

Australian Consumer Law Review

Response to Issues Paper and Submission May 2016

AIRLINE CUSTOMER ADVOCATE

1. EXECUTIVE SUMMARY

One of the stated aims of the national consumer policy framework is to improve consumer wellbeing through consumer empowerment and protection.¹

Although the Australian Consumer Law (ACL) provides a broad regime for prohibiting unfair commercial practices, this submission will consider whether airline passengers currently have adequate protections under the ACL when disputes arise with the airlines they contract with because there is a change in the flight time resulting from a delay, cancellation or overbooking.

The ACL provides consumers with robust rights to a refund or other remedy if a seller cannot provide the service that has been paid for. This general proposition also applies to airlines however, consumers are also subject to the airline's non negotiated contract usually described as its "Conditions of Carriage". These conditions include provisions that expressly provide that flight times are not guaranteed. As an airline can therefore lawfully change and reschedule flight times for weather or operational or engineering reasons at any point after booking and prior to departure, and given flight times are not an essential term of the contract, consumers aren't automatically entitled to a refund or other compensation under the ACL.

I acknowledge at the outset that no airline's conditions of carriage intend to restrict the application of the ACL and the various guarantees it provides consumers. Notwithstanding, the sometimes harsh financial reality for airline passengers is that there is a tension between what would ordinarily apply if there was a failure to provide a service under the ACL, and that which applies pursuant to an airline's conditions of carriage. This is because an airline can restrict its liability for any financial loss that a passenger incurs when a flight is delayed or cancelled, or overbooked as well as the circumstances in which a refund of the booking, or a credit, will be offered.

This submission will consider this anomaly and whether there should be legislative reform, including mandatory compensation to supplement existing protections under the ACL.

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¹ http://consumerlaw.gov.au/files/2016/03/ACLreview_issues_paper.pdf at page 6

1. INTRODUCTION

1.1 About the Airline Customer Advocate

The Airline Customer Advocate (ACA) was established on 1 July 2012 to facilitate the resolution of complaints from customers of the 5 participating airlines about the services provided by the airline. These airlines are Jetstar, Qantas, Regional Express, Tigerair and Virgin Australia. Its role is to resolve complaints that have been unable to be resolved to the customer's satisfaction and lead customer advocacy within the Australian aviation industry.

The ACA provides an informal process to resolve complaints that accords with an airline's customer charter, as well as its conditions of carriage and any applicable laws including international conventions that define an airline's liability in prescribed circumstances such as lost baggage. In addition, the ACL also protects airline customers.

1.2 Complaints about delays and cancellations

Until something goes wrong, most consumers aren't aware that airlines don't guarantee flight times and that this condition is included in all airline contracts.

Flight delays and cancellations and refunds consistently rank as the two top issues complained about to the ACA.² Customers' complaints about delays and cancellations include delays and cancellations due to weather or operational reasons as well as overbookings.

1.3 Weather delays and cancellations

At the outset it is important to distinguish between flights that are delayed or cancelled due to an event or circumstances beyond an airline's control and the consequences of which it would state it couldn't avoid. These events include weather, or air traffic control or a security or safety issue. Such events contrast to an event or circumstance ***within an airline's control*** (my emphasis) and would include issues of a technical, operational, or engineering nature, or crewing/rostering.

Australian aviation has a long established culture of safety, as well as a broad regulatory framework to ensure that a safe and secure aviation industry is maintained. Public policy, and indeed the very nature of aviation therefore mandates that airlines ought to be permitted to cancel or delay flight schedules due to weather, or other unforeseen circumstances that may adversely impact the safety of the aircraft, its crew and passengers.

Although the ACA receives complaints about flights that are delayed or cancelled due to weather, this submission will only focus on whether there is a barrier to consumers enforcing their rights under the ACL in relation to delays and cancellations due to events that are ***within an airline's control***.

² http://www.airlinecustomeradvocate.com.au/lib/Docs/AnnualReport/Annual_Report_2012_14_Feb.f, http://www.airlinecustomeradvocate.com.au/lib/Docs/AnnualReport/Annual_Report_2013.pdfhttp://www.airlinecustomeradvocate.com.au/lib/Docs/AnnualReport/Annual_Report_2014.pdf

2. FLIGHT DELAYS AND CANCELLATIONS WITHIN AN AIRLINE'S CONTROL AND OVERBOOKINGS

2.1 Current regulatory regime

There is currently no regulatory framework in Australia that provides airlines passengers with a guaranteed right to a refund or compensation in the event a flight is cancelled or delayed for an event or reason within the airline's control, or if a passenger is denied boarding due to overbooking.

Every airline has its own policies and commitments about how it manages delayed and cancelled flights and overbookings. These are contained within the airline's conditions of carriage (and its customer charter if it is an Australian airline). As a first step, airlines aim to inform passengers about delays and cancellations as soon as reasonably possible, and the applicable reason/s for the disrupt. The airline may also offer accommodation and/or airport transfers depending on the duration of the delay and if they are away from their home port. Passengers are generally not entitled to additional financial compensation for out-of-pocket expenses or inconvenience.

Usually when a flight is delayed or cancelled, the airline will attempt to rebook the passenger on the next available flight. If the next available flight is not acceptable to the passenger, then the airline may offer a refund or credit depending on the airline's conditions of carriage and/or fare rules.

Customers' complain to the ACA about the delay or cancellation and the airline's decision to decline their claim for a refund. These claims can include subsequent out-of-pocket expenses such as transport, food and telecommunications as well as forfeited accommodation and connecting flights, and economic losses such as forfeited wages or income loss.

Overbooking is lawful in Australia and will be discussed later. Airlines oversell seats because it is possible that it could operate the flight with empty seats that could otherwise be filled.

If consumers wish to make a claim for a refund of the cancelled or delayed flight, or overbooking, and/or any other out-of-pocket expenses or loss, then these are the current steps for consumers to claim that outcome:

Step 1: Complain to the airline.

Step 2: If unresolved by the airline, the customer can complain to the ACA³ or a state or territory consumer protection government body.

Step 3: If the claim remains unresolved, consider legal advice about commencing legal action in a court or tribunal.

³ For complaint eligibility criteria see <http://www.airlinecustomeradvocate.com.au/General/Eligibility.aspx>

2.2 The overseas experience

2.2.1 Europe

EC Regulation 261/2004 provides compensation and/or assistance to passengers if their flight has been delayed by more than 3 hours, or cancelled, or they have been denied boarding or downgraded. It applies if departing either from an EU airport on any airline or if arriving into the EU (from outside the EU) on an EU carrier. Compensation is only payable if the cause of the delay was due to an event within the airline's control and ranges from EUR250-EUR600.

The triage of compensation and/or assistance available to passengers and a summary of these regulatory provisions appear below:⁴

Compensation for flight delay

Flight delay arriving 3 hours+ late:

EUR250 for flights of 1500kms or less (e.g. London-Paris)

EUR400 for flights between 1500kms-3500kms (e.g. London-Istanbul)

EUR400 for flights within the EU 1500kms+

Flight delay arriving 3-4 hours late:

EUR300 for flights 3500kms+ between an EU and non-EU airport (e.g. London-Dubai)

Flight delay arriving 4 hours+ late:

EUR600 for flights 3500kms+ between an EU and non-EU airport (e.g. London-Dubai)

In addition, if the delay is more than 2-4 hours, a passenger is entitled to food and drink vouchers, telecommunications, and accommodation if delayed overnight.⁵

Flight delay arriving 5 hours+ late

A refund of the fare is payable if the passenger decides not to travel and irrespective of cause of the delay.

In addition, if a passenger elects to receive a refund rather than a rerouting, and the delay is caused by the airline, then additional compensation can be claimed if the flight lands 3+ hours later than scheduled.⁶

⁴ http://ec.europa.eu/transport/themes/passengers/air/doc/neb/questions_answers.pdf_reg_2004_261.pdf and <http://www.moneysavingexpert.com/travel/flight-delays>

⁵ <http://www.moneysavingexpert.com/travel/flight-delays> at page 18

⁶ Ibid at page 19

Compensation for flight cancellation

Refund or a new flight (re-routing) for flight cancellation

If a flight is cancelled, regardless of the reason for the cancellation *and* (my emphasis) however long before the flight is due to depart, a passenger has the right to a refund of the cancelled flight or an alternative flight/re-routing.⁷

If the passenger is at the airport and re-routed on that date, the airline also has to offer additional assistance such as food and phone calls. If it's an overnight delay, then accommodation is provided.

Compensation for flight delay and late arrival of rescheduled flight

Compensation from EUR125-EUR600 can also apply for the delayed arrival of the later rescheduled flight and depends on the flight length and the extent of the delayed arrival. For the below compensation to be payable, the rescheduled flight has to arrive at the destination later than originally scheduled.⁸

Flight cancelled 7-14 days before departure:

EUR125 for inter EU flights of 1500kms or less (e.g. London-Paris) and departs 2 hours+ before, and arrives up to 2 hours late

EUR250 for inter EU flights of 1500kms or less (e.g. London-Paris) and departs 4 hours+ late. Or departs 2 hours+ before, arrives 2 hours+ late

EUR200 for flights between 1500kms-3500kms (e.g. London-Istanbul) and departs 2 hours+ before, arrives up to 3 hours late

EUR400 for flights between 1500kms-3500kms (e.g. London-Istanbul) and departs 4 hours+ late. Or departs 2 hours+ before, arrives 3-4 hours late

EUR300 for flights 3500kms+ (e.g. London-Dubai) and departs 2 hours+ before, arrives up to 4 hours late

EUR600 for flights 3500kms+ (e.g. London-Dubai) arrives 4 hours+ late

Flight cancelled less than 7 days before departure:

EUR125 for inter EU flights of 1500kms or less (e.g. London-Paris) and departs 1 hour+ before, arrives up to 2 hours late

EUR250 for inter EU flights of 1500kms or less (e.g. London-Paris) arrives 2 hours+ late

EUR200 for flights between 1500kms-3500kms (e.g. London-Istanbul) and departs 1 hour+ before, arrives up to 3 hours late

EUR400 for flights between 1500-3500kms (e.g. London-Istanbul) arrives 3 hours+ late

⁷ Ibid at page 29

⁸ Ibid at pages 35-36

EUR300 for flights 3500kms+ (e.g. London-Dubai) and departs 1 hours+ before, arrives up to 4 hours late

EUR600 for flights 3500kms+ (e.g. London-Dubai) arrive 4 hours+ late

Compensation for overbooking

If a passenger is denied boarding due to an overbooking and voluntarily gives up their seat, any compensation payable is up to the passenger and the airline to agree on. The airline must also refund the ticket price if the passenger declines to travel.⁹

Compensation when a passenger involuntarily gives up their seat:

EUR125 for inter EU flights of 1500kms or less (e.g. London-Paris) and arrives up to 2 hours late

EUR250 for inter EU flights of 1500kms or less (e.g. London-Paris) and arrives 2 hours+ late

EUR200 for flights between 1500kms and 3500kms (e.g. London-Istanbul) and arrives up to 3 hours late

EUR400 for flights 1500kms+ within the EU and arrives 3 hours+ late

EUR300 for flights 3500kms+ (e.g. London-Dubai) and arrives up to 4 hours late

EUR600 for flights 3500kms+ (e.g. London-Dubai) and arrives 4 hours+ late

2.2.2 United States of America

Within the United States Department of Transportation, the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings monitors compliance and investigates violations of the Department's consumer protection requirements.¹⁰

Compensation for flight delay and cancellation

In the USA, the federal government doesn't prescribe what assistance or compensation is payable to passengers affected by delayed or cancelled flights.¹¹

Compensation for overbooking

For overbookings on domestic flights, compensation is only payable if the flight is oversold and a passenger involuntarily gives up their seat and the new flight arrives at the destination at least one hour later after the original flight arrival time for both domestic and international flights.¹²

⁹ Ibid at page 36

¹⁰ See generally <https://www.transportation.gov/airconsumer>

¹¹ <https://www.transportation.gov/airconsumer/fly-rights>

¹² Ibid at page 7

Involuntary removal and new flight arrives 1-2 hours later, or 1-4 hours later for an international flight:

200% of the one-way fare to the final destination that day (maximum USD675)

Involuntary removal and new flight arrives 2+ hours later, or 4+ hours later for an international flight:

400% of the one-way fare to the final destination that day (maximum USD1350)

In addition, the passenger can keep their original ticket and use it on another flight. Or if they purchase another flight to get to their destination, then they can “request an involuntary refund.”¹³

2.2.3 Canada

In Canada, the Canadian Transportation Agency (CTA) manages complaints about flights originating in Canada or where the destination is Canada by domestic and foreign airlines. It states it is “an independent quasi-judicial tribunal operating under the *Canada Transportation Act*.”¹⁴

Compensation for flight delay and cancellation

As in the USA and Australia, there is no federal legislative requirement for an airline to pay compensation or reimburse out of pocket expenses other than as provided for in the airline’s contract (or tariff as it is generally described). The CTA states:

*Air carriers are required to apply their tariff and can be ordered by the Agency to compensate you for out-of-pocket expenses you may incur if they do not do so. Furthermore, pursuant to applicable international conventions, carriers are also liable for damages you have incurred unless they can demonstrate that they took all the measures that could reasonably be required to prevent them, or that it was impossible for them to take such measures. They will often arrange alternate transportation to enable you to reach the destination named on your ticket. If this is not possible, you may be entitled to a refund of the unused portion of your ticket.*¹⁵

In five published decisions in 2013, the CTA ordered Air Canada, WestJet and Air Transat to permit passengers to choose whether they wanted a refund, or to be rebooked when a flight is delayed, cancelled (for a reason within the airline’s control) or overbooked and additional compensation:

“If overbooking or cancellation of a flight results in the passengers choosing to no longer travel, they will be entitled to a return flight home within a reasonable time, free of charge, and a full refund of the ticket price.”¹⁶

¹³ Ibid

¹⁴ see <https://www.otc-cta.gc.ca/eng/resources-air-travellers>

¹⁵ See <https://services.otc-cta.gc.ca/eng/air-complaints>

¹⁶ See <https://www.otc-cta.gc.ca/eng/agency-decisions-increase-rights-and-remedies-passengers-travelling-air-canada-westjet-and-air-trans>

Compensation for overbooking

As in Australia, an airline will usually offer to rebook the passenger on the next available flight and any compensation will depend on what is provided in the carrier's conditions of carriage.

Although there is currently no federal regulation in Canada, the CTA has recently published a number of decisions ordering certain carriers to better compensate passengers who are denied boarding due to overbooking. For example, Air Canada's compensation payable for domestic and international flights now ranges from CAD200 to CAD800 depending on the delay.¹⁷

¹⁷ <https://www.otc-cta.gc.ca/eng/publication/denied-boarding-due-over-booking-bumping>

3. SIGNIFICANT RECENT DEVELOPMENTS IN AUSTRALIA

Under the ACL's consumer guarantee provisions, when a business fails to provide a service, consumers are entitled to either a refund or the business has to fix the problem and resupply the service. The consumer guarantee provisions also provide a consumer with a right to compensation if they have incurred subsequent expenses in addition to the business not delivering the service, particularly if the expenses were reasonably foreseeable.

Following receipt of a significant number of complaints to the ACCC and state and territory consumer protection regulators, in April 2015 the ACCC investigated Air Asia regarding two services that were cancelled or re-routed and caused some passengers to incur subsequent out-of-pocket expenses, disrupted travel and longer flights. These were the details of the cancellations and re-routings:

- Flights cancelled between Adelaide and Kuala Lumpur from 25 and 26 January 2015. This meant passengers had to rebook on another carrier or independently travel to Perth or Melbourne so as they could fly Air Asia to Kuala Lumpur.
- Flights cancelled between Melbourne and Denpasar scheduled to commence from 26 December 2014 because Air Asia had not obtained regulatory approval from Australia's Civil Aviation Safety Authority. As a result, passengers would have an increased travel time as they were required to be re-routed via Kuala Lumpur.

At the time, Chairman Rod Sims said:

"Consumers are entitled to compensation for any reasonably foreseeable loss due to the failure of a business to deliver a contracted service, and these claims should be dealt with promptly."

"It is very important that any business has in place systems and processes to properly handle and consider customer refunds and that they can adjust quickly when things go wrong and there is an increase in the number of claims."¹⁸

The ACCC's administrative resolution of its investigation delivered a number of outcomes including a commitment by Air Asia to process any future requests for alternative flights, credits and refunds within 14 days and to expeditiously process valid claims for reasonable out-of-pocket expenses in a fair and reasonable manner.¹⁹

¹⁸<https://www.accc.gov.au/media-release/airasia-x-commits-to-process-for-customers-affected-by-cancelled-kuala-lumpur-and-denpasar-flights>

¹⁹Ibid

4. BALANCE BETWEEN CONSUMER PROTECTIONS UNDER THE ACL AND AN AIRLINE'S CONDITIONS OF CARRIAGE

Today's airline consumer has numerous airline carriers to choose from with a wide range of service offerings that are factored into the fare and the final booking price. Whether a flight is refundable in the event of a delay, cancellation or overbooking will also depend on the airline's conditions of carriage and fare rules as well as any service commitment in its customer charter.

Consumers also need to ensure that they understand the particular airline's service product they are purchasing and whether it is suitable for their specific purpose, or needs. However, when it comes to flight delays and cancellations and overbookings, consumers may not be entitled to a refund or other compensation to cover any out-of-pocket expenses from the airline no matter how well informed they are.

I accept there maybe a view here in Australia that there needs to be a balance between an airline's contractual obligations and a passenger's rights, and that self-regulation ought to continue as there is appropriate oversight and enforcement by our national and state consumer protection government bodies. Notwithstanding, given the range of compensation schemes extant in the EU, the USA and Canada, there is an equally compelling argument for reasonable compensation parity for Australian consumers affected by flight delays and cancellations caused by an event within the airline's control, and overbookings .