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Court of Filing FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 27/10/2023 6:59:05 PM AEDT
Date Accepted for Filing: 27/10/2023 6:59:09 PM AEDT
File Number: VID685/2023
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
QANTAS AIRWAYS LIMITED
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

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Concise Statement in Response

No. 685 of 2023

Federal Court of Australia

District Registry: Victoria

Division: General

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

QANTAS AIRWAYS LIMITED (ACN 009 661 901)

Respondent

- 1 This is the Concise Statement in Response (**Concise Response**) of Qantas to the Concise Statement filed by the ACCC on 31 August 2023, as particularised and limited by letters from the ACCC's solicitors to Qantas' solicitors dated 22 September 2023 and 3 October 2023 (the **Concise Statement** or **CS**).
- 2 Unless the context indicates otherwise, this Concise Response adopts terms defined in the Concise Statement. This approach is adopted for convenience only and does not convey any admission by Qantas, particularly where such defined terms seek to characterise conduct.
- 3 There is a dispute at the centre of these proceedings as to the nature of the "services" that Qantas supplies for the purposes of the relevant provisions of the ACL. The ACCC contends that Qantas supplies carriage on "particular flights". Qantas disputes this. The "service" that Qantas supplies is not carriage on any "particular flight" but rather a bundle of rights that includes alternative options to which consumers are entitled in respect of a cancelled flight. Consistently with the provision of that service, by both its pre-contractual statements, and contractual terms, Qantas makes clear to ordinary and reasonable consumers that, while Qantas will do its best to get consumers where they want to be on time, it does not guarantee particular flight times or its flight schedules. Qantas says that, in light of those express statements, the ACCC's allegations that Qantas, at any time, makes implied or partly-implied representations that Qantas will use reasonable endeavours to operate any "particular flight", or that any "particular flight" has not been cancelled, are wrong.

Filed on behalf of (name & role of party) Qantas Airways Limited (ACN 009 661 901) (Respondent)

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A. IMPORTANT FACTS RELEVANT TO THE CLAIM

Flight cancellations are an accepted and unavoidable aspect of operating an airline

- 4 The operation of any large domestic and international network airline involves a highly complex process of planning and resourcing the airline's network and schedule. That process is not static. The ability of an airline to operate consistently with any schedule can be, and is, affected by a diverse range of factors, including aircraft availability and workforce planning. For this reason, airline schedules are inherently subject to change. Even in periods of normal operations, flight cancellations (as a result of both planned and unplanned events) are an unavoidable aspect of the operation of a large domestic and international network airline. Ordinary and reasonable consumers can be taken to understand this, and particularly so during and after the COVID-19 pandemic.
- 5 The terms on which Qantas treats, and contracts, with consumers reflect this. Qantas makes clear both in its pre-contractual statements and contractual terms that, while Qantas will do its best to get consumers to where they want to be on time, it does not guarantee flight times or flight schedules and they do not form part of a consumer's contract of carriage with Qantas. Qantas' Conditions of Carriage (which form part of each consumer's contract with Qantas) provide for the consumer to be provided with alternative options at their election, including rights of re-accommodation, where flights are cancelled.
- 6 The complexity involved in planning and resourcing a network airline's network and schedule increased materially during, and in the aftermath of, the COVID-19 pandemic. In that period, the domestic and international airline industry faced unprecedented challenges. In the earlier part of the Relevant Period, Qantas continued to experience the effects of movement restrictions and border uncertainty associated with the pandemic. In the latter part of the Relevant Period, being the aftermath of the pandemic, Qantas was affected by industry-wide staff shortages and fleet unavailability. These matters resulted in Qantas cancelling a larger number of flights than usual. However, Qantas denies that flights were cancelled for the "retention of take off and landing slots" (CS [5]).

Qantas expressly does not guarantee flight times or flight schedules

- 7 The allegations at CS [2]-[3] as to the "services" that Qantas offers, and the manner in which it offers them, is incomplete and, for that reason, inaccurate.
- 8 In accordance with long-standing industry practice, Qantas prepares a core schedule of flights for each season defined by the International Air Transport Association (**IATA**) (Northern Winter and Northern Summer) and makes airfares available for sale in accordance with that schedule. Nevertheless, both in offering those airfares for sale, and in its contracts with consumers, Qantas states explicitly that it does not guarantee flight times or flight schedules.

- 9 For example, throughout the Relevant Period, the booking flow on Qantas' website comprised four steps: Flights, Options, Passengers and Payment. A consumer who booked online using that booking flow necessarily encountered a number of prominent and express pre-contractual statements to the effect that Qantas did not guarantee flight times or flight schedules. Without limitation, these included:
- (a) the statement in bold text on the Flights page: "We will do our best to get you where you want to be on time, but we don't guarantee flight times or schedules and they aren't part of our contract with you." From around October 2021 onwards, this statement was included in a teal-highlighted box, which gave it even greater prominence;
 - (b) on the Options page, under the heading "Fare Conditions", consumers proceeding with a booking were required to "accept" an acknowledgment that read: "I acknowledge that flight times are not guaranteed and do not form part of my contract of carriage. Qantas may need to change or cancel flights or schedules – travel insurance is recommended".
- 10 These prominent and plain English statements on Qantas' website are reflected in Qantas' Conditions of Carriage, which are incorporated into Qantas' contracts with consumers. The Conditions of Carriage expressly state that Qantas does not guarantee flight times (cl 5.2 and 9.1(a)), but include clauses entitling consumers to specified alternative options at the consumer's election (including rights of re-accommodation), relevantly, where Qantas cancels a flight for an event within its control (cl 9.1) or for an event beyond its control (cl 9.2).
- 11 Having regard to these matters, the ACCC's claim wrongly proceeds on the premise that the "service" that Qantas relevantly supplies for the purposes of the provisions of the ACL at issue in these proceedings is a "particular flight". To the contrary, the "service" Qantas relevantly offers is a bundle of contractual rights, which are consistent with Qantas' promise to do its best to get consumers where they want to be on time. That bundle of rights includes alternative options to which consumers become entitled in respect of cancelled flights, but does not include any promise to provide a "particular flight" or to operate to a particular schedule.

The Alleged Scheduled Flight Representation

- 12 Qantas denies that it made the alleged Scheduled Flight Representation (CS [7]).
- 13 Having regard to Qantas' express disclosures, ordinary and reasonable consumers understood that Qantas did not guarantee flight times or its published schedule, and made no representation, at any time, that any "particular flight" had not been cancelled.

The Alleged Reasonable Endeavours Representation

- 14 Qantas denies that it made the alleged Reasonable Endeavours Representation (CS [8]).
- 15 As particularised by the ACCC, the Reasonable Endeavours Representation is alleged to have been made, in part, in cll 5.2 and 9.1(a) of the Conditions of Carriage. Those clauses, read with the Conditions of Carriage as a whole, make clear that, while Qantas will use reasonable endeavours to operate in accordance with its published flight schedules, and thereby to do its best to get consumers where they want to be on time, Qantas does not represent that it will use reasonable endeavours to operate any particular flight within its schedule.

Alleged Flight Unchanged Representation

- 16 Qantas denies that it made the alleged Flight Unchanged Representation (CS [9]).
- 17 As stated in paragraph 13 above, Qantas made no representation, at any time, that any particular flight had not been cancelled. Further, Qantas did not represent to consumers that the “Manage Booking” page would, at all times, necessarily reflect the latest scheduling decisions that Qantas had made.

Alleged Manage Booking Representation

- 18 Qantas denies that it made the alleged Manage Booking Representation (CS [10]).
- 19 As particularised by the ACCC, the Manage Booking Representation is alleged to have been made, in part, in cll 5.2 and 9.1(a) of the Conditions of Carriage. As addressed in paragraph 15 above, Qantas did not represent by those clauses (or otherwise) that it would use reasonable endeavours to operate any particular flight.

B. ALLEGED PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

Alleged contraventions of s 18 of the ACL

- 20 Qantas denies that it made the alleged representations and that it contravened s 18 of the ACL.

Alleged contraventions of ss 29 and 34 of the ACL

- 21 Qantas’ principal answer to the alleged contraventions of ss 29(1)(b) and (g) and 34 of the ACL is that it did not make the alleged representations.
- 22 There is a further answer to the alleged contraventions of ss 29 and 34 of the ACL. The ACCC alleges that the relevant “service” that Qantas offered and contracted to supply was a “particular flight”, but that is a “service” that Qantas explicitly and expressly disclaimed supplying in both its pre-contractual statements and in its Conditions of Carriage. Properly characterised, the “service” that Qantas offered, and contracted to provide, was a bundle of contractual rights, which are consistent with Qantas’ promise to do its best to get consumers

where they want to be on time, but that did not include any promise or obligation to operate any flight with a particular flight number with a scheduled date and time.

23 In those circumstances:

- (a) none of the alleged representations, if made, was a representation as to the “quality” of the relevant “services” within the meaning of s 29(1)(b) of the ACL because the “services” did not include the operation of any “particular flight” that was cancelled;
- (b) none of the alleged representations, if made, was to the effect that the relevant “services” had “performance characteristics, uses or benefits” within the meaning of s 29(1)(g) of the ACL because the “services” expressly did not include the operation of any “particular flight” that was cancelled; and
- (c) none of the alleged representations, if made, were liable to mislead the public as to the “characteristics or suitability for their purposes” of the relevant “services”, because the “services” did not include the operation of any “particular flight” that was cancelled.

Wrongly accepting payment

24 Qantas denies that it contravened s 36(3) of the ACL.

25 The alleged contravention of s 36(3) of the ACL (CS [12] to [13] and [17]) again depends upon an incorrect characterisation of the relevant “services” as a “particular flight”, rather than the bundle of contractual rights (including provision of alternative options upon cancellation), that Qantas offers and contracts to provide, consistent with Qantas’ promise to do its best to get consumers where they want to be on time.

26 Section 36(3)(a)(i) of the ACL does not apply to the relevant “services” because there was no period specified for the performance of the bundle of contractual rights at the time that Qantas accepted payment. That bundle of rights expressly excluded any guarantee of flight times. The ACCC does not allege any alternative case relying on s 36(3)(a)(ii) of the ACL (see CS [12]).

27 The ACCC does not allege that there were reasonable grounds for believing that Qantas would not be able to provide the whole bundle of contractual rights that comprised the “relevant services” (including the provision of alternative options upon cancellation, such as re-accommodation) at any relevant time. Instead, the ACCC’s case depends entirely upon the erroneous proposition that the relevant “service” was a “particular flight” at a particular time, notwithstanding Qantas’ clear statements to the contrary.

C. RELIEF SOUGHT

28 Qantas denies that the ACCC is entitled to the relief sought in the Originating Application.

D. ALLEGED HARM


29 Qantas denies CS [19]. The ACCC ignores the remedies that Qantas provided to consumers when flights were cancelled, including re-accommodation on other flights at times similar to the cancelled flights and refunds.

This Concise Response was prepared by Ruth Higgins SC, Robert Yezerki SC, Kane Loxley and Andrew Barraclough.

Certificate of lawyer

I, Michele Laidlaw, certify to the Court that, in relation to the Concise Response filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 27 October 2023



Signed by Michele Laidlaw

Lawyer for the Respondent