

22 December 2017

Katrina Kendall
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Dear Ms Kendall

Re: 'Carriage of Passengers and their Luggage by Sea: the Athens Convention 2002

Thank you for your email of 30 November 2017 inviting me to respond to the Consultation document *Carriage of Passengers and their Luggage by Sea: the Athens Convention 2002*.

I welcome the consultation on the Athens Convention 2002 and the very helpful Consultation document you have produced. As a member of the Maritime Law Association of Australia and New Zealand (MLAANZ) I have been party to a number of submissions to government supporting the adoption of the convention. I write this response, though, in my personal capacity as an academic. I have been teaching about, and researching into, the Athens Convention since 1987 and, for convenience, I have also attached a brief biographical note at the end of this submission.

Please find my response set out below.



Nicholas Gaskell
Professor of Maritime and Commercial Law

Department of Infrastructure and Regional Development Consultation document

Carriage of Passengers and their Luggage by Sea: the Athens Convention 2002 (November 2017)

Consultation Question (1) Do you think the Australian Government should ratify the Athens Convention?

Yes. Australia should accede to the Athens Convention 2002, for the reasons presented in the Consultation Document.

Australia was a long term participant in the negotiations at the IMO for the 2002 Protocol to the original Athens Convention 1974. Indeed, along with the UK, Australia played a leading role in negotiating this instrument that was part of a suite of IMO conventions dealing with liability for marine incidents. Australia is also party to most of those conventions, including pollution conventions such as the Civil Liability Convention, 1992 and the Bunker Pollution Convention 2001. Accession would therefore be consistent with existing treaties to which Australia is a party.

Financial Security. The main aim of this suite of IMO conventions, and the Athens Convention in particular, was to provide financial security for maritime claims. After the *Titanic* disaster the international community ensured that there were sufficient lifeboats for passenger ships. The Athens Convention 2002 for the first time ensures that there are sufficient “financial lifeboats” in the event of a major disaster. It does this through compulsory insurance and direct action against insurers. That is a form of financial security that has been successfully adopted in other maritime conventions and is backed by the major P&I Clubs who insure the majority of the world’s sea going passenger ships.

Maritime law presents particular enforcement difficulties for claimants, especially where the potential defendant is a foreign shipowner or operator with limited assets in Australia. Many, if not most, ships would be owned in a corporate structure whereby each ship is owned by a single ship company. In the event of a major disaster the company’s only asset will disappear, making enforcement more difficult. Major operators, such as Carnival, are reputable and it is unlikely that they would not respond to existing claims, but there may be smaller less reputable (or less financially secure) operators. Moreover, it is not possible to predict how even large operators would respond in the event of a major casualty involving death or injury to thousands of passengers.

Strict liability. Professor Kate Lewins of Murdoch University has demonstrated in a number of articles and in her book *International Carriage of Passengers by Sea* (2017) that there is great uncertainty about the current liability system in Australia. The Athens Convention 2002 will, in my view, provide a simpler and clearer path for claimants in injury and death cases. The Convention does not affect existing law about more general breaches of a passenger contract (eg quality of service).

The introduction of strict liability up to 250,000 sdr for most “shipping” incidents is to be welcomed as a way of simplifying proof for claimants, and bringing equivalence to air law in the Montreal Convention 1999 (although the strict liability figure in the Athens Convention is over twice that of the 113,000 sdr in the Montreal Convention). It means that in the event of say a collision with a cargo ship that is 100% at fault, the passengers would still be able to sue the carrying passenger ship. This would avoid the problem that occurred when the liner *Empress of Ireland* was sunk in 1914 (with the loss of 840 passengers – more than in the well-known sinking of the *Titanic*). In that casualty, the liner was innocent and the passengers struggled to enforce a claim against the coal

carrier that negligently collided with it, as the guilty ship was owned, in effect, by a one ship company.

Damages. The Convention will not affect the calculation of damages (save as to limits – see Question (2), below). This means that ordinary principles of assessment will apply, as affected eg by State Civil Liability Acts. It should be noted that, unlike the Montreal Convention 1999, there is no express restriction in the Athens Convention 2002 on the recovery for psychological or mental injury. The Athens Convention 2002 would also require compulsory insurance levels at a similar level to the Montreal Convention 1999, but with the added protection that there would be a direct action against eg a foreign insurer.

Wide applicability. The scope of application of the convention, its wide jurisdictional choices, and the uniform availability of its regime in the EU (a holiday destination for many Australians) provide consumer advantages and more certainty than under the present law. Moreover, the Athens Convention prevents any contractual exclusion of liability below that provided for in the Convention.

International compromise. The Athens Convention 2002 is not perfect. It does not solve all passenger problems, but must be viewed as a reasonable compromise. It is the best solution available internationally for passengers as “consumers”. Evidence of this is the fact that the EU has adopted it (and indeed extended it from international to domestic transport). The EU Commission has fostered one of the most pro-consumer suite of laws in the western world; if the EU Commission and Council have been satisfied by the compromise solution then that should give some comfort to Australian legislators. Australia would be joining an internationally acceptable regime similar to, and in some ways better than, the Montreal Convention on international air travel.

Consultation Question (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?

Limitation of Liability for injury and death: principles. In the LLMC 1996 and Athens Convention 2002, the issue of limitation of liability has been central, particularly to shipowners and their insurers. I was present at the diplomatic conferences that adopted these instruments and can affirm that everybody realised this. Insurers, especially the P&I Clubs, regard limitation as important as it enables them to offer unlimited cover to their members, knowing that in most cases there will be a cap on liability in most national laws. This restriction on liability is also important of the Clubs to be able to get reinsurance. There were fears after the Athens Convention that the Convention liabilities might be uninsurable, but the IMO Guidelines have produced a compromise on the terrorist insurance issues. Given the size of modern cruise ships, the potential liabilities are enormous. For that reason, the Clubs generally have a policy limit of US\$2 billion per event (ie disaster). On my calculations, this would enable compensation to 5700 passengers at the guaranteed Athens Convention 2002 figure of 250,000 sdr per passenger. This is about the size of a very large cruise ship (but note that the *Harmony of the Seas* can apparently carry 6314 passengers). [There is a lower overall cover of 340 million sdr for war/terrorism incidents under the IMO Guidelines, but these can be ignored for the moment.]

It is also important to note that whereas there is flexibility under the Athens Convention 2002 and the LLMC 1996 to have unlimited liability of the carrier (see below), it is not possible to increase the *direct* liability of the insurer beyond 250,000 sdr per passenger.

Limitation is controversial. In my view it is more justifiable for property claims where owners will normally have some form of insurance, than for injury/death claims in general where individuals are less likely to have their own insurance (eg bystanders injured on land if a ship hits a jetty). In fact, most cruise ship passengers will be aware of the need to obtain some form of holiday personal

insurance (although this may be less common for ferry passengers). Indeed, during the negotiations for the Athens Convention 2002 there were serious suggestions that, instead of having compulsory liability insurance of the carrier (as now under Art 4bis), the convention should be based around compulsory personal insurance by individual passengers. The proposal went no further largely because it was said (surprisingly) that there was no appropriate market for such cover. The fact that most passengers will have some sort of cover for medical expenses and some cover for injury/death should have some influence on the debate about whether there ought to be limits of liability under the Convention. My own view is that irrespective of the Athens Convention 2002, passengers should still be encouraged to take out personal insurance; while this may be argued as a form of double insurance, it is an added protection.

The Opt outs. At the 1996 and 2002 diplomatic conferences, a number of States, eg Japan, insisted on opt-outs for limits for passenger claims. From recollection, Australia and the UK were also big supporters of opt outs. Under the LLMC 1996 this can be done under Art 15(3bis). Australia has enacted the LLMC 1996 in the Liability for Maritime Claims Act 1989, as amended, but has not exercised the right yet to allow unlimited liability under Art 7. All Australia needs to do is to enact a provision in national law and then to notify the Secretary General of the IMO. No formal reservation is needed. It is also possible, under Art 7(2) of the Athens Convention 2002 to use an opt out and have unlimited liability under that Convention, again simply by enactment in national law and notification to the IMO. The question is whether this is appropriate for one, both or neither.

Relationship of Athens Convention limit and LLMC 1996 limits. What is often misunderstood is the effect that the two conventions have when they are both in force without using the opt out provisions. I know from my own experience that even senior maritime law practitioners can misunderstand the relationship. Indeed, it was at the heart of debates about compensation after the *Herald of Free Enterprise* disaster in the UK in 1987.

Individual claims may be subject to per passenger limits of 400,000 sdr per passenger under the Athens Convention 2002; ie about Au\$746,000 (all Au\$ examples are based on IMF figures taken on 22 November 2017 at 1 sdr=Au\$1.86423). That limit would apply to each passenger, so that the carrier could rely on that limit in a sinking even if only a handful of passengers were in fact killed or injured. The disadvantage for passengers is that this liability in no way matches the total cover of the carrier's insurance, ie \$US 2 billion (see above).

In theory, unless a State uses an opt out in addition to this Athens per passenger limit, the limit under the LLMC 1996 might also potentially apply as an overall global limit. The LLMC 1996 Art. 7 provides a separate set of limits for claims by passengers against the carrying ship. This operates as an overall maximum, entirely separate from the limits in Art. 6 (eg applying to collision claims between ships). To confuse matters, a claim by passengers against a colliding ship would be met by that ship's ordinary LLMC Art. 6 limits. The maximum LLMC 1996 Art. 7 limit is calculated according to the ship's theoretical carrying capacity (at 175,000 sdr per passenger; ie about Au\$326,000).

It is important not to confuse the Athens and LLMC limits as they look similar. It should be noted that States are not obliged to be parties to both; they can operate independently as stand alone conventions, and that is why each needed to have some sort of limitation provision for passenger claims against the carrying ship. If 100 passengers made a claim, they could each be met by an Athens limit of 400,000 sdr. If the LLMC 1996 Art 7 also applied (ie without an opt out), those individual 100 claims (already limited to 400,000 sdr) might also face a second limit, eg if there was a major disaster and every passenger was killed or injured. That is why a State such as Australia ought to opt for limitation under one or other of the regimes, but not both. To that extent, the double limit in Option (1) of the Consolation document should be rejected.

LLMC 1996 Opt out. A number of States have used the LLMC 1996 opt out. These include the UK, Denmark and Sweden. The UK has removed the LLMC 1996 Art 7 limit completely, but as a matter of policy has decided to retain the Athens Convention 2002 per passenger limits. In effect, this is Option (3) in the consultation document. Sweden, by contrast, has exercised the opt out but instead of having unlimited LLMC 1996 liability, it has replaced the 175,000 sdr per certificated passenger limit by one of 250,000 sdr per certificated passenger.

Adopting Athens without opt out. The simplest solution is to enact the Athens Convention 2002 without using its opt out; ie to keep the per passenger limits of 400,000 sdr per person (about Au\$746,000). This is what all ratifying/acceding States have done (eg in the EU); I am not aware of any State that has used the Athens opt out. This accords with the compromise reached at the diplomatic conference. If Australia were to follow this solution then it must still decide what to do about the LLMC 1996 limits. In my view, Australia should then follow the UK or Swedish approach in relation to the LLMC 1996 limits, above; ie adopt Option (3) not Option (1). However, I believe that there is merit in considering Option (2), or variations of it.

Using LLMC 1996 without LLMC opt out. Option (2) assumes that the Athens Convention 2002 opt out is used so that only the LLMC Art 7 applies. In such a scenario, passengers may face no limit at all depending on the theoretical (not actual) carrying capacity of the ship and the number of claimants. Thus, a ship such as the *Queen Mary 2* is apparently licensed to carry 2,620 passengers. That would mean that the sum of 458,500,000 sdr (175,000 sdr x 2620) would be available to the claimants as a group; that is about Au\$854 million. Assume that there was a sinking, but only, say, 100 passengers were killed or seriously injured. On any analysis, Au\$854 million would be more than sufficient to compensate these passenger claims in full. In this way, the LLMC 1996 Art 7 limit is more favourable to passengers - as where there are a few claims the global *theoretical* limit will never apply. In this sense Option (2) gives a better result for passengers than Option (3).

Where there is a major disaster, though, in which, say, all the passengers are killed or injured, then obviously all the claims will come up against that LLMC 1996 global limit (in theory, if all the claims are equal, at 175,000 per passenger; ie about Au\$326,000). It is in such a major disaster that Option (3), applying only the Athens Art 7 limit of 400,000 sdr, has the advantage; each passenger would have access in theory to these amounts (assuming that the shipowner was solvent and noting that the compulsory insurance is only for 250,000 sdr).

The choice between Option (2) and Option (3) therefore depends upon the mischief that it is sought to avoid. The Option (2) approach means that most 'occasional' deaths and injuries aboard large cruise ships would not be met by any limit at all. In the *Costa Concordia* sinking in Italy, there were luckily only 32 passenger deaths (although presumably there were many claims for minor injuries and mental stress). But under the Option (3) Athens regime each would have been limited to 400,000 sdr, whereas the ship's global LLMC 1996 limit would have been very high. On the assumption that she was certified to carry 3700 passengers her global LLMC 1996 would be about Au\$1.2 billion (on November 2017 sdr rates, as above). Option (2) therefore gets closer to making the full amount of the ship's insurance available for claimants. And if a version of Option (4) is adopted, eg the Swedish approach of having a higher LLMC 1996 Art 7 figure of say, 250,000 sdr per certificated passenger, then even more would be available in a major disaster – again making better use of the US\$2 billion cover available.

I suspect that comments from personal injury lawyers may vary between those who have represented individual claimants (who may prefer Option (2)) and those who are more familiar with large class actions (who may instinctively prefer Option (3)). It would not be surprising if members of the Australian Lawyers Alliance (ALA) might prefer to have no limits at all, but keeping the status quo would mean continuing to apply the LLMC 1996 Art 7, ie Option (2).

Option (4); opt out of LLMC but increase Athens limits. The dilemma of the safe Option (3) is therefore that the 400,000 sdr Athens limits apply even to a small number of claims, and the full liability insurance capacity is not utilised. At the 2002 diplomatic conference there was some private comment that the compromise limit of 400,000 sdr per passenger was much less than might have been expected (eg that the industry might have settled for a higher figure). The figure of 500,000 sdr per passenger was one figure mentioned; that would be about Au\$932,115.

The selection of any figure for a per passenger limit will be somewhat arbitrary. If it applies, there is bound to be some claimant who does not recover full damages. In Australia there has been a long debate about whether the cost of compensation claims for personal injury and death are too high, and whether this results in extra insurance costs. To some extent, the Civil Liability Acts are an attempt to regulate the amount of awards. I am not familiar with the details of those debates and have not seen any published statistics about the level of compensation awards before and after the enactment of the CLAs. During the Athens Convention 2002 negotiations, one study indicated that, within Europe, there was a huge variation in the level of injury and death awards. In common law systems it was fairly clear that it was cheap to kill young people (who had no dependent relatives), while doctors aged 40 with two children were very expensive!

The selection of an appropriate per passenger limit is therefore bound to involve broad questions of policy. The Montreal Convention has no limit on the fault liability of an air carrier, but the recent Malaysian Airlines disasters appear to indicate that enforcing unlimited liability may not be easy; and the compulsory insurance cover is only 260,000 sdr (without the express possibility of direct action). My understanding is that there is a \$725,000 per passenger limit for domestic air carriage in Australia under the Civil Aviation (Carriers' Liability) Act 1959 (as amended); this is similar to the Athens 400,000 sdr limit. It might be possible to make special provision for the relatively rare claims that might exceed the Athens limits under consideration, eg for catastrophically injured claimants. I understand that there are some precedents in motor vehicle legislation. The simple fact, though, is that no system can be perfect, that the Athens Convention seeks to make an improvement overall, and that it is difficult to distinguish between categories of claimants once limits apply.

On balance, I consider it best to adopt some sort of limit, but to retain legislative flexibility in case the limits prove unacceptable over time. In practice unlimited liability might seem attractive, as under the Montreal Convention 1999, but the reality is that ships can carry 10 times or more than number of passengers than aircraft and the insurance market is not unlimited.

Summary of my conclusions on limits. To summarise my answers to the options canvassed in section 5.3 of the Consultation:

Option (1): I do not think it appropriate to have a potential doubt limit by applying both the Athens Convention Art 7 limits and the LLMC 1996 Art 7 limits. It is unnecessary and unfair.

Option (2): This is an advantageous option where there are small numbers of claims and still provides a large overall fund for major claims. The direct action figure under Athens will always mean that there is no guarantee of being able to claim all damages from the shipowner itself, eg if it is insolvent. To some extent, passengers might be warned of shortfalls and encouraged to take out personal insurance

Option (3): This is the safest option in the sense that it is similar to that adopted by a country such as the UK. It provides a conservative approach to limits and gives a degree of certainty to claimants. But where there are small numbers of claimants it does not utilise the full insurance cover. It is unlikely to be opposed by the cruise or insurance industry. To some extent, passengers might be warned of shortfalls and encouraged to take out personal insurance.

Option (4): I think that variations of Option (2) and (3) could validly be considered. As I propose retaining some flexibility in the legislation, I will refer to these possibilities under “Gaskell Option (5)”, below.

Gaskell Option (5). Even if Option (2) or (3) were selected, I believe that the legislation should allow some flexibility for Australia based on experience with the conventions. It is notoriously difficult to amend legislation at a later stage, so I would propose that powers be retained in any legislative enactment so that a Minister may (by delegated legislation) in future exercise the opt outs to alter the applicable limits in either the LLMC 1996 or the Athens Convention 2002. Unless there is some constitutional restriction, this scenario would enable the government to be able to react more quickly than the IMO if it became clear that the selected option was not working or that the IMO agreed limits had become out of date. The difficulty of increasing limits at the IMO was made abundantly clear to Australia in the aftermath of the *Pacific Adventurer* casualty. Here it took years before Australia was able to see increases to the LLMC 1996 Art 6 (non-passenger) limits, and even then not at a level that was satisfactory to us. If ever exercised, the opt out details would need to be communicated to the IMO, but that would not be a difficulty.

In addition to the flexibility outlined above, I can see advantages in variations of Options (2) and (3)/(4):

Option (2) variation. Opt out of Athens Convention 2002 limits. Retain LLMC 1996 global limits, but increase the LLMC 1996 Art 7 figure of 175,000 sdr per certified passenger to, say, 250,000 sdr (like Sweden). This would mean that the full insurance capacity was available for small number of claims (eg no limits applying in practice in those cases). In a major disaster, the global limit of the shipowner might be higher, although the guaranteed amount would still only be 250,000 sdr per passenger from the insurer. Any increase in Convention limits would be opposed by the cruise and insurance industries; it is possible that increased costs might be passed on to Australian customers.

Option (3)/(4) variation. Opt out of LLMC 1996 Art 7 global limit. Opt out of the Athens Convention 2002 limit, but provide for an increased per passenger limit of, say, 500,000 sdr per passenger. This would help ameliorate to some extent the drawbacks of Option (3). Again, any increase in Convention limits would be opposed by the cruise and insurance industries; it is possible that increased costs might be passed on to Australian customers.

While I recognise that Option (3) is the easiest, I consider that either of the two variations above would be acceptable. On balance, though, I marginally prefer the **Option (2) variation**.

Consultation Question (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?

The Consultation document refers in section 5.2 to the need to have a number of ancillary provisions in the domestic implementing legislation, similar to the Civil Aviation (Carriers' Liability) Act 1959 (CACL Act). I refer to the form of any such legislation, below, but I might add that consideration could be given to providing advance payments eg \$20,000 (for death) within 15 days (as under EU passenger law and the Montreal Convention).

Domestic carriage issues. I recommend that the Athens Convention 2002 be enacted as soon as possible; ie to deal with international travel. As the convention can be enacted relatively quickly for this purpose, it is appropriate to deal separately with domestic carriage.

Given the special constitutional problems presented by State and Territory law and the differing resources of smaller operators, special consideration needs to be given to how to deal with intra State

and inter-state travel. As a matter of principle, there is probably a need to provide greater uniformity in the carriage of passengers domestically, especially given the variety of State laws and the uncertainty created by the possibility of limitation of liability under the LLMC 1996 and in State law, as well as the apparent absence of any compulsory insurance scheme with direct action. Any domestic reform should aim for the type of COAG led uniformity as has been achieved with the Australian Consumer Law; ie avoiding different treatment of operators (and passengers) depending on where in Australia a casualty occurred. It is significant that the EU has gradually extended the Athens Convention type provisions in stages to the smaller craft that operate within (and between) member States. This has given the industry long enough lead times to adjust to the increased insurance requirements of Athens type provisions. Unlike the EU, Australia does not have a major ferry industry and the carriage of passengers may be much more localised. It is difficult to see, though, why compulsory insurance provisions might not be required, although some care will be needed to ensure that small passenger craft are not treated more strictly than bus or coach operators, or indeed, hotels.

In my view, a more detailed study is required of this domestic issue. Indeed, I might suggest that this is the sort of research study that might be usefully be commissioned, under the Australian Research Council's "Linkage" grant scheme, from a consortium of Universities with expertise in maritime law and the carriage of passengers. I would declare an interest in that my institution, the TC Beirne School of Law at The University of Queensland would be interested in participating in such a project, and I believe that Professor Kate Lewins at Murdoch University would also be interested.

Australia does have a different category of "domestic" passenger ship operations that are not covered by the convention as they are not "international" voyages. There are cruise ships, owned by international operators, which perform voyages that do not have an international destination. An example would be a three day round trip from Brisbane, going into international waters, but with no intermediate port of call (eg in Fiji). A cruise ship might also be performing a long voyage itinerary (eg from Singapore to the Antarctic) but Queensland passengers might join only for the leg between Brisbane and Sydney. It is difficult to see why such operations should not immediately be subject to Athens Convention 2002 requirements as soon as Australia accedes to the Convention. This would be a national law application of the convention. The drafting of such a national law provision may need some consideration. Kate Lewins and I have previously suggested (through MLAANZ) that the following limited extensions could be applied to what is technically non-international travel; for example, contracts of carriage performed by:

- a. a foreign registered ship;
- b. a ship with a passenger capacity of [X?] passengers [or Y GRT];
- c. a ship involving a voyage of at least one night's duration [because some cruises might just be overnight, and not quite 24 hours.] Overall, such a measure will ensure the short voyages of international operators have just one liability regime applicable to all their contracts.

Form of enacting legislation. Different drafting techniques have been adopted to enact IMO liability conventions into national law. The worst examples internationally are where the drafters feel the need to convert the convention language into some national style. While this is necessary for regulatory matters, where the details are invariably left to States, it is inappropriate for liability conventions where every single word of the convention has been debated and agreed as part of an international compromise to achieve uniformity. Sometimes even ambiguities are deliberate.

As a stand-alone private law type of instrument it would be better, as far as possible, to enact the full Convention (as consolidated) in a schedule to an Act. The UK Athens legislation is an example, as is s.9B of the Civil Aviation (Carriers' Liability) Act 1959 which simply gives the force of law to the Montreal (air) Convention. The Athens enabling Act can then deal separately with any national adjustments.

The danger of not incorporating the convention as a whole is that not only does it become more difficult to understand the logical structure of the instrument (which is designed to be read as a whole), but uncertainty and errors can unintentionally occur. Australian legislation which has had to deal with enacting similar maritime compulsory insurance regimes includes the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 and the Protection of the Sea (Civil Liability) Act 1981, although my view is that they involve some unnecessary complications by not using the force of law/schedule approach. Indeed, the Bunker Act has apparently failed to give effect in s. 11 to Art 4 of the Bunker Convention, with the apparent result that Australia is in breach of its international obligations to provide the agreed defences to liability. Another example where there may be unnecessary confusion caused by piecemeal incorporation is that of IMO's Salvage Convention 1989 as enacted in the Navigation Act 2012. It appears that the time bar provisions have not been properly enacted (even at State level) so that again there may be a breach by Australia of its international obligations.

I make these comments with all due respect to skilled statutory drafters, who have to deal with constitutional complications beyond my expertise, but I simply indicate that there are many examples (eg in the UK) where "rewriting" the maritime *liability* conventions has created uncertainty.

Additional substantive provisions. While I have cautioned, above, about rewriting the convention, I do think that consideration ought to be given to whether it is possible, without breaching treaty law, to make certain substantive clarifications of (or extensions to) the Athens Convention provisions. The aim would be to ensure consistent with principles of Australian consumer contract law. Such "improvements" would be ancillary provisions designed to ensure that there could be no unfair avoidance by operators of the aims of the Athens Convention 2002.

There would be nothing difficult or even controversial about providing for certain compulsory information for consumers (backed by criminal sanctions), eg: notices as to their rights and liabilities; where the complete terms of the contract can be found; the identity of the carrier and performing carrier; details about insurance and claims handling, including the two year time bar.

More difficult perhaps would be where carriers try to avoid the wide and generous application provisions in Art 2. A number of major cruise operators have apparently started to flag their ships in States not party to the Athens Convention 2002, eg the Bahamas. This may be an attempt to avoid applying the Convention under Art 1(a) (which applies it to ships flagged in a State party). Australians would be covered by the Convention under Art 1(c) if they join a ship in a State party (eg in Australia or the EU), but what if they make a booking from Australia for a cruise in a non-Athens State, eg a cruise in Asia? Here the Athens Convention 2002 would only apply if "the contract of carriage has been made in a State party". There are uncertainties under general contract law principles of offer and acceptance, as to where a contract can be made. This is complicated where agents are involved or where internet bookings are made. As I understand the position, the **Electronic Commerce Convention 2005** (as enacted in Commonwealth and State laws, such as the Electronic Transactions Act 2001 (Qld)) does not definitely decide this issue. Questions of offer and acceptance are still for national law. The carrier may seek to argue that the contract was made in another place (eg in the flag State which is not a party to the Convention), or may insert terms in a contract of carriage providing that the contract is made at a particular time (when its Ruritanian office accepts the passenger's offer to buy a cruise) or in in a particular place (eg a non State party).

In my view consideration should be given to having an anti-avoidance provision, eg a consumer protection deeming provision should be introduced into Australian law. Kate Lewins and I have already suggested that:

- a. A maritime model might be s.11(1) of the Carriage of Goods by Sea Act 1991.
- b. Alternatively, the enabling Act implementing the Athens Convention 2002 could deem the contract of carriage to be made under Australian law where the passenger is habitually resident within Australia, and the operator has pursued or directed marketing activities to Australia, even if the cruise is to be fully performed outside Australia. This wording is along the lines of the Consumer Rights Act 2015 (UK), eg s.74 referring to the “close connection” of a consumer with the UK.

These sorts of deeming provisions may raise more general internet commerce issues, and the policy to be adopted under private international law more generally. To that extent, consultation with Treasury under the ACL, and the Attorney General’s Department (international law) would be appropriate.

Interaction with Civil Liability Act regimes (largely State based). The interaction with the CLA regimes will probably need to be explicitly dealt with in the enabling Act. The CLA regimes lay down substantive tests and restrictions on duties/liabilities, as well as restrictions on the quantum of damages paid to successful plaintiffs. One issue will be quantum limitation (see question 2, above). Kate Lewins and I have previously noted some provisional views on the two main aspects to these CLA regimes:

- a. The first is the alteration of tests of liability generally. These should probably *not* operate in conjunction with Athens as they will undermine and cut across the international scheme and reduce the uniformity aspect that is so important to industry.
- b. The second aspect concerns the restrictions on quantum of claims (ie limitation). Passenger claims are already subject to limitation under the LLMC 1996, and Athens also contains per passenger limits on quantum. Depending on the answer to Question 2, above, the simplest solution may be to exclude the passenger claims that fall within Athens from the operation of the CLA entirely and leave the liability aspect of passenger claims to be dealt with by Athens, with any limitation on quantum to be determined by Athens itself or the LLMC.

However, I recognize that it may be decided that the CLA regimes can work fully with the Athens Convention 2002, and that this may avoid complicating issues concerning the interaction of Federal and State laws. In any event, my strong view is that great care needs to be taken in drafting to ensure that no uncertainty is caused by the possible interaction of the CLAs with Athens.

Finally, it might be helpful to have some sort of clarification in the legislation about how far personal insurance payments should be taken into account if there is an award of damages under the Athens Convention 2002. I say this because it seems likely that passengers will continue to take out personal holiday insurance (and should probably be encouraged to do so).

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Nick Gaskell is Professor of Maritime and Commercial Law at the Marine and Shipping Law Unit (MASLU) of the TC Beirne School of Law, The University of Queensland. Prior to joining UQ in 2009, Nick worked for some 33 years at the Institute of Maritime Law, University of Southampton. He is a UK qualified barrister, and is an Associate Tenant at Quadrant Chambers (London), one of the leading maritime law sets.

Nick Gaskell has considerable experience of the negotiation of international maritime law conventions at the International Maritime Organisation. In particular, he participated in the lengthy IMO Legal Committee deliberations on drafting revisions to the Athens Convention 1974 which led to the 2002 Protocol which created the Athens Convention 2002. He was a member of the UK delegation at the 2002 diplomatic conference that agreed the Convention.

He has taught maritime law to governments, practitioners and students within the maritime legal and shipping professions both within Australia and internationally and has authored/edited seven books, 41 book chapters and over 50 articles.

In particular, he has been teaching and researching the carriage of passengers for some 30 years, starting with the *Herald of Free Enterprise* disaster in the UK in 1987, when a ferry sailed with its bow doors open causing great loss of life.