

ACCC 'TAKES OFF' AGAINST AIRLINE'S NO REFUND POLICIES: PASSENGER TRANSPORT, HOSPITALITY & LEISURE PROVIDERS BEWARE

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Antitrust, Competition and Trade Regulation Alert

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IN BRIEF

Airline operators Qantas, Jetstar, Tigerair and Virgin Australia have each recently admitted that they may have breached the Australian Consumer Law (ACL) by misleading consumers about their rights and remedies.

Each of the four airline's made statements on their booking platforms that flights were "non-refundable" or that passengers were required to pay an extra fee in order to get a refund.

Each airline provided an Undertaking to the Australian Competition and Consumer Commission (ACCC), that it will review its refund policies, websites and booking systems to ensure legal compliance with the ACL.

Further, Jetstar's statements about consumer rights under the ACL also led to the ACCC commencing legal court action against Jetstar. The parties have agreed that Jetstar will be subject to a penalty of AUD1.95 million.

These actions serve as a timely reminder that:

- the ACCC's enforcement of the consumer guarantee provisions in the ACL is not just against suppliers of goods - it equally applies to suppliers of services
- suppliers of services need to examine their terms and conditions, as well as other statements on their websites and promotional materials to ensure compliance with the ACL - or risk enforcement action by the ACCC.

BACKGROUND

Since 2011, the ACL provided Australian consumers with "consumer guarantees", a guaranteed level of protection for goods and services. Under this regime, service providers are required to render services in accordance with specified consumer guarantees. Further details about the consumer law regime are provided below.

In 2017, with a focus on the airline industry, the ACCC investigated numerous complaints about consumer guarantees and rights and published its report - *Airline: Terms and Conditions Report*.

ACCC'S STANCE ON AIRLINE CONDUCT

Consumers may have been misled about their rights under the ACL when they purchased airline tickets via Jetstar, Qantas, Tigerair and Virgin Australia's websites, mobile sites or its mobile apps.

Specifically, the table below identifies the types of conduct engaged by the airlines which the ACCC deemed to be of concern:

AIRLINE	CONDUCT	ACCC'S COMMENTS
JETSTAR	<p>On its booking platforms, Jetstar's "Economy Starter" fares and "Plus Bundle" fares were not refundable.</p> <p>Consumers were only entitled to refunds on fares if they purchased a flight bundle at additional costs.</p> <p>A 'flight bundle' means 'extras' in addition to a seat and carry-on baggage, which includes items such as food, in-flight entertainment and flight flexibility.</p>	<p>A service provider cannot imply or state refunds are not available in circumstances where they may be available under the ACL.</p>
QANTAS	<p>In relation to its 'Red e-deal' fare types, refunds were not available.</p>	
JETSTAR	<p>Jetstar limited its liability to either supplying the services again or paying the cost of having the services supplied again, at its discretion.</p>	<p>Service providers are not entitled to limit or exclude remedies under the ACL.</p> <p>Goods or services that fail to meet the consumer guarantees as listed under Part 3-2 of the ACL are subject to a variety of legal remedies under the ACL.</p>
JETSTAR & QANTAS	<p>Jetstar and Qantas made representations which stated that their Flight Services were not subject to statutory guarantees or warranties.</p>	<p>Consumer guarantees under Part 3-2 of the ACL cannot be excluded, restricted or modified by contract.</p>
TIGERAIR	<p>On its Fee and Charges web page, and in its Customer Compensation Policy for 'Disruptions – within 72 hours of departure', Tigerair expressly or impliedly stated that:</p> <p>a) refunds would only be provided if consumers paid a</p>	<p>Consumers are entitled to:</p> <p>a) a remedy of refund of service or resupply per the consumer guarantee provisions</p>

AUSTRALIA	"refund admin fee" b) consumers were limited to receiving a remedy only in the form of a credit, and valid for 6 months.	b) recover reasonably foreseeable damages incurred as a result of failure to comply with consumer guarantees in certain circumstances
VIRGIN AUSTRALIA AIRLINES	In its Fare Rules, relating to 'Domestic Getaway' and 'International Short-Haul' fare types, and its Guest Compensation Policy for 'Domestic and International Short Haul': a) refunds were not available at any time b) consumers were limited to receiving a remedy only in the form of a credit, and valid only for 12 months.	

UNDERTAKINGS PROVIDED BY EACH AIRLINE

In response to the ACCC's findings, each airline agreed to conduct a comprehensive review of their policies, compliance programs, web pages and booking systems to ensure compliance with the ACL, update its internal policies, modify its online websites and review its staff training policies.

JETSTAR'S AUD1.95 MILLION PENALTY

Taking further steps, in December 2018, the ACCC instituted legal proceedings in the Federal Court of Australia against Jetstar for making false and misleading representations to its consumers.

Jetstar admitted to these contraventions and both parties agreed to a penalty of AUD1.95 million and an additional contribution to the ACCC's costs.

The Court will review the proposed penalties and determine whether these orders are appropriate. The first case management hearing is listed on 23 January 2019.

BUSINESS IMPLICATIONS

The ACCC's legal proceeding against Jetstar and its success in securing court-enforceable undertakings from all four Australian airlines reiterates the importance for businesses, and in particular, suppliers of services, to comply with the ACL, including the consumer guarantees.

While many of the ACCC's prosecutions relating to consumer guarantees have been against suppliers of goods, there are equivalent guarantees for consumers of services.

"No-refunds" (in any circumstances) were a key feature of airlines' low cost business model or lower cost fares of full service airlines - this was one of the key focuses of the ACCC investigation and court action against Jetstar.

A review of the airline's most recent online terms and conditions demonstrates that there have been significant changes, including the creation of specific web pages which address consumer rights under the ACL.

For businesses, this serves as a stark reminder that the ACL has overwhelming reach with its investigative powers and is prepared to use these and its enforcement powers against an individual entity or across an industry that suffers from significant complaints.

It would be prudent for all businesses, particularly service providers in similar or related industries such as land transport, hospitality and leisure sectors to review their terms and conditions for compliance - and to limit the risk of complaints that would "attract" the attention of the ACCC.

THE OPERATION OF CONSUMER GUARANTEES TO SERVICE PROVIDERS

Businesses sometimes ignore that the ACL gives consumers guarantees no matter the contractual position, often relying upon their terms and conditions, policies or statements to consumers, to limit and in some cases exclude liability in circumstances where goods or services do not meet consumer expectations.

However, irrespective of contractual terms or advice to consumers, it is important for businesses to recognise that the ACL, automatically applies if your business:

- supplies a service costing less than AUD40,000 or
- supplies a service costing more than AUD40,000, that is ordinarily acquired for a personal, domestic or household purpose.

In Australia, consumers are afforded with the guarantee that businesses will provide services:

- with due care and skill
- which are fit for any specified purpose
- within a reasonable time (when no time is specified).

Businesses must use an acceptable level of skill or technical knowledge and take all necessary care to avoid loss or damage when providing a service - and where they are made aware of the specific need of the customer, the service must be fit for that specified purpose.

Consumers have the right to a remedy if services do not meet a consumer guarantee. Businesses have the obligation to fix the "wrong," and this would involve fixing the problem, and/or issuing a refund. Businesses would be liable to pay consumers not only a refund for the service, but for any consequential or associated loss or damage flowing from the failure to meet the consumer guarantee.

For example, a hotel service provider that fails to provide a service of acceptable quality may be liable to provide a refund. However, if that consumer moves and instead chooses to stay the night at another hotel of comparable quality, that hotel service provider may be required to compensate the consumer for the cost of that night, including transportation costs in moving from the hotel.

RISK MANAGEMENT

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