

1 July 2019

Ministry of Transport
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By email: ca.bill@transport.govt.nz

SUBMISSION on Civil Aviation Bill exposure draft

1. Introduction

Thank you for the opportunity to make a submission on the exposure draft of the Civil Aviation Bill. This submission is from Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial and comprehensive consumer information and advice.

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2. General comments

We support proposed changes to the Civil Aviation Act (CAA) to clarify the Disputes Tribunal's jurisdiction to hear compensation claims. We also strongly support new regulation-making powers to prescribe airlines' obligations to inform passengers about their consumer rights.

However, we are disappointed the draft bill does not propose changes to the airline liability provisions. The existing provisions are not only inconsistent with consumers' rights under the Consumer Guarantees Act (CGA), they are also inconsistent with consumer protection provisions in many other jurisdictions.

In the case of domestic flight delays or cancellations outside an airline's control, the CAA exempts the airline from any liability. This effectively means consumers are not entitled to a refund when a domestic flight is cancelled for reasons such as bad weather.

In these situations, Air New Zealand and Jetstar undertake to book customers on another flight.^{1,2} However, if a customer on a standard fare does not wish or is unable to take this flight, the airlines only provide a credit.^{3,4} Jetstar credits expire after six months and Air New Zealand credits after 12 months.⁵ To book a flight using this credit, Air New Zealand customers may have to pay a customer service fee.

The provisions of the CAA allow airlines to use these terms and retain customers' money when no service has been provided.

In contrast, when consumers purchase a service from any other service provider, they have the right to request a refund when the service is not provided. For example, if a concert is cancelled due to weather or an act of god, and a ticketholder cannot attend on the re-scheduled date, they are entitled to request a refund.

We do not consider there is a reason for airlines to receive special treatment. We also do not consider it is reasonable for consumers to rely on domestic travel insurance to cover losses. Domestic travel insurance is comparatively less comprehensive than international travel insurance.

Complaints to our office show the existing CAA provisions are causing consumer detriment. Our recommendation is for domestic airline passenger rights to be better aligned with consumer protection provisions in EU regulations. These provide:

- where a flight is cancelled due to circumstances beyond an airline's control, passengers must be offered a rescheduled flight or refund as well as assistance (including refreshments and accommodation);
- where a flight is cancelled due to factors within an airline's control, passengers must be offered a rescheduled flight or refund plus assistance and set amounts of compensation.

These requirements ensure passengers are provided for when unforeseen cancellations occur, encourage airlines to avoid delays (for example, offering available seats on earlier as well as later flights if bad weather is approaching) and discourage airlines from cancelling flights due to factors under their control.

We would like to see the Civil Aviation Bill require:

- replacement flights or refunds in all cases of cancellation, at the passenger's choice
- refunds (at a passenger's request) in all cases of delay of more than five hours
- set levels of compensation in cases of cancellation and delay of more than three hours caused by circumstances within the airline's control
- set levels of assistance offered for cancellation and delay beyond the airline's control. Airlines should be required to provide water or other refreshments after a delay of one hour and food after a delay of three hours.

3. Specific comments on the bill

3.1 Liability of carrier in respect of delay

Section 244(2) of the bill allows carriers to avoid liability for damages where delay is caused by:

- meteorological conditions

¹ Air New Zealand Q&A. Retrieved from: https://airnz.custhelp.com/app/answers/detail/a_id/41/~/_what-happens-if-my-flight-has-been-cancelled-because-of-bad-weather-or

² Jetstar conditions of carriage. Retrieved from: <https://www.jetstar.com/nz/en/conditions-of-carriage-jq>

³ Air New Zealand customer service and tarmac delay plan. Retrieved from: <https://www.airnewzealand.co.nz/customer-service-and-tarmac-delay-plan>

⁴ Jetstar conditions of carriage. Retrieved from: <https://www.jetstar.com/nz/en/conditions-of-carriage-jq>

⁵ Correspondence with airlines.

- compliance with instructions, advice, or information given by an air traffic control service
- obedience to orders or directions given by a lawful authority
- *force majeure*
- the purpose of saving or attempting to save life.

This section means consumers are not entitled to a refund when a service is cancelled (unless they have paid for a fully refundable fare).

As noted above, we consider this conflicts with the rights consumers ordinarily have under the Consumer Guarantees Act when purchasing goods and services. Under the CGA, where a service provider fails to deliver a contracted service, and the failure cannot be remedied or is substantial, the consumer is entitled to a refund.

We consider it difficult to justify such a broad exemption for airlines from liability when contracted services are not provided. We therefore recommend section 244(2) of the bill state:

- in the event of a cancellation, the airline must offer the customer a replacement service of a comparable standard
- if the customer on a cancelled service declines the offered replacement service, they are entitled to a refund
- if a service is delayed more than five hours, customers can elect a refund.

3.2 Avoidance of liability

Section 245 of the bill allows carriers to avoid liability for damages if:

- the carrier took all necessary measures to avoid the damage, or
- it was not possible for the carrier to have taken those measures.

We consider this section is very broad and the limitations on liability need to be more narrowly defined.

We are also concerned the section allows airlines to avoid paying damages in cases of mechanical failure.

Internationally, mechanical failure is deemed a factor within the airline's control. A judgment of the European Court of Justice determined:

*The fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken all reasonable measures.*⁶

Mechanical failure is a foreseeable event for which airlines should plan. Requiring airlines to cover their passengers' losses when mechanical failure occurs incentivises them to plan for contingencies.

To align with international standards, we recommend section 245 outline an airline is liable for damages in cases of mechanical failure.

3.3 Limitations of actions

Sections 251 and 253 limit a consumer's ability to claim for damages to within two years of the event.

⁶ Judgment of the Court of Justice in Case C-549/07. Retrieved from: https://curia.europa.eu/jcms/jcms/P_31802/fr/

The Limitation Act 2010 limits claims for recovery of money owed to six years after the act or omission. All other service providers must abide by this limitation. We therefore consider airlines should be subject to the same requirement.

From complaints to our office, we are aware consumers' efforts to resolve problems with airlines may be drawn out by the airlines' failure to respond in a timely manner. We therefore consider a two-year timeframe to be inadequate.

We recommend the limitations in the Civil Aviation Bill are brought into alignment with the Limitation Act.

3.4 Jurisdiction of Disputes Tribunal

We strongly support section 328. We agree it is not clear how passengers might exercise their rights for compensation under current legislation.

In our experience, claims for lost, delayed or damaged bags or damage caused by delay are typically under \$2000. The limitations in the Civil Aviation Act and Montreal Convention mean the Disputes Tribunal is the appropriate place to hear such claims.

We advise consumers seeking compensation to make a claim through the Disputes Tribunal, as it is the most cost-effective option. The new section recognises this and appropriately extends the tribunal's jurisdiction to hear claims involving the CAA and Montreal Convention.

3.5 Informing passengers of their rights

We strongly support section 330(1)(e), providing for regulations setting out airlines' requirements to inform passengers about their consumer rights. However, we consider these regulations should not be discretionary. We recommend the bill provide for regulations to be prepared no later than six months after the date of royal assent.

Consumer awareness of the Civil Aviation Act and Montreal Convention is low. Based on complaints we receive, we're also aware consumers may not be informed of their rights in the event they make a request to an airline for compensation.

In a recent case, a consumer booked a flight that was later cancelled by the airline. The consumer was re-booked on a flight arriving one day later. However, the new itinerary did not suit his travel plans and he contacted the airline's service centre to request a refund. The staff member informed him he was only eligible for a credit.

When the matter was escalated to the staff supervisor, the supervisor provided the same information. It was only after the consumer filed a complaint with the airline that he received compensation for the damage caused by delay and owed to him by law.

The new disclosure regulations would help address this issue. We note EU airlines are subject to the following disclosure rules:

A printed or electronic notice informing a customer of their air passenger rights must be clearly displayed at the airline check-in desk, at check-in kiosks and online. If customers are denied boarding, the flight was cancelled, they experienced a delay of more than two hours at departure or they arrived with a long delay at their final destination, the airline must give them written notice setting out the rules for compensation and assistance.

We recommend similar obligations apply here. We strongly support a requirement for airlines to provide standardised written notification in plain English, outlining

passengers' rights in the event of delays. Information should be provided for both domestic and international flights.

We also support the disclosure of pricing policies and methodologies, to allow authorities and consumers to understand if price discrimination is occurring.

Thank you for the opportunity to make a submission. If you require any further information, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read "Sue Chetwin". The signature is fluid and cursive, with a long horizontal flourish at the end.

Sue Chetwin
Chief executive