



Australian Government

Department of Infrastructure, Transport, Regional Development and Communications



# Regulation Impact Statement

Australia's accession to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the 2002 Protocol (Athens Convention 2002)

July 2020

## About the Department of Infrastructure, Transport, Regional Development and Communications

The department is responsible for the design and implementation of the Australian Government's infrastructure, transport and regional development policies and programs. We work to:

- Support economic growth through transport
- Make travel safer
- Increase transport access
- Keep transport secure
- Support regional development and local communities
- Provide good governance in the territories

### Copyright

© Commonwealth of Australia 2020 This work is copyright. You may reproduce the whole or part of this work in unaltered form for your own personal use or, if you are part of an organisation, for internal use within your organisation, but only if you or your organisation do not use the reproduction for any commercial purpose and retain this copyright notice and all disclaimer notices as part of that reproduction. Apart from rights to use as permitted by the Copyright Act 1968 or allowed by this copyright notice, all other rights are reserved and you are not allowed to reproduce the whole or any part of this work in any way (electronic or otherwise) without first being given specific written permission from the Commonwealth to do so.

# Table of Contents

1.	Executive Summary .....	8
1.1	The Problem .....	8
1.2	The Objective .....	9
1.3	Options.....	9
1.4	Consultation .....	10
1.5	Impact .....	10
1.6	Key Findings .....	10
2.	Introduction .....	13
2.1	Context.....	14
2.2	Comparison to international air travel.....	15
3.	The Problem .....	17
4.	Option 1: Retain the Status Quo (No change).....	19
4.1	Australia .....	19
4.2	LLMC Convention .....	19
4.2.1	LLMC Liability limits .....	19
4.2.2	Claims process and recovery of payments .....	20
4.2.3	Existing interaction between the Australian Consumer Law and the State Based Civil Liability Regimes.....	20
4.2.4	Existing claims data.....	22
4.3	Other Considerations .....	23
4.3.1	Liability Waivers.....	23
4.3.2	Passenger Liability Regulation (PLR) .....	23
4.3.3	Private Travel Insurance .....	23
4.4	Summary .....	24
5.	Option 2: Accede to Athens but retain 1996 LLMC global limits, (opt out of Athens limits) .....	26
5.1	Option 2 Summary .....	27
6.	Option 3: Accede to Athens with two variations on limits.....	29
6.1	Option 3a – Athens Tier 1 limits (strict liability) with Athens Tier 2 Limits (upper limit) .....	29
6.1.1	Strict Liability (Art.3) .....	29
6.2	Option 3b – Athens (Tier 1) limits with increased Athens upper limits (Tier 2) .....	31
6.2.1	Summary.....	31
7.	Option 4: Option 2 or 3 and extend to “voyages to nowhere” and smaller domestic operators .....	33
7.1	Application to smaller operators to be canvassed.....	34
8.	Expected Compliance costs .....	36
8.1	Regulatory Compliance .....	36
8.1.1	Australian vessels certified to carry more than 12 passengers on overseas voyages .....	36
8.1.2	Foreign vessels carrying more than 12 passengers .....	37

8.1.3	DCV that may take more than 12 passengers on multiple night cruises .....	37
8.1.4	Conclusion.....	38
9.	Consultation Process .....	39
9.1.1	Who we engaged with .....	39
9.1.2	Responses received .....	40
9.1.3	Summary of key views of respondents.....	40
10.	Impact Analysis.....	42
10.1	Identification of whose costs and benefits counts.....	43
10.2	Outline of impacts and measurement indicators.....	44
10.3	Impact Analysis .....	44
10.3.1	Cruise companies .....	44
10.3.2	Insurance companies.....	47
10.3.3	Passengers .....	49
10.3.4	Government .....	52
10.4	Luggage Compensation .....	53
10.5	Cost of Implementation .....	53
10.6	Summary of Impacts Identified .....	53
10.7	Options discussion .....	55
11.	Key findings and recommendation.....	57
11.1	Key findings .....	57
11.2	Recommendation .....	58
12.	Implementation and Evaluation Considerations .....	59
12.1	Australian Law (ACL/CLA interactions).....	59
12.2	International Conventions .....	59
12.3	Evaluation.....	59
13.	Appendix A: List of Stakeholders contacted .....	61
14.	Appendix B: Stakeholder representatives engaged .....	62
15.	Appendix C: Athens Convention State Parties.....	63
16.	Appendix D: Options Analysis for Consultation.....	66

## Figures

Figure 1: Options Assessed in the development of the Regulation Impact Statement.....	9
Figure 2: International flagged ship arrivals in Australian Ports restricted to the top 8 countries. Blue indicates Athens Convention Parties (2002 Protocol). ....	15
Figure 3: Schematic outlining the existing framework and claims process (top) and the passenger claim process under the Athens Convention (bottom) if Australia were to accede to the 2002 Protocol. ....	18
Figure 4: Non-economic loss for personal injury thresholds and caps by state compared to the Competition and Consumer Act. ....	21
Figure 5: NSW Fair Trading 'cruise' claims data provided for 2015 to 2019 showing distribution of claims across 'Practice' across years. ....	23
Figure 6: Engagement statistics for the development of the Regulation Impact Statement .....	40
Figure 7: Maximum liability against a sliding scale of casualty numbers based on LLMC and Athens limits .....	45

## Tables

Table 1: Scenarios per person liability .....	30
Table 2: Passenger Capacity based on Vessel Liability Insurance.....	30
Table 3: Liability limits for loss or damage to luggage and vehicles Scenarios.....	30
Table 4: Identified Costs and Benefits by User Group .....	43
Table 5: Maximum amount paid by cruise ship under different scenarios (SDR values) .....	46
Table 6: Change in liability limits and insurance costs (all values in AUD) .....	48
Table 7: Change in fares for passengers .....	49
Table 8: % Change in fares for passengers* .....	50
Table 9: Example Lost Earnings in Submitting a Claim .....	50
Table 10: Upper Limit of Claims.....	51
Table 11: Maximum amount awarded to individual passenger under different scenarios (SDR values).....	52
Table 12: Assessment of the Impacts identified:.....	54
Table 13: Discussion of differences between options .....	55

**No index entries found.**

## Glossary of terms

1974 Convention	Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974
2002 Protocol	Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974
ACL	Australian Consumer Law
AMSA	Australian Maritime Safety Authority
Athens Convention	Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the 2002 Protocol
Carrier	Under the Athens Convention, a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is performed by that person or by a Performing Carrier. In the context of this paper, Carrier and Shipowner are used interchangeably
CCA	Competition and Consumer Act 2010
CLA	Civil Liability Acts
Claimant	A person who makes a claim or asserts a right or an interest against a Shipowner or Carrier. In the context of this paper, claimant and passenger are used interchangeably
Contract of Carriage	Under the Athens Convention, a contract made by or on behalf of a Carrier for the carriage by sea of a passenger and his luggage,
Department	Department of Infrastructure, Transport, Regional Development and Communications
DCV	Domestic Commercial Vessel
International Carriage	Under the Athens Convention, any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or scheduled itinerary, there is an intermediate port of call in another State
International Waters	The term “international waters” used in this document is synonymous with the ‘high seas’ or ‘beyond national jurisdiction’
LLMC Act 1989	Limitation of Liability for Maritime Claims Act 1989
LLMC Convention	Convention on Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol
P&I	Protection and Indemnity (insurance)
Passenger	Any person carried on a ship under a contract of carriage; in the context of this paper, a ‘passenger’ is also referred to as a ‘claimant’
PSC	Port State Control
RIS	Regulation Impact Statement
STCLAs	State / Territory Civil Liability Acts
Shipping incident	Shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship
SDR	Special Drawing Rights which are a supplementary foreign-exchange reserve asset defined and maintained by the International Monetary Fund. The SDR is an artificial

	unit of account for the IMF, and is not a currency per se. An SDR instead represents a claim to currency held by IMF member countries for which they may be exchanged. On the 13 November 2019, 1 SDR = AUD \$2.00724.
--	--

# 1. Executive Summary

## 1.1 The Problem

The Australian cruise ship industry is a growing industry, with Australian passenger numbers quadrupling over the last decade<sup>1</sup>. With this growth, there is a greater need to ensure that Australian passengers and shipping carriers are provided with high quality legal protections informed by the world's best practice.

Presently, Australian passengers on international cruise ships who pursue a claim relating to injury or luggage can be faced with an overly complex process which may impact the ability to make legitimate claims. Many cruise ships are registered in foreign countries; the companies that own the cruise ships are often based internationally; the accidents often happen in international waters or in the territory of another country; the burden of proof lies with the claimant whom also, typically only has one year to bring any type of claim for injuries against a cruise ship. Furthermore, claims must be brought to the company directly and may be bound by limitations outlined in the individual cruise contract. Currently, the claims process for passenger injury or death is governed by the application of the Australian Consumer Law (ACL) where carriers are bound by a statutory guarantee to exercise due care and skill in the carriage of their passengers as well as the obligation to ensure the provision of expected services. Evidence suggests that except for unique and complex scenarios, the international cruise industry operating in Australia has an adequate consumer complaints resolution policy and approach seeing most claims, which are predominantly 'hotel claims' resolved directly through the company. However, lack of clarity exists around the coverage of passengers when injured outside of Australian waters, the application of the ACL and whether the limitations contained within the State and Territory Civil Liability Acts apply. Furthermore, whilst it is understood that most of the shipping industry operating in Australia holds insurance for passenger claims, there is no compulsory requirement for ships to have passenger liability insurance, or a legal presence in Australia. Passengers can therefore be exposed to the risk of a carrier not being able to pay compensation, or avoiding payment, or can be required to pursue a claim in a foreign court.

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the 2002 Protocol (Athens Convention) seeks to implement a regime for assigning liability in international passenger shipping that provides passengers and carriers with greater legal certainty and assurance of cover. It shifts the burden of proof for 'shipping incidents' from the passenger to the carrier and provides defined options to resolve legal claims arising from shipping accidents that are arguably simpler and more extensive than those currently available under Australian law. The Athens Convention sets out an international regime of carrier liability for damage suffered by passengers, (or where luggage has been lost or damaged), on board ships engaged on international voyages. It applies to any international carriage captured under the umbrella of the Athens Convention where:

- the ship is flying the flag of or is registered in a State Party to the Convention, or
- the passenger's contract is made in a State that is party to the Convention, or
- when the place of departure or destination is in a State that is party to the Convention.

In this paper, when the benefits for accession are discussed it is limited to these situations where the Athens Convention applies. The Athens Convention also provides added protection of potential direct action against a ship's insurer (for example, if the cruise company becomes insolvent). There are currently 31 Parties to the 2002 Protocol worldwide (Appendix C).

If Australia were to accede to the Athens Convention, all claims for the recovery of damages for death and personal injury, as well as loss or damage to the passenger's luggage, sustained during the course of international carriage, would be brought into alignment with other State Parties whilst also allowing Australia to implement its own definitions around the limitation of liability.

---

<sup>1</sup> Cruise Lines International Association Australasia – Cruise Tourism's Contribution to the Australian Economy 2016-17, p 3.



## 1.2 The Objective

The Athens Convention was initially adopted in 1974 and entered into force in 1987 but has since been extensively updated, most significantly by the 2002 Protocol. In effect, under the Athens Convention 2002, passengers who suffer loss or damage to luggage, or personal injury or death should have access to simpler, cheaper legal recourse against carriers and insurers, up to specified limits. The 2002 Protocol to the Athens Convention entered into force in 2014 but Australia is not a party to it.

This Regulation Impact Statement (RIS) assesses options for Australia's accession to the Athens Convention (2002 Protocol). The analysis provides a sound basis on which to assess the financial and regulatory impacts of the policy options for implementation of the Convention, including non-implementation. The objective of the analysis is to show the potential impact on the cruise and insurance industry stakeholders that may be affected, and on the Australian shipping passenger or consumer markets.

Along with the option of maintaining the status quo and not acceding, this document outlines three options in acceding to the Athens Convention. It outlines potential impacts to the three significant stakeholder groups: consumers, insurers and the cruise industry.

This RIS was developed in March/April 2020, during the 2020 COVID-19 pandemic. The analysis, however, is based on assumptions prevailing to February 2020 and does not reference any changes to circumstances from the pandemic. The conclusions and recommendations reached are independent of the pandemic and its effects. However, we consider that there will be significant changes to the cruise industry as a result, and that the nature of these changes will take time to assess. These impacts will ultimately need to be assessed and considered in future when considering any regulatory change.

## 1.3 Options

The Department has identified four policy options for consideration, which include no change, and three options that see Australia's accession to the Athens Protocol 2002 with variations to limits and application to voyages. These options are illustrated in the figure below and were refined after initial public and industry consultation undertaken by the Department in December 2017<sup>2</sup>.

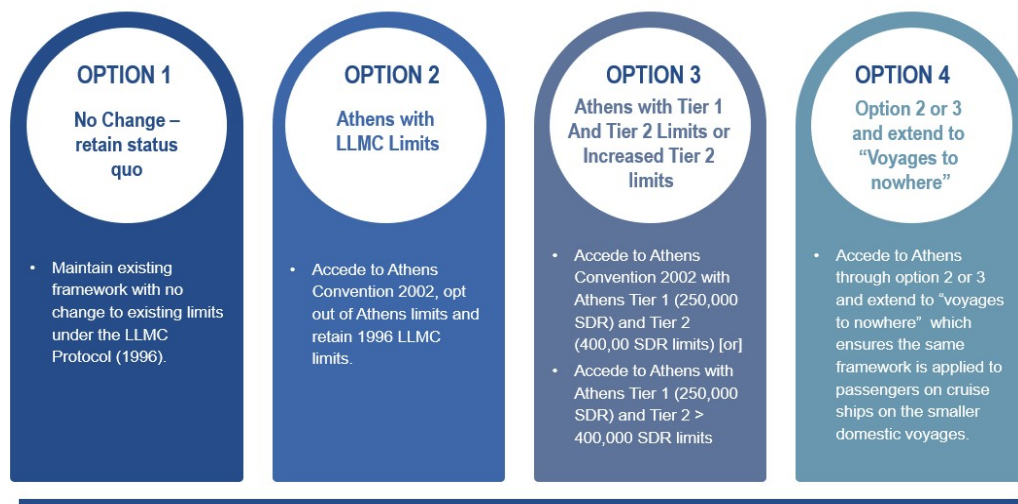


Figure 1: Options Assessed in the development of the Regulation Impact Statement

<sup>2</sup> Carriage of passengers and their luggage by sea (2017) Department of Infrastructure and Regional Development  
[https://www.infrastructure.gov.au/maritime/business/liability/files/athens\\_convention\\_discussion\\_paper.pdf](https://www.infrastructure.gov.au/maritime/business/liability/files/athens_convention_discussion_paper.pdf)

## 1.4 Consultation

In November 2017 the Department published a Discussion Paper<sup>3</sup> and received a number of formal submissions. In November 2019, the Department engaged NineSquared to undertake further, targeted consultation to conduct a cost benefit analysis and options analysis to develop this Regulation Impact Statement.

Changes in regulation relating to claims on cruise ships will impact on several user groups in different ways. The cost benefit analysis considers these groups, with the final assessment based on a national impact. For this analysis, the relevant user groups who may be impacted by a change in the regulation were identified as cruise companies, insurance companies, passengers and the government. Consultation for the preparation of this RIS was undertaken with the various stakeholders over the period January to April 2020. A total of 54 stakeholders ranging across these stakeholder groups, with the addition of the legal sector, were contacted to obtain feedback on an options paper. Of the 54 stakeholders contacted, 24 provided feedback on the options and cost benefit analyses (See Appendix A and B). Of the 24 engaged, the cruise industry represented 25%, government sector 42%, legal sector at 17%, insurance sector 8% and consumer groups 8%. Consultation with those potentially impacted by regulatory changes provided important information on existing claims processes, insurance arrangements, and the interaction between the Australian Consumer Law (ACL) and State / Territory Civil Liability Acts (STCLAs).

## 1.5 Impact

For the majority of the impacts discussed, the main differences occur between the current status quo (option 1) and the options which involve acceding to the Athens Convention (options 2, 3a, 3b and potentially option 4). Areas assessed included impacts on effort to make a claim, claim frequency and value, insurance costs, passenger numbers and implementation requirements. These impacts were investigated across the different user groups.

Generally, accession to the Athens Convention was assessed as having a neutral impact to Government and the Insurance industry, a beneficial impact to passengers and an adverse impact to the cruise industry. Further considerations are also outlined including a description of the existing complexities between the ACL and STCLAs regarding cruise ship claims.

Overall, the analysis suggests that there is no strong or urgent case for accession to the Athens Convention. Considering current events and the short to medium economic impact likely to be experienced by the cruise industry, including implications to financial security, safety compliance, insurance and passenger willingness to travel, it is recommended that the government consider deferring action until the implications become clearer.

## 1.6 Key Findings

Evidence suggests that there is already adequate protection of consumer/passenger rights in Australia through the existing Australian Consumer Law (ACL) and State / Territory Civil Liability Acts. The disadvantage in maintaining the status quo largely lies with the consumer (passengers) due to uncertainty of coverage for damages, jurisdictional inconsistencies, lack of clarity around extraterritorial application of state / territory laws, and the interaction of 'recreational activities' under the ACL. However, acceding to the Athens Convention would only partly resolve these issues: namely through mandating carrier insurance, establishing strict liability limits and providing uniformity of rights to all passengers where captured by the Athens Convention. The complexities around the claims process would only be alleviated in part, and further consideration would need to be given to the legislation enacting the Athens Convention to ensure it is explicit as to how damages would be awarded under the regime.

---

<sup>3</sup>Carriage of passengers and their luggage by sea (2017) Department of Infrastructure and Regional Development  
[https://www.infrastructure.gov.au/maritime/business/liability/files/athens\\_convention\\_discussion\\_paper.pdf](https://www.infrastructure.gov.au/maritime/business/liability/files/athens_convention_discussion_paper.pdf)

Australia's accession to the Athens Convention would likely have a detrimental impact to the Cruise Industry in the short to medium term. Evidence suggests that except for unique and complex scenarios, the cruise industry operating in Australia has an adequate consumer complaints resolution policy and approach seeing most claims resolved directly through the company. Most claims are minor in size and are categorised as 'hotel claims' with payout figures below the company's insurance deductible ('excess') which would not be affected by Australia's accession to the Athens Convention.

In instances of serious injury or catastrophic events, the Athens Convention would provide some certainty of maximum claims per passenger through the Tier 2 upper limit for damages of 400,000 SDR, however, trends suggest that the risk of such an incident for voyages operating in Australia are low. Given the perceived adequacy of the existing framework, imposing new regulatory requirements on the industry and consequent re-training of legal and customer services staff, redrafting of contracts, operating policies and procedures would impose costs on industry without necessarily providing any substantial benefits for customers.

Impacts on the Government and insurance industry sectors were assessed as neutral. Consultation with the Australian Maritime Safety Authority (AMSA) indicated that existing compliance processes would handle compliance around Athens Convention requirements with little additional regulatory cost. The Government may incur some costs associated with the drafting and implementation of new legislation and may derive some benefit from their regulations being in line with other countries. From an international travel perspective, accession to the Athens Convention could contribute to consistency of international agreements and promote international conformity, like the Montreal Convention. Simply put, an Australian traveling internationally by air or sea, where captured under the Athens Convention, could be assured a uniform process and coverage to a similar value for personal injury, regardless of their mode of travel.

Stakeholder engagement suggested that insurance companies would proportionally pass on any changes to insurance premiums to the cruise industry and may also benefit from alignment with other countries and consistency amongst its P&I member group.

Upon reviewing the impact assessment, the Australian Competition and Consumer Commission (ACCC) concurred with the analysis that there is already adequate protection of consumer rights in Australia through the ACL. In addition, although the ACCC's enforcement and compliance work is designed to encourage sector- and economy-wide compliance with the CCA rather than resolving individual complaints, in principle the ACCC supports Australia's accession to the Athens Convention and other associated legislative amendments that would give consumers greater clarity and certainty when enforcing their rights.

Whilst there are clear benefits to passengers if Australia were to accede to the Athens Convention, there is no strong or urgent case for government action. The moderate benefits for passengers could be outweighed by the regulatory burden imposed on the cruise industry, and the cost to government of reviewing Australian consumer law and the State / Territory civil liability limitations, so as to ensure uniformity with Australian laws.

As stated above, this conclusion was reached based on analysis prior to the effects of the COVID-19 pandemic. The pandemic is likely to have major and ongoing impacts on the cruise ship industry, and the effects of additional regulation may be felt more by the industry.

During the finalisation of this RIS, it is clear that there is some significant legal action underway regarding the liability of cruise ships. Three cases have the potential to shed light on the ease by which a complainant can take a case against a cruise ship company, and the results of these complaints. The first is a case considered by the High Court of Australia regarding compensation for disappointment in a cruise<sup>4</sup>. The second is a class action being prepared against Royal Caribbean regarding the multiple fatalities during an excursion on White Island<sup>5</sup>. The third is a class action being prepared against Carnival Australia regarding the operation of the Ruby

---

<sup>4</sup><http://www.mondaq.com/australia/marine-shipping/927820/high-court-appeal-class-action-decision-to-benefit-passengers-of-cruise-ship>

<sup>5</sup> <https://www.abc.net.au/news/2020-04-27/new-zealand-white-island-volcano-disaster-four-corners/12150706?nw=0>

Princess and its relationship to COVID-19 infections<sup>6</sup>. Given the changing circumstances and uncertainty over the shape of the cruise industry post-COVID 19, the current legal action, and the lack of an urgent case for change, it may be beneficial to revisit the assessment of the regulatory impact of accession to the Athens Convention at a later date.

---

<sup>6</sup> <https://www.shine.com.au/service/class-actions/ruby-princess-coronavirus-claim>

## 2. Introduction

The 1974 Athens Convention, and its successor the 2002 Protocol, establishes a comprehensive integrated system to govern the liability of cruise ship operators for personal injuries and property damage sustained by cruise ship passengers. It contains standards for establishing liability and permissible defences as well as its own statute of limitations and venue provisions.

The Athens Convention establishes a fault-based liability regime for damage and injuries suffered by passengers at sea during international carriage. In non- "shipping incident" cases<sup>7</sup> (e.g. "hotel claims"), the passenger has the burden of proving the fault or neglect of the carrier and the extent of the loss or damage suffered. On the other hand, in "shipping incidents" cases, such as shipwreck, capsizing, collision, stranding, explosion, fire or defects in the ship, the burden of proof shifts from the passenger to the carrier.

### Article 2 – Application

*This Convention shall apply to any international carriage if:*

- (a) the ship is flying the flag of or is registered in a State Party to this Convention, or*
- (b) the contract of carriage has been made in a State Party to this Convention, or*
- (c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention*

Australia is currently a party to the Convention on Limitation of Liability for Maritime Claims (LLMC Convention) which provides a 'global liability limit' to a ship whereas the Athens Convention applies a 'per passenger limit'. The global liability limit under the LLMC Convention is set at 175,000 SDR multiplied by the ship's certified passenger capacity for passenger liability. The Tier 1 per passenger liability limit under the Athens Convention is 250,000 SDR (2002 Protocol). As such, depending on the size of the ship and the number of passengers it is authorised to carry, compensation for passengers under the Athens Convention could, if the LLMC Convention limit did not apply, be significantly higher than what is currently permitted under the LLMC Convention. The LLMC Convention has the capacity to provide higher compensation for passengers on large vessels that have higher capacity for passengers, if only a few of those passengers file claims.

In addition to the 'tier 1' strict liability limit of 250,000 SDR, Article 7(1) of the Athens Convention applies a 'tier 2' liability limit of 400,000 SDR. The carrier is not required to hold compulsory insurance for the tier 2 liability limit though. Article 7(2) allows a State Party to prescribe a higher national limit of liability, provided that it is not lower than the limit (currently 400,000 SDR) prescribed in Article 7(1).

The Athens Convention and the LLMC Convention enable governments to decide whether to limit carriers' liability for personal injury and death under either or both of the Conventions.

If Australia were to accede to the Athens Convention, all claims for the recovery of damages for death and personal injury, as well as loss or damage to the passenger's luggage, sustained during the course of international carriage, would be brought into alignment with other Parties. This would allow Australia to implement its own national limit of liability for death or personal injury subject to the requirements set out in the Convention.

As of November 2019, 31 State Parties have ratified the Athens Passenger and Luggage (PAL) Protocol 2002<sup>8</sup> (Athens Convention 2002). Accession to Athens Convention 2002 could contribute to consistency of

---

<sup>7</sup> Athens Protocol 2002, Article 3, 5(a) "shipping incident" means shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship.

<sup>8</sup> International Maritime Organisation – status of conventions  
<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>

international agreements and promote international conformity, similar to the Montreal Convention (1999) for air carrier liability.

Leading on from the 2017 discussion paper and formal submissions received, the Department of Infrastructure, Transport, Regional Development and Communications (the Department) is considering four policy options which are outlined in some detail and assessed in this paper. The options in summary are:

1. Retain the status quo (i.e. not accede)
2. Accede to Athens but retain 1996 LLMC global limits, and opt out of Athens limits
3. Accede to Athens with either a) Athens Tier 1 limits with Athens Tier 2 Limits or b) Athens (Tier 1) limits with increased Athens upper limits (Tier 2)
4. Option 2 or 3 and extend to “voyages to nowhere” and smaller domestic operators

## 2.1 Context

The global cruise ship industry carried nearly 29 million passengers in 2017, equating to roughly 1 million additional passengers each year since 2009. A total of 5.7% of passengers are reported to come from the Asia Pacific. With over 50 cruise lines, the global cruise ship industry generates 45.6 billion USD in wages and salaries and 134 billion USD in total economic output worldwide.

Australia and the surrounding region continue to be a key focus for the international cruise lines. During the 2018-19 financial year, the sector grew more than 10% in total value to the national economy, and cruise tourism contributed 5.2 billion AUD in direct and indirect output.<sup>9</sup>

Passenger carrying ships present insurers and underwriters with some complex and significant exposures when compared to other types of ships, particularly due to the total passenger capacity, often in the thousands. The highest profile accident and most expensive marine claim in recent history is the disaster involving Costa Concordia in 2012, which ran aground off the coast of Italy, leading to a significant loss of life (32 deaths), a difficult salvage process and expenses of 1.5 billion EUR (approx. 2.4 Billion AUD) through claims and salvage, with the protection and indemnity claim in excess of 1.2 billion EUR alone<sup>10</sup>.

Considering the growing upward trend in the Australian cruise ship industry for both the frequency and carrying capacity of ships, it is timely to review the adequacy of the existing liability framework. This includes the claims process and liability limits for passengers and luggage, both for consistency across cruise ships visiting, and conformity to international conventions.

Figures for cruise ship arrivals in Australian ports for 2017-18 show that 47% of cruise ships (including Australian ships) are registered to countries that have acceded to the Athens Convention. Between 2011 and 2018, arrivals by ships registered to State Parties to the Protocol increased by 71% compared to a 54% increase by ships registered to states that were not Parties to the Athens Convention. Figure 2 shows the arrival figures across the top 8 visiting flags (out of a total of 19) from 2011 to 2018 and is colour coded depending on whether the vessel is or isn't registered to an Athens 2002 protocol State.

It is therefore also timely to review whether Australia should be brought into alignment with other Parties to the Protocol, the costs and benefits of doing so, whilst also considering the ability for Australia to implement its own limits where considered appropriate.

Submissions to the Department's 2017 discussion paper included discussion of applying the Convention to domestic carriage of passengers which occurs during “voyages to nowhere”. A voyage or cruise ‘to nowhere’ is characterised by the absence of a port of call, with the ship returning to the same port from which it departed, capitalising on the ability to operate the casino and duty-free outlets legally, and often promoted as a sampler cruise or short break. There are also several domestic cruise companies (such as operators in Australia's

---

<sup>9</sup> Australian Cruise Association 2018/19 Annual Report

<sup>10</sup> Protection and indemnity claims would include those claims which would fall under the Athens Convention passenger liability limits i.e. for damages relating to passenger injury and luggage.

Kimberley region) that would fall under this definition, where passengers may not experience the same claims and liability framework challenges when compared to the larger international operators.

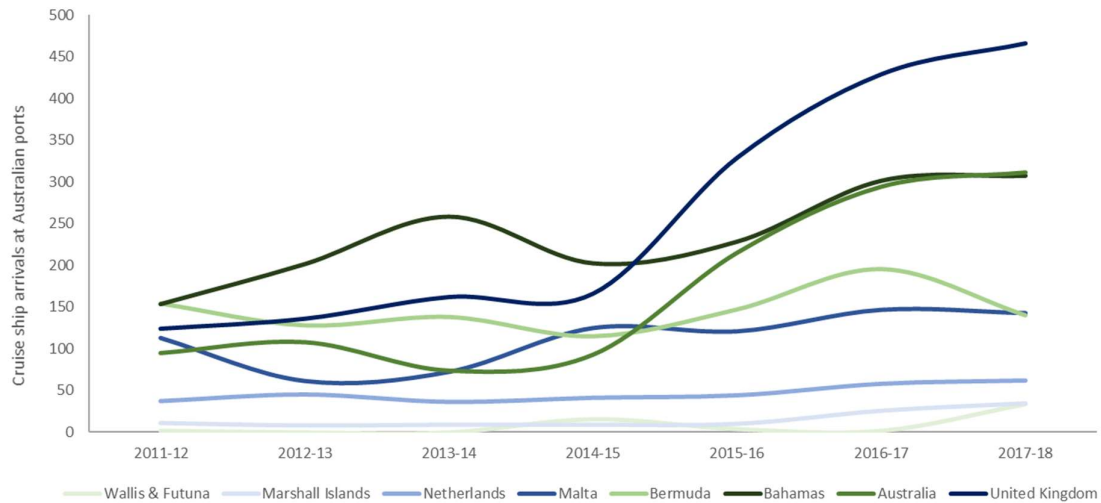


Figure 2: Cruise Ship Arrivals at Australian ports, by vessel flag (including Australian domestic vessels carrying > 12 passengers). Data restricted to the top 8 countries. Blue indicates Athens Convention Parties (2002 Protocol). Data supplied by Lloyd's List Intelligence (LLI), 2019. Australian ship movements (unpublished data), London

## 2.2 Comparison to international air travel

Accession to Athens Convention 2002 could promote international conformity and contribute to consistency of international agreements, like the Montreal Convention (1999) for air carrier liability. Comparing international air travel liability frameworks with the maritime sector can be useful in assessing whether Australia should accede to Athens and if so, how. Those sustaining injury on a commercial aircraft on international voyage are not subjected to the Australian domestic regime for personal injuries. The Montreal Convention has been in place for over a decade in Australia with little controversy, supporting the argument to align the maritime industry and afford its passengers the same assurance of protection in the event of carrier negligence.

The need for the Montreal Convention stemmed from the inadequacy of the Convention for the Unification of Certain Rules Relating to International Carriage by Air ("*Warsaw Convention*") which was the Convention that originally determined carriers' liability. The Warsaw Convention was first signed in 1929, during an era which the young aviation industry required protection from potentially ruinous compensation claims. The Warsaw Convention used terminology and language which became outdated and whilst it was updated several times, not all Parties ratified all the amendments. The Montreal Convention addressed these problems by raising carriers' liability limits, presenting the liability framework in a single consistent Convention and updating the terminology used.

In 2008, Australia amended its Civil Aviation legislation to give effect to the Montreal Convention. It was strongly supported by the aviation industry which believed that early ratification by States and the coming into force of the Montreal Convention would result in the accrual of significant benefit to consumers and to the air transport industry generally, through increased efficiencies and uniformity of law<sup>11</sup>.

In Australia, the Civil Aviation Safety Authority (CASA) is responsible for administering and enforcing the Commonwealth and State compulsory insurance schemes. The legislation governing the schemes is contained

<sup>11</sup> Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008. Federal register of Legislation.

<https://www.legislation.gov.au/Details/C2008B00098/Explanatory%20Memorandum/Text>

in Part IV(A) of the *Commonwealth Civil Aviation (Carriers' Liability) Act 1959*, together with the *Civil Aviation (Carriers' Liability) Regulations 1991* and complementary State legislation. Additional supporting provisions are contained in the *Civil Aviation Act 1988* and *Civil Aviation Safety Regulations 1998*.

Under the Montreal Convention (as administered through Australia's Civil Aviation legislation), each air carrier who carries passengers for hire or reward to or from Australia, or within Australia, is required to have passenger liability insurance in place to ensure that compensation will be paid in respect of death or personal injury to passengers arising from an air accident and for damaged or delayed checked luggage. The current liability cap for international passenger carrying operations is 260,000 SDR, and 725,000 AUD (~360,000 SDR) for domestic passenger carrying operations. The requirement for mandatory domestic insurance was introduced in 1995 in response to the June 1993 Monarch Airlines fatal accident that saw 5 passengers and 2 pilots fatally injured when a Monarch Airlines flight traveling between Sydney and Young was destroyed on impact.

The provisions of the Carriers' Liability Act applying to non-Montreal Convention international flights (i.e. between Australia and a country that is not a Party to the Montreal Convention) remained unchanged. The provisions of the Act applying to domestic flights also remained unchanged.

The introduction of strict liability up to 250,000 SDR for most shipping incidents would bring maritime in-line with the Montreal Convention 1999. The Athens Convention 2002 would also require compulsory insurance levels at a similar level to the Montreal Convention 1999, but with the added protection of passengers being able to take direct action against a ship's insurer (for example, if the cruise company becomes insolvent).

The legislation governing aviation liability requires carriers to have in place an acceptable contract of insurance and to routinely submit evidence of that insurance to CASA whenever a contract is commenced, varied or renewed. This is a potential model for consideration if Australia were to accede to the Athens Convention.



### 3. The Problem

Pursuing a claim against a cruise ship relating to injury or luggage has numerous unique challenges for customers. Many cruise ships are registered to foreign countries; the companies that own the cruise ships are often based internationally; the accidents often happen in international waters or in the territory of another country; and claimants typically only have one year to bring any type of claim for injuries against a cruise ship. Claims have to be brought to the company directly and may be bound by limitations outlined in the individual cruise contract.

Each cruise contract generally differs between companies and even within companies depending on where they are operating. The contract entered into by the passenger when purchasing the ticket will state where a case should be brought if a claim is made and the time limits for making a claim. Cruise contracts also typically contain long and detailed terms and conditions, which can lead to cascading arguments during a claims process, resulting in unnecessary expense and delay in resolution. This can be compounded with often short timeframes for a case to be brought against a company and then heard before the courts. The modest value of most claims makes it unattractive to proceed with a claim if it will require a complex legal process.

Whilst it is understood that most of the shipping industry operating in Australia holds insurance for passenger claims, there is no compulsory requirement for ships to have insurance for passenger claims, or a legal or administrative presence in Australia. Passengers can therefore be exposed to the risk of a carrier not being able to pay compensation, avoiding a payment, or having to pursue a claim in a foreign court.

Considering the growth in the Australian cruise ship market, it is timely to review the existing liability framework, claims process and liability limits for passengers and their luggage for consistency across carriers visiting, and conformity to international conventions. The Athens Convention relating to the Carriage of Passengers and their luggage by Sea (PAL) 1974, as amended by the 2002 protocol, establishes a comprehensive integrated system to govern the liability of cruise ship operators for personal injuries and property damage sustained by cruise ship passengers. It contains standards for establishing liability and permissible defences as well as its own statute of limitations and venue provisions. As of 2020, there are 31 State Parties to the Athens Convention (Appendix C). The Department of Infrastructure, Transport, Regional Development and Communications (the Department) is assessing whether Australia should also accede to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the 2002 Protocol (Athens Convention 2002), and determine whether they adequately address the aforementioned problems.

If Australia were to accede to the Athens Convention, all claims, which are caught under the umbrella of the Athens Protocol 2002, for the recovery of damages for death and personal injury, as well as loss or damage to the passenger's luggage, sustained during the course of international carriage, would be brought into alignment with other State Parties whilst also allowing Australia to implement its own national limit of liability for death and personal injury subject to the limitations in the Convention.

The key differences between the existing framework and where the Athens Convention applies, include:

- A process that better clarifies and standardises passenger claims in Australia
- Provides plaintiffs with a choice of venues for their litigation
- Carriers would be held strictly liable for injuries or death arising from shipping incidents
- Burden of proof shifts from the passenger to the carrier for all shipping incidents
- Provides assurance of liability coverage through compulsory insurance and access to the Insurer in instances where the company is unable to pay damages
- Coverage for damage to luggage and vehicles
- Creates passenger liability uniformity with at least 31 other states

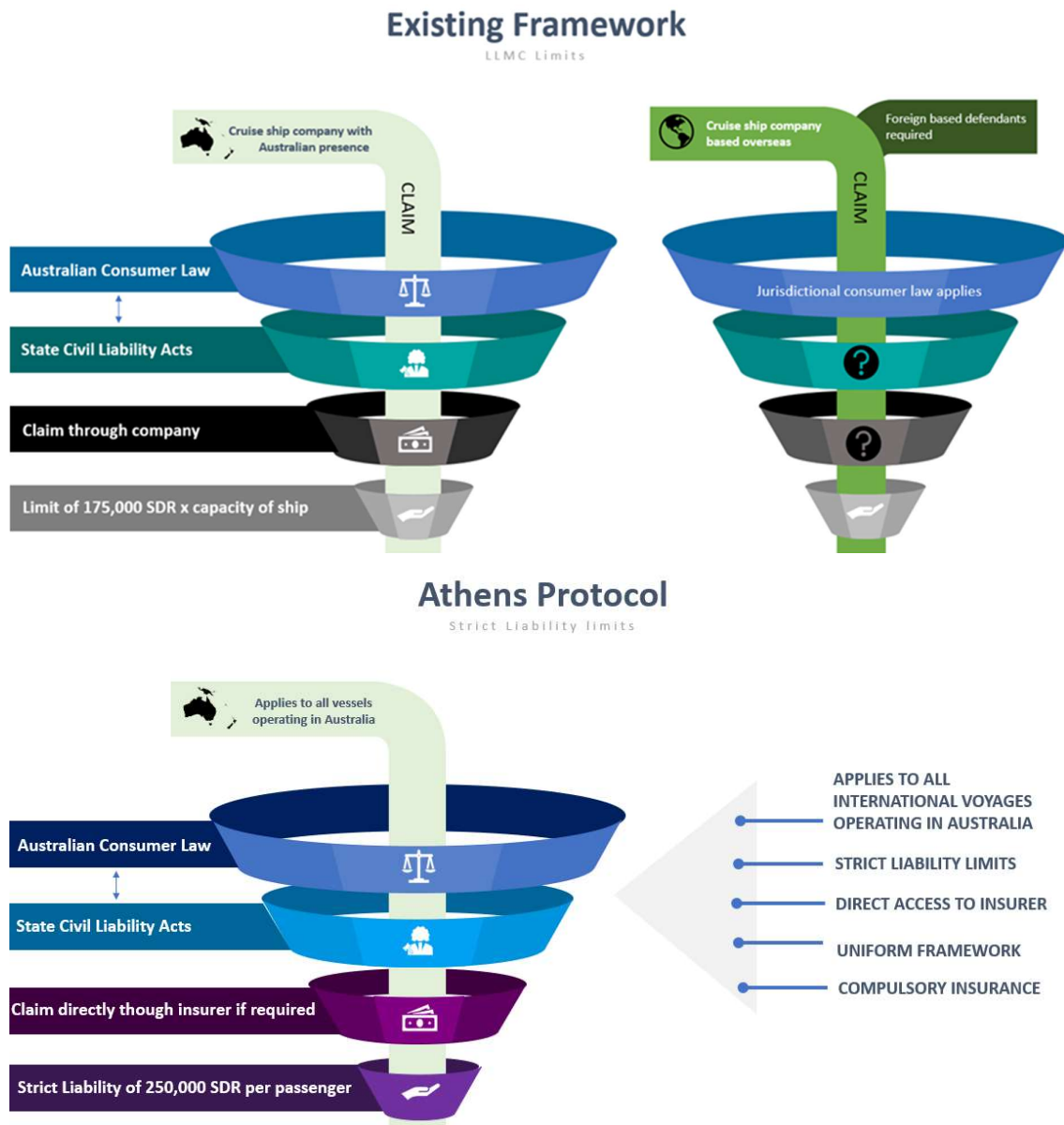


Figure 3: schematic outlining the existing framework and claims process (top) and the passenger claim process under the Athens Convention (bottom) if Australia were to accede to the 2002 Protocol.

Note: It is assumed that vessels operating in Australia either include a departure or arrival (or both) to an Australian Port according to the contract of passage and therefore satisfies Article 2(c) of the Athens Convention (see section 2)

## 4. Option 1: Retain the Status Quo (No change)

### 4.1 Australia

The Australian Consumer Law (ACL) is a national law for fair trading and consumer protection that has been adopted uniformly by the state and territory governments and commenced on 1 January 2011. The ACL is administered and enforced by the Australian Competition and Consumer Commission (ACCC) and state and territory consumer protection agencies. The ACL creates a basic set of guarantees for consumers who acquire goods and services (such as passenger cruises) from a service provider or carrier in circumstances where there is a relevant connection to Australia. The ACL assists consumers to resolve a dispute with the supplier where the service does not meet a statutory consumer guarantee. In these circumstances, the ACL provides the consumer with a range of remedies. The consumer can seek to recover the amount of the loss or damage caused by the conduct of the supplier (or other relevant person involved in the contravention) under section 236 and, in some cases, the consumer will be entitled to compensation for damages and loss under section 237.

In addition to the protections conferred under the ACL, consumers are also able to pursue claims for damages in respect of harm resulting from the fault of a person, in actions based in negligence, contract or other causes of action under common law. Some limits are placed on the amount of a claim by State and Territory Civil Liability Acts, which each modify essential elements of the action, for example with different limitation periods, statutory defences, and limits on damages. See section 4.2.3 below for further detail.

### 4.2 LLMC Convention

The Convention on Limitation of Liability for Maritime Claims 1976 (LLMC Convention) allows Shipowners to limit their total liability for claims arising out of one single event, referred to as 'global limitation'. The LLMC Convention applies to claims for loss of life and personal injury, as well as loss of or damage to property. Australia is a party to the LLMC Protocol 1996, which is implemented in Australia by the *Limitation of Liability for Maritime Claims Act 1989* (LLMC Act).

Carriers can limit their liability under the LLMC Convention, unless it is proven that the loss occurred due to an intentional act or omission, or that the carrier acted recklessly with the knowledge that such damage would probably occur. Liability limits are specified in respect of claims for loss of life or personal injury, and property claims (such as damage to other ships).

In Australia, it is **not mandatory** to hold passenger liability insurance. Passenger insurance is regarded as a business decision. However, through consultation with representatives from across the maritime industry, there is a strong view that it would be highly unlikely for cruise operators to be uninsured. Feedback from stakeholders indicates that absence of insurance by cruise ships has not yet been identified in Australian Courts through damage claims.

#### 4.2.1 LLMC Liability limits

The liability limit for loss of life or personal injury to passengers on a ship is calculated according to carrying capacity of the ship where the overall passenger limit is 175,000 SDR multiplied by the ship's certified passenger capacity (LLMC 1996 protocol). Article 15 of the LLMC Convention provides state parties with the flexibility to set a higher maximum carrier liability limit (up to unlimited liability) in respect of claims for loss of life or personal injury to passengers. Australia has implemented the standard LLMC Convention limit in the LLMC Act. Australia could however increase the limit through amending the LLMC Act and notifying the Secretary General of the IMO.

#### 4.2.2 Claims process and recovery of payments

Pursuing a claim against a cruise ship relating to injury or luggage has numerous unique challenges which impact the claims process. Many cruise ships are registered to foreign countries; the companies that own the cruise ships are often based internationally; the accidents often happen in international waters or in the territory of another country; and claimants typically only have one year to bring any type of claim for injuries against a cruise ship. These circumstances for claims can occur in different geographic locations, including the points of embarkation and disembarkation. Claims have to be brought to the company directly and may be bound by limitations outlined in the individual cruise contract.

Each cruise contract generally differs between companies and even within companies depending on where they are operating. The contract entered into by the passenger when purchasing the ticket will state where the case should be brought if a claim was to be made and how long the claimant has before submitting a claim. Cruise contracts also typically contain long and detailed terms and conditions, which can lead to cascading arguments during a claims process leading to expense and delay in resolution. Compounded with often short timeframes for a case to be brought against a company and then heard before the courts, navigating cruise contracts can be complex and burdensome for passengers. The modest value of most claims makes it unattractive to proceed with a claim involving a complex legal debate.

Whilst the majority of the shipping industry operating in Australia holds insurance for passenger claims, there is no compulsory requirement for ships to have insurance for passenger claims, or a legal presence in Australia. Passengers can therefore be exposed to the risk of a carrier not being able to pay compensation, or avoiding payment, or having to pursue a claim in a foreign court.

#### 4.2.3 Existing interaction between the Australian Consumer Law and the State Based Civil Liability Regimes.

The Australian law applicable to passengers carried by sea is widely regarded as being complex and difficult to navigate. Where the Australian Consumer Law (ACL) applies, carriers are bound by a statutory guarantee to exercise due care and skill in the carriage of their passengers. Under section 61(2) of the ACL, there is a guarantee that services will be of such a nature, quality, state, or condition that they might reasonably be expected to achieve a particular purpose made known to the supplier by the consumer. Under section 61(1) of the ACL, there is a guarantee that services will be reasonably fit to achieve a particular purpose made known to the supplier by the consumer. The nature of the obligations imposed on service providers under the consumer guarantees is not in itself problematic as the duty of care closely aligns with a carrier's common law obligation. However, insofar as they involve a duty of care to avoid injury or death, the legal position is less straightforward due to the exceptions of the ACL and the impact of the 'uplift' of State Laws (such as Civil Liability Acts)<sup>12</sup>. The known issues include:

- **Recreational Services**

As highlighted above, the ACL imposes a statutory guarantee on service providers to exercise due care in the provisions of services in trade and commerce. However, there is what is termed a 'carve out' (found in the parent Act, the *Competition and Consumer Act* (CCA) 2010 s139A) which allows for service providers to exclude liabilities in relation to injuries sustained during the provision of recreational services. The definition of 'recreational services' in the CCA is quite narrow in that an entire cruise is unlikely to constitute a recreational service but this has not been tested in case law. To trigger s139A, an exclusion clause must only exclude injury or death, and not property, and the exclusion clause must be part of the contract. Importantly however, significant personal injury caused by a supplier's reckless conduct cannot be excluded under section 139A, and such an exclusion clause would be void under section 64 of the ACL despite whether an activity is or isn't classed as a 'recreational service'.

---

<sup>12</sup> Lewins, K. (2018) Cruise Ship Passengers and Australian Law: Known Problems and Some New Answers. *Australian & New Zealand Maritime Law Journal*, 32 (2). pp. 1-16.

- **The interaction between the ACL and state based Civil Liability regimes**

The objectives of the CCA (which contains the ACL) and the various state Civil Liability Acts (CLAs) have overlapping applications. The objective of the CCA could be described as enhancing consumer protection and the CLAs as placing importance on personal responsibility, reining in the law of negligence and limiting aspects of a defendant's liability. The CLAs also have unique rules applicable to recreational activities, defined more broadly than the CCA. The CLAs permit the use of waivers, risk warnings and disclaimers in relation to recreational services and have special rules for dangerous recreational activities.

- **Quantum of claims**

The CLAs seek to minimise the quantum of claims awarded in the event that a defendant is found liable. In most states/territories, plaintiff's damages are subject to a threshold and a cap for financial and non-financial losses. However, thresholds for general damages and definitions vary significantly between states where restrictions on the scope of damages for non-economic loss for personal injury actions are stipulated at statute.

State	Relevant Act	Thresholds	Damages Cap (AUD)
QLD	Civil Liabilities Act 2003	No minimum threshold	\$378,550
ACT	Civil Law (Wrongs) Act 2002	No minimum threshold	No Cap
SA	Civil Liability Act 1936	Low threshold but requires the plaintiff to demonstrate that they have significant impairment of the ability to lead a normal life for at least 7 days and have incurred medical expenses around \$2,750.	\$300,000 (indexed)
VIC	Wrongs Act 1958	The plaintiff must have suffered a significant injury (5% permanent impairment or 10% if psychiatric).	\$611,430
NSW	Civil Liability Act 2002	Personal injury must be more than 15% of the most extreme case in order to receive compensation.	\$658,000
TAS	Civil Liability Act 2002	No award if damages are assessed at < \$4000. Where assessment if \$4000 - \$20,000 award is calculated Award = 1.25 x (amount assessed - \$4000). Where assessment is > \$20,000, award is equal to that amount.	No Cap
WA	Civil Liability Act 2002	No award if damages are assessed < 18,000. Where assessment is \$18,001 - \$55,000 award if calculated as: Award = assessment - \$18,000. Where assessment is \$55,001 - \$73,000, award if calculated as: Award = assessment - (\$18,000-(award-\$55,000)).	No Cap
NT	Personal Injuries (Liability for Damages) Act 2002	No award unless the whole person impairment is greater than 5%	\$662,000
<b>Competition and Consumer Act 2010</b>		15% or more of the most extreme case	\$350,000

Figure 4: Non-economic loss for personal injury thresholds and caps by state and territory compared to the Competition and Consumer Act.

The CCA restricts personal injury damages along the same lines as the NSW CLA (15%), however, the CCA does not extend to personal injury damages awarded for a breach of the consumer guarantees and is capped at a significantly less figure than most states. Therefore, the restrictions on the amount of damages contained in the State / Territory CLAs generally apply to personal injury claims brought under the ACL consumer guarantees. It can be argued that Australia has as many different systems for damages assessment as there are different CLAs, though the differences between them might be minor. Whilst these variations are unlikely to be an issue for a single plaintiff, in instances where there are multiple plaintiffs from multiple states, it could create different outcomes for plaintiffs.

The varying state and territory limits need to be considered in the implementation of options that advocate accession to the Athens Convention.

- **When passengers are injured outside of Australian waters**

It is unclear whether CLA limitations apply for coverage of passengers when injured outside of Australian waters. Some CLAs are silent as to extraterritorial application, the intent to apply state CLA beyond the state and the interaction of 'recreational activities' under the ACL. In *Moore v Scenic Tours Ltd*, the trial judge found the CLA (NSW) does not necessarily apply to losses sustained overseas, but this finding was overturned on appeal with both parties having sought special leave to appeal to the High Court<sup>13</sup> to determine whether damages can be recovered.

Although recent cases have clarified certain aspects, Australian law as it currently applies to cruise ship passengers has some degree of uncertainty. The laws governing personal injury are inconsistent between states. Where a personal injury occurs during the course of delivery of services caught by the ACL, questions of liability and the amount of damages are complicated by the different effect of state / territory CLAs. For comment on future considerations for cruise passenger claims under the ACL/CLA regime, please see section 12.1.

#### 4.2.4 Existing claims data

Statistics were provided by NSW Fair Trading / NSW Department of Customer Service and the Australian Competition and Consumer Commission (ACCC) indicating complaints received relating to the cruise industry from January 2015 to February 2020<sup>14</sup>. NSW data is important as major cruise ship contracts nominate NSW as the jurisdiction applying. In NSW, a total of 84 complaints were received across a combination of cruise companies and travel agencies. Most complaints received were in relation to quality, passenger rights and responsibilities and conduct of the cruise line (Figure 5) with only one complaint pertaining to injury and 2 complaints pertaining to luggage damage. The remainder of complaints are classified as "hotel claims" which relate to illness or distress associated with the delivery of service and perceived conflict with advertised service. Nation-wide data obtained from the ACCC for the same period shows an average of 138 contacts a year relating to quality, passenger rights and responsibilities and conduct of the cruise line. There has been a slight increase over the period, however the average is steady at around 13 contacts per month for the past three years. This is likely to increase in 2020, with a large number of contacts received from March onwards in relation to the COVID-19 pandemic and its impact on the cruise industry.

These claims do not include complaints/claims settled directly with the cruise company or claims that have been settled through litigation. It is interesting to note that complaints are steadily decreasing over this five-year period in NSW, whilst steadily increasing nationwide.

Information received through consultation with Cruise Lines International Association (CLIA) and its members indicates that greater than 90% of complaints and claims are managed and settled internally and therefore would not be registered with NSW Fair Trading or the ACCC.

---

<sup>13</sup> *Scenic Tours Pty Ltd vs Moore* (2018) NSWCA 238.

<sup>14</sup> Complaints received by NSW Fair Trading in relation to "Cruise" 2015-2020. Data supplied to NineSquared Pty Ltd. for consideration in drafting the Options Analysis for Australia's Accession to the Athens Convention (2002).

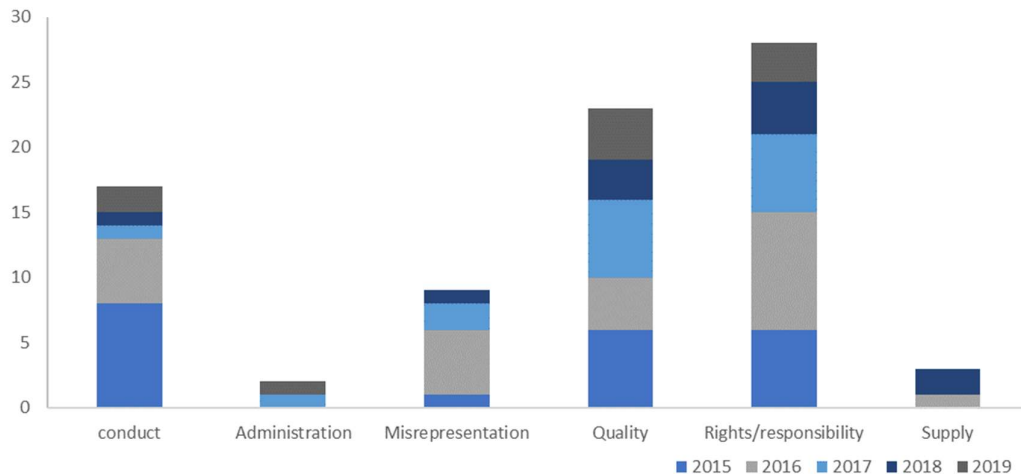


Figure 5: NSW Fair Trading 'cruise' claims data provided for 2015 to 2019 showing distribution of claims across 'Practice' across years.

## 4.3 Other Considerations

### 4.3.1 Liability Waivers

Most cruise ships have waivers included in the passage contract limiting the liability of the cruise line for injuries or luggage damage and loss, and subsequently encourage their passengers to take out additional travel insurance or pay a fee to the cruise line for greater liability protection of personal goods. While cruise lines may assert that these limited liability waivers are iron-clad, in many cases, a company cannot contract out negligence and therefore the waivers are not valid and enforceable to the degree outlined in the contract. However, a challenge to the contracts might require expert counsel to navigate the complexities of Australian Maritime Law, Australian Consumer Law and Contract Law.

### 4.3.2 Passenger Liability Regulation (PLR)

The Passenger Liability Regulation (PLR) came into effect within the European Union (EU) and European Economic Area (EEA) on 31 December 2012. The Regulation gives effect to the key provisions of the Athens Convention, together with the 2006 IMO Reservation and Guidelines for Implementation of the Convention covering war risks. Some international carriers, homeported in Australia, carry PLR insurance consistent with compulsory insurances requirements under Athens. It is not unusual for large cruise companies who routinely operate in the EU as well as Australia, to already be compliant with the Athens Convention. However, accession to Athens in Australia would likely have implications on the insurance premiums due to the greater number of passengers to whom the Athens limits would then apply.

### 4.3.3 Private Travel Insurance

Most cruise ship companies either require or strongly recommend that passengers take out private travel insurance, however, this is not unanimous across the industry, nor could it be used in lieu of compensation from the cruise company in instances of fault and/or negligence. Private travel insurance policies typically have claim limits for accidental death, serious injury and/or loss of income of only 25,000 AUD, which is significantly lower than the LLMC limits or Athens strict liability limits. If a passenger were to make a claim through their private travel insurance for injury caused by the cruise company, travel insurance policies usually require the payout to be repaid to them out of compensation received from the cruise line or the cruise line's insurer if a claim was also made to the cruise company.

## 4.4 Summary

In submissions received to the 2017 Discussion paper, sentiment within the cruise industry ranged from neutral towards favouring the status quo. The primary reasons for the cruise industry to favour the status quo relate to the protections already afforded to Australians under existing Australian Consumer Law, the rarity of serious shipping incidents, and a perceived Euro-centric focus of the Athens Convention, as represented by the countries that are party to the Convention.

The Impact Analysis considered each of the proposed options in their end state once implemented in relation to the baseline option of maintaining the status quo. Option 1, to continue as currently, would therefore not lead to any impacts different to the current framework.

### ***Benefits of maintaining the status quo***

- Business as usual, no change to existing processes, company policies and procedures, and no implementation costs.
  - The Department's Discussion paper acknowledged that the major international cruise companies with business operations in Australia take great care to ensure the full incorporation in their Australian passage contracts of existing protections under ACL<sup>6</sup>, and that changes to these laws may necessitate revisions to a company's policies and procedures.
  - The discussion paper also acknowledged that international cruise companies with business operations in Australia have made efforts to clarify jurisdictional uncertainty in contracts of carriage. For example, the Australian passage contracts of Carnival Australia and Royal Caribbean permit claims to be brought in Australian courts and provide that NSW law is the applicable law governing these contracts.
- The existing legal framework and industry practice is adequate.
- Claims for damages can access the full amount of the global LLMC limit for that ship rather than a limit per person under the Athens Convention.

### ***Constraints and challenges of maintaining status quo***

- There is no uniformity in liability limits in Australia for passenger carrying commercial vessels.
- Existing personal travel insurance coverage for cruise travel indicates a maximum claimable sum of approximately 25,000 AUD for death or disablement. If the ship's passenger liability insurance funds were not available for claiming damages (i.e. if the ship was uninsured) this would leave a potential significant gap from what would be accessible under the Athens Convention.
- Fairness and equity concerns if for example an EU or UK resident travelling on a cruise ship departing from an Australian port is afforded greater legal recourse in the case of loss, injury or death than an Australian resident in a neighbouring cabin on the same cruise. Whilst this is important for fairness and equity, it is also of importance during catastrophic incidents. For example, if a vessel carrying 2000 passengers sinks resulting in catastrophic loss, and 1000 passenger contracts of carriage were made in a State Party to Athens Convention (i.e. UK, EU) and 1000 were Australian, families of the former would have access to a fully insured, set amount of compensation that can be recovered as an administrative process because of strict liability. Australian passengers, however, on the same cruise, who suffered the same consequence, and whom don't meet eligibility criteria for the Athens Convention could be disadvantaged. Similarly, passengers from different Australian states may be entitled to different amounts under state CLA limits.
- Potential for certain claims to attract high legal defence costs due to the complex legislative framework.
- There is no requirement for shipowners to gain and maintain insurance in the LLMC Convention and there is no avenue for passengers to sue insurers directly.
- The onus is 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 under the LLMC Convention, the limits for which are set in the LLMC Convention.



- The total amount of compensation that a court is able to award is limited by the LLMC Convention to the global limit of 175,000 SDR times the number of passengers able to be carried.
- The absence of a requirement for a cruise company to be registered in Australia and therefore may not have a legal presence in Australia.
- Some smaller cruise companies could require disputed claims to be heard in courts in overseas jurisdictions.
- Even if the carrier has insurance, under the current legal framework passengers are not able to sue the insurer directly, and thus may not have access to insurance proceeds in the event that the cruise ship company becomes insolvent.
- Rights of cruise passengers appear inconsistent with the rights of aviation passengers under the Montreal Convention.

## 5. Option 2: Accede to Athens but retain 1996 LLMC global limits, (opt out of Athens limits)

The Athens Convention 2002 will provide a simpler and clearer path for claimants in injury and death cases resulting from shipping incidents. The Convention does not affect existing law about more general breaches of a passenger contract (e.g. quality of service, also known as ‘hotel claims’) which will still come under the ACL unless the claimant can prove that the carrier was negligent and that the injury resulted from that negligence. Importantly, the Athens Convention provides financial security for maritime claims through compulsory insurance and direct action against insurers. The Athens Convention involves introducing a strict liability up to 250,000 SDR for most “shipping” incidents. However, under Article 7(2) of the Athens Convention 2002, it is possible to **opt out** and prescribe an alternate limit of liability providing it is greater than the 400,000 SDR described in the Convention.

### *Article 7 – Limit of liability for death and personal injury*

*A State Party may regulate by specific provisions of national law the limit of liability prescribed in paragraph 1, provided that the national limit of liability, if any, is not lower than that prescribed in paragraph 1. A State Party, which makes use of the option provided for in this paragraph, shall inform the Secretary General of the limit of liability adopted or of the fact that there is none*

This option assumes that the Athens Convention 2002 opt out is used so that only the LLMC Article 7 applies where the total passenger liability limit for the ship is 175,000 SDR x registered passenger carrying capacity of the ship (see 4.2.1). In such a scenario, passengers face no ‘per passenger’ limit and therefore may have access to a greater pool of funds on the occasion of a small number of impacted passengers (see example for a working example).

#### **Example – Ovation of the Seas**

Passenger capacity of 4,180.

Sum available to claimant group: 175,000 SDR x 4,180 = 731.5 million SDR (1.46 billion AUD)

In the event of a fire on board or a sinking resulting in 50 passengers killed or seriously injured, 1.46 billion AUD would be available to compensate the passenger claims in full with no imposed individual limit. In this way, the LLMC 1996 Article 7 limit is more favourable to passengers – as where there are a few claims the global theoretical limit will never apply. If the ship sinks and all passengers are killed however, the limit per claim will be 175,000 SDR or 351,267 AUD.

If, however, the Athens Convention Article 7 Tier 2 limit of 400,000 SDR was applied in a major disaster, each passenger would potentially have access to the amount of 400,000 SDR if damages were demonstrated to be greater than the Strict Liability Limit of 250,000 SDR.

The LLMC Convention does not seek to place liability limitations for luggage or vehicles. As such, the Athens limits for luggage and vehicles would be adopted. The Athens 2002 protocol liability limits for loss or damage to luggage and vehicles includes 2,250 SDR for cabin luggage, 12,700 SDR for vehicles and 3,375 SDR for other luggage.

It is important to note that the LLMC limit was set two decades ago and has not seen limits reviewed in line with Australia’s aviation sector where passenger liability limits are currently 250,000 SDR – 260,000 per passenger for international travel. If LLMC limits were increased to 250,000 SDR, they would be equivalent to

the compulsory tier 1 insurance in the Athens Convention. The civil aviation carriers' liability framework is also currently under review to ensure adequacy and relevancy of the regulatory framework, including a review of limits<sup>15</sup>.

The Attorney-General's Department's Office of International Law has identified some legal risk relating to the implementation of this option. While the Office stated the option is consistent with Article 7(2) of the Athens Convention, which requires that any liability limit should not be lower than the limits in the convention, the view could be taken that it sets a limitation on compensation. If any future re-evaluation of acceding to the Athens Convention is undertaken, there would be a need to revisit this option to consider how that risk may be reduced in the design of its implementation.

## 5.1 Option 2 Summary

The option of retaining the 1996 LLMC global limits and opting out of Athens limits means that the 'occasional' death or injury would not be subject to any limit, other than the maximum limit for the ship (i.e. licenced passenger capacity x 175,000 SDR). In most cases, this would provide greater access to compensation for passengers. Without opting out of Athens, liability would be capped at a maximum of 400,000 SDR per person on each distinct occasion regardless of the number of impacted passengers.

### ***Positives***

- Greater access to funds if an incident results in the occasional casualty.
- Compulsory passenger liability insurance.

### ***Constraints and challenges***

- The global limits under Article 7 of LLMC are 175,000 SDR multiplied by the capacity of the ship.
- The shift of the burden of proof from the claimant (status quo) to the cruise operator (under Athens) may lead to a greater number of opportunist claims being brought against the cruise operator and greater time costs associated with managing the increase in claims. However, this is only possible in relation to shipping incidents.

### Key Points from Impact Analysis



Under Option 2 it would become mandatory for a cruise company to take out insurance. Currently, **insurance is not mandatory**, and **no minimum limit** is required. Companies which do not currently hold insurance (expected to be <10% of the market, see footnote 23) would be required to obtain insurance. It is expected that these additional costs would ultimately be passed onto passengers or absorbed by the cruise company. The increase is not estimated to be large in relation to a cruise company's operating costs, nor represent a large increase in the passenger fare price. As Option 2 accedes to the Athens Convention, insurance companies would have more examples from other countries to provide accurate estimates and lawyers would have more information to advise claimants.

In Option 2, the **burden of proof** is shifted to the carrier for shipping incidents where the carrier must demonstrate they were not negligent compared to the current state where the passenger must prove the carrier was negligent. This makes it easier for a passenger to lodge a claim and harder for a cruise company

<sup>15</sup> Civil Aviation Carriers' Liability discussion paper (July 2018) Department of Infrastructure, Regional Development and Cities.  
[https://www.infrastructure.gov.au/aviation/international/files/civil\\_aviation\\_carriers\\_liability\\_discussion\\_paper.pdf](https://www.infrastructure.gov.au/aviation/international/files/civil_aviation_carriers_liability_discussion_paper.pdf)

to gather evidence to reject a claim. This may result in more claims needing to be paid out, therefore increasing costs to cruise companies but benefiting passengers.

Under Option 2, the process for submitting a claim would follow the Athens Convention but the current limits for the amount a passenger can claim would remain the same. Therefore, there would be no change to the maximum amount a passenger could claim, but the effort involved in lodging a claim and likelihood it is approved are improved for the passenger.

Currently, Australian passengers on international cruise ships who pursue a claim relating to injury or luggage, can be faced with an overly complex recourse which may be different depending on the carrier, residential location of the claimant, location of the incident and the terms and conditions of the contract of carriage. Where the Athens Convention applies, Option 2 provides uniformity in the claims process, providing equity to passengers and potentially increasing demand from a perceived easier claims system.

In summary, implementing Option 2 would be likely to increase costs for cruise companies which do not currently hold insurance and could lead to more claims being paid out. Passengers would benefit from an easier and consistent process to lodge a claim, but with the same upper limits awarded as currently.

## 6. Option 3: Accede to Athens with two variations on limits

Option three considers two variations, both involving accession to the Athens Convention but with variations in the upper limit of liability. Feedback from stakeholders suggests that this needs to be considered against the likelihood of catastrophic incidents where the existing upper limit may not prove sufficient to cover all damages.

### 6.1 Option 3a – Athens Tier 1 limits (strict liability) with Athens Tier 2 Limits (upper limit)

For death and personal injury claims, the Athens 2002 protocol provides a strict liability limit of 250,000 SDR per passenger on each distinct occasion. If the loss exceeds the limit, the carrier is further liable up to an overall maximum limit of 400,000 SDR per passenger unless the carrier shows that the incident which caused the loss occurred without the operator's (or their servants') fault or neglect. However, compulsory insurance is only required for the tier 1 limit of SDR 250,000.

The Athens 2002 protocol also includes liability limits for loss or damage to luggage and vehicles which includes 2,250 SDR for cabin luggage, 12,700 SDR for vehicles and 3,375 SDR for other luggage.

#### 6.1.1 Strict Liability (Art.3)

In relation to shipping incidents, the fault-based regime under the Athens Convention 1974 would be replaced with strict liability, but there are two tiers to the liability:

- Strict Liability limit 250,000 SDR (also referred to as Tier 1)
- Upper limit 400,000 SDR (also referred to as Tier 2)

Tier 1 - the carrier is strictly liable up to the set limit (250,000 SDR) unless the carrier can prove that the accident was caused by (a) a natural phenomenon, act of war, hostilities or insurrection; or (b) by a third party with intent to cause the incident (such as a terrorist act). If and to the extent that the loss exceeds the above limit, the carrier is further liable, up to 400,000 SDR, (Tier 2) unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier (Article 3(1) of the Athens Convention). Non shipping-related incidents are not covered by strict liability, meaning a claimant would still have to prove that the carrier was at fault in such an incident.

Importantly, and one of the key benefits of acceding to the Athens Convention 2002 is that carriers must have financial security to cover death or personal injury for 250,000 SDR per passenger, whereas under the status quo, insurance for passenger liability is not compulsory.

The tables on the next page compare liability scenarios across a variety of cruise ships that routinely travel to and from Australian ports.

Table 1: Scenarios per person liability

Cruise Ship	Max pax capacity		Athens Tier 1 (250,000 SDR)	Athens Tier 2 (400,000 SDR)	LLMC (175,000 SDR)
Ovation of the Seas	4180	SDR	1.045 billion	1.672 billion	731.5 million
		AUD	2.098 billion	3.356 billion	1.468 billion
Queen Mary 2	3271	SDR	817.8 million	1.308 billion	572.4 million
		AUD	1.6 billion	2.626 billion	1.149 billion
Pacific Adventurer	2636	SDR	659 million	1.054 billion	461.3 million
		AUD	1.322 billion	2.116 billion	926 million
Pacific Dawn	1915	SDR	478.8 million	766 million	335.1 million
		AUD	961 million	1.538 billion	672.7 million
Pacific Aria	1260	SDR	315 million	504 million	220.5 million
		AUD	632.3 million	1.012 billion	442.6 million

\* AUD to Special Drawing Rights conversion on 13 Nov 2019 (1 SDR = 2.00724 AUD)

Table 2: Passenger Capacity based on Vessel Liability Insurance

Passenger (pax) capacity based on vessel liability insurance	Athens Tier 1 (250,000 SDR)	Athens Tier 2 (400,000 SDR)	LLMC (175,000 SDR)
500 Million AUD	996 pax	622 pax	1423 pax
2 Billion AUD	3985 pax	2490 pax	5693 pax

\* AUD to Special Drawing Rights conversion on 13 Nov 2019 (1 SDR = 2.00724 AUD)

Table 3: Liability limits for loss or damage to luggage and vehicles Scenarios

Cruise Ship	Max pax capacity		Loss or damage of cabin luggage (2,250 SDR)	Loss or damage to other luggage (3,375 SDR)
Ovation of the Seas	4180	SDR	9.4 million	14.1 million
		AUD	18.9 million	28.3 million
Queen Mary 2	3271	SDR	7.4 million	11.04 million
		AUD	14.8 million	22.2 million
Pacific Adventurer	2636	SDR	5.9 million	8.9 million
		AUD	11.9 million	17.9 million
Pacific Dawn	1915	SDR	4.3 million	6.5 million
		AUD	8.7 million	13 million

Pacific Aria	1260	SDR	2.8 million	4.3 million
		AUD	5.7 million	8.5 million

\* AUD to Special Drawing Rights conversion on 13 Nov 2019 (1 SDR = 2.00724 AUD)

## 6.2 Option 3b – Athens (Tier 1) limits with increased Athens upper limits (Tier 2)

If Australia were to accede to the Athens Convention, all claims for the recovery of damages for death and personal injury, as well as loss or damage to the passenger's luggage, sustained during the course of international carriage, would be brought into alignment with other Parties whilst also allowing Australia to implement its own definitions around the limitation of liability. For example, in respect of personal injury, Article 7 of the Athens Convention provides member states with some flexibility in stating that:

*"A State Party may regulate by specific provisions of national law the limit of liability prescribed in paragraph 1 [400,000 SDR], provided that the national limit of liability, if any, is not lower than that prescribed in paragraph 1."*

This option would see the accession to Athens Tier 1 with increased Tier 2 limits (i.e. automatic coverage of 250,000 SDR but if loss exceeds the limit then the carrier is liable to have **higher** than 400,000 SDR (to be nominated or unlimited) liability. In response to the 2017 discussion paper, Professor Nick Gaskell proposed a figure of 500,000 SDR. Gaskell proposed that this would help ameliorate some of the drawbacks of options 3a (such as insufficient funds to cover damages from rare but significant incidents). It has also been suggested that an exception to the Athens Convention limits should be made in the event that the passenger has sustained a catastrophic injury, providing for unlimited liability where negligence can be proven. However, consultation with the cruise industry suggested that it would be impossible for cruise companies to obtain unlimited insurance due to the existing insurance arrangements which is based on a collective P&I group reinsurance mechanism (see section 10.3.2) and distribution of risk and relative predictability of claims.

### 6.2.1 Summary

#### **Benefits**

- For passengers, the burden to prove no fault lies with the carrier for shipping incidents. For non-shipping incidents, the claimant must prove the cruise operator was at fault.
- For carriers and insurers, strict liability means maximum claims can be calculated and factored.
- The Athens Convention Tier 1 limit of 250,000 SDR is comparable to the Montreal Convention compulsory insurance of 260,000 SDR, bringing alignment between air and sea international travel.
- Athens upper limit of 400,000 SDR is comparable to Australia's domestic air carriage per passenger limit under the Civil Aviation (Carrier's Liability) Act 1959.

#### **Constraints and Challenges**

- In certain circumstances 400,000 SDR per passenger may not be sufficient to cover full damages.
- There is currently no provision for consideration of unlimited liability for instances of rare, but catastrophic claims that would exceed 400,000 SDR in damages.
- Higher liability requirements are likely to be met with higher insurance premiums which may be passed onto the consumer. However, the impact of any such cost increases should be measured against the clear benefits that acceding to the Convention would deliver. Furthermore, given that cruise lines generally already carry insurance, and operate in a competitive and open market alongside alternative tourism operators, any changes to consumer pricing will remain subject to market forces.

- The shift of the burden of proof from the claimant (status quo) to the cruise operator (under the Athens Convention) may lead to a greater number of opportunist claims being brought against the cruise operator and greater time costs associated with managing the increase in claims.
- Unlimited insurance is unlikely to be obtainable under existing insurance mechanisms.
- Legislative change would result in costs to the industry through the re-drafting of contracts, re-training of legal teams, customer support and complaints staff and internal company policies.

## Key Points from Impact Analysis



Under Option 3 it would become mandatory for a cruise company to take out **insurance with a minimum cover limit**. Currently, insurance is not mandatory, and no minimum limit is required. Companies which do not currently hold insurance (expected to be <10% of the market, see footnote 23) would be required to obtain it and those with insurance under the limit would need to increase their liability cover. Options 3a and 3b differ in the minimum amount of liability coverage required. It is expected these additional costs would ultimately be passed onto passengers or absorbed by the cruise company. The increase is not estimated to be large in relation to a cruise company's operating costs, nor represent a large increase in the passenger fare price. As Option 3 follows Athens Convention, insurance companies would have more examples from other countries to provide accurate estimates and lawyers would have more information to advise claimants.

In Option 3, the **burden of proof** is shifted so that in an incident, the cruise company must demonstrate it was not negligent compared to the current state of a passenger needing to demonstrate negligence. This makes it easier for a passenger to lodge a claim and harder for a cruise company to gather evidence to reject a claim. This may result in more claims needing to be paid out, therefore increasing costs to cruise companies but benefiting passengers.

Under Option 3, the process for submitting a claim follows the Athens Convention and **the upper limit a passenger can claim is increased**. The significance of this increase compared to individual Australian state / territory CLA limits varies, however for all states / territories the Tier 2 Athens limits are higher than the current CLA caps in place.

Currently, Australian passengers on international cruise ships who pursue a claim relating to injury or luggage, can be faced with an overly complex recourse which may be different depending on the carrier, residential location of the claimant, and location of the incident. Option 3 provides uniformity in the claims process, to the extent the Athens Convention applies, providing equity to passengers and potentially increasing demand from a perceived easier claims system.

In summary, implementing Option 3 would likely increase costs for cruise companies which do not currently hold insurance or need to increase their liability amount and could lead to more claims being paid out. Passengers would benefit from an easier and consistent process to lodge a claim, and increased upper limits compared to currently.



## 7. Option 4: Option 2 or 3 and extend to “voyages to nowhere” and smaller domestic operators

The Athens Convention applies to international carriage only and for vessels carrying greater than 12 passengers. If enacted in Australia, without additional regulatory application, 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 and Norwegian Cruise Line also carry passengers interstate (i.e., from one Australian state port to another Australian state port) and on intrastate voyages leaving and returning to the same port with no stops in between (known as ‘voyages to nowhere’ or ‘sampler cruises’). Demand for domestic cruising has grown substantially, with local cruisers growing by 23 per cent from 269,915 in 2015 to 332,979 in 2016<sup>16</sup>.

Smaller passenger cruise vessels also operate in Northern Australia between Broome and Darwin offering multi-day cruise services to the Kimberley carrying between 12 and 120 passengers depending on the vessel. There are also some passenger and vehicle carrying ferries (both day and overnight trips) operating within Australia such as the Spirit of Tasmania, Kangaroo Island ferry and Moreton Island Ferries. Whilst the Athens Convention application is intended for international passengers, some member states such as the EU have adopted the Convention for both international and domestic transport and have been satisfied with the solution which has intentionally been pro-consumer. The reasoning behind extending the Athens Convention to domestic carriage includes:

- Passengers would be governed by the same regime regardless of whether they were transiting to and disembarking in Australia from a foreign port; or remaining on the ship and transiting between Australia Ports on a foreign flagged cruise ship; or embarking in Australia and transiting to another Australian Port. All passengers would have access to the same liability limits if negligence on the behalf of the ship were to occur impacting passengers and/or their luggage.
- Ships that do not travel to international ports still carry similar maritime risk and are often operated by foreign carriers and in international waters. It would seem to be sensible for these voyages to be covered by the Athens Convention.
- Subject to any constitutional considerations, future amendments to the enabling Act could provide national adjustments for such voyages. In response to the 2017 discussion paper, Professors Lewins<sup>17</sup> and Gaskell<sup>18</sup> proposed that such amendments to allow for the inclusion of the ‘voyages to nowhere’ would include extension of the application to contracts of carriage performed by:
  - a) A foreign registered ship
  - b) A ship with a passenger capacity of (X) - to be nominated
  - c) Involving a voyage of at least one night’s duration

Applying the Athens Convention to cruises operated by Australian flagged ships that solely operate within Australia by Australian companies may, however, not prove reasonable given low passenger numbers, and existing LLMC limits and ACL application deemed satisfactory. The constraints and challenges identified in section 4.5 may still apply. Having one single liability requirement regardless of voyage type might be considered favourable. To undertake a considered cost benefit analysis and comprehensive understanding of the impacts to the smaller domestic maritime passenger carrying fleet would require extensive consultation with these vessel operators and the co-operation of the states/territories and has been excluded from this current analysis.

---

<sup>16</sup> Australian Cruise Association 2018/19 Annual Report

<sup>17</sup> Professor Nick Gaskell Response to the Athens Convention 2002 Consultation, University of Queensland, School of Law

<sup>18</sup> Professor Kate Lewins Response to the Athens Convention 2002 Consultation, Murdoch University School of Law

Whilst the EU has applied the Athens Convention to its domestic passenger carrying fleet (such as ferries operating within and between member states), it has done so gradually to enable sufficient lead times for the industry to adjust to the increase in insurance requirements. In Australia, the Athens Convention could be enacted and applied to Australia's international passenger carrying industry quite quickly (including the 'voyages to nowhere'), and whilst there is clear benefit for compulsory passenger insurance amongst Australia's passenger carrying domestic fleet, special consideration needs to be given to deal with state/territory consumer laws and the laws governing domestic commercial vessels.

## 7.1 Application to smaller operators to be canvassed

Australia has a unique market for domestic coastal cruises as well as large passenger and vehicle ferries. The domestic coastal cruises industry predominantly operates in the Kimberley region, where cruises travel between Broome and Darwin, carrying between 12 to 120 passengers on multi night cruises with the occasional international visit to Indonesia. Australia also has some large ferries transporting both passengers and vehicles from the mainland to offshore islands such as Tasmania, Stradbroke Island, Moreton Island, and Kangaroo Island. The carrying capacity of these vessels range from 250 – 1400 passengers and 30-500 vehicles depending on the ship. Currently, carriage contracts, with the exception of Consumer Guarantees (under the ACL), exclude any liability for loss, death or personal injury incurred as a result of or in connection with the negligence of the operator or ship owner except in circumstances where a claim is brought against them, in which case the claims are limited to the amounts set out in the LLMC Act. Also, under Australian Law there is no mandatory requirement for a commercial vessel to have insurance for passengers and luggage, which is generally perceived as a business risk decision.

As a matter of principle, Professors Gaskell and Lewins have argued that there is a need to provide greater uniformity in the carriage of passengers domestically by sea, especially given the variety of state laws and interstate voyages, the limitation of liability under the LLMC 1996 and absence of compulsory insurance schemes with direct action for domestic commercial vessels. A review of the adequacy of the existing application of the Australian consumer law is required to fully evaluate impacts of applying the Athens Convention to the domestic sector.

## Key Points from Impact Analysis



The impact of Option 4 would differ depending on whether the set-up of Option 2 or Option 3 is used. Compared to the current baseline (Option 1), Option 4 would have the same impacts as either Option 2 or Option 3 but applied to a larger number of vessels which operate voyages to nowhere or domestic voyages. This additional number is expected to be small as few cruise companies only operate voyages to nowhere, and as such would be required to be covered by the implemented option anyway.

Under Option 4 it would become mandatory for a cruise company to take out **insurance** and **could include a minimum cover limit**. Currently, insurance is not mandatory, and no minimum limit is required. Companies which do not currently hold insurance (expected to be <10% of the market, see footnote 23) would be required to obtain it and, if applicable, those with insurance under the limit would need to increase their liability cover. It is expected these additional costs would ultimately be passed onto passengers or absorbed by the cruise company. The increase is not estimated to be large in relation to a cruise company's operating costs, nor represent a large increase in the passenger fare price. As both variations of Option 4 follow the Athens Convention, insurance companies would have more examples from other countries to provide accurate estimates and lawyers would have more information to advise claimants.

In both variations of Option 4, the **burden of proof** is shifted so that in an incident, the cruise company must demonstrate it was not negligent compared to the current state of a passenger needing to demonstrate negligence. This makes it easier for a passenger to lodge a claim and harder for a cruise company to gather evidence to reject a claim. This may result in more claims needing to be paid out, therefore increasing costs to cruise companies but benefiting passengers.

Under Option 4, the process for submitting a claim follows the Athens Convention and, depending on the variant chosen the upper limit a claimant can receive could also increase. Therefore, the effort involved in lodging a claim, the likelihood it is approved and potentially the upper limit to be received are all improved for the passenger.

Currently, Australian passengers on international cruise ships who pursue a claim relating to injury or luggage, can be faced with an overly complex recourse which may be different depending on the carrier, residential location of the claimant, and location of the incident. Option 4 provides uniformity in the claims process, providing equity to passengers and potentially increasing demand from a perceived easier claims system.

In summary, implementing either variation of Option 4 would likely increase costs for cruise companies which do not currently hold insurance (or hold a lower limit of insurance) and could lead to more claims being paid out. Passengers would benefit from an easier and consistent process to lodge a claim, and potentially from higher maximum limits they could receive.

## 8. Expected Compliance costs

### 8.1 Regulatory Compliance

The Australian Maritime Safety Authority (AMSA) provided the following information to assist in the development of a regulation impact statement addressing the implications of Australia acceding to the Athens Convention and cost implications in relation to:

- *Australian flagged passenger vessels with overseas certification*
- *foreign flagged passenger vessels*
- *domestic commercial vessels (DCV) that may take more than 12 passengers on multiple night cruises*

#### 8.1.1 Australian vessels certified to carry more than 12 passengers on overseas voyages

There are currently six such vessels operating under the Australian flag:

- three of these undertake overseas voyages.
- the remaining three operate domestically but carry the certification required to undertake overseas voyages (these include some of the 'Kimberley/Broome' vessels). These vessels hold certification as regulated Australian vessels (not DCV) but do not offer multiple night voyages. These include the overnight ferries with passenger accommodation that operate between Tasmania and Victoria (which are the only ferries with accommodation).
- AMSA understands that one further vessel which will undertake overseas voyages is under construction.

##### **Costs to AMSA**

These vessels operate as regulated Australian vessels under the *Navigation Act 2012* and are subject to flag State control inspections by AMSA.

AMSA would incur negligible additional compliance costs if these vessels became subject to Athens Convention requirements.

There would be a small-time cost to issue insurance certificates, which would be compensated on a cost recovery basis (see following).

##### **Costs to operators**

The vessel operators would be required to carry specific passenger insurance, to the limits required by the Athens Convention. It is not known whether these vessels are currently insured for passenger liability, but it is possible they would be as part of their professional and indemnity (P&I) insurance. The current limits of that insurance are not known by AMSA.

To comply with the Athens Convention, Australia must ensure relevant Australian flagged ships hold a certificate attesting that insurance or financial security to cover liability under the Athens Convention is in place. This would likely involve certification from AMSA to demonstrate that they have the necessary insurance in place. Based on other similar regulatory functions, it would likely require an application to AMSA and payment of a fee (currently \$70) for issue of the certificate on an annual basis.

Owners would apply for the passenger insurance certificate at the same time as making applications for Bunker Insurance certificates because insurance is provided on an annual basis, and cover is for March-February each year.

### 8.1.2 Foreign vessels carrying more than 12 passengers

All foreign flagged commercially operated vessels carrying more than 12 passengers on international voyages are classified as 'passenger' vessels for the purposes of international certification. Recreational craft that carry more than 12 passengers (for example, private super yachts) are not captured by the international passenger certification regime.

#### ***Costs to AMSA***

All foreign vessels (commercial and recreational) visiting Australian ports can be subject to Port State Control (PSC) inspection by AMSA to ensure they are meeting international requirements. Which vessels AMSA inspects is determined by a risk profiling system used to calculate a risk factor for the probability of detention.

In 2018 AMSA undertook 55 inspections on foreign vessels certified as passenger vessels. Two vessels were detained, giving a low detention rate of 3.60%.

All vessels subject to PSC have their full suite of certification checked. Across all PSC inspections (2922) only 1.3% of detainable deficiencies related to certificates and documentation<sup>19</sup>.

There would be no additional cost to AMSA in checking whether a vessel had a valid Passenger Insurance certificate during a PSC inspection.

#### ***Costs to operators***

For foreign certified passenger vessels that are not flagged to a State Party to the Athens Convention, or which do not already carry passengers in ports of States party to that Convention, there may be additional costs in obtaining valid passenger insurance, and there would be costs in obtaining a valid passenger insurance certificate from the administration of a State Party. If AMSA were to be required to issue such certificates this would be done on a cost recovery basis in accordance with the AMSA cost recovery guidelines. Given the nature of the cruise industry, this scenario is not considered very likely.

#### ***Cruise to nowhere***

Any of the above vessels (Australian or foreign flagged) might conduct 'voyage to nowhere' cruises, and if so, no significant additional costs or compliance workload would arise.

### 8.1.3 DCV that may take more than 12 passengers on multiple night cruises

DCV's are only certified to operate within Australia's Exclusive Economic Zone (that is, within 200 nautical miles of the coast) unless an exception applies – not relevant for current purposes. The data AMSA holds on the DCV fleet is currently incomplete, however, the data shows there are about 1500 DCV with a vessel use category of 'passenger vessel' with berths – that is, a vessel that carries or is certified to carry more than 12 passengers and can provide accommodation. The data does not accurately record the number of berths on each of these vessels.

A Certificate of Operation applies to the use of DCV. The Certificate of Operation data does not record details such as the duration of overnight voyages. Local intelligence suggests that there are a number of DCV passenger vessels with accommodation for more than 12 passengers that undertake multi-night cruises (other than on dive or fishing charters). These vessels, (of which there are approximately four) operate in the Kimberley and on the Murray River. Nevertheless, all the above vessels could undertake 'cruise to nowhere' depending on their current geographic area certification.

#### ***Costs to AMSA and to the operator***

Costs in relation to passenger insurance would be similar to those outlined above for other Australian flagged vessels.

---

<sup>19</sup> Port State control report 2018. Australian Maritime Safety Authority. <https://www.amsa.gov.au/vessels-operators/port-state-control/port-state-control-report-2018>

One potential area that may increase costs for AMSA is in checking that the insurance presented meets Athens Convention requirements. This is because these vessels may not insure with the well-known, large, international group of P&I insurers, who are familiar with international convention requirements, meaning that AMSA would need to undertake additional due diligence before certificates could be issued. Given the number of vessels involved, AMSA does not consider this cost likely to be significant.

#### **Costs of provision of incident data**

The above consideration relates to compliance and insurance costs arising from implementing the Athens Convention. In the past AMSA has identified the potential for further costs to arise – in relation to details of incidents. This is because a claim for compensation under the Athens Convention (in most cases) must arise from a ‘shipping incident’, which is defined in the Athens Convention as:

*‘shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship’ (which itself is defined to mean ‘any malfunction or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation or disembarkation of passengers, or when used for the propulsion, steering, safe navigation, mooring, arriving at or leaving berth or anchorage, or damage control after flooding, or when used for the launching of life saving appliances’)*

It is therefore possible that AMSA will hold relevant information to ground the claim, so AMSA could see an increase in requests for documents or information to support such claims. These requests would most likely be treated as requests for information under the Freedom of Information Act 1982. As the information would be that of a party other than the applicant, third party consultation would be required. As AMSA cannot cost recover some expenses (for example, the first five hours of decision-making time) each such request would have an impact on AMSA’s resources. Nevertheless, incident data suggests that there are few incidents on vessels certified for overseas voyages (both Australian and foreign flagged) that would fall within the above definition.

#### **8.1.4 Conclusion**

Overall, AMSA’s view is that ratification of the Athens Convention would have little impact on its operations.

## 9. Consultation Process

In the development of a regulation impact statement, good practice dictates that appropriate consultation has been undertaken with stakeholders that are likely to be impacted by the potential regulatory change under assessment. Consultation plays an important role in ensuring that every practical and viable policy alternative has been considered. As a result of the formal submissions in response to the publicly available 2017 Discussion paper, the potential policy options were narrowed down to four for further in-depth, targeted consultation and assessment. In this case, consultation is critical in helping the Department quantify the regulatory burden of proposed regulatory measures on impacted businesses, wider industry and the consumer. Consultation was conducted between 30 January and 3 March 2020 through a variety of channels including online survey, phone discussion, email and face to face meetings.



### 9.1.1 Who we engaged with

The Department and NineSquared collectively contacted a total of 54 stakeholders ranging across the cruise and maritime industry, legal sector, government, insurance and consumer groups (Appendix A). Of the 54 contacted, 24 agreed (Appendix B) to discuss the options and provide feedback for the options analysis and cost benefit analysis. Of these 24, the cruise industry represented 25%, government sector 42%, legal sector at 17%, insurance sector 8% and consumer groups 8% (figure 6). Consultation with those potentially impacted by regulatory changes provided important information on existing claims processes, insurance arrangements, and the interaction between the Australian Consumer Law (ACL) and State / Territory Civil Liability Acts (STCLAs).

The core objectives of the stakeholder engagement were to:

- Thoroughly understand the current claims processes and identify existing challenges.
- Understand the existing insurance arrangements to predict how the Athens Protocol may impact insurance premiums.
- Obtain data to input into the Cost Benefit Analysis calculations.
- Where data could not be obtained, understand the various impacts and benefits of each option for each stakeholder group

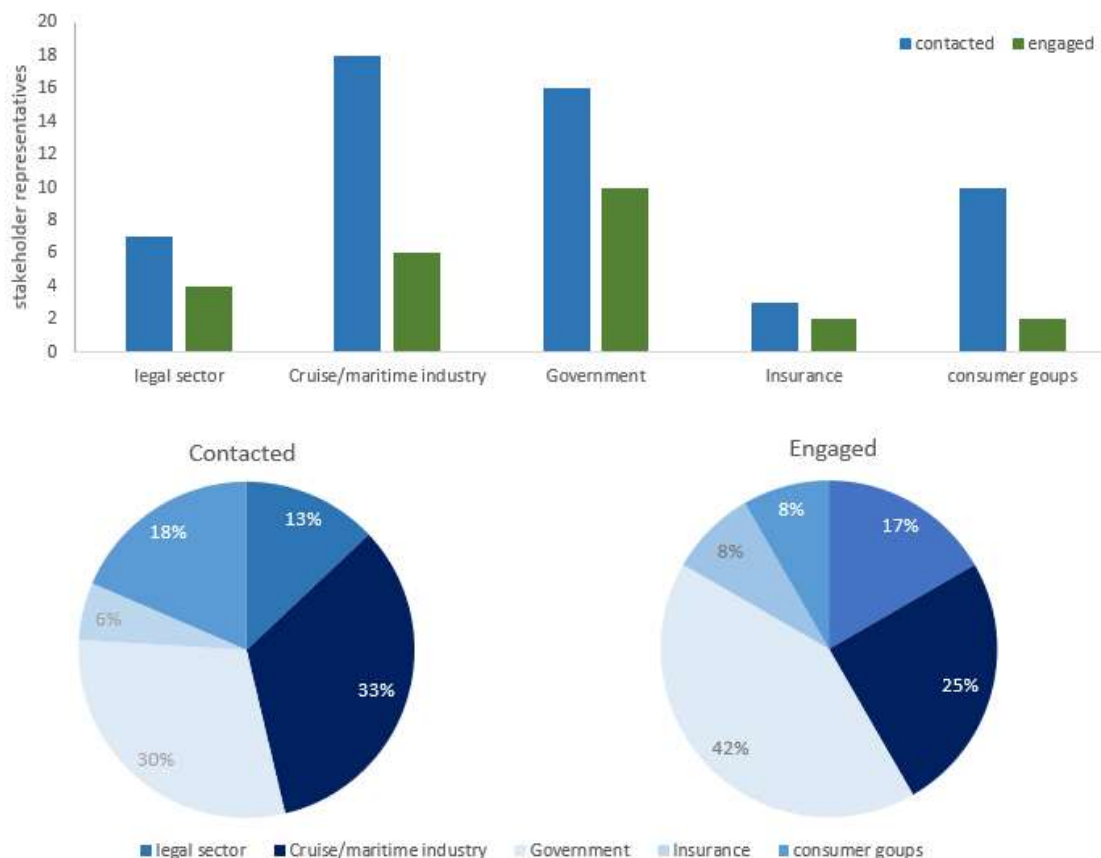


Figure 6: Engagement statistics for the development of the Regulation Impact Statement

### 9.1.2 Responses received

Responses were received by email, phone, through the online survey and face to face which informed the options analysis and cost benefit analysis. We found that the most effective form of engagement was through email and teleconferences. Few stakeholders chose to take part in the online survey. This is likely due to the desire to engage in more broad discussions across the options which most stakeholders indicated were complex and required in depth consideration of how any change to existing regulations would have effect.

Individual responses are not identified in this analysis due to privacy policy requirements.

### 9.1.3 Summary of key views of respondents

Consultation provided an opportunity for stakeholders to contribute their views to the analysis of the options put forward by the Department and the development of the Regulation Impact Statement. Overall, there was agreement amongst members of stakeholder groups regarding the existing protection afforded by the ACL and state/territory CLAs to cruise ship passengers. Whilst the cruise industry support the Australian Government in the final decision as to whether Australian accedes to the Athens Convention, they emphasised the importance of a practical approach that considers current measures being undertaken by the cruise industry to provide protection to its passengers:



*We see no clear rationale for a liability regime which differentiates between Australian passengers on a domestic cruise and Australian passengers on an international cruise. For this reason, we apply the Australian passage contract incorporating the ACL to both domestic and international cruises marketed to Australian Consumers.... Ratification of the Athens Convention and determination of the most appropriate liability framework are ultimately matters for the Australian Government.... Carnival Australia encourages a practical consideration of the issues informed through this consultation.*

*- Carnival Australia*

*We believe that a combination of Australia's existing consumer protection laws together with the industry's approach to passage conditions, insurance etc. do provide cruise ship passengers with effective protection/rights that are as effective as those enjoyed by landside vacationers.....and are designed to protect passengers from the negligence of the carrier in terms of personal loss or injury.*

*- Royal Caribbean Cruises*

In other areas, views were shared across stakeholder groups where concern was raised about the interaction of the Athens Convention with the ACL and State and Territory Civil Liability Acts, where emphasis was placed on assessing the potential additional complexities to the claims process resulting from Australia's accession to the Athens Convention in the Cost Benefit Analysis.

*In the context of any potential implementation of the Athens Convention by Australia, the interaction with both the ACL and the CLAs must be carefully thought through so as not to add an extra layer of complexity to such claims. The aim must be to substitute clarity and uniformity for the layers of complexity and uncertainty that are hallmarks of the current position.*

*- Professor Kate Lewins, Murdoch University School of Law*

*While ratification of the Athens Convention may present a useful codification of liability principles, its impact in practice is likely to be limited because of the comprehensive nature of the Australian Consumer Law.*

*- Carnival Australia*

However, whilst the cruise industry's preference is to remain business as usual, the legal sector firmly support Australia's accession to the Athens Convention to provide uniformity to the claims process, security of passenger protection, and to ensure consistency with existing maritime treaties to which Australia is a party.

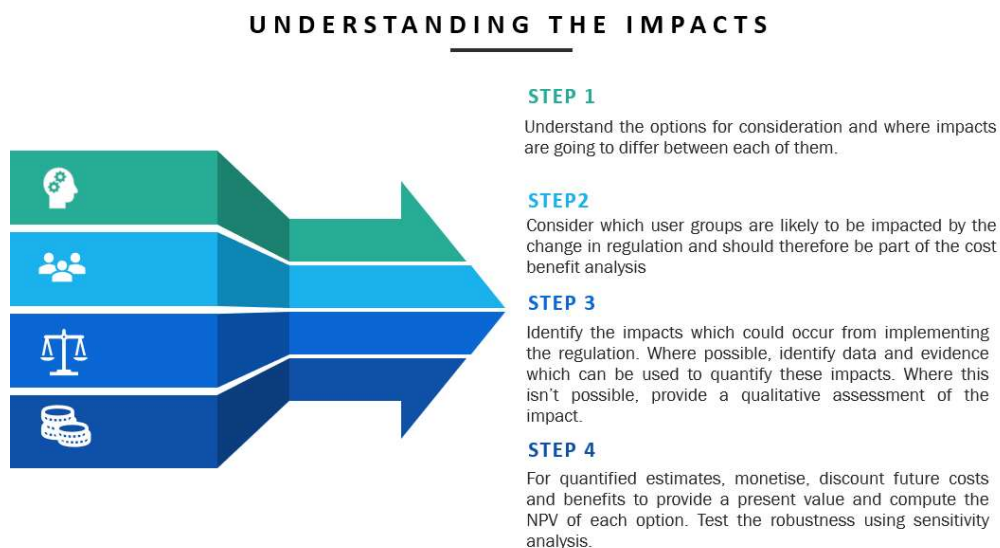
*Australia was a long-term participant in the negotiations at the IMO for 2002 Protocol to the original Athens Convention 1974. Along with the UK, Australia played a leading role in negotiating this instrument that was part of a suite of IMO conventions dealing with liability for marine incidents. Australia 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 Party.*

*- Professor Nick Gaskell, School of Law, University of Queensland*

## 10. Impact Analysis

Cost benefit analysis is “a method of evaluation that attempts to estimate and compare the total benefits and costs of a particular policy proposal”<sup>20</sup>. It is useful for informing decision makers of the potential impacts of each policy option and providing a way of comparing these impacts when they occur to different groups of people and across different time periods. The Government’s published cost benefit analysis guidelines also ensure that all policy proposals are evaluated using the same framework, providing consistency between decisions taken. Impacts are considered at the point in time when regulation has already been enacted and any necessary implementation costs have occurred. The cost of implementation is considered separately when deciding whether the benefits of end-state regulation would outweigh the cost of changes.

To understand the impacts of the options being considered the following steps were taken:



Other countries have conducted similar assessments of the impacts of acceding to the Athens Convention. In 2012, the UK Government conducted an Impact Assessment (IA) of extending the Athens Convention to cover voyages which start and end their journey in the UK<sup>21</sup>. Whilst under slightly different circumstances, this IA estimated a total Net Present Value (NPV) of £0.4m for the preferred option of applying the new regulations to passenger ships of EU Classes A and B only. This was based on quantifying the additional costs of certificates needed to prove compliance and the additional war and terrorism insurance that would be needed to ensure passengers were not worse off than the existing UK regulation. The benefits occurred due to these costs not occurring in the preferred option compared to the baseline, given that ships would need to be compliant with EU Regulation from a certain date. Other impacts were discussed but unable to be quantified due to a lack of evidence.

Following implementation, the UK Government also carried out a Post Implementation Review (PIR) in 2018<sup>22</sup>. The response to consultation was minimal and informal discussions confirmed that industry had not found the new regulations overly burdensome. The new regulation was not considered to be contentious when it was introduced and given that most UK ships were already obliged to comply with the Athens Convention, the changes to liability limits for those operating UK voyages were minimal. All inspected ships were found to have adequate insurance and the Maritime Coastguard Agency did not receive any feedback that obtaining

<sup>20</sup> <https://www.pmc.gov.au/sites/default/files/publications/006-Cost-benefit-analysis.pdf>

<sup>21</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/2725/annex-c-regulatory-ia.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/2725/annex-c-regulatory-ia.pdf)

<sup>22</sup> [http://www.legislation.gov.uk/uksi/2012/3152/pdfs/ukiod\\_20123152\\_en.pdf](http://www.legislation.gov.uk/uksi/2012/3152/pdfs/ukiod_20123152_en.pdf)

insurance had been arduous. No major incidents had occurred since the legislation was introduced, making it difficult to understand the full impact of the changes. The recommendation of the PIR was to continue with the current regulation that is applying Athens Convention to voyages within the UK on class A and B vessels.

## 10.1 Identification of whose costs and benefits counts

Changes in regulation relating to claims on cruise ships will impact on several user groups in different ways. A cost benefit analysis considers all of these user groups, with the final assessment based on a national impact.

For this analysis, the relevant user groups who will be significantly impacted by a change in the regulation have been identified as:

1. Cruise companies
2. Insurance companies
3. Passengers
4. Government

Each of these groups has been invited to provide input into the options assessment. This was done through various stages of stakeholder engagement as discussed earlier in this paper. Their input has been valuable to informing the impact analysis conducted.

The legal industry may also be impacted by changes to any legislation around passenger claims. Currently, lawyers support both passengers making claims and cruise companies who are on the receiving end of the lodged claims. For the cost benefit analysis, this group have not been separately considered. It is assumed that lawyers working on behalf of the passengers would continue to do so, but may incur some cost of training to understand the new legislation and potentially fewer hours of work per claim as there is expected to be less legal involvement needed in order to make a claim. If the legal support required to lodge a claim is reduced, the disbenefit to lawyers of less work would be offset by the benefit to passengers making a claim not needing to pay as much in legal fees. Lawyers working on behalf of cruise companies are assumed to be employed full-time by that company, and hence would be working on something else if not on passenger claims. There may be a change in the number of lawyers a cruise company requires, if the options lead to a significant change in the complexity or number of claims lodged.

Many of the impacts that a change in legislation would lead to have a net neutral impact on society. This is because the additional costs or benefits are simply transferred between user groups so a benefit to one group would impose a similar cost to another group. This means many of the impacts would not affect a calculated NPV.

The table below sets out the key costs and benefits identified for each user group. These are explained in more detail in the Impact Analysis (section 10.3) below.

*Table 4: Identified Costs and Benefits by User Group*

User group	Identified benefits	Neutral	Identified costs
<b>Cruise companies</b>	Number of passengers	Claim payments	Compulsory insurance Insurance limits Number of claims
<b>Insurance companies</b>	International consistency	Turnover	Passenger contact
<b>Passengers</b>	Effort of claiming Security	Amount able to claim	Fares
<b>Government</b>	International consistency	Conflicting interests	Cost of ongoing regulation

## 10.2 Outline of impacts and measurement indicators

The impacts of changing the current legislation to one of the proposed options are wide ranging and diverse in terms of the user group impacted, scale of the impact and likelihood that it occurs. This cost benefit analysis considers all potential impacts but is only able to quantify some of them. This is due to a lack of evidence to inform the baseline, a robust estimate of what would happen under each option and the uncertainty over how different user groups will react to changes.

Where possible, estimates have been calculated to provide some scale of the impacts. These are based on numerous assumptions and should be considered to be a high-level guide of what the impact could be. Analysis has been carried out for an individual case, or a specific scenario as explained in the discussion. It has not been possible, nor considered reliable, to scale these impacts to a national level or over time. This is due to a lack of evidence around how many cases currently arise, how many result in a successful payout, how much cruise companies currently pay in insurance, as well as other information about the current scenario. Instead, various scenarios have been provided for each situation to provide a broad view.

## 10.3 Impact Analysis

The following sections discuss the impacts on each of the user groups identified as potentially being affected by changes in the current legislation. Where there may be differences between the options, these are also discussed. Impacts that are possible to quantify or have supporting evidence are also included.

### 10.3.1 Cruise companies

**Compulsory insurance:** Under current regulation and following the LLMC Protocol, it is not compulsory for a cruise company to have insurance against passengers claiming for injury, illness or death. Without insurance, a cruise company would still be required to payout if a passenger lodges a claim for damages. Therefore, a cruise company will only take out insurance if they expect the cost of paying insurance to be lower than the cost of paying the passenger claims that are lodged against them based on their own risk assessment. The Athens Convention stipulates cruise companies must have insurance. Therefore, options 2, 3 and 4 would require cruise companies which don't currently hold insurance to obtain it. An estimated > 90%<sup>23</sup> of cruise companies already have insurance, so the impact is expected to be low as there would be no change to most cruise companies.

**Insurance limits:** Currently legislation allows cruise companies to choose whether to take out insurance or not and the limit to which they are insured. Under Athens Convention, cruise companies must be insured for a minimum of 250,000 SDR (equivalent to 524,052 AUD) x ship passenger capacity (see section 6). For cruise companies which do not currently have insurance up to that limit, this would incur additional operating costs. Similarly, the strict liability limit per passenger and potential to increase damages awarded through absolute liability may also increase the amount cruise companies pay for their insurance. The insurance limits required vary by option.

It is likely that the increased cost of insurance will ultimately be passed onto passengers on the cruises through higher fares, increased prices for services on board or a reduction in quality to reduce costs, such as fewer staff on the ship. One estimate suggests that insurance fees are approximately 3% of the operating costs and correspondingly 3% of the ticket price<sup>24</sup>. If the increase in insurance premium was passed onto passengers through higher fares, it is likely that this would be a small increase relative to the total fare and cost of the cruise. Therefore, most passengers would be able to absorb the extra fare and it would not affect their

---

<sup>23</sup> This assumes that all large cruise lines carry P&I insurance based on feedback obtained through consultation. We have allowed for a 10% margin to ensure a conservative assessment for the impacts assessment, however we are not aware of any cruise ship without relevant insurance.

<sup>24</sup> Response to survey carried out by NineSquared as part of stakeholder engagement.

decision to take the cruise. Alternatively, cruise companies may absorb the cost internally to maintain market competitiveness which would incur a greater cost to the cruise company initially.

Most large cruise ships are profit making with evidence suggesting the average profit margin is between 4 and 14%<sup>25</sup>. Royal Caribbean finance reports show an average of 15% profit over the past five years and Carnival has reported approximately 14% margin on its current performance<sup>26</sup>. Therefore, there may be some scope for cruise companies to absorb some of the higher cost of insurance and pass some of the cost onto consumers through higher fares.

**Amount paid in claims:** Current legislation places a limit in the total amount a ship can be expected to pay for one incident as 175,000 SDR x ship capacity. If only one person is affected by the incident, they are entitled to receive up to that full amount. However, as claims pass through Australian Consumer Law to decide the amount awarded, this limit has never been reached. Under Athens Convention, the strict liability limit is set per passenger at 250,000 SDR. If the loss exceeds the 250,000 SDR the liability limit can increase to 400,000 SDR unless the carrier can prove the incident occurred without the fault or neglect of the carrier. There is also an option for the upper limit of 400,000 SDR to be increased or removed by State Parties. Under some circumstances, this would reduce the maximum payout a cruise company can be expected to pay.

The table below shows some example scenarios and how much a cruise company would be required to pay in SDR under each. Under some instances, the maximum amount the cruise company could be required to pay is higher under Athens Convention compared to current LLMC regulations, whilst under others it is the reverse. The cruise company would benefit from reduced maximum payments in the incident when there is one serious injury or death, and the passenger affected is currently entitled to compensation equal to the ship's full liability. The cruise company would benefit from Athens limits if up to 350 passengers are involved in a Tier 1 incident or 219 in a Tier 2 incident, on a 500-passenger ship. If more casualties are involved, the cruise company would be better off with the lower limits currently in place under LLMC. Given that serious incidents involving multiple passengers are rare, it is likely that the cruise company would benefit from the per passenger limits set under Athens Convention. This is shown in Figure 7 which presents the maximum amount a cruise company could be expected to payout under different numbers of casualties.

There are currently no limits on the amount an individual passenger can receive as under LLMC, only the upper limit of the amount a cruise company can be expected to payout is fixed. Any limits would be determined by jurisdictional court determinations. Therefore, whilst differences in the maximum amount payable can be considered, it is difficult to assess the impact of acceding to the Athens Convention without knowing the amounts currently awarded.

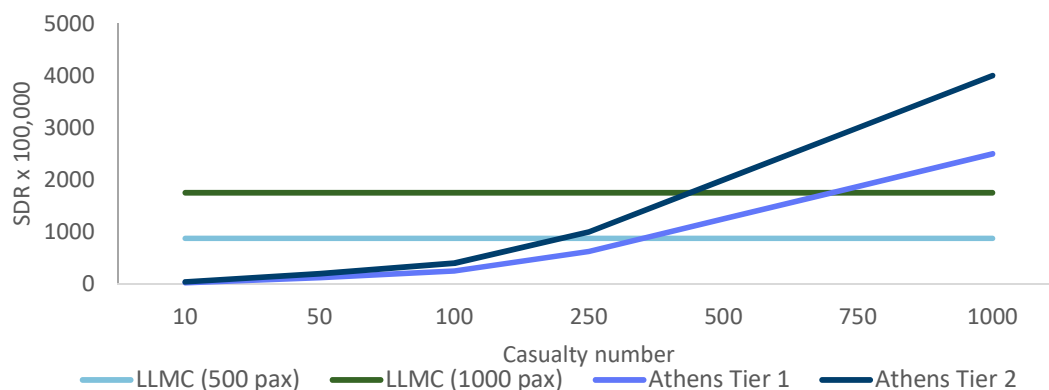


Figure 7: Maximum liability against a sliding scale of casualty numbers based on LLMC and Athens limits

<sup>25</sup> <https://www.jeremykisner.com/cruise-ship-industry/>

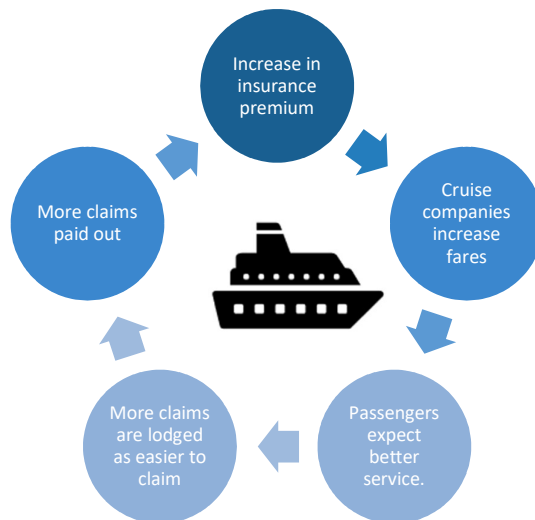
<sup>26</sup> <https://www.marketwatch.com/investing/stock/ccl/profile>

Table 5: Maximum amount paid by cruise ship under different scenarios (SDR values)

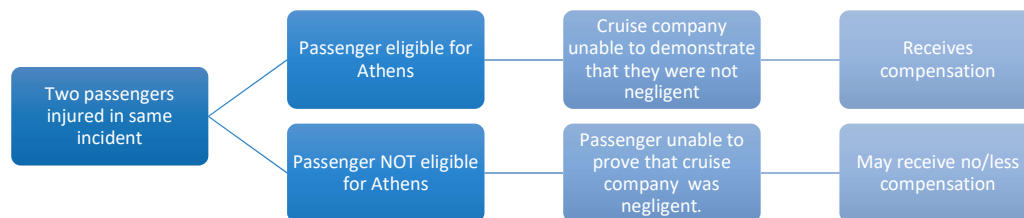
Scenario		LLMC	Athens		Difference	
Ship size	Number claimants	175,000 ship capacity x	250,000 Tier 1	400,000 Tier 2	Tier 1	Tier 2
500	1 injury	87,500,000	250,000	400,000	- 87,250,000	-87,100,000
500	500 injuries	87,500,000	125,000,000	200,000,000	37,500,000	112,500,000
500	1 death	87,500,000	250,000	400,000	- 87,250,000	- 87,100,000
500	5 deaths	87,500,000	1,250,000	2,000,000	- 86,250,000	- 85,500,000
1000	1 death	175,000,000	250,000	400,000	-174,750,000	-174,600,000

**Number of claims:** The current legislation requires passengers to demonstrate that a cruise company was negligent when making a claim. During stakeholder engagement, the cruise industry said relatively few claims are progressed through the full litigation process, as most claims (>90%) can be agreed between the cruise company and passengers. They suggested that it is often easier for the cruise company to pay compensation than go through a drawn-out legal proceeding. The NSW Fair Trading Commission received only 1 claim in the last five years relating to passenger injury. This supports the notion that there are relatively few claims which are currently brought against cruise companies pertaining to personal injury and/or unresolved through customer relations services internally.

Under Athens protocol the burden of proof is shifted so that when a claim is brought under Article 3 of the Athens Convention (i.e. resulting from a shipping incident), the cruise company must demonstrate that they were not negligent. This makes it easier for a passenger to lodge a claim and may increase the number of claims brought against the cruise industry resulting in higher legal costs to the cruise industry either through appointment of legal counsel or through internal legal teams. This could also result in more claims being paid out as the evidence needed to reject a claim is harder to gather. If a cruise company is required to pay out more passenger claims, their insurance premiums may increase. This could be passed onto passengers, pushing their fares up higher. Passengers may expect a higher quality service when they have paid a higher fare, and hence the number of claims may increase further. This process could become circular as insurance premiums increase to cover the additional claims being lodged or a determination of increased risk of additional claims may result in increased premiums. Some cruise companies may struggle to cover the higher insurance costs, pushing them out of the industry. Fewer companies in the industry could have a negative impact on the market as there are fewer options for passengers and fares could increase. However, other external factors such as competition and health of the insurance industry and claims per financial year across the P&I member group may also impact insurance premiums beyond claim frequency.



**Number of passengers:** Current legislation differs depending on where the cruise ship is registered, where the passenger purchased their ticket, where the passenger is a resident and where the cruise ship is located when an incident occurs. This means that the same incident may impact multiple passengers, but their rights to claim may be different depending on if they meet the eligibility criteria for the Athens Convention.



These two passengers could have the same injuries resulting from a shipping incident, on the same cruise ship but receive different compensation. Similarly, Australian states impose different maximum limits which can be claimed. Therefore, two passengers claiming in different Australian states may be entitled to different amounts. It may be difficult for a passenger to understand their rights when an incident occurs as they are not consistent across countries, as discussed in section 4.2.2 where lack of clarity exists around the coverage of passengers when injured outside of Australian waters and whether the CLA limitations apply. To some passengers, these effects may discourage them from taking part in a cruise. Therefore, acceding to the Athens Convention 2002 which is more widespread internationally could increase demand for cruises.

### 10.3.2 Insurance companies

**Money flow:** Insurance companies charge cruise companies based on the expected amount and value of claims they will have to pay out. This is estimated so that insurance companies cover their own costs and on average, the cost of any payouts made to cruise companies. Acceding to the Athens Convention 2002 may impact the way insurance companies assess a cruise company's risk i.e. shift in the burden of proof from the consumer to the cruise line; greater number of passengers that can access strict liability limits; and a change in the number and value of payouts made. Insurance companies will estimate the new amount that they will need to charge cruise companies to ensure their costs are still covered.

Stakeholder engagement suggested that insurance companies would proportionally pass on any changes in liability limits by a fixed amount per additional \$1m insured. This pass-on amount was expected to be between \$300 and \$500 per additional million. As a general example, this means that if a cruise ship is required to have insurance to cover liabilities up to \$2bn, assuming they are currently only insured up to \$200m, insurance

costs could increase between \$540,000 and \$900,000. Alternatively, the insurance company may charge a fixed proportion of the insurance increase. Given that the charges are passed onto cruise companies, each of options 2, 3 and 4 would have limited impact on the insurance company.

The following table shows the change in insurance premiums for a ship carrying 5000 passengers under each of the options. The insurance limits have been calculated based on the amount that the ship would be required to have in each option. It assumes ships currently have an insurance limit of \$200 million, based on stakeholder engagement and presents payment amounts for an additional charge of \$300 and \$500 per additional million liability cover. This impact is also relevant for cruise companies who would be required to pay the additional charge.

In this calculation we have estimated the additional cost that insurance companies would pass onto cruise companies to cover the increased liability limits as a result of changing regulations. However, we do not have a reliable estimate for how much cruise companies currently pay for their insurance. Therefore, these estimates are a guide and should not be interpreted as a percentage increase on what cruise companies currently pay.

(NB: calculations provided by Subject Matter Expert from Steadfast IRS and based on calculated max liabilities (SDR x passengers x \$ conversion rate))

Table 6: Change in liability limits and insurance costs (all values in AUD)

Option	Insurance limits	Change in liability	\$300 AUD	\$500 AUD
1	\$0.2bn	Base case for comparison		
2	\$1.83bn	\$1.63bn	\$490,255	\$817,091
3a – Tier 1	\$2.62bn	\$2.42bn	\$726,078	\$1,210,130
3a – Tier 2	\$4.19bn	\$3.99bn	\$1,197,725	\$1,996,208
3b – Tier 1	\$2.62bn	\$2.42bn	\$726,078	\$1,210,130
3b – Tier 2	No limit	Uncertain	Uncertain	Uncertain

**International consistency:** Insurance companies currently insure cruise companies across the globe which are each required to meet different criteria. There is an onus on insurance companies to understand multiple arrangements to help their clients be compliant. Thirty one countries are party to the Athens Convention already, and hence acceding to the Athens Convention 2002 would help reduce the complexity on insurance companies to understand the different requirements (on the presumption that the liability limits aligned with these countries and were not adjusted). Given that many countries are already following the Athens Convention, there is a wider evidence base for insurance companies to draw from. This means they are likely to be able to provide more accurate estimates of expected number of claims and the amount that will need to be paid out. This benefits both insurance companies and cruise companies as there is more information available to accurately assess the costs and reduce uncertainty.

**Passenger contact:** Currently, when a claim is submitted the cruise company liaises with the passenger. If needed, the cruise company will then claim money back from their insurance provider to cover the cost of the payout if the sum is greater than the deductible. Under the Athens Convention, the passenger is entitled to claim directly from the insurance provider if the cruise company is unable to pay the awarded damage or fails to comply with court directives (i.e. is insolvent or attempts to avoid payment). In these instances, the insurance company would need to be prepared and resourced to deal with the passenger involved.

### Insurance industry

Protection and Indemnity or better known as P & I Clubs are a compilation of non-profit making organizations controlled by ship-owners and operators who communally contribute to certain third-party liability risks related to their business especially their maritime businesses. Whether it is a container ship or a cruise ship, all ships require a high level of insurance cover to satisfy insurance requirements around the world. To provide this cover, the 13 P&I clubs around the world that comprise the International Group have established a claims sharing agreement, underpinned by the world re-insurance markets that allows for each club to provide high



levels of insurance cover for each individual ship for each individual incident that occurs. This arrangement comprises three building blocks of cover<sup>27</sup>.

The **first block** comprises cover by the P&I club that is insuring the ship where that club retains the first level of insurance on its own. For a claim for a single incident that exceeds the limit of the first block, the **second block** provides a cost sharing system where each other 13 clubs share claims arising from maritime accidents involving the insured ships. This is referred to as the pooling arrangement.

The **third block** that sits above block two extends the limit of insurance provided to ships by means of a collective purchase of high levels of reinsurance from the world's reinsurance markets. This cover brings together over 80 reinsurances from around the world and includes 20 of the top 25 reinsurers across the globe. This insurance is purchased annually by the International Group on behalf of the 13 clubs and their ship owner members. It is obtained on advantageous terms due in part to the large volume of ships and various types, corresponding distribution of risk and relative predictability of claims.

With the three building blocks combined, ships are provided with the highest level of insurance cover available to ship owners worldwide. This can only be achieved through the 13 clubs collectively insuring. The 2020/21 collective pool is 3.1 Billion USD (including the collective overspill).

### 10.3.3 Passengers

**Change in fares:** It is likely that any changes in insurance costs for a cruise company are ultimately passed onto passengers in the form of higher fares or other hidden charges, as discussed under the cruise company section 10.3.1. This assumes that passengers travelling on cruises are not price sensitive. Evidence from the US cruise industry found that 81% of cruise passengers earned over \$60,000 USD<sup>28</sup>, approximately the median income in the US, suggesting most cruise passengers earn more than average. Additionally, the percentage change in fares arising from increased insurance premium is likely to be low as a total share of the fare.

The table below shows estimated fare increases from the higher insurance liability cover required under each option. This assumes a cruise ship carries 5000 passengers on an 8-day cruise. Fare increases are shown if the cost is borne just by one passage, or a larger cruise company may be able to share costs across multiple trips. In this instance, estimates are for an 8-day cruise, carrying 5000 passengers which operates 75% of the time (34 times a year). The insurance values relate to the additional amount cruise companies would be required to pay, as discussed earlier in section 10.3.2.

(NB: calculations provided by Subject Matter Expert from Steadfast IRS and based on calculated max liabilities (SDR x passengers x \$ conversion rate))

Table 7: Change in fares for passengers

Option	Change in fare, one cruise		Change in fare, multiple cruises	
	\$300 insurance	\$500 insurance	\$300 insurance	\$500 insurance
<b>2</b>	\$ 98.05	\$ 163.42	\$ 2.87	\$ 4.78
<b>3a – Tier 1</b>	\$ 145.22	\$ 242.03	\$ 4.24	\$ 7.07
<b>3a – Tier 2</b>	\$ 239.54	\$ 399.24	\$ 7.00	\$ 11.67
<b>3b – Tier 1</b>	\$ 145.22	\$ 242.03	\$ 4.24	\$ 7.07
<b>3b – Tier 2</b>	Uncertain	Uncertain	Uncertain	Uncertain

<sup>27</sup> International Group for P&I insurance. <https://www.igpandi.org/reinsurance>

<sup>28</sup> <https://cruisemarketwatch.com/market/>

Table 8: % Change in fares for passengers\*

Option	% Change in fare, one cruise		% Change in fare, multiple cruises	
	\$300 insurance	\$500 insurance	\$300 insurance	\$500 insurance
<b>2</b>	9%	14.5%	0.5%	0.5%
<b>3a – Tier 1</b>	13%	21.5%	0.5%	0.5%
<b>3a – Tier 2</b>	21.5%	35.5%	0.5%	1%
<b>3b – Tier 1</b>	13%	21.5%	0.5%	0.5%
<b>3b – Tier 2</b>	Uncertain	Uncertain	Uncertain	Uncertain

\*Values shown are rounded to the nearest 0.5%

The average fare for an 8-day cruise is \$1,120<sup>29</sup>. The increases shown above range from 9% to 36% of the total fare when the cost is paid by only one cruise, or 0.26% to 1.04% when shared between multiple cruises. The more voyages a ship does per year, the more the cost will be able to be shared between passengers, placing a lower impact on the fare increase. It is unlikely that a cruise ship will only do one trip per year so we would expect the costs to be closer to the multiple trips option than the one cruise only option. Whilst this is a disbenefit to passengers, it is relatively small in comparison to the total cost of their cruise.

In the event that a passenger has an incident and needs to lodge a claim, there are several differences between the current regulation and the options presented where Australia would accede to Athens. These affect the effort and ability to make a claim, the potential payout a claimant would receive and the likelihood that compensation is paid.

**Effort of claiming:** One of the main differences between current legislation and the Athens Convention is where the burden of proof falls. Under the current LLMC Protocol, the passenger making a claim must prove that the cruise company where the incident occurred was at fault and/or negligent. In contrast, under the Athens Convention 2002 the burden of proof falls to the cruise company to demonstrate that they were not negligent. This means that the effort required by a passenger to submit a claim would be lower.

One scenario is to assume that it would take approximately 5 days of effort from an individual to submit a claim under the current set-up. This includes time to gather evidence, meet with lawyers, prepare any paperwork and potentially attend court hearings. Assuming average weekly earnings of \$1,659<sup>30</sup>, this is approximately the cost to the individual in lost earnings just to place the claim. Under the Athens Convention, the effort required from an individual to place a claim may be lower (for shipping incidents) as the burden of proof lies with the cruise company. The passenger can also place their claim directly with the insurance company if the company is unable to produce payment for damages. As an estimate, this could reduce the cost of making a claim to 2 days effort, or \$664 in lost earnings, therefore giving a \$995 benefit to the passenger per claim made.

Table 9: Example Lost Earnings in Submitting a Claim

	Lost workdays	Lost earnings
<b>LLMC</b>	5	\$ 1,659
<b>Athens</b>	2	\$ 664

Under Athens, passengers have longer to bring a claim to court compared to the current legislation, which differs by cruise company but is typically only one year. This allows more time for the passenger to see the

<sup>29</sup> <https://www.escape.com.au/experiences/cruises/how-much-does-cruising-cost-a-guide-for-every-cruise-budget/news-story/c6911bc1724e8384cd1fac5b581c831e>

<sup>30</sup> November 2019 ABS release,  
<https://www.abs.gov.au/ausstats/abs@.nsf/lookup/6302.0Media%20Release0Nov%202019>

effects of the incident and may mean a claim which previously would have been out of the timeframe, is now able to be brought to court. Some injuries may also develop over time, so a longer time period would allow them to also be lodged as a claim. This would benefit some passengers who previously were unable to make a claim due to missing the deadline to lodge it.

Another change in the effort required for a passenger to submit a claim is where they are able to lodge that claim. Currently, complexities lie in where a passenger can bring a claim depending on the contract of passage. Under the Athens Convention 2002, the passenger can choose from certain defined options as to where to lodge their claim, but the court chosen must be in a State Party to the Athens Convention 2002<sup>31</sup>. For Australian citizens, this would provide the option of lodging a claim in their home country and home state where they are likely to be more familiar with the legal system, language and general ways of conducting business. In stressful circumstances, such as having to claim for an injury suffered / sustained on holiday, this could bring significant benefit to passengers. Consultation with the legal industry suggested some claims brought to them are difficult to progress as they require engaging with countries who may operate under different regulations and hence leave the passenger relatively unprotected.

**Amount of successful claim:** Under the different options presented, there are different maximum limits for how much a passenger can claim. Currently, compensation claims are also assessed in line with Australian Consumer Law. Therefore, it is unlikely that claims are awarded the full maximum amount. Acceding to Athens would not affect the use of Australian Consumer Law in deciding compensation amounts, unless it was separately decided that this would be beneficial, ensuring compliance with article 7.

Table 10: Upper Limit of Claims

	Option 1 (status quo)	Option 2	Option 3	Option 4
Maximum claim	175,000 SDR x ship capacity (split between claimants)	175,000 SDR x ship capacity (split between claimants)	250,000 SDR per passenger <i>or</i> 400,000 SDR per passenger (negligence)	Same as option 2 or option 3
Difference to status quo	N/A	Same limits apply	75,000 SDR per passenger <sup>32</sup> <i>or</i> Potentially negative	Dependent on option chosen

The current LLMC limits are set at 175,000 SDR x ship capacity and an individual can access the full ship liability in serious incidents. If there is only one claimant, this could allow the individual to access up to 175,000 SDR multiplied by the ship's capacity. However, if there are multiple claims on the same ship, this limit is shared among the claimants. One benefit to passengers of acceding to the Athens Convention would be to remove the link between their compensation claim maximum limit and the number of people affected by the incident. This would allow claims to be assessed on how much damage the incident has caused the individual, and not rely on how many other people have also been affected in awarding the payout.

The table below shows the maximum payout which could be awarded in different circumstances. It shows that the passenger would benefit from a higher payout under Athens Convention in incidents when there is a non-serious injury or there are numerous passengers claiming. However, when the incident is more serious or causes death, Athens does not permit an individual access to the full ship's liability and therefore as a maximum limit, the passenger would be worse off under Athens compared to currently. This difference is smaller when more people are affected as the Athens limit is per person and not reliant on the number of other people impacted.

<sup>31</sup> Article 17, 1(c) "the Court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State"

<sup>32</sup> This difference would occur if all passengers were impacted and received an equal share of the cruise ship's maximum liability under LLMC.

Table 11: Maximum amount awarded to individual passenger under different scenarios (SDR values)

Scenario		LLMC	Athens		Difference	
Ship size	Number claimants	175,000 x ship capacity (serious)	250,000 Tier 1	400,000 Tier 2	Tier 1	Tier 2
500	1 injury	87,500,000	250,000	400,000	- 87,250,000	-87,100,000
500	500 injuries	175,000	250,000	400,000	75,000	225,000
500	1 death	87,500,000	250,000	400,000	- 87,250,000	-87,100,000
500	5 deaths	17,500,000	250,000	400,000	- 17,250,000	-17,100,000
1000	1 death	175,000,000	250,000	400,000	-174,750,000	-174,600,000

**Security:** There are small benefits to passengers from knowing that there is standard regulation across numerous countries. This may be a particular benefit to passengers who are travelling on an international cruise ship or have purchased their ticket abroad. Some passengers may also derive benefit from an equality perspective, knowing passengers covered by the Athens Convention will be treated the same in the case of an incident, compared to current legislation which could allow for differences between passengers

### 10.3.4 Government

**Cost of ongoing regulation:** The Government will be impacted by any changes in the cost of ongoing enforcement and subsequent maintenance of regulation. Currently, regulations are enforced on a risk assessment basis as it is believed that most cruise ships follow regulations as it is in their commercial interests to do so. Some of the requirements of the Athens Convention, such as stated insurance limits, may not align with the commercial interests of the cruise company and will therefore need some enforcement from the Government or another public body. This could place an ongoing cost which is not currently required. Consultation with the Australian Maritime Safety Authority (section 8) indicated however, that due to existing compliance regimes that the ratification of the Athens Convention would impose little additional regulatory cost on its operations.

The UK Government requires ships to obtain a certificate from the Secretary of State which shows their compliance. This costs £31 for the shipping companies to obtain. The Australian Government could consider a similar approach to cover the costs of regulation.

**Conflicting interests:** The Government should consider the net impact on society. Many of the impacts discussed in this assessment have been benefits to one user group but impose a similar cost on another group. Therefore, the overall impact is likely to be small. However, when deciding on an option the Government may wish to protect the interest of one group over another. This could be for many reasons, for example protecting passenger's rights by ensuring they are well protected in the event of a claim; or supporting cruise companies to help maintain jobs in the industry during a difficult time. Some of the interests may not align, and hence the Government should weigh up the overall impact. They may also wish to consider disadvantaged groups, such as how low-income households may be affected or smaller cruise companies.

**International Consistency:** The Government may derive some benefit from their regulations being in line with other countries. This could make discussion over cases occurring internationally easier, as well as being able to draw on previous experiences to implement regulation.

## 10.4 Luggage Compensation

The current regulations under the LLMC do not provide any cover for damage or loss of luggage. Stakeholder engagement confirmed that most passengers would take out private travel insurance or be covered under the contract signed with the individual cruise company before participating in their cruise. Under the Athens Convention, passengers are entitled to claim up to a certain limit for loss or damage to their cabin luggage or vehicles whilst on the cruise. Acceding to Athens would provide the option to passengers of whether they wish to claim directly through the cruise company using the Athens Convention limits, or if they prefer to claim through their travel insurance provider. It is likely that the travel insurance provider would either direct the claimant to the cruise company or their insurer in the first instance or claim the cost back from the cruise company directly, and therefore ultimately it is the cruise company which pays out. The impacts of this change are expected to be minimal for two reasons. Firstly, as set out above, the cruise company will ultimately pay for any loss or damages, and hence there is limited change to them if the passenger claims through the travel insurance provider or through the Athens Convention. Secondly, in most cases the amount a passenger could claim through their travel insurance would be similar to the limits set under Athens. Given the option, passengers would likely continue to claim under their travel insurance as it is a more familiar and quicker process. Some passengers may decide travel insurance is no longer worthwhile. However, this is likely to be a small number of passengers as travel insurance covers risks much broader than luggage and is often mandated by cruise companies.

## 10.5 Cost of Implementation

The impacts have been considered in this cost benefit analysis assuming that any change in regulation has already occurred, the industry has had time to adapt and the new regulation is well embedded. This is to ensure that impacts are considered in their end state and the effort involved to make any changes does not influence the assessment of whether the policy change is a good idea or not.

However, when making a recommendation it is also important to consider what would be required to implement any changes. Any changes to legislation should be outweighed by the anticipated benefits. Otherwise, the cost of changing legislation would place an unnecessary burden on industry.

Impacts to consider include:

- Cost to the government of agreeing new legislation, updating regulation and ensuring initial compliance
- Cost to legal industry, cruise companies and insurance providers of understanding changes, training staff and where necessary writing new contracts
- Cost to passengers, both financial and on well-being, of any changes in their rights
- Uncertainty during any changeover period and potential costs which could arise as a result

Stakeholder engagement suggested that the cost for cruise companies of implementation could be significant. They highlighted that there would be a need for legal involvement to re-write existing contract templates, as well as time and cost associated with training their in-house legal teams in the new regulations. Other staff may also need to be retrained so that they can correctly inform passengers of their rights in the case that an incident occurs during a cruise. Whilst unable to provide an estimate within the timeframes, these costs are estimated to be high.

## 10.6 Summary of Impacts Identified

The impacts on the following page have been assessed using a seven-point scale from large beneficial to large adverse. When assessing the scale of an impact, the issues discussed above have been considered and a judgement made based on the size of the impact, the likelihood it occurs and any other factors which may be relevant. The table presents the scale for a comparison of acceding to the Athens Convention compared to the current baseline of LLMC protocol. Differences between the identified options are discussed afterwards.

Table 12: Assessment of the Impacts identified:

User group	Impact	Scale	Explanation
<b>Cruise companies</b>	Insurance – compulsory and change in limits	Slight adverse	>90% companies already have insurance. Small cost on those that don't, likely to be passed onto consumers.
	Amount paid in claims	Slight adverse	Australian Consumer Law will continue to set limits for payment amounts. Unlikely that limits will be reached in most cases. Payouts could increase in some instances.
	Number of claims	Moderate adverse	Likely increase in claims from passengers could reduce ability to settle out of court. Balanced by increases in insurance premiums passed back to consumers.
	Number of passengers	Slight beneficial	Reduced uncertainty of claims, equity between passengers and perceived improvement in safety could increase demand for cruises.
<b>Insurance companies</b>	Money flow	Neutral	Likely to receive higher payments from cruise companies but also have to payout more claims.
	International consistency	Slight beneficial	More experiences to draw from make it easier to estimate insurance premiums. More consistency reduces costs of specific training.
	Passenger contact	Slight adverse	Insurance company may be required to liaise with passenger in incidents where cruise company cannot pay.
<b>Passengers</b>	Change in fares	Moderate adverse	Higher insurance costs and premiums may be passed on through higher fares.
	Effort of claiming	Large beneficial	Burden of proof shifts to cruise company, longer timeframe to lodge claim and more consistent framework internationally reduces effort required by passengers to make a claim.
	Amount available for claim	Slight beneficial	Australian Consumer Law will continue to set limits for payment amounts. Unlikely that limits will be reached. In some cases, payouts may increase.
	Security	Moderate beneficial	Equal treatment between passengers and more certainty over rights internationally may increase feeling of security for passengers.
<b>Government</b>	Cost of ongoing regulation	Slight adverse	Increased cost of ensuring cruise companies are compliant with regulation.
	Conflicting interests	Neutral	Choice over how to support different user groups.
	International consistency	Slight beneficial	Industry support for international consistency.

Large Adverse
Neutral
Large Beneficial

## 10.7 Options discussion

For most of the impacts discussed, the main differences occur between the current status quo (Option 1) and the options which involve acceding to Athens (Options 2, 3a, 3b and potentially Option 4). The table below shows for which options the impacts are applicable and a brief explanation.

Table 13: Discussion of differences between options

User group	Impact	Option			Discussion
		2	3	4	
Cruise companies	Insurance compulsory	Y	Y	Y	All options would mandate insurance
	Change in limits	N	Y	?	Option 2 retains current limits, other options change.
	Amount paid in claims	N	Y	?	Related to change in limits
	Number of claims	Y	Y	Y	Change in burden of proof under all options.
	Number of passengers	Y	Y	Y	Potentially some impact on demand for all options.
Insurance companies	Money flow	N	Y	?	Related to change in limits
	International consistency	?	Y	?	Some consistency from acceding to Athens, but different limits in Option 2.
	Passenger contact	Y	Y	Y	All options acceding to Athens could change contact with passengers.
Passengers	Change in fares	N	Y	?	Related to change in limits
	Effort of claiming	Y	Y	Y	Acceding to Athens would change effort required by passengers to make a claim.
	Ability to claim in Australia	Y	Y	Y	Acceding to Athens would ensure court cases could be heard in Australia.
	Amount available for claim	N	Y	?	Related to limits as defined by each option.
	Security	Y	Y	Y	All options would benefit passengers feeling of security.
Government	Cost of ongoing regulation	Y	Y	Y	Would require checking compliance with mandatory insurance.
	Conflicting interests	Y	Y	Y	All options would require considering the interest of each user group.

In general, the impacts are related to whether the liability limits change or not, and the difference in how a claim is lodged. Some impacts are therefore not relevant to Option 2 as the limits stay the same as the status quo and acceding to Athens only changes how a claim is lodged and mandates insurance cover.

Option 3 also has two variations, one where there is no maximum upper limit in the case that damages are extremely high. This would affect the scale of the impact, but not change the impacts which are relevant. Given that Australian Consumer Law is used to determine how much compensation is awarded, the limits are rarely reached. There is unlikely to be significant difference between the variations of Option 3.

Option 4 considers extending the range of cover to also include voyages to nowhere, using either Option 2 or 3. As such, the impacts of this option depend on whether Option 2 or Option 3 is selected for implementation.

The scale of impacts could be larger, given that more vessels would be impacted. However, stakeholder engagement suggests that most cruise companies operating voyages to nowhere also operate internationally. Therefore, the vessel would already be required to be covered under international protocols.



## 11. Key findings and recommendation

### 11.1 Key findings

#### ***Existing protection***

Evidence suggests that there is extensive protection of consumer/passenger rights in Australia already. Where the Australian Consumer Law (ACL) applies, carriers are bound by a statutory guarantee to exercise due care and skill in the carriage of their passengers. Under the same law, carriers are also obliged to ensure that services should be reasonably expected to achieve the result made known to the consumer, and the services must be reasonably fit for purpose.

Statistics relating to the number of consumer complaints received in NSW relating to cruise voyages demonstrate an overall steady decrease over the last five years and a high proportion of 'hotel' type claims as opposed to injury or luggage claims. Whilst these statistics do not include claims resolved directly with the carrier, or those settled through litigation, they indicate the low frequency of unresolved injury claims over a five-year period. Engagement with the cruise industry further supported the adequacy of and compliance with the existing framework under the ACL and management of most claims through internal complaint management and resolution processes.

Whilst under the existing framework, there is no compulsory requirement for passenger and luggage liability insurance, all cruise industry stakeholders engaged held insurance and conveyed the unlikelihood that any commercial passenger carrying vessels operating in Australia were not insured due to the value of the assets attached to the business.

#### ***Jurisdictional inconsistencies***

There is some inconsistency in recourses available to passengers depending in what state / territory the consumer lives or where the claim must be brought (which may be stipulated in the contract of carriage). The different State / Territory Civil Liability Acts seek to minimise the quantum of claims awarded if a defendant is found liable. In most States, plaintiff's damages are subject to a threshold and a cap for financial and non-financial losses. There is significant variability between the states which can make it challenging for passengers to understand the likely success of a claim in even the most straight forward of passenger liability claims. This can often lead to 'forum shopping' (if a venue is not pre-determined in the contract) and added complexity for both the passenger and the Carrier.

Lack of clarity exists around the coverage of passengers when injured outside of Australian waters and whether the CLA limitations apply. Some CLAs are silent as to extraterritorial application, the intent to apply state CLA beyond the state and the interaction of 'recreational activities' under the ACL.

The aim of the Athens Convention is to provide clarity and uniformity to the claims process by allocating the burden of proof to the carrier, stipulating strict liability limits to ensure coverage and ensuring all passengers have access to the same avenues of recourse. However, to ensure complete uniformity is afforded to all passengers, legislation enacting the Athens Convention would need to be explicit as to how damages would be awarded under the regime (i.e. through one CLA, all CLAs, ACCC).

Furthermore, Australia's accession to the Athens Convention may benefit Australian courts in applying judgements due to their ability to draw on the experiences and judgements of overseas jurisdictions that are considered under the auspices of the Athens Convention.

#### ***Catastrophic event recourse***

Under the existing framework, there is some potential inconsistency in treatment of some Australian passengers in a narrow range of circumstances (particularly rare catastrophic events) compared to passengers from nations which are Party to the Athens 2002 Protocol. For example, an EU or UK resident who entered into a contract of carriage in their home State (and therefore protected by the Athens Convention under Article 2(1)(b)), travelling on a cruise ship departing from an Australian port may be afforded greater protection and potential compensation in the case of loss, injury or death than an Australian resident in a

neighbouring cabin on the same cruise. Whilst this is important for fairness and equity, it is also of importance during catastrophic incidents where a high number of passengers are affected and liability limits may differ between passengers.

#### ***Alignment with the aviation industry***

Under the existing framework, the rights of cruise passengers appear inconsistent with the rights of aviation passengers under the Montreal Convention (1999) for air carrier liability. Accession to the Athens Convention 2002 could contribute to consistency of international agreements and promote international conformity, like the Montreal Convention. Simply put, an Australian traveling internationally by air or sea, where captured by the Athens Convention, could be assured a uniform process and coverage to a similar value for personal injury, regardless of their mode of travel.

#### ***Overall impact assessment***

The Impact Assessment indicates that overall, Australia's accession to the Athens Convention (either option 2 or 3) presents moderate passenger benefits, a minor disadvantage to the cruise industry and a neutral impact to the insurance industry and Australian Government.

## **11.2 Recommendation**

Whilst there are benefits to passengers if Australia were to accede to the Athens Convention 2002, there is no strong or urgent case for government action. The moderate benefits likely to passengers could be outweighed by the regulatory burden imposed on the cruise industry in addition to the requirement to review the application of the ACL and STCLAs when drafting enacting legislation to ensure uniformity is achieved.

These conclusions were reached based on analysis of data and stakeholder consultations undertaken up to February 2020, before the impacts of the COVID-19 pandemic were felt. It is clear that cruise companies, and the cruise industry itself, will be significantly affected by the COVID-19 crisis. The implications for financial security, safety compliance, insurance and passenger willingness to travel are still to become clear, and the effects of any additional regulation may be felt more heavily by the industry.

During the finalisation of this RIS, it is clear that there is some significant legal action underway regarding the liability of cruise ships. Three cases have the potential to shed light on the ease by which a complainant can take a case against a cruise ship company, and the results of these complaints. The first is a case considered by the High Court of Australia regarding compensation for disappointment in a cruise. The second is a class action being prepared against Royal Caribbean regarding the multiple fatalities during an excursion on White Island. The third is a class action being prepared against Carnival Australia regarding the operation of the Ruby Princess and its relationship to COVID-19 infections.

Given the changing circumstances, the current legal action, and the lack of an urgent case for action, it is recommended that the government consider deferring action until the implications are clearer.

The recommendation is therefore Option 1, to remain with the status quo.

For any future reconsideration of acceding to the Athens Convention, the preferred options would be ranked Option 3b, Option 3a and Option 2. In addition, the application of Option 4, to include 'voyages to nowhere' and smaller domestic operators should be seriously considered as part of all the ranked options. This ranking reflects the potential benefits and coverage for claimants whilst remaining acceptable to industry. It would be advisable that the costings undertaken for this statement be reassessed as part of any future reconsideration.

## 12. Implementation and Evaluation Considerations

### 12.1 Australian Law (ACL/CLA interactions)

In the context of any potential implementation of the Athens Convention by Australia, the interaction with both the ACL and the CLAs must be carefully thought through so as not to add an extra layer of complexity to such claims. The aim should be to substitute clarity and uniformity for the layers of complexity and uncertainty that are hallmarks of the current position. Legal academics have suggested that Australia would be best served by one uniform system of jurisdiction, liability and quantum for passenger personal injuries and death claims<sup>33</sup>, and that there should be no more than one limitation regime operational at any one time. The Athens Convention would provide that regime; however, it leaves the assessment of damages to the court in a particular jurisdiction to determine. The legal sector has argued that any enacting legislation would need to be explicit about whether personal injury damages awarded under any Athens regime will be assessed at common law; or according to CLA, or according to the CCA.

Further, it is important to note that if Australia were to accede to the Athens Convention 2002 and capped damages under the Athens regime itself, other quantum limits should not be applied i.e. to prevent claims being subject to various caps under different legislative instruments such as the LLMC 1989 (the carriers general right to limitation).

### 12.2 International Conventions

The external affairs power in the Australian Constitution allows the Commonwealth Government to make laws which implement a treaty or international instrument. For example, the *Racial Discrimination Act 1975* implements in Australia the United Nations Convention on the Elimination of all forms of Racial Discrimination, and applies these laws uniformly across Australia, overriding state and territory legislation to the extent of any inconsistency.

Accession to the Athens Convention would likely require the Australian Government to implement new domestic laws to meet Australia's obligations. The intention is to provide consistency in the civil liability regimes, at least as they apply to shipping incidents covered by the Athens Convention. However, it is doubtful that accession to the Convention would provide additional power to the Commonwealth beyond its constitutional power to regulate commerce, which is already the basis of the Australian Consumer Law. The differing state and territory Civil Liability Acts continue despite there arguably being power to bring them into conformity if desired.

### 12.3 Evaluation

Having identified that neither the benefits nor disbenefits of accession to the treaty are significant, it is difficult to provide clear KPIs for easy evaluation of government action. The circumstances where benefits to passengers are clearest are in the event of a catastrophe with major loss of life, which thankfully is a very rare occurrence. Normal KPIs of cruise industry financial status, such as change in prices and the number of claims are all affected by more factors than accession to this Convention.

As with the post-impact evaluation review conducted by the United Kingdom, a qualitative survey of cruise companies and passenger representatives several years after any accession may be the best evaluation

---

<sup>33</sup> Lewins, K. (2018) Cruise Ship Passengers and Australian Law: Known Problems and Some New Answers. *Australian & New Zealand Maritime Law Journal*, 32 (2). pp. 1-16.

approach. In the event of non-accession, it may be that the case for accession might be reviewed in several years' time, to look at changed industry circumstances and perspectives.

## 13. Appendix A: List of Stakeholders contacted

### **Government**

Australian Maritime Safety Authority  
Australian Competition and Consumer Commission  
Department of the Treasury  
Department of Home Affairs  
Department of Health  
NSW Fair Trading  
Destination NSW  
Ports Australia  
Queensland Department of Innovation, Tourism  
Industry Development and the Commonwealth  
Games  
Queensland Tourism Industry Council  
South Australian Tourism Commission  
Australian Chamber of Commerce and Industry  
Department of Prime Minister and Cabinet  
The Office of Best Practice Regulation  
Department of Foreign Affairs and Trade  
Attorney-General's Department

### **Consumer groups**

Advance Cairns  
Australia Pacific Touring (APT)  
Tourism Northern Territory  
Tourism Tasmania  
Tourism Top End  
Tourism Western Australia  
Visit Victoria  
Destination NSW  
Choice  
Tourism & Transport Forum

### **Insurance Industry**

Steadfast Pty Ltd.  
International Group of P&I Clubs  
Navigators

### **Cruising and maritime Industry**

Australian Cruise Association  
Carnival Australia  
Cruise Lines International Association Australasia  
Crystal Cruises  
Norwegian Cruise Line  
Ponant Yacht Cruises and Expeditions  
Royal Caribbean Cruise Lines  
Seabourn Cruises  
Silversea Cruises  
Viking Cruises  
Coral Expeditions  
Kimberly Expeditions  
Kimberly Quest  
North Star Cruises Australia  
Australian Peak Shippers Association  
Maritime Industry Australia Ltd  
Shipping Australia  
Superyacht Australia

### **Legal sector**

Australian Maritime and Transport Arbitration  
Commission  
Somerville legal  
Stacks Goud Kamp  
Murdoch University  
The Maritime Law Association of Australia and New  
Zealand  
The University of Queensland  
Australian Lawyers Association

## 14. Appendix B: Stakeholder representatives engaged

### **Government**

The Department of Prime Minister and Cabinet  
The Office of Best Practice Regulation  
The Attorney-General's Department  
Department of Foreign Affairs and Trade  
Department of the Treasury  
Department of Home Affairs  
Department of Health  
Australian Maritime Safety Authority  
Australian Competition and Consumer Commission  
NSW Fair Trading

### **Cruise and Maritime Industry**

Marine Industry Australia (MIAL)  
Carnival Cruise Line  
Royal Caribbean International  
CLIA – Cruise Lines International Association Australasia  
Superyacht Australia  
Anonymous cruise company

### **Consumer Groups**

Tourism and Transport Forum Australia  
Destination NSW

### **Legal Sector**

The Maritime Law Association of Australia and New Zealand  
Professor Kate Lewins - Murdoch University  
Professor Nick Gaskell – University of Queensland  
Stacks GoudKamp Personal Injury Lawyers

### **Insurance**

Steadfast Pty Ltd.  
International Group for P&I

## 15. Appendix C: Athens Convention State Parties

### ATHENS CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA

1974

PROTOCOL 1976

PROTOCOL 1990

PROTOCOL 2002

(as at November 2019)

	COUNTRY	PAL 1974		PAL PROT 1976		PAL PROT 1990 (Not in force)	PAL PROT 2002	
1	Republic of Albania	Denounced		Denounced		Denounced	Y	1
2	Argentine Republic	Y	1	Y	1			
3	Commonwealth of the Bahamas	Y	2	Y	2			
4	Barbados	Y	3	Y	3			
5	Kingdom of Belgium	Denounced		Denounced			Y	2
6	Belize	Denounced					Y	3
7	Republic of Bulgaria						Y	4
8	People's Republic of China	Y <sup>34</sup>	4	Y <sup>35</sup>	4			
9	Congo	Y	5					
10	Republic of Croatia	Denounced		Denounced		Denounced	Y	5
11	Kingdom of Denmark						Y	6
12	Commonwealth of Dominica	Y	6	Y	5			
13	Arab Republic of Egypt	Y	7			Y		
14	Republic of Finland						Y	7
15	French Republic						Y	8
16	Republic of Equatorial Guinea	Y	8					

<sup>34</sup> Extended to Hong Kong and to Macao

<sup>35</sup> Extended to Hong Kong and to Macao

17	Republic of Estonia	Y	9	Y	6			
18	Georgia	Denounced		Denounced			Y	9
19	Hellenic Republic	Denounced		Denounced			Y	10
20	Co-operative Republic of Guyana	Y	10					
21	Ireland	Denounced		Denounced			Y	11
22	Hashemite Kingdom of Jordan	Y	11					
23	Republic of Latvia	Denounced		Denounced			Y	12
24	Republic of Liberia	Y	12	Y	7			
25	State of Libya	Y	13	Y	8			
26	Republic of Lithuania						Y	13
27	Grand Duchy of Luxembourg	Y	14	Y	9	Y		
28	Republic of Madagascar						Y	14
29	Republic of Malawi	Y	15					
30	Republic of Malta						Y	15
31	Republic of the Marshall Islands	Denounced		Denounced			Y	16
32	Montenegro						Y	17
33	Kingdom of the Netherlands						Y	18
34	Federal Republic of Nigeria	Y	16					
35	Kingdom of Norway						Y	19
36	Republic of Palau						Y	20
37	Republic of Panama						Y	21
38	Republic of Poland	Y	17	Y	10			
39	Portuguese Republic						Y	22
40	Romania						Y	23
41	Russian Federation	Denounced		Denounced			Y	24
42	Saint Kitts and Nevis	Y <sup>36</sup>	18				Denounced	
43	Kingdom of Saudi Arabia	Y	19	Y	11			
44	Republic of Serbia	Denounced					Y	25
45	Slovak Republic						Y	26

<sup>36</sup> It is unclear as to the status of Saint Kitts and Nevis in relation to the 1974 Athens Convention



46	Republic of Slovenia						Y	27
47	Kingdom of Spain	Denounced		Denounced		Denounced	Y	28
48	Kingdom of Sweden						Y	29
49	Swiss Confederation	Y	20	Y	12			
50	Syrian Arab Republic						Y	30
51	Kingdom of Tonga	Y	21	Y	13	Y		
52	Ukraine	Y	22	Y	14			
53	United Kingdom of Great Britain and Northern Ireland	Denounced <sup>37</sup>		Denounced <sup>38</sup>			Y <sup>39</sup>	31
54	Republic of Vanuatu	Y	23	Y	15			
55	Republic of Yemen	Y	24	Y	16			
	<b>TOTAL</b>		<b>24</b>		<b>16</b>			<b>31</b>

---

<sup>37</sup> Extended to Bermuda, Virgin Islands, Cayman Islands, Falk Islands, Gibraltar (denounced), Isle of Man, Jersey, Montserrat, Pitcairn, & St Helena

<sup>38</sup> Extended to Bermuda, Virgin Islands, Cayman Islands, Falk Islands, Gibraltar (denounced), Isle of Man, Jersey, Montserrat, Pitcairn, & St Helena

<sup>39</sup> Extended to Gibraltar

## 16. Appendix D: Options Analysis for Consultation