

Aviation Industry Ombuds Scheme

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

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to have input to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' ('Department') consultation on the design and implementation of the proposed Aviation Industry Ombuds Scheme.
2. Since the COVID-19 pandemic, the ALA has been a vocal advocate of consumer protection reform in the aviation industry in order to incentivise airlines to respect passengers' consumer rights and to make airlines accountable to passengers when things go wrong.
3. The ALA has previously identified the lack of a single framework setting out passengers' rights to a refund or compensation as a weakness of Australian law. The result is that passengers' rights are found in a complex web of legislation which is hard for consumers to understand. When it comes to the Australian Consumer Law (ACL) in particular, the ALA has identified that there is a significant gap in the ACL when it comes to air passengers.
4. Therefore, in our submission on the Aviation Green Paper last year,² the ALA called for the Federal Government to create new aviation-specific consumer protection laws in the form of a Passenger Bill of Rights, rather than extend or amend existing legislation, which is already complex.
5. Given the gaps and complexities in the ACL, the ALA maintains that new aviation-specific consumer protection laws in the form of a Passenger Bill of Rights would have been preferable to the decision to establish an Aviation Industry Ombuds Scheme to enforce passenger rights under the ACL. Nevertheless, the ALA supports the improvement that a well-designed Aviation Industry Ombuds Scheme will bring to Australian air passengers.
6. However, the ALA considers that it is imperative for a variety of legal issues to be considered and addressed when establishing the Aviation Industry Ombuds Scheme in order for it to be successful and ultimately provide airline accountability, which is currently lacking in Australia.
7. Our submission, in responding to the questions posed in the Department's August 2024 publication *The Aviation Industry Ombuds Scheme – Consultation paper* ('Consultation

² Australian Lawyers Alliance, Submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *Aviation Green Paper* (29 November 2023) <<https://www.lawyersalliance.com.au/resources/2023>>.

Paper'),³ addresses the following matters and highlights key considerations that we urge the Department to address with when establishing the Aviation Industry Ombuds Scheme:

- a. the design of the Aviation Industry Ombuds Scheme;
- b. complaint handling under the Aviation Industry Ombuds Scheme;
- c. guidance and reporting, in particular with regards to what publications the Aviation Industry Ombuds Scheme should produce;
- d. a show cause arrangement with airlines;
- e. compliance with the Aviation Industry Ombuds Scheme, namely enforcement arrangements; and
- f. overseas schemes, whose features could inspire Australia's Aviation Industry Ombuds Scheme.

Design of the Aviation Industry Ombuds Scheme

8. This section of the ALA's submission will address matters raised in the Discussion Paper regarding the design of the Aviation Industry Ombuds Scheme.

What should be the objectives of the Aviation Industry Ombuds Scheme?

9. The ALA submits that the objectives of the Aviation Industry Ombuds Scheme should include the following:
 - enforcing consumer protections for air travellers;
 - enforcing the Aviation Customer Rights Charter;
 - providing a quick and cheap alternative dispute resolution service for air travellers who have been unable to resolve their dispute directly with an airline or airport;

³ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Australian Government, *The Aviation Industry Ombuds Scheme – Consultation paper* (August 2024).

- receiving and investigating complaints by air travellers and making decisions that are binding on airlines and airports; and
- providing information to support ongoing improvements in the scheme.

10. In fulfilling the Aviation Industry Ombuds Scheme’s objectives, the ALA submits that the ombudsperson must act independently in all respects.

What powers and functions should the ombudsperson have?

11. The ALA recommends that the Aviation Industry Ombudsperson should have the power and function to:

- receive and process complaints by air travellers in a standardised and accessible form, including provisions for both written form and online portal options for submitting complaints;
- direct airlines and airports to respond to complaints within a specified time period;
- make decisions that are binding on airlines and airports within a specified time period;
- make binding decisions to compensate “damage” occasioned by delay in the carriage by air of passengers and baggage covered by the Montreal Convention⁴, which is incorporated into Australian law by the *Carriers Liability (Civil Aviation) Act 1959* (Cth) (‘CALCA’) – that is, not solely enforce passenger rights under the ACL;
- make binding decisions in respect of domestic flight delay, delayed luggage and lost luggage claims under the ACL and/or loss and damaged baggage claims under section 29 of the CACLA;
- make binding decisions on airports and airlines to provide specific remedies to air travellers for breaches of the ACL – such as, a breach of the guarantee to provide services within a reasonable time under section 62 of the ACL, in accordance with the consumer rights to recover the amount of “loss or damage” caused by the breach

⁴ See: Article 19.

(under section 236 of the ACL) and to recover damages for reasonably foreseeable “loss or damage” caused by the breach (under section 267 of the ACL);

- direct airlines and airports to make the following specific remedies to complainants, with **this power being crucial** because neither the Montreal Convention nor the ACL reference what constitutes “loss” or “damage”:
 - cash refunds in respect of unused ticket(s);
 - monetary losses flowing from flight cancellations or delays,⁵ including but not limited to hotel accommodation, pre-booked tours, pre-booked concerts or sports game tickets, taxis and parking;⁶
 - emotional loss for inconvenience, disappointment and distress. **If this is not specifically addressed in the establishment of the Aviation Industry Ombuds Scheme, there will be significant ambiguity for the Aviation Industry Ombudsperson’s powers under existing legislation.** This is because disappointment and distress are only currently recognised as a recoverable head of loss in Australia when the purpose of the contract is enjoyment and relaxation,⁷ and the purpose of a flight ticket is arguably to get from A to B without an enjoyment or relaxation component. However, Australian law also recognises the need to passengers to be compensated for breach of consumer rights, such as the recent Qantas “ghost flights”

⁵ The Department should note that New Zealand’s scheme allows for reasonable costs that flow from the cancellation or delay which Australian airlines are already subject to: Sofia Geraghty, ‘NZ watchdog to sue Jetstar for misleading consumers’, *Travel Weekly* (online, 19 September 2024) <<https://travelweekly.com.au/article/new-zealand-watchdog-takes-jetstar-to-court-over-misleading-consumers-on-flight-compensation>>.

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

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

settlement with the ACCC which compensates \$225 to domestic ticketholders and \$450 to international ticketholders.⁸

- direct airlines to pay air travellers a cash refund or flight credit at the choice of the air traveller in all circumstances where an air traveller does not receive the flight they bought for reasons outside the air traveller's control. In this regard, the ALA submits that the section 267(1)(c) ACL exemption, which became infamous during the COVID-19 pandemic, should not apply to flight cancellations and the Aviation Industry Ombudsperson's power to direct airlines to pay cash refunds for cancelled flights should not be subject to section 267(1)(c) of the ACL. The ALA notes that the EU261 scheme allows passengers to receive a full refund for cancelled flights no matter what the reason.
- direct airlines and airports to compensate emotional loss for inconvenience, disappointment and distress by reference to a legislated scale as seen in other jurisdictions. **This is essential for transparency to passengers about their rights, fairness amongst passengers, and the simple running of the Aviation Industry Ombuds Scheme.** The Federal Government and the Department should be particularly mindful that without the Aviation Industry Ombudsperson having a legislated scale to which they can refer, section 275 of the ACL mandates that the restrictive provisions of any state or territory be picked up if damages are being assessed. The result will be inconsistency between the treatment of passengers across Australia and the complexity of whether the relevant factor for which state or territory's law should be followed by the Ombudsperson is domicile of the passenger, location where the ticket contract was formed, location of the where the delay took place, location of final delayed destination etc.
- obtain data to assist in making improvements to the Aviation Industry Ombuds Scheme; and
- make recommendations for improvements to the Aviation Industry Ombuds Scheme.

⁸ Australian Competition and Consumer Commission, 'Qantas agrees to \$20m payments to customers and, subject to court approval, a \$100m penalty for misleading consumers' (Media Release, 6 May 2024) <www.accc.gov.au/media-release/qantas-agrees-to-20m-payments-to-customers-and-subject-to-court-approval-a-100m-penalty-for-misleading-consumers>.

Which airlines and airports should be required to be members of the Aviation Industry Ombuds Scheme? Should there be any exemptions and, if so, on what grounds?

12. As a preliminary point, the ALA wishes to note, with respect, that the following reference in the Consultation Paper is not correct: *“Given that international airlines (when operating services departing from Australia) are required to comply with the ACL”*.⁹ In reality, the ACL extends more broadly than this. The ACL applies to all businesses carrying on business in Australia and extends to their conduct outside Australia.¹⁰ It, therefore, applies to all domestic airlines and airports, and to international airlines who carry on business in Australia – i.e. airlines flying to Australia, not just flying out of Australia. The ALA’s interpretation of the ACL is that if an Australian buys a ticket to or from Australia with an international carrier, all legs of that ticket are covered by the ACL.
13. The ALA further notes that the Montreal Convention already applies to all international flights between Australia and other signatory states.
14. The ALA notes that the issue of which airlines / international flights are covered by a passenger rights’ scheme is dealt with differently in different jurisdictions. For example, the Canadian scheme applies to all flights to and from Canada on any airline, EU261/UK261 applies to all international outbound flights from the EU/UK on any airline, but only international inbound flights on EU/UK flights. The ALA recommends that the Department considers the advantages and disadvantages of these different approaches.
15. In response to this question, the ALA submits that the Aviation Industry Ombuds Scheme should apply to:
- all commercial airports operating on Australian territory;
 - all airlines operating domestic routes;
 - all international airlines for their conduct within Australian airspace.
 - all Australian airlines wherever they are operating around the world; and

⁹ Consultation Paper 12.

¹⁰ *Competition and Consumer Act 2010* (Cth) s 5.

- all international flights to and from Australia, operated by any airline (which will ensure that all Montreal Convention flights are covered).
16. We contend that all airlines and airports should be covered by the Aviation Industry Ombuds Scheme with no exemptions, so that all passengers then have a right to seek a remedy. It is important that the Ombudsperson will have the power to order remedies against international airlines for breaches of the Montreal Convention which are currently very difficult for consumers to enforce, as highlighted by the recent experience of Michael Pascale, who spent 18 months chasing compensation for lost luggage under the Montreal Convention.¹¹
17. Whilst the ALA urges all airlines and airports to be members of the Aviation Industry Ombuds Scheme, we acknowledge that the level of the remedy could be differentiated between larger and smaller airlines, as well as between larger and smaller airports.
18. The ALA submits that the Department must give full and proper consideration to the application of the Aviation Industry Ombuds Scheme to code share flights. There will be confusion as to which airline is responsible for a passengers' flight delays or cancellations if that passenger purchased a ticket with one airline, but the service is supplied by (and, therefore, the ACL guarantees to service are owed by) another carrier. We note that the EU and UK schemes address this by placing the responsibility on the carrier who operates the flight. The ALA believes this approach would suit the Aviation Industry Ombuds Scheme, as it is simple for consumers to understand and they can easily identify which airline is transporting them.
19. Additionally, the Department must give full and proper consideration to how issues regarding connecting flights will be managed under the Aviation Industry Ombuds Scheme. The ALA notes that many international destinations involve at least one transfer for Australian passengers. This can often be with a second carrier, although a passenger may have purchased a combined ticket (such as, through a travel agent). If one leg of the journey is cancelled or delayed or results in lost luggage, it is important for the Aviation Industry Ombuds Scheme to be clear as to which airlines fall under the scheme. We refer the Department to the case of

¹¹ Mary Lloyd and Michael Atkin, 'How this Australian took on an airline – and won – after it lost his luggage', *ABC News* (online, 29 July 2024) <www.abc.net.au/news/2024-07-29/srilankan-airlines-lost-luggage-travel-compensation/104145954>.

flightright GmbH v American Airlines, Inc.,¹² in which the EU261 scheme was extended to apply to domestic connecting flights in a different jurisdiction (in that instance the United States) when flights are combined by a travel agent, and the passenger had been charged an overall price and issued a single ticket but had suffered a long delay to the arrival at their destination. The ALA also notes that the Canadian scheme applies to all flights to, from and within Canada, including connecting flights. The Department must make it clear whether connecting flights in other jurisdictions with airlines who do not carry on business in Australia and are therefore not subject to the ACL will also fall under the Aviation Industry Ombuds Scheme particularly when purchased as a single ticket to or from Australia. For simplicity, the ALA recommends that the Aviation Industry Ombuds Scheme applies to all international flights to and from Australia, including when an international transfer is required to reach the destination with an airline (regardless of whether or not that airline carries on business in Australia); but it is not necessary that domestic connecting flights in a foreign jurisdiction would be covered under the Aviation Industry Ombuds Scheme. The ALA considers that few passengers would be disadvantaged by this approach given that most jurisdictions already have their own air passenger rights scheme in place which would apply.

Should the government adopt a phased approach to the application of the Aviation Industry Ombuds Scheme to different categories of airlines and airports?

20. The ALA does not support a phased approach to the application of the Aviation Industry Ombuds Scheme to different categories of airlines and airports.
21. This would lead to confusion for passengers – especially for those connecting between different flights on different airlines.

What features of existing industry ombuds schemes, and similar bodies, in Australia and overseas, should be considered in the design of the Aviation Industry Ombuds Scheme?

22. The ALA suggests that the Department consider the Air Passenger Protection department of the Canadian Transport Agency when designing the Aviation Industry Ombuds Scheme. It

¹² *flightright GmbH v American Airlines*, Case C-436/21 (CJEU) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0436>>.

provides online educational materials to passengers on their rights and administers a simple air travel complaint resolution process.¹³

23. We, therefore, submit that this would be a model whose features could inspire the design of Australia's Aviation Industry Ombuds Scheme.

Complaint handling

24. This section of the ALA's submission addresses what the Aviation Industry Ombuds Scheme's complaint handling processes should be.

25. The ALA agrees with the Government's and Department's assessment, expressed in the Consultation Paper,¹⁴ that the efficacy of the Aviation Industry Ombuds Scheme depends on the scope of its jurisdiction being well-defined and that the Aviation Industry Ombuds Scheme should consider complaints in relation to:

- "any matters set out in the Aviation Customer Rights Charter";
- the ACL;
- "matters included in airlines' and airports' contracts with their customers"; and
- lost/damage baggage under the *CACLA*.

26. We submit that the Department should also ensure that the Aviation Industry Ombuds Scheme has jurisdiction over Montreal Convention delay and luggage claims, as noted earlier in this submission.

27. The ALA notes, however, that it is difficult for stakeholders to comment fully on complaint handling and associated processes in the absence of the Aviation Customer Rights Charter, against which complaints will be evaluated.

28. The ALA welcomes future and urgent consultation on the Aviation Customer Rights Charter, as well as on the Aviation Industry Ombuds Scheme's role in relation to disability access,

¹³ See: Government of Canada, *Canadian Transportation Agency* (Web Page, 25 January 2023) <www.canada.ca/en/transportation-agency.html>.

¹⁴ Consultation Paper 15.

complaints about disability discrimination, and the overlap with the Australian Human Rights Commission's remit.¹⁵

What types of complaints should be eligible for consideration by the Aviation Industry Ombuds Scheme, and what types of complaints should not?

29. As articulated above, the ALA contends that the Aviation Industry Ombuds Scheme must be a simple, 'one-stop shop' for Australians who have air travel disputes with airlines and airports.
30. This, we submit, would include lost or delayed luggage under the CACLA, delays or luggage claims under the Montreal Convention, and ACL claims.
31. The ALA submits that the following are examples of the types of complaints that should be eligible for consideration by the Aviation Industry Ombuds Scheme:
 - Cancellation and time delays (including care standards to passengers during delays, communication standards to passengers of cancellation and delays, and directing airlines to provide remedies to passengers when flights are delayed and cancelled as outlined throughout this submission);
 - Denial of boarding due to overbooking;
 - The issuing of travel credits instead of refunds;
 - Airline rules for redemption of travel credits such as expiry period and availability of the same flights at the same price;
 - Compulsory downgrading;
 - Failure to seat minors with adults in their travelling party;
 - Requiring payment for minors to be seated with adults in their travelling party;
 - Lost and/or delayed luggage;
 - Damaged luggage; and

¹⁵ Consultation Paper 16.

- Complaints about the quality of service purchased versus the service received, such as purchasing a business class flight but the flatbed or inflight entertainment system does not work, or buying a ticket in an advertised cabin that does not exist on that route.¹⁶

Should the Aviation Industry Ombuds Scheme be able to accept complaints relating to breaches of privacy by members of the scheme?

32. The ALA submits that breach of privacy matters can already and should be dealt with by existing privacy-related complaints and accountability structures in Australia, led by those who specialise in that area.
33. We consider that Aviation Industry Ombuds Scheme should prioritise aviation-related matters and complaints that are currently not addressed or are not adequately addressed under existing legislation or another scheme.

How should the Aviation Industry Ombuds Scheme handle complaints about airlines and airports in relation to services purchased through a travel agent or other third party?

34. The ALA submits that the Aviation Industry Ombuds Scheme should have jurisdiction over complaints from all passengers about services provided by airlines and airports regardless of whether the passenger purchased the service directly or through a travel agent/third party.
35. We note that travel agents play a key role in the formation of contracts between consumers and travel providers including the knowledge that they have about provider terms and conditions being imputed to consumers without specific disclosure¹⁷. With air travel, travel agents in some instances also have the ability to combine flights with different airlines to form a single ticket¹⁸. We, therefore, submit that travel agents should be educated about their power and responsibility when facilitating contracts for consumers.

¹⁶ For example Sam Buckingham-Jones, 'Man wins \$12,600 for 'worn out' seats in Emirates business class', *The Australian Financial Review* (online, 19 March 2023) <www.afr.com/companies/media-and-marketing/business-class-advertising-reality-shortfall-prompts-nz-court-payout-20230317-p5csyv>.

¹⁷ *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149 (2 September 2022)

¹⁸ See, eg, *flightright GmbH v American Airlines, Inc.*

36. The ALA also submits that that there are weaknesses in the ACL for complaints arising from a travel agent / third party conduct when it comes to consumer travel law issues. However, this matter is beyond the scope of the current consultation.

What existing complaints schemes or processes have the potential to overlap with the Aviation Industry Ombuds Scheme?

37. As discussed above, the Aviation Industry Ombuds Scheme would overlap with luggage claims that can be made under the CACLA, as well as Montreal Convention delay and luggage claims.

38. In order to avoid further confusion and complexity, it is imperative that the Aviation Industry Ombuds Scheme becomes a “one-stop shop” for air passenger consumer complaints and does not solely enforce rights under the ACL.

Who should be eligible to make complaints to the Aviation Industry Ombuds Scheme?

39. The ALA submits that the sole criteria for eligibility to make a complaint to the Aviation Industry Ombuds Scheme should be that the complainant is an air passenger. We contend that any passenger, regardless of the purpose of their travel or who bought their ticket (such as an employer or family member), should be able to make a complaint under the Aviation Industry Ombuds Scheme.

40. We submit that the Aviation Industry Ombuds Scheme is needed for accountability to airlines and incentives for them to operate consistently with their legal obligations. An exemption for any size businesses and not-for-profit organisations which would force their affected passengers to go to court for breaches of the section 62 ACL guarantee on timeliness, as an example, would undermine the aim of incentivising airlines and airports to operate consistently with legislative obligations and defeat the object of the scheme.

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

attend a medical appointment, or to visit family or friends. All passengers should be eligible to complain to the Aviation Industry Ombuds Scheme about the timeliness of the communication of the cancellation, the care standards provided if passengers were delayed at the airport before the flight was ultimately cancelled and should have the inconvenience compensated in a uniform and transparent way.

42. We note that the EU261 scheme gives passengers delay compensation regardless of the reason for travel.¹⁹ If a passenger is travelling for work and had the ticket paid for by their employer, it is the *individual* who is inconvenienced and receives compensation not the person or entity that purchased the ticket.

43. We also note the Montreal Convention does not distinguish between passenger types for damages eligibility.

If small business and not for profit (NFP) organisations are eligible to make complaints, in addition to consumers, what criteria should be applied to define eligible small businesses and NFPs?

44. As set out above, the ALA contends that all passengers should be eligible to make complaints to the Aviation Industry Ombuds Scheme regardless of whether their ticket was purchased by a business of any size or a NFP organisation.

45. The ALA submits that for the Aviation Industry Ombuds Scheme to bring effective improvement to the passenger experience, it must apply to all passengers. To bring in a scheme with complainant eligibility exemptions or a two-pronged complaint process for individuals versus business/NFP travellers will bring an added layer of complexity and uncertainty to a labyrinth of legislation that is already difficult for consumers to navigate.

What complaint resolution process should the Aviation Industry Ombuds Scheme adopt?

46. The ALA suggests that the Department considers the Air Passenger Protection department of the Canadian Transport Agency when designing the Aviation Industry Ombuds Scheme's complaint resolution process.

¹⁹ Regulation (EC) No 261/2004 of the European Parliament and of the Council (11 February 2004).

47. We suggest that a complainant should be required to complain to the airport or airline first. If the complainant is unsatisfied with the airport's or airline's response, the complainant should be eligible to submit the complaint to the Aviation Industry Ombudsperson. The airline/airport should get the right to reply to the official complaint as submitted to Aviation Industry Ombudsperson and offer a solution. The dispute resolution process should then require an attempt at informal resolution (including through dispute resolution or other forms of informal resolution). If the complaint remains unresolved, the Aviation Industry Ombudsperson should have the power to make a binding decision on the airport/airline.
48. The ALA submits that the Aviation Industry Ombuds Scheme should outline to complainants what options they have to access appeal avenues or to access the common law to progress their claim if unsatisfied with the Ombudsperson's decision.
49. With regards to the Department's concern about complaints being frivolous and vexatious, the ALA submits that the Aviation Industry Ombuds Scheme and accompanying Aviation Customer Rights Charter must clearly define air passenger rights and eligibility criteria for complainants if those rights are breached. All eligible complaints should be progressed through the Aviation Industry Ombuds Scheme. The motivation of the complainant may only be relevant to the extent it affects whether the complainant cooperates with the Aviation Industry Ombudsperson, or not.

How much time should an airline or airport have to resolve a complaint, before the complaint is considered by the Aviation Industry Ombuds Scheme? What factors should be considered by the Ombudsperson when deciding if a complaint was resolved within a reasonable time?

50. In the interests of both expediency and procedural fairness, we submit that an airline or airport should be afforded a period of 30 days to resolve the issue first. If a complaint direct to the airport or airline is a prerequisite to a complaint to the Aviation Industry Ombuds Scheme, the time limit for filing a complaint with the Ombudsperson will inform how much time the airline or airport should have to resolve the complaint.
51. The ALA suggests that information provided by the complainant to identify their eligibility e.g. proof of travel and the issues being complained of are relevant factors when deciding whether the airline or airport resolved the complaint in a reasonable time.

What time limit should apply for making a complaint?

52. The ALA notes that there is a two-year limitation period to commence proceedings in Montreal Convention and CACLA claims.
53. In light of this the ALA suggests that there should be a one-year time limit for making a complaint with the Aviation Industry Ombuds Scheme. For complaints nearing the one-year deadline, there should be a process whereby a complainant can lodge a complaint to the Aviation Industry Ombuds Scheme within one year without first complaining to the airline or airport directly and the Ombudsperson should have the power to stay the Aviation Industry Ombuds Scheme complaint pending the parties going through their usual first pre-action steps in the process.

What should be the maximum monetary amount the ombudsperson is able to award?

54. The ALA acknowledges that a monetary cap on the remedies awarded under the Aviation Industry Ombuds Scheme is necessary. This would undoubtedly be important for airports and airlines for insurance purposes.
55. We recommend a different monetary cap depending on the issue being complained of divided broadly into luggage claims, cancellations, delays (and accessibility issues which is outside the scope of our submission). In order for transparency, fairness and a uniform approach across Australia (taking into account section 275 of the ACL in particular), the ALA recommends that the remedies awarded by the ombudsperson follow a scale depending on the issue. We refer the Department to the eligibility criteria and compensation amounts for complaints under overseas schemes as compiled in Annexure A (**enclosed**).
56. The ALA notes that the cap for luggage claims under the CACLA is \$3,000 but under section 19 of the Montreal Convention is 4150 SDR (around \$8,000 AUD). In order for consistency, the ALA recommends a cap of \$8,000 per passenger for all luggage claims whether domestically under the CACLA, internationally under the Montreal Convention, or both under the ACL / Aviation Customer Rights Charter.
57. In respect of flight delays or cancellations, the ALA suggests that the cap be \$15,000 except in instances of cancellations where the entire cost of the ticket was more than \$15,000, in which case a full refund of the ticket should be made even if higher than \$15,000. We note

that in New Zealand reasonable costs arising from delay is set on ten times the cost of the ticket with a maximum of NZD\$11,000.

58. If a complainant wishes to make a claim greater than the maximum monetary amount, the passenger would need to go through the court process.

Guidance and reporting

59. This section of the ALA's submission relates to materials and publications which the Aviation Industry Ombuds Scheme should be required to produce.

What regular publications should the Aviation Industry Ombuds Scheme produce?

60. The ALA submits that the Aviation Industry Ombuds Scheme must promote public awareness about consumer rights and the Aviation Industry Ombuds Scheme's processes through public education campaigns and written, accessible guidance.
61. We contend that it is essential for transparency and accountability for the Aviation Industry Ombuds Scheme to publish data on the nature of complaints it receives/processes, the volume of complaints received/processed, the length of time taken to determine claims, the parties complained about, the percentage of decisions resolved between parties and the percentage that are escalated requiring a binding decision to be made.

What processes should the Aviation Industry Ombuds Scheme adopt to provide procedural fairness to scheme members before it publishes certain data and information?

62. The ALA suggest that future scheme members are best placed to make recommendations on this. The ALA submits that transparency is essential to improve air passenger experience. The ALA also notes that data is already published by BITRE regarding on time performance and the show cause arrangement will also involve publication of data.

Show cause arrangement

63. This section of the ALA's submission addresses the government's proposed show cause arrangement.

What specific powers should the Aviation Industry Ombuds Scheme have to require airlines to provide information about delays and cancellations?

64. The ALA considers that requiring airlines, as outlined in the Consultation Paper,²⁰ "to report the reasons for cancellations and delays of flights as part of their regular reporting of flight data to BITRE, within the Department of Infrastructure, Transport, Regional Development, Communications and the Arts" is essential for transparency and accountability. We also submit that reasons must be provided to passengers at the time of the cancellation or delay.

65. We support the Aviation Industry Ombudsperson:

- providing airports and airlines with a selection of prepopulated reasons from which they can choose to explain their delays and cancellations, with those reasons reflecting clearly whether it was within the airport's and airline's control. This is essential rather than allowing airports and airlines to use free text and phrase reasons in ways which might potentially obscure what happened and who was responsible;
- requiring airlines to provide internal documents (which will not be published broadly) to substantiate the reasons they select for delays or cancellations – including flight logs, maintenance schedules and internal communications; and
- having the resources and powers to collate monthly data of the reasons for delays and cancellations.

²⁰ Consultation Paper 21.

Scheme compliance

66. This section of the ALA's submission addresses enforcement arrangements.
67. The ALA supports the issuing of fines for airlines or airports which fail to comply with any legislative requirements or with a decision of the Aviation Industry Ombuds Scheme.
68. The ALA also agrees that it is appropriate for the ACCC to prosecute systematic breaches and repeated non-compliance by airlines or airports.

Overseas schemes

69. **Enclosed** as Annexure A, the ALA has prepared a table detailing overseas schemes which address aviation-related complaints, including with regards to flight delays and cancellations.
70. As detailed earlier in our submission, in order for transparency, fairness and a uniform approach across Australia (taking into account section 275 of the ACL in particular), the ALA recommends that the remedies awarded under the Aviation Industry Ombuds Scheme follow a scale depending on the issue. We trust that the comparative table at Annexure A will assist the Department.

Conclusion

71. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts on the proposed Aviation Industry Ombuds Scheme.
72. The ALA is available to provide further assistance to the Department on the issues raised in this submission.



Michelle James
National President,
Australian Lawyers Alliance



Victoria Roy
Chair, Travel Law Special Interest Group
Australian Lawyers Alliance

Annexure A

A table detailing overseas flight delay compensation schemes (excluding cancellation specific rules):

Jurisdiction	Flight Distance (if applicable)	Delay Conditions	Compensation Amount	Notes	Key Features
Canada: <i>Air Passenger Protection Regulations (SOR/2019-150)</i> Canada Transportation Act	N/A	3-6 hours (delay)	\$400 CAD	Applies to larger airlines	Distinction between large and small airlines
		6-9 hours (delay)	\$700 CAD	Applies to larger airlines	
		9+ hours (delay)	\$1,000 CAD	Applies to larger airlines	
		3-6 hours (delay)	\$125 CAD	Applies to smaller airlines	
		6-9 hours (delay)	\$250 CAD	Applies to smaller airlines	
		9+ hours (delay)	\$500 CAD	Applies to smaller airlines	
EU: <i>Regulation (EC) No 261 / 2004 'EU261'</i>	All flights < 1500km	3+ hours (delay)	€250 EUR	Delays and cancellations compensable if not caused by an 'extraordinary circumstance'	EU261 refers to flights 'operated by' which is relevant for code share flights EU261 allows passengers to choose a refund for cancelled flights whatever the cause Passenger compensated regardless of who bought the ticket
	All internal EU flights 1500km + and other flights 1500km – 3500km	3+ hours (delay)	€400 EUR		
	Flights between EU and non-EU country 3500km +	3 – 4 hours (delay)	€300 EUR		
	Flights between EU and non-EU country 3500km +	4+ hours (delay)	€600 EUR		
UK	All flights < 1500 km	3+ hours (delay)	£220 GBP	Mirrors EU261	

Regulation (EC) No 261/2004 (as amended by The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019) 'UK261'	All flights 1500km – 3500km	3+ hours (delay)	£350 GBP		
	Flights 3500km +	3-4 hours (delay)	£260 GBP		
	Flights 3500km +	> 4 hours (delay)	£520 GBP		
United States: Department of Transportation Involuntarily Denied Boarding Rules Title 14 Chapter II Subchapter A Part 250	N/A	Denied boarding, 0–1-hour arrival delay	No compensation	Applies to domestic and international flights	Compensation is payable at the airport at the time of the denied boarding
		Denied boarding, 1-2 hour arrival delay (domestic)	200% of one-way fare, up to \$775 USD	Applies to domestic flights only	
		Denied boarding, 2+ hour arrival delay (domestic)	400% of one-way fare, up to \$1550 USD	Applies to domestic flights only	
		Denied boarding, 1-4 hour arrival delay (international)	200% of one-way fare, up to \$775 USD	Applies to international flights	
		Denied boarding, 4+ hour arrival delay (international)	400% of one-way fare, up to \$1550 USD	Applies to international flights	

Malaysia: <i>Malaysian Minister of Transportation Regulation Number 89/2015, paragraph 2</i>	N/A	4+ hours (delay)	Rp 300,000 (~\$30 AUD)	Exception for bad weather or technical issues	
Brazil: <i>Brazilian National Civil Aviation Agency Resolution Nº 400</i>	N/A	Denied boarding	€600 EUR	International flights	Repayment of compensation for material damages and “moral damages” (stress and inconvenience) if airline fails to provide material assistance
		Denied boarding	€300 EUR	Domestic flights	
		4+ hours (delay)	Up to €1500 EUR	All flights	
Thailand: <i>Protection of Passenger Rights Using Thai air carriers’ Services for Domestic Scheduled air services 2010 (B.E. 2553)</i>	N/A	5-hour delay	600 Baht (~\$17 USD)		
		6-hour delay	1200 Baht (~\$33 USD)		
India: <i>India’s Directorate General of Civil Aviation Air Passenger Charter Act, 2019</i>	N/A	Delay exceeding 24 hours	Up to INR 20,000 (~\$370 AUD)		
New Zealand: <i>New Zealand Civil Aviation Act 1990</i>	N/A	Mirrors Montreal Convention for domestic flights	Up to 10x cost of airfare		