

Submission to Australian 2023 Aviation Green Paper

This submission addresses three areas:

- Airline consumer protection,
- Domestic airline competition, and
- International aviation market.

1. Airline Consumer Protection.

Australia

Australian consumer protection for airline passengers lags much of the world, and relies too heavily on general Australian Consumer Law.

For passengers in Australia, legislated protections are found in the broader consumer law, and in the case of international aviation, in some limited international treaties. ‘Consumer Guarantees’¹ provided in Australian Consumer Law provide only that services must be delivered within the arguably vague framework of a ‘reasonable time’.

This “Consumer Guarantee” on timely delivery of the service is too vague, and not sufficiently specific to deal with disrupted air travel. Airline customers have a reasonable expectation of:

- arriving at their destination,
- arriving at (or close to) the time published by the airline in its schedule at the time the reservation was paid and ticketed, or
- arriving at some amended time that was advised far enough in advance of travel to allow related reservations and bookings to be amended.

The options that a passenger has to adapt their wider travel plans diminish as the departure date approaches. Within the final days before travel, hotel cancellation deadlines pass, and alternative travel or connecting flight options are frequently sold out or priced at much higher ‘last minute demand’ levels.

Disrupted travel, whether through delays, cancellations, or denied boardings has impacts that go beyond the specific flight issue. A delay of more than a few hours may render an entire journey pointless if the meeting or event that the traveller was flying to has already occurred before the delayed or rebooked flight will arrive. Late arrival leads to missed business meetings and family

¹ <https://www.accc.gov.au/about-us/publications/consumer-guarantees-a-guide-for-businesses-and-legal-practitioners>

events. More complexity arises when the flight is part of a longer journey, and missed connecting flights, unused prepaid accommodation, or missed cruise departures flow from the lack of timely travel.

While passengers should build some flexibility into flight connectivity, regulations in many developed economies (e.g. European Union², Canada) make it clear the airline has obligations and responsibilities in the event of delays, cancellations and denied boardings. The absence of such protections in Australia sees events such as Bonza's cancellation of all of scheduled services for December 2023 between Darwin and the Gold Coast, just hours before the departure of the first flight on December 1st 2023. In Europe or Canada this would have triggered obligations to move passengers on other routes to get them to their destination, and would have triggered compensation. In Australia it has left passengers delayed, significantly out of pocket finding alternative flights, or with travel totally abandoned and deposits lost.

Delays in having a wet leased aircraft from Canadian carrier Flair (owned by Bonza's owners 777 Partners) were not a last minute engineering or weather problem, but a completely foreseeable administrative issue that could and should have been communicated to customers well in advance of travel date. Instead disrupted passengers were left with:

"As we've previously shared our Gold Coast base is due to be operated by our partner Flair in the short term whilst we recruit Aussie crew for our third base," Bonza CEO Tim Jordan said.

*"This arrangement brings with it separate regulatory approval process with CASA [the Civil Aviation Safety Authority]. That process is progressing but is not yet complete and as a result, we've had to make the regrettable decision to defer some flights between Gold Coast and Darwin in the coming weeks."*³

More established Australian air carriers provide some guidance on what may be offered to customers who are denied boarding or whose flights are delayed or cancelled. Qantas for example offers the following advice:

Customers are entitled to a refund in the following situations:

- *If we cancel your flight and we cannot offer you suitable alternative arrangements.*
- *If we delay your flight to the extent that you have to cancel your travel.*
- *If we make a significant change to the scheduled flight time and we are unable to book you on an alternative flight that is acceptable to you.*
- *If we cause you to miss a connecting Qantas flight on which you have a confirmed reservation.*
- *If we are unable to carry you and you have a confirmed reservation.*

² Regulation EC 261/2004 of the European Parliament and of the Council of the European Union.

³ <https://www.news.com.au/travel/travel-updates/incidents/customer-fury-as-bonza-cancels-darwin-to-gold-coast-flights-for-december/news-story/e967f873ab60257f6baf72b910c0c58f>

Other than the unambiguous event of denied boarding or a missed connection to another Qantas flight (note not a connection to another carrier), the Qantas conditions use vague descriptions of timeliness.

Europe EC261/2004⁴

By comparison with Australia, the European Union Compensation requirements are detailed, specific, and mandated. They have been in place since legislation in 2004. The regulations give agency in the situation to the customer, including an option of full fare refund AND to be returned to the start point of the journey if the delay or cancellation makes continuation of the journey pointless.

Rates of compensation vary by flight distance. For example, for a cancelled long-haul flight from Europe passengers are entitled to:

compensation amounting to EUR600 (GBP520), except when any of the circumstances set out in the Note at the end of this section on Cancellation apply to you. And the choice between:

- (i) reimbursement* within 7 days of the full cost of your ticket, at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to your original travel plan, together with, when relevant, a return flight to the first point of departure on your ticket, at the earliest opportunity; or*
- (ii) re-routing, under comparable transport conditions, to your final destination[^], at the earliest opportunity; or*
- (iii) re-routing, under comparable transport conditions, to your final destination[^] at a later date at your convenience, subject to availability of seats.*

Assistance: free of charge:

(a) meals and refreshments in a reasonable relation to the waiting time; and

(b) two telephone calls, telex or fax message, or e-mails. In the event of re-routing in connection with your cancelled flight, if the expected time of departure of the new flight is at least the day after the cancelled flight, we will also offer you:

(c) hotel accommodation in cases: – where a stay of one or more nights becomes necessary; or – where a stay additional to that intended by you becomes necessary; and

(d) transport between the airport and place of accommodation (hotel or other).

⁴ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement

Airlines can avoid these compensation costs where passengers are advised in advance and provisions are made to minimize inconvenience. Compensation can be reduced where the airline is able to offer an alternative flight under comparable transport conditions, the arrival time of which does not exceed the original scheduled arrival time by four hours or more. Compensation is also not paid where the airline has informed customers of the cancellation 14 days or more before the scheduled time of departure.

As the disruption is advised closer to departure, the provisions to avoid compensation tighten. Where a cancellation occurs between 7-13 days before the scheduled time of departure, the airline must offer an alternative flight which allows departure no more than two hours before the scheduled time of departure and arrives at the final destination less than four hours after the scheduled arrival time; or where the passenger is informed of the cancellation less than 7 days before the scheduled time of departure. The airline must offer an alternative flight which allows departure no more than one hour before the scheduled time of departure and reach the final destination less than two hours after the scheduled arrival time.

This approach is designed to stop precisely the absolute last minute disruption like that caused by Bonza in December 2023, by allowing airlines to avoid compensation costs through timely advice of cancellations and schedule changes.

Canadian Consumer Protection

The Canadian market more closely resembles Australia, and the Canadian consumer protection model reflects the lower population density and presence of smaller regional airlines. Requirements are different for smaller airlines, carrying fewer than 2 million passengers per year than they are for the larger carriers. The requirements also recognize that many airlines have commercial partners who can less expensively resolve delay and cancellation problems.

In Canada - an airline operating a flight that is delayed or cancelled for reasons within its control must communicate key information and, when applicable, do the following for the affected passengers:

- Provide assistance to the passenger,
- Offer alternate travel arrangements or a refund, and
- Pay compensation for inconvenience caused.

Large Airlines⁵

Large airlines must book the passenger on the next available flight that is operated by them, or an airline with which they have a commercial agreement. The new flight:

- must take any reasonable route out of the same airport to the passenger's destination indicated on their original ticket; and

⁵ <https://otc-cta.gc.ca/eng/publication/flight-delays-and-cancellations-a-guide>

- must depart within nine hours of the departure time indicated on the passenger's original ticket.

If the airline cannot provide a reservation on a flight which departs within nine hours, they must book the passenger, as soon as possible, on a flight operated by any airline. The new flight:

- must take any reasonable route out of the same airport to the passenger's destination indicated on their original ticket. This may mean buying a ticket for the passenger on a competing airline; and,
- must depart within 48 hours of the departure time indicated on the passenger's original ticket.

If the airline cannot provide a reservation on a flight which departs within 48 hours of the original departure time, the airline must book the passenger as soon as possible, on a flight operated by any airline, from a nearby airport. They will also have to transport the passenger to that airport, free of charge. The new flight:

- must take any reasonable route out of the nearby airport to the passenger's destination indicated on their original ticket.

In summary, while the European provisions may be excessive for the much smaller Australian aviation market, the actions of Bonza in December 2023 underline only too clearly the need for formalized and specific protections for Australian aviation consumers. The Canadian model provides a good example.

2. International Aviation

Australian governments have been proposing more open and free international markets for over 20 years. Former Deputy Prime Minister John Anderson set out an objective for a liberalized international market in 2002. Over twenty years later, open skies agreements are widespread, but the Australian international aviation market has seen little progress.⁶

Apart from some small freight carriers, international operations by Australian carriers are limited to Qantas and Virgin Australia. The retirement of widebody aircraft from the Virgin Australia fleet during its bankruptcy restructure reduced that airline's international scope to B737 operations to New Zealand, Bali, the Pacific Islands, and a single daily service to Japan from Cairns.

While the Qantas group fleet includes aircraft at both Qantas and Jetstar capable of long-haul operations, the group has progressively retreated from Continental Europe (all but seasonal Rome flights), serves only Shanghai in China, scaled back services to Tokyo to A330 aircraft, and does not serve a number of large Asian markets including Malaysia, Taiwan, and Vietnam.

⁶ <https://theconversation.com/under-open-skies-the-market-not-the-minister-would-decide-how-often-airlines-could-fly-into-australia-213214>

The limited participation by Australian carriers in international markets leaves Australian travellers, as well as inbound tourists, international students, and business visitors increasingly reliant on capacity operated by, and competition generated by, foreign carriers. As Australia-Europe services have evolved from the end point carriers to the intermediate hub operators, some previously negotiated bilateral capacity (such as Australia-Germany) now lies dormant from both ends of the route, while growth on the new routes via the Middle East faces capacity constraints. The current reality of travel to Europe from Australia, is that the most likely intermediate points are Dubai, Singapore, and Qatar, while Vietnam, China, and Turkiye are the emerging intermediate points.

As the 2023 rejection of an application by the Government of Qatar for an increase in capacity between the two countries demonstrated, Australian travellers cannot rely on the Australian Government to assure the growth of capacity through the preferred intermediate ports, even to large markets like Europe that are almost devoid of service by Australian airlines and see little prospect for a return of substantial capacity by any end point airline.

As noted in Douglas and Sarram (2023)⁷, Australia lags far behind the United States, Canada, Singapore, or New Zealand in liberalising agreements. The negative impact on the welfare of Australians from the current policy position is measured in higher outbound airfares, lower tourist arrivals, higher business input costs, and reduced employment. Far from protecting Australian jobs, restricting international capacity to major markets in Europe or Asia reduces opportunities for employment in the broad range of industries where growth is driven by passenger or freight capacity.

3. Domestic Aviation

The Australian domestic market sees very limited competitive tension. Capital city routes are served by the Qantas Group, Virgin Australia and a limited presence from Rex. The largest operators in the important FIFO include subsidiaries of these three airlines, as well as Alliance. Alliance in turn operates a range of regional jet services for the Qantas Group. The remaining carriers such as Air North or Skippers Aviation hold a small share of the total domestic market in limited geographic regions.

Lack of Competition on Main Domestic Routes

Examples of busy sectors in the Asian region with similar block times to the main Australian East Coast city pairs (MEL-SYD-BNE) include Singapore (SIN) to Kuala Lumpur (KUL) and Tokyo (NRT/HND) to Osaka (KIX/ITM/UKB). While the major Australian routes have only Qantas subsidiary Jetstar offering Low Cost (LCC) model competition, SIN-KUL is served by low-cost operators Scoot, Jetstar Asia, Air Asia, and Batik (Malindo) Air as well as full-service Malaysia Airlines and Singapore Airlines. On the Tokyo-Osaka routes, services are offered by

⁷ Douglas, I and Sarram, S. Under 'open skies' the market, not the minister, would decide how often airlines could fly into Australia, *The Conversation*, September 12th, 2023.

LCCs Peach, Jetstar Japan, Starflyer and Skymark, as well as full-service carriers Japan Airlines and ANA. Simpleflying reports that LCCs now provide more than 50% of the seat capacity in the Asia-Pacific region - a growth from only 14% in 2013.⁸ Since the demise of Tiger Airways, Australian domestic LCC capacity has been left to Jetstar, and new entrant Bonza which is not serving major city pairs.

Concerns have been raised about slot hoarding.

Sydney Airport capacity is constrained. Allegations have been made that capacity issues in Sydney are exacerbated by slot hoarding by incumbents, and that this hoarding makes new carrier market entry difficult. The BITRE domestic data from October 2023 shows a cancellation rate that lends some credence to these slot hoarding claims. Despite 10% of the flights between Sydney and Melbourne vv being cancelled in October, on time performance for the month was extremely poor. At 66%, Qantas had an on-time performance worse than the worst performing ultra-low-cost airline in the USA in the lead up to the Thanksgiving holiday⁹. Two issues emerge:

- The cancellations were heavily focused on the most slot constrained city pair, and
- the very poor on time performance, even after the cancellations, suggests that the major carriers on that route had insufficient aircraft capacity to operate their full published schedules.

Cabotage is impractical.

Cabotage is proposed from time to time as a solution to the lack of competition but has very limited real potential. Most foreign carriers operating into Australia fly widebody aircraft that are optimised for long-haul operations, and have operating costs not suited to short haul routes. The aircraft are fitted with large premium cabins, and in many cases would have completed a long inbound sector, requiring a crew change at the Australian gateway.

Even where crewing could be managed cost effectively, few domestic markets are large enough to justify the use of a widebody aircraft, and serving a market with a large block of seats at a single departure time is relatively unattractive to consumers. A carrier considering cabotage flying would operate to few destinations, and the cabotage flights would have the added inconvenience of operating out of international terminals at the gateway city. Further complications include the need to operate to airports with runways and terminals capable of accepting large widebodies, staffed for processing international arrivals, and equipped with the ground handling and engineering resources required to turn the large aircraft around.

A further disincentive for the introduction of cabotage operations is the prospect of breaking existing hub connections for the current long-haul services. Unless the aircraft has an extended

⁸ Seet, C. (2023) Explained: The Landscape of Asia's Low-Cost Carrier Sector. Simpleflying.com April 10, 2023

⁹ <https://www.forbes.com/sites/marisagarcia/2023/11/29/90-of-us-holiday-flights-should-be-on-time/?sh=c878eee4e3bb>

<https://simpleflying.com/us-airlines-thanksgiving-performance-analyzed/>

turnaround at the Australian gateway, the cabotage operation requires the long-haul flights to be retimed.

Air New Zealand arguably has the best prospect of flying cabotage sectors, with its frequent trans-Tasman narrow body operations, but it has never taken up the opportunity to fly domestically in Australia.

Fares should be benchmarked against Asia-Pacific markets.

Comparisons with 1980s pre-deregulation fares and conditions are not relevant for current market analysis. Since that time massive changes have happened to alter airline cost structures. Current narrow body aircraft burn less than half the fuel per seat/kilometre of the B727-200s in use at that time. Distribution costs have changed radically, with online direct bookings completed by the passenger replacing travel agent commissions and large call centres to process reservations. Advanced revenue management systems have lifted average seat factors by twenty points, and dynamic pricing tools have replaced standard Economy and First-Class fares that were signed off regularly by governments.

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