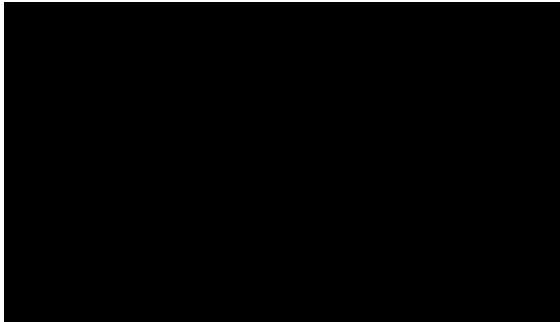


12 December 2022



Official Information Act #22.060 - response

1. We refer to your request received on 16 October 2022 for information about complaints the Commission has received about Jetstar Airways Pty Limited (**Jetstar**) and Air New Zealand Limited (**Air New Zealand**).
2. Following discussion and clarification, you requested the following information:
 - 2.1 in the period 1 August 2019 to 16 October 2022, how many complaints the Commission received about Jetstar and Air New Zealand;
 - 2.2 how many complaints the Commission received from Consumer NZ (and the nature of those complaints) and how many complaints from other parties;
 - 2.3 how many complaints were tagged against the Fair Trading Act in the Commission's system;
 - 2.4 the resulting action from these complaints tagged against the Fair Trading Act;
 - 2.5 the duration between complaints being lodged and then when a decision was made to take any further action;
 - 2.6 the duration between complaints lodged and then the end of an investigation/project outcome; and
 - 2.7 what action can the Commission take in response to these complaints, and what action the Commission did take with those complaints.

3. On 11 November 2022 the Commission extended the time limit by which we must make a decision on your request to 12 December 2022.

Our response

4. We have decided to grant your request.

Number of complaints received

5. Over the last three years, between 1 August 2019 and 16 October 2022 (the relevant period) the Commission received **206** complaints about Jetstar.
6. During the relevant period the Commission received **594** complaints about Air New Zealand.

Complaints from Consumer NZ versus others

7. During the relevant period, we received one complaint from Consumer NZ about Jetstar and one complaint from Consumer NZ about Air New Zealand.
8. Please see **Appendix A** for a summary of the complaint about Jetstar and **Appendix B** for a summary of the complaint about Air New Zealand.

Complaints tagged against the Fair Trading Act

9. In the last three years 199 of the 206 complaints about Jetstar were tagged against the Fair Trading Act. By tagging against the Fair Trading Act we have identified the complaint as mentioning conduct that may potentially raise Fair Trading Act issues. Please note that this does not represent confirmed breaches of the Fair Trading Act as a breach of the Fair Trading Act can only be determined by the Courts.
10. In the last three years 571 of the 594 complaints about Air New Zealand were tagged against the Fair Trading Act. Again, please note that this does not represent confirmed breaches of the Fair Trading Act.
11. It is important to read the complaint number information in the following context:
 - 11.1 Complaints data on its own cannot paint a complete picture of compliance with the law. The fact that a complaint has been received does not necessarily mean that a trader has done anything wrong or any harm has been caused to any consumer or competitor. Some complaints will not be assessed by the Commission because they are unfounded or outside our jurisdiction, and some complaints that are assessed will not proceed to further action.
 - 11.2 The complaints data only reflects what consumers have chosen to report to the Commission or to other organisations that have in turn provided information to the Commission. Some complaints on the same matter are likely to have reached other complaint bodies instead of the Commission.

- 11.3 Larger traders are likely to generate more complaints as a function of their scale; we have not adjusted for this.
- 11.4 Complaint volumes for a trader can be about a single matter or multiple matters. Some matters that attract a high level of publicity can generate a large volume of complaints.

Resulting action from complaints

- 12. In response to your request at [2.4] above, we set out in **Appendix C** what action the Commission took as a result of the 199 complaints received about Jetstar in the relevant period and tagged against the Fair Trading Act.
- 13. We provide the same information for the 571 complaints received about Air New Zealand in the relevant period, and tagged against the Fair Trading Act, in **Appendix D**.

Duration for completion of complaints

- 14. The period of time between the complaint being lodged and when a decision was made to take further action such as adding to a demand (explained below) or deciding to take no further action at that time, is a median of **21.16** days for complaints about Jetstar.
- 15. The period of time between the complaint being lodged and when a decision was made to take further action such as adding to a demand (explained below) or deciding to take no further action at that time, is a median of **15.08** days for complaints about Air New Zealand.
- 16. Please note that these numbers are estimates only and may be skewed by instances where a complaint was reopened for further action such as reassessment, or where a decision is made but the complaint is not closed immediately.
- 17. The numbers were calculated by subtracting the 'date closed' by the 'date received' of each closed complaint, and then finding the median (middle value) of these numbers, rounded to two decimal places. This calculation excludes complaints that have not been closed.
- 18. The timing may not be representative of the time taken to close complaints outside of this subject matter and time period, due to other processes operating at the time of these complaints (eg, complaints about certain traders being automatically assigned to a demand / project during COVID-19).
- 19. In response to your request at [2.6] regarding the period of time between the complaint being lodged and the investigation outcome, unfortunately we don't consider we can provide a meaningful calculation. This is due to a number of reasons:

- 19.1 Complaints may have been assigned to a 'scoping' demand that is open longer-term to keep an eye on key issues in the market.
- 19.2 Complaints that are closed now may be involved in further work in the future.
- 19.3 While complaints may have originally been closed with an expected outcome, this does not necessarily mean that was the final behaviour (e.g. a complaint may be closed as an NFA (no further action),¹ but then a few months later may be assigned to a project).
- 20. We are declining this part of your request under s 18(f) of the Official Information Act 1982 as it would require substantial collation. We are also not confident that a meaningful calculation can be provided, following substantial collation, for the reasons discussed above.

Commission action in relation to complaints

- 21. When a consumer contacts the Commission with a complaint about a trader it is logged in the Commission's complaint database. The Commission receives thousands of complaints every year. Each complaint is initially assessed by the Screening and Enquiries Team on the basis of the information available at the time. When conducting this initial assessment, the Screening and Enquiries Team considers:
 - 21.1 the likelihood of a breach of the relevant legislation (the Fair Trading Act 1986, Credit Contracts and Consumer Finance 2003, and the Commerce Act 1986);
 - 21.2 whether there are ongoing investigations into relevant parties;
 - 21.3 the Commission's Enforcement Response Guidelines;² and
 - 21.4 the Commission's strategic priorities and resourcing constraints.
- 22. The Commission has the power to act on complaints but is not required to take action in relation to all possible breaches of the legislation that we enforce.
- 23. If a complaint is appropriate for further consideration, it is reviewed by a panel of managers and subject matter experts from within the Competition, Fair Trading and

¹ The Commission may decide not to take further action in relation to a complaint for a number of reasons. These reasons include, but are not limited to, circumstances where we consider the complaint is better suited to private action by the complainant, the complaint is subject to the jurisdiction of another agency, or where there is no clear breach of the law. However, each complaint and enquiry provides information that is valuable to the Commission. This contributes to future priorities, potential issues for us to watch closely or emerging issues to refer to our policy agency, MBIE. In this regard, we will monitor complaints or information we receive as we look to future prioritisation.

² Available at: <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

Credit Branches. The panel decides which complaints are to be prioritised for further assessment by the Branch with reference to our Enforcement Response Model.³

24. This process enables us to identify complaints that best reflect our current enforcement priorities.⁴ The outcomes of the process are not final and we may revisit any complaint at a later stage, should we wish to reconsider the issues it presents.
25. As set out in our Enforcement Response Guidelines, Commission action can range from no further action to Court proceedings.
26. As noted above, the action the Commission has taken in response to complaints received about Jetstar and Air New Zealand is detailed in Appendices C and D.
27. In respect of the complaints received about Jetstar in the relevant period, the Commission is currently investigating whether Jetstar has breached the Fair Trading Act when communicating to consumers about their rights when flights are delayed or cancelled. The investigation was opened on 25 October 2022 and details can be found here: <https://comcom.govt.nz/case-register/case-register-entries/jetstar-airways-pty-ltd>
28. The Commission also investigated Jetstar's cancellation of flights during COVID-19 alert levels, and the remedies offered to consumers when cancellations occurred. The Commission considered that Jetstar's templated communications gave rise to a possible breach of section 13(i) of the Fair Trading Act and issued Jetstar with compliance advice.⁵ The investigation came about as a result of complaints that are included in the table of complaints below. The investigation was opened on 27 August 2020 and closed on 2 June 2021, details can be found here: <https://comcom.govt.nz/case-register/case-register-entries/jetstar-airways-pty-ltd2>
29. In the relevant period, none of the complaints received about Air New Zealand have resulted in any formal investigations or subsequent enforcement actions against Air New Zealand by the Commission. However, the Commission has engaged with Air New Zealand twice during the relevant period around its obligations under the Fair Trading Act, providing guidance and sharing anonymous complaint information.
30. Please note the Commission will be publishing this response to your request on its website. Your personal details will be redacted from the published response.

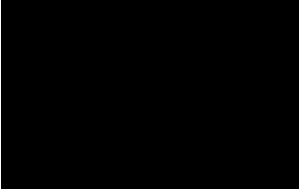
³ Our Enforcement Response Model is discussed in more detail from page 3 of the Commission's Enforcement Response Guidelines, available here: https://comcom.govt.nz/data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf.

⁴ For further information, see: <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-criteria/>

⁵ Compliance advice letters (CAL) are educative and are issued in response to problematic conduct that we have identified. Accordingly, what the letter advises of is the risk of conduct breaching the law, and how to avoid a potential breach in future. A CAL does not represent a finding that a trader has contravened the law. Only the Courts can decide if a breach of the law has occurred.

31. Please do not hesitate to contact us at uia@comcom.govt.nz if you have any questions about this response or require any further information.

Yours sincerely



OIA and Information Coordinator

Released Under Official Information Act 1982

Appendix A (Jetstar)		
Complaint number	Nature of complaint	Complainant
ENQ0570251	<p>11 October 2022</p> <p>Jetstar misleading consumers about their rights under the Civil Aviation Act (CAA) and potentially breaching the Fair Trading Act (FTA).</p> <p>Jetstar is advising passengers it:</p> <ul style="list-style-type: none"> a) is not liable to pay for overnight accommodation and additional costs (e.g. for meals, transportation etc.) that passengers incur as a result of an international flight delay within its control. b) is not liable to pay additional transportation costs (for example, a flight on another airline) when it cancels a domestic flight for reasons within its control. Instead, it advises passengers it is only required to provide a refund of the original fare. c) is only liable for 'up to \$150 AUD/NZD reimbursement per room' for accommodation costs, 'up to \$30 reimbursement per person' for meals, and will only pay for transfers in some circumstances, when there has been a delay or cancellation within the airline's control. <p>We consider this is misleading, and a breach of the FTA, because:</p> <ul style="list-style-type: none"> a) an airline is not liable if it can prove it took all measures it reasonably could to avoid the damage or it was impossible to take such measures. So, essentially, airlines are liable for costs that passengers incur when an international flight is delayed for reasons within the airline's control. This includes the cost of food, accommodation, transfers etc. b) a carrier is liable for damage caused by delay in the carriage of passengers. So, if a passenger's domestic flight is cancelled or delayed for a reason within the airline's control, and they need to book themselves a rental car, bus, or another flight to get to their destination, the airline is required to refund the cost of the airfare and reimburse the passenger any additional costs they incur. c) an airline's liability for damage caused by delay in the carriage of passengers (on domestic flights) is limited to 	Consumer NZ

	<p>the lesser of the amount of damage proved to have been sustained, or 10 times the amount paid for the flight. So, if a passenger pays \$80 for their airfare and their flight is cancelled or delayed, the airline is liable for up to a maximum of \$800 in damages. We therefore consider Jetstar's attempts to limit its liability to \$150 for accommodation, \$30 for meals and only some transfers are misleading and has no effect.</p>	
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Appendix B (Air New Zealand)		
Complaint number	Nature of complaint	Complainant
ENQ0539851	<p>18 May 2020</p> <p>Air New Zealand's refusal to refund passengers under US Department of Transportation (DoT) rules - We believe the information Air New Zealand is providing to consumers misleads them about their rights to refunds and breaches the Fair Trading Act.</p> <p>The US DoT issued an Enforcement Notice¹ on 3 April 2020 reiterating that any US or foreign airline operating aircraft to, from or within the US must promptly refund passengers on flights cancelled or significantly delayed due to Covid-19.</p> <p>In correspondence with one customer, Air New Zealand stated: The US Department of Transportation regulations you refer to does require all flights that are to, from or within the United States be refunded, should a credit not be suitable. As you're not entering the United States and remain airside while in transit, this legislation does not apply in this instance.</p> <p>We are also concerned Air New Zealand's correspondence with passengers: (a) has claimed the rules only apply to US citizens or those who booked through a US website; (b) is only offering refunds under the DoT rules on request, rather than as a general rule; and (c) is only offering partial refunds to some passengers booked on flights to and from the US.</p> <p>Air New Zealand's statements mislead passengers about their rights to refunds and breach the Fair Trading Act.</p>	Consumer NZ

Appendix C (Jetstar) ⁶	
Screening assessment outcome	Number
No further action (NFA) ⁷	123
Add to project ⁸	50
Add to investigation	12
Waiting for information	2
Add to demand ⁹	5
Not yet assessed	7
Grand total	199

⁶ As at 16 October 2022.

⁷ The Commission may decide not to take further action in relation to a complaint for a number of reasons. These reasons include, but are not limited to, circumstances where we consider the complaint is better suited to private action by the complainant, the complaint is subject to the jurisdiction of another agency, or where there is no clear breach of the law. However, each complaint and enquiry provides information that is valuable to the Commission. This contributes to future priorities, potential issues for us to watch closely or emerging issues to refer to our policy agency, MBIE. In this regard, we will monitor complaints or information we receive as we look to future prioritisation.

⁸ We may add an enquiry to an existing project. The Fair Trading branch currently has several open projects which focus on certain areas, such as product safety and consumer information standards, credence claims, egregious conduct, rights and obligations and retail pricing and promotion activities.

⁹ A demand is the name the Commission gives a matter where we intend to complete further work. We place demands on a list and prioritise them based on our Enforcement Criteria and current strategic priorities. We review our demand lists on a regular basis and sometimes demands are removed from the list, this is called a resource review. We may remove a demand from our list of pending work for several reasons (e.g. the trader has amended its conduct, the trader is no longer operating, and/or other matters have come to our attention that have de-prioritised previous demands).

Appendix D (Air New Zealand) ¹⁰	
Screening assessment outcome	Number
No further action (NFA)	380
Add to Demand	149
Add to project	19
Waiting for information	3
Add to Investigation	1
Information passed to trader (IPTT) ¹¹	14
Further assessment by Branch	3
Not yet assessed	2
Grand total	571

¹⁰ As at 16 October 2022.

¹¹ We may take the opportunity to contact a trader to assist them in better understanding and complying with the law. We refer to this as Information passed to trader (IPTT). We find that raising such issues directly with businesses can help them to understand and better comply with their legal obligations.