

ACCC Increases Enforcement of Consumer Guarantees Against Airlines

IN SHORT

The Situation: Following consumer complaints, the Australian Competition and Consumer Regulator ("ACCC") has released a report reminding airlines of obligations when dealing with the flying public.

Looking Ahead: The ACCC has indicated that this is only the first step, and that it will seek to further engage with the airlines in 2018 to discuss its "expectations for change," to include amending their practices and possibly providing refunds.

In December 2017 the ACCC, in response to complaints in the Australian airline industry, took the significant step of releasing a report on airline business practices: "[Airlines: Terms and Conditions](#)" ("Report"). The Report highlights the most common issues arising in the Australian airline industry when it interacts with the flying public under the Australian Consumer Law ("ACL"), in particular, in relation to statutory consumer guarantees. The Report addresses conduct of all airlines operating in Australia (including both domestic and international carriers, but also carriers that offer services to Australian consumers in Australia, for example under a code share arrangement).



The Report indicates that, absent change in airline policies, enforcement action by the ACCC is a real possibility, including actions involving individual travelers.



The ACCC has indicated that it has found that many of the airlines' policies may not comply with their obligations under the ACL, including in relation to consumer guarantees and warranties and the unfair contracts regime. The Report has identified significant concerns with practices of the Australian airline industry in the following areas:

- Statements on airlines' websites that certain economy fares are non-refundable.
- Excessive fees for cancellation and charges.
- Consumer Guarantees in relation to flight changes or cancellations.

The Report indicates that, absent change in airline policies, enforcement action by the ACCC is a real possibility, including actions involving individual travelers. Consumers are also able to bring private actions for contraventions of the ACL, although given the ACCC's focus, noncompliance with the ACL by an airline is increasingly likely to attract unwelcome regulator attention.

Earlier in 2017, an ACCC action against Jetstar Airways and Virgin Australia Airlines led to the two airlines paying [penalties of \\$545,000 and \\$200,000](#) respectively for breaches of the ACL. Specifically, the ACCC alleged the airlines engaged in "drip pricing," in which they drew customers into an online purchase process with a headline price, failing to provide adequate disclosure of additional fees and charges that would be incrementally added during the booking process.

The release of the Report is in line with the [ACCC's previous statements](#) that it is currently prioritizing consumer guarantees, as part of its enforcement priorities for 2017. The new car retailing industry has similarly been the subject of an industry-specific report, and no doubt this industry also will face increased enforcement action in the event of continuing alleged contraventions of the ACL. For airlines and associated businesses, the Report, the ACCC's previous statements, and its drip pricing actions, highlight that the airline industry will remain on the ACCC's radar in 2018. The ACCC has also indicated that it may also take the unusual step of pursuing matters on behalf of individual consumers where steps to correct conduct are not taken by the airlines. Accordingly, airlines should be aware that they may need to engage with the ACCC in the future in relation to their consumer contracts. Conduct that airlines should review includes:

- **Policies related to delays and cancellations.** Airlines need to be sure that their policies properly reflect their obligations under the ACL and that refunds (or other remedies) are provided in accordance with those obligations. Instances in which the airline may have an obligation to consumers arising under the ACL include flight delays, flight changes, and flight cancellations that occur as a result of the actions (or inactions) of the airline.

- **Refund payments.** The ACCC has commented that flight credits or vouchers are not in its opinion equivalent to a refund as a remedy pursuant to the ACL.
- **Policies related to refunds.** Statements that consumers are not entitled to a refund may in fact contravene the ACL as it may provide the consumer with the impression that there is no right to a refund in any circumstances despite the fact that this is a right that the airline cannot restrict, alter, or remove. The consumer guarantees provisions in the ACL may give rise to a right of a refund in certain circumstances, such as where the airline cancels the flight due to too few bookings. The ACCC notes that it is unlikely to be sufficient for the Airline's Conditions of Carriage to clarify the airlines position on the application of the consumer guarantees under the ACL.
- **Change or cancellation fees.** Change or cancellation fees that may be characterized as excessive are at risk of contravening the unfair contracts provisions. To assess a fee as excessive, the ACCC notes that factors such as how far in advance the ticket was acquired, whether the fee represents a significant portion of the original fare, unrelated to costs, or if the change or cancellation is as a result of the actions of the carrier will be relevant.

The ACCC recently has focused on the enforcement of statutory guarantees generally and the unfair contracts regime. Its new Report and enforcement policies now indicate an increasing focus on the practices of the Australian airline industry.

TWO KEY TAKEAWAYS

1. Airline policies related to delays and cancellations, refunds, and change and cancellation fees are likely to face scrutiny.
2. To avoid ACCC enforcement actions, airlines should ensure that their consumer guarantee policies comply with the ACL.

CONTACTS



Nicolas Taylor
Sydney



Prudence J. Smith
Sydney



Bruce J. McDonald
Houston/Washington



Yizhe Zhang
Beijing/San Francisco

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[Amendments to Australian Antitrust Regime Take Effect](#)



[Terms and Conditions Land Online Trader in Difficulty in Australia](#)



[ACCC Tests Extension of Unfair Contract Terms Regime to Australian Small Businesses](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113