



7 June 2024

Committee Secretary
Senate Standing Committee on Rural and Regional Affairs and Transport
PO Box 6100
Parliament House
Canberra ACT 2600

IATA Response to Airline Passenger Protections (Pay on Delay) Bill

The International Air Transport Association (IATA) is the global trade association for the world's airlines, representing some 330 airlines or over 80% of total air traffic. In Australia, our members include Qantas, Virgin Australia, Link Airways and many foreign airlines that operate international services to Australia. We support many areas of aviation activity and help formulate industry policy on critical aviation issues.

IATA is aware of the ongoing discussion calling for customer compensation schemes to be introduced in Australia, similar to those in the European Union and Canada, even as the Australian model of applying general consumer law to air travel is typically considered global best practice. There is no evidence that prescriptive, aviation-specific regimes deliver improved performance in terms of delays or cancellations. As will be further highlighted in this submission, the Pay on Delay Bill is also based on an on-time performance situation which is no longer current nor relevant, with the industry having made great strides to improve performance. IATA therefore considers that the focus for the Government should be to make the existing system work better rather than replicating the poor practices of other regions or undertaking fundamental reform.

IATA is of the firm belief that schemes such as those in Europe or Canada do not comply with the basic principles or objectives of good policymaking. The purpose of consumer protection regulation should be to create incentives to operate in the consumers' interest, where such incentives are not already supplied by the market. That is not the case in aviation. Airlines have strong economic incentives to operate on-time. The costs associated with delays and service recovery can be massive, even without the punitive costs associated with compensation schemes. As a consequence, neither European Union Regulation 261 (EU261) or the Canadian Air Passenger Protection Regulations (APPRs) have had any impact on punctuality or levels of cancellation. These regulations have instead increased the cost of travel and damaged the relationship between airlines and customers.

The other major flaw with punitive, compensation-based frameworks is that they do not account for the complexity of airline operations and the multitude of factors that are outside airlines' control. Airlines face the full burden of paying for compensation while the rest of the value chain (airports, ANSPs etc) do not, even though the airlines are fully incentivised to operate to schedule.

In order to improve performance across the aviation ecosystem, Australia should develop a model for consumer protection based on the core principle of shared accountability to better align accountability for performance with control and influence. Shared accountability could take a variety of forms, from the publication of performance data to the principle of shared accountability being incorporated into regulatory frameworks. We stand ready to assist the Government in developing a framework appropriate for Australia.

This submission will explore the experiences of other jurisdictions with customer compensation schemes, the pertinence of effective consumer communication, and the marked operational improvements in the Australian aviation sector over recent months.



IATA would be happy to provide further written information to the Committee in relation to the above recommendations. If you require additional information, please do not hesitate to contact our Area Manager for South West Pacific,

Sincerely yours,

Kelvin Lee
Assistant Director
External Affairs and Sustainability
IATA Asia Pacific



Communication is crucial for improving the passenger experience

IATA research has consistently found that one of the key priorities for consumers in the event of disruption is access to better information during disruption and before travel starts. This is not just a job for airlines, but also for airports, government agencies and intermediaries and calls for collaborative solutions.

Airlines globally are making great strides in the provision of real-time information through digital platforms as well as making the processes for rebooking more easily available to consumers including, in many cases, giving the customer direct control over their choices. Passengers are able to choose alternate flights using airlines' mobile apps in the event of a disruption or predicted weather event. In some cases, airlines also allow consumers to access relevant vouchers for meals, accommodation and transport should there be a prolonged delay.

Given that a significant proportion of flight disruptions are due to circumstances outside airlines' control, it is crucial, consistent with the equitable principle of shared accountability, that all actors in the aviation ecosystem with a role in ensuring a smooth passenger experience are accountable for providing timely and accurate information related to flight disruption within their control.

While airlines are investing in technology to support and facilitate passengers in the event of flight disruptions, there continues to be a specific challenge with travel booked through intermediaries. In some cases, the intermediaries do not always pass on the contact details of the customer to the airline, resulting in airlines being unable to contact consumers directly in the event of flight disruption. IATA is of the view that intermediaries should be obliged to forward contact details to airlines, subject to relevant data privacy considerations, or they should bear the accountability of any consequences for having failed to provide these contact details to airlines.

Recognising the value of having a single source of information to provide passengers with information about both their rights and their responsibilities when flying, the UK has developed an Air Passenger Travel Guide¹. This not only informs passengers of their rights but also tells them what they should be aware of before booking, and what they need to do prior to travel and during the travel experience. IATA supports the concept of the Air Passenger Travel Guide on the basis that a well-informed passenger is an empowered passenger.

Internationally, compensation-based regimes have proven ineffective for achieving desired outcomes

Prescriptive, compensation-based regimes such as EU261 and the Canadian APPRs increase the cost of travel and put connectivity, consumer choice and competition at risk. Analysis carried out for the European Commission indicated that the cost to airlines of EU261 totalled AUD 8.9 billion in 2018².

Similarly, the APPRs are estimated to cost airlines AUD 340 million in 2023 with proposed changes potentially increasing this liability to AUD 1.25 billion. Given the thin margins in the airline industry, consumer costs are inevitably impacted with a disproportionate impact on the most price sensitive consumers and the viability of the most economically marginal routes, with regional connectivity particularly affected.

Australia was not alone in experiencing challenges with operational performance in the post-pandemic period (though this submission will also highlight marked recent improvements). There is no evidence that delays and cancellations are significantly worse in Australia than in regimes that follow a prescriptive, sector-specific model. Moreover, these issues are largely a temporary phenomenon resulting from the unprecedented shock that COVID-19 caused to air transport rather than being a symptom of a structural problem.

¹ Air passenger travel guide, Government of the United Kingdom (<https://www.gov.uk/government/publications/air-passenger-travel-guide>)

² European Commission, 'Study on the current level of protection of air passenger rights in the EU', January 2020, viewed on 29 November 2023, <https://www.sipotra.it/wp-content/uploads/2020/01/Study-on-the-current-level-of-protection-of-air-passenger-rights-in-the-EU.pdf>
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European Union

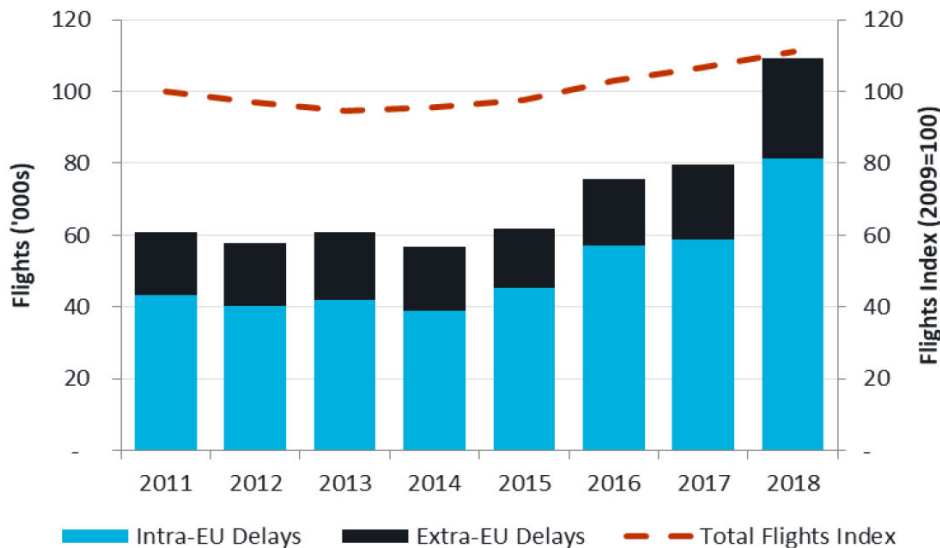
In Europe, delay analysis data for 2022 shows the extent of the problems. Across the European network as a whole, less than 55% of flights were on time during the peak of the summer season due to congestion and supply chain issues and again in mid-December due to weather. While these figures are averages for Europe as a whole, at certain airports and certain areas of Europe, performance was significantly worse.

European Union Regulation 261 / 2004 (EU261)

When discussing EU261, it is important to note that it was originally intended to influence commercial decisions made by carriers, particularly in relation to overbooking but also so-called “commercial” cancellations where carriers cancelled flights with insufficient numbers of passengers booked to travel. Indeed, it is because the Regulation was intended to have a dissuasive effect on decisions within airlines’ commercial control that the compensation limits were set so high. EU261 can be considered relatively successful in achieving these original aims. For example, figures prepared for the European Commission show that less than 0.2% of passengers were denied boarding in 2018.

The concept of compensation being payable for long delays is not included in the text of EU261; under the Regulation as drafted, compensation is only payable in the event of cancellation. This is because the European Commission understood that airlines already face strong financial incentives to avoid flight delays, to the extent that they are within carriers’ control. However, successive legal interpretations by the Court of Justice of the European Union (CJEU), but most notably the 2009 *Sturgeon* judgement³, have fundamentally altered the way that EU261 is implemented in practice with the consequence that the bulk of claims under EU261 now relate to operational disruption, thereby severely weakening the link between accountability and control.

Figure: Number of delayed flights of over 2 hours (Intra-EU and extra-EU delays)



Source: Steer for the European Commission, based on Eurocontrol CODA Analysis

³ Court of the European Commission *Sturgeon v Condor*, European Parliament (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007CJ0402>)
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As a result of the disconnect between accountability and control, disruptions have increased following the *Sturgeon* judgement. The number of flights disrupted increased significantly between 2011 and 2018, with an increase of air traffic delays being a major contributing factor. Air traffic delays in Europe have continued to increase following the pandemic with average delay in European airspace of 2.1 minutes per flight in 2023 (Year to September) compared to 1.7 minutes per flight in 2019.

At the same time, the costs to airlines associated with EU261 have more than trebled from AUD2.7 billion in 2011 to AUD8.9 billion in 2018, equivalent to approximately AUD7.50 per passenger. It is worth noting that the cost per passenger of EU261 was almost equivalent to net post-tax profit per passenger in 2018. Moreover, despite the healthy recovery of the industry, IATA forecasts that the net profit per passenger for 2023 will be AUD3.5 per passenger, less than half that of 2018. It is also crucial to note that the profit margins vary significantly by region, with Asia Pacific airlines expected to make an overall net loss of about AUD10.8 billion.

The EU261 regime is also complex to navigate for both airlines and consumers, exacerbated by uneven application of the Regulation across the 27 Member States of the European Union given that enforcement is a national responsibility:

- Consumers are often unclear whether they are entitled to compensation;
- For airlines, each case of disruption is unique. Many cases require detailed investigation which can be a highly manual process involving different departments across the airlines, driving the increase in legal and administrative costs;
- Claims Management Companies (CMCs) have emerged to take advantage of complexity and the high potential value of compensation. CMCs charge commission that can be worth up to 50% of the value of the compensation, depending on the specifics of the case; and
- The CJEU has acted in a *de facto* legislative capacity. In particular, *Sturgeon* had the practical effect of changing the Regulation. Since 2004, it has delivered more than 70 judgements relating to EU261. IATA is not aware of any other single piece of European legislation which has generated so much case law from the CJEU.

Following the *Sturgeon* judgement, the European Commission recognised that there were major problems with the way that EU261 was being implemented and proposed a major revision in 2013. Adoption of the revision was stalled due to a political dispute between Spain and the UK. While the revision was revived in 2019 / 2020, discussions were halted due to the onset of the COVID-19 pandemic.

In short, EU261, does not address the main priorities of consumers:

- It has failed to deliver improvements in performance due to the lack of shared accountability and specifically the failure to provide proper accommodation for airlines seeking redress against other stakeholders in the aviation ecosystem.
- The high cost to airlines of compensation payments feeds through to increased costs to all consumers given the low profit margins in the airline business. These increased costs disproportionately affect the most price-sensitive consumers and threaten the sustainability of the most marginal routes, with regional connectivity particularly threatened. This is a further reason why IATA encourages the Government not to pursue a compensation-based regime.
- The lack of shared accountability also makes it harder for consumers to have access to timely and reliable information when disruption does occur. The first module of the shared accountability framework, related to real-time communication of the cause of disruption would help to address this gap.



In the United States, data from the October 2023 Air Travel Consumer report shows that of the 23% of flights that did not arrive on time, less than one third (31%) were due to circumstances within the airline's control. The remaining cancellations or delays were caused by factors such as weather, causes attributable to air navigation services, security delays or reactionary delays (due to a delay with an earlier flight). As in Europe, punctuality performance in the US varies across the year with over 30% of flights arriving late in July 2023.

In the US, the model of publishing performance data and using dashboards to provide consumers with information on performance of domestic services has some merit in terms of increasing transparency. However, the US approach replicates the same mistakes as the compensation-based regimes in the European Union and Canada in that it does not consider the aviation ecosystem as a whole with all the emphasis being on airline performance. Therefore, the US model is also not consistent with the principle of shared accountability.

The industry also has serious concerns with the U.S. Department of Transportation's two new broad consumer protection rules. The "Refunds and Other Consumer Protection Rule" will force airlines to provide automatic refunds for delays or cancellations, irrespective of the cause of the disruption. The "Enhancing Transparency of Airline Ancillary Fees Rule" will render online searches less seamless and reduce price competition on optional airline services. These one size fits all passenger service mandates will raise airline costs which will ultimately be reflected in higher ticket prices.

Canada

In Canada, out of nearly 199,000 delays that occurred during 2022, just over 87,500 (44%) were considered to be within an airline's control and not due to a safety issue. A very similar share of delays – almost 83,000 or 42% - were due to factors outside airlines' control including air traffic control (22%), weather and security.

The APPRs in Canada replicate many features of EU261. It is therefore unsurprising that EU261 and the APPRs share the challenges associated with a lack of clarity over how certain key concepts are to be determined. In the case of EU261 a central problem is with the interpretation of "extraordinary circumstances", which has been a factor in many of the CJEU cases related to EU261. With the APPRs, a similar issue arises with the concept of disruption due to "situations within airlines' control but required for safety purposes", which under the APPRs do not trigger compensation but for which standards are set for care and assistance as well as onward travel. The lack of a clear definition setting out under which circumstances disruption is "required for safety purposes" has caused uncertainty for passengers alike as well as the Canadian Transportation Agency (CTA) which has a backlog of some 57,000 claims awaiting processing.

An important similarity between Australia and Canada is the importance of regional connectivity, so it is relevant to consider the impact of the APPRs on regional connectivity in Canada.

Regional connectivity in Canada, particularly in northern and remote communities, is vital for many people, allowing access to medical services, education, and social connections. There are numerous regional routes across the country, connecting passengers from smaller communities to other communities or major hubs for beyond connections. These routes present specific challenges from geographic, operational and economic perspectives. With regards to the APPRs, the regulations are particularly challenging for carriers operating these routes given that



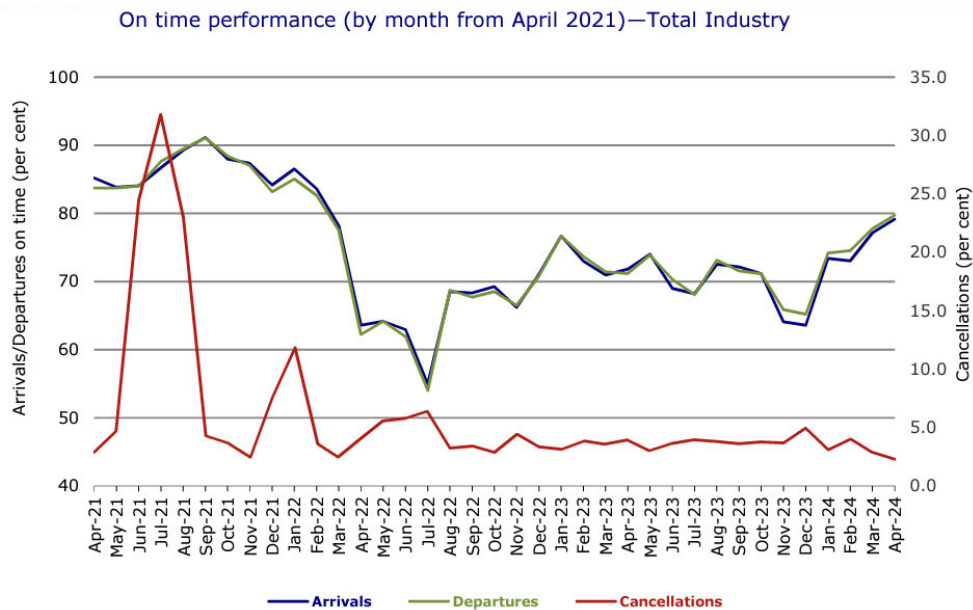
infrastructure and weather are common causes of delay, and limited flight frequencies mean that rebooking options are limited when disruption does occur.

Analysis carried out by Intervistas for the National Airline Council of Canada (NACC) suggests that the costs associated with the APPRs are likely to have an especially negative impact on regional connectivity given that the economics of these routes is already marginal to begin with. The impact of higher costs on route profitability feeds through to reductions in routes and frequencies operated and increases in air fares. The consequences for social cohesion become apparent as air travel becomes less accessible and affordable, and barriers to connectivity increase for passengers who are already restricted to air service for connection to the rest of Canada.

The Australian aviation sector has shown marked improvements

In the second reading of the Airline Passenger Protections Bill on 15 May 2024⁴, Senators referred to the 3.1% cancellation rate and 73.4% on-time performance rate in January 2024, per the Bureau of Infrastructure and Transport Research Economics (BITRE) data for the month. It is worth noting that prior to 15 May 2024, both the February and March BITRE reports showing a sustained improvement in on-time arrivals and departures and decrease in cancellations, had been released.

The April 2024 BITRE statistics⁵, shown below, were released on 21 May 2024 and further show that this is a sustained trend, with airlines achieving a 79.9% on-time departure rate, and 2.3% cancellation rate. Airlines have indicated that they anticipate their performance will continue to improve as they instigate a range of measures to safeguard operational reliability for facets within their control. It is expected that May 2024 statistics will further galvanise this trend.



Source: BITRE April 2024 Domestic airline on-time performance report⁶

Further to this, in the ACCC report into *Domestic airline competition in Australia*, released on 21 May 2024, it was highlighted that *“reliability of services has generally improved over recent months, with cancellation and delay rates*

⁴ Commonwealth of Australia, Senate (2024). *Bills – Airline Passenger Protections (Pay on Delay) Bill 2024 – Second Reading*

⁵ BITRE April 2024 Domestic airline on-time performance report

⁶ *ibid*



moving closer to long-term industry averages in March 2024". The report highlighted how the cancellation rates on some of the routes most maligned by media⁷ and indeed called out in previous senate inquiries⁸, such as Canberra to Sydney, had seen marked improvements in their reliability. It flagged that cancellation rates on this specific route dropped from 5.2% in December 2023 to 1.8% in March 2024.

It should be noted that this report also highlights the shortcomings of Airservices Australia, who were responsible for 16.2% of the ground delay minutes in December 2023. The high levels of absenteeism were deemed a factor in contributing to poor reliability.

The industry is continuing to make great strides in improving its operational performance. It is the collective efforts of not just airlines, but other parts of the travel ecosystem, including airports and air traffic control, that will result in the continued amelioration of the on-time performance and cancellation statistics, and deliver better outcomes for Australian consumers. IATA firmly disagrees with the baseline statistics utilised for the second reading of this Bill as they were out of date at the time of reading and failed to take into account the significant improvements across all carriers.

⁷ *Qantas cancellations on Canberra-Sydney route hit record altitude*, Australian Financial Review, 25 September 2023

⁸ Commonwealth of Australia, Senate Select Committee on Commonwealth Bilateral Air Service Agreements, 27 September 2023

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