability for catastrophic injury.

My preference, in order would be:

1. Option 3 / 4: retain Athens limits but with unlimited liability for catastrophic injury.

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<sup>15</sup> I would prefer a definition that gives courts some discretion as to what constitutes 'catastrophic' for this purpose, to account for the fact that the type of injuries likely to be suffered in a road accident (being injuries sustained through violent impact) would be narrower than those that might occur on a ship at sea.

2. Option 2 with an increased LLMC limit of 250,000 SDR as suggested by Professor Gaskell.

In any case, I endorse Professor Gaskell's suggestion that any enabling Act include a ministerial power to increase limits by delegated legislation.

**(3) Do you have any other comments or are there any other issues that you consider are relevant to Infrastructure's consideration of the potential ratification of the Athens Convention?**

1. Clarification of reach of Convention: 'place where contract made'

Article 2 of the Convention states it will apply to international carriage where the contract has been 'made in a State Party to this Convention.' Article 17 also uses that phrase. Determining the place where a contract is 'made' is a question of domestic law. In Australia (as well as other common law countries) a legal analysis must be conducted to determine where a contract has been 'made'.

- As a consequence, it is not always easy to determine where a contract is 'made'. It would involve legal analysis to determine the place of acceptance of the offer and the effect of any relevant contract terms, as well as the legal status of intermediaries such as travel agents and cruise line booking agents. Without a 'bright line', parties can and will argue that point. There is plenty of evidence of this in the cases.
- It is possible that the intended application of the Convention could be subverted by contract terms designed to lead to a conclusion that the contract was 'made' somewhere other than Australia.

Further, cruise contracts are frequently entered over the internet. Carrier sites that might be situated on servers anywhere in the world. The legal analysis is further complicated in that instance. The wording of the original 1974 Convention did not and could not anticipate contracts concluded over the internet. The Electronic Commerce Convention 2005 (as enacted throughout Australia) leaves questions of offer and acceptance to domestic law, so

it is of no help. It is notable that Consumers can easily be wrongfooted by internet contracts. For a recent travel example, see *Gonzalez v Agoda Co* [2017] NSWSC 1133 (the plaintiff, a NSW resident, used her home computer to book a hotel in Paris using Agoda, a hotel aggregator service. She was injured in the hotel. The judge permanently stayed proceedings against Agoda, giving effect to an exclusive jurisdiction clause in the terms and conditions.)

In submissions to the Department on behalf of MLAANZ, Professor Nick Gaskell and I have suggested that any enabling Act clarify the operation of Art 2(1)(b) and Article 17. It would seem reasonable that where a carrier contracts with an Australian resident or a person who is physically in Australia, then there would be an expectation that the contract should be covered by the Convention even if the carrier is outside Australia and the contract is fully performed outside of Australia. There would be various means of achieving this, and we outlined some of those in our submission. They include:

- a) A provision similar to s11(1) of Carriage of Goods by Sea Act 1991 (Cth).
- b) A provision deeming the contract to have been 'made' in Australia where the passenger (or the passenger's agent) or the cruise line's agent are physically in Australia.
- c) deeming the contract of carriage to be made under Australian law where the operator has 'engaged in conduct' in Australia as regards the passenger. This phrase has been the subject of recent clarification in the context of internet contracts and the Australian Consumer Law (*ACCC v Valve Corp (No 3)* [2016] FCA196 (Edelman J)). There is some advantage in adopting a phrase already well understood and in use in Australian consumer protection legislation.
- d) A provision similar to that adopted in the Consumer Rights Act 2015 (UK), providing that the contract is deemed to be made in Australia:
  - Where the passenger is habitually resident in Australia;
  - where the carrier has pursued or directed marketing activities to Australia; or
  - where the passenger is in Australia at the time the booking is confirmed (protecting tourists who make a contract while in Australia).

I consider it is important to create a test that is easily understood and applied on the facts. I prefer b) or d) for that reason. (Option d) is broader, because on certain facts, it could be triggered where an Australian is actually outside Australia when the contract is made.)

If a deeming provision is inserted, it should be made clear that the provision does not seek to change, alter or extend the convention itself. Rather it seeks to stipulate situations when a contract will be taken to have been 'made' in Australia - a legitimate matter for national contract law under the Convention.

## 2. Interaction with the State civil liability regimes ('CLAs')

One of the complexities of Australian law relating to passengers currently is the interaction between the statutory guarantees as to services contained in the Australian Consumer Law, and the liability framework contained in the State based CLAs. I have written several articles touching on some of the issues that arise.<sup>16</sup> Passenger claims pose a particular challenge to the operation of CLAs. In many cases concerning passenger injury, the law applicable is in dispute, and may not be that of Australia; and the negligent act/breach of contract usually occurs outside Australia. Further, the claims are usually brought by way of an action for breach of the Commonwealth statutory guarantees contained in the Australian Consumer Law, which constrains the operation of state CLAs in some respects.<sup>17</sup> The law is still unsettled; the High Court has not yet reviewed certain approaches taken, and there are issues that remain unlitigated. It is safe to say that the ACL and CLA have a fractious relationship.

In my view, if Australia is to implement the Athens Convention, the expected role of the CLA in passenger claims must be explicitly laid out. First, the CLAs contain various provisions that modify common law liability of a defendant for any type of negligent conduct, whether arising out of contractual duty or otherwise. They also contain special rules concerning waivers, alcohol, recreational services and dangerous activities, amongst others. Secondly, because

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<sup>16</sup> 'Cruise Ship Operators, their Passengers, Australian Consumer Law and State Civil Liability Acts – Part 1' (2015) 29 ANZ Maritime Law Journal 93; 'Cruise Ship Operators, their Passengers, Australian Consumer Law and State Civil Liability Acts – Part 2' (2016) 30 ANZ Maritime Law Journal 12.

<sup>17</sup> For example, the recreational services provisions in the Australian Consumer Law operates more narrowly than those in the CLAs. The ACL, as a Federal Statute, overrides State provisions to the contrary.

the Athens Convention does not seek to modify the assessment of damages, domestic rules on assessment of damages will therefore apply. The CLAs also contain restrictions, thresholds and caps on quantum of claims.

A particular problem is that although the CLAs enacted in each State were intended to be uniform, the provisions of the State CLAs vary markedly. To take a single example: some States require a minimum threshold of harm before damages will be payable for non-economic loss; in NSW, it must be over 15% of the most extreme case (with only 1% of damages then being recoverable); in Victoria it is a 5% impairment; but in WA there is no such threshold requirement. There are further provisions dealing with economic loss. Professor Luntz describes it as 'a mishmash of caps, thresholds, deductibles and scales, both sliding and linear'.<sup>18</sup> Variation exists as regards the liability aspects too. Take, for example, the effect of contractual waivers of liability. Some States restrict the use of waivers; while others, like NSW, permit a provider to rely upon a waiver of liability where the provider has been negligent. There are many other examples of such inconsistencies. It has been noted by torts commentators that the effect of the civil liability amendments has been to replace a cohesive Australian law of negligence with eight different state based regimes.

The current application of CLAs to international passenger claims is problematic.

First, because the CLAs are inconsistent with one another, there is the spectre of inconsistent outcomes for actions taken in different states but concerning the same incident. This in turn heightens the risk of forum shopping and state based conflict of law issues. While a carrier might have relied upon an exclusive jurisdiction clause to select the forum court, such an option will be inconsistent with the Athens Convention Art 17.

Secondly, the interaction between CLAs and overlapping federal laws, such as the Australian Consumer Law, is still unclear and the caselaw is nascent. The High Court has yet to adjudicate on the approaches taken in the lower courts to reconcile the

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<sup>18</sup> Harold Luntz et al, *Torts: Cases and Commentary* (7th edn, LexisNexis 2013).

Federal and State legislation applicable to personal injuries sustained in breach of statutory guarantees. Given that the State courts are straining to make sense of the relationship between the CLA and other federal legislation also dealing with liability for harm causing personal injuries, problems appear inevitable if Athens is introduced without explaining how it is to interact with the State CLAs.

Thirdly, many passenger claims arise from incidents occurring outside Australian waters. The application of the CLAs to events occurring outside the territory of each State is also problematic. Cases concerning particular provisions of the NSW CLA have concluded those provisions do not apply to conduct outside the state of NSW;<sup>19</sup> but it is unclear if that will be extended to other provisions. In any event, the CLAs in other states are drafted differently and it is always possible for a State legislature to amend its CLA to extend its reach extraterritorially. The status quo has little to recommend it.

If Athens Convention is implemented in Australia but the enabling Act remains silent as regards the CLAs, I would be concerned about the consequences of this inconsistency. It seems to me that it will result in uncertainty and lack of uniformity ultimately leading to an increased risk of preliminary disputes and forum shopping. This would be the antithesis of what is sought to be achieved by introducing the Convention in the first place. In resolving claims arising from an international maritime incident, the laws applicable should be standard, clear and certain across Australia. If two Australian passengers have been injured as a result of one maritime incident, and litigation is pursued in Australia under the Athens legislation, then the passengers should be subject to the same regime no matter in which State proceedings are issued.<sup>20</sup>

So how should the Athens Convention interact with the CLAs? Given the inconsistencies between the different CLAs, the tests of liability that cut across the international regime that the Athens Convention creates, and the question mark over the extraterritorial application of

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<sup>19</sup> See *Insight v Young* (HCA) [2011] HCA 16, (2011) 243 CLR 149. See also *Moore v Scenic Tours Pty Limited (No 2)* [2017] NSWSC 733.

<sup>20</sup> While one would hope that all litigation would be conducted in one place; the result of litigation undertaken in different states should, ideally, be the same.

the CLAs to accidents outside Australia in any event, I am in favour of excising the Athens Convention claims from the operation of the CLAs. If the CLA provisions were to apply to carrier's negligence as regards passengers, the result would be a reduction in international uniformity regarding this type of claim. (It would also lessen the value of international caselaw interpreting the Athens provisions; and Australian cases would be of diminished value to other jurisdictions.)

Excising the Athens Convention claims from the CLAs would lead to a clearer, certain regime, at least during the period of operation of the Convention (embarkation/disembarkation). That should mean parties should not have to engage in lengthy litigation to establish the interaction between Australian statutes. This should result, in most cases, in quicker resolution of claims, and an overall decrease in legal costs incurred by both parties. Although where the passenger is successful the damages awards will be higher, those awards will be subject to limitation by either the LLMC or Athens limits as canvassed by the Discussion Paper. While not perfect, it is a compromise result leading to what should be a fairer, stand alone regime.

There are examples of such excisions in each State jurisdiction. The list typically includes particular classes of personal injuries for which there is already a stipulated regime – motor vehicle accidents, workers compensation, and dust related illness. While aviation claims are not excised, it must be remembered that they are strict liability claims in any event: therefore only the quantum limitation provisions of the CLA could ever be applicable.<sup>21</sup> Athens Convention claims will not always be strict liability claims; some will be 'hotel' claims. While it might be tempting to view this as an argument that 'hotel' claims should fall within CLA and the strict liability claims outside it, one should remember that carriers actively market their cruises as holiday destinations in and of themselves, and the carriers are in perhaps a unique position given that they manage and control both the hotel and maritime functions of the ship. It is also important to remember that there is judicial support for the view that the CLAs may not apply to claims arising from accidents outside the State jurisdiction in any event.

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<sup>21</sup> For example, see *Dibbs v Emirates* [2015] NSWSC 1332, [94].



**In summary, I advocate a total excision of the Athens claims from the state based CLA regimes for clarity and certainty. The enacting Act should stipulate that State legislation governing civil liability actions does not apply to passenger claims to the extent that the enabling Act applies.<sup>22</sup>**

If that is not acceptable, then there will need to be careful drafting of explicit provisions that will explain how the Athens Convention will interact with the CLA regimes. Frankly, that will be a difficult task.

If the quantum limitation provisions of one or other of the State CLAs were to apply, then my view is no other limitation regime should apply to that claim. **In that case I would alter my response to Question 2 above and prefer option 4 with neither Athens nor LLMC limits applicable to passenger claims. In other words, my view is that there should be only one form of quantum limitation available to the carrier, whether it is found in the Athens Convention, the LLMC, or domestic law.**

### 3. Extension to domestic carriage – in certain circumstances, and then in stages

The Athens Convention applies to international carriage only. If enacted in Australia, without more, it will only apply to carriage to or from an Australian port on a voyage that visits a foreign port. However, many international carriers such as Carnival, Royal Caribbean Line, Norwegian Cruise Line also carry passengers interstate and even on intrastate voyages: namely, from one Australian port to another Australian port. Often this might involve a short sealeg of what is a longer voyage that continues onto a foreign port. Cruise ships will regularly collect passengers from my home port of Fremantle, proceed east to Sydney, where some

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<sup>22</sup> This would also clarify the right of passengers to recover modest damages for disappointment and distress: this is an area of some complexity but see the discussion in my book *International Carriage of Passengers by Sea* (Sweet & Maxwell, 2016) at [4-129] – [4-130] and resources listed there. Note that in the recent case of *Moore v Scenic Tours Pty Limited (No 2)* [2017] NSWSC 733, the judge noted he was obliged by precedent (namely the NSW Court of Appeal decision in *Insight Vacations v Young* [2010] NSWCA 137) to hold that a claim for disappointment and distress by a passenger was a claim for ‘mental harm’ (and a personal injury claim) pursuant to the Civil Liability Act 2002 (NSW), ‘however surprising that result may appear in this case to be’ [854]. This would have been fatal for the plaintiff’s claim for that head of damage on the facts of that case; however the judge found the CLA (NSW) did not apply to injuries sustained outside NSW and therefore damages for disappointment and distress could be awarded. The judgment is the subject of an appeal.

passengers will disembark but others will proceed onto New Zealand. It would not be sensible for the passengers embarking in Fremantle to be governed by different regimes in the event that an accident occurred in the Great Australian Bight. Another example is where foreign owned cruise ships (like the 'Astor') will 'homeport' in one Australian port but carry out a series of interstate or even intrastate voyages. Strictly speaking, these are purely domestic voyages, not international voyages, yet they involve maritime risk and foreign carriers and ships. It would be sensible for such voyages to be covered by Athens Convention also.

Through MLAANZ, Professor Gaskell and I have advocated for any enabling Act to extend the operation of the Athens regime to foreign registered ships carrying more than X passengers on a voyage of at least one night's duration departing from an Australian port. Whilst the constitutional implications must be considered, we believe such an extension would be sensible and would probably be welcomed by those carriers. It would mean that all passenger claims against that carrier/ship for injury and damage could be resolved under the same regime.

In due course, it would be beneficial to consider extending the Athens regime: for example, to Australian cruise operators operating interstate and intra-state voyages.<sup>23</sup> Ultimately, it may even extend to the ferry industry and charter operators where there is no overnight component. (I have seen terms and conditions relied upon by the ferry and charter industries where they seek to disclaim liability for personal injury in contravention of the statutory guarantee of due care and skill imposed by the ACL.) Any such extension could be done in stages, as has occurred in EU and in England. Co-operation with the States may be required. I concur with Professor Gaskell that this is an area that is worthy of more detailed study, considering implications of extending the regime. I would be willing and interested in participating in the study proposed by Professor Gaskell by way of an ARC Linkage grant.

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<sup>23</sup> There are several boutique cruise operators that conduct voyages along the Kimberley and Queensland coasts, for example.

#### 4. Information to be provided to passengers

Through MLAANZ, Professor Gaskell and I have also put forward the view that carriers should be obliged to provide passengers with information:

- Stipulating the identity of the contracting/performing carrier and the insurer.<sup>24</sup>
- Outlining the existence of rights under the Athens Convention and the key provisions of the Convention.<sup>25</sup>

The carrier should also be required to nominate an Australian address for service of any proceedings arising out of the contract of carriage if requested by the passenger. Requiring plaintiffs to serve proceedings on foreign corporations outside Australia rather than the carrier accepting service in Australia is not unheard of, even by those operators active in the Australian market.

#### 5. No bar on class actions permitted

It is not uncommon for the standard terms of cruise ship operators to seek to bar passengers from joining a class action. Such a term may well be void as an unfair term within the meaning of the ACL, but a court would be required to decide the point. Rules of Court provide for class (representative) actions for a reason. In a major casualty, such proceedings would be both efficient and desirable. Article 17 r1 might be considered wide enough to ensure the right to class action (as part of the domestic law), but it would be helpful if this could be clarified for the avoidance of doubt.

I hope this will be of some assistance.

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<sup>24</sup> There have been several English cases where the identity of the contracting carrier and performing carrier has been unclear and disputed.

<sup>25</sup> The EU Athens Regulation 392/2009 (EU) requires carriers to provide 'appropriate and comprehensible information regarding their rights under this Regulation' to be provided at point of sale or latest at the place of departure. The information need be supplied only once, by either the contractual or performing carrier. Providing passengers with the summary prepared by the European Commission will satisfy the notice requirement. (Art 7).

**Brief Biography**

Professor Kate Lewins

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Professor Kate Lewins is a maritime law academic who specialises in carriage of passengers by sea. She is the author of the monograph *International Carriage of Passengers by Sea* (London, Sweet & Maxwell 2016). Kate has published scholarly papers, made submissions to government and delivered conference presentations on passenger issues over the span of some 15 years. Kate teaches a Masters of Law unit on international carriage of passengers by sea at the Centre for Maritime Law, National University Singapore. Kate is a former legal practitioner specialising in maritime claims and a longtime member of MLAANZ. She has specialised in maritime law for 30 years.