

Airlines update

Matthew Brooks, Partner, HWL Ebsworth (Chair)

Alexander McKinnon, Barrister-at-law, 16 Quay Central Chambers

Jennifer Page, General Counsel & Company Secretary, Air New Zealand

Overview

- **Consumer protection & passenger rights**
- **ESG & Sustainability**
- **Automation & digitisation**
- **Other top-of-mind legal issues**
 - Passenger travel bans
 - Human Rights

Consumer Protection & Passenger Rights

Aviation Green Paper, September 2023

Key issues

- Strong competition is desirable
- Consumer complaints suggest competition is not delivering the desired outcomes
- Key complaints include cancellations, delays and T&Cs for refunds/flight credits
- A “framework” is needed

Current situation

- Australian Consumer Law provides baseline protections
- No aviation-specific consumer protection laws
- Insurance also mentioned including possible need to make insurance compulsory for third party (surface damage) risks

Consumer groups

- 31 of 192 public submissions mentioned “consumer protections” as a key issue
- Improve customer complaint-handling
- Airline Consumer Advocate, but not a substitute for a “low-cost, accessible legal process which can ensure passengers can access fair treatment”
- Complaints to ACCC

Airline Consumer Advocate (Australia)

TOP FIVE COMPLAINTS OVERALL

Below are the top five complaint issues overall.

Airline (Number complaints per 100,000 passengers* carried)	Refund request 42%	Flight delay or cancellation 29%	Baggage services 12%	Fees or charges 4%	Loyalty/Frequent flyer program 2%
Rex (Regional Express)	Refund request 0.68 per '00000	Flight delay or cancellation 0.47 per '00000	Baggage services 0.17 per '00000	0	0
Qantas	Refund request 1.27 per '00000	Flight delay or cancellation 0.36 per '00000	Baggage services 0.4 per '00000	Fees or charges 0.11 per '00000	Loyalty/Frequent flyer program 0.11 per '00000
Virgin Australia	Refund request 0.92 per '00000	Flight delay or cancellation 0.72 per '00000	Baggage services 0.26 per '00000	Fees or charges 0.06 per '00000	Loyalty/Frequent flyer program 0.02 per '00000
Jetstar	Refund request 0.64 per '00000	Flight delay or cancellation 0.95 per '00000	Baggage services 0.16 per '00000	Fees or charges 0.13 per '00000	Loyalty/Frequent flyer program 0.03 per '00000

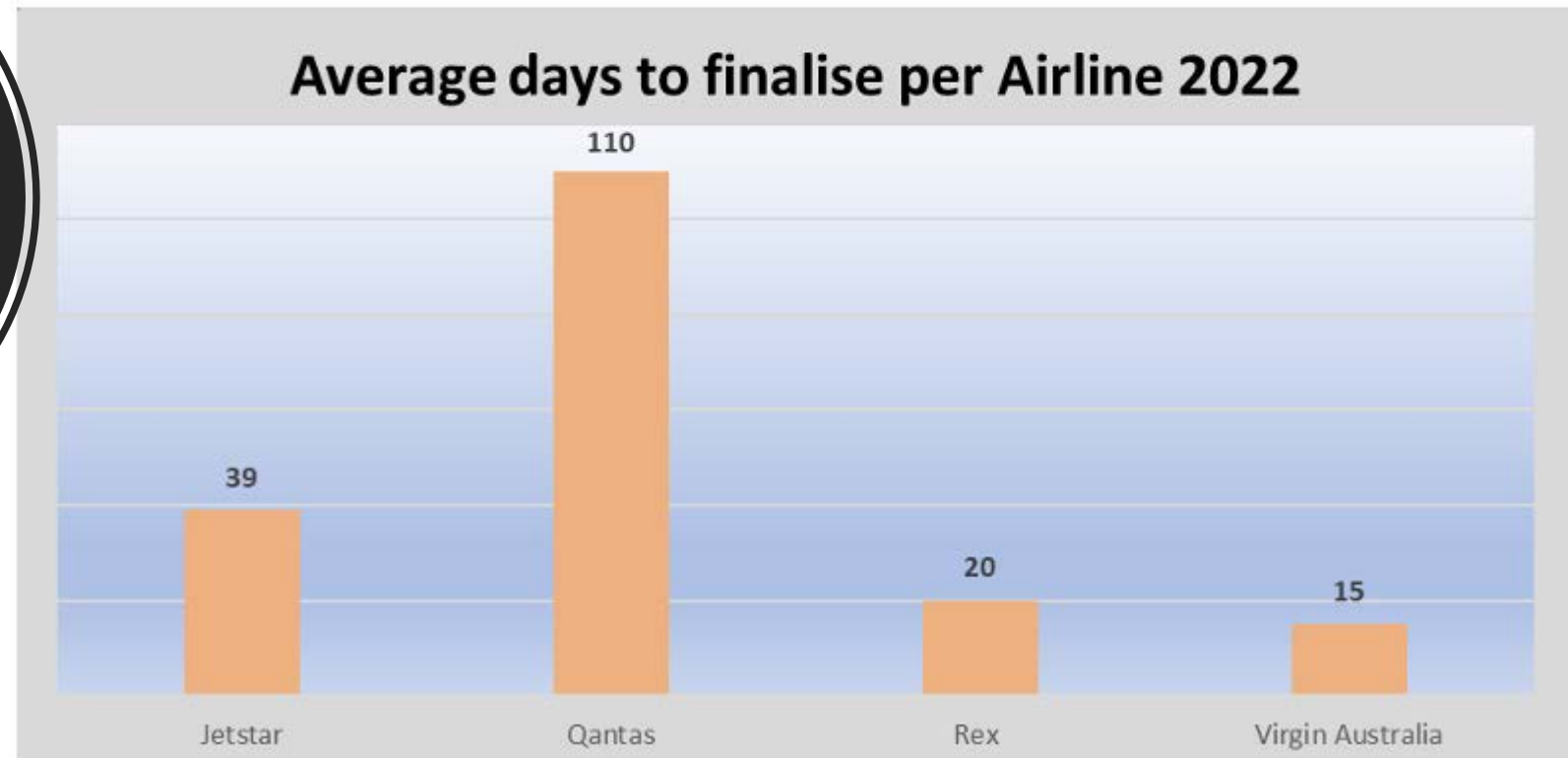
A zero result refers to zero complaints in that category.

Source: ACA Annual Report 2022

TIME TAKEN TO FINALISE COMPLAINTS.

The average number of days taken to finalise a complaint was 46 business days in 2022. This is well over the published 20 business day timeframe specified by the participating airlines. This is an increase of 29 days from 2021. This can be attributed to impacts on staffing at the Airline Customer Advocate and participating airlines during the COVID-19 pandemic.

**Airline
Consumer
Advocate
(Australia
)**



Source: ACA Annual Report 2022

Consumer Protection: global models

1. EU / UK
 - EU 261 and UK equivalent post-Brexit
2. Canada
 - Air Passenger Protection; “small” and “large” airlines
3. US
 - “Final Rule” Refunds and Other Consumer Protections
4. New Zealand
 - Civil Aviation Act - capped liability model



Consumer Protection: EU / UK

- EU Regulation 261
- 11 February 2004



EU 261

1. **Article 7** provides for compensation. Designed to apply to denied boarding and cancellation unless “*cancellation caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken*” (Art 5(3)).
2. A right to reimbursement and re-routing, and care and assistance, applies for *delay in departure*.
3. Compensation also available for downgrades.
4. **CJEU extended scope to delays in *arrival*** (cf. Art 19 of Montreal Convention) - the *Sturgeon* case

Consumer Protection: Canada

Compensation levels

The amount of compensation owed depends on how late you arrived at your final destination and on the [size of the airline](#).

Large airlines* must pay you:

- **\$400** if you arrive late at your destination by **3 hours or more**, but **less than 6 hours**
- **\$700** if you arrive late at your destination by **6 hours or more**, but **less than 9 hours**
- **\$1,000** if you arrive late at your destination by **9 hours or more**

If you **choose to be refunded instead of rebooked**, large airlines must still pay you **\$400**.

*The size of the airline is listed in the terms and conditions of your ticket (the airline's tariff). Examples of large airlines include Air Canada (including Jazz and Rouge), WestJet, Sunwing Airlines, Air Transat, and Flair Airlines.

Small airlines* must pay you:

- **\$125** if you arrive late at your destination by **3 hours or more**, but **less than 6 hours**
- **\$250** if you arrive late at your destination by **6 hours or more**, but **less than 9 hours**
- **\$500** if you arrive late at your destination by **9 hours or more**

If you **choose to be refunded instead of rebooked**, small airlines must still pay you **\$125**.

*The size of the airline is listed in the terms and conditions of your ticket (the airline's tariff). Examples of small airlines include Canada Jetlines, Canadian North, and Porter Airlines

Consumer Protection: Canada

Rebooking obligation

- Regardless of type of delay or cancellation, the operating airline must ensure the passengers complete their itinerary (i.e. reach final destination)
- Large carrier may be obliged to book with competitors or another airport
- Large airlines also have obligations even if flight disruption is outside of their control

Consumer Protection: US

1. **Final Rule** signed on 1 April 2024 and announced on 24 April 2024
 - DOT issued under authority to prohibit unfair or deceptive practices
2. **Automatic cash refunds** - cancel or significantly (3hr / 6hr) change flights; time limit for effecting refunds; refunds must be provided when a person unable to travel for medical reasons
3. **Disclosure** of baggage, change and cancellation fees upfront; “fair” disclosures about whether it is necessary to purchase extras such as seat selection
4. **End discount “bait-and-switch” tactics**



Consumer Protection: New Zealand

- **Civil Aviation Act (CAA):** Airlines liable for 'damage' caused by delay/cancellation of a **domestic flight**.
- **Controllable:** Refund and CAA damages for losses
- **Uncontrollable:** Fare credit and no damages. Delay or cancellation due to weather, air traffic control, directives by an authority, a force majeure event or if the event was necessary to save or attempt to save a life.
- **Liability cap:** Actual costs reasonably incurred (i.e. flight cost and any other out of pocket expenses). Need evidence and capped at 10 x fare paid.
- Pax obligation to avoid or mitigate losses
- Airlines not liable for 'damage' if can show that "all necessary measures to avoid the damage" were taken (or if it's not possible to take such measures).

Consumer Protection: insight ACCC v Qantas (FCA, No. 685 of 2023)

Qantas' Concise Statement in Response:

- 3 There is a dispute at the centre of these proceedings as to the nature of the “services” that Qantas supplies for the purposes of the relevant provisions of the ACL. The ACCC contends that Qantas supplies carriage on “particular flights”. Qantas disputes this. The “service” that Qantas supplies is not carriage on any “particular flight” but rather a bundle of rights that includes alternative options to which consumers are entitled in respect of a cancelled flight. Consistently with the provision of that service, by both its pre-contractual statements, and contractual terms, Qantas makes clear to ordinary and reasonable consumers that, while Qantas will do its best to get consumers where they want to be on time, it does not guarantee particular flight times or its flight schedules. Qantas says that, in light of those express statements, the ACCC’s allegations that Qantas, at any time, makes implied or partly-implied representations that Qantas will use reasonable endeavours to operate any “particular flight”, or that any “particular flight” has not been cancelled, are wrong.

Consumer Protection: some thoughts

- What do consumers really want? E.g. compensation or rebooking
- Consider claims handlers popping up and taking advantage
- Costs on airlines; who ultimately pays?
- Disclosure of T&Cs vs compensation schemes
- Existing schemes e.g. Montreal Convention
- Aviation or all passenger transport ?
- How can behaviour be changed?

ESG & Sustainability

ESG: key areas of legal focus

- Greenwashing/Greenhushing
- Climate Related Disclosures
- Modern Slavery/Supply Chain
- Environmental /Property
- Cultural and Diversity Strategies
- Social Licence - customer expectations/initiatives
- Directors' duties/tortious liability



Sustainability: the Aviation Green Paper (Towards 2050)

- SAF
- Fleet renewal
- Electrification
- Air traffic management

Sustainability drivers



- SAF will be essential to decarbonisation of the industry, especially for medium and long-haul international flights on larger aircraft for which, at this stage, there is no clean technology alternative in the period to 2050.
- Fleet renewal and the gradual introduction of improved, more fuel-efficient aircraft, will deliver incremental sustainability gains in the short-medium term. New aircraft can be 15 to 25 per cent more fuel efficient than the planes they replace.
- Electric, hydrogen-electric, and hydrogen aircraft are considered the most attractive long-term (post-2050) solution for industry decarbonisation. These aircraft may enter the fleet in the medium-long term and would primarily replace regional turboprops and small jets due to range and payload constraints. However, without a step-change in technology, these aircraft are unlikely to comprise a material portion of the Australian commercial aviation fleet by 2050.
- ATM will likely play a small but important role in increasing aviation sustainability in the short-medium term by supporting more flexible, fuel efficient flight paths.

Automation and digitisation

Automation & digitisation

- Automatic boarding gates
- Biometric technology
- Revenue management
- Aus and NZ Satellite Based Augmentation System (SBAS)
- Loyalty platform
- Cargo/ baggage automation
- Customer innovations/app services/onboard



Automation & digitisation: overall thoughts

- Cyber security risks
- Protection of sensitive personal information
- Productivity /cost benefits
- Customer expectations
- Competitive advantages

Other top-of-mind legal issues



- Passenger travel bans
- Human Rights



7b) Our right to refuse to carry you when we have banned you from our route network

7b1) Separately, and in addition to our right to refuse to carry you under any of the provisions of 7a), **We** will be entitled to refuse to carry **you** or **your baggage** if **we** have given **you** a banning notice.

7b2) By a banning notice **we** mean a written notice **we** have given to **you** informing **you** that **you** are banned from being carried on **our** route network. (This means **you** are banned from travelling on all flights we operate.) This notice will give the date when the ban comes into force and the period for which it applies. A banning notice will also ask **you** not to buy a **ticket** or ask or allow anyone to do so for **you**.

7b3) If **you** try to travel while a banning notice is in force, **we** will refuse to carry **you** and **your** only recourse will be receipt of an involuntary fare refund. **You** will not be entitled to any compensatory or other damages.

Thank you!

