
Case note: *Commissioner of Taxation v Qantas Airways Ltd*

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Does an airline promise to fly the passenger?

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.

What are the legal rights of the airline and the passenger in air travel?

The High Court of Australia has recently examined these legal rights in the decision of *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCA 41 (the *Qantas* decision) which was handed down on 2 October 2012.

When does a legally binding contract of carriage come into existence?

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 be a long time after air ticket issued. The law was found 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 that the passenger could rely upon. It was like a voucher which might be honoured on presentation.

Since 1975, 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.

In the *Qantas* decision, the High Court of Australia revisited the legal rights in an air ticket. In the view of Justices

Gummow, Hayne, Kiefel and Bell 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.’

Justice Heydon added ‘without delay’ to that the promise. This is now the law in Australia as 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 if it 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.

What are the legal rights to fly 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, 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.

What happens to the GST on unused tickets?

The *Qantas* decision was a revenue case – it concerned an application by Qantas for a refund of GST paid on unused air fares for domestic flights in Australia.

This is the GST process: when an air fare is paid to Qantas, the airline issues a Tax Invoice/Receipt to the passenger which includes GST (Goods and Services Tax, known elsewhere as VAT). Qantas remits the GST collected to the Commissioner of Taxation monthly as

collected, rather than holding the GST for payment in the month when the flight is conducted. The monthly remission is a legal requirement.

Some tickets are not used; not all passengers who have air tickets take the flight they book. Some cancel their booking before the flight. Others transfer their booking, if the fare rules permit, but do not end up using the new booking. Yet others are 'no-shows' – they do not turn up for their flight.

In all cases, Qantas was ready and willing to fly the passenger, had they turned up.

The *Qantas* decision concerns GST paid on unused fares. There are two kinds of unused fares. If the unused fare was a discount or restricted fare, then the fare rules allow the unused air fare (and the GST paid on it) to be forfeited to the airline. If the unused fare was a 'max' or fully flexible fare, the fare rules allow the passenger to claim a transfer or a refund of the fare. But if no refund or transfer is requested, the fare rules provide that the unused fare (and the GST paid on it) is forfeited to the airline.

Qantas claimed that it was entitled to keep both the unused fare and the GST. Qantas had paid the GST to the Commissioner of Taxation and was therefore claiming a refund. Qantas argued that the substantial or essential purpose for which the fare was paid was the air travel. Because the air travel had not been supplied, the purpose had failed, and the GST that had been paid on the unused fare should be refunded to it.

The amounts of GST paid on unused fares that Qantas claimed should be refunded to it were substantial. In the period from July 2005 to June 2008 they amounted to AU\$26,604,347 for forfeited fares where no refund was available and AU\$7,671,570 for forfeited fares where a

refund was available but no refund claim had been made.

The High Court decided by a four-to-one majority that the contract of carriage for air travel was to be read as follows: the making of a reservation or booking (and payment of the air fare) which gave rise to 'a promise [by the airline] to use best endeavours to carry the passenger and baggage' created sufficient legal rights for the passenger, and/or amounted to the entry of sufficient legal obligations for the airline, to give rise to a 'taxable supply' as defined in the GST Law, at the time when the air fare was paid. GST was payable regardless of whether or not the air travel was supplied.

The High Court concluded that the Commissioner of Taxation was entitled to keep the GST paid upon the air fares, even though the air tickets were for unused fares. Therefore Qantas failed in its claim.

The *Qantas* decision means that the point of time at which a legally binding contract of carriage by air arises, and the point of time at which a taxable supply arises under the GST Law, is aligned as being the time at which the air fare is paid, which is in the booking process.

Implications of the *Qantas* decision for the travel and hospitality industry in Australia

- In the travel industry, airlines, cruise operators, coach operators, rail operators and water transport operators all require full payment of the fare to be made in advance of the travel. Payment is made when a booking is made, or before boarding the airline, ship, coach, train or ferry. Therefore, they are all in the same position as Qantas. They are not entitled to a refund of the GST they pay (or must pay) to the Commissioner of Taxation

on the unused fare, if they forfeit the fare of a traveller who is a no-show or who decides not to travel. But if they refund all or part of the unused fare to the traveller, they may apply for an adjustment (effectively, a refund) of the GST.

- In the hospitality industry, a reservation fee is paid by credit card when the

booking is accepted. If the guest is a no-show, the hotel/resort will forfeit at least one night's tariff. They are in the same position as Qantas. They are not entitled to a refund of the GST they pay (or must pay) to the Commissioner of Taxation on the unused reservation fee, if they forfeit the fee paid for the reserved room.