

Aviation Customer Rights Charter

Submission to the Department of Infrastructure,
Transport, Regional Development, Communications
and the Arts, Australian Government

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Who we are

The **Australian Lawyers Alliance (ALA)** is a national association of lawyers, academics and other professionals dedicated to protecting and promoting access to justice and equality before the law for all individuals.

Our members and staff advocate for reforms to legislation, regulations and statutory schemes to achieve fair outcomes for those who have been injured, abused or discriminated against, as well as for those seeking to appeal administrative decisions.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Our head office is located on the land of the Gadigal people of the Eora Nation. As a national organisation, the ALA acknowledges the Traditional Owners and Custodians of the lands on which our members and staff work as the First Peoples of this country.

More information about the ALA is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts ('Department') on the Aviation Customer Rights Charter ('Charter').
2. Since the COVID-19 pandemic, the ALA has been a vocal advocate of consumer protection reform in the aviation industry in order to incentivise airlines to respect passengers' consumer rights and to make airlines accountable to passengers when things go wrong.
3. The ALA has previously identified the lack of a single framework setting out passengers' rights to a refund or compensation as a weakness of Australian law. The result is that passengers' rights are found in a complex web of legislation which is hard for consumers to understand. When it comes to the *Australian Consumer Law (ACL)* in particular, the ALA has identified that there is a significant gap in the *ACL* when it comes to air passengers.
4. Therefore, in our submission on the Aviation Green Paper in 2023,² the ALA called for the Federal Government to create new aviation-specific consumer protection laws in the form of a Passenger Bill of Rights, rather than extending or amending existing legislation, which is already complex.
5. Given the gaps and complexities in the *ACL*, the ALA maintains that new aviation-specific consumer protection laws in the form of a Passenger Bill of Rights would have been preferable to the decision to develop the Charter that complements existing passenger rights under the *ACL*. Nevertheless, the ALA supports the improvement that a well-drafted Charter will bring to Australian air passengers.
6. However, the ALA considers that it is imperative for a variety of legal issues to be considered and addressed when further developing the Charter, in order for it to be a useful resource for passengers, rather than adding to the complexity of the landscape.
7. ALA members are committed to strengthening rights and protections for Australian aviation customers. Australian passengers urgently need certainty and an overhaul of their rights so that they will no longer be trailing behind the European Union, the United Kingdom, Canada,

² See: Australian Lawyers Alliance, Submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Aviation Green Paper* (29 November 2023).

Brazil, Turkey, India and countless other jurisdictions who have flight delay compensation schemes.

8. The ALA's submission focuses on:
 - a. the need to see the final proposed model of the Aviation Ombuds Scheme;
 - b. matters from the Charter that require clarification;
 - c. what is missing from the Charter; and
 - d. the application of the Charter to real-world scenarios.

The need to see the final proposed model of the Aviation Ombuds Scheme

9. The ALA considers that it is important for stakeholders to understand what the final proposed model of the Aviation Ombuds Scheme ('Scheme') looks like, so that stakeholders can fully understand how the Charter will function within the Scheme.
10. This includes, for example, what airlines and airports will be bound by the Charter, which itself depends on who are members of the Scheme.
11. Seeing the final proposed model of the Scheme would also assist stakeholders in understanding how the Charter will be enforced. The ALA is concerned that there will be so many exemptions, barriers or processes involved in aviation customers activating their rights under the Charter and through the Scheme, such that aviation customers will end up making claims through court processes instead, or will feel too weary and will abandon the complaints process entirely.

Matters requiring clarification

12. ALA members have identified the following matters from and relating to the Charter that require clarification from the Department.

Coverage for certain aviation customers

13. The ALA notes the following from the Department's website:³

The Charter will complement, not replace, consumers' existing rights under Australian Consumer Law (ACL) and does not seek to interpret the ACL.

14. We are concerned that it is unclear who the Charter will cover, and that – under strict interpretation of the *ACL* – not all air passengers will be covered by the Charter.

15. The ALA submits that the sole criteria for eligibility to have rights under the Charter (and, by extension, to make complaints under the Scheme) should be that the consumer is an air passenger. We contend that any passenger, regardless of the purpose of their travel or who bought their ticket (such as an employer or family member), should have rights under the Charter and also through the Scheme.

16. We submit that the Charter is needed for accountability to airlines and incentives for them to operate consistently with their legal obligations. An exemption for any sized businesses and not-for-profit organisations which would force their affected passengers to go to court for breaches of the section 62 *ACL* guarantee on timeliness (as an example) would undermine the aim of incentivising airlines and airports to operate consistently with legislative obligations and would defeat the objects of the Charter and the Scheme.

17. There should be no distinction between passengers travelling for business and passengers travelling for personal reasons. Similarly, there should be no distinction between passengers travelling on a ticket booked by their employer and passengers travelling on a ticket purchased directly. To illustrate this, the ALA contends that when the last flight of the day is cancelled from a regional airport, passengers who are travelling for work and had their ticket paid for by their employer are equally inconvenienced as passengers travelling on holiday, to attend a medical appointment or to visit family and friends.

18. All passengers should have rights under the Charter about the timeliness of the communication of the cancellation, the care standards provided if passengers were delayed

³ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Aviation Customer Rights Charter* (Web Page) <www.infrastructure.gov.au/have-your-say/aviation-customer-rights-charter>.

at the airport before the flight was ultimately cancelled and should have the inconvenience compensated in a uniform and transparent way.

19. The ALA notes that the EU261 scheme gives passengers delay compensation regardless of the reason for travel.⁴ If a passenger is travelling for work and had the ticket paid for by their employer, it is the individual who is inconvenienced and receives compensation not the person or entity that purchased the ticket.
20. We also note the Montreal Convention does not distinguish between passenger types for damages eligibility.

The provision of information by airlines and airports

21. Proposed Right 2 in the Charter intends “to strengthen the expectation that airports and airlines will provide the best possible information and service to customers”.⁵
22. In addition to the ALA contending that this should be a requirement on airports and airlines (not merely an “expectation”), ALA members are also seeking clarification from the Department about which airports and airlines will be bound by the Charter.
23. The Charter, in the ALA’s view, should apply to the following airports and airlines:
 - all commercial airports operating on Australian territory;
 - all airlines operating domestic routes;
 - all international airlines for their conduct within Australian airspace;
 - all Australian airlines wherever they are operating around the world; and
 - all international flights flying to and from airports in Australia, operated by any airline (which will ensure that all Montreal Convention flights are covered).

⁴ Regulation (EC) No 261/2004 of the European Parliament and of the Council (11 February 2004).

⁵ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Aviation Customer Rights Charter* (Consultation Paper, December 2024) 9.

The right to prompt and fair remedies and support during and after cancellations, delays and disruptions

24. The ALA is seeking clarification from the Department as to how Proposed Right 3 will interact with Montreal Convention rights and *ACL* rights, especially with regards to damage and loss, including monetary losses and emotional losses.

25. The ALA submits that passengers should have the right under the Charter to the following specific remedies (remedies which airlines and airports should be directed to make by the Aviation Industry Ombudsperson), with this clarification in the Charter being crucial because neither the Montreal Convention nor the *ACL* reference what constitutes “loss” or “damage”:

- cash refunds in respect of unused ticket(s);
- monetary losses flowing from flight cancellations or delays, including but not limited to hotel accommodation, pre-booked tours, pre-booked concerts or sports game tickets, taxis and parking;⁶ and
- emotional loss for inconvenience, disappointment and distress. If this remedy is not specifically included in the Charter, there will be significant ambiguity for the Aviation Industry Ombudsperson’s powers under existing legislation. This is because disappointment and distress is a recoverable head of loss in Australia when the purpose of the contract is enjoyment and relaxation.⁷ The ambiguity results from the purpose of a flight ticket arguably being to get from A to B without an enjoyment or relaxation component. However, to complicate matters further, Australian law does also recognise the need to passengers to be compensated for breach of consumer rights, such as the recent Qantas “ghost flights” settlement with the ACCC which compensated \$225 to domestic ticketholders and \$450 to international ticketholders.⁸ Clarifying this right to compensation for inconvenience,

⁶ For example, in the incident of Qantas cancelling flights from Adelaide to Sydney, affecting Port Adelaide Football Clubs fans from watching their team in the AFL preliminary final, aviation customers should be compensated for unusable match tickets and hotels and emotional loss as well as unused flight tickets parking: Sowaibah Hanifie, ‘Port Adelaide Football Clubs fans furious after \$1000 Qantas flights to Sydney’s game cancelled’, *7 News* (online, 20 September 2024) <<https://7news.com.au/news/port-adelaide-football-clubs-fans-furious-after-1000-qantas-flights-to-sydneys-game-cancelled-c-16120820>>.

⁷ *Jarvis v Swans Tours Ltd* [1972] EWCA 8; *Baltic Shipping Co v Dillon* [1993] HCA 4; *Moore v Scenic Tours Pty Ltd* [2020] HCA 17.

⁸ Australian Competition and Consumer Commission, ‘Qantas agrees to \$20m payments to customers and, subject to court approval, a \$100m penalty for misleading consumers’ (Media Release, 6 May 2024)

disappointment and distress, and creating a scale for the value of this compensation, will provide Australian passengers with the clear right to compensation that already exists for air passengers in many other jurisdictions.

What is missing from the Charter

26. ALA members have identified the following rights which should be included in the Charter:

- a. **The right for minors to be seated with an adult in their travelling party:** This right should be included in the Charter and seating a minor with an adult in their travelling party should be at no extra cost to aviation customers.
- b. **The right for aviation customers to receive the service and features for which they paid:** Examples include having a reclining seat, having a working entertainment system, or booking a particular class of carriage (such as, booking a business class seat but ending up in economy). The threshold for activating this right should be the same as section 61(1) in the *ACL* (“reasonably fit for that purpose”) and section 61(2) in the *ACL* (“a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that the customer might reasonably be expected to achieve that result”). For class downgrading, the price difference is currently unregulated. It should be set as the price of the lower class fare on the same ticket type on the date of purchase, not on the date of the flight.
- c. **A timeframe for communicating with customers about the status of the flight and the expected departure times:** In the explanation for Proposed Right 3 of the Charter, it is stated that airlines “should provide customers with regular updates on the status of the flight and the expected departure times”.⁹ The ALA submits that up-to-date information should be provided to customers no later than every 30 minutes.
- d. **A requirement to communicate changes in aircraft and consequential seat allocation with transparency and as soon as practicable, and allowing passengers the opportunity to change their flights at no charge if impacted:** The ALA is

<www.accc.gov.au/media-release/qantas-agrees-to-20m-payments-to-customers-and-subject-to-court-approval-a-100m-penalty-for-misleading-consumers>.

⁹ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Aviation Customer Rights Charter* (Consultation Paper, December 2024) 10.

concerned by the practice of airlines changing aircraft, such as for operational reasons, which impacts the number of seats in each cabin class, but failing to inform passengers of the consequential changes to seat allocation. For example, an airline may change the aircraft from an Airbus A330 to a Boeing 737 that results in fewer business class seats. The airline may notify passengers of the change in aircraft and any change in the departure and arrival times; but may not be transparent about the reduction in business class seats, leading to business class customers being unable to allocate a seat online and discovering close to departure time that they have, in fact, been given an involuntary downgrade.

- e. **Further examples of care standards during flight disruptions and delays:** In the explanation for Proposed Right 3 of the Charter, the ALA submits that access to Wi-Fi, access to device charging stations and access to a means of communication should be added to the list of what must be provided by airlines. The ALA also submits that all passengers should have the right to appropriate accommodation in the event of significant delay, and certain passenger groups should have this right in the event of moderate delay (such as, passengers with disability, and pregnant and breastfeeding women). This should be paid for by the airline and may be in the form of hotel accommodation or lounge access, depending on the time and length of the delay.
- f. **Addressing instances of overbooking:** The Charter should address instances of overbooking, whereby airlines call for aviation customers to volunteer (usually with inducements) to travel on the next available flight. For passengers who are then still denied boarding, they should be treated as if it were a flight cancellation.
- g. **Choice for customers regarding refunds, re-bookings and travel credits:** The ALA supports adding into the Charter a right for aviation customers to have the choice between a refund, travel credit or seat on the next available flight at no additional cost to the passenger in the event of cancelled flights, no matter what the cause. This remedy should not be limited to cancellations within the airline's control.
- h. **Expiry dates for travel credits and vouchers:** The ALA submits that the Charter should specify that any travel credits or vouchers issued must have an expiry date of at least three years after being issued.

27. The ALA also submits that it should be stated within the Charter, so aviation customers are aware, that airlines and airports are required to provide comprehensive training to their staff

about the Charter and the rights enshrined therein. These rights should also be communicated to passengers at key stages in their booking and travel experience.

Application of the Charter to real-world scenarios

28. ALA members offer for the Department's consideration the following real-world scenarios, to assess how the Charter would or would not apply to assist aviation customers:

- a. A customer arrives for a flight but is given an involuntary downgrade.¹⁰ How is the fare difference calculated based on the customer's rights in the Charter?
- b. How would the Charter address monetary and emotion loss from flight cancellations or delays for aviation customers?¹¹
- c. How would the Charter provide rights for aviation customers who do not get the service they paid for and, more specifically, who do not get the service guaranteed under subsections 61(1) and (2) of the *ACL*?¹²
- d. Would the Charter provide any rights or compensation for people who have missed key appointments (for example, medical appointments) or commitments because of flight cancellations or delays?¹³

¹⁰ See, eg, Hannah Cross, 'Qantas apologises after kicking Vietnam veteran out of business class seat for young pilot', *The West Australian* (online, 4 September 2023) <<https://thewest.com.au/news/qantas/qantas-apologises-after-kicking-vietnam-veteran-out-of-business-class-seat-for-young-pilot-c-11807889>>.

¹¹ See, eg, Sowaibah Hanifie, 'Port Adelaide Football Clubs fans furious after \$1000 Qantas flights to Sydney's game cancelled', *7 News* (online, 20 September 2024) <<https://7news.com.au/news/port-adelaide-football-clubs-fans-furious-after-1000-qantas-flights-to-sydneys-game-cancelled-c-16120820>>.

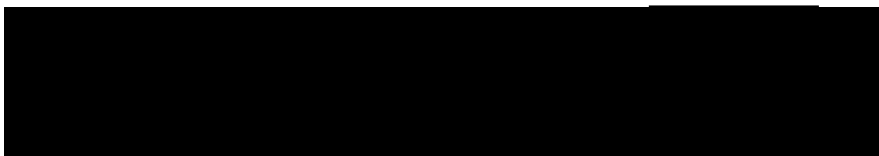
¹² See, eg, Sam Buckingham-Jones, 'Man wins \$12,600 for 'worn out' seats in Emirates business class', *The Australian Financial Review* (online, 19 March 2023) <www.afr.com/companies/media-and-marketing/business-class-advertising-reality-shortfall-prompts-nz-court-payout-20230317-p5csyv>.

¹³ See, egs, Isla Evans, 'Rex crisis leaves doctors feeling nervous', *ABC News* (online, 31 July 2024) <<https://www.abc.net.au/news/2024-07-31/rex-regional-routes-operating-vulnerable-medical-patients/104163172>>; National Rural Health Alliance, 'Rural routes imperative for a healthy Australia' (Media Release, 6 August 2024) <<https://www.ruralhealth.org.au/news/rural-routes-imperative-healthy-australia>>.

Conclusion

29. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input on the Aviation Customer Rights Charter to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts.

30. The ALA is available to provide further assistance to the Department on the issues raised in this submission.



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