

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission given for the purposes of section 87B

by

Virgin Australia Airlines Pty Ltd ABN 36 090 670 965

Person giving the Undertaking

- 1 This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Virgin Australia Airlines Pty Ltd ABN 36 090 670 965 of 56 Edmondstone Road, Bowen Hills, 4006, in the State of Queensland (**Virgin Australia**) for the purposes of section 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

Background

- 2 On 20 December 2017, the ACCC published its *Airlines: Terms and Conditions Report* (**Report**). In the Report, the ACCC noted that between 1 January 2016 and 14 December 2017, it had received over 1,400 complaints about airlines, largely in relation to 'no refund' statements, excessive fees for cancelling or changing flights and issues relating to consumer guarantees.

Virgin Australia

- 3 Virgin Australia is an Australian airline and operates over 2700 domestic flights per week to more than 38 Australian cities and centres, as well as operating international short-haul and long-haul flight services.
- 4 Consumers can purchase flights operated by Virgin Australia through Virgin Australia's booking platform on its website (www.virginaustralia.com.au) (**Website**), its mobile site or its mobile app (together, the **Booking Platforms**). Approximately 40% of all flight bookings made for Virgin Australia flight services are purchased through the Website.
- 5 Virgin Australia's flight services are subject to its *Conditions of Carriage* and *Fare Rules*, which can be accessed and viewed through the Booking Platforms. Virgin Australia also operates a *Guest Compensation Policy*, which can also be accessed and viewed through the Booking Platforms.
- 6 *Conditions of Carriage*: Virgin Australia's *Conditions of Carriage* set out the conditions that apply to the contract for the booking of its flight services.
- 7 *Fare Rules*: Virgin Australia's *Fare Rules* are incorporated into the *Conditions of Carriage* by reference, form part of Virgin Australia's contract of carriage with its customers for flights, and provide passengers with information about the flexibility of fares (including refunds). A customer's right to change or cancel a Virgin Australia flight booking as set out in the *Fare Rules* is separate from, and in addition to, a customer's right to request a replacement flight service or a refund in the event of a flight delay or cancellation under the consumer guarantees contained in the Australian Consumer Law (ACL).
- 8 *Guest Compensation Policy*: Virgin Australia's *Guest Compensation Policy* sets out the compensation and assistance Virgin Australia will provide to passengers when their flight has been delayed or cancelled.

Australian Consumer Law

- 9 The ACL in Schedule 2 to the CCA provides consumers with a guaranteed level of protection for goods and services they acquire (**consumer guarantees**). Consumer guarantees cannot be excluded, restricted or modified.
- 10 Relevantly, section 62 of the ACL provides that, if a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be supplied within a reasonable time.
- 11 Consumers who are supplied goods or services that fail to meet the consumer guarantees under Part 3-2 of the ACL are entitled to remedies under Part 5-4 of the ACL, against the supplier of the goods or services depending on whether the failure is major or not.
- 12 Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.
- 13 Section 29(1)(m) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of services or in connection with the promotion by any means of the supply or use of goods or services, make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a consumer guarantee under the ACL).
- 14 Representations by a supplier that purport to limit or exclude remedies available under the ACL, including statements such as 'no refunds' or 'non-refundable', may contravene the ACL because they imply that refunds are not available at any time.

Conduct of concern

- 15 The ACCC is concerned that Virgin Australia's Booking Platforms may have created an overall impression that risked misleading consumers about the nature and potential application of their consumer guarantee rights, including about the remedies that consumers may be entitled to in the event of flight delays or cancellations.
- 16 In particular, the ACCC is concerned that, during a period estimated to be from at least 1 January 2017 to 31 March 2018, Virgin Australia may have made representations to consumers that, in relation to its 'Domestic Getaway' and International Short-Haul fare types:
 - (a) refunds were not available at any time; and
 - (b) consumers were limited to receiving a remedy only in the form of a credit, and valid only for 12 months.
- 17 These representations were either express, or were implied from:
 - (a) Virgin Australia's *Fare Rules* in relation to its 'Domestic Getaway' and 'International Short-Haul' fare types; and/or
 - (b) Virgin Australia's *Guest Compensation Policy* for the 'Domestic and International Short Haul' fare types.
- 18 By making these representations in circumstances where:
 - (a) consumers are entitled to a remedy of a refund or resupply of the service in accordance with the consumer guarantee provisions if there has been a major failure to comply with a consumer guarantee; and/or

- (b) consumers may be entitled to recover reasonably foreseeable damages they incur as a result of a failure to comply with the consumer guarantees in certain circumstances, in accordance with the consumer guarantee provisions;

the ACCC is concerned that Virgin Australia may have made false or misleading representations about the existence or effect of the rights or remedies available to consumers which could constitute contraventions of sections 18 and 29(1)(m) of the ACL.

- 19 In response to the ACCC's concerns, and consistent with its desire to be as transparent as possible with its customers, Virgin Australia:
- (a) has acknowledged the ACCC's concerns that its conduct could have constituted contraventions of sections 18 and 29(1)(m) of the ACL;
 - (b) has voluntarily cooperated with and responded to the ACCC's enquiries; and
 - (c) has enhanced its messaging to consumers by making amendments to its Booking Platforms, including its *Fare Rules, Conditions of Carriage and Guest Compensation Policy*, to address the ACCC's concerns.

Commencement of this Undertaking

- 20 This Undertaking comes into effect when:

- (a) this Undertaking is executed by Virgin Australia; and
- (b) this Undertaking so executed is accepted by the ACCC.

(Commencement Date).

- 21 This Undertaking has effect for three (3) years after the Commencement Date (**Term**).
- 22 Upon the Commencement Date, Virgin Australia undertakes to assume the obligations set out in **Attachment A** for the Term of the Undertaking for the purposes of section 87B of the CCA.

Acknowledgements

- 23 Virgin Australia acknowledges that:

- (a) the ACCC will make this Undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- (b) the ACCC may, from time to time, make public reference to this Undertaking, including in news media statements and in ACCC publications; and
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

Executed as an Undertaking

Executed by Virgin Australia Airlines Pty Ltd ABN 36 090 670 965 pursuant to section 127(1) of the Corporations Act 2001 by:



Signature of director



Signature of director/company secretary

JOHN BORGHETTI

Name of director (print)

SHARYN PAGE

Name of director/company secretary (print)

06/12/2018

Date

06/12/2018


Date

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the Competition and Consumer Act 2010 (Cth) on:

14/12/18

Date

and signed on behalf of the Commission:



Rodney Graham Sims
Chair

14/12/18

Date

Attachment A

- 1 Upon the Commencement Date of this Undertaking, Virgin Australia undertakes for the purposes of section 87B of the CCA to assume the obligations set out below.

Comprehensive review of Virgin Australia's policies, compliance programs, website and booking systems

- 2 Virgin Australia will, within 6 months of the Commencement Date of this Undertaking, cause a comprehensive review to be undertaken of:

- (a) its policies, procedures and Consumer Law Compliance Programs, having regard to AS ISO 19600:2015 (*Compliance management system – Guidelines*); and

- (b) its Booking Platforms;

and make any changes necessary, to ensure that:

- (c) Virgin Australia's relevant systems, policies, procedures and practices reflect Virgin Australia's obligations to consider remedies available to its customers under the ACL in the event of flight delays or cancellations;

- (d) any representations concerning remedies available to consumers in the event of a breach of the consumer guarantees which it makes on its Booking Platforms and in its policies and procedures are consistent with the ACL; and

- (e) Virgin Australia makes available to consumers information about remedies they are entitled to under the ACL.

Issue an internal policy statement outlining Virgin Australia's commitment to compliance with the ACL

- 3 Virgin Australia will, within 3 months of the Commencement Date of this Undertaking, issue an internal policy statement outlining Virgin Australia's commitment to compliance with the ACL (**Compliance Statement**). Virgin Australia will ensure that the Compliance Statement:

- (a) contains a statement of commitment to compliance with the ACL;

- (b) contains an outline of how commitment to ACL compliance will be realised within Virgin Australia;

- (c) contains a requirement for all staff to report any ACL compliance concerns to the Chief Legal Officer or any other senior manager appointed to ensure compliance with this Undertaking;

- (d) contains a commitment that whistleblowers with ACL compliance concerns will not be prosecuted or disadvantaged in any way and that their reports will be kept secure and will only be used for the purposes of investigating the identified compliance concern in accordance with the Virgin Australia Group's internal whistleblower policies; and

- (e) contains a statement that Virgin Australia will take action, against any person who is knowingly or recklessly concerned in a contravention of the ACL.

Notify relevant employees of Virgin Australia's obligations to consumers under the ACL and Virgin Australia's ACL Compliance Statement

- 4 Virgin Australia will take reasonable steps to ensure its directors, officers and those employees whose duties include dealing with enquiries or complaints made by Australian consumers are

made aware of the Compliance Statement and any changes made to Virgin Australia's compliance policies as a result of the review undertaken at paragraph 2 above.

Creation of a Consumer Guarantees webpage on the Virgin Australia Website

- 5 Virgin Australia will, within 30 days of the Commencement Date of this Undertaking, create a 'Consumer Guarantees' webpage on its Website to provide a clear and concise statement of consumers' rights under the ACL. The webpage will include, at a minimum, a description of the consumer guarantees that apply to flight services, and the ACL remedies available to consumers against Virgin Australia, in the event of a failure to comply with those guarantees as they apply to flight services.

Inclusion of hyperlink to Virgin Australia's Consumer Guarantees webpage in communications sent to consumers in the event of cancellations and/or flight delays

- 6 Virgin Australia will, within 3 months of the Commencement Date of this Undertaking, ensure that a hyperlink to its 'Consumer Guarantees' webpage (referenced at paragraph 5 above) is prominently included in:

- (a) emails; and
- (b) any other form of alerts or notices (where it is technically possible to include the hyperlink);

in circumstances where Virgin Australia ordinarily sends communications to passengers, such as when passengers' flights are delayed or cancelled. Where it is not technically possible to include a hyperlink in the alert or notice, Virgin Australia will ensure that the alert or notice makes specific reference to:

- (c) a location on its Website; or
- (d) an email Virgin Australia sends to customers regarding the flight delay or cancellation;

which includes a hyperlink to the Consumer Guarantees webpage.

Staff training

- 7 Virgin Australia will, within 6 months of the Commencement Date of this Undertaking, cause a comprehensive review to be undertaken of its existing training material for all customer-facing staff (including ground staff, online customer support staff and telephone customer support staff), and ensure that it includes training on compliance with relevant provisions of the ACL, including those provisions relating to consumer guarantees and misleading and deceptive conduct.
- 8 Virgin Australia will, within 3 months following completion of the review referred to in paragraph 2 above, complete compliance training for all customer-facing staff who are primarily responsible for responding to customer queries and complaints from Virgin Australia customers, and thereafter provide annual compliance training
- 9 Virgin Australia will, from the Commencement Date of this Undertaking, ensure it provides compliance training for new customer-facing staff who are primarily responsible for responding to customer queries and complaints from Virgin Australia customers within 3 months of the commencement of their employment.

Past complaint review

- 10 Virgin Australia will, within 9 months of the Commencement Date of this Undertaking, engage a suitably qualified independent compliance professional or legal practitioner with expertise in

Australian consumer law and the aviation industry (the **Past Complaints Reviewer**), to commence a review of past complaints by:

- (a) subject to paragraph 11, identifying any Relevant Complaints; and
- (b) reassessing each identified Relevant Complaint to determine whether the consumer was entitled to a remedy under the ACL.

11 A Relevant Complaint:

- (a) includes any complaints involving a Virgin Australia Domestic Getaway fare or an International Short Haul fare, recorded in Virgin Australia's customer relationship management system during the period 1 January 2017 to 31 March 2018, where following a delay or cancellation to their flight service:
 - (i) the complaint related to consumer guarantee issues; or
 - (ii) the complaint related to consumer guarantee issues and the complainant requested a remedy and was refused that remedy by Virgin Australia; and
 - (b) does not include complaints that were resolved in a Court or Tribunal.
- 12** The process for identifying Relevant Complaints may include an initial phase of conducting automated searches of Virgin Australia's customer relationship management system that are reasonably and effectively designed to:
- (a) identify for consideration consumer contact records that may relate to a Relevant Complaint; and/or
 - (b) identify for exclusion from consideration consumer contact records that do not relate to a Relevant Complaint.
- 13** Where the Past Complaints Reviewer determines that a consumer was entitled to a remedy under the ACL (which was not offered/provided) (**Relevant Complainant**), Virgin Australia will contact the Relevant Complainant to offer them a remedy, or choice of remedies, in accordance with their rights under the ACL (**Revised Remedy**).
- 14** Virgin Australia will, within 3 months of completion of the Past Complaint Review, provide a report to the ACCC that includes the following information:
- (a) an explanation of the process used to identify Relevant Complaints and Relevant Complainants;
 - (b) the number of Relevant Complaints and Relevant Complainants identified; and
 - (c) a list of the categories of Relevant Complainants, and for each category of Relevant Complainant, a summary of the issues complained of and a list of Revised Remedies offered under each category.
- 15** Virgin Australia will maintain a record of all documentation relating to the review of each Relevant Complaint, including the assessment and recommendation made by the Past Complaints Reviewer, for the Term of this Undertaking (**Past Complaint Review Records**).

Statement

- 16** Virgin Australia will, within 30 days of the Commencement Date of this Undertaking, publish or cause to be published on its Website and mobile site a statement in the form and terms of **Attachment B**, ensuring that:

- (a) the statement is prominently hyperlinked at the top of the homepage of the Website and mobile site; and
- (b) the statement remains on the Website and mobile site for no less than 30 days; and
- (c) the statement shall:
 - (i) have a bold type heading in at least 16 point type and the body of the statement shall be in a type not less than 11 point; and
 - (ii) include the business logo of Virgin Australia at the top.

Annual review

- 17 Virgin Australia will, for the duration of this Undertaking, appoint an appropriately qualified Virgin Australia employee to be responsible for conducting two reviews, at least one year apart, of the commitments made in this Undertaking, and that responsible officer will report to the Group Executive of Virgin Australia on the effectiveness and implementation of the commitments made in this Undertaking.
- 18 As part of their annual review, the officer will conduct an ACL risk review (**Risk Review**), which sets out in the form of a written report:
 - (a) a review of a sample of 20 consumer complaints received and resolved every month in relation to consumer guarantee issues and/or consumers who were seeking a remedy following a delay or cancellation to their flight service. The review will consider the outcomes reached in each of the complaints reviewed, any potential issues with ACL compliance that are identified and the steps taken or that will be taken to address those issues;
 - (b) the relevant areas of Virgin Australia's promotion or supply of flight services in Australia (being the Booking Platforms, *Conditions of Carriage, Fare Rules and Guest Compensation Policy*) (**Relevant Areas**) which are at risk of misrepresenting to consumers that they are not entitled to remedies under the consumer guarantees for flight delays or cancellations (**Identified Risks**);
 - (c) the procedures put in place by Virgin Australia in relation to the Relevant Areas of its promotion or supply of flight services in Australia to minimise the Identified Risks;
 - (d) any material gaps in Virgin Australia's existing procedures for managing the Identified Risks; and
 - (e) recommendations for any action to be taken to address the Identified Risks.
- 19 Virgin Australia will, as soon as reasonably practicable following the Risk Review, implement any reasonable and appropriate recommendations made by the Risk Review.

ACCC enquiries

- 20 For the purposes of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with Virgin Australia, and Virgin Australia will respond to such enquiries within a reasonable period of time.

Attachment B

STATEMENT

[Virgin Australia logo]

VIRGIN AUSTRALIA PROVIDES UNDERTAKING TO ACCC ABOUT CONSUMER GUARANTEES

Since January 2018, Virgin Australia has been engaging with the Australian Competition and Consumer Commission (ACCC) following the ACCC's publication of its *Airlines: Terms and conditions* report on 20 December 2017 (**Report**).

In the Report, the ACCC noted that between 1 January 2016 and 14 December 2017, it had received over 1,400 complaints about airlines, largely in relation to 'no refund' statements, excessive fees for cancelling or changing flights, and issues relating to consumer guarantees.

In Virgin Australia's subsequent engagement with it, the ACCC expressed particular concern that Virgin Australia may have made representations to consumers, and/or gave consumers the overall misleading impression, that for its 'Domestic Getaway' and 'International Short-Haul' fare types:

- refunds were not available at any time; and
- consumers were limited to receiving a remedy only in the form of a credit, and valid only for 12 months.

Virgin Australia has sought to address the ACCC's concerns by:

- voluntarily cooperating with and responding to the ACCC's enquiries;
- enhancing its messaging to consumers by making amendments to its Website, mobile site and mobile app, including its *Fare Rules*, *Conditions of Carriage* and *Guest Compensation Policy*, to address the ACCC's concerns; and
- providing the ACCC with a court enforceable undertaking under section 87B of the *Competition and Consumer Act 2010* that outlines all the additional steps that Virgin Australia will take to address the ACCC's concerns. These steps include a review of past complaints and the potential offer of remedies.

More information about your consumer guarantee rights under the ACL where Virgin Australia has delayed or cancelled your flight can be found at www.virginaustralia.com/au/en/experience/service-experience/guarantees/.

