



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Airlines: Terms and conditions

Report

20 December 2017

Executive Summary

The Australian Competition and Consumer Commission (ACCC) has examined issues arising in the Australian airline industry relating to consumer guarantee rights and contract terms which may be unfair.

Consumer guarantees relating to services provided in industries such as the airline industry are a current priority for the ACCC. Airlines must ensure they comply with the Australian Consumer Law (ACL), avoid unfair contract terms and make sure their terms and conditions are consistent with consumer guarantees.

Between 1 January 2016 and 14 December 2017 the ACCC received over 1400 consumer complaints about airlines. These included hundreds of complaints relating to consumer guarantees and excessive fees.

The ACCC has reviewed complaint data from its own records, state fair trading agencies and consumer group CHOICE about the largest Australian-based airlines (the Airlines) and has identified the following issues of focus:

1. 'no refund' statements on the Airlines' websites;
2. excessive fees for flight cancellations and changes; and
3. the application of consumer guarantees, including statements made about a customer's consumer guarantee rights under the ACL, in circumstances where flights have been cancelled or delayed.

The purpose of this report is to highlight common consumer issues arising in the airline industry and the ACCC's concerns, and to inform consumers of their ACL rights when dealing with airlines. Where consumer issues continue, the ACCC will take action to address concerns.

1. 'No refund' statements

A number of airlines make statements on their websites that sale, low cost and non-flexible economy fares are non-refundable. These statements most commonly appear in sections outlining the Fare Rules.

'No refund' statements may lead consumers to believe they are not entitled to a refund under any circumstance. However, consumers who purchase goods and services have rights to remedies under the ACL which businesses cannot restrict, alter or remove.

In most instances the 'no refund' statement is qualified in the Airlines' Conditions of Carriage, which explain when a refund can be obtained and refer to the ACL obligations.

However, the ACCC is concerned that these qualifications are not sufficient to clarify the initial and prominent no refund representation. The Airlines' Conditions of Carriage are lengthy, often in fine print, and it can be difficult for consumers to find the relevant information.

The appearance of airline online platforms and the way information is displayed has evolved since we announced our focus on the industry's practices. The ACCC will continue to monitor how information about refunds is conveyed by the Airlines, and take enforcement steps where broad and misleading 'no refund' claims are made.

2. Excessive fees for cancellation and changes

All of the Airlines have provisions in their respective Conditions of Carriage and/or Fare Rules that outline the fees that will be charged to consumers who cancel their flights or make changes to their bookings once a ticket is purchased.

Generally the fees are a fixed amount regardless of the price of the fare, but can sometimes vary depending on the fare type and the destination.

Consumer complaints

Complaints indicate that consumers consider cancellation fees to be excessive, and therefore unfair, in circumstances where:

- the amount of the fee does not take into account how far in advance the cancellation or change occurs, such as when the airline might have sufficient time to resell the seat;
- the fee represents a significant proportion of the original airfare;
 - eg. *Consumer A purchased return flights from Los Angeles to Sydney for four people with an Australian airline, for a total cost of \$3,500. Approximately 35 days prior to departure, Consumer A cancelled the flights. The airline charged a cancellation fee of \$500 per person. This equated to a total fee of \$2,000 for fares totalling \$3,500 (approximately 57%).¹*
- the cancellation or the change was caused by the actions of the airline, for example, where a consumer cancels due to the airline changing the date and time of the flight, and providing alternatives not acceptable to the consumer.
 - eg. *Consumer B booked a flight from Melbourne to Gladstone via Brisbane. The airline cancelled the Melbourne to Brisbane flight and rescheduled it to a time which clashed with the Gladstone to Brisbane leg. The airline advised consumer B that they could be placed on an earlier originating flight, but to make this change consumer B would have to pay an \$80 change fee.*

Unfair contract terms

The ACL protects consumers from unfair contract terms in standard form contracts. These are contracts which are prepared by one party and offered on a 'take it or leave it' basis. Contracts between the Airlines and their customers are standard form contracts.

To be 'unfair', a contract term must:

- cause a significant imbalance in the parties' rights and obligations;
- not be reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- cause financial or other detriment if it were relied on.

For more information on unfair contract terms, please visit our website at <https://www.accc.gov.au/consumers/contracts-agreements/unfair-contract-terms>

¹ The examples in this report are taken from real consumer experiences.

Are fees charged by Airlines unfair contract terms?

The ACCC recognises that the Airlines differentiate fares with different levels of flexibility. This means that a consumer often has less flexibility to cancel or change their flight details when they have purchased a cheaper fare. This is not problematic in itself.

However, where the size of the fee imposed by the airline to cancel or change a flight is disproportionate to the cost of the original fare, or is unrelated to costs, then concerns may arise.

The ACCC is particularly concerned with fees imposed by airlines where the charges are the result of decisions or circumstances within the control of the airline rather than the consumer – for example, the circumstances of Consumer B in the example above. A contract term that allows for the application of a change fee in circumstances where the airline has cancelled the flight is, in the ACCC's view, likely to be unfair.

Another example of a term that may amount to an unfair contract term is one which enables the airline to penalise a consumer for breaching or terminating the contract, but does not penalise the airline for breaching or terminating the contract. From the complaint data, there appears to be an imbalance in rights between consumers and the Airlines, and the Airlines are entitled to make unlimited changes whereas the consumer is financially penalised for making even minor adjustments.

The ACCC will be engaging with the Airlines to understand exactly how, when and why these fees are charged, and is likely to take action where unfair contract term provisions are identified and not addressed.

3. Consumer Guarantees: Changes and cancellations

The ACCC has identified that complaints about the Airlines commonly arise when:

1. a flight is delayed or cancelled, causing the consumer to miss a specific event or obligation;
2. a flight is delayed or cancelled, causing the consumer to incur financial losses while they wait for the next scheduled flight e.g. accommodation, transport, food, missed flight connections;
3. a flight is changed by the airline to an unsuitable time for the consumer; or
4. due to the actions of the airline (e.g. cancellation, delay or reschedule), the consumer seeks reimbursement for purchasing a fare to the same destination with another airline.

Consumer guarantees

The ACL creates a basic set of guarantees for consumers who acquire goods and services. These are intended to ensure that consumers receive the goods and services that they pay for. When these consumer guarantees are not met, consumers are entitled to a remedy. The remedy consumers are entitled to will depend on whether the failure to comply with the guarantee is major or minor.

There are three guarantees relating to the supply of services such as airline travel:

- guarantee as to due care and skill;
- guarantee as to fitness for a particular purpose; and
- guarantee as to reasonable time for supply.

For more information on consumer guarantees, please visit our website at <https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees>

Airlines terms and conditions

Each airline has policies which outline the remedies offered to consumers affected by a flight delay or cancellation. From the ACCC's review of these policies, there does not appear to be a consistent approach by the Airlines about the remedies provided to consumers affected by a flight cancellation or delay.

Airline policies state that they will use reasonable endeavours to operate in accordance with their schedule, and due to the nature of air travel, they do not guarantee flight times.

However, the Airlines all adopt an approach that seeks to differentiate between events within the Airline's control and events outside the Airline's control. There is no common definition for either term. From a review of their policies, it appears that they treat:

- events **within the Airlines' control** as including issues with staffing or aircraft maintenance.
- events **outside the Airlines' control** as including weather, issues with air traffic control or problems at the airport.

More generous remedies for cancellations and delays are provided for events within the Airline's control.

Some consumers have raised concerns with the ACCC that events within an airlines control have been described as being "outside their control". They speculate that an airline's decision to cancel a flight due to low passenger numbers has been presented as being cancelled for a different reason. This issue is of significant concern to the ACCC and we will be making specific enquiries of the Airlines to examine it further.

The ACCC is also concerned about instances where an airline's policies outlining remedies offered to consumers are not consistent with a consumer's rights under the ACL. This could lead to an airline failing to provide a consumer with a remedy they are entitled to under the consumer guarantees, as well as the airline making misrepresentations to the consumer, whether orally or in writing.

Consumer complaints

The ACCC has reviewed a large number of consumer complaints in relation to their interaction with the Airlines. Consumers expressed a range of concerns, including:

- receiving only a partial remedy or no remedy in circumstances where they may be entitled to one;
eg. *Consumer C booked return flights from Brisbane to Canberra. The airline cancelled the return flight so consumer C sought a refund for his return flight. The airline refused to provide a refund unless Consumer C paid an \$80 fee.*
- when consumers do receive a remedy, the airline represents that it is providing the remedy out of 'goodwill', in circumstances where the consumer was entitled to a remedy under the ACL;
eg. *Consumer D purchased two tickets for his family members. At the gate, the airline said that the flight was overbooked. The airline offered to place the two passengers on a flight the next morning but required a \$50 change fee per person. The fee was later refunded as a 'gesture of goodwill' by the airline.*

- the Airlines appear to offer remedies to consumers on an ad hoc basis, rather than through a consistent and reasoned application of their policies and procedures;
- consumers may engage with airlines through a variety of channels including face-to-face (e.g. at an airport), phone, instant messaging etc. On each occasion an individual consumer contacts the airline they may receive inconsistent responses about how their complaint will be resolved;
- consumers receiving a remedy in the form of a travel voucher or credit with the airline instead of a refund or compensation. These travel vouchers or credits often contain conditions on how to use it and when it needs to be redeemed. The ACCC's view is that these travel vouchers or credits are not equivalent to a refund, and should not be used as a substitute when a consumer is entitled to a refund under the ACL;

eg. *Consumer E booked a same day return flight from Sydney to Canberra. Prior to take off, the flight was cancelled due to a mechanical fault. The delay extended beyond the departure time for Consumer E's return flight from Canberra back to Sydney. Consumer E sought a refund from the airline, but was advised that the airline does not provide refunds, and was provided with a flight credit instead.*

- an airline cancels or delays a flight and the consumer has to book an alternative flight, either with the same or a different airline, and the airline refuses to refund or compensate the consumer for this additional cost.

eg. *Consumer F booked a flight from Sydney to Melbourne. The flight was cancelled prior to take off. Consumer F was informed there would not be a replacement flight and that she would only be entitled to a refund. After booking a flight with another airline for the next day, Consumer F was informed that the original airline had rescheduled her flight for the next day. Consumer F was provided with a refund for the original fare but was denied a refund for the additional cost of rebooking her flight with another airline.*

The ACCC considers that these examples may raise a number of concerns under the consumer guarantees regime in the ACL.

Conclusion

Airlines must ensure they comply with the ACL, avoid unfair contract terms and make sure their terms and conditions are consistent with consumer guarantees.

In the event of a dispute with the airline, consumers should keep the following documents:

- tickets;
- flight itinerary;
- boarding passes;
- receipts of any costs incurred; and
- any communications with the airline.

It is also beneficial to keep detailed notes of any interactions with airline staff either over the phone or in person.

The ACCC focuses on issues that will, or have, the potential to cause widespread consumer detriment, and seeks to take action that will assist and protect all consumers. A material number of consumers have raised significant concerns about the impact of the Airlines' use of, and reliance on, their terms and conditions to impose fees and avoid the provision of

refunds for services that are not provided as promised. Accordingly the ACCC will take further steps to address the matters identified in this report.

In 2018 we will engage with the Airlines to discuss our expectations for change. While we do not ordinarily pursue individual consumer matters, in this area, where steps are not taken, the ACCC may need to action a number of individual matters to effect broader changes.