

Why airlines can refuse to fly passengers

Anthony J Cordato,
Cordato Partners,
Sydney

Contracts of carriage by air are a peculiar kind of contract because the carrier/airline can decide whether to fly or not to fly the passenger and their baggage.

Air travellers cannot assume that if they hold an air ticket for a domestic flight in Australia, the airline must honour the flight arrangements.

When must the airline honour the air travel arrangements?

The High Court of Australia has recently examined the legal rights of the airline and the passenger in the air travel arrangements in the decision of *Commissioner of Taxation v Qantas Airways Limited* [2012] HCA 41 (*the Qantas decision*) which was handed down on 2 October 2012.

For many years in Australia, it was the law that a legally binding contract of carriage by air did not come into existence until the time the passenger had checked in and a boarding pass had issued. This could often be a long time after the air ticket issued!

The law was laid down in the 1975 decision of the High Court of Australia in *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125.

After examining the terms and conditions of the air ticket, Chief Justice Barwick concluded:

the ... airline operator does not ... assume ... any obligation to carry the intended passenger. ... [because] the terms of the ticket with their ... extensive limitations and exclusions preclude the existence of a ... contract of carriage ... until the boarding pass issues.

The exclusions in the air ticket were so wide that the High Court considered that the airline had a complete discretion to fly the passenger, and the passenger had no legal rights to complain. Therefore the air ticket did not represent a legally binding contract of carriage (by air) that the passenger could rely upon. It was like a voucher which might be honoured on presentation.

Since 1975, the consumer law has created many new rights for travel consumers, and the terms and conditions of the air ticket have been extensively redrafted in response.

The High Court takes a new look at the airline's promise to fly

In the *Qantas* decision, the High Court of Australia revisited the legal rights in an air ticket. This is the way the High Court saw the legal rights in the modern air ticket: ***The Qantas conditions and the Jetstar conditions ... provide ... a promise to use best endeavours to carry the passenger and***



baggage, having regard to the business operations of the airline, according to Justices Gummow, Hayne, Kiefel and Bell. Justice Heydon added *without delay* to that the promise. This is now the law in Australia because the High Court is the final court of appeal.

The High Court saw this as the core promise by the airline. The promise could be modified for a number of business operational reasons, such as bad weather, air traffic control delays, strikes, technical disruptions and late inbound aircraft. But if the passenger 'turns up' at the airport, ready for the flight booked, then the promise means that the passenger has various legal rights for compensation if the airline denies boarding (because of overbooking), delays or cancels the flight.

The High Court concluded (unanimously) that the promise to fly in the modern air ticket had brought forward the point of time that a legally binding contract of carriage arose to the time when the booking is made, and full payment of the air fare was confirmed. The Court did so even though the promise to fly was conditional, that is, the ***airline's promise to carry the passenger and baggage on***

a particular flight was hedged having regard to the business operations of the airline.

Therefore, what are the legal rights of the passenger for air travel arrangements booked that the airline must honour in Australia?

- The air ticket is a legally binding contract of carriage once the flight reservation has been made, and full payment of the air fare is confirmed.
- The air ticket contains the airline's fare rules and conditions of carriage, because the passenger has accepted these by marking the tick box displayed on the payment screen (or on an earlier screen) in an on-line booking.
- The conditions of carriage make it clear that the airline's promise to fly in the air ticket is highly conditional, and make it clear that the passenger cannot legally force the airline to fly them on a particular flight.
- The conditions of carriage contain the airline's rights to deny boarding, delay or cancel the flight which apply even after the passenger has checked in.
- But in return, the conditions of carriage contain the passenger's rights to be given refreshments, booking transfers, compensation or refunds for denied boarding, delayed or cancelled flights.
- The fare rules contain the rules for changing flight reservations and bookings, and for refunds, according to the type of air fare purchased. Fully flexible fares will allow changes and refunds; restricted and discount fares will usually not allow changes or refunds to air bookings. ●

How to take down your enemy's website

Someone has got something on their website which belongs to you. It could be a photograph, an article or all or part of your own website. You ask them to remove the offending item and they either refuse to do so or ignore you.

In a perfect world you would launch a cyber attack, or send an 11 man Israeli assassination team dressed as tennis players to take them out. Less satisfying but just as effective, would be to have the host of the offending website switch it off until the offending items were removed by the website owner.

Here is a three step plan to achieve this:

- Tell your IT person the problem and ask him to find out who hosts the offending site. If you try to do this yourself you will be awash with terms; some vaguely familiar such as domain name and internet service provider (ISP) and others that are way out, such as WHOIS, carriage service provider, registrar and registrant.
- Send the host a Take Down Notice. This is a request which identifies the infringing content and requests that it be removed. It is the duty of the host to take down the website expeditiously (loosely defined as 48 hours) after receiving a Take Down Notice or they can



become liable themselves for the copyright infringement.

- Send a copy of the Take Down Notice to the offending site. This may take the fun out of the Take Down Notice procedure but it may cause the site owner to decide to remove the infringing item rather than risk the site being taken down unexpectedly.

If you doubt that the host can unexpectedly take down a website, just think about the last time that your own website disappeared for a day or more. ●



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Paul Brennan is a practising lawyer on Queensland's Sunshine Coast and author of *The Law is an Ass...Make Sure it Doesn't Bite Yours!*
info@lawanddisorder.com.au