ACCC submission

Submission in response to the Aviation Green Paper

November 2023

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

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Land of the Ngunnawal people
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Key points

The ACCC is pleased to see the prominence of competition and consumer protection considerations in the Aviation Green Paper, reflecting the importance of these issues in aviation. We also welcome the opportunity to respond to the Aviation Green Paper.

Australia's domestic airline industry is one of the most highly concentrated industries in the country, other than natural monopolies. As demonstrated in our submission to the Aviation White Paper terms of reference, the lack of effective competition over the last decade has resulted in underwhelming outcomes for consumers in terms of airfares, service reliability and customer service.

One of the most effective ways to promote domestic airline competition is to implement reforms that would help new and expanding airlines to better access take-off and landing slots at Sydney Airport. Improving access to Australia's busiest airport and key international gateway will translate to better competitive outcomes across the country.

The Harris Review has already identified numerous reforms to the demand management scheme at Sydney Airport. Of particular importance is adopting recommended changes that align Sydney Airport's slot management scheme with the Worldwide Airline Slot Guidelines and allow flexibility in slot management to improve efficiency. However, we consider the Australian Government should go further than this to promote competition at Sydney Airport.

Slot management at Sydney Airport has become increasingly important for competition across the country. Therefore, competition should be one of the Slot Manager's key objectives, in addition to achieving the existing airport movement cap and other noise management provisions. Doing so will improve productivity of Sydney Airport, therefore promoting new entry or expansion of the smaller airlines and improved competition.

Of equal importance is ensuring transparency and independence around slot allocation, usage and compliance. Slot allocation and usage data currently collected should be made publicly available. Further, the Slot Manager and Compliance Committee should be totally independent from airlines, with appropriate and robust enforcement powers and penalties in place. This will protect against any slot misuse that harms competition and efficiency, both at Sydney Airport and more broadly across the aviation industry.

As we have regularly called for, the regulatory framework for airports must change to provide greater protection against their significant market power in negotiations with airlines. The Australian Government needs to, at minimum, implement enhanced information provision requirements for airports that we recommended earlier this year. However, we consider providing the ACCC with powers to create record-keeping rules would provide greater flexibility and adaptability for future. There must also be a pathway to binding commercial arbitration for airport and airline negotiations, to promote the efficient use of, and investment in, airport infrastructure.

We consider a review of the Aeronautical Pricing Principles and their application, as flagged in the Aviation Green Paper, is warranted. The Aeronautical Pricing Principles are not assisting airlines as the Australian Government intends, because they are unenforceable and there is no oversight of their application. A review of the principles could consider the best methods for determining efficient long-run costs of airports and what form of oversight might be needed, to ensure the principles are truly fit-for-purpose. Following this review, the Australian Government should mandate the use of the Aeronautical Pricing Principles and introduce an appropriate enforcement mechanism to ensure their correct use.

The lack of effective competition in the domestic airline industry has resulted in high prices, poor customer service (particularly poor communication), decreasing service quality, issues resolving disputes and obtaining redress, and a general lack of accountability. Since 2018, the ACCC has received on average over 360 contacts each month about airline issues. Further, the lack of any effective mechanisms for consumers to resolve disputes and enforce their Australian Consumer Law (ACL) consumer guarantees rights, as well as ongoing customer service issues, has led to a recent dramatic increase in consumers contacting regulators, including the ACCC. For the first 9 months of 2023, contacts to the ACCC about airline issues have remained persistently high and above pre-pandemic levels. The monthly contacts in 2023 to date are 179% higher than in 2018 and 100% higher than in 2019.

The Australian Government has an opportunity to modernise and significantly improve the consumer protection framework in the airline sector. In particular, the ACCC considers the following reforms would improve consumer protections in the airline industry:

- A truly independent airline ombuds scheme, with the ability to make binding decisions, to replace the ineffective Airline Customer Advocate.
- The introduction of a targeted and fit-for-purpose compensation scheme for delayed or cancelled flights, which builds on existing ACL consumer guarantee rights and is underpinned by the ombuds scheme recommended above.

We also continue to recommend relevant economy-wide reforms to the ACL, which will also help to improve consumer protections in the airline sector:[1]

- The introduction of economy-wide reforms to the ACL consumer guarantees to make it a contravention of the ACL for businesses to fail to provide a remedy for consumer guarantees failures when they are legally required to do so.
- The introduction of an economy-wide prohibition on unfair trading practices in the ACL.

The Aviation Green Paper considers how to maximise the contribution of aviation to the Australian Government's net zero targets, including through the Australian Jet Zero Council and proposed Transport and Infrastructure Net Zero Roadmap. Of particular relevance to the ACCC's remit, we support the development of robust frameworks that provide transparency to the market about the environmental impacts of different aviation businesses, as well as the actions different businesses are taking to mitigate their environmental impact. This will enable consumers to better compare the different aviation businesses and make more informed purchasing decisions. This, in turn, will promote fair competition by ensuring that consumer's purchasing decisions support businesses to realise the full competitive benefits of their green investments, driving further innovation and investment in support of the transition to net zero.

As expressed in our submission to the Aviation White Paper terms of reference, the long-term interests of Australian consumers should remain front and centre of all the issues being considered through the Aviation White Paper process.

[1] We note the existing Government consultation processes on improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the ACL; and on options to address unfair trading practices across the economy. This are both discussed further below.

1. Introduction

The ACCC welcomes the opportunity to respond to the Aviation Green Paper. We are pleased to see the Aviation Green Paper recognise the importance of competition and consumer protections in the development of aviation policy.

Our submission to the Aviation White Paper Terms of Reference highlighted that:

- A lack of competition, particularly for domestic services, has led to poor outcomes for travellers in terms of choice, airfares, reliability and customer service.
- Consumer protections for the aviation industry must be strengthened, particularly through the introduction of an effective and independent ombuds scheme.
- Major airports are regional monopolies and require fit-for-purpose regulation.

Our submission to this paper builds on the above by providing additional information and considerations for the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) in reaching its final positions for the Aviation White Paper.

The ACCC's role in aviation

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The ACCC's primary responsibilities are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies.

The CCA also contains the ACL, which is also enforced by state and territory ACL regulators alongside the ACCC under a one law, multi-regulator model.

The ACCC currently has the following roles specifically relating to the aviation industry:

- The ACCC conducts annual price and service quality monitoring of the 4 major airports (Brisbane, Melbourne, Perth and Sydney, collectively the 'monitored airports') under Part VIIA of the CCA and Part 8 of the *Airports Act 1996*. This includes monitoring the provision of aeronautical and car parking services at those airports.
- The ACCC has a role in assessing proposed price increases by Sydney Airport (for regional air services) and Airservices Australia under the price notification regime contained within Part VIIA of the CCA. Airservices Australia submitted a draft price notification to the ACCC on 27 September 2023, which we are currently assessing.[2]
- The ACCC also recently recommenced its role monitoring prices, costs and relating to the supply of domestic air passenger transport services. This is under a new direction issued by the Treasurer on 6 November 2023, which lasts until 31 December 2026.[3] The new direction aligns with the previous direction we held from June 2020 to June 2023.

[2] ACCC, *Airservices Australia 2023*.

[3] See the *Competition and Consumer (Price Monitoring – Domestic Air Passenger Transport) Direction 2023*.

The new direction to the ACCC will enable us to provide continued transparency and scrutiny of the domestic air services industry at a time when new and expanding airlines are still trying to establish themselves.

ACCC involvement with the aviation industry since March 2023

The ACCC has undertaken several actions and released multiple publications in relation to the aviation industry since it made its submission in response to the Aviation White Paper terms of reference in March 2023. These are summarised below.

Authorisation activity

Under Australian competition law, the ACCC is able to grant exemptions to businesses engaging in activities that will or may break certain parts of competition law, provided the activities have a net public benefit or do not actually harm competition. Authorisation is one process for gaining an exemption.

The ACCC decided in April 2023 to grant re-authorisation for 5 years to Qantas Airways and Jetstar Airways for the continued coordination of 2 Jetstar Asian-based joint ventures and, in certain circumstances, between Jetstar Japan and Japan Airlines.[4] We also granted authorisation, in August 2023, for Qantas Airways, Emirates and their related entities (including Jetstar) to continue coordinating their passenger and cargo transport operations across their networks under 2028.[5] We granted both authorisations on the basis that the benefits for travellers of the coordination would likely outweigh the detriments, by facilitating connectivity between a wide range of destinations. We also considered the latter authorisation would optimise earning and redemption opportunities from the airlines' respective loyalty rewards programs.

The ACCC denied Virgin Australia and Alliance Airlines' application for re-authorisation of their agreement to coordinate, jointly tender for and supply services to corporate customers, mainly for fly-in fly-out employees, in May 2023.[6] The airlines did not demonstrate that there was sufficient public benefit from the proposed coordination to outweigh the likely detriment.

In September 2023 the ACCC issued a draft determination to deny authorisation for Qantas Airways and China Eastern Airlines and their related entities (including Jetstar) to continue coordinating operations between Australia and mainland China.[7] The ACCC was concerned that the authorisation would provide Qantas and China Eastern with the opportunity and incentive to increase prices. The 2 airline groups ended their partnership in October 2023.

Enforcement activity

In August 2023 the ACCC launched action in the Federal Court alleging Qantas Airways engaged in false, misleading or deceptive conduct, by advertising tickets for flights that it had already cancelled but not removed from sale.[8] The ACCC alleges that for more than

4 ACCC, *ACCC re-authorises coordination between Jetstar's Asian brands*, media release, 19 April 2023.

5 ACCC, *Qantas and Emirates to continue coordination on flights*, media release, 17 August 2023.

6 ACCC, *ACCC denies re-authorisation of airline charter alliance*, media release, 5 May 2023.

7 ACCC, *The ACCC proposes to deny coordination between Qantas and China Eastern*, media release, 15 September 2023.

8 ACCC, *ACCC takes court action alleging Qantas advertised flights it had already cancelled*, media release, 31 August 2023.

8,000 flights scheduled to depart between May and July 2022, Qantas kept selling tickets on its website for an average of more than 2 weeks, and in some cases for up to 47 days, after the cancellation of the flights. It is also alleged that, for more than 10,000 flights scheduled to depart between May to July 2022, Qantas did not notify existing ticketholders that their flights had been cancelled for an average of about 18 days, and in some cases for up to 48 days. The matter is currently before the Federal Court.

Merger and acquisitions activity

In April 2023 the ACCC announced that it would oppose Qantas Airway's proposed acquisition of Alliance Airlines.[9] Both Qantas and Alliance are key suppliers of air transport services to mining and resource companies who need to transport 'fly-in fly-out' workers in Western Australia and Queensland. The ACCC concluded that the transaction was likely to substantially lessen competition in the markets for the supply of air transport services to resource industry customers in Western Australia and Queensland.

Monitoring and associated activity

Monitoring reports

The ACCC released its final report under the original direction to monitor domestic air passenger services in June 2023.[10] The report said that a lack of effective competition is a key reason why the domestic airline sector had generally underperformed for many years in terms of meeting the needs of both the travelling public and the parts of the economy that rely on domestic air travel. Qantas Group has been the dominant airline group, with its 2 brands, Qantas and Jetstar, generally accounting for around 60% of domestic passengers and a higher proportion of the industry profits.

The report noted the significant developments in recent years with respect to Rex beginning to operate jet aircraft on routes between major cities and Bonza launching low-cost services that directly connect regional centres to holiday destinations. However, the report also said that the new competition provided by both airlines was far from assured. Both airlines would also need to expand significantly to become meaningful competitors to the Qantas Group and Virgin Australia. The report said that both airlines may be hindered in plans for expansion by limited access to take-off and landing slots at large airports, especially Sydney Airport.

In August 2023 the ACCC published its latest report on the performance of Brisbane, Melbourne, Perth and Sydney airports (i.e. the monitored airports) for 2021-22.[11] The report noted that:

- Passenger numbers increased at all monitored airports, largely due to rebounding domestic travel. Total passenger numbers ranged from 30% to 51% of 2018-19 levels.
- The financial performance of Brisbane, Melbourne and Perth airports improved in 2021-22, but declined further for Sydney Airport. Total operating margins for all 4 monitored airports remained below 2018-19 levels, ranging between 8% and 42%.
- All 4 monitored airports reported operating losses from aeronautical operations, which provide the primary source of revenue. Losses ranged from -0.05% to -38.8% in 2021-22.

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9 ACCC, *ACCC opposes Qantas' acquisition of Alliance*, media release, 20 April 2023.

10 ACCC, *Airline competition in Australia – final report*, June 2023.

11 ACCC, *Airport monitoring report 2021-22*, August 2023.

Advice to government on changes to enact the Productivity Commission's recommendations for airport monitoring

In May 2023 the ACCC provided 2 sets of recommendations to the Australian Government to enhance the effectiveness of the airport monitoring regime. We provided these recommendations following a request from the Department of Infrastructure, Transport, Regional Development, Communications and the Arts to review changes required to the current monitoring regime, to enact recommendations from the Productivity Commission's 2019 review of Economic Regulation of Airports.

The first set of recommendations related to enhancing transparency around the monitored airports' operations and to detect the excise of market power more readily (Productivity Commission recommendation 9.4).[12] This would be via requiring the monitored airports to maintain records of, and report to us on, systematically disaggregated data and detailed cost allocation methodologies in relation to aeronautical, car parking and landside access services.

The second set of recommendations related to updating quality of service indicators for monitored airports to improve their fitness for purpose (Productivity Commission recommendation 9.5).[13] This would be via requiring the monitored airports to report information relating to 53 matters, consisting of a mix of existing, amended and new matters.

We provided a more comprehensive summary of this advice in our 2021-22 Airport Monitoring report.[14]

[12] ACCC, *More detailed information on airport performance: ACCC final advice – Productivity Commission recommendation 9.4*, May 2023.

[13] ACCC, *Airport quality indicators – recommendations to government*, May 2023.

[14] ACCC, *Airport monitoring report 2021-22*, August 2023, pp 27-35.

2. Policy reforms to promote airline competition

The domestic airline industry is one of the most highly concentrated industries in Australia, other than natural monopolies. The lack of effective competition over the last decade has resulted in underwhelming outcomes for consumers in terms of airfares, reliability of services and customer service. The expansion of Rex and the entry of Bonza in recent years have created the opportunity for the industry to enter a more competitive period. However, both would need to expand significantly if they are to become more meaningful competitors to the Qantas Group and Virgin Australia.

One of the most effective ways the Australian Government can promote airline competition is to implement reforms that would help new and expanding airlines to better access take-off and landing slots at Sydney Airport.[15]

Sydney Airport is Australia's busiest and a key international gateway. Current policy settings mean it can be difficult for new and expanding airlines to obtain take-off and landing slots at this key airport. This impedes competition in 2 ways:

- Existing rules allow airlines to retain slots and to continually improve their slot allocation, limiting opportunities for new and expanding airlines to obtain slots.
- Airlines are able to exploit current policy settings by acquiring more slots than they need and hoarding them for strategic reasons. This entrenches the positions of incumbent airlines, limiting new and expanding airlines' ability to gain a footing and challenge existing airlines, to the detriment of consumers.

Below, we discuss reforms the Australian Government should consider to further promote competition at Sydney Airport.

Competition should be an objective for the slot management scheme

There are no stated objectives for the demand management scheme at Sydney Airport. According to the Harris Review and the Australian National Audit Office's 2007 audit of the implementation the *Sydney Airport Demand Management Act 1997*, the intentions of the legislation were outlined during the second reading of the legislation in Parliament. These intentions were to:

- establish into law the 80 movements per hour cap and a way to administer it
- alleviate congestion delays and spread flights more evenly within hours
- protect access for regional airlines and consumers
- provide potential new entrants with equal access to slots as their established competitors.[16]

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15 ACCC, *Airline competition in Australia – final report*, June 2023, p 3; ACCC, *Aviation White Paper ACCC submission in response to the terms of reference*, 15 March 2023, p 16.

16 Peter Harris AO, *Review of the Sydney Airport Demand Management Scheme*, February 2021, p 8, accessed 21 November 2023; Australian National Audit Office, *Implementation of the Sydney Airport Demand Management Act 1997*, 7 March 2007, accessed 21 November 2023.

The Sydney Airport Slot Management Administration Manual provides a somewhat clearer indication of the objectives of the cap management and slot regime at Sydney Airport (at least how they were viewed in 2013). The manual states the objectives for the scheme are for it to:

- provide an effective means of administering the movement limit
- help alleviate delays caused by congestion
- guarantee access to slots for regional services
- spread aircraft movements more evenly within hours, and
- provide equal access to slots for new entrants.[17]

The above objectives are discussed in the context of the required annual review 'carried out to monitor the Slot Manager's compliance with legislative objectives and obligations of the slot regime'.[18] It is not made clear anywhere else in the manual that these are the objectives to which the Slot Manager should be adhering or that the Compliance Committee should be enforcing.

Explicitly stating the objectives of any legislation or regulatory framework up-front, rather than hidden or ambiguously referred to, is best practice and has multiple benefits. Clear objectives make it easier to ensure decisions are made for the purpose of achieving what the legislation or framework is intended for. They can also assist in conducting audits or reviews and for identifying where changes may be required, and with enforcing the framework. Clear objectives are also valuable for enforcement purposes, as it is clearer when a breach has occurred or an error made in following the legislation or framework.

Noise management was a key factor in creating the demand management scheme at Sydney Airport and remains an ongoing community concern. The Harris Review considered whether the objectives of the scheme should be defined. It noted the benefits of including objectives in policy, but concluded 'the gains of doing so would be modest' due to the risk of unsettling the community.[19]

The ACCC considers there are significant benefits from defining the scheme's objectives. We encourage the Australian Government to introduce clear and specific objectives for the slot management scheme at Sydney Airport and to specifically include competition as one of these objectives, in addition to the important noise management objectives of the scheme, for the Slot Manager and Compliance Committee to follow. Slot management at Sydney Airport has become increasingly important for competition across the country, and should therefore be amended to incorporate competition as one of its key purposes. This can be done in a way that preserves the existing noise management measures, including the movement per hour cap and curfew, but enables promotion of competition when allocating and managing slots at Sydney Airport.

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17 Department of Infrastructure and Transport, *Sydney Airport Slot Management Administration Manual* (Version 1.1), July 2013, pp 20-21, accessed 21 November 2023.

18 Department of Infrastructure and Transport, *Sydney Airport Slot Management Administration Manual* (Version 1.1), July 2013, p 21, accessed 21 November 2023.

19 Peter Harris AO, *Review of the Sydney Airport Demand Management Scheme*, February 2021, p 13, accessed 21 November 2023.

Changes to better align with the Worldwide Airport Slot Guidelines should be adopted

The Harris Review considered it desirable for the Sydney Airport Demand Management Scheme to align with the Worldwide Airport Slot Guidelines, where possible, and made multiple recommended changes to the scheme to enable alignment with the Worldwide Airport Slot Guidelines.[20]

The ACCC agrees that the Australian Government should amend the scheme, as recommended by the Harris Review, to align with the Worldwide Airport Slot Guidelines. As previously noted, implementing these reforms would maximise the efficiency and productivity of Sydney Airport under the existing aircraft movement cap and make more slots available to new and expanding airlines, thereby improving choice and competition against incumbents.[21]

In particular, we urge the Australian Government to:

- **Change the definition of a 'new entrant' to an airline that has less than 7 slots on a particular day.** The current definition uses complicated language, but broadly an airline must self-identify as a new entrant and have less than 5 historic slots. The Harris Review noted that around 10% of airlines at Sydney Airport are likely to benefit from this change.
- **Remove the current preference for changes to historic slots over new applicants.** After unchanged historical slots are allocated (i.e. they retain their current slot allocation), 50% of slots remaining in the pool would be allocated to new entrants and 50% allocated to incumbents, including those that have forfeited an existing historic slot to change it. This would provide improved access to slots for new entrants and expanding airlines, and also address incumbency of large airlines by eliminating preferential treatment that enables them to continually improve their slot allocation.
- **Adopt the Worldwide Airport Slot Guideline standards for slot misuse.** As noted in the Harris Review, these standards are more comprehensive than those currently in the scheme and there is substantial guidance for ensuring compliance with these standards, particularly around the 'use it or lose it' and misuse of slot rules. This will assist the Compliance Committee in more clearly identifying where slot misuse is occurring.

The demand management scheme should allow flexibility to improve efficiency

Our understanding is that the Sydney Airport Demand Management Scheme was primarily established as a noise management scheme, hence the 80 movements per hour cap and curfew being key provisions of the scheme. We have above discussed ways to ensure competition can be factored into the scheme without contradicting these key noise management provisions. We consider the Australian Government can take a similar approach regarding efficiency in the aviation industry, by ensuring the scheme is not so rigid as to prevent flexibility that could provide improved efficiency of the airport.

The Harris Review recommended giving Airservices Australia the ability to schedule 80 movements per clock hour, rather than on a 15-minute rolling basis, and exceed the

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20 Peter Harris AO, *Review of the Sydney Airport Demand Management Scheme*, February 2021, p 15, accessed 21 November 2023.

21 ACCC, *Aviation White Paper ACCC submission in response to the terms of reference*, 15 March 2023, p 19.

80 movements per hour cap for a short period (up to 2 hours) following a major incident to allow the airport to recover from disruptions the incident caused, albeit with some continued guarantees to minimise disruptions to the community.[22] In reaching this conclusion, it noted analysis by the Productivity Commission that found of the 104 disruptive events at Sydney Airport in 2018, there were only 12 instances where the actual movements per hour were at the operational cap of 80 and would require exceeding that cap to recover from disruptions.[23]

These are clear examples of where a flexible approach can improve efficiency of both Sydney Airport and the aviation industry, without compromising the integrity or intention of the noise management elements of the scheme. The ACCC supports the Australian Government implementing these recommendations, and considering other potential approaches, to enable greater efficiency of Sydney Airport within the current noise management provisions. However, we consider these changes are separate to our other recommended amendments to the slot management scheme, which are to address competition issues. The Australian Government should still look to implement amendments to address these competition issues, even if it is hesitant to adopt changes to calculating the 80 movements per hour cap and ability to temporarily exceed the cap in the event of major incidents.

Transparency of slot allocation and use should be improved

The Sydney Airport Demand Management Regulations require the Slot Manager to keep records of slot allocation, gate movement times and, where requested by the Slot Manager, reasons provided for the gate movement. The Slot Manager must also keep a record of whether the slot complied with the 'use it or lose it' test. The Slot Manager must keep these records for 7 years.[24] These records are vital for establishing whether airlines are inefficiently using or misusing allocated slots. Going a step further and publishing these records would greatly improve transparency around slot allocation and usage at Sydney Airport.

The Harris Review recommended that the Slot Manager publish information at the end of each season showing all slots allocated to airlines, and all vacant slots, to 'all parties' in electronic form. It also recommended that the Slot Manager should in future provide this information for any given season in a format that enables 'an interested party' to interact with slot allocation data and test potential slot combinations before applying for slots at Sydney Airport.

We urge the Australian Government to ensure wider publication of slot allocation and usage, whereby it is publicly available to anyone, not just airlines and other 'parties' to the scheme, to provide even broader transparency around slot usage. This could be particularly useful as Western Sydney Airport opens and to see how airlines use the 2 airports to service customers in the Sydney Basin. It would also provide transparency around information available to the Compliance Committee when investigating potential slot misuse.

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22 These included recovery mode not ever extending into the curfew period and an independent body being required to declare a major incident.

23 Peter Harris AO, *Review of the Sydney Airport Demand Management Scheme*, February 2021, pp 43-44, accessed 21 November 2023.

24 Sydney Airport Demand Management Regulations 1998, Part 23 s 16, accessed 21 November 2023.

The Harris Review noted that Airport Coordination Australia (i.e. the Slot Manager at Sydney Airport) suggested that historic slot usage is in some way commercially sensitive, but the Review disagreed with this view, arguing 'the allocation of a public resource, and the retention of a barrier to entry (even a necessary barrier, such as the historic provision of rights) should be a matter readily open to viewing'.[25] We agree with the Harris Review that transparency around usage of such a key public asset is vital.

Slot administration and compliance should be independent and robust

Slot administration and compliance need to be key components of the Sydney Airport Demand Management Scheme. However, the ACCC holds concerns that both components are not as independent or as robust as they should be and are not working effectively to implement the scheme as intended. We consider that the Australian Government must amend both to improve the effectiveness of the scheme.

Slot administration

The Sydney Airport Slot Manager's functions are 'to develop, administer and amend the Slot Management Scheme'.[26] The Minister for Infrastructure, Transport, Regional Development and Local Government, in consultation with the Department, is responsible for appointing a body to act as the Slot Manager at Sydney Airport.

Airport Coordination Australia is the Slot Manager at Sydney Airport, as appointed by the then Minister of Infrastructure, Transport, Regional Services and Local Government in 1997. The Airport Coordination Australia board consists of an independent Chair and members representing Qantas Airways, Virgin Australia, the Regional Aviation Association of Australia and Sydney Airport.[27]

The ACCC is concerned that the Slot Manager at Sydney Airport consists of members from the 2 largest domestic airlines. The Slot Manager needs to be independent from industry participants, so as to avoid any potential conflicts of interest, real or perceived, in carrying out the slot management functions. The current scenario, whereby the 2 airlines that represent around 95% of the domestic airline industry are members of the body responsible for managing slots at Sydney Airport, creates at minimum a perceived conflict of interest regarding any matters involving new or expanding airlines wanting access to slots.[28]

Slot compliance

The current compliance provisions around slot management at Sydney Airport do not appear to be working effectively and require numerous changes to function as intended.

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25 Peter Harris AO, *Review of the Sydney Airport Demand Management Scheme*, February 2021, p 50, accessed 21 November 2023.

26 Department of Infrastructure and Transport, *Sydney Airport Slot Management Administration Manual* (Version 1.1), July 2013, p 17, accessed 21 November 2023.

27 Airport Coordination Australia, *About ACA*, Airport Coordination Australia website, 2023, accessed 21 November 2023.

28 Qantas flew around 38% of domestic passengers in the year to January 2023, Virgin flew 34% and Jetstar flew 23%. See ACCC, *Aviation White Paper ACCC submission in response to the terms of reference*, 15 March 2023, p 13.

The ACCC supports the Harris Review's conclusions that the compliance regime be strengthened. However, we consider the Australian Government needs to go further than the recommendations put forward by the Harris Review in some areas, as outlined below.

The Compliance Committee must be totally independent

Under the Sydney Airport Demand Management Regulations 1998, the Compliance Committee is to be comprised of up to 7 members appointed by the Minister, with at least:

- three members nominated by airlines that regularly use Sydney Airport, at least one of which must be nominated by regional service operators
- one member nominated by Sydney Airport, and
- one member nominated by the body that provides air traffic control services at Sydney Airport.[29]

This requirement means that the airlines which may be misusing slots are members of the committee responsible for identifying any such misuse and imposing penalties. Similar to the airlines being board members of the body that is the Slot Manager, this creates at minimum a perceived conflict of interest, if not an actual conflict.

The Harris Review recommended appointing an independent Chair with substantial legal experience in a compliance context. In our view, this would not go far enough. While an independent Chair would provide some balance to the Compliance Committee, the Chair could still be overruled by a majority if multiple established airlines did not want to pursue action. Further, an independent Chair would not solve the issues around perceived conflicts of interest caused by airline membership.

The ACCC therefore strongly encourages reforms to the composition of the Compliance Committee to ensure that it is completely independent and devoid of any potential or perceived conflicts of interest. Ideally, this would be in the form of a completely independent oversight body. Such a body could be funded via an industry levy or directly by the Australian Government.

The Compliance Committee must have powers to initiate enforcement action

The Harris Review observed there is 'uncertainty over the unusual arrangements' for determining compliance with slot usage and imposing penalties or launching enforcement action. It stated that the Slot Manager has, in effect, become responsible for taking legal action, even though the scheme envisages that either the Compliance Committee or the Slot Manager may issue infringement notices. The Slot Manager can only take legal action if it conducts a board review and mediation steps first, at its own expense. This has incentivised the Compliance Committee and Slot Manager to sanction slot misusers by removing historic preference for slots, as they have done at times during existence of the scheme. They have not taken any further action, such as applying fines, for persistent slot misuse.[30]

Under the current legislative provisions, the Compliance Committee can recommend to the Slot Manager that it should vary, suspend or cancel slots; however, the Slot Manager is not required to comply with this recommendation – only have regard to it.[31] This legislative

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29 See Sydney Airport Demand Management Regulations 1998, Part 2, s 5.

30 Peter Harris AO, *Review of the Sydney Airport Demand Management Scheme*, February 2021, p 35, accessed 21 November 2023.

31 See *Sydney Airport Demand Management Act 1997*, Part 4, Division 3, s 47.

provision further illustrates that the burden for determining whether to take action against slot misuse falls to the Slot Manager, rather than the Compliance Committee, as should be the case.

The Harris Review concluded that:

> *"The incentives against any genuine action to fine slot abusers is substantial and appears to represent a failure of policy design… the design is one where the strongest legal sanction in support of slot compliance is not likely to ever be used".*[32]

It urged that the compliance regime be strengthened and recommended the Minister appoint a delegate with responsibility to take forward any compliance action in the Federal Court that the Compliance Committee recommends following slot misuse.

The ACCC strongly agrees that the Australian Government needs to strengthen the compliance regime. Reforms must enable the Compliance Committee to access meaningful enforcement action, by imposing its own penalties independently (such as loss of existing slots or fines) or by pursuing civil action in the Federal Court to seek significant financial penalties in events of serious slot misuse.

Appointing a delegate that is responsible for taking compliance action to the Federal Court, as recommended in the Harris Review, may alleviate some of the key problems with taking this form of action. However, we consider it more appropriate that the Compliance Committee itself be given sufficient powers to initiate enforcement action, including civil action, to help avoid additional regulatory burden and process. Regardless of which avenue the Australian Government prefers, it is critical that the entity responsible for launching enforcement action is capable and appropriately equipped and resourced to do so.

The Compliance Committee must be able to audit slot usage

In order for the stronger 'use it or lose it' provisions under the World Airline Slot Guidelines to be effective, there must be a mechanism to monitor and test how airlines are using their allocated slots. The Harris Review recommended that the Slot Manager be responsible for identifying instances where scrutiny of slot usage is needed and appointing an unconflicted auditor to examine the data and publish its conclusions in a timely manner.

The ACCC considers that the Compliance Committee should be responsible for conducting audits, or for appointing an unconflicted auditor to carry out this examination. Separating responsibility for implementing slot allocation and for enforcing its correct use is best practice and will ensure resourcing is properly focused on each respective task.

Regardless of which body conducts or initiates audits, as discussed above there must be sufficient data recorded that is verified through audits and made publicly available to assess whether slot misuse has occurred. This would help uncover whether legitimate operational or commercial factors (such as frequent weather issues, delays or cancellations due to planes being out of position, cancellations due to lack of demand for a given flight, etc.) are affecting slot usage, or whether there are signs of slot misuse and further action should be taken. Audits could be conducted or initiated following reports by airlines or the airport operator of potential misuse by other airlines, or at the Compliance Committee's own initiation.

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[32] Peter Harris AO, *Review of the Sydney Airport Demand Management Scheme*, February 2021, p 35, accessed 21 November 2023.

The Compliance Committee must have sufficient resources and expertise, and meet regularly to provide true oversight and enforcement

The ACCC agrees with the Harris Review's arguments that it is essential for the revised Compliance Committee to be resourced properly. There are a complex range of factors the Compliance Committee must be across, including airline and airport operations, competition issues and slot regulations, to determine whether slot misuse has occurred. It must also have experience in enforcement matters, to ensure any misuse is appropriately sanctioned and that those sanctions act as sufficient deterrent to repeated slot misuse.

The Australian Government could achieve this by establishing an independent oversight body to act as the Compliance Committee, as mentioned above, and subsequently resourcing this body with staff accordingly. Alternatively, the Compliance Committee could have memorandums of understanding or secondment arrangements with the Department or other bodies that have staff with this expertise.

The Compliance Committee must also meet regularly to have effective oversight and be able to take action against alleged slot misuse in a timely manner. The Sydney Airport Demand Management Regulations 1998 specify that the Compliance Committee must meet at least once in a calendar year and there is evidence that the Committee historically planned to meet a minimum of 4 times per year, during and at the end of each of the 2 seasons.[33] However, recent public comments suggest the Compliance Committee has not met since 2015.[34]

The Harris Review called for the Compliance Committee to meet during the season. We consider this is the minimum frequency with which meetings should be held to ensure regular oversight of slot usage. The Compliance Committee should not be prevented from meeting more frequently if it considers there is a need.

The Australian Government should implement slot management reforms as soon as possible

We encourage the Australian Government to implement reforms as soon as possible. The benefits of implementing reforms to the slot management scheme, such as those we suggest above, will take time to flow through. This is due to the seasonal slot allocation and time required for airlines to seek out additional slots freed up by slot reform. New and expanding airlines need access to slots at Sydney Airport now, in what is currently a critical time for the industry as these players attempt to solidify their positions in the airline market and compete effectively with the incumbents.

The current slot arrangements are due to sunset in April 2024. We strongly urge the Australian Government to ensure the reforms are in place before this date, to provide certainty for industry.

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[33] See Sydney Airport Demand Management Regulations 1998, Part 2, s 9A; Department of Infrastructure and Transport, *Sydney Airport Slot Management Administration Manual* (Version 1.1), July 2013, p 37, accessed 21 November 2023.

[34] Select Committee on Commonwealth Bilateral Air Service Agreements, *Report*, October 2023, p 72, accessed 21 November 2023.

3. Policy reforms to address airport market power

Many airports in Australia are regional natural monopolies. These airports typically have significant market power, as they do not face effective competition from other airports for provision of air transportation services in their region. The extent of the market power varies, depending on how critical a 'hub' for economic activity the airport is.

Airports seek to maximise their profits, just as any other business, and can seek to achieve this by charging monopoly prices and/or limiting service levels because they are not constrained by competition. Airports may also under or over invest in their infrastructure, and lack incentives to operate efficiently or adopt innovative technologies and service models. These actions hamper productivity and cause efficiency losses, therefore harming consumers and the broader Australian economy.

The Productivity Commission has found in its previous inquiries that at least the 4 airports the ACCC monitors (Sydney, Melbourne, Brisbane and Perth) have significant market power.[35]

As noted in our submission to the Aviation White Paper Terms of Reference:

- The ACCC has repeatedly observed in its airport monitoring reports that the 4 monitored airports achieved sustained high profit margins and we regularly receive complaints from airlines about the behaviour of the monitored airports during negotiations. We also receive complaints from airports, suggesting that there is some inefficiency in the current negotiations.
- The Productivity Commission commented on high international charges at Sydney and Brisbane airports, Sydney Airport's high profitability and high operating costs at Perth Airport in its 2019 inquiry report.[36]
- The ACCC is concerned that these findings collectively indicate the current light-handed regime is not working well enough to prevent the monitored airports exercising market power.[37]

We consider the Australian Government should adjust the regulatory framework to provide greater protections against airport market power in negotiations. We also consider the Australian Government should make changes to how the Aeronautical Pricing Principles are applied.

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35 Productivity Commission, *Price Regulation of Airport Services (2002)*, 13 May 2002, p 133, accessed 21 November 2023; Productivity Commission, *Economic Regulation of Airport Services (2012)*, 30 March 2012, p 63, accessed 21 November 2023 and Productivity Commission, *Economic Regulation of Airport Services (2019)*, 22 October 2019, p 89, accessed 21 November 2023.

36 Productivity Commission, *Economic Regulation of Airport Services (2019)*, 22 October 2019, p 89, accessed 21 November 2023.

37 ACCC, *Aviation White Paper ACCC submission in response to the terms of reference*, 15 March 2023, p 35.

Changes must be made to address airports' market power

A key objective of the Australian Government for the regulatory oversight of airports is to facilitate commercially negotiated outcomes in airport operations, as well as to encourage efficient operation of, and investment in, airports.[38] However, despite some airlines having a degree of negotiating power, there remains a significant power imbalance between the airports and airlines in these negotiations. There are 2 key factors that cause this imbalance of power, namely:

- airlines do not have access to sufficient information required to effectively negotiate with airports for access.
- there is no efficient or effective recourse for airlines when airports use their market power in negotiations.

In our view, the Australian Government must make changes to the regulatory framework to address *both* of these factors and correct the imbalance of power in airport and airline negotiations.

Enhanced information provision requirements for airports will reduce information asymmetry in negotiations

Airlines need access to sufficient information about the airports' operations and costs to be able to effectively negotiate with them for access to airport infrastructure. This is particularly true for smaller airlines and new entrants, which have less capacity to gather this information compared with larger, well-established airlines.

As noted in our submission to the Productivity Commission's 2019 Inquiry into the Economic Regulation of Airports, it is unclear whether airports are providing sufficient information to airlines to enable meaningful negotiations. Airlines have raised concerns that they have insufficient information around cost/benefit analysis for capital projects proposed by airports, for example.

We recommended that the Productivity Commission consider introducing a means to reduce the information asymmetry between airports and airlines in negotiations, such as giving the ACCC powers to create record-keeping rules for airports, as it does in telecommunications.[39]

The Productivity Commission ultimately recommended the Australian Government strengthen the ACCC's current airport monitoring regime to enhance transparency around the airports' operations and to detect the exercise of market power more readily (Recommendation 9.4). The Australian Government supported this recommendation and subsequently requested that the ACCC:

- review the current reporting requirements under Parts 7 and 8 of the Airports Regulations, and

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38 The Australian Government's objective of facilitating commercially negotiated outcomes in airport operations is stated in the terms of reference for the Productivity Commission Inquiry into the Economic Regulation of Airports (2019). See Productivity Commission, *Economic regulation of airports (2019) Terms of reference*, Productivity Commission website, 22 June 2018, accessed 21 November 2023.

39 ACCC, *Productivity Commission Inquiry into the Economic Regulation of Airports – ACCC submission in response to the Issues Paper*, September 2018, Recommendation 2, pp 35-36.

- provide advice on amendments to these regulations to align them with the Government's response to the Productivity Commission's recommendations and improve their fitness for purpose.

Following extensive consultation with industry, the ACCC provided its full advice to the Department in early May 2023, which is available on our website.[40] At a high-level our advice was for the Australian Government to amend the Airport Regulations to require the monitored airports to:

- disaggregate aeronautical and non-aeronautical financial statements and operational data
- break down all expenses and assets on a cost allocation basis (i.e. break costs down into direct costs, shared but attributable costs and shared but unattributable costs), and
- describe the methodologies used to allocate costs, assets and revenues.

Implementing these information provision requirements for airports, and subsequent ACCC reporting on this information, will significantly improve the information airlines have about the airports' cost of operations and investments. This will therefore strengthen airlines' position when negotiating with airports for access to infrastructure and associated services.

The ACCC encourages the Australian Government to implement our recommendations on these enhancements to airport information provision as soon as possible. However, these changes are the minimum required to improve information provision for airport monitoring. The Australian Government should still consider providing the ACCC with powers to create record-keeping rules and subsequently publish collected information, as we originally suggested. Record-keeping rule powers would provide flexibility for the ACCC to regularly assess the ongoing need for airports' data and amend requirements as necessary. As previously noted, this need not be a costly exercise.[41]

Access to arbitration will help address the imbalance of power in commercial negotiations

The current regulatory framework does not provide any efficient or effective recourse for airlines if negotiations with airports break down. Airlines can therefore be effectively forced to walk away from negotiations or accept terms provided by airports, should negotiations break down to that point. This contradicts the Australian Government's intention for meaningful commercial negotiations to take place between parties and illustrates the significant imbalance of negotiating power between airlines and airports.

The ACCC's ongoing and long-term monitoring role, coupled with consistent Productivity Commission recommendations that airports do not need anything more than monitoring, means there is no credible threat of regulation of airports.[42] Consequently, there is nothing to incentivise airports not to use their market power during negotiations with airlines.

Airlines must have access to a credible and effective form of recourse if they cannot reach commercial agreement with airports to truly benefit from the above enhancements to

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40 ACCC, *More detailed information on airport performance ACCC final advice – Productivity Commission 9.4*, May 2023.

41 ACCC, *Productivity Commission Inquiry into the Economic Regulation of Airports – ACCC submission in response to the draft inquiry report*, March 2019, p 20.

42 ACCC, *Productivity Commission Inquiry into the Economic Regulation of Airports – ACCC submission in response to the Issues Paper*, September 2018, p 31; ACCC, *Productivity Commission Inquiry into the Economic Regulation of Airports – ACCC submission in response to the draft inquiry report*, March 2019, p 2; ACCC, *Airport monitoring report 2020-21*, June 2022, p 22; ACCC, *Airport monitoring report 2021-22*, August 2023, p 24.

information provisions by airports. We therefore strongly encourage the Australian Government to introduce provisions to enable binding commercial arbitration to occur should negotiations between airports and airlines breakdown (i.e. a negotiate/arbitrate regime).

We have previously outlined numerous benefits of adopting such a regime, including:

- Arbitration provides a credible threat against misuse of market power by airports, by incentivising them to negotiate in good faith with airlines.
- Airlines generally support a negotiate/arbitrate regime, with Qantas, Virgin Blue (now Virgin Australia), the Board of Airlines Representative of Australia and the Regional Aviation Association of Australia all previously advocating for the introduction of binding arbitration carried out by an independent party.[43]
- A negotiate/arbitrate framework is a light-handed and flexible regulatory solution, given the limited need for intervention, and could protect either airlines or airports in the event they had weaker negotiating power than their counterpart.[44]

In the ACCC's experience, a negotiate/arbitrate framework is unlikely to lead to a large number of arbitrations, particularly in the context where vertical integration of monopolies is not an issue. [45]

We consider that using commercial arbitration is the preferred model of arbitration for resolving disputes between airlines and airports. Commercial arbitration has the advantages of being able to focus on commercial principles and the expectation of arbitration concluding in a timely manner.

We strongly encourage the Australian Government to introduce a pathway to binding commercial arbitration for airport and airline negotiations. This, coupled with enhanced information provision by airports to the ACCC, will go a significant way to improving the regulatory framework of airports.

The Australian Government should conduct a review of the Aeronautical Pricing Principles and make them mandatory and enforceable

The Australian Government considers the Aeronautical Pricing Principles to be a critical part of its light-handed regulatory regime for Australian airports. They are designed to assist airlines in negotiations with airports that have market power by arming them with essential information and providing an objective framework to:

- assess the reasonableness of airports' offers
- identify specific factors that are causing the parties to disagree on what prices are fair and reasonable, and
- seek an effective resolution of disputes between the parties.

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43 Qantas Group, Virgin Blue Airlines, the Regional Aviation Association of Australia and the Board of Airline Representatives of Australia, *Productivity Commission Inquiry into the Economic Regulation of Airport services - Submission made by members of the airline industry*, 21 April 2011, accessed 21 November 2023.

44 ACCC, *Productivity Commission Inquiry into the Economic Regulation of Airports – ACCC submission in response to the Issues Paper*, September 2018, pp 36-39.

45 ACCC, *Productivity Commission Inquiry into the Economic Regulation of Airports – ACCC submission in response to the Issues Paper*, September 2018, pp 37-38.

The ACCC has previously noted that the Aeronautical Pricing Principles are not assisting airlines as intended.[46] We have observed that there is disparity in compliance with, and understanding of, the Aeronautical Pricing Principles, whereby:

- although most airports use a model to inform their pricing for negotiations with airlines, there is evidence that some do not, and
- of those airports that use a pricing model to inform negotiations, there can be significant disagreement between airports and airlines about the inputs (with the latter having little access to information to assess whether the airport's offer is reasonable).

Further, airports can threaten loss of access to facilities when there is substantial disagreement, which airlines have very few viable options against.

In the ACCC's view, these issues stem from the fact the Aeronautical Pricing Principles are unenforceable and there is no oversight of their application.

The ACCC encourages the Australian Government to conduct a targeted review of the Aeronautical Pricing Principles and their application, as considered in the Aviation Green Paper. Such a review should consider the best method for airports to determine their efficient long-run costs and therefore set prices.[47] The review could also consider what form of oversight might be needed to ensure airport and airline agreements align with the Aeronautical Pricing Principles.

The Australian Government should then mandate the use of the Aeronautical Pricing Principles following such a review, and make them enforceable. As demonstrated above, relying on the expectation that airport and airline agreements adhere to the Aeronautical Pricing Principles does not work. The Australian Government must amend the Airports Regulations 1997 to mandate use of these principles to set prices and introduce an appropriate enforcement mechanism to provide effective and efficient recourse against their misuse. This would then lead to consistent application of the Aeronautical Pricing Principles in agreements between airports and airlines across the country.

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[46] ACCC, *Aviation White Paper ACCC submission in response to the terms of reference*, 15 March 2023, pp 32-33; ACCC, *Airport monitoring report 2021-22*, August 2023, pp 7-8 and 26-31.

[47] The ACCC has previously suggested that a Building Block Model, as widely used in other regulated industries, could be an effective tool for airports to determine their efficient long-run costs. See ACCC, *Airport monitoring report 2021-22*, August 2023, pp 29-31.

4. Consumer protection

Consumers continue to raise concerns and frustrations about issues in the aviation sector with regulators, government and in the media. The lack of competition and choice in the sector results in high prices, poor customer service (particularly poor communication), decreasing service quality, issues resolving disputes and obtaining redress, and a general lack of accountability. The ACCC's consumer contacts data since we made our submission to the Aviation White Paper terms of reference in March 2023 (discussed further below) indicates that these concerns and frustrations continue to persist.

As discussed in our submission to the Aviation White Paper terms of reference, consumers play a crucial role in fostering an efficient and competitive aviation industry. Engaged and empowered consumers lead to improved competition, productivity, and innovation. In competitive markets, consumers do not make purchasing decisions based on price alone. Customer service and the entire consumer experience when dealing with a business is also hugely influential in consumers' decision making.

Unfortunately, the relatively low level of competition in the domestic airline market over much of the last decade has a direct impact on airlines' incentives to invest in overall service provision. The lack of viable alternatives and reliance on air travel due to Australia's geography means there is less choice for customers. This reduces the incentive for the airlines to invest in systems and measures that would provide high-quality customer service.

The airlines should be able to resolve most consumer issues at the point of initial contact, or even proactively before the issue generates consumer complaints, rather than consumers having to resort to raising issues with regulators or pursuing claims in tribunals or small claims courts.

However, the lack of any effective mechanisms for consumers to resolve disputes and enforce their ACL consumer guarantees rights, as well as customer service issues, has led to a dramatic increase in consumers contacting regulators, including the ACCC.

The ACL is administered under a one-law, multiple-regulator model. The ACCC and state and territory consumer protection agencies, are responsible for compliance and enforcement action under the ACL. In the majority of cases, consumers contact ACL regulators for assistance following attempts at resolving their issue with the relevant airline. The state and territory consumer protection agencies often help resolve individual disputes by negotiating an outcome on a consumer's behalf with the relevant airline. Although the ACCC is not a dispute resolution body, we have at times assisted groups of consumers resolve issues with the airlines, this was particularly the case during the COVID-19 pandemic.[48] The poor consumer experience in the airline sector has led to an increased impost on the informal dispute resolution services provided by ACL regulators. Despite this work by the ACL regulators, the issues consumers are experiencing demonstrate that meaningful changes to the consumer protection framework in the airline sector are required.

As discussed further below, the ACCC supports improvements to the consumer protection framework. This includes economy-wide reforms to the ACL, alongside specific reforms for

[48] See ACCC, *The impact of COVID-19 on consumers and fair trading*, November 2020.

the aviation sector. In particular, the ACCC considers the following reforms would improve consumer protections in the airline industry:

- The introduction of economy-wide civil penalties when a business fails to provide a remedy to a consumer when they are legally required to do so under the consumer guarantees in the ACL.[49]
- The introduction of an economy-wide prohibition on unfair trading practices.[50]
- The introduction of a targeted and fit-for-purpose compensation scheme for delayed or cancelled flights.
- A truly independent airline ombuds scheme, with the ability to make binding decisions, to replace the ineffective Airline Customer Advocate.

ACCC contacts data and existing consumer laws

The ACCC receives thousands of contacts about international and domestic airlines every year. However, despite the large spike in contacts in 2020 due to the COVID-19 pandemic, contacts were also trending up in the years prior to 2020 and have been trending up since travel restrictions and lockdowns were lifted. Contacts remain persistently high in 2023 (to 30 September 2023), with the average monthly contacts significantly higher than pre-pandemic levels.

Table 4.1 ACCC contacts regarding international and domestic airlines from January 2018 to 30 September 2023

ACCC contacts regarding airlines (international and domestic)[51]		
Year	**Total contacts**	**Average contacts per month**
2018	1553	129
2019	2157	180
2020	9332	778
2021	3161	263
2022	5708	476
2023*	3225	360

[49] The Government has previously released a consultation paper on improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the ACL. This is discussed further below.

[50] The Government is currently consulting on options to address unfair trading practices across the economy. This is discussed further below.

[51] As a comparison, while the data in the ACCC's 2017 Airlines Terms and Conditions Report only covered domestic airlines, the report noted that between 1 January 2016 and 14 December 2017 the ACCC received over 1,400 contacts about issues with the airlines.

Figure 4.1 ACCC contacts regarding international and domestic airlines from January 2018 to 30 September 2023

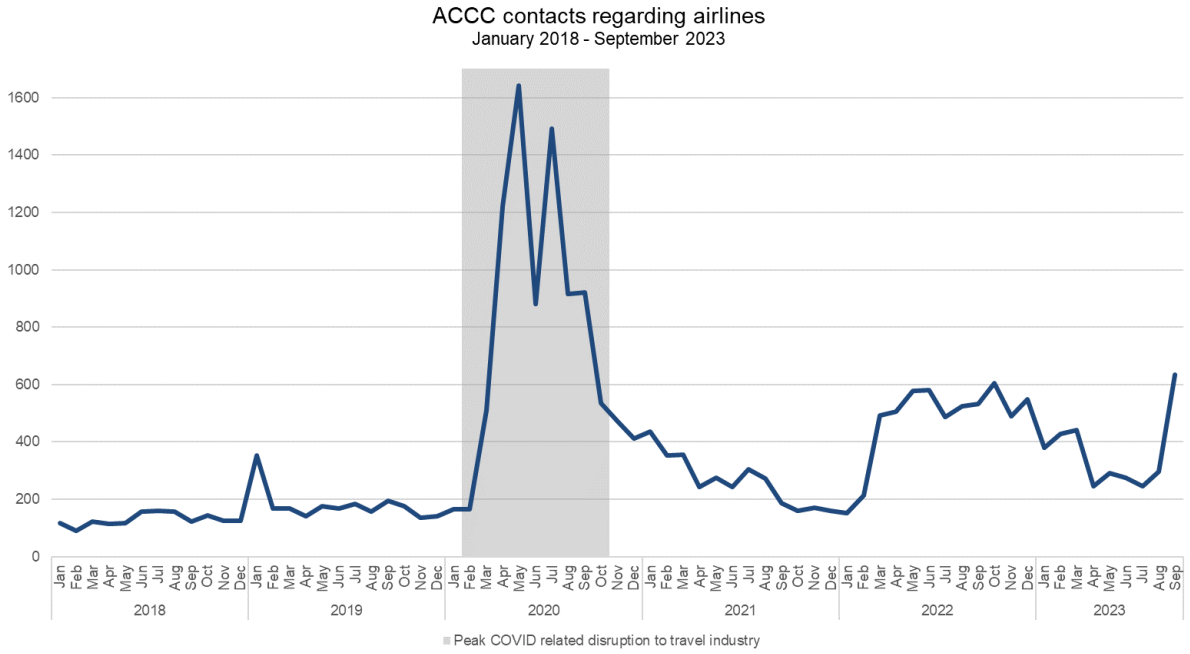


Figure 4.2 Distribution of ACCC contacts regarding airlines from January 2018 to 30 September 2023 – international vs domestic airlines

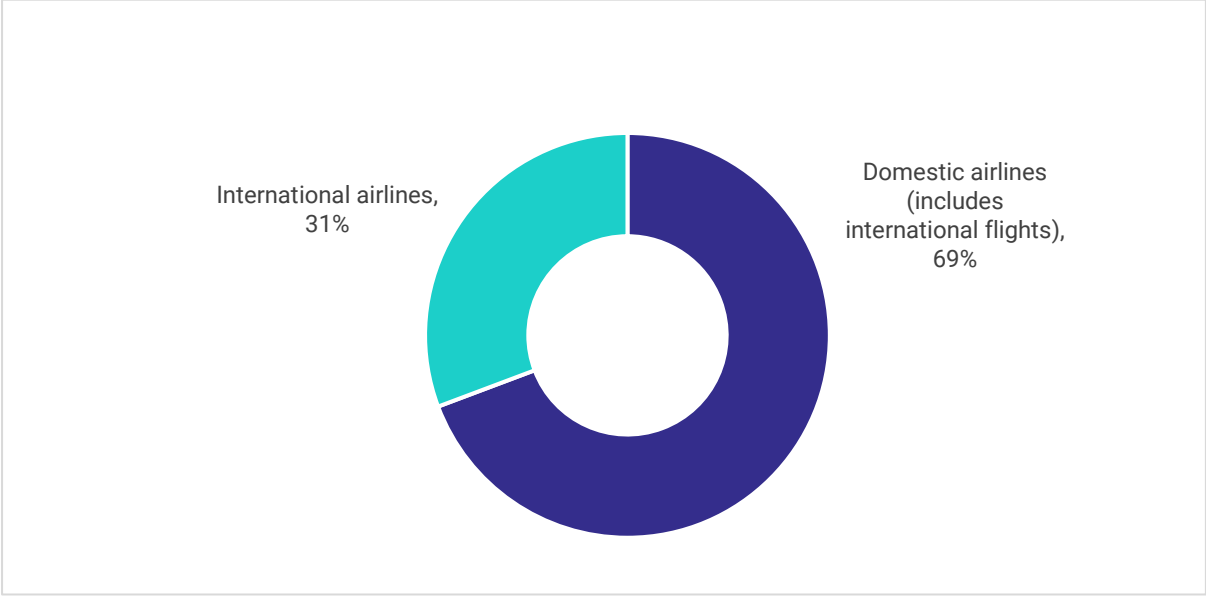
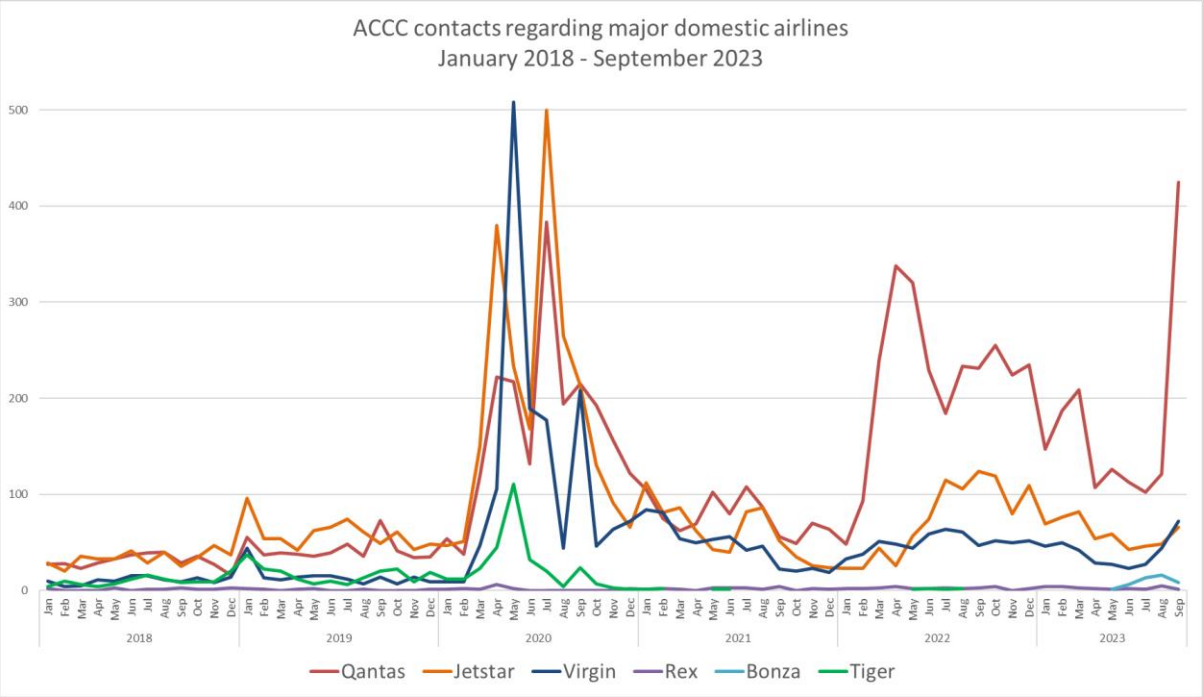


Figure 4.3 ACCC contacts regarding the major domestic airlines from January 2018 to 30 September 2023



The figures in Table 4.1 are total contacts regarding airlines. Contacts do not always mean a business has acted in breach of the ACL or the CCA. These figures will also include:

- contacts where consumers have enquired about their rights on an issue (as opposed to making a complaint about an airline's conduct)
- an increase in contacts about Virgin during 2020, which largely related to Virgin entering administration, and its subsequent purchase by Bain Capital, and how this impacted consumers' rights
- contacts where consumers are complaining about conduct that would not give rise to a breach of the ACL or the CCA
- contacts where an airline is perceived to be responsible for parts of the aviation supply chain they do not control (e.g. airport facilities, air traffic control)
- contacts involving issues arising with airline bookings made through travel agents or other intermediaries. In these cases, the cause of the consumer's issue may lie with the airline, the intermediary, neither, or both.
- complaints about the airlines' conduct where the allegations have not been confirmed or verified.

Notwithstanding these caveats, and even accounting for the 2020 spike due to COVID-19 related travel issues, such an increased level of contacts is at least indicative of the airlines' decreasing ability and effectiveness in handling and resolving consumer complaints.

We are also aware of the broader industry issues around the COVID-19 related 2020 spike in contacts, and the more recent 2022 increases in contacts from our compliance, enforcement and monitoring work in the aviation sector. These issues are summarised in our submission to the Aviation White Paper terms of reference.[52] As a result of the COVID-19

[52] ACCC, Submission in response to Aviation White Paper Terms of Reference, March 2023, pages 25 to 26.

related issues, in 2020 the ACCC conducted a number of urgent interventions in the travel sector.[53]

For the first 9 months of 2023, contacts to the ACCC have remained persistently high and above pre-pandemic levels. Monthly contacts in 2023 (to 30 September 2023) are 179% higher than in 2018 and 100% higher than in 2019.

There was a significant increase in consumer contacts about Qantas in August and September 2023. This occurred during the same period as the ACCC commencing legal action against Qantas Airways for alleged false, misleading, or deceptive conduct, and other Qantas issues in the media.[54]

Existing consumer protection framework

Under the ACL consumer guarantees, travel providers including airlines are required to supply their services with due skill and care and within a reasonable time. If these consumer guarantees are not met, then consumers are entitled to a remedy. This may be a refund or replacement service, depending on whether the failure to meet the consumer guarantee is a major or minor failure.

Further, if there is a major failure to meet any of the consumer guarantees, in addition to a refund or replacement service, consumers are also entitled to compensation for consequential loss or damage that is reasonably foreseeable and caused by the failure to meet the consumer guarantee.

The airlines have compensation policies that set out the further assistance they will provide if a consumer's flight is delayed or cancelled, such as providing a voucher for, or reimbursing (up to a certain limit) the costs of, a meal and/or accommodation. The level of assistance promised by airlines under these policies depends on whether the cancellation or delay was within the airline's control, how long the flight delay was for and whether the customer is located at their home airport.

However, an airline compensation policy cannot exclude consumers' rights under the ACL consumer guarantees, and the compensation consumers may be entitled to in any particular case may be greater than the limits set in the airlines' compensation policies.

Where a travel provider provides their service (e.g. the airline provides the flight), however the consumer misses the service through no fault of the travel provider, consumers will not be entitled to a refund or credit under the ACL consumer guarantees.

The ACL consumer guarantees are also unlikely to apply if an airline delays or cancels a flight due to the actions of a third party, such as in the instance of government restrictions on travel, like those implemented in response to the COVID-19 pandemic. In this situation, consumers' entitlement to a refund or credit will generally be determined by the terms and conditions of their booking.

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53 See ACCC, *The impact of COVID-19 on consumers and fair trading*, November 2020.

54 ACCC, *ACCC takes court action alleging Qantas advertised flights it had already cancelled*, media release, 31 August 2023.

Improving consumer protections for airline customers

The ACCC considers the following reforms to the consumer protection framework (both economy-wide and airline sector specific) will greatly improve consumer welfare, as well as improve fair trading and competition in the sector.

Penalties for failing to provide remedies under the ACL consumer guarantees

The ACCC has been strongly advocating for reform to the ACL consumer guarantees to make it a contravention of the ACL for businesses to fail to provide a remedy for consumer guarantees failures when they are legally required to do so.

This was a key recommendation in our submission to Treasury's December 2021 consultation paper on options aimed at improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the ACL.[55]

The ACCC is advocating for this as a whole-of-economy reform, not an airline sector specific reform. At present, despite the considerable compliance and enforcement activities by the ACL regulators over the years, there are little to no incentives in the ACL for businesses across all sectors to comply with their consumer guarantee obligations. Currently, the consumer guarantees provide a private right enforceable by consumers. The ACL regulators are not able to take legal action to penalise suppliers or manufacturers that simply refuse to provide consumers with a remedy they are entitled to under the consumer guarantees.[56] This significantly undermines the consumer guarantees regime.

Where there is non-compliance with the consumer guarantees, it is also difficult for individual consumers to enforce their rights. While small claims courts and tribunals are intended to provide a low-cost method for consumers to enforce claims, including consumer guarantee claims, the costs of taking action in a court or tribunal can be considerable, particularly when consumers are opposing a well-resourced airline. Further, there is limited effectiveness to such court or tribunal actions as consumers may not be granted the full remedy they are entitled to. In many tribunal considerations, the focus can be on determining some resolution to the dispute involving compromise, usually by consumers, rather than necessarily following the parties' entitlements and obligations under the law.

The ACCC's recommended reform would change business incentives to comply with their consumer guarantee obligations, and more effectively support consumers in securing their statutory consumer guarantee rights.

Unfair trading practices prohibition

Throughout the ACCC's work, we have identified unfair trading practices which cause harm to consumers and small businesses, and are not adequately addressed by the existing provisions of the ACL. Such conduct can be:

- harmful but does not reach the legal threshold for unconscionable conduct;

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[55] See The Treasury, *Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law*, December 2021, accessed 21 November 2023

[56] While the ACL regulators can take action if a business misleads consumers about their entitlement to a remedy, such an action does not directly deal with the core issue of businesses not providing the remedies consumers are entitled to.

- not misleading or deceptive, but distorts consumer choice by creating confusion or hiding or omitting relevant information; or
- not captured by the unfair contract term provisions (for example, unfair conduct engaged in pursuant to a contract term that is, on the face of it, not an unfair contract term).

The Government is currently consulting on options to address unfair trading practices.[57] The ACCC supports the introduction of an economy-wide prohibition on unfair trading practices in the ACL.

The ACCC will engage directly with that consultation process, however we note that an appropriately framed prohibition on unfair trading practices in the ACL could also assist in addressing consumer issues in the aviation industry.

Compensation scheme for delayed or cancelled flights

The consumer guarantees in the ACL are principles-based and framed around reasonableness. However, as noted above, it can be very difficult for consumers to enforce their consumer guarantees rights and it is inefficient for consumers to pursue these on an individual basis in cases where many consumers are similarly impacted.

Despite the existence of ACL consumer guarantees rights, airline customers in Australia can bear significant additional costs for delayed or cancelled flights.

Many customers with delayed or cancelled flights are unable to reschedule their travel plans associated with the flight. This can result in consumers being out of pocket, paying for related activities and accommodation which they are unable to use. Customers can also be placed on alternative flights which are unsuitable for their travel needs, such as missing a medical appointment, major life event (e.g., wedding, funeral), or a business meeting. Consumers also often report accepting a flight credit for their original disrupted flight and needing to pay for a new flight with another airline to travel in time to meet these appointments or life events. However, these new flight bookings often need to be made very close to, or on, the date of travel, resulting in the consumers often paying for substantially higher airfares to get to their destination.

Airlines also often limit the level of assistance provided in many circumstances. For example:

- airlines offering only an airport voucher where a consumer's morning domestic flight has been significantly delayed and they are rescheduled to an evening flight, despite many impacted consumers likely incurring other costs from the delay.
- airlines' rigidly adhering to the cap on accommodation reimbursement stated in their compensation policies. This can leave consumers significantly out of pocket in circumstances where they have to book their own accommodation (where the airline has not arranged this for them), and at the time there is some significant event occurring which means accommodation costs in that location are particularly high.

The financial impact and inconvenience on consumers travelling to and from remote and rural areas is often more acute, given flights to those locations operate with less frequency.

Many international jurisdictions have prescriptive requirements for compensation in many circumstances when a flight has been delayed or cancelled. The European Union scheme is

[57] See The Treasury, *Unfair trading practices – Consultation Regulation Impact Statement*, accessed 21 November 2023 (the Federal Government is leading the consultation on behalf of it and all the states and territories).

discussed in more detail below, however other jurisdictions including the United Kingdom, Canada, Israel, Nigeria and Mexico also have some form of a mandatory prescriptive compensation scheme in operation. The design and operation of the scheme differs according to the jurisdiction. For example, the European Union, United Kingdom, Canada and Israel have a fixed monetary compensation amount depending on the length and nature of the delay, while Nigeria and Mexico have a compensation amount based on a percentage of the ticket price.

In May 2023, the United States Department of Transport announced it will also introduce new rules for airlines in the United States to provide compensation and cover expenses for passengers of delayed or cancelled flights.[58] This will include monetary compensation for significant delays and cancellations within an airline's control.

European Union compensation scheme

Since 2004, the European Union has had rules in place for compensation and assistance in many circumstances of delayed or cancelled flights. This is known as Regulation (EC) No 261/2004 (EC261).[59]

EC261 provides that consumers are entitled to compensation for delays of 3 hours or later, with the amount of compensation tiered based on the delay and the type of flight. This includes whether it is internal to the European Union or not, and whether the flight distance is under 1,500km, between 1,500km and 3,500km, or over 3,500km. Compensation for delays ranges from €250 to €600 based on this tiering. For flights that are cancelled, consumers are also entitled to a full refund if the cancellation occurs:

- within 7 days of the flight's departure, or
- between 2 weeks and 7 days of the flight's departure, and they are not offered an alternative flight which will allow them to depart no more than 2 hours before the original scheduled time of departure and to reach their final destination less than four hours after the original scheduled time of arrival.

EC261 also specifies that it applies without prejudice to consumers' rights to further compensation, but notes that compensation under EC261 may be deducted from any such further compensation.

EC261 does not apply where the reason behind the flight disruption can be connected to 'extraordinary circumstances' and the issue is outside of the airline's control. Extraordinary circumstances include political instability, extreme weather conditions, medical emergencies, air traffic control restrictions, acts of terrorism and the like.

However, even in extraordinary circumstances, airlines must still show that they have taken reasonable measures to prevent the delay. For example, bad weather may be considered an extraordinary circumstance, however if other airlines were prepared for it and prevented delays then that standard applies to all airlines.

Introduction of a compensation scheme in Australia

The airline sector needs to improve performance, customer service and engagement, and timely and fair consumer dispute resolution. A carefully designed and fit-for-purpose

[58] US Department of Transportation, 2023, *DOT to Propose Requirements for Airlines to Cover Expenses and Compensate Stranded Passengers*, 8 May 2023, accessed 21 November 2023.

[59] See Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004, accessed 21 November 2023

mandatory consumer compensation scheme applying to significantly delayed or cancelled flights, underpinned by an effective ombuds scheme, would achieve these outcomes.

The ACCC notes that such a scheme would help address:

- the sustained high, and increasing, levels of consumer complaints in the sector (noting that complaints have increased and decreased in a differential way across participants in the sector over time);
- the inconsistent and piecemeal assistance provided by airlines; and
- the difficulties consumers experience in trying to enforce their ACL consumer guarantee rights.

Such a scheme would also help provide greater certainty for both airlines and consumers about how much compensation should be provided in specific delay and cancellation scenarios. In many issues of delay or cancellation, a primary concern from consumers is simply that there is a lack of adequate and timely communication from the airline as to what reimbursements and assistance they will provide.

Empirical research in 2018 found that flights subject to EC261 requirements were more likely to arrive on time than flights not bound by EC261 requirements. Researchers analysed the flight performance of inbound flights to Europe, comparing European Union and non-European Union carriers which serviced the route. They found that airlines subject to compensation EC261 requirements were 5% more likely to arrive on time, and the mean arrival delay was reduced by 4 minutes. Researchers found the benefit to consumers was, "strongest on routes with little competition, and for legacy carriers."[60]

While the introduction of a compensation scheme in Australia will likely introduce greater incentives for airlines to improve flight performance and prevent delays which are controllable, the ACCC considers the main objective to be achieved is to ensure consumers are provided with adequate customer service and redress when there are cancellations or delays.

The ACCC notes arguments that the implementation of a compensation scheme in Australia will result in higher operating costs for airlines. Research conducted for the European Commission in 2020 found that the average direct cost per passenger for airlines implementing EC261 was €4.4 in 2018, which had risen from €1.8 in 2011.[61] The analysis also found that compliance with EC261 represented 3% of all total costs for full-service carriers and 6% for low-cost carriers.[62]

Airlines may raise ticket prices, or absorb any additional costs arising from a compensation scheme and record lower profits, or both. Although increased costs may be passed on in some way, affected customers are already bearing significant direct costs for delayed or cancelled flights, receiving inadequate customer service when dealing with cancellations and delays, and facing significant issues in resolving disputes around redress for cancellation and delays. A well-designed compensation scheme would decrease those costs and is a clear and equitable policy solution to help address this harm. Moreover, a clear and certain framework for compensation may be more cost effective than having complaints determined in a piecemeal way.

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60 H. Gnutzmann and P. Śpiewanowski, 2023, "Can Consumer Rights Improve Service Quality? Evidence from European Air Passenger Rights", Transport Policy, vol. 136, pp 155-168, accessed 21 November 2023.

61 Steer, 2020, "Study on the current level of protection of air passenger rights in the EU", report prepared for Directorate-General for Mobility and Transport, European Commission, p viii, accessed 21 November 2023. We note this research was conducted before the COVID-19 pandemic.

62 Steer, 2020, p 95-96. [Short citation]

The Aviation Green Paper seeks views as to whether the remit of the Airline Customer Advocate should be expanded to include it working with industry to introduce 'fixed payout' type insurance products which provide more certain compensation arrangements.

We are concerned that a compensation scheme under a framework like this could lead to situations where consumers are being offered to pay additional costs for consumer guarantee rights which they automatically receive for free under the ACL. We are also concerned about the potential for such insurance products to share many of the harmful characteristics of add-on or 'junk' insurance, which was widely condemned in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.[63] This included add-on insurance products, bundled in with another product at the point of sale, which provided no additional benefit, and commission arrangements that incentivised the sale of these add-on insurance products. The ACCC has also observed similar issues with the supply of poor-value extended warranty products.[64] These add-on warranty products often offer little additional protections beyond existing ACL consumer guarantee rights. This information is often not made clear to consumers at the point of sale.

The ACCC considers that rather than simply replicating an airline compensation scheme from a comparable international jurisdiction, such a scheme in Australia should build on the existing ACL consumer guarantees. Consideration needs to be given to what aspects of other schemes have worked well, and what aspects have created problems, to ensure such a scheme in Australia avoids similar problems.

If the Government introduces a targeted and fit-for-purpose compensation scheme, further consideration and consultation will be needed regarding the following factors:

- The relationship between the operation of the scheme and the existing consumer guarantee provisions in the ACL, ensuring the scheme does not diminish consumers' ACL rights.
- The circumstances when a delay or cancellation is considered within an airline's control (for example, commercial decisions to not operate a flight, including to consolidate passengers), the circumstances when a delay or cancellation is considered outside an airline's control (for example, Government-imposed travel restrictions), and how compensation arrangements should apply in each circumstance.
- The need to establish greater transparency about the reasons for significant delays and cancellations.
- The timeframes which would constitute a significant delay.
- The monetary compensation amounts to be provided to customers for specific delays or cancellations.
- The principles to be considered as to consumers' entitlements for reimbursement of consequential losses in particular circumstances, such as where the airline has met some or all of the consumer's needs arising from the significant delay or cancellation,[65] or where the standard level of compensation for significant delays or cancellations may not be sufficient due to the consumer's specific circumstances.[66]

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63 The Hon. Kenneth Hayne QC, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 1 February 2019, p 288, accessed 21 November 2023.

64 For example, ACCC, *National Warranty Company agrees to change extended warranties*, media release, 28 September 2017.

65 For example, where the airline directly organises accommodation for the consumer for the period until they can take their new flight.

66 For example, where a consumer in a remote or rural area is forced to pay a cancellation fee for a medical appointment they missed due to the airline's significant delay to or cancellation of their flight.

The ACCC considers that it is critical for the compensation scheme to be underpinned by an independent and accessible ombuds scheme that can make binding decisions. Not only is there a need in general for such an ombuds scheme (as discussed further below), but this will also mitigate the enforcement and claims resolution issues seen in the European Union, including the risk of a large claims agency industry emerging in Australia as it has in the European Union.

The ACCC considers that the design of the European Union model contributes to issues seen with EC261. The European Union does not have a mandatory system of dispute resolution for the aviation sector, with member states having different rules for dispute resolution, regulatory oversight and enforcement. Analysis commissioned for the European Commission found that only 38% of eligible passengers in 2018 claimed compensation.[67] It found consumers faced a "complex system with limited transparency", with some claims taking up to several months to process.[68]

These issues have resulted in the rise of claims agencies in European Union countries, most notably in member countries where specific circumstances of those countries' justice, enforcement and/or alternative dispute resolution systems have created enforcement gaps or ideal environments for claims agencies to flourish.[69] Claims agencies are businesses which act for affected consumers in making EC261 compensation claims, often on a no-win, no-fee basis, taking their fees from the compensation amounts the airlines are required to pay under EC261 for their clients' claims.[70] A report commissioned by the European Court of Auditors in 2018 noted that airlines had estimated as many as 50% of EC261 claims are received from claims agencies.[71] The same report also noted cases of claims agencies requesting compensation from airlines on behalf of consumers, without the consumers even being aware of this action.

Ombuds schemes in Australia are designed to be free and accessible, without the need for paid representation. As an example, the Review of the Australian Financial Complaints Authority in 2021 found that 4.4% of claims at the authority were lodged by paid advocates.[72]

Having a compensation scheme supported by an independent ombuds scheme would also mean the ombuds scheme could develop guidance regarding how airlines should deal with particular scenarios. Such guidance would incentivise airlines to resolve many issues at the first instance without consumers needing to resort to the ombuds scheme, other than for more complex disputes.

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67 Steer, 2020, p vii. [Short citation]

68 Steer, 2020, p vii. [Short citation]

69 For example, it has been reported that a reason for the predominance of claim agencies in the Netherlands is that EC261 claims can be brought before courts where parties can act 'in person' and can be represented by a representative that is not a lawyer. See HFW, *Regulation (EC) 261/2004 Litigation: Claim agencies in the crosshairs of the European Commission*, April 2017, accessed on 21 November 2023.

70 Due to concerns with misconduct in this sector, the European Commission issued an Information Notice in March 2017 to clarify relevant European Union consumer protection, marketing and data protection laws applicable to claim agencies' activities in relation to EC261. See European Commission, *Informing notice to air passengers*, 9 March 2017, accessed on 21 November 2023.

71 See European Court of Auditors, *EU passenger rights are comprehensive by passengers still need to fight for them*, 2018, accessed on 21 November 2023.

72 See The Treasury, *Review of the Australian Financial Complaints Authority*, August 2021, accessed 21 November 2023.

Dispute resolution

Airline Customer Advocate

The 2009 Aviation White Paper supported a self-regulatory approach to dispute resolution, but the Federal Government concluded that it:

> *"will monitor the industry's efforts to develop proposals to better handle consumer complaints over the coming year, and will consider a more interventionist approach should this become necessary."*[73]

Industry self-regulation of dispute resolution, and the overall design and operation of the Airline Customer Advocate, has been demonstrably ineffective. Making changes to the existing Airline Customer Advocate model will not improve outcomes to a satisfactory level. A more interventionist approach is required to introduce an effective airline industry dispute resolution scheme in Australia.

The Airline Customer Advocate was established in July 2012 as an industry-based scheme to facilitate the resolution of complaints from customers about the service provided by the participating airlines. These airlines are currently Jetstar Airways, Qantas, Regional Express and Virgin Australia. The Airline Customer Advocate is funded by the airlines and is overseen by a committee of airline representatives.

As noted in our submission to the Aviation White Paper terms of reference consultation, the Airline Customer Advocate has a limited remit to consider consumer complaints and has no ability to make decisions on remedies for consumers. For example:

- During the period of COVID-19 travel restrictions it determined that it could not accept the most common complaints from consumers about COVID-19 related cancelled travel.
- A requirement for 'eligible' complaints is that the consumer must have first followed the relevant airline's internal complaints process. If a consumer attempts to do this but gets no response from the airline despite chasing multiple times, the Airline Customer Advocate will deem this an ineligible complaint as the full internal airline complaints process was not completed.

Further, the Airline Customer Advocate also has no power to determine an outcome of a dispute. Its only real 'power' is that the airlines are required to respond to a complaint the Airline Customer Advocate puts to them. The Airline Customer Advocate assigns complaints to a case manager at the airline concerned. The airline case manager then prepares a written response to the complaint on behalf of the airline concerned.

The Airline Customer Advocate then reviews the response and "if necessary will ask the airline for more information … or explain the airline's position". The consumer will then receive a response from the Airline Customer Advocate.[74]

The Airline Customer Advocate's annual report for 2022 showed that only 43% complaints considered "actioned and closed" by the Airline Customer Advocate were resolved to the consumer's satisfaction.[75] The report also notes the results of a survey undertaken of consumers with closed complaints. Three hundred and twenty-five consumers responded to the survey, representing 26% of finalised complaints:

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[73] Australian Government, *National Aviation Policy White Paper*, December 2009, p 87, accessed 21 November 2023.

[74] Airline Customer Advocate, *How to lodge a complaint*, Airline Consumer Advocate website; n.d., accessed 21 November 2023.

[75] Airline Customer Advocate, *Airline Customer Annual Report 2022*, October 2023, p 12, accessed 21 November 2023.

- Only 29% of consumers agreed or strongly agreed their complaint was managed in a timely way.
- Only 25% of consumers agreed or strongly agreed that the Airline Customer Advocate was independent in all its interactions with them.[76]

The Aviation Green Paper seeks views on whether the Airline Customer Advocate's governance arrangements should be revised, including expanding its remit to educate customers on their legal entitlements.

The ACCC considers that this would not address the key problem consumers are experiencing in the airline sector, which is about resolution of consumer issues and disputes. The sustained level of airline-related complaints indicates consumers at least have a good awareness, at a high level, that they have some form of legal rights. While more work can always be done to improve the information provided to consumers about their rights, the main driver of consumer issues and detriment is that airlines have not adequately invested in systems, processes and people to meaningfully handle consumer complaints and provide appropriate redress. Greater consumer education delivered by the Airline Customer Advocate will not rectify this problem.

Independent airline ombuds scheme

The Airline Customer Advocate should be replaced with a truly independent, external dispute resolution ombuds scheme which has the power to make binding decisions. Such an ombuds scheme model would allow for timely, efficient and fair resolution of customer complaints.

The new ombuds scheme should be set up so it is industry funded, but retains independence. The scheme should be underpinned by legislation and follow the Government's Benchmarks for Industry-based Customer Dispute Resolution. These benchmarks are accessibility, independence, fairness, accountability, efficiency and effectiveness.[77] Through these principles, ombuds schemes in Australia make decisions based on the law, good industry practices, and fairness in all the circumstances.

The Telecommunications Industry Ombudsman (TIO), the Australian Financial Complaints Ombudsman (AFCA), and energy and water and other ombuds schemes in Australia have been set up following these principles and are regularly reviewed against them.

As an example, characteristics of the TIO scheme that help make it an effective dispute resolution scheme include:

- While the TIO is predominantly funded by telecommunications service providers (including carriers and eligible carriage service providers), the Board consists of an independent chair with a balanced mix of directors with industry and consumer experience.
    - Telecommunication service providers are charged an annual fee, plus an additional amount based on the percentage of the number of referrals to the TIO the provider had in the previous calendar year compared to the total referrals the TIO received in the same year. This acts as an incentive for providers to improve internal dispute resolution processes so less referrals are made to the TIO.

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[76] Airline Customer Advocate, *Airline Customer Annual Report 2022*, October 2023, pp 6, 13, accessed 21 November 2023.

[77] The Treasury, 2015, *Benchmarks for Industry-based Customer Dispute Resolution*, February 2015, accessed 21 November 2023.

- The TIO has authority to make decisions on complaints about telephone and internet services that are binding on the service provider (if the consumer choses to accept the decision), up to $100,000 in value.
- The TIO also provides a number of guides for consumers and industry to help with common complaints and publishes a quarterly report outlining the complaint types and trends.[78]
- In addition to resolving individual complaints, the TIO also addresses broader issues through its systemic issues work. The TIO initiates investigations into issues that have, or are likely to have, a negative effect on multiple consumers or a particular type of consumer. The TIO engages with service providers about these issues and may also publish reports about these issues which provide guidance to consumers and recommendations to service providers to improve their practices. The TIO's systemic investigations work can often also result in a referral to other regulators.

The TIO is also subject to an independent review every 5 years, which includes public consultation and examines the TIO's role and effectiveness in contributing to better consumer outcomes in the telecommunications industry. The review reports make recommendations for improvements and are provided to the relevant Minister as well as published on the TIO's website.

The ACCC considers that participation in such an ombuds scheme should be mandatory for airlines operating in Australia. In the United Kingdom, Ryanair was a voluntary member of an alternative dispute resolution scheme, Aviation ADR. In 2019, Aviation ADR ordered Ryanair to pay over £2.6m to its customers after cancelling flights due to strikes.[79] However, Ryanair left Aviation ADR to avoid paying the money to its customers. A mandatory scheme in Australia will mitigate the risk that an airline will exit the scheme if it disagrees or does not want to pay particular compensation to its customers.

The ACCC notes arguments that the implementation of an independent ombuds scheme in Australia will result in higher operating costs for airlines, which will be passed on to customers. However, airline customers are already bearing substantial costs for delays and cancellations. Further, airlines should already be investing in customer service to ensure consumers receive what they pay for, and adequate redress when they don't. This includes investing in internal dispute resolution processes.

The introduction of an ombuds scheme will create better incentives to achieve this. Airlines will be incentivised to triage and resolve the bulk of complaints at the first instance, rather than having those complaints addressed through the ombuds scheme. It will also encourage airlines to identify and address systemic, root cause issues earlier, to minimise the number of consumer complaints which are resolved through the ombuds scheme.

A well-functioning external dispute resolution framework will result in timely, efficient and fair resolution of consumer complaints, and airlines that have strong internal dispute resolution processes will also attract demand from consumers who strongly factor better customer service in their purchasing decisions. In the long term, this will increase trust and confidence in the aviation sector and help ensure the market operates fairly and efficiently.

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[78] Similarly, the Australian Financial Complaints Authority's Datacube publicly reports on the numbers and types of financial complaints considered through its dispute resolution process, and their outcomes at a high level. See AFCA Datacube.

[79] See P Collinson and M Brignall, 'Ryanair savings millions in payouts after leaving arbitration body', *The Guardian*, 4 October 2019, accessed 21 November 2023.

5. Robust frameworks provide clarity in support of the transition to net zero

The Aviation Green Paper considers how to maximise the contribution of aviation to the Australian Government's net zero targets, including through the Australian Jet Zero Council and proposed Transport and Infrastructure Net Zero Roadmap.[80] This includes consideration of a number of policy matters that are beyond the ACCC's remit. We have limited our comments to issues raised in the Aviation Green Paper that may impact market mechanisms and consumer protection.

The ACCC supports the development of robust frameworks that provide certainty to industry on investment decisions to reduce emissions in the aviation sector and provide clarity to industry on their responsibilities to support the transition to net zero. The ACCC also encourages the Australian Government to consider how these frameworks could help provide transparency in the market about the environmental impacts of different aviation businesses, as well as the actions different businesses are taking to mitigate their environmental impact. This will enable consumers to better compare different aviation businesses to make more informed purchasing decisions. This, in turn, will promote fair competition by ensuring that consumer's purchasing decisions support businesses to realise the full competitive benefits of their green investments, and drive further innovation and investment in support of the transition to net zero.

Greenwashing can undermine the transition to net zero

Consumers are becoming increasingly conscious and concerned about climate change and other environmental concerns and want to make more sustainable purchasing decisions.[81] Many businesses are taking genuine steps to reduce their emissions footprint and adopt more sustainable practices. However, some businesses are making exaggerated or false claims in order to capitalise on 'green demand'.[82]

Legitimate claims about the environmental impacts of a business, product or service are a point of differentiation between businesses, can drive innovation and competition in the market, and assist in the transition to net zero. However, exaggerated or false claims can distort the market and undermine these efforts.

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80 Australian Government, *Aviation Green Paper: Towards 2050*, September 2023, p 74, accessed 21 November 2023.

81 Research conducted by the Consumer Policy Research Centre in 2022 found that 45% of Australians always or often consider sustainability as part of their purchasing decision-making; Consumer Policy Research Centre, *The consumer experience of green claims in Australia*, 2022, accessed 21 November 2023.

82 In a 2022 sweep of online environmental claims, the ACCC found that 57% of 247 businesses were making potentially misleading green claims; ACCC, *Greenwashing by businesses in Australia – findings of ACCC's internet sweep*', 2 March 2023.

False and misleading environmental claims (often referred to as 'greenwashing') can distort the competitive process and lead to consumer harm by:

- limiting a consumer's ability to make informed choices between different products or services in the market and undermining consumer trust
- leading consumers to pay more for the value of an environmental impact that does not exist
- disadvantaging businesses that provide a product or service which is genuinely more sustainable
- creating a disincentive for businesses to genuinely reduce their environmental footprint and develop and invest in new goods and services which are more sustainable and may have other benefits.

Internationally, airlines have been found to have misled consumers over their sustainability claims

Internationally, regulators, courts and policymakers are considering a number of issues arising from sustainability representations being made by businesses, including airlines, that are potentially misleading to consumers, including the following:

- Claims underpinned by airlines' initiatives to offset or reduce emissions that give the false impression that flying is sustainable.[83,84]
- Claims that are not adequately substantiated.[85]
- Comparative claims where the basis of comparison is not made sufficiently clear.[86]
- Claims underpinned by sustainability targets that may not be credible, as many technical solutions to reduce the emissions profile of air travel aren't yet available on mass-scale, such as sustainable aviation fuels.[87,88]
- Sustainability claims underpinned by the use of emissions offsetting activities that may not be of high integrity.[89]

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83 The Netherlands Authority of Consumers and Markets (ACM) found that Ryanair was misleading consumers over statements 'fly greener' that were underpinned by its CO2 offset program; ACM, *Ryanair clearer about CO2 compensation following ACM action*, 20 January 2023, accessed 21 November 2023.

84 The UK Advertising Standards Authority (ASA) found that statements by Etihad about its approach to 'sustainable aviation' were misleading, noting that despite the use of modern aircraft and flight practices to reduce emissions, air travel still produces high levels of CO2 and non-CO2 emissions; ASA, *ASA Ruling on Etihad Airways*, 12 April 2023, accessed 21 November 2023.

85 The UK ASA banned a campaign by Lufthansa for giving the false impression to consumers that it had already taken action to reduce its environmental impact, when in fact the actions were expected to deliver results only years or decades into the future; ASA, *ASA Ruling on Deutsche Lufthansa AG t/a Lufthansa*, 1 March 2023, accessed 21 November 2023.

86 The UK ASA found that Ryanair had mislead consumers over representations it was 'Europe's Lowest Fares, Lowest Emissions Airline'; ASA, *ASA Ruling on Ryanair Ltd t/a Ryanair Ltd*, 5 February 2020, accessed 21 November 2023.

87 This will shortly be considered by the Dutch courts in respect of allegations that KLM's 'Fly Responsibly' campaign misled consumers in violation of European Union consumer law; P Greenfield, 'Delta Air Lines faces lawsuit over $1bn carbon neutrality claim', *The Guardian*, 30 May 2023, accessed 21 November 2023.

88 This issue was raised in a recent complaint by the European Consumer Organisation to the European Commission alleging misleading climate-related claims by 17 European airlines; The European Consumer Organisation, *Consumer groups launch EU-wide complaint against 17 airlines for greenwashing*, media release, 22 June 2023, accessed 21 November 2023.

89 This is being considered by a class action suit against Delta Airlines; P Greenfield, 'Delta Air Lines faces lawsuit over $1bn carbon neutrality claim', *The Guardian*, 30 May 2023, accessed 9 November 2023.

- Consumers not readily understanding what is meant by headline claims such as 'carbon neutral', 'climate neutral' or 'net zero'.[90,91]

The ACCC has released guidance to help businesses understand their obligations when making sustainability claims

Where businesses, including aviation businesses, choose to make voluntary representations about the environmental impacts of their business, products or services, it's important that those representations are accurate and substantiated.

The ACCC recently released draft guidance for business about making environmental and sustainability claims.[92] The ACCC will be releasing additional guidance on emissions and offset claims in 2024.

[90] The Netherlands ACM undertook research that found terms such as 'CO2 neutral' are poorly understood by consumers, see Kantar Public, *CO2 offset claims: Consumer survey*, unofficial English translation, July 2022, accessed 21 November 2023.

[91] The European Parliament and Council recently reached provisional agreement to prohibit generic environmental terms without proof of recognised excellent environmental performance related to the claim. Additionally, agreement to prohibit claims based on emissions offsetting that a product has a 'neutral', 'reduced' or 'positive' impact on the environment; European Parliament, *'Green claims' directive: Protecting consumers from greenwashing*, October 2023, accessed 21 November 2023.

[92] ACCC, *Environmental and sustainability claims: Draft guidance for business*, July 2023.