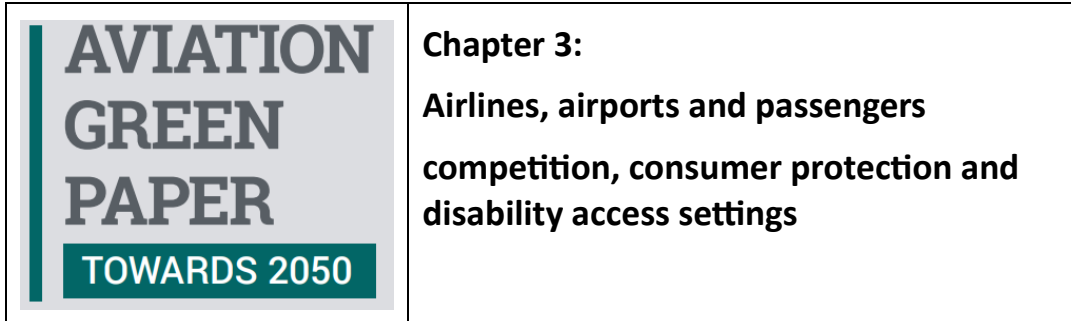


Aviation Green Paper

Submissions by Anthony J Cordato, Cordato Partners Tourism Lawyers

These submissions are limited to the Consumer Protection issues raised in Chapter 3 of the Aviation Green Paper.



What the Green Paper says:

Consumer protection

Key issues

- Consumer complaints in Australia suggest competition is not delivering the outcomes consumers expect.
- Key consumer complaints include flight cancellations, delays and the terms and conditions for refunds and flight credits when these occur.
- This framework needs to consider different international ticketing arrangements.

Facts

The COVID-19 pandemic resulted in widespread flight cancellations, primarily due to health and travel restrictions. Following the pandemic, flight delays and cancellations remain well above long-term trends. This has contributed to a sharp rise in consumer complaints about airlines. Stakeholders have also raised concerns about the terms and conditions for refunds and flight credits for flights cancelled during the COVID-19 pandemic.

Australia has no aviation-specific consumer protection laws. The terms and conditions of carriage which apply to an airline are governed by the *Australian Consumer Law (ACL)*. The ACL contains Consumer Guarantees that services will be rendered *with due care and skill* and that services will be supplied *within a reasonable time*. There must be no unfair contract terms. The ACL is administered primarily by the ACCC, with State Fair Trading Offices also empowered.

In July 2023, on time arrivals were significantly lower than the long-term average (68.2 per cent versus 81.3 per cent) and on time departures were also significantly lower (68.1 per cent versus 82.5 per cent). Cancellations are significantly higher than the long-term average (4 per cent versus 2.1 per cent).

The ACCC does not generally resolve individual consumer complaints about delayed or cancelled flights. It focusses its compliance activities on issues that can result in widespread harm.

Since 2012, the Australian Consumer Advocate (ACA), has handled consumer complaints involving the participant airlines (who fund it), namely Qantas, Jetstar, Regional Express and Virgin Australia. It can only hear complaints, and cannot issue binding decisions against the airlines, such as to pay compensation. It passes on its recommendations for complaint resolution to the airline to implement.

This means the ACA is not a substitute for a low-cost, accessible legal process which can ensure passengers can access fair treatment. Nor does it cover international airlines.

Proposals and requests for views

The Australian Government proposes to act to improve complaint handling processes and strengthen consumer protections in the airline sector. The Australian Government is interested in stakeholder views on options to improve the effectiveness of consumer protection arrangements.

The Australian Government is seeking views on revising the governance arrangements for the Airline Customer Advocate, including expanding its remit to educate customers on their legal entitlements, and working with industry to introduce 'fixed payout' type insurance products which provide more certain compensation arrangements.

The Australian Government is also seeking to understand whether options pursued in other jurisdictions – such as a Customer Rights Charter or a stronger ombudsman model – would deliver benefits to Australia's aviation sector.

Submissions

- Australian airlines do not compensate for flight cancellations and delays (as opposed to re-issuing tickets, refunds and credits).
- Australian airlines will refund fares only if the event causing the delay or cancellation was within their control.
- European and North American (Canadian) airlines must pay compensation in addition to a fare refund or another flight booking for cancellations and for delays of more than 3 hours (defined by time of arrival at the destination), if the flight cancellation or delay was not caused by an extraordinary circumstance. See Annexure for a summary of the provisions.
- The adoption of the European model is not recommended because the refund mechanism is a one size fits all mechanism and is not suited to airline operations which work on refunds and non-cash compensation such as flight credits and 'frequent flier / air miles / loyalty' points or seat / class upgrades.
- The Canadian model is more nuanced than the European model, but it suffers from being a cash compensation model, and is not suited to Australia (in my submission).
- An appropriate consumer compensation framework needs to reflect the operational realities of air travel while providing adequate minimum baseline protections for travellers.
- My submission is that the Canadian model be used as a template, but instead of cash compensation, air fare credits are provided in amounts similar to the Canadian model, which the passenger can elect to convert to points. This could easily fit into the model Australian airlines use.

- The Australian Consumer Advocate (ACA) is an industry body funded by the four major domestic airlines and operates as a clearing house for consumer complaints. It has failed because it cannot make binding decisions, and only passes on its recommendations for complaint resolution to the airline to implement.
- The State Consumer Tribunals have decided that they cannot hear claims against international airlines any longer on the grounds that they have no jurisdiction. Therefore, consumers have recourse only to the Courts which are not equipped to hear these claims due to procedural requirements, court costs being relatively high compared with claim amounts, and the prospect of adverse costs orders.
- Jurisdiction needs to be conferred on the State Consumer Tribunals to hear complaints against both domestic and international airlines.
- The fact that Australia has no aviation-specific consumer protection laws is not an impediment. Airlines must comply with the *Australian Consumer Law* (ACL). The ACL contains Consumer Guarantees that services will be rendered *with due care and skill* and that services will be supplied *within a reasonable time*.
- If the compensation mechanism for cancellations and delays were incorporated into the *Australian Consumer Law*, that would be sufficient, without an aviation specific law. Clear definitions of what events are inside and what are outside the control of the airline are needed.

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ANNEXURE

Airlines in Europe: Compensation for cancellations and delays

European Law (EU Regulation 261/2004) provides financial compensation if these flights are delayed or cancelled:

- If your flight is *within the EU* and is operated either by an EU or a non-EU airline
- If your flight *departs from the EU* to a non-EU country and is operated either by an EU or a non-EU airline
- If your flight *arrives in the EU* from outside the EU and is operated by an EU airline

A flight is *cancelled* if the airline fails to notify the passenger it is cancelled at least 14 days prior to the due departure date, and is treated as *cancelled* when:

- the original flight schedule is abandoned, and the passenger was transferred to another scheduled flight;
- the aircraft took off but, was forced to return to the airport of departure and the passenger was transferred to another flight;
- the aircraft arrived at an airport which was not ticketed as the final destination, and the re-routing was not agreed by the passenger.

A flight is *delayed* when:

- the passenger arrives at the final destination with a delay of more than 3 hours, unless the delay was due to extraordinary circumstances.
- the flight arrives at an airport which is not ticketed as the final destination as a result of an agreed re-routing or is a diversion to another airport that serves the same town, city or region.

The *financial compensation payable* for delayed or cancelled flights is:

- EUR 250 for flight distances of 1,500 km or less
- EUR 400 for flight distances of more than 1,500 km within the EU, and other flights between 1,500 km and 3,500 km
- EUR 600 for flight distances of more than 3,500 km

No compensation is payable if the flight was cancelled or delayed because of an *extraordinary circumstance*:

Examples of events considered by the EU as an *extraordinary circumstance* are:

- air traffic management decisions
- political instability
- adverse weather conditions
- security risks.

Examples of events not considered to be an *extraordinary circumstance* are:

- most technical problems which come to light during aircraft maintenance or are caused by failure to maintain an aircraft
- collision of mobile boarding stairs with an aircraft
- strikes by air carrier staff (internal strike action)

Some events such as a labour strike external to an air carrier that affects the operation of the airline may be considered as an *extraordinary circumstance* if: (i) there is a link between the extraordinary circumstance and the delay or the cancellation; and (ii) the delay or cancellation could not have been avoided even if all reasonable measures had been taken.

There are some circumstances where no compensation is payable:

- No EU compensation is payable if you have already received benefits (compensation, re-routing or other assistance from the airline) for flight related problems for this journey under the relevant law of a non-EU country.
- No EU compensation is payable for delays, cancellations or overbooking for flights *from* the UK *to* the EU by a UK airline. But compensation is payable for flights *from* the EU *to* the or elsewhere by a UK airline.

In addition, airline must provide assistance for delays:

If the flight is delayed for two hours or more **at departure**, the airline must offer the passenger care (meals and refreshments and, if necessary, accommodation).

For more see the Your Europe [Air Passenger Rights](#) webpage.

Airlines in North America: Compensation for cancellations and delays

USA

The United States Department of Transportation (DOT) is responsible for consumer protection. Until recently, the only consumer protection the DOT provided was to fine airlines for “Tarmac Delays”.

Tarmac Delays are situations when passengers on board an aircraft and are either awaiting take off or are on an aircraft which has just landed. The delay must be for 3 hours or more. Common causes are bad weather (thunderstorms, icy surfaces, snow), high traffic, mechanical issues, security threats and delayed crew members.

The DOT has a new policy. This is from [Aviation Consumer Protection Service Dashboard](#):

“The DOT has initiated a new rulemaking to make passenger compensation and amenities mandatory when airlines cause flight disruptions. After a two-year DOT push to improve the passenger experience, the 10 largest airlines now guarantee meals and free rebooking on the same airline and nine guarantee hotel accommodations.

The DOT’s Airline Customer Service Dashboard highlights which airlines currently offer cash compensation, provide travel credits or vouchers, or award frequent flyer miles when they cause flight delays or cancellations.”

Canada

The Canadian Transportation Agency (CTA) has developed the *Air Passenger Protection Regulations* (SOR/2019-150) to set minimum airline obligations toward passengers.

This is from the [CTA Webpage](#)

“Airlines must provide compensation for the inconvenience of flight cancellations and flight delays of 3 hours or more and if the disruption is within their control and not related to safety, and if the airline notified you of the disruption 14 days or less in advance.

Airlines must pay you compensation based on the length of your delay, which is determined by your arrival time at the final destination on your ticket.

Large airlines must pay:

- \$400 if the passenger arrives three or more hours late, but less than six hours
- \$700 if the passenger arrives six or more hours late, but less than nine hours
- \$1,000 if the passenger arrives nine or more hours late

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 (tariff). Air Canada (including Jazz) and WestJet are currently large airlines.

Small airlines must pay:

- \$125 if the passenger arrives three or more hours late, but less than six hours
- \$250 if the passenger arrives six or more hours late, but less than nine hours
- \$500 if the passenger arrives nine or more hours late

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 (tariff). Sunwing Airlines, Air Transat, Porter Swoop and Flair Airlines are currently small airlines.

All compensation amounts are in Canadian dollars.

You have one year to make a compensation claim with the airline in writing. The airline has 30 days to respond by issuing a payment or telling you why it believes compensation is not owed.

If you have already received compensation for the same event under the passenger protection rules of another country, you cannot receive further compensation under these Canadian regulations.

Airlines must offer you compensation in monetary form — for example cash, cheque, or a deposit into your bank account. Airlines can also offer you other forms of compensation such as vouchers or rebates. Other forms of compensation offered must:

- have a higher value than the monetary compensation required, and
- cannot expire.

The airline must tell you in writing the amount of compensation you are owed and the value of any other form of compensation that they offer. You always have the right to choose between monetary compensation and other form(s) offered by the airline. If you choose another form, you must confirm in writing that you know that monetary compensation is available.”