

FARES FAIR!! WHY JETSTAR WAS ORDERED TO PAY ALMOST \$2 MILLION IN CONSUMER RIGHTS PENALTIES

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In recent news, the Federal Court has ordered Jetstar Airways to pay \$1.95 million in penalties for making false or misleading representations about consumer guarantee rights under the Australian Consumer Law (**ACL**). This comes in the wake of broader ACCC investigation and enforcement action in the airline industry where four of Australia's major airline brands (Qantas, Tiger, Virgin and Jetstar) have entered court-enforceable undertakings regarding their refund policies.

So, what are the statutory consumer guarantees?

To summarise, the ACL contains a basic set of guarantees for consumers who acquire goods and services in Australia, known as "consumer guarantees". These are intended to ensure that consumers receive the goods and services that they pay for and have a remedy if the consumer guarantees are not met, and these guarantees are automatically implied into basically every consumer purchase and cannot be contracted away or avoided. In respect of supply of services, such as airline travel, one of the guarantees is that there is a reasonable time for supply, i.e. that the service is supplied in a reasonable time. This means if something goes wrong – e.g. a flight is significantly delayed or cancelled for a reason within the airline's control and the airline cannot put the passenger on an alternative flight within a reasonable time – the consumer may be entitled to a remedy such as a refund or replacement flight, or where not possible, reimbursement of costs incurred in obtaining an alternative flight from another airline.

Consumer guarantees are in addition to the terms and conditions in an airline's Conditions of Carriage (i.e. the written agreement between the airline and the customer) and any additional fare rules or terms that apply to a flight booking. Again, they automatically apply by law to every consumer transaction and cannot be avoided. This means airline conditions cannot undermine or remove the consumer guarantees and the airline cannot mislead a consumer that the consumer guarantees do not apply or are not applicable to their fare – which was precisely what Jetstar did.

What happened?

Jetstar made claims on its website:

- a) that its 'Economy Starter' fares and 'Plus Bundle' fares were not refundable - generally, it is ok in some instances to say that certain fares are subject to different refund rules, as is the case with "Flexi Fares" compared to "Saver" fares on some airlines for instance, but refunds are always available under certain of the consumer guarantees so to imply otherwise is a problem; and
- b) that customers were only entitled to refunds on fares if they purchased a flight bundle at additional costs.

Additionally, Jetstar's stated in its terms and conditions that flight services supplied by Jetstar were not subject to any statutory guarantees or warranties (including those in the ACL), which was just plain wrong – and illegal.

Jetstar admitted it had engaged in misleading and deceptive conduct and made false and misleading representations concerning consumer rights and remedies and conceded to the \$1.95 million penalty awarded.

As mentioned above, Jetstar was not the only airline accused of dodgy conduct, although its breach was arguably the most blatant. Tigerair was pulled up by the ACCC for telling consumers they could get a refund only if they paid a "refund admin fee" and for limiting refunds

to a credit voucher valid for 6 months, while Virgin was reprimanded for saying some of its fares were non-refundable and for offering credit vouchers valid for 12 months. Qantas similarly misled consumers into thinking they could not get a refund on “Red e-deal” fares.

Key distinctions

Airlines commonly make statements that sale, low cost and non-flexible economy fares are non-refundable. This means that a consumer often has less flexibility to cancel or change their flight details when they have purchased a cheaper fare. As mentioned above, this is not problematic in itself. The consumer guarantees do not go so far as to protect a consumer for change of mind or where they have missed their flight, through no fault of the airline. Airlines are therefore free to offer more attractive cancellation and refund rights as a value-add on more expensive fares. That is just good business.

However, broad ‘no refund’ statements may lead consumers to believe they are not entitled to a refund under **any** circumstance and this is where the problem lies because they do have a remedy and are entitled to a refund in a situation where there has been a breach of the consumer guarantees.

Key learnings

The ACCC has indicated that making a broad ‘no refund’ statement and then qualifying in the Conditions of Carriage that the consumer guarantees still apply is not enough. Conditions of Carriage are often lengthy and difficult for a consumer to find, so including the fact that they have the consumer guarantee rights in the fine print does not overpower the main message. That is, a consumer could be misled from the more prominent “no refunds” message, that ‘no means no’ in all cases.

Other conduct – like only offering a partial remedy or charging fees to provide a remedy or referring to a remedy under the ACL as being as a “gesture of goodwill” rather than a consumer right – have also been criticised by the ACCC.

This latest outcome for Jetstar therefore sends a strong message that businesses supplying consumer products and services simply cannot make blanket ‘no refunds’ statements (or attach certain conditions to refunds), or otherwise attempt to contract out of or avoid consumer’s statutory rights.

Contact us

If you would like further information on the above and how it impacts on your business or your client’s business, or you need advice regarding the consumer guarantees on retailers or suppliers, please contact one of our experts below.

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