NAVIGATING TOWARDS AN AIRWORTHY PROTECTION REGIME FOR NEW ZEALAND'S AIRLINE PASSENGERS

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Delays and cancellations are a frequent occurrence in air travel, but passenger protections in New Zealand lag behind those in other jurisdictions such as the European Union and Canada. Concerns around airlines' treatment of passengers were brought to the fore during the COVID-19 pandemic, but protections were not strengthened in the replacement of the Civil Aviation Act 1990 with the Civil Aviation Act 2023. The new Act provides insufficient protection to passengers, and New Zealand's other consumer law is also inadequate and difficult to apply to an airline context. Neither set of law has a dispute resolution scheme that is fit for purpose. Public enforcement of relevant laws by regulators is limited to breaches of the Fair Trading Act 1986, largely for misleading or deceptive trading practices, and not for breaches of specific obligations to passengers.

This article examines the deficiencies in New Zealand's airline passenger protection law and compares that law with the corresponding law in Australia, the European Union and Canada. It advocates for the making of regulations that provide for fixed amounts of compensation when a flight is delayed for controllable reasons, rather than laws which require a passenger to prove damages. That is consistent with the European and Canadian approaches. It also advocates for refunds to be made available to passengers where flights are cancelled or significantly delayed. To ensure that new regulations would be effective, this article also advocates for an adjudicative dispute resolution scheme, funded by airlines according to their market share and the number of complaints received, with capacity for public enforcement (monetary fines) by the Commerce Commission.

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I INTRODUCTION

In March 2023, Parliament passed the Civil Aviation Bill (now the Civil Aviation Act 2023), which repealed and overhauled law previously contained in the Civil Aviation Act 1990 and the Airport Authorities Act 1966.[1] The then-Associate Minister of Transport, the Hon Kiritapu Allan, heralded the Bill as a "significant modernisation of civil aviation legislation".[2] In many respects, it is: it has overhauled several aspects of the law in both the safety and regulatory fields. Yet the new Act, in force from 5 April 2025,[3] makes no changes to passengers' rights and protections when their travel is disrupted. Consumer rights advocates, including Consumer NZ, have criticised the lack of reform in this area, which has attracted greater interest following the widespread travel disruption caused by COVID-19.[4]

This article will examine the rights passengers have when they or their baggage are delayed and demonstrate how the current law is inadequate and difficult to enforce. Schemes in Australia, the European Union (EU) and Canada all provide useful insights into how the law might be improved, and the challenges in doing so. Considering these insights, this article advocates for detailed regulations to strengthen and more clearly prescribe passenger protections, a new dispute resolution scheme with adjudicative powers, and the power for the Commerce Commission to impose financial penalties on airlines who fall short of their obligations.

II CURRENT LAW

New Zealand's laws governing airlines' liability for passenger and baggage delay are fragmented and, at times, highly uncertain. Sources of liability include the Civil Aviation Act 1990 (until 5 April 2025), the Consumer Guarantees Act 1993 (CGA) and the Fair Trading Act 1986 (FTA). The relevant law in the Civil Aviation Act 1990 has been carried over into the 2023 Act substantively unchanged. Accordingly, this section will refer primarily to the 2023 Act.

A Civil Aviation Act 2023

Part 8 of, along with schs 4–6 to, the Civil Aviation Act 2023 provide the airline passenger protections in New Zealand's law, including by serving as the ratification instrument for the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention).[5] Part 8 provides two parallel regimes, in sub-pts 2 and 3, that are applied depending on

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1 Civil Aviation Bill 2021 (61-2) at 1.

2 (28 March 2023) 766 NZPD 15712.

3 Civil Aviation Act 2023, s 2.

4 Federico Magrin "Aviation bill fails to protect passengers' rights when 'shirked' around by airlines" (24 February 2023) Stuff <www.stuff.co.nz>.

5 Compare Civil Aviation Act 1990, pts 9A and 9B; and Civil Aviation Act 2023, schs 4–6.

whether the carriage is international or domestic. The domestic law, in sub-pt 3, applies to carriage where, according to the contract for carriage, the origin and destination are both in New Zealand and there is no agreed stopping place outside New Zealand.[6] The domestic sector of a connecting international itinerary is still considered "international carriage" for the purposes of the Act; for this reason, a single aircraft can be undertaking both international and domestic carriage at the same time.[7]

Both regimes have three essential features. First, an airline is presumed liable for damage occasioned by delay unless it can prove an exception applies; secondly, it is up to the passenger to prove the quantum of the damage; and thirdly, liability is subject to specified monetary limits. Although the international regime applies to delays in the carriage of both passengers and their baggage, the domestic regime only covers passengers.

1 International carriage

The Montreal Convention (the Convention), adopted in 1999, provides a uniform international regime for airline liability for several types of damage. Article 19 – incorporated through sub-pt 2 and sch 6 to the Act – provides:[8]

> The carrier is liable for damage occasioned by delay in the carriage by air of *passengers, baggage or cargo*. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Liability is limited in terms of Special Drawing Rights (SDRs). The value of one SDR is calculated daily by the International Monetary Fund using a basket of five major currencies. Liability for passenger delay is limited to SDR 5,346 and for baggage delay to SDR 1,288 per passenger;[9] roughly NZD 11,500 and NZD 2,800, respectively.[10]

Significantly, the Convention is intended to serve as a uniform international code. To this end, art 29 provides for broad exclusivity, requiring that actions for damages in the carriage of baggage, passengers and cargo, "whether under [the] Convention or in contract or in tort or otherwise", only be brought subject to the conditions and limits of liability set out in the Convention.[11] The Convention's

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6 Civil Aviation Act 2023, s 270(1); and compare Civil Aviation Act 1990, s 91V(1).

7 Civil Aviation Act 2023, s 270(2); and compare Civil Aviation Act 1990, s 91V(2)(a).

8 Civil Aviation Act 2023, sch 6 art 19 (emphasis added); and compare Civil Aviation Act 1990, pt 9A and sch 6.

9 Civil Aviation Act 2023, sch 6 art 22(1) and (2).

10 Conversion rate as at 31 August 2024 using SDR 1 = NZD 2.15. Both conversions rounded to the nearest NZD 100.

11 Civil Aviation Act 2023, sch 6 art 29.

exclusivity clause therefore presents a potential barrier to deploying other consumer protection legislation covering international carriage.

2 *Domestic carriage*

Domestic provisions for airline liability – set out at pt 8 sub-pt 3 of the Civil Aviation Act 2023 – descend from those originally set out in the Carriage by Air Act 1967. That Act ratified the Warsaw Convention and Hague Protocol[12] – the predecessors to the Montreal Convention – and made provision for domestic carriage, with its domestic provisions broadly modelled on the international provisions. Section 274 of the 2023 Act provides that an airline is liable for damage caused by delay in the carriage of passengers.[13] As under the international regime, s 276 exempts an airline from liability where it can prove that it, and its agents and servants, took all measures necessary to avoid the damage, or that it was not possible to take those measures.[14] Section 274(2) also exempts an airline from liability for delay where the delay arose by meteorological conditions, compliance with air traffic control, obedience of orders given by a lawful authority, force majeure or for the purpose of saving – or attempting to save – a life.[15] Finally, s 277 limits liability for delay to the lesser of the actual damage sustained or 10 times the fare paid.[16]

Unlike under the international regime, airlines are not liable for damage caused by the delay of domestic passengers' baggage. This was not the original position under the Carriage by Air Act, which provided for such liability until it was amended by the Carriage of Goods Act 1979.[17] Under the later Act, the laws governing the carriage of goods – which hitherto had varied depending on the mode of carriage – were rationalised. Baggage- and cargo-related provisions in the Carriage by Air Act were removed, and carriage by air of baggage and cargo became subject to the mode-agnostic provisions of the Carriage of Goods Act. With that, statutory liability was limited to loss or damage,[18] a position that was maintained in the restatement of contract and commercial law in 2017.[19]

3 *Remedies and enforcement*

For claims under both the international and domestic Civil Aviation Act schemes, the remedy is damages. Unlike in other jurisdictions such as Canada and the EU, where the law provides for fixed

12 Carriage by Air Act 1967, sch 1.

13 Compare Civil Aviation Act 1990, s 91Z.

14 Compare Civil Aviation Act 1990, s 91ZA.

15 Compare Civil Aviation Act 1990, s 91Z(2).

16 Compare Civil Aviation Act 1990, s 91ZC.

17 See Carriage by Air Act 1967, s 25(1).

18 Carriage of Goods Act 1979, s 9.

19 Contract and Commercial Law Act 2017, s 256.

amounts of compensation, New Zealand's law requires a passenger to prove the quantum of the damage incurred. In practical terms, making a claim will necessitate the collation of receipts for expenses caused by delays, such as meals, accommodation and ground transport. Still, both schemes lend some favour to passengers by presuming an airline to be liable where a delay has caused damage. It is the airline's responsibility to prove that it is not liable by dint of one of the relevant exceptions in the Act or Convention.

To enforce a claim for damages under either the domestic or international schemes, passengers may take a claim to either the Disputes Tribunal or to the courts.[20] The Disputes Tribunal can hear claims of up to $30,000.[21] This would be sufficient for most foreseeable claims under the Act, but in the case of larger claims, a claim would need to be filed in the District Court. The Disputes Tribunal is private by default, and only selected, anonymised decisions are published.[22] It was not until 2016 that the Tribunal's jurisdiction with respect to the 1990 Act was confirmed by the High Court in *Air New Zealand Ltd v Disputes Tribunal*, with this jurisdiction being clarified in the 2023 Act.[23]

By having its enforcement powers vested in the Tribunal, the efficacy of the Act's passenger protections is significantly undermined. With limited public reporting of decisions and private-by-default hearings, it is impossible to determine the number or nature of airline disputes being considered by the Tribunal. In addition, airlines' public accountability for non-compliance with the law is diminished and passengers may be discouraged from making a claim if there is only limited public documentation of previous passengers doing the same.[24] In its general review of courts and tribunals in 2004, the Law Commission concluded that there was no "compelling reason for such a major compromise of the principle of openness" in the Disputes Tribunal.[25] This opacity, combined with the Tribunal's onerous requirement to attend a hearing and its filing fee of $59 (which is not

20 See Civil Aviation Act 2023, s 269 definition of "court". Article 33 of the Montreal Convention sets out the jurisdictions where a claim for international carriage can be brought, which may offer a passenger a strategic advantage because the quantum of damages is calculated according to domestic, not international, law: see Civil Aviation Act 2023, sch 6 art 33.

21 Disputes Tribunal Act 1988, s 10(3).

22 Section 39.

23 *Air New Zealand Ltd v Disputes Tribunal* [2016] NZHC 393, [2016] 2 NZLR 713; and Civil Aviation Act 2023, s 269 definition of "court".

24 See Ethan Griffiths "Secret court cases kept from public" *Herald on Sunday* (Auckland, 7 May 2023) at 26.

25 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 321–322.

refundable, even for successful claimants)[26] make it a wholly unsuitable venue for disputes under an airline passenger protection regime.[27]

The proper defendant in a claim for damages is not necessarily the airline that issued the passenger's ticket. This presents some difficulty for passengers when several airlines are involved in their carriage, as is often the case. Both schemes have broadly similar rules for "successive carriage" that set out whether:[28]

(a) the airline that issued the ticket will be liable; or
(b) another airline involved in the carriage will be liable; or
(c) both or all airlines (ticketing and operating) involved in the carriage will be jointly and severally liable (and, for each, to what extent).

Such issues rarely arise in domestic travel where travel tends to be on one airline. In international travel, it is often common for several airlines to be involved in a passenger's journey, and any one of those may be the underlying cause of a delay. The distinction between a "contracting carrier", a "successive carrier" and another carrier that is not a successive carrier makes it difficult for passengers to ascertain which airline a claim should be brought against. The answer depends heavily on the construction of the passenger's ticket and whether flights operated by other airlines were sold under an "interline" arrangement or a "codeshare" arrangement.[29] Generally, in a simple interline arrangement, flights on another airline are sold with a flight number bearing the other airline's own "code", or two-letter prefix, and the ticketing airline will not be liable for passenger delays caused by the other airline.[30] Under a codeshare arrangement, flights on another airline are sold with a flight number bearing the ticketing airline's code, and both airlines are jointly and severally liable for any passenger delay caused by the other airline. The rules differ again for baggage.[31] These rules provide flexibility for airlines to sell tickets on other airlines, in one itinerary, with relatively minimal degrees of cooperation and low levels of risk. However, for a typical passenger trying to ascertain which airline to seek compensation from, they can create confusion.

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26 But see Regulatory Systems (Tribunals) Amendment Bill 2024 (115-1), cl 5, which would enable referees to order that the respondent pay a successful applicant's filing fee.

27 Disputes Tribunal Rules 1989, r 5.

28 Civil Aviation Act 2023, ss 273 and 275, and sch 6 cls 36 and 39–40; and compare Civil Aviation Act 1990, ss 91X–91Y.

29 Bartholomew J Banino, Auguste Hocking and Marissa N Lefland "Article 36: Successive carriage" in George Leloudas, Paul S Dempsey and Laurent Chassot (eds) *The Montreal Convention: A Commentary* (Edward Elgar Publishing, Cheltenham, 2023) 431 at [36.36].

30 At [36.34].

31 Civil Aviation Act 2023, sch 6 arts 36(3) and 39–40.

No public enforcement is provided for under the Act, which simply provides for airlines' liability under their contracts with their passengers. Airlines cannot be fined for repeated non-compliance.

4 Passenger information and reporting obligations

Section 410 will provide a new regulatory power to require that airlines provide passengers with information about their rights and entitlements, as well as publish statistics about their operations. In its 2014 consultation document for its review of the Civil Aviation Act 1990, the Ministry of Transport expressed the view that strengthening the passenger protection provisions in the Act was unnecessary, and that better education around the existing law would suffice.[32] Should information provision regulations be made under the new Act, the efficacy of New Zealand's passenger protection regime is likely to improve, even if no substantive changes are made to the law itself.

In its submissions to the Ministry on the Civil Aviation Bill's exposure draft, and to the Transport and Infrastructure Committee on the Bill itself, Consumer NZ noted that passenger awareness of the law was low, and airlines did not always inform passengers of their rights adequately.[33] It suggested that regulations made under the new power should be made similar to those in the EU, which require written notices to be given to passengers at various times; for example, when their flight is delayed.[34] Airlines, however, were less enthusiastic about the potential for new obligations. Air New Zealand believed that disclosure provisions were not required,[35] while Qantas and the Board of Airline Representatives stressed the need to ensure that disclosure requirements did not overload passengers and were not unduly onerous on airlines.[36]

The power to require an airline to disclose operational statistics will also enable greater accountability for airlines and ensure that any future reforms to passenger protections, or regulation of the airline industry more broadly, can be developed with the benefit of greater information. The Australian Competition & Consumer Commission (ACCC) is required to publish quarterly reports on

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32 Ministry of Transport *Civil Aviation Act 1990 and Airport Authorities Act 1966 Consultation Document* (2014) at [C.41].

33 See Consumer NZ "Submission to the Transport and Infrastructure Committee on the Civil Aviation Bill 2021" (2 December 2021) at 4; and Consumer NZ "Submission to the Ministry of Transport on the Civil Aviation Bill exposure draft" (1 July 2019) at 4.

34 Consumer NZ "Submission to the Transport and Infrastructure Committee on the Civil Aviation Bill 2021" at 4.

35 Air New Zealand "Submission to the Ministry of Transport on the Civil Aviation Bill exposure draft" (2019) at [78].

36 Qantas "Submission to the Ministry of Transport on the Civil Aviation Bill exposure draft" (22 July 2019) at [5]; and Board of Airline Representatives New Zealand "Submission to the Ministry of Transport on the Civil Aviation Bill exposure draft" (22 July 2019) at [54].

the Australian airline industry,[37] including on service reliability, and making regulations to enable the Ministry of Transport to do the same would be a positive step.[38]

As at June 2024, the Ministry of Transport has not yet undertaken or programmed the policy work required to design regulations under s 410, as the resources of the Ministry are currently focused on implementing the systemic changes brought about by the 2023 Act.[39]

B Consumer Guarantees Act 1993

New Zealand's principal consumer protection law, the Consumer Guarantees Act 1993, is relevant to the provision of passenger air transport services. Although the guarantees and remedies are relatively clear, the usefulness of the CGA for airline passengers is severely hamstrung by the wide exception to liability (s 33), the ability of airlines to contract out for business passengers (s 43), and the limited applicability of the CGA to international air travel. Passengers are consumers – and therefore protected by the CGA – because air travel is a service which is, as a regular practice or occurrence, and in the ordinary course of events, acquired for personal use.[40] Like the Civil Aviation Act 2023, the CGA is enforced in either the Disputes Tribunal or the courts, and is therefore vulnerable to the issues, described above, that arise in those venues. There is no public enforcement of the CGA.

The Civil Aviation Act 2023 presumes liability unless the carrier can prove that a delay was the result of something outside its control, whereas the CGA requires the passenger to prove that a guarantee in the Act was breached. This burden, combined with the difficulties faced when applying the CGA to air travel, make it a generally unhelpful protection for passengers and means that it does not achieve its consumer protection objectives in the airline industry.

1 Guarantees

Three guarantees, in ss 28–30, are relevant in the case of delay or cancellation. First, s 28 provides that services must be carried out with reasonable care and skill. Where delay or cancellation is caused by a failure to exercise reasonable care and skill, this will be a breach of the s 28 guarantee. Airlines are unlikely to be forthcoming with information explaining the delay, especially if it reveals fault on their part, so s 28 is of limited use to passengers.[41] However, unlike the guarantees in ss 29 and 30, the s 28 guarantee applies even to suppliers who contract out all or part of the services to a sub-

37 Competition and Consumer (Price Monitoring—Domestic Air Passenger Transport) Direction 2023 (Cth).

38 See for example Australian Competition & Consumer Commission *Airline competition in Australia* (February 2024) at 16.

39 Letter from Gary Tonkin (Manager, Civil Aviation Act Implementation Programme, Ministry of Transport) to the author regarding a request for information made under the Official Information Act 1982 (5 June 2024).

40 See *Nesbit v Porter* [2000] 2 NZLR 465 (CA) at [29].

41 See Kate Tokeley "Late Departures: Consumers' Rights Under the Consumer Guarantees Act 1993" (2003) 10 Otago LR 411 at 413–414.

contractor. This means that where a delay is caused by a sub-contractor who fails to exercise reasonable care and skill – for example, the late delivery of fuel to the aircraft by a refuelling company – the airline will still be liable. There is no need, unlike for ss 29 and 30, to find that the sub-contractor was a "servant or agent" for the purposes of s 33. That issue will be discussed below.

Secondly, s 29 provides that services must be reasonably fit for a particular purpose that "the consumer makes known to the supplier … as the particular purpose for which the service is required or the result that the consumer desires to achieve". Although there is some level of ambiguity as to whether "makes known" includes making known by way of implication, it is consistent with the objectives of consumer protection to assume that it does.[42] A passenger purchasing a ticket on a flight which has been represented by the airline as arriving at a certain time should be enough to "make known" that purpose.

Finally, s 30 provides that services must be completed within a reasonable time. Although it is not applicable in cases where that time is fixed by the contract, left to be fixed in a manner agreed by the contract or left to be determined by the course of dealing between the parties, most airline contracts for carriage specifically state that flight timings are not guaranteed and do not form part of the contract.[43] As such, the s 30 guarantee is arguably still applicable to air travel.

2 Remedies

Section 32 of the CGA provides remedies for a breach of the guarantees in ss 28–30. The passenger can require the airline to remedy the breach within a reasonable time (ie provide alternative transport to complete the contract for carriage); or, if the airline does not, the passenger can cancel the contract (obtaining a refund) or claim reimbursement from the airline for remedying the breach themselves (arranging carriage with another carrier).[44] And, if the breach is of a "substantial character" or cannot be remedied (for example, there are no alternative flights), the passenger can cancel the contract or obtain compensation for any reduction in the value of the flights below the price paid.[45] In either case (substantial breach or not), the passenger can claim damages for the reasonably

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42 See Kate Tokeley "Consumer Guarantees Act 1993: The Guarantees" in Kate Tokeley and Victoria Stace (eds) *Consumer Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2023) 137; Tokeley, above n 41, at 414; and Annie Fraser "The Liability of Service Providers under the Consumer Guarantees Act 1993" (1994) 16 NZULR 23 at 36.

43 See for example Air New Zealand "Our Conditions of Carriage" (9 May 2024) <www.airnewzealand.co.nz>, cl 8.4; and Jetstar "Conditions of Carriage" (November 2023) <www.jetstar.com/nz>, cl 8.1(a).

44 Consumer Guarantees Act 1993, s 32(a).

45 Section 32(b). Section 36 sets out when a breach of a guarantee is of a "substantial character".

foreseeable loss from the breach.[46] As will be discussed below, the availability of these remedies in relation to international travel is likely limited by the Montreal Convention.

3 *Fault exception*

Section 33 balances the guarantees by providing an exception to liability similar to that found in the Civil Aviation Act 2023 when a breach of the s 29 or 30 guarantee occurs only because of:[47]

(a) an act or default or omission of, or any representation made by, any person other than the supplier or a servant or agent of the supplier; or

(b) a cause independent of human control.

The exception from liability provided by s 33 raises problems for consumers in the context of how airlines typically operate: with several necessary prerequisites of flight contracted to third parties such as ground handling, refuelling and catering. Whether a sub-contractor is considered a "servant or agent" is unclear, and it has been argued that to properly achieve the consumer protection purposes of the Act, "servant or agent" should be given a broad, non-technical meaning.[48] If it were not, then there would be an inconsistency with the law of contract, under which a principal is liable for its sub-contractor's actions. Without sub-contractors being considered servants or agents for the purposes of the CGA, a delay caused by, for example, a late refuelling truck or catering company would absolve the airline of its obligation to provide redress. Because those sub-contractors are not directly supplying the passenger with any service, there is also no right of redress under the CGA against them directly. The Montreal Convention and Civil Aviation Act 2023 also use "servants or agents" terminology and are arguably subject to the same flaw.[49]

4 *Contracting out*

Section 43(2) of the CGA allows parties to contract out of the Act where the agreement to do so is in writing, the services are supplied and acquired in trade, both parties are in trade and it is fair and reasonable that the parties are bound by the agreement to contract out. Air New Zealand, unlike most (if not all) international carriers, includes a contracting out provision in its conditions of carriage where flights are acquired for "business purposes".[50] Qantas and Jetstar previously did the same, but

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46 Section 32(c).

47 Sections 33(a) and 33(b).

48 Fraser, above n 42, at 39–40; and Kate Tokeley "Consumer Guarantees Act 1993: Remedies" in Kate Tokeley and Victoria Stace (eds) *Consumer Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2023) 166.

49 Civil Aviation Act 2023, s 276 and sch 6 art 19.

50 See Air New Zealand, above n 43, at cl 1.6; Jetstar, above n 43; Qantas "Conditions of Carriage" (31 July 2024) <www.qantas.com/nz>; Air Canada "International Tariff" (22 August 2024) <www.aircanada.com>;

amended their conditions of carriage in 2024 to remove this condition.[51] Section 43(2A) provides a non-exhaustive list of factors a court must consider when determining what is fair and reasonable. Notably, para (c) includes the respective bargaining power of the parties – including the ability for negotiation, and whether one party had to "accept or reject the agreement on the terms and conditions presented by another party". Given that airline conditions of carriage are offered on a "take it or leave it" basis, with no facility for negotiation, the "fair and reasonable" requirement in s 43(2)(d) may not be met, at least in some circumstances. Some routes – largely domestic and trans-Tasman routes – are exclusively served by a contracting-out carrier, so business travellers have no choice but to contract out of the CGA. This may increase the likelihood of such a clause being found not to be fair and reasonable on such routes, exposing airlines to a fine of up to $600,000 for attempting to contract out of the CGA otherwise than in accordance with the s 43(2) requirements.[52]

5 International application

The applicability of the CGA to international carriage is unclear because of the Montreal Convention and jurisdictional issues. First, the exclusivity of the Montreal Convention serves as a bar to some remedies provided for under the CGA. Article 29 prevents "any action for damages, however founded" except in accordance with the Convention, which, in the case of delay, is governed by art 19. Although this bar does not prevent passengers from obtaining CGA remedies for cancellation – widely held by international courts to be non-performance rather than delay, and thus outside the scope of art 19[53] – it does prevent them from obtaining any CGA remedies for delay that might be considered "damages" under the Convention. This clearly excludes the ability to obtain damages for any foreseeable loss incurred, but it is not immediately clear whether it prevents the passenger from exercising their rights to cancel the contract and obtain a refund, to obtain reimbursement where the customer makes alternative travel plans, or to obtain a partial refund where those rights would otherwise apply. Concerningly, two recent Disputes Tribunal decisions appear to have proceeded on the basis that the CGA simply does not apply to international flights, and that the Convention is

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Fiji Airways "International and domestic tariff" (20 April 2023) <www.fijiairways.com>; Singapore Airlines "Conditions of Carriage" (1 September 2021) <www.singaporeair.com>; United Airlines "Contract of Carriage Document" (28 June 2024) <www.united.com>; and Emirates "Conditions of Carriage for Passengers and Baggage" (1 June 2024) <www.emirates.com>.

51 Qantas "Conditions of Carriage" (25 May 2023) <www.qantas.com/nz>, cl 2.4; and Jetstar "Conditions of Carriage" (November 2023) <www.jetstar.com/nz>, cl 2.7.

52 See Consumer Guarantees Act, s 43(4); and see Fair Trading Act 1986, ss 13(i) and 40(1).

53 See Wolf Müller-Rostin and Jae Woon (June) Lee "Article 19: Delay" in George Leloudas, Paul S Dempsey and Laurent Chassot (eds) *The Montreal Convention: A Commentary* (Edward Elgar Publishing, Cheltenham, 2023) 209 at [19.14]–[19.18].

"exclusive of *any* resort to the rules of domestic law".[54] The difference between cancellation and delay, and the exclusion only of actions for damages, means that such an interpretation of the law is not entirely correct.

Secondly, the applicability of the CGA to the airline industry is also made complex by the lack of clear law on its territorial reach.[55] Not only are international flights arriving in or departing New Zealand to be considered, but flights between and within other countries are often sold as part of a single itinerary including New Zealand flights. Traditional choice-of-law issue resolution favours the law with the closest and most real connection with the transaction. Relevant factors in the airline industry may include the method of booking (for instance, an airline's New Zealand website or its international website, or an overseas online travel agency), the direction of travel, the currency of payment or whether a return journey was to or from New Zealand.

C Fair Trading Act 1986

Section 9 of the FTA prohibits anyone in trade from engaging in conduct which is misleading or deceptive, or which is likely to deceive. Section 13(i) also prohibits false or misleading representations concerning the existence, exclusion or effect of any conditions, warranties, guarantees, rights or remedies. Although these provisions do not provide any specific protections for airline passengers by way of additional remedies, they do impose certain responsibilities on airlines to not mislead passengers as to their existing rights. They do not create a positive obligation to proactively inform customers of their rights but could prohibit omissions in some circumstances.[56] Half-truths – such as referring the passenger to the contract for carriage when other rights also apply – might be unlawful in some circumstances.[57] The consequence of this is that the conduct of airlines in handling passenger complaints and disputes is a constant balancing act between not misleading or deceiving passengers but, for the protection of the airline, not doing more than is strictly necessary.

New Zealand has recently seen instances of airlines appearing to fall short – or just toe the line – of their obligations under the FTA. For example, in September 2024 the Commerce Commission announced that it would be filing charges against Jetstar for breaching s 13(i).[58] The Commission had

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54 *KN and PN v V Inc* [2023] NZDT 354 at [6]; and *MK v R Ltd* [2023] NZDT 719 at [6] (emphasis added; identical wording in both cases).

55 See Kate Tokeley "Consumer Guarantees Act 1993: Overview and Coverage" in Kate Tokeley and Victoria Stace (eds) *Consumer Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2023) 65 at 102–108.

56 Section 2 of the Act defines "conduct" as including "omitting to do an act".

57 See Debra Wilson "General Rules of Misleading and Deceptive Conduct and Misrepresentations" in Kate Tokeley and Victoria Stace (eds) *Consumer Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2023) 181 at 195.

58 Commerce Commission "ComCom alleges Jetstar misled consumers about compensation for flight delays and cancellations" (press release, 18 September 2024).

previously warned Jetstar in 2022 regarding its communications to customers about flights it cancelled in response to COVID-19. Jetstar had advised passengers that they were entitled to flight credits, and only briefly mentioned their ability to "enquire" about a refund, which the Commission felt risked misleading customers.[59] Jetstar had also advised passengers that there were fixed limits to its liability for accommodation and meals under the Civil Aviation Act 1990 – of $150 per night and $30 per meal – even though the Act provides no such limit.[60] Consumer NZ has also raised concerns about the information provided to consumers by both Air New Zealand and Jetstar surrounding entitlement to refunds and compensation. In the early stages of the pandemic, for example, Air New Zealand advised customers transiting through the United States that they were not entitled to a refund for their cancelled flights.[61] This was contrary to an Enforcement Notice issued by the United States Department of Transportation, reiterating the obligation of airlines to refund their customers regardless of the reason for, or cause of, cancellation,[62] which applies even to transiting passengers. The airline later reversed its position.[63]

II OVERSEAS REGIMES

A Australia

Australia is a party to the Montreal Convention, and the Convention has legal effect in Australia.[64] New Zealand and Australia are therefore largely alike with respect to international flights, but, unlike in New Zealand, there is no statute law explicitly governing domestic delays. Instead, through the Competition and Consumer Act 2010 (Cth), the Australian Consumer Law (ACL) provides consumer guarantees which are broadly similar to those found in New Zealand's CGA. These include the guarantees to render services with due care and skill, which are fit for purpose, and within a reasonable time.[65] Unlike the CGA, the ACL does not permit airlines to contract out of the guarantees for

59 Tom Pullar-Strecker "Jetstar was warned last year by Commerce Commission of possible law breach" (14 October 2022) Stuff <www.stuff.co.nz>.

60 Consumer NZ "Jetstar misleading passengers about their rights under the Civil Aviation Act" (12 October 2022) <www.consumer.org.nz>.

61 Matthew Theunissen "Consumer NZ to lodge complaint over Air NZ's refusal to refund all cancelled US flights" (18 May 2020) Radio New Zealand <www.rnz.co.nz>.

62 Blane A Workie "Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel" (3 April 2020) United States Department of Transportation <www.transportation.gov>.

63 Radio New Zealand News "Air NZ to refund customers transiting through US" (18 May 2020) <www.rnz.co.nz>.

64 Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Act 2008 (Cth).

65 Competition and Consumer Act 2010 (Cth), sch 2 cls 60–62; and compare Consumer Guarantees Act, ss 28–30.

business travellers.[66] The ACL also contains a nearly identical exception to liability for breaches of the guarantees of fitness for purpose and reasonable time of provision.[67] However, a cause independent of human control will only absolve an airline of liability where that cause occurred *after* the services were supplied.[68] This is narrower than s 33(b) of the CGA – where the cause can occur at any time – and arguably eliminates an airline's ability to rely on causes "independent of human control" in cases of cancellation or delay; the services will not yet have been supplied.

Otherwise, protections are left to the passenger's contract with their airline and vary carrier-to-carrier. For example, Qantas and Jetstar (a low-cost subsidiary of Qantas) have nearly identical conditions of carriage, but Qantas provides stronger rights to passengers. For significant delays outside its control, Qantas offers a refund if it cannot rebook the passenger onto an acceptable service; Jetstar merely offers a credit.[69] And, although Qantas uses the term "Significant Change" to refer to a change that materially impacts the passenger and their travel plans, Jetstar quantifies the term as a change of three hours or more to the scheduled departure time.[70] Virgin Australia – which, together with Qantas and Jetstar, carries 93 per cent of all passengers in Australia[71] – also provides a refund if it cannot make suitable alternative arrangements.[72]

The Australian Department of Infrastructure, Transport, Regional Development, Communications and the Arts has recently released a comprehensive White Paper on the Australian aviation industry.[73] In its submissions on the White Paper's terms of reference, the ACCC was critical of the consumer protections currently available to Australian passengers. Poor customer service and communication, uncertainty of rights and a lack of accountability were all identified as pain points for the consumer experience more broadly.[74] It found that there were "little to no incentives" to comply with ACL guarantees and it was difficult for consumers to enforce their rights, especially against a well-

66 Competition and Consumer Act (Cth), sch 2 cl 64.

67 Sch 2 cl 267(1)(c).

68 Sch 2 cl 267(1)(c)(ii).

69 Qantas, above n 50, at cls 10.2(b) and 10.4(b); and Jetstar, above n 43, at cl 8.2.

70 Qantas, above n 50, at cl 2 definition of "Significant Change"; and Jetstar, above n 43, at cl 1 definition of "Significant Change".

71 Australian Competition & Consumer Commission, above n 38, at 21.

72 Virgin Australia "Guest Compensation Policy" <www.virginaustralia.com> at cls 3 and 4.

73 Department of Infrastructure, Transport, Regional Development, Communications and the Arts *Aviation White Paper: Towards 2050* (26 August 2024).

74 Australian Competition & Consumer Commission *Aviation White Paper: ACCC submission in response to the terms of reference* (15 March 2023) at 22.

resourced airline.[75] Although there is currently the Airline Consumer Advocate (ACA) – a scheme funded by airlines and overseen by a committee of airline representatives – the ACCC argued that this scheme is inadequate and that a wholly new dispute resolution system is required.[76]

The ACCC considered that the Australian Telecommunications Industry Ombudsman (TIO) could serve as a useful template for an airline dispute resolution scheme.[77] That scheme is funded by telecommunications service providers but is unlike the ACA model in that its governance board consists of equal numbers of industry, consumer and independent directors. And, unlike the ACA, the TIO's decisions are binding unless the consumer does not accept the decision. The scheme is therefore geared towards protecting consumers' rights and accepts that to do so necessitates providing consumers with further avenues for dispute resolution, while restricting the ways a large, powerful telecommunications service provider can appeal a decision.

B European Union

All EU states are party to the Montreal Convention. In addition, EU Regulation 261/2004 (the Regulation) provides graduated levels of compensation for passengers when their carriage is delayed or cancelled.[78] The Regulation applies to passengers on flights within the EU and flights leaving the EU on any airline, and flights to the EU flown by EU airlines.[79] Although the Regulation explicitly makes provision for compensation for cancellation only, the European Court of Justice has held that it is available where a passenger suffers a delay in arriving at their destination in excess of three hours.[80]

Rather than adopt an approach which compensates passengers for damages caused or costs incurred, compensation is based on the distance of the flight, as follows:[81]

(a) €250 (NZD 450) for all flights 1,500 km or less;

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75 At 27.

76 At 28.

77 At 29.

78 Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2002] OJ L46/1 [Air Passengers Rights Regulation (EU)].

79 The Regulation also applies in Switzerland, Norway and Iceland. The United Kingdom carried over the Regulation by virtue of the European Union (Withdrawal) Act 2018 (UK) and has subsequently amended it to operate effectively in the United Kingdom, including by specifying compensation amounts in Pounds Sterling; see Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (UK).

80 Cases C-402/07 and C-432/07 *Sturgeon v Condor* [2009] ECR I-10923.

81 Conversion rate as at 2 September 2024 using €1 = NZD 1.78. All conversions rounded to the nearest NZD 50.

(b) €400 (NZD 700) for all intra-Community flights longer than 1,500 km, or all other flights longer than 1,500 km but 3,500 km or less; and
(c) €600 (NZD 1,050) for all other flights.

After a delay of three hours, or a flight cancellation, passengers are entitled to the level of compensation which corresponds to the distance of their flight.[82] Passengers are also entitled to this compensation if they are denied boarding, for example, if an airline overbooks a flight.[83] If an airline is able to reroute a passenger so that they arrive less than two, three or four hours late (depending on the distance), then the compensation payable may be halved.[84] Passengers are not entitled to compensation if the airline can prove a delay or cancellation was caused by extraordinary circumstances,[85] but other assistance obligations still apply.[86] For example, after five hours, a passenger has a right to abandon their travel and obtain a refund and, in some cases, repatriation to their point of origin.[87] Accommodation and airport transfers must also be provided for overnight delays, regardless of the cause.[88]

The extraordinary circumstances exception to compensation applies where the airline can prove the cancellation or delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.[89] These may include "political instability, meteorological conditions … security risks, unexpected flight safety shortcomings and strikes".[90] Technical or maintenance issues will generally not be an exceptional circumstance unless they are "not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control".[91] And, although strikes are included in recital 14 of the Regulation as an example of an extraordinary circumstance, lawfully held strikes by airline staff will not absolve an airline of liability, but strikes by air traffic control or airport staff may.[92]

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82 Air Passengers Rights Regulation (EU), above n 78, arts 5 and 7(4).

83 Article 4.

84 *Sturgeon*, above n 80, at [63].

85 At [69].

86 See Sophia Tang "Air Carriers' Obligation in 'Extraordinary Circumstances'" (2013) 4 EJRR 275.

87 Air Passengers Rights Regulation (EU), above n 78, arts 6 and 9.

88 Articles 6(1) and 9(1)(b).

89 Article 5(3).

90 Recital 14.

91 Case C-549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061 at [34].

92 Case C-28/20 *Airhelp v Scandinavian Airlines System* ECLI:EU:C:2021:226 at [42] and [52].

Each state which is party to the Regulation also has a National Enforcement Body (NEB), or sometimes multiple bodies. In most cases, a state's NEB is its consumer protection agency or its civil aviation regulator. The Regulation requires that, in addition to designating an NEB, each member state also imposes sanctions for infringements of the Regulation which are "effective, proportionate and dissuasive".[93] However, the actual effectiveness of each NEB varies. Some do not have the power to make individual orders that are binding on airlines. In many cases, the sanctions that NEBs can impose are too weak to be effective.[94] Overall, reports into the Regulation's effectiveness suggest that, despite it being ostensibly highly favourable to consumers, it is not well adhered to.

Compliance with the Regulation also imposes significant costs on airlines. A September 2019 study by the European Regions Airline Association (ERA), an airline advocacy group, found that compensation for delays and cancellations regularly exceeded twice the revenue for any given flight.[95] Some airlines have baulked at the Regulation. For example, low-cost carrier Ryanair implemented a €2 "levy" in 2011, ostensibly to cover the increased costs it was facing from the Regulation.[96] There is a case to be made that with lower fares comes the acceptance of higher degrees of risk, and that is the approach taken in Australia, where Jetstar provides weaker protections than its full-fare parent airline, Qantas. However, given the lack of competition and choice in the New Zealand aviation market – where many routes are served exclusively by one or two airlines – leaving the level of protection to be determined by contract could result in airlines offering minimal protection without having any incentive to introduce correspondingly low fares.

In its report, the ERA also argued that the scheme is unfair to small and regional airlines, and that small airlines with fewer than 2.5 million passengers per year should only be liable to pay half the compensation that larger airlines are required to pay.[97] The impact on regional carriers may be particularly relevant in the New Zealand domestic context, where most airports are in the regions. In recent decades, several regional airlines have been started but have subsequently collapsed. Even the big two airlines – Air New Zealand and Jetstar – have struggled in the regional market. In 2016, Air New Zealand withdrew service from several regional airports and in 2019, Jetstar terminated its

93 Article 16(3).

94 Sara Drake *Case analysis: the transposition and implementation of Regulation 261/2004 on air passenger rights* (European Parliament, PE 608.843, November 2018) at 7.

95 European Regions Airline Association *An ERA study into Regulation EU261: passenger compensation for delayed or cancelled flights* (September 2019) at 13.

96 Dan Milmo "Ryanair adds €2 levy to cover EU rules on compensation" *The Guardian* (online ed, London, 31 March 2011).

97 European Regions Airline Association, above n 95, at 6.

consistently loss-making regional operations after four years.[98] A lack of rail-based public transport means that regional air routes serve an even more essential purpose here than they do in Europe. If passenger protections in New Zealand are strengthened, care must be taken to ensure that such protections do not serve as an unjust burden of participation in, and barrier to entry into, the regional market.

C Canada

Canada is a party to the Montreal Convention and has additional passenger regulations which are similar to those of the EU. The Air Passenger Protection Regulations (APPR) were introduced in 2019 and provide a suite of measures relating to airline passenger rights, including how airlines must handle disruptions.[99] They apply to all flights within, to, or from Canada, as well as any connecting domestic flights in other countries. Like the European scheme, the APPR provide for similar fixed amounts of compensation in certain situations. Notably, Canada has experienced issues with both the applicability and enforcement of the APPR which have necessitated reform just four years after their introduction.

1 Compensation, alternative arrangements and refunds

The APPR currently provide for compensation for cancellation, delay or denial of boarding within the airline's control and not when required for safety purposes.[100] Compensation is graduated both according to the size of the carrier and the length of the delay between the arrival time on the passenger's ticket and the passenger's actual arrival time, and is as follows:[101]

98 Jetstar "Jetstar proposes withdrawal from regional flying in New Zealand" (25 September 2019) <newsroom.jetstar.com>; and Stuff "Air NZ announces regional network cuts" (11 November 2014) <www.stuff.co.nz>.

99 Air Passenger Protection Regulations (SOR/2019-15) (Canada).

100 Section 12(1).

101 Conversion rate as at 2 September 2024 using CAD 1 = NZD 1.19. All conversions rounded to the nearest NZD 50.

Summary of compensation under the APPR for delay, cancellation and denial of boarding within the airline's control and not when required for safety purposes						
Delay length (Arrival-based)	**Small carriers** Delay or cancellation[102]		**Large carriers** Delay or cancellation[103]		**All carriers** Denial of boarding[104]	
< 3 hrs	None		None		CAD 900	NZD 1,100
3 – <6 hrs	CAD 125	NZD 150	CAD 400	NZD 500	CAD 900	NZD 1,100
6 – <9 hrs	CAD 250	NZD 300	CAD 700	NZD 850	CAD 1,800	NZD 2,150
9 hrs or more	CAD 500	NZD 600	CAD 1,000	NZD 1,200	CAD 2,400	NZD 2,850
Right to refund exercised	CAD 125	NZD 150	CAD 400	NZD 500	None	

A unique feature of the APPR is that its requirements vary depending on the size of the airline. The APPR deem a "large carrier" to be one which has transported two million or more passengers in each of the two preceding calendar years, with the residual category being "small carriers".[105] A small carrier (for example, a contracted regional airline or a subsidiary) which carries a passenger on behalf of a large carrier owes the same obligations to that passenger as a large carrier.[106] Large carriers have shorter timeframes in which to make alternative arrangements when flights are cancelled, and in some cases are obliged to arrange transport on another airline if that is the only option.[107]

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102 Section 19(1)(a).

103 Section 19(1)(b).

104 Section 20(1).

105 Section 1(2) definition of "large carrier".

106 Section 1(4).

107 See s 17.

The challenges faced by the APPR in practice also demonstrate the inherent dichotomy of safety (which may necessitate disruption) and passenger protection (which incentivises flying as scheduled). Rather than have two categories of cancellations, delays or denials of boarding – those inside or outside the carrier's control – the Canada Transportation Act initially provided a third: those within the carrier's control but required for safety purposes.[108] The obligations imposed by the APPR in such cases are somewhat of a middle-ground: compensation was not required as it would be for incidents wholly within the airline's control, but the airline still had to arrange alternate transport or offer a refund under the same rules as apply in those cases.[109] This three-tiered approach helped to temper the perceived risk to a comprehensive safety culture posed by the increased financial costs to airlines when flights do not operate as scheduled.[110]

But, just four years after the APPR's implementation, the three categories of control are now being replaced.[111] The Canadian Transportation Agency (CTA) has noted that the categories are unclear, contributing to a lack of passenger certainty of rights and difficulties enforcing the APPR.[112] In particular, the proper categorisation of delays which are matters of safety but still clearly caused by the airline – such as a crew shortage – can be difficult to determine.[113] The APPR also do not operate on a presumption that an event is within an airline's control and not required for safety purposes, which makes proving breaches difficult for passengers. The nub of the problems with the APPR was summarised by the Nova Scotia Small Claims Court in *Geddes v Air Canada*:[114]

> The language is complex and legalistic; one needs detailed or specific knowledge … and the process to seek compensation, once invoked, does not lend itself to quick resolution. This case illustrates that complexity, as lengthy pre-hearing processes involved the issuance of subpoenas to obtain detailed records from [Air Canada about its fleet and maintenance].

Amendments to the Canada Transportation Act (not yet in force) require that the CTA amend the APPR so that airline control – and therefore the obligation to provide compensation – is assumed, except where it can prove that the delay, cancellation or denial of boarding was caused by exceptional

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108 Canada Transportation Act SC 1996 c 10, s 86.11(1)(b).

109 Air Passenger Protection Regulations (Canada), s 11.

110 See George Petsikas "Reconciling Airline Passenger Rights and Flight Safety: Will Canada Pick Up the Ball Dropped by the EU?" (11 November 2022) Institute of Air & Space Law, McGill University <www.mcgill.ca>.

111 Canadian Transportation Agency *Consultation Paper: Proposed changes to clarify, simplify and strengthen the* Air Passenger Protection Regulations (July 2023).

112 At 4.

113 See for example Sophia Harris "WestJet launches legal battle to overturn order to compensate passenger $1,000" (23 August 2022) CBC News <www.cbc.ca>.

114 *Geddes v Air Canada* [2021] NSSM 27 at [2].

circumstances.[115] This is largely analogous to the European presumption of liability, except that the CTA intends to define exceptional circumstances in significantly more detail than the European Regulation.[116]

2 Dispute resolution

The CTA is the quasi-judicial disputes resolution body for complaints under the APPR. Previously, the CTA reviewed complaints where the passenger was unsatisfied with the airline's response to a complaint or where the airline did not respond within 30 days. The efficacy of the CTA as the adjudicative agency had been questioned, however, due to the immense backlog of complaints which emerged immediately following the APPR's implementation in 2019, and was compounded by mass flight disruption as a result of COVID-19; a "23-fold leap in demand".[117] Some passengers resorted to using Small Claims Courts to resolve disputes instead.[118] In September 2023, the CTA streamlined its complaints resolution process, which now gives airlines only 14 days to respond, and provides for initial screening by the CTA and mediation before a full adjudication. It is hoped that the new approach will be more efficient and promote faster resolution.[119]

The CTA may also impose financial penalties on airlines who breach the APPR. The maximum penalty which can be fixed under the APPR is CAD 250,000 (NZD 295,000) – a tenfold increase on the original limit of CAD 25,000 (NZD 29,500) – but the APPR have not yet been updated to reflect this.[120]

III IMPROVEMENTS

New Zealand's passenger protection laws need reform. The current system has been shown to provide inadequate protection to consumers, be difficult to apply to the airline industry and, in many cases, be confusing. Stronger laws are needed, and the European and Canadian schemes serve as useful starting points for intervention.

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115 Budget Implementation Act SC 2023 c 26, s 465.

116 See Canadian Transportation Agency, above n 111, at 7.

117 Raisa Patel and Ashley Burke "Canadian Transportation Agency overwhelmed by 2-year backlog of air passenger complaints" (31 May 2020) CBC News <www.cbc.ca>.

118 See for example Darren Major "Air passengers losing patience with enforcement agency as backlog of complaints balloons" (13 August 2022) CBC News <www.cbc.ca>.

119 Canadian Transportation Agency "Air travel complaints resolution process" (30 September 2023) <www.otc-cta.gc.ca>.

120 Conversion rate as at 2 September 2024 using CAD 1 = NZD 1.19; Canada Transportation Act SC 1996 c 10, s 177(1)(b)(ii), as amended by Budget Implementation Act SC 2023 c 26, s 466; and Air Passenger Protection Regulations (Canada), s 32.

A Airline Liability and Compensation

In the author's opinion, the Civil Aviation Act 2023 should be amended to enable the making of regulations relating to airline passenger protections. The Ministry of Transport would develop the relevant regulations through consultation with consumers, airlines and other affected stakeholders. Using regulations rather than statute to establish a new scheme would allow for rules which are sufficiently technical and specific to the practical realities of air travel to be drafted: a key requirement to ensuring certainty and ease of comprehension in a consumer law regime. A regulation-based approach would also enable the rules to be recalibrated or rebalanced as necessary. Canada's experience with the APPR, which have required amendment since their original promulgation, shows the importance of such a capability.

1 Remedies

Approaches to compensation in the EU and Canada have demonstrated the benefit of a scheme which provides easily determinable fixed sums of compensation, rather than liability for damages. The current law in New Zealand, which requires damages to be proven, is administratively burdensome for both passengers and airlines and fails to recognise the non-monetary harm incurred from delays and cancellations. It requires the conscious collection of expense receipts at a time when passengers may be scrambling to rearrange their plans. Where flights are delayed or cancelled, the new regulations should provide for specific amounts of compensation according to the length of the delay and the distance of the flight. To protect the regional airline industry, the Canadian approach – where these amounts are reduced for airlines who carry fewer than 2 million passengers annually – should be strongly considered. Such regulations should also apply to all international flights – regardless of airline size – to and from New Zealand.[121]

Where delays are significant, passengers should be entitled to abandon their travel and obtain a refund in the same medium as their fare payment. Although some variability in timing is accepted when booking a flight, passengers travelling for specific purposes have no use for flights which have been delayed to such an extent that they lose the value of their travel. The provision of expiring credits to passengers in such a situation is inappropriate because it forces passengers to purchase tickets at future prices, and travel even if they no longer have any need to, to avoid losing the benefit of their credit. Other assistance, such as meals and accommodation, should also be provided where appropriate, as in the EU and Canada.

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121 Despite art 29 of the Convention asserting the exclusivity of its conditions and limits in international delay cases, the Supreme Court of Canada has held that fixed compensation is different from individualised damages and therefore not inconsistent with the Convention, suggesting that such regulations would be permissible: see *International Air Transport Association v Canadian Transportation Agency* 2024 SCC 30 at [94].

2 Domestic baggage

Liability for delayed domestic baggage should, at a minimum, be restored to provide the same liability as for international baggage. As is already recognised by the law,[122] carriage of passenger baggage is unlike the carriage of other goods because it is incidental to the carriage of its owner. Passengers expect that their baggage will arrive with them at their destination. In most cases, baggage contains personal effects essential to comfortable life and a delay in its arrival can cause significant distress and expense.

Consistency with the international regime would also streamline liability rules for both airlines and passengers. When the inclusion of the law governing the carriage of goods and baggage by air was consolidated into the Carriage of Goods Act, both Air New Zealand and the National Airways Corporation opposed the change. Both airlines preferred domestic rules for carriage of goods by air that modelled the "proven"[123] and "well-tested" Warsaw regime, which provided "certainty and uniformity on a universal scale".[124] Had the airlines' submissions been adopted, they would likely still be liable for delayed domestic baggage today.

3 Exceptions to liability

The current exceptions to liability set out in s 274 of the Civil Aviation Act 2023, and the burden of proving them being on airlines, are mostly justified. Still, to provide certainty, new regulations should set out the exceptions with greater specificity. Difficulties determining what is within an airline's control have been seen in both the EU and Canadian regimes. The response that this has elicited in Canada – a change in the categories of control and greater enumeration of circumstances which qualify as "exceptional"[125] – suggests that similar drafting would be required here. In particular, where a delay is made necessary for safety reasons, care must be taken to ensure that airlines are liable for circumstances of their own creation (such as reasonably foreseeable technical failures, or crew shortages), whilst also maintaining a positive safety culture.

The apparent gap in liability where a delay is caused by sub-contractors should also be closed. It is the author's view that passengers should not have to bear the risks that exist in an industry where the services of several service providers, usually unknown to and unselected by the passenger, must be performed at precisely the right time to ensure a flight leaves on time. Airlines should be left to apportion risk and ensure that their contractual relationships with suppliers provide for indemnity. If

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122 See Contract and Commercial Law Act, s 246 definition of "checked baggage".

123 National Airways Corporation "Submission to the Statutes Revision Committee on the Carriage of Goods Bill 1977" at [4].

124 Air New Zealand "Submission to the Statutes Revision Committee on the Carriage of Goods Bill 1977" at [2].

125 See Canadian Transportation Agency, above n 111, at 7–8.

the cause of a sub-contractor's failure would not have allowed an airline to escape liability had it undertaken to perform the work itself, then the airline should not escape liability simply because its sub-contractor was neither an agent nor a servant.

Under the current law, there is no requirement for airlines to provide a refund if a flight is cancelled (although the CGA may give the passenger this right in some cases). Airlines, including Air New Zealand, contract with passengers that expiring credits will be given instead of refunds where flights are cancelled.[126] During the pandemic, this enabled airlines – including Air New Zealand – to avoid refunding passengers whose flights were cancelled if no overseas law required them to do so.[127] Although extraordinary circumstances justify an exception to liability for compensation, they should not enable an airline to retain monies for services which are never provided, nor should they allow it to stipulate the terms under which the benefit of those monies can be realised. Requiring airlines to refund passengers on cancelled flights regardless of the cause would be consistent with airlines' obligations in Canada, the EU, and the United States.[128]

B Dispute Resolution

Stricter laws and obligations for airlines must also be accompanied by a fit-for-purpose disputes resolution scheme for them to be of any value. The Disputes Tribunal is not a suitable venue for New Zealand's airline passenger disputes, and the European and Canadian examples demonstrate how strong substantive protections can be undermined by difficulties in enforcement. A disputes resolution body with adjudicative and enforcement abilities, modelled on successful disputes resolution schemes for other industries in both Australia and New Zealand, is suggested.

Both Australia's TIO and New Zealand's Utilities Disputes Ltd serve as useful templates. In its submissions on the 2021 Civil Aviation Bill and on the 2019 Exposure Draft, the Utilities Disputes Board suggested that an alternative dispute resolution scheme for the airline industry could resolve some of the issues presented by the current reliance on the Disputes Tribunal.[129] These include accessibility (by removing the filing fee and the need to attend a hearing), the benefit of consistency and expertise to be gained from a centralised and knowledgeable decision maker, and the ability to undertake regular reporting on both the number and nature of disputes. For instance, Utilities Disputes

126 See Air New Zealand, above n 43, cl 15.5. Since the COVID-19 pandemic, cl 15.5 has been fleshed out to provide detailed examples but remains substantively unchanged from its pre-pandemic form.

127 See Esther Taunton "Air NZ 'confident' about flight credit process as Qantas faces legal action" (23 August 2023) Stuff <www.stuff.co.nz>.

128 Air Passengers Rights Regulation (EU), above n 78, arts 5(1)(a) and (8)(1)(a); Air Passenger Protection Regulations (Canada), s 10(3)(b); and Workie, above n 62.

129 Utilities Disputes Board "Submission to the Ministry of Transport on the Civil Aviation Bill exposure draft" (22 July 2019).

publishes regular reports on how many complaints and enquiries are received, how they are resolved and on any trends apparent in complaints.

Following investigation or attempts at conciliation, both the TIO's and Utilities Disputes' processes ultimately enable each to make a determination that is binding on the service provider but can be rejected by the consumer in favour of taking the matter to a judicial body. However, adopting the same model for airline dispute resolution would eliminate an airline's right to appeal decisions under what is likely to be a technical and complex regulation. This concern could be balanced by offering both parties a right of appeal in the District Court. The prospect of having to participate in an appeal may discourage passengers from continuing with a claim, and so the adjudicative body – not the other party – should be responsible for responding to such appeals and defending its decision before the Court.

The cost of administering a scheme should be met by airlines for three reasons. First, an airline-funded model would encourage compliance with the law and prompt in-house resolution of complaints. Secondly, the model would enable larger airlines and those which are relatively worse at resolving complaints to cover a higher proportion of the scheme's cost. This is consistent with Utilities Disputes' current funding model, whereby providers are levied based on market share and the number of deadlocked complaints the provider had in the previous year.[130] Finally, funding that is directly linked to the scheme's workload would ensure the scheme is sufficiently resourced to deal with complaints expeditiously. Long complaint processing times such as those seen in Canada, where the CTA handles complaints, must be avoided if the system were to be effective.

Regular reporting by such a scheme would also enable interplay with a public enforcement agency, discussed below, to ensure proactive enforcement. Systemic issues are routinely investigated by the TIO, largely identified from complaint trends, and can result in the TIO issuing a formal recommendation to service providers or referring the issue to a regulator such as the ACCC.[131] This approach should also be adopted in New Zealand to streamline public enforcement and avoid the need for duplicate complaints and investigations.

C Public Enforcement

In most cases, an individual passenger's claim will be for a relatively small amount of money. Even in jurisdictions with strong protections and individual dispute resolution processes, some airlines have consistently fallen short of their obligations.[132] Without proper public enforcement – that is, the

130 See Utilities Disputes Ltd "The General and Scheme rules for the Energy Complaints Scheme operated by Utilities Disputes Limited" (1 April 2019) <www.udl.co.nz>.

131 Telecommunications Industry Ombudsman "Systemic Issues at the TIO: Fact sheet" (March 2022) <www.tio.com.au>.

132 See for example Sara Drake "Delays, cancellations and compensation: Why are air passengers still finding it difficult to enforce their EU rights under Regulation 261/2004?" (2020) 27 MJ 230 at 232.

ability to fine airlines – there is a risk that airlines will assess the cost of repeated non-compliance and occasional participation in dispute resolution as less than the cost of simply complying with the law in all cases in the first place.

The Civil Aviation Authority (CAA), the Commerce Commission and the body that would be established under the above recommendation are all candidates for the role of public enforcement agency. In the author's opinion, the most appropriate body to hold these powers is the Commerce Commission. Many European countries designate their CAA-equivalent as their NEB, but in New Zealand the CAA's role is largely concerned with aviation safety, and public enforcement of a passenger protection scheme would be a significant departure from that role. The Commerce Commission is already responsible for the public enforcement of airlines' FTA obligations, and so giving public enforcement powers to the Commission under new regulations would avoid having various powers siloed in different bodies. As public enforcement is intended to respond to systemic issues, having all relevant powers vested in the same body would enable more effective action.[133]

As under the FTA, breaches of the new regulations should be an offence, with the potential penalty for breaching the new regulations being sufficiently large to deter airline non-compliance. The maximum fine for a body corporate who contravenes pts 1–4A of the FTA is $600,000, with the ability for the Commerce Commission to issue infringement notices (without criminal proceedings) of up to $2,000.[134] Similarly, the strengthened Canadian APPR will enable fines of up to CAD 250,000 (NZD 295,000) to be imposed on airlines. For consistency with the FTA, a maximum fine and infringement fee of $600,000 and $2,000 respectively are suggested.

IV CONCLUSION

Air travel can be a perilous exercise fraught with disruption. Sometimes that disruption is the fault of airlines, and sometimes it is genuinely uncontrollable. When plans are foiled, passengers rightly expect that they will be looked after in a way that is fair and properly accounts for the responsibility of their airline for the inconvenience. This article has shown that from end to end, the law in New Zealand does not properly protect passengers' interests. The little protection that does exist is unclear and insufficient, is not easily enforceable and provides no way of dealing with systemic non-compliance. Although other jurisdictions' interventions have not been without their difficulties, those difficulties provide useful guidance for the development of a new scheme. This article's proposals outline the essential waypoints on the route to a scheme that addresses the current approach's flaws and should be adopted if passenger trust and confidence is to be maintained.

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133 See also Jae Woon Lee and Victor S Chan "The Air Passenger Protection Regime in Hong Kong: A Plea for a Coordinated Approach" (2023) 48 Annals Air & Space L 107.

134 Fair Trading Act, ss 40 and 40B.