Airlines and the Australian Consumer Law

A few days below Christmas last year, the Australian Competition and Consumer Commission (**ACCC**) released a report titled "Airlines: Terms and Conditions".[1]

In this report the ACCC focuses on issues arising from services provided by Australian airlines. Specifically issues relating to consumer guarantee rights and contract terms which may be unfair when considered against the Australian Consumer Law (**ACL**).

The report is important because the ACCC appears to acknowledge that there have been failings by Airlines to date with respect to their ACL obligations.

In a positive development for consumers, the ACCC says that in 2018 it will "*engage with the Airlines to discuss [their] expectations for change*." Although this statement appears benign on the face of it, it is fairly significant in that the ACCC is putting Airlines on notice. In this respect the ACCC goes on to say "*While we do not ordinarily pursue individual consumer matters, in this area, where steps are not taken, the ACCC may need to action a number of individual matters to effect broader changes*."

The ACCC notes that between 1 January 2016 and 14 December 2017 they received over 1400 consumer complaints about airlines including hundreds of complaints relating to consumer guarantees and excessive fees.

Their report focused on the following issues:

1. 'No refund' statements on the Airlines' websites;
2. Excessive fees for flight cancellations and changes; and
3. The application of consumer guarantees, including statements made about a customer's consumer guarantee rights under the ACL, in circumstances where flights have been cancelled or delayed.

1. 'No refund' statements

According to the ACCC:

"A number of airlines make statements on their websites that sale, low cost and non-flexible economy fares are non-refundable. These statements most commonly appear in sections outlining the Fare Rules.

[1] https://www.accc.gov.au/publications/airlines-terms-and-conditions-report

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'No refund' statements may lead consumers to believe they are not entitled to a refund under any circumstance. However, consumers who purchase goods and services have rights to remedies under the ACL which businesses cannot restrict, alter or remove.

In most instances the 'no refund' statement is qualified in the Airlines' Conditions of Carriage, which explain when a refund can be obtained and refer to the ACL obligations.

However, the ACCC is concerned that these qualifications are not sufficient to clarify the initial and prominent no refund representation. The Airlines' Conditions of Carriage are lengthy, often in fine print, and it can be difficult for consumers to find the relevant information."

When dealing with no refund issues, consumers should be aware that notwithstanding claims by Airlines, they may be entitled to refunds for services not delivered. Each instance will turn on its own facts. Suffice to say consumers should not be deterred by Airlines fobbing off any refund enquiry. Where practicable, consumers should seek more information and clarification from the Airline including putting a pointed question to them about the ACL and how a denial of refund is consistent with the ACL in this regard.

2. Excessive fees for cancellation and changes

The ACL protects consumers from unfair contract terms in 'standard form contracts' which is what Airline contracts are. That is, standard form contracts are contracts which are prepared by one party and offered on a 'take it or leave it' basis.

To be an unfair contract term the term must meet certain legal definition – essentially be such that it causes imbalance in the parties' rights and obligations, not required by the advantaged party to protect their legitimate interest and cause a detriment to one party where it is relied on.

According to the ACCC:

"The ACCC recognises that the Airlines differentiate fares with different levels of flexibility. This means that a consumer often has less flexibility to cancel or change their flight details when they have purchased a cheaper fare. This is not problematic in itself.

However, where the size of the fee imposed by the airline to cancel or change a flight is disproportionate to the cost of the original fare, or is unrelated to costs, then concerns may arise.

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The ACCC is particularly concerned with fees imposed by airlines where the charges are the result of decisions or circumstances within the control of the airline rather than the consumer..."

For consumers, the message is that where you have had to cancel a flight (or the airline has cancelled the flight) and seeks to impose a substantial cancellation fee on you that is disproportionate to the fare, the cancellation may be in breach of the ACL. This means you may have remedies against the Airline.

3. Consumer Guarantees: Changes and cancellations

On this issue, the ACCC report states:

"*The ACL creates a basic set of guarantees for consumers who acquire goods and services. These are intended to ensure that consumers receive the goods and services that they pay for. When these consumer guarantees are not met, consumers are entitled to a remedy. The remedy consumers are entitled to will depend on whether the failure to comply with the guarantee is major or minor.*

There are three guarantees relating to the supply of services such as airline travel:

- *guarantee as to due care and skill;*
- *guarantee as to fitness for a particular purpose; and*
- *guarantee as to reasonable time for supply."*

Consumers should not take an Airline's word that they cannot offer a remedy because it is "not in their policy." The starting point for any consumer remedy should be the ACL and not the Airlines policy especially where the Airlines policy is inconsistent with the ACL. It is important to note where Airlines make claims that that an ACL remedy is not available to a consumer, this may also amount to misrepresentation by the Airline.

Conclusion

As stated above, Airlines, like other service providers Airlines must ensure they comply with the ACL, avoid unfair contract terms and make sure their terms and conditions are consistent with consumer guarantees.

Practically, where you have a dispute with an Airline, as a starting point you should collect evidence such as tickets; boarding passes, flight itinerary, receipts (including of all costs incurred by you), correspondence with Airline, detailed notes of any phone discussions.

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Where you are not able to deal with the Airline yourself especially in asserting your ACL rights, it may be you contact the ACCC or a community legal centre. Alternatively if you have no luck with these avenues or if the dispute is substantial, you should seek advice from a lawyer.

For more information or assistance please visit our office or contact us on (03) 8555 3892.

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