

**CONSUMER PROTECTIONS FOR AIRLINE
PASSENGERS**

**A REPORT FOR THE
CANADA TRANSPORTATION ACT
REVIEW SECRETARIAT**



**PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC**

Written by:

John Lawford
Jonathan Bishop
Alysia Lau
Kent Sebastian

Public Interest Advocacy Centre
ONE Nicholas Street, Suite 1204
Ottawa, Ontario K1N 7B7
31 March 2015

© Copyright 2015

Contents may not be commercially reproduced.
Any other reproduction with acknowledgment is encouraged.

The Public Interest Advocacy Centre
(PIAC)
Suite 1204
ONE Nicholas Street
Ottawa, ON
K1N 7B7
Tel: (613) 562-4002 Fax: (613) 562-0007
E-mail: piac@piac.ca Website: www.piac.ca

Canadian Cataloguing and Publication Data

Consumer Protections for Airline Passengers:
A Report for the *Canada Transportation Act* Review Secretariat

The views expressed in the report are not necessarily
those of the *Canada Transportation Act* Review Secretariat, Transport Canada or
the Government of Canada.

Executive Summary

This report prepared by the Public Interest Advocacy Centre outlines current consumer protections and recourse options available to airline passengers in Canada and proposes new models which will strengthen consumer protection in the airline industry moving forward.

Over 120 million passengers choose to travel by air in Canada per year. Yet, the consumer protection framework for airline passengers in Canada is unclear and, where it operates, not always efficient and effective for consumers. The rules meant to protect consumers are scattered in individual provisions across the *Canada Transportation Act* and *Air Transportation Regulations*, and otherwise determined by air carriers themselves in tariffs. As well, the air travel complaints process is housed within the Canadian Transportation Agency, which has a broader mandate to carry out various other licensing, dispute resolution and regulatory responsibilities. As a result, the air travel complaints process is difficult to access and use, inefficient in resolving complaints, and not transparent for airline passengers, especially due to a total lack of promotion of the process.

Analysis of international jurisdictions

A review of consumer protections for airline passengers in Australia, the European Union and the United States of America shows that the Australian model seems to have the greatest degree of flexibility and adaptability, since the Airline Consumer Advocate (ACA) is funded and structured by agreement between the major Australian airlines. Despite the ACA appearing to be a positive influence on the industry, having the airlines in complete control of the consumer protection regime also means that the regime would likely never provide consumers with strong compensation guarantees, or incent airlines to operate under a set of consumer protection-oriented principles. Lack of government intervention also reduces the ability of the regime to remedy chronic industry problems.

The United States' model shifts the balance more in favour of consumers, with legally-backed financial penalties imposed by a government authority, providing a strong incentive for airlines to develop new policies and eliminate poor industry practices for the benefit of consumers. Changes enacted through a public regulatory process allows all interested parties, including individual consumers, public interest groups and airline trade groups, to provide their views on proposed regulations and promote compromise. However, the lack of an effective consumer complaint and enforcement mechanism appears to be holding back the United States. Despite a reduction in problems, such as tarmac delay, due to enforcement of new passenger protection rules from the Department of Transportation (DOT), complaints filed with the DOT have recently *increased* over five years.

The European Union's (EU) model, largely embodied in Reg 261/2004, provides strong guarantees for consumers, with specific compensation guarantees owed to consumers in a broad range of circumstances, such as general delays beyond a defined hour threshold. Due to the complexities of the European Union, the air passenger rights regime is extremely inflexible, requiring the full EU legislative process for any changes and enforcement handled by existing institutions within member states such as the domestic civil aviation regulator. These National Enforcement Bodies (NEBs) provide strong incentives for airlines to comply with Reg 261/2004 and provide a convenient institution for consumers to file complaints and seek enforcement of their rights; however non-uniform enforcement standards across the EU have weakened the impact of Reg 261/2004.

Comparing the three jurisdictions, the ACA clearly has the lowest cost implications for all parties—particularly for the Australian government and Australian consumers—with the costs primarily borne by airlines. However, the ACA has obvious limitations in the effect it can have on changing airline policies and practices. With the greater resources available to it, the DOT in the United States was able to nearly eliminate excessive tarmac delays in 5 years through vigorous enforcement. The DOT's effectiveness does come at a cost, however, requiring a highly trained staff and significant resources to effectively monitor airlines for compliance. Some European Union member states appear to have reduced these costs by integrating compliance enforcement with existing civil aviation regulation or competition authorities. Clearly there is wide variation among member states in how NEBs are structured, and how much funding is dedicated towards consumer complaints and enforcement activities. While there is a strong correlation between the funding required to enforce consumer protection rules and the volume of activity in the member state (*e.g.* number of airlines and airports operating in the country, passengers served per year, etc.), the NEB implementation structure likely has a large impact on how much funding is necessary to effectively enforce the regulations.

Overall, there is no clear winner among the three models for passenger rights. Increasing degrees of government intervention can reduce flexibility and adaptability to changing industry practices, but also appears to improve airline compliance with policy goals through legally-backed enforcement and the publication of complaint statistics.

Analysis of Canadian industries

PIAC does not recommend the Ombudsman for Banking Services and Investments (OBSI) dispute resolution model for addressing disputes arising between air passengers and their air carriers. The limited enforcement power held by adjudicators, combined with the perception that those adjudicators hired by a bank have a conflicted position, remain fatal flaws in a system mandated to help consumers resolve disputes in a timely, impartial and transparent manner.

However, the model employed by the Commissioner for Complaints for Telecommunications Services (CCTS) to resolve disputes between telecommunications service providers and consumers in Canada is worthy of serious scrutiny for policymakers in other sectors. The CCTS has proven itself to be efficient and accessible as a complaints process for those consumers who have used it. In addition, the funding structure as well as the composition of the Board of Directors allows for multiple stakeholders to contribute to this process in a productive manner.

The CCTS, as an industry dispute resolution model, is singularly focused, and CCTS customers appear to be very satisfied with the service they receive. Moreover, the CCTS has made extensive efforts to be transparent regarding the structure of organization, senior staff, its complaint process, complaints statistics, as well as the identification of systemic industry issues.

Recommendations

The lack of clarity for consumers when it comes to their rights as air passengers results in the ongoing erosion of consumer confidence in, and the company image of, Canada's airlines. Despite the complexity and awareness challenges associated with the current Canadian Transportation Agency complaints process, complaint figures continue to grow. However, rather than criticize the operation of airlines operating in Canada, PIAC suggests these findings present an excellent opportunity for airlines to improve their reputation and boost consumer confidence.

In order to meet the challenges posed by the existing complaint resolution regime, airline passengers in Canada would be well served by the introduction of two new vehicles:

- ◆ a document to champion the rights of Canadian air passengers; and
- ◆ a body specifically designed to resolve air passenger complaints that applies to all airlines operating in Canada.

The document would be a comprehensive, organized, yet binding statement of rules applying to air travel in Canada. Such an "Airline Code" would ensure that airline passengers have the information and protection they need to make informed choices and participate effectively in the market. Evidence from the telecommunications and financial sectors suggest a clear trend towards creating such codes to assist consumers in federally-regulated industries. Similar to those sectors, PIAC recommends that the exact content of such a code for the airline industry should be guided by a public consultation process.

In addition to the creation of an Airline Code, PIAC recommends the creation of an Air Passenger Complaints Commissioner with the primary mandate to resolve complaints at the individual case level. This body should be modelled largely on the CCTS.

If the creation of an Air Passenger Complaints Commissioner is undertaken, it is critical that extensive efforts are made to be publicly transparent. This transparency effort should extend to the structure of the organization, senior staff, its complaint process, detailed annual reporting on complaints statistics, as well as the identification of systemic industry issues. Moreover, industry stakeholders must do their utmost to ensure Canadians are made aware that a new dispute resolution regime is available to serve them.

Under this proposed model, the Canadian Transportation Agency would maintain a central role in overseeing the airline industry by continuing to uphold the other mandates and responsibilities assigned to it in the *Canada Transportation Act*. These include resolving disputes between carriers and addressing, of its own motion, systemic issues raised in customer complaints and identified by the Air Passenger Complaints Commissioner. The Canadian Transportation Agency should also continue to receive formal applications from individuals who wish to see changes in air carrier tariffs or policies or who wish to complain about fares or service related to domestic service that is solely provided by one carrier. The Agency may also be best placed to oversee the creation, structure and functions of the Air Passenger Complaints Commissioner, as well as to review these aspects of the organization periodically.

Taken together, a future Airline Code and Air Passenger Complaints Commissioner, if functioning as anticipated, would not only clarify the “rules of the road” for air travel passengers in Canada, but would create the lift required for the reputation of the airline industry in Canada to take off.

PIAC received funding from the *Canada Transportation Act* Review Secretariat to prepare this report. The views expressed in the report are not necessarily those of the Secretariat, Transport Canada or the Government of Canada.

Table of Contents

Executive Summary	iii
Glossary.....	ix
Introduction	1
Application.....	3
Part I: The Current Consumer Protection Environment for Airline Passengers.....	5
1.1 Canadian consumer protection rules.....	6
1.2 The air travel complaints process.....	7
1.3 Airline customer complaints statistics.....	10
1.4 Challenges for today’s aggrieved air travel passengers	12
1.4.1 Ease of access and use.....	13
1.4.2 Efficiency.....	15
1.4.3 Transparency and clarity.....	16
Part II: Consumer Protections for Airline Passengers in Other Jurisdictions	20
2.1 Description of airline consumer protection systems.....	20
2.1.1 Australia.....	20
2.1.2 European Union.....	23
2.1.3 United States.....	28
2.2 Analysis of consumer protection systems.....	32
2.2.1 Consumer protection model.....	32
2.2.2 Scope of consumer protections	34
2.2.3 Ease of access for consumers: Complaints and remedies	36
2.2.4 Administrative and compliance costs.....	38
Part III: Finding a Solution – An Air Passenger Complaints Commissioner.....	44
3.1 Need for a renewed passenger complaints process.....	44
3.2 A cautionary tale: Banking industry - OBSI	48
3.2.1 Limitations of OBSI model.....	50
3.2.2 Is the OBSI model for Canadian banking suitable for air passengers?	52
3.3 A promising model: Telecom industry - CCTS	52
3.3.1 Advantages of CCTS model.....	57
3.3.2 Critique of the CCTS in its current form.....	58
3.4 Applicability of CCTS model to airline industry	59
3.4.1 Is the CCTS a suitable dispute resolution model for Canadian air passengers?	62

3.5	Role of the Canadian Transportation Agency in consumer protection.....	63
Part IV: Looking to the Future – A Code for Airline Passengers		66
4.1	The trouble with tariffs	66
4.2	Past efforts to create codes for airline passengers	69
4.3	The path towards a code for airline passengers	70
4.3.1	Objectives of the Airline Code.....	70
4.3.2	Consultation process	70
4.3.3	Substance of the Airline Code.....	71
4.3.4	Enforcement.....	72
Conclusion and Recommendations		74

Glossary

ACA	Australian Airline Consumer Advocate
CAAP	Canadian Association of Airline Passengers
CCTS	Commissioner for Complaints for Telecommunications Services
CRTC	Canadian Radio-television and Telecommunications Commission
DOT	United States Department of Transportation
EU	European Union
GRI	Global Reporting Initiative
NEB	National Enforcement Body
OBSI	Ombudsman for Banking Services and Investments
PIAC	Public Interest Advocacy Centre
TSP	Telecommunications Service Provider
US	United States of America

Introduction

This report prepared by the Public Interest Advocacy Centre outlines current consumer protections and recourse options available to airline passengers in Canada and proposes new models which will strengthen consumer protection in the airline industry moving forward.

In 2013, air passenger traffic at Canadian airports totaled **122.4 million passengers**, including 73.8 million domestic and 48.5 million international.¹ This represented a 53.8% increase since 1997, with significant growth in the domestic sector in particular.² In December 2014 alone, Canada's two major airlines, Air Canada and WestJet, together transported 3.8 million passengers over 108,000 hours and 10.3 billion passenger-kilometers.³ Meanwhile, 93 NAV CANADA airports recorded 5.5 million aircraft take-offs and landings (including 2.3 million passenger flights) in 2013, with Toronto's Lester B. Pearson International Airport, Vancouver International Airport, and Montreal's Pierre Elliott Trudeau International Airport leading the busiest Canadian air travel sites.⁴

Yet, the consumer protection framework for airline passengers in Canada is unclear and, where it operates, not always efficient and effective for consumers. The rules meant to protect consumers are scattered in individual provisions across the *Canada Transportation Act* and *Air Transportation Regulations*, and the air travel complaints process is housed within the Canadian Transportation Agency, which has a broader mandate to carry out various other licensing, dispute resolution and regulatory responsibilities. Meanwhile, other jurisdictions such as the United States of America mandate that airlines have specific consumer protections, such as tarmac delay contingency plans, prohibitions of tarmac delays in excess of three hours, and adequate

¹ "International" flights include those that are in the "Transborder" and "Other International" sectors as designated in the *Air Transportation Regulations*.

Statistics Canada, "Air passenger traffic and flights," Table 401-0044, online: StatsCan <<http://www5.statcan.gc.ca/cansim/a26>> (accessed 17 February 2015).

² *Ibid.* and Statistics Canada, "Description for chart 1: Total enplaned/deplaned passengers," *Air Carrier Traffic at Canadian Airports* (2013), Publication no. 51-203-X, online: StatsCan <<http://www.statcan.gc.ca/pub/51-203-x/2013000/longdesc-ct001-eng.htm>> (accessed 17 February 2015).

³ Statistics Canada, "Operational statistics for major Canadian airlines, level IA, by airline," Table 401-0043, online: StatsCan <<http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=4010043>> (accessed 2 March 2015)

⁴ Statistics Canada, "Analysis," *Aircraft Movement Statistics: NAV CANADA Towers and Flight Services Stations: Annual Report (TP 577)* (2013), Publication no. 51-209-X, online: StatsCan <<http://www.statcan.gc.ca/pub/51-209-x/2014001/part-partie1-eng.htm>> (accessed 17 February 2015);

Statistics Canada, "Air passenger traffic and flights," Table 401-0044, online: StatsCan <<http://www5.statcan.gc.ca/cansim/a26>> (accessed 17 February 2015); and

Statistics Canada, "Table 1-1: Passengers enplaned and deplaned on selected services – Top 50 airports," *Air Carrier Traffic at Canadian Airports* (2013), Publication no. 51-203-X, online: StatsCan <<http://www.statcan.gc.ca/pub/51-203-x/2013000/t002-eng.htm>>.

food and water after a two hour tarmac delay. Violations of the rule can result in a civil fine of up to \$27,500 per violation.

A strong consumer protection framework is central to the empowerment of airline passengers and the operation of an airline industry that is responsive to consumer needs and complaints. A weak consumer protection model leaves airline passengers at the mercy of their airlines in what is regularly a serious imbalance of power between airlines and their customers. This is particularly important as many routes, and especially domestic routes, may only be serviced by one or, at most, two carriers. Therefore, it would be nearly impossible for a dissatisfied airline passenger to express that dissatisfaction by simply “leaving” one airline and choosing to fly solely with another.

This report examines the types of air travel consumer protections implemented in foreign jurisdictions, notably Australia, the United States and the European Union. It also studies consumer protections rules and recourse options in other industries in Canada and analyzes their advantages and drawbacks in order to propose an efficient and effective consumer protection model for the air travel industry in Canada.

The report begins by identifying the airline passenger protection rules and complaints processes which are currently in place in Canada, as well as the challenges associated with them. It then provides an overview of complaint mechanisms in other federally-regulated service sectors, such as telecommunications and financial services and proposes potential models for an airline complaints body.

Finally, it posits the necessity of an eventual airline passenger code to appropriately gather into one place, and to state in a passenger-friendly fashion, those rules, regulations and guidelines that govern air travel from a passenger perspective. Harmonization with the proposed complaints system is a key driver of the content of the Airline Code, and the report concludes with recommendations of a fair and transparent process for creating and maintaining such a code within the present and future regulatory environment.

Application

In PIAC's view, the recommendations proposed in this report – particularly in regards to the Air Passenger Complaints Commissioner and the Code for Airline Passengers – should apply to all persons operating an air service for the transportation of passengers which require a licence from the Canadian Transportation Agency in Canada. These include both domestic and foreign carriers in relation to all domestic and international services as defined in the *Canada Transportation Act*,⁵ but *exclude* those air services exempted from Part II of the *Canada Transportation Act* by the Canadian Transportation Agency in section 3(1) of the *Air Transportation Regulations*.⁶

The *Canada Transportation Act* requires all persons operating an “air service” in Canada to hold a licence.⁷ An “air service” is defined as “a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.”⁸ The Canadian Transportation Agency further clarified the meaning of an “air service,” including the meaning of “publicly available,” in Decision No. 390-A-2013⁹ by stating that an air service is one that is:

- i. offered and made available to the public;
- ii. provided by means of an aircraft;
- iii. provided pursuant to a contract or arrangement for the transportation of passengers or goods; and
- iv. offered for consideration.

This decision also excluded “private carriage” – including personal use of aircraft or corporate aircraft – from being considered “publicly available”.¹⁰

PIAC's view is that the recommendations proposed below with regards to airline passenger consumer protections should apply to all air carriers, Canadian and foreign, operating an air service for the transportation of passengers in Canada.¹¹ Furthermore,

⁵ SC 1996, c 10, s 55(1).

⁶ SOR/88-58.

⁷ See: *Canada Transportation Act*, SC 1996, c 10, s 57:

57. No person shall operate an air service unless, in respect of that service, the person
- (a) holds a licence issued under this Part;
 - (b) holds a Canadian aviation document; and
 - (c) has the prescribed liability insurance coverage.

⁸ *Ibid*, s 55(1).

⁹ Canadian Transportation Agency, Decision No. 390-A-2013, In the matter of determinations of what constitutes an “air service” and the criteria to be applied by the Canadian Transportation Agency (7 October 2013), File No. M4161-9 PRO, online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/eng/ruling/390-a-2013>>.

¹⁰ *Ibid*.

¹¹ Save for those exempted under s 3(1) of the *Air Transportation Regulations*.

the recommendations should apply to all domestic and international services defined in the *Canada Transportation Act* as:

“domestic service” means an air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country;

[...]

“international service” means an air service between Canada and a point in the territory of another country;¹²

The recommendations in this report would equally apply to chartered air services as well as scheduled international services insofar as these services are made available to the public.

¹² *Canada Transportation Act*, SC 1996, c 10, s 55(1).

Part I:

The Current Consumer Protection Environment for Airline Passengers

Canadian airline passengers fly subject to numerous international conventions¹³ and bilateral air transport agreements¹⁴ signed between Canada and other foreign jurisdictions, but in Canada are also subject to the *Canada Transportation Act*,¹⁵ the *Aeronautics Act*,¹⁶ and the *Air Transportation Regulations*.¹⁷ These acts and regulations are administered and implemented by the independent quasi-judicial tribunal, the Canadian Transportation Agency.

Not all aspects of or services related to air transportation are overseen by these rules and regulator. The federal Minister of Transport establishes general transportation policy. Airports are usually operated by their own individual management authorities.¹⁸ Airport security is primarily governed and carried out by the Canadian Air Transport Security Authority. The official languages provided on a flight are overseen by the Minister of Canadian Heritage and Official Languages as well as the Office of the Commissioner of Official Languages. And, travel agencies and tour operators are regulated by Canadian provinces.

However, most services which airline passengers associate with their airline carriers, including flight disruptions, ticketing, and baggage transportation are governed by the *Canada Transportation Act*, *Air Transportation Regulations*, and especially the Canadian Transportation Agency. The operation of these two sets of legislation and the role of the Canadian Transportation Agency¹⁹ stem from the National Transportation Policy set out in section 5 of the current *Canada Transportation Act*. This section declares that the national transportation policy objectives are that:

... a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at

¹³ See, for instance: *Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signature at Montreal on 28 May 1999: "Montreal Convention 1999"*, ICAO Doc No 4698, online: International Air Transport Association <http://www.iata.org/policy/Documents/MC99_en.pdf>.

¹⁴ For a list of bilateral air transport agreements, see: Canadian Transportation Agency, "Transport agreements," online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/eng/bilateral-agreements>> (accessed 4 February 2015).

The Government of Canada has promoted the liberalization of Air Transport Agreements pursuant to its 2006 *Blue Sky Policy*. For more information, see: Transport Canada, "The Blue Sky Policy: Made in Canada, for Canada" (2014), online: Transport Canada <<http://www.tc.gc.ca/eng/policy/air-bluesky-menu-2989.htm>>.

¹⁵ SC 1996, c 10.

¹⁶ RSC 1985, c A-2.

¹⁷ SOR/88-58.

¹⁸ E.g. Aéroports de Montréal, Greater Toronto Airports Authority, International Airport Authority Ottawa, Vancouver Airport Authority, etc.

¹⁹ See: Canadian Transportation Agency, "Our organization and role," online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/eng/our-organization-and-role>>.

the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada.

There is significant reliance on competition and market forces,²⁰ as even the Canadian Transportation Agency states that its vision is “a competitive and accessible national transportation system that fulfills the needs of Canadians and the Canadian economy.”²¹ The Canadian Transportation Agency implements the *Canada Transportation Act*, creates the *Air Transportation Regulations*, and processes and resolves airline passenger complaints.

1.1 Canadian consumer protection rules

In a 2001 report on airline travel in Canada, PIAC wrote:

There is a taken-for-granted assumption by passengers that there are a common set of rules that apply to all carriers. In point of fact, there are no such industry standards in Canada. Moreover, since reregulation, domestic carriers establish their own rules or tariffs, and these are implemented without any public review...²²

Fifteen years later, much of this statement remains true today. The *Canada Transportation Act* and *Air Transportation Regulations* currently contain few prescriptive rules designed to protect airline customers in their relationships with their carriers. Those that exist focus primarily on:

- Disclosure in domestic and international tariffs;
- Discontinuation of a domestic service;
- Advertising;
- Accessible transportation; and
- General powers of the Canadian Transportation Agency to assess the policies of air carriers on the basis of reasonableness and undue discrimination.

For instance, sections 107 and 122 of the *Air Transportation Regulations* set out the types of policies which must be described in the domestic and international tariffs of airline carriers. These include policies related to:

- Ticket reservation, cancellation, confirmation, validity and loss;
- Refunds for services purchased but not used;
- Acceptance of children;

²⁰ *Canada Transportation Act*, SC 1996, c 10, s 5(a).

²¹ Canadian Transportation Agency, “Mission, mandate, vision and values,” online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/eng/mission-mandate>> (accessed 4 February 2015).

²² Andrew Reddick, *High Hopes and Low Standards! The Life and Times of Airline Travel in Canada* (Ottawa: Public Interest Advocacy Centre, 2001) at p 42.

- Refusal to transport passengers or goods;
- Method of calculation of charges not specifically set out in the tariff; and
- Failure to operate the service or failure to operate on schedule.

Section 86.1 of the *Canada Transportation Act* directs the Canadian Transportation Agency to make regulations on airfare advertising, including a requirement to include all the costs in the advertised price, as well as to indicate in the advertisement all fees, charges and taxes collected by third parties. These rules were incorporated into Part V.1 of the *Air Transportation Regulations*, which also require advertisements to disclose additional information such as the point of origin and destination of the service and the limitation on the period during which the advertised price is offered;²³ they also prohibit advertisements from describing an air transportation charge as a tax.²⁴

And, Part V of the *Canada Transportation Act* and Part VII of the *Air Transportation Regulations* set out rules which apply to the transportation of persons with disabilities. The *Air Transportation Regulations* in particular set out services which airline carriers must provide if requested, including:

- Assisting with registration at the check-in counter;
- Assisting in boarding and deplaning;
- Assisting in retrieving the person's baggage;
- Serving special meals, where available, and providing limited assistance with meals; and
- Inquiring periodically during the flight about the person's needs.²⁵

1.2 The air travel complaints process

Canadian airline passengers have benefited from a form of air travel ombudsman before.

An Office of the Air Travel Complaints Commissioner was created in July 2000 following the merger of Air Canada and Canadian Airlines. It was given three key mandates:

- 1) To review and attempt to resolve written air travel complaints that have not already been resolved by an air carrier to the satisfaction of the air travel consumer, in circumstances where no other remedy exists;
- 2) To mediate or arrange for mediation of air travel complaints when appropriate and provide a report to the complainant and the air carrier; and

²³ *Air Transportation Regulations*, SOR/88-58, ss 135.8(1)(b) and (c).

²⁴ *Ibid.*, s 135.91.

²⁵ *Ibid.*, ss 147(1)(a), (c)-(d), (h), (j)-(k).

- 3) To provide a report, at least twice yearly, to the Governor in Council through the Minister of Transport.²⁶

In its first annual report reviewing the July 2000 to June 2001 period, the Air Travel Complaints Commissioner received 2,912 individual complaints, compared to the mere 169 complaints received by the Canadian Transportation Agency the previous year in 1999.²⁷ Nonetheless, the Commissioner estimated that he still only received less than 2% of the total number of complaints which airline carriers received.²⁸ At the time, the most problematic issues were: quality of service, flight schedules, baggage, and ticketing.²⁹

Bill C-11, proposed in 2006, stated that the position of the Air Travel Complaints Commissioner was only established as a temporary measure.³⁰ The position was subsequently removed, and the complaints process has now been reincorporated into the functions of the Canadian Transportation Agency.

Section 85.1 of the *Canada Transportation Act* empowers the Canadian Transportation Agency to receive, review, and “attempt to resolve” – including mediation where appropriate – air travel complaints. However, the Canadian Transportation Agency resolves disputes both between business parties, and between airline passengers and carriers, and is thus required to split its time and resources between the two. The following diagram outlines the airline customer complaints process through the Canadian Transportation Agency, as well as the timeline required to reach a settlement or decision after a complete application has been received.

²⁶ Canadian Transportation Agency Air Travel Complaints Commissioner, *The Air Travel Complaints Commissioner's Report: July 2000 to June 2001* (2001), online: Government of Canada <<http://publications.gc.ca/collections/Collection/TW1-5-2001-2E.pdf>> at pp 4 and 6.

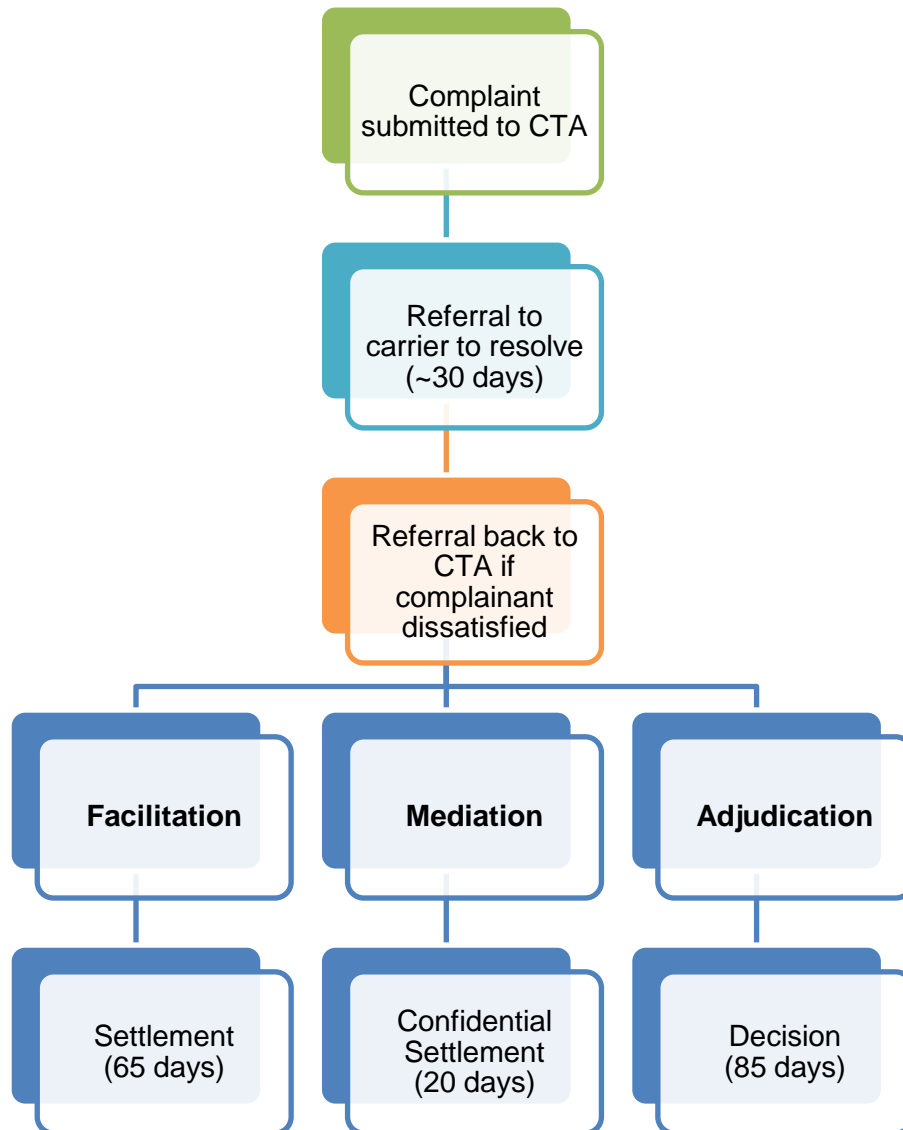
²⁷ *Ibid* at p 18.

²⁸ *Ibid* at p 19.

²⁹ *Ibid* at p 25.

³⁰ See: *Bill C-11: Transportation Amendment Act* (26 May 2006, Rev. 27 September 2007), online: Library of Parliament <<http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/39/1/c11-e.pdf>> (accessed 6 February 2015) at p 14.

Figure 1. Canadian Transportation Agency air travel complaints process³¹



Airline passengers have the option to file their complaint to either the informal facilitation process or the formal adjudication process. In the informal facilitation process, the Canadian Transportation Agency will first refer the complaint to the air carrier involved if the carrier has not already had an opportunity to resolve the complaint. The complaint is then referred back to the Canadian Transportation Agency if the complainant remains dissatisfied and the Canadian Transportation Agency will attempt to resolve to achieve a

³¹ See: Canadian Transportation Agency, "Air complaints," online: Canadian Transportation Agency <<https://services.otc-cta.gc.ca/eng/air-complaints>> (accessed 5 February 2015); and Canadian Transportation Agency, "Overview: How disputes are decided," online: Canadian Transportation Agency <<https://services.otc-cta.gc.ca/eng/overview-how-disputes-are-decided>> (accessed 5 February 2015).

settlement through facilitation. If unsuccessful, the complainant may also make use of other alternatives such as mediation or adjudication.

The Canadian Transportation Agency states that remedies can range from refunds and compensation to air carrier policy changes; it is not, however, authorized to award damages.³²

1.3 Airline customer complaints statistics

The Canadian Transportation Agency's 2013-2014 annual report shows that it received **1,006 air travel complaints** for that year, including 882 received for facilitation – a 67% increase from the 2012-2013 year.³³ The 2013-2014 statistics also appear to show that:

- 134 cases were resolved between the complainant and the carrier;
- 519 cases were successfully facilitated;
- 8 cases were resolved through mediation; and
- 23 cases were resolved through adjudication.³⁴

Based on these numbers, and recognizing that the Canadian Transportation Agency also carries over cases from the previous year, this amounts to about 67% of air travel complaints that were successfully resolved in 2013-2014. Other complaints were closed for various reasons, withdrawn, or are still ongoing.

The following table shows the top ten air carriers (Canadian and foreign) based on the number of air travel complaints in the facilitation process.

³² Canadian Transportation Agency, "Air complaints," online: Canadian Transportation Agency <<https://services.otc-cta.gc.ca/eng/air-complaints>> (accessed 25 February 2015).

³³ Canadian Transportation Agency, *Annual Report 2013-2014* (June 2014), online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/sites/default/files/ar-2013-2014-final.pdf>> at pp 22-23.

³⁴ *Ibid* at pp 22-23.

Table 1. Top airlines by number of air travel complaints in facilitation³⁵

Airline	Number of complaints in the facilitation process by year					Average
	2013-2014	2012-2013	2011-2012	2010-2011	2009-2010	
Air Canada	392	217	152	135	139	207
Swiss International	74	51	0	0	2	25
Air Transat	26	18	23	29	25	24
Jazz Aviation³⁶	42	16	10	16	22	21
Sunwing	35	26	12	16	20	21
United	31	21	16	8	4	16
Westjet	25	14	8	11	11	13
Air France	17	16	6	12	18	13
KLM	14	9	7	7	8	9
British Airways	13	9	13	4	4	8

The Canadian Transportation Agency noted that in 2013-2014, flight disruptions were the most common issue raised in air travel complaints for facilitation, followed by quality of service, and baggage-related complaints.³⁷ The following table lists the top issues raised in air travel complaints.

³⁵ Canadian Transportation Agency, "Statistics 2013-2014," online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/eng/statistics-2013-2014>>.

³⁶ Jazz is a contract carrier for Air Canada and operates its flights on Air Canada's behalf. See: Jazz, "About Jazz," online: Jazz < <http://www.flyjazz.ca/en/home/aboutjazz/default.aspx>> (accessed 6 February 2015).

³⁷ Canadian Transportation Agency, *Annual Report 2013-2014* (June 2014), online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/sites/default/files/ar-2013-2014-final.pdf>> at p 24.

Table 2. Top issues raised in air travel complaints in facilitation³⁸

Type of issue	Number of complaints in the facilitation process by year				
	2013-2014	2012-2013	2011-2012	2010-2011	2009-2010
Flight disruptions	568	281	226	158	199
Quality of service³⁹	398	694	551	233	224
Baggage	281	212	123	148	163
Reservations	172	116	33	44	38
Refusal to transport	170	64	53	67	53
Ticketing	136	92	68	68	75
Fares	105	63	10	7	8
Denied boarding	82	55	23	25	19

The Canadian Transportation Agency's 2013-2014 data show a significant increase in number of complaints over the last five years – and in particular over the last year. Air Canada, Swiss International, Sunwing, Jazz, United and Westjet have all seen considerable increases in the number of complaints involving their carriers, in some cases of two or three fold over the last five years.

Certain types of issues raised in complaints have also become much more prevalent. Notably, cases involving flight disruptions or refusal to transport have doubled over the last year alone, and those involving reservations, ticketing and fares have grown two to four times over the last five years. Some issues, such as those related to baggage, have remained consistently high without noticeable declines in the number of complaints. Only complaints for quality of service have decreased, although this could be attributed to the fact that the Canadian Transportation Agency has no jurisdiction to address these types of complaints.

1.4 Challenges for today's aggrieved air travel passengers

The Canadian Transportation Agency's statistics show that the total number of air travel complaints has grown over the last three reporting years – and almost doubled in the last year alone.

³⁸ Canadian Transportation Agency, "Statistics 2013-2014," online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/eng/statistics-2013-2014>>.

³⁹ Addressing complaints related to quality of service is outside of the Canadian Transportation Agency's jurisdiction.

Table 3. Total number of air travel complaints by year⁴⁰

Year	Informal Facilitation	Adjudication	Total
2011-2012	499	19	518
2012-2013	529	25	554
2013-2014	882	121	1,006
% change over 3 years	+76.7%	+536.8%	+94.2%

As the number of complaints grows, it is important to consider the extent to which the current complaints system is easy to access, efficient and effective for consumers. PIAC has identified several challenges with the current complaints system which make it far from efficient or effective for airline passengers.

1.4.1 Ease of access and use

No in-house carrier complaints process

The first person airline passengers typically wish to speak to when they have a complaint is the air carrier itself. In fact, the Canadian Transportation Agency refers complainants to their airlines so that carriers have an opportunity to resolve the complaint first.⁴¹

However, no major Canadian airline, including Air Canada, Air Transat, Sunwing, WestJet or Porter Airlines, has an ombudsman or a formalized complaints system that is clear and visible for passengers. While some carriers such as Porter Airlines and WestJet

⁴⁰ Canadian Transportation Agency, *Annual Report 2013-2014* (June 2014), online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/sites/default/files/ar-2013-2014-final.pdf>> at p 23;

Canadian Transportation Agency, *Annual Report 2012-2013* (May 2013), online: Canadian Transportation Agency <http://www.otc-cta.gc.ca/sites/default/files/annual_report_en_final.pdf> at p 31; and

Canadian Transportation Agency, *Annual Report 2011-2012* (May 2012), online: Canadian Transportation Agency <http://www.otc-cta.gc.ca/sites/all/files/altformats/books/CTA-Annual-Report-2011-12-EN_1.pdf> at p 32.

⁴¹ The Canadian Transportation Agency states that, "When the Agency receives a complaint, it must first ensure that the carrier has had an opportunity to resolve the issues raised. If not, the Agency refers the complaint to the carrier." See: Canadian Transportation Agency, "Statistics 2013-2014," online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/eng/statistics-2013-2014#toc-tm-3-2>> (accessed 9 February 2015).

See also: Canadian Transportation Agency, "Air complaints," online: Canadian Transportation Agency <<https://services.otc-cta.gc.ca/eng/air-complaints>> (accessed 9 February 2015).

do have online complaints forms, other airlines merely refer customers to a long list of various contacts.⁴² Carriers also do not provide airline passengers with any information or details related to their in-house complaints process including, for instance, the time it would take to process the complaint as well as how the complaint would be handled.

A budding complaint often also begins at the airport, where it is not always easy for airline customers to locate or contact airline staff who are trained to receive and address complaints.

Inadequate visibility of Canadian Transportation Agency complaints process

Awareness of the Canadian Transportation Agency air travel complaints process faces several barriers. First, it is not widely advertised – particularly by airline carriers. PIAC’s scan of airline websites could not locate one which clearly referred aggrieved airline passengers to the Canadian Transportation Agency complaints process. Moreover, PIAC is not aware of any consumer education or publicity campaigns advertising the existence of the Canadian Transportation Agency complaints process – even in airports, where many consumer complaints are likely to arise.

In addition, although filing a complaint for informal facilitation with the Canadian Transportation Agency does not appear exceedingly onerous, it is neither straightforward nor extremely easy to access for consumers. For instance, while complainants are able to fill out and file a complaint form online, there is no telephone number or other means of communication which would directly connect an airline passenger with the Canadian Transportation Agency office which handles and processes complaints.

Furthermore, the Canadian Transportation Agency is tasked with a myriad of other responsibilities, including regulating other forms of transport and resolving disputes between industry parties. It can therefore be difficult for an airline customer to locate the specific office or process for air travel complaints within the broader transportation regulatory agency.

Complex Canadian Transportation Agency adjudication process

While the Canadian Transportation Agency’s informal facilitation process may be simpler and less challenging for air travel customers to navigate, complainants have no choice but to turn to adjudication in cases where they are unable or dissatisfied with resolving their complaints at the informal level. The Canadian Transportation Agency does not presently investigate complaints independently in order to render a recommendation or binding decision.

⁴² Some consumers have even alleged, for instance, that Air Canada’s supposed customer service office in Calgary, Alberta is a post office box number in a pharmacy. See: Ellen Roseman, “Air Canada should improve customer service” (14 May 2013), online: Ellen Roseman <<http://blog.ellenroseman.com/?p=1632>>.

However, the adjudication process is much more akin to the process of litigation, demanding legal arguments and in-depth research into transportation law and policy. In fact, individual complainants – many of whom are self-represented – are often stacked against the legal and regulatory departments of airline carriers, creating a significant imbalance of power, knowledge and resources.

For instance, a persuasive application alleging that an air carrier tariff or policy is unreasonable⁴³ would require an understanding of legal principles and past Canadian Transportation Agency decisions on what would be considered “unreasonable”. This knowledge would be far beyond the reach of the average airline customer and could act as an obstruction to obtaining the relief a complainant might deserve.

A formal adjudication would also be subject to the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*,⁴⁴ whose extensive process could include originating applications, answers, replies, interrogatories, and requests, including requests for confidentiality and disclosure. Individual complainants are also required to review all the responses provided by carriers and to file replies typically within a short period of time – five business days, for instance, according to the Canadian Transportation Agency’s rules.⁴⁵

This complex and protracted process essentially compels airline passengers to settle their complaints at the informal level either by facilitation or mediation, even if they are dissatisfied with the result. There would be no other feasible or realistic alternative.

1.4.2 Efficiency

The Canadian Transportation Agency may not have the capacity or the resources to efficiently and effectively handle all air travel complaints, particularly if the number of complaints continues to increase dramatically in the same way it did in 2013-2014.

As described above, the Canadian Transportation Agency was able to successfully resolve around 67% of complaints in the 2013-2014 year. The Canadian Transportation Agency also notes that it was able to resolve 82% of its successfully facilitated cases within its 90-day target.⁴⁶

However, these numbers are noticeably lower than other independent ombudsman models in Canada specifically dedicated to resolving complaints. For instance, the Commissioner for Complaints for Telecommunications Services received **11,340**

⁴³ For instance, see: *Canada Transportation Act*, SC 1996, c 10, s 67.2(1).

⁴⁴ SOR/2014-104.

⁴⁵ *Ibid*, s 20(1).

⁴⁶ Canadian Transportation Agency, *Annual Report 2013-2014* (June 2014), online: Canadian Transportation Agency <<https://www.otc-cta.gc.ca/sites/default/files/ar-2013-2014-final.pdf>> at p 22.

complaints in the 2013-2014 year and was able to successfully resolve 87% of them – 77% within 40 days and 89% within 60 days.⁴⁷

A speedy, efficient remedy is vital to the operation of an effective consumer complaints model. Both aggrieved airline passengers and air carriers seek fast and effective resolutions to each complaint and dispute. However, there are a number of barriers to achieving the efficient resolution of a complaint via the current Canadian Transportation Agency model, including limited resources for a broad regulatory agency, and a complaints handling process which comprises of several steps and dispute resolution options. These include:

- Referral to carrier;
- Referral from carrier and investigation;
- Facilitation;
- Mediation; and
- Adjudication.

Each step adds more time to the resolution of a complaint. The efficiency of the Canadian Transportation Agency complaints process is further challenged by the complex adjudication process described above.

Given that the Canadian Transportation Agency already handles a large volume of complaints as well as other disputes related to rail, marine and accessibility, the Agency also does not appear to have the capacity or the resources to resolve airline passenger complaints as efficiently and effectively as possible – or to make significant improvements to the complaints process in the near future. This would be particularly true where the number of airline passenger complaints continues to increase as it has in the last few years.

1.4.3 Transparency and clarity

No clarity with regards to consumer protections and rights

A significant challenge for Canadian airline passengers is the lack of clarity with regards to consumer protections and rights. There is no single document, code or official website which sets out the list of airline consumer rules and rights applicable in Canada. This is important because consumers need to be able to understand their rights in order to understand that they are able to file a complaint and obtain relief. Similarly, having one document which plainly describes the consumer protections applicable to air travel can prevent airline passengers from filing frivolous or ineligible complaints.

⁴⁷ Commissioner for Complaints for Telecommunications Services, *Annual Report 2013-14*, online: CCTS <<http://www.ccts-cprst.ca/wp-content/uploads/pdfs/en/2013-2014/CCTS-Annual-Report-2013-2014.pdf>> at pp 3 and 9.

Most of the policies and rules which apply to airline passengers are currently established by airlines themselves through domestic and international tariffs. Presently, air carriers are required to make their tariffs – or their “terms and conditions of carriage” – available to the public at their business offices and on the websites they use to sell their services.⁴⁸ However, these tariffs are neither reader-friendly nor easy to comprehend – and some appear to be made deliberately so. For instance, Air Canada’s published tariffs consist mostly of separate, scanned documents which are difficult to make out and impossible to search for key words or terms.⁴⁹ It would be exceedingly difficult for the average consumer to determine his or her rights by painstakingly sifting through each applicable carrier’s tariffs.

It is altogether, therefore, challenging and nearly impossible for airline passengers to be able to easily access and clearly understand the consumer protection rules and rights which may apply to them on any given flight.

Insufficient air carrier reporting on performance

Given that flying with an airline creates a relationship between a passenger and his or her air carrier, there is a significant lack of transparency from air carriers themselves today. Airline passengers have no access to indicators of their air carrier’s performance, including:

- Adherence to flight schedules;
- Flight cancellations;
- Lost, delayed and damaged baggage;
- Recent changes in fees, fares and airline policies; and
- Number of in-house complaints received and resolved.

Airlines passengers should be able to easily find and access this information. Because the Canadian Transportation Agency is currently prohibited from dealing with complaints related to quality of service, for instance, public disclosure of an air carrier’s performance at the very least empowers airline passengers to make informed and reasonable choices when purchasing a ticket. However, although this information is presumably gathered, none of it is publicly provided by air carriers today.

Insufficient Canadian Transportation Agency reporting on complaints and complaints review process

The Canadian Transportation Agency is required by section 85.1(6) of the *Canada Transportation Act* to report annually on a number of metrics, including:

⁴⁸ *Canada Transportation Act*, SC 1996, c 10, s 67.1(1); and *Air Transportation Regulations*, SOR/88-58, ss 116-116.1.

⁴⁹ See: Air Canada, “Conditions of carriage and Tariffs,” online: Air Canada <http://www.aircanada.com/en/travelinfo/before/gcc_tariffs.html> (accessed 10 February 2015).

- Number and nature of air travel complaints;
- Names of carriers against whom the complaints were made;
- Manner complaints were dealt with; and
- Systemic trends observed.

Nonetheless, the Canadian Transportation Agency is not restricted to reporting solely on these factors. In fact, more detailed reporting would bolster public confidence in the air travel complaints process and reinforce the system's benefits for airline customers. It is important that airline passengers know that complaints they file are handled both efficiently and effectively.

However, the Canadian Transportation Agency's reporting on air travel complaints thus far has primarily been restricted to the metrics mandated by the *Canada Transportation Act*. Furthermore, although the Agency is required to indicate systemic trends observed in air travel complaints, PIAC has not yet come across substantial Canadian Transportation Agency analysis of systemic issues – beyond very general observations on annual trends – which airline passengers have encountered.

This contrasts greatly with the annual reports published by the former Air Travel Complaints Commissioner which typically numbered between 40 and 60 pages and included many other indicators, including:

- ◆ Analysis of systemic problems for Canadian airline passengers;
- ◆ Frequency of complaints by month;
- ◆ Number of complaints by province, territory and country;
- ◆ Breakdown of major issues (e.g. regarding baggage: delayed, lost, damaged, size limits, etc.);
- ◆ Types of remedies complainants sought;
- ◆ Consumer satisfaction with the resolution obtained; and
- ◆ Recommendations for and responses from airline carriers.

Moreover, there is little information available on the complaints review process and the staff or Canadian Transportation Agency members involved. Other ombudsman models typically make widely known the name of the complaints commissioner, as well as the names of the offices, boards of directors and staff involved; the structure of the organization; and the procedural codes and policies which apply to their complaints process. All of this information is usually found on one central website dedicated to the complaints process, and consumers do not need to – as they currently do with most Canadian Transportation Agency documents – sort through hundreds of pages pertaining to other regulatory frameworks and responsibilities in order to find information that relates to air travel complaints.

Therefore, the current Canadian Transportation Agency complaints model falls well short of sufficiently reporting on a number of indicators, including details of airline passenger complaints, transparency on the complaints process and offices involved, and

systemic issues identified in the air travel industry. This may in part be due to the sheer number of other regulatory tasks and responsibilities with which the Canadian Transportation Agency is also charged.

In sum, the current air travel complaints system has grown to be complex, inefficient and unclear, and requires significant adjustments in order to be more consumer-friendly and effective for airline customers. Consumers need to:

- ❖ Understand the consumer protection rules;
- ❖ Know how and where to file an air travel complaint; and
- ❖ Be able to obtain an efficient, independent and effective resolution.

This is even more important if the number of complaints continues to grow at the same rate that it has in the last few years.

Part II:

Consumer Protections for Airline Passengers in Other Jurisdictions

Many jurisdictions around the world have created consumer protection systems to explicitly address issues in the airline industry, however these systems vary widely in their scope, rules and implementation. This section details the systems used in Australia, the European Union and the United States.

2.1 Description of airline consumer protection systems

Each jurisdiction's consumer protection system is described by focusing on four elements: (1) the model of consumer protection and complaints handling; (2) the scope of consumer protections, such as the types of regulated events or the categories under which a consumer can launch a complaint; (3) the process consumers must follow to file a complaint; and (4) how these protections are enforced on the airlines, and the remedies available to consumers for complaints that are validated.

All information was gathered from publicly available sources. Note that protections falling under more general bodies of law, such as contract law or competition law, are only discussed briefly where necessary.

2.1.1 Australia

Consumer Protection Model

Australia does not have a formal airline passenger rights system that binds airlines to a minimum standard of behaviour.

In 2009, the Australian Government released a long-term aviation policy document entitled "Flight Path to the Future."⁵⁰ The policy included consumer protection as a key pillar of policy changes, but stopped short of recommending binding regulations on airlines. Instead, the report focused on relevant changes in the then-upcoming *Australian Consumer Law*,⁵¹ an Australia-wide update to state and federal consumer protection laws, and a call for each airline to develop complaint handling charters and jointly create an independent third party organization for resolving consumer complaints.

The five major airlines based in Australia (Qantas, Virgin Australia, Regional Express, Tigerair and Jetstar) created complaint handling charters, as requested, in

⁵⁰ Commonwealth of Australia, "National Aviation Policy White Paper: Flight Path to the Future" (December 2009), online:
<http://www.infrastructure.gov.au/aviation/publications/pdf/Aviation_White_Paper_final.pdf>.

⁵¹ *Competition and Consumer Act 2010* (Cth), Schedule 2.

2010.⁵² Through consultation with the Australian Government, and it appears without the involvement of consumer groups,⁵³ the airlines established the Airline Customer Advocate (ACA),⁵⁴ an industry ombudsperson, who began taking complaints in July 2012. The ACA works with a representative from each airline to resolve complaints within 20 working days,⁵⁵ but does not have the power to bind airlines to a resolution.

Details on the funding and organizational structure of the ACA do not appear to be public. One media report suggests that the ACA is comprised of a single person.⁵⁶ In a report, the ACA claims to advocate specifically in the interest of consumers (unlike other ombudsperson models that aim to be impartial among both parties) and claims that although the ACA is funded by the airline industry, the ACA is only accountable to the airlines “in relation to the administration of the scheme,” and not for day-to-day operations.⁵⁷ The ACA publishes an annual report,⁵⁸ detailing complaint statistics and various ACA performance metrics. Complaint resolution statistics and consumer surveys suggest the ACA is fulfilling its mandate and consumers find it helpful.

Scope of Consumer Protection

The ACA can only resolve complaints made against the five participating airlines, therefore passengers of international airlines or the smaller regional airlines are outside of the ACA’s jurisdiction. Complaints must be related to the following services provided by the airline:

- airport lounge facilities;

⁵² Qantas, “Customer Charter and Frequent Flyer Customer Commitment” (2010), online: <<http://www.qantas.com.au/travel/airlines/customer-charter/global/en>>; Virgin Australia, “Guest Charter (Customer Service Plan)” (2010), online: <<http://www.virginaustralia.com/au/en/experience/service-experience/customer-service-plan/>>; RegionalExpress, “Customer Charter” (2010), online: <<http://www.rex.com.au/FlightInfo/CustomerCharter.aspx>>; Tigerair, “Customer Charter And Customer Feedback Policy” (2010), online: <http://www.tigerair.com/au/en/customer_charter.php>; and Jetstar, “Jetstar Customer Guarantee” (February 2010), online: <http://www.jetstar.com/~/_media/5055E884DB264A9AAEABA8F748E58C0F.ashx>.

⁵³ CHOICE, “National airline customer advocate two steps forward, one step back” (2012), online: <<http://www.choice.com.au/media-and-news/media-releases/2012-media-releases/national%20airline%20customer%20advocate%20two%20steps%20forward%20one%20step%20back.aspx>>.

⁵⁴ Airline Customer Advocate, online: <<http://www.airlinecustomeradvocate.com.au/General/Default.aspx>>.

⁵⁵ Anthony Albanese, “A National Airline Customer Advocate” (22 April 2012), online: <<http://anthonyalbanese.com.au/a-national-airline-customer-advocate>>.

⁵⁶ John Rolfe, “Airline Customer Advocate calls for laws to make airlines pay passengers compensation for cancelled flights” (7 August 2014), online: <<http://www.theaustralian.com.au/news/airline-customer-advocate-calls-for-laws-to-make-airlines-pay-passengers-compensation-for-cancelled-flights/story-e6frg6n6-1227015605458>>.

⁵⁷ Airline Customer Advocate, “Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes” (May 2013), online: <<http://ccaac.gov.au/files/2013/06/AirlineCustomerAdvocate.pdf>>.

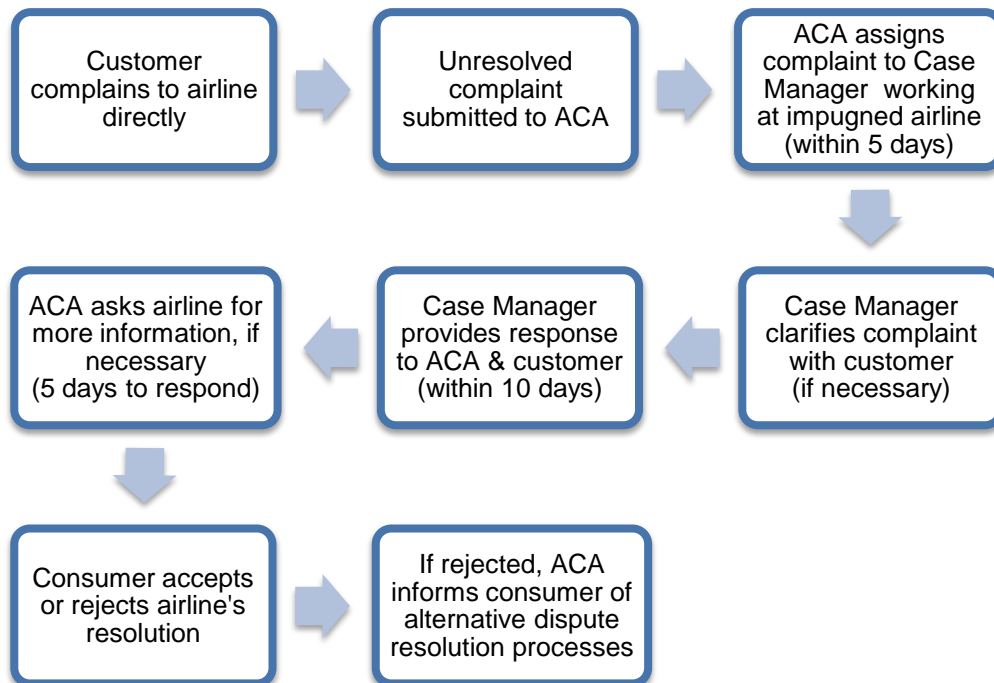
⁵⁸ Airline Customer Advocate, “Annual Reports” online: <<http://www.airlinecustomeradvocate.com.au/General/AnnualReports.aspx>>.

- baggage services;
- customer service at the airport or in-flight;
- discrimination and services for customers with specific needs;
- fees and charges;
- flight delays or cancellations;
- frequent flyer program terms and conditions;
- requests for refunds;
- safety and security; or
- telephone or internet reservations.

Consumer Complaints Process

Fundamentally, the ACA serves as a mediator of last resort. Therefore, a consumer with a complaint against a participating airline must have complained directly to the airline and must have been unable to reach a resolution. Otherwise, the ACA will simply refer the consumer to the airline for resolution under the airline’s complaint handling charter. It appears that in most circumstances, the consumer must obtain a ‘complaint reference number’ from the airline’s internal customer service system before the ACA will investigate a complaint. If the consumer is unable to resolve the complaint under the airline’s charter, they can submit the complaint to the ACA. The ACA aims to finalize complaints within 20 working days, unless more time is needed to gather facts from the customer. The complaint process, from the initial complaint to the ACA’s involvement, functions as follows:

Figure 2. Australian Airline Customer Advocate complaint process



Enforcement & Available Remedies

The ACA does not have the power to bind airlines to a specific resolution, even where a complaint is well-founded. The ACA merely has direct access to second-line support staff within the airline's customer service system, and advocates on the consumer's behalf. The remedies available to consumers are therefore at the discretion of the airline. Airlines are not subject to penalties imposed by the Australian Government for failing to resolve complaints. However, the ACA does publish an annual report detailing the complaints per capita among the participating airlines, and overall the categories of complaints that occur most frequently. These statistics may 'name-and-shame' airlines into compliance, and the Australian Government suggested they may use complaint data to inform future regulatory changes in the industry.

2.1.2 European Union

Consumer Protection Model

The European Union ("EU") has a formal passenger rights scheme binding on EU member states (and other states by agreement, such as Switzerland) through Regulation EC 261/2004⁵⁹ ("Reg 261/2004").⁶⁰ An EU Regulation, once passed by the European Parliament and Council of the European Union, immediately has the effect of law in all member states.

Thus, all airlines licensed to operate in the EU have been regulated by Reg 261/2004 since it took effect in February 2005. Airlines' obligations under Reg 261/2004 are enforced by the National Enforcement Body ("NEB") in the jurisdiction where the airline operates.⁶¹ NEBs are responsible for maintaining records on all flights taking off from or landing at airports within their jurisdiction, and ensuring the rights of passengers on those flights are respected, including imposing sanctions on airlines that are "effective, proportionate and dissuasive" where necessary.⁶² Reg 261/2004 does not prescribe the

⁵⁹ European Commission, "Regulation (EC) No 261/2004 Of The European Parliament And Of The Council of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91" [2014] OJ, L 46/1, online: <http://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC_1&format=PDF>.

⁶⁰ European Commission, "Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air" [2006] OJ, L 204/1, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1107&from=EN>>.

⁶¹ NEBs tend to be the either a country's civil aviation authority or a division of the country's Transportation Ministry. See: European Commission, "National Enforcement Bodies under Regulation [EC] 261/2004" (2 February 2015), online: <http://ec.europa.eu/transport/themes/passengers/air/doc/2004_261_national_enforcement_bodies.pdf>.

⁶² Reg 261/2004, art 16.

operation of NEBs in any significant detail, therefore the thresholds that would trigger an investigation or enforcement action vary between member states.

Reg 261/2004 provides a minimum standard of rights for passengers when certain events occur, including prescribed compensation for violations of those rights. Airlines are entitled to a defence from the obligation to pay compensation in certain circumstances, namely “extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”⁶³ However, airlines must always provide passengers with a minimum level of care,⁶⁴ including during extraordinary circumstances.⁶⁵

Calls for changes over the years has led the European Commission to begin investigating changes to Reg 261/2004, with a public consultation in 2011⁶⁶ and an initial exploratory report provided in 2012.⁶⁷ The European Commission proposed many changes in 2013, focused on four key areas of reform: clarifying legal grey areas; several new passenger rights; greater responsibilities for NEBs in enforcement, complaint handling and sanctioning; and reducing the financial burden on airlines of compliance.⁶⁸ Enacting the proposed changes does not appear to have progressed since June 2014.

Scope of Consumer Protection

Reg 261/2004 applies to passengers on flights that depart from, or land in, any EU Member State or a state to which the Regulation applies by agreement.

Reg 261/2004 provides rights for consumers under four categories of events: (1) denied boarding; (2) flight cancellation; (3) delay; and (4) upgrading or downgrading.⁶⁹

Denied boarding and flight cancellation trigger the right to compensation under the following scheme, which can be reduced if the airline provides, and the consumer accepts, a re-routed flight that reaches the consumer’s original destination under a certain delay:

⁶³ Reg 261/2004, art 5(3).

⁶⁴ Reg 261/2004, art 9.

⁶⁵ See: ECJ *Denise McDonagh v Ryanair Ltd*, C-12/11, online: <<http://curia.europa.eu/juris/document/document.jsf?docid=133245&doclang=en>>.

⁶⁶ European Commission, “Passenger Rights” (2012), online: <http://ec.europa.eu/transport/themes/passengers/consultations/2012-03-11-apr_en.htm>.

⁶⁷ Steer Davies Gleave, “Exploratory study on the application and possible revision of Regulation 261/2004” (July 2012), online: <<http://ec.europa.eu/transport/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application-and-possible-revision-of-regulation-261-2004.pdf>>.

⁶⁸ European Commission, “Air Passenger Rights Revision – Frequently Asked Questions” (13 March 2013), online: <http://europa.eu/rapid/press-release_MEMO-13-203_en.htm>.

⁶⁹ Reg 261/2004, arts 4, 5, 6, 10.

Table 4. Compensation Regime for Denied Boarding and Flight Cancellation

Flight Distance	Compensation Value	Maximum Delay Threshold for Reduced Compensation	Reduced Compensation Value
1,500 km or less	€250	2 hours	€125
Between 1,500 km and 3,500 km	€400	3 hours	€200
Greater than 3,500 km	€600	4 hours	€300

Note that compensation can be paid through cash, or with a signed agreement by the consumer, travel vouchers or other services provided by the airline. Notification of cancellations in advance of the flight can absolve airlines of compensation, in certain circumstances.⁷⁰

Compensation for flight cancellation can be denied if the airline can prove the cancellation is caused by 'extraordinary circumstances.' However, this defence has been narrowed through decisions of the European Court of Justice. For example, unforeseen technical issues during aircraft maintenance no longer qualify as extraordinary circumstances.⁷¹ The scope of 'extraordinary circumstances' has been the subject of significant debate, and is one of the major targets for reform of Reg 261/2004; however, in 2013 a meeting between NEBs resulted in a non-binding guidance document detailing categories of circumstances that fall within the definition.⁷²

Excessive delay (measured from the original scheduled departure time) is based on the same flight distances and timeframes as Table 4, and entitles passengers to the right to care. Delays in excess of 5 hours entitle consumers to the full compensation amounts shown in Table 4, or a return flight to their point of departure. Decisions by the European Court of Justice have since held that delays in excess of 3 hours trigger the right to compensation, which commentators have argued effectively rewrote the delay provisions of Reg 261/2004.⁷³

Denied boarding, flight cancellation and delay trigger various aspects of the right to care, which includes (free of charge): reasonable amounts of food and refreshments in

⁷⁰ Reg 261/2004, art 5(c).

⁷¹ Such as ECJ *Friederike Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA*, C-549/07, online: <<http://curia.europa.eu/juris/celex.jsf?celex=62007CJ0549&lang1=en&type=TXT>>; see commentary at John Balfour, "EU Air Passenger Rights - Focus on Regulation 261/2004" (February 2011), online: <<http://whoswholegal.com/news/features/article/28878/eu-air-passenger-rights-focus-regulation-2612004>>.

⁷² "Draft list of extraordinary circumstances following the National Enforcement Bodies (NEB) meeting held on 12 April 2013" (19 April 2013), online: <<http://ec.europa.eu/transport/themes/passengers/air/doc/neb-extraordinary-circumstances-list.pdf>>.

⁷³ See John Balfour, "EU Air Passenger Rights - Focus on Regulation 261/2004" (February 2011), online: <<http://whoswholegal.com/news/features/article/28878/eu-air-passenger-rights-focus-regulation-2612004>>.

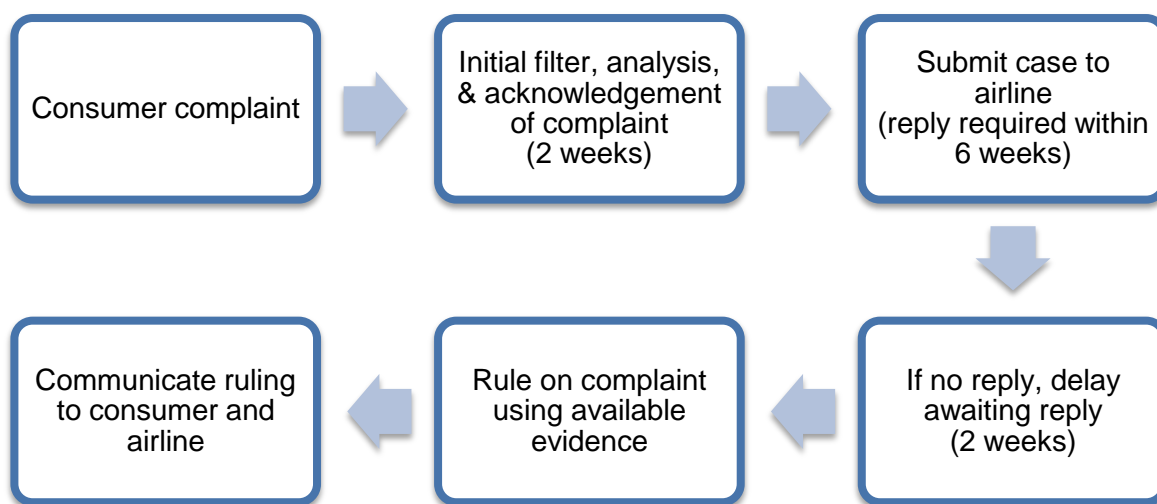
relation to waiting time; hotel accommodation if necessary, including transportation to and from the hotel; and access to communication services for two messages, such as two phone calls or two emails.⁷⁴

Consumers also have protections against an airline unilaterally upgrading or downgrading a passenger's flight class. Consumers cannot be compelled to pay extra for an upgraded flight, and airlines must pay 30%, 50% or 75% of the price of ticket for a downgraded flight, depending on the distance thresholds described in Table 4.

Consumer Complaints Process

Consumers are encouraged to make their claim for compensation directly to the airline, by citing the appropriate section of Reg 261/2004.⁷⁵ Otherwise, consumers must complain to the appropriate NEB depending on the location of their flight. The complaint processes are different between NEBs, however various non-binding guidance documents have been released over the years as a result of consultations between NEBs.⁷⁶ One such document describes the following general complaint procedure for NEBs:

Figure 3. European Union National Enforcement Body general complaint process



The document suggests that for clear cases, resolving a complaint can take a maximum of 3-4 months, and for complex cases involving legal proceedings, over 6

⁷⁴ Reg 261/2004, art 9.

⁷⁵ European Commission, "Air Passenger Rights" (17 December 2013), online: <http://europa.eu/youreurope/citizens/travel/passenger-rights/air/index_en.htm>.

⁷⁶ See e.g. "NEB-NEB Complaint Handling Procedure under Regulation [EC]261/2004", online: <http://ec.europa.eu/transport/themes/passengers/air/doc/neb/neb_complaint_handling_procedure_s.pdf>; "NEB-Airline Procedure under Regulation [EC]261/2004", online: <http://ec.europa.eu/transport/themes/passengers/air/doc/neb/neb_airlines_procedures.pdf>

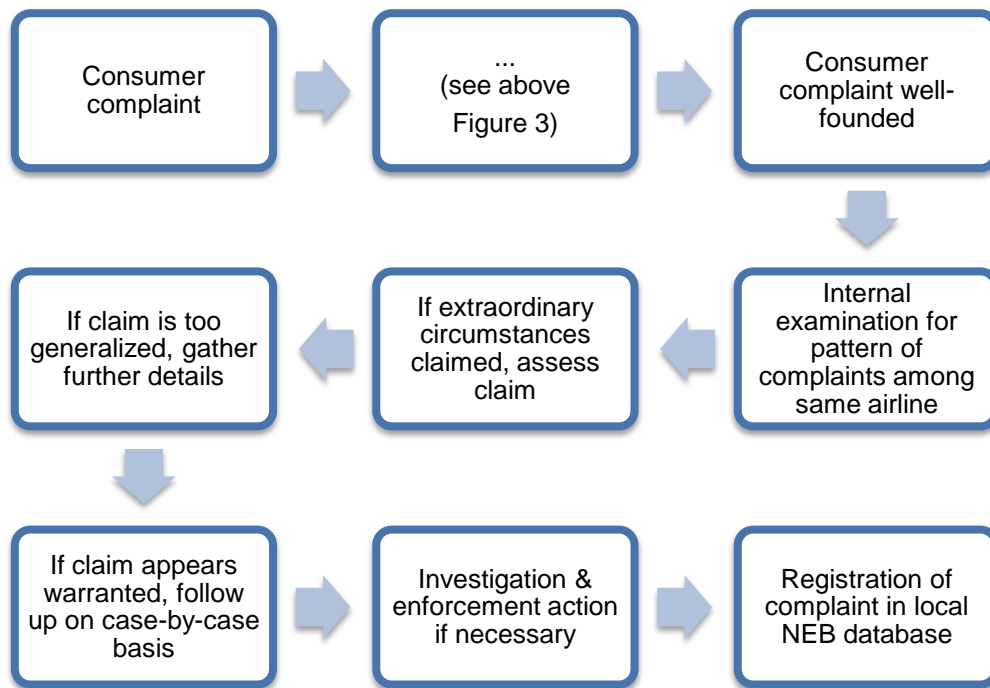
months.⁷⁷ A freedom of information response from the United Kingdom’s Civil Aviation Authority describing their internal processes confirms they follow this general process.⁷⁸

Enforcement & Available Remedies

As with the consumer complaint process, enforcing airline violations of Reg 261/2004 falls under the mandate of the NEB where the complaint took place. The specific sanctions for an airline failing to comply with the rules depend on the local laws where the complaint is handled. For example, in the United Kingdom, failure for an airline to comply with an obligation under Reg 261/2004 subjects the airline to a fine not exceeding £5,000.⁷⁹

The process leading to an enforcement action also varies by member state. Similar to the complaint handling process, NEBs developed a enforcement guideline document describing the following general process:

Figure 4. European Union National Enforcement Body general enforcement process



⁷⁷ NEB-NEB Complaint Handling Procedure, *supra* note 76.

⁷⁸ Civil Aviation Authority, “FOIA reference: F0001740” (17 December 2013), online: <<http://www.caa.co.uk/docs/1357/F0001740ReplyLetter.pdf>>.

⁷⁹ *The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005*, SI 2005/975, s 3(2): “A person guilty of an offence under this regulation shall be liable on summary conviction, to a fine not exceeding level 5 on the standard scale.” The standard scale is a reference to the *Criminal Justice Act 1982*, (UK) which sets a 5-level scale for fines; currently level 5 is £5,000.

NEBs may also take a proactive approach to ensuring passenger rights under Reg 261/2004 are respected, as the United Kingdom's Civil Aviation Authority claims it does, through random unannounced spot checks and other tactics.⁸⁰

Consumer remedies under Reg 261/2004 are mainly based around monetary compensation as described in Table 4 above, or a similar compensation regime for forced downgrading. Airlines can also provide alternate flights if delays compared to the consumers original flight are reasonable. If consumers are dissatisfied with the complaint process through the appropriate NEB, they can bring the airline to court (local, or the European Court of Justice) over the amounts owed under Reg 261/2004.

One recent development of note, is the European Court of Justice's decision in *Denise McDonagh v Ryanair Ltd*. The Court held there is no limit on the liability of airlines to provide the right of care under Reg 261/2004 Article 9 (i.e. meals, refreshments, hotel accommodation), even in the face of extraordinary circumstances such as the ash cloud that resulted from the eruption of Icelandic volcano Eyjafjallajökull in 2010. Limitation on this liability has become a major pillar of the suggested reform to Reg 261/2004.

2.1.3 United States

Consumer Protection Model

The United States has a formal passenger rights system, imposed on airlines through federal laws and federal aviation regulation, which generally must form part of an airline's contract of carriage or other policies (e.g. tarmac delay contingency policy).⁸¹

The Department of Transportation ("DOT"), a federal agency, has the authority to make regulations regarding consumer protection in the air travel industry, largely based on the authority to prevent air carriers from engaging in "unfair and deceptive practices and unfair methods of competition."⁸² Congress has a broader role, including oversight of the DOT, through Congressional Committees that hold hearings and publish reports on issues in the industry (such as airline passenger rights).

After several highly-publicized media reports where passengers were kept waiting in an airplane on the tarmac for several hours,⁸³ the Obama administration began a series of proposals to improve air passenger protections. Congressional hearings were held which eventually resulted in the DOT issuing new regulations entitled "Enhancing Airline

⁸⁰ Civil Aviation Authority, "FOIA reference: F0001164" (22 June 2011), online: <<http://www.caa.co.uk/docs/1357/F0001164ReplyLetter.pdf>>.

⁸¹ Rachel Tang, "Airline Passenger Rights: The Federal Role in Aviation Consumer Protection" (20 May 2013), online: <<http://fas.org/sgp/crs/misc/R43078.pdf>>.

⁸² 49 USC § 41712.

⁸³ One notable case was in 2007 where passengers were kept for up to 11 hours inside the airplane, see: Tucker Reals, "JetBlue Attempts To Calm Passenger Furor" (15 February 2007), online: <<http://www.cbsnews.com/news/jetblue-attempts-to-calm-passenger-furor>>.

Passenger Protections.” The first set of rules were proposed in 2009 and the second set were proposed in 2011; both are now fully in effect.⁸⁴ A third set of rules, focused mainly on price transparency, is currently being considered.⁸⁵

DOT regulations appear to be narrowly focused, and targeted to address specific consumer harms that have been identified through public hearings and a pattern of consumer complaints. For example, there are no penalties for general flight delays; however, ‘tarmac delays’ (when passengers are on the plane and cannot return to the terminal) exceeding certain thresholds are now punishable by large fines, and airlines are required to meet a minimum standard for passenger care while passengers are waiting. Compensation is available to consumers for certain events, such as denied boarding, however compliance appears to be enforced mainly through financial penalties levied by the DOT.

Scope of Consumer Protection

The 2009 and 2011 “Enhancing Airline Passenger Protections” rules made several reforms throughout the airline industry, largely focused on setting minimum standards in airline policies rather providing specific resolution to consumer harms.⁸⁶

For example, airlines are now required to acknowledge a consumer complaint within 30 days, and respond substantively to the complaint within 60 days of its receipt. Previously, response timelines were at the discretion of the airline, with no real penalty for lack of compliance with their own policies.

Other policy requirements include: a customer service plan which must be published on the airline’s website, and auditing requirements to ensure compliance with that policy; a tarmac delay contingency plan and adherence to that plan; a policy to notify consumers of flight status changes, including publishing delays on the airline’s website; a prohibition on unfair choice-of-forum dispute resolution clauses in the contract of carriage; and a prohibition on scheduling ‘chronically delayed’ flights.

Several specific consumer protections created by the rules are notable. Tarmac delays in excess of three hours (four hours for international flights) are now prohibited, in conjunction with a required ‘tarmac delay contingency plan’ to provide consumer care during the delay (e.g. adequate food and water must be made available after a two hour

⁸⁴ Department of Transportation, “Enhancing Airline Passenger Protections” (30 December 2009), online: <<http://airconsumer.ost.dot.gov/rules/Final%20Rule%20on%20Enhancing%20Airline%20Passenger%20Protections.pdf>>; Department of Transportation, “Enhancing Airline Passenger Protections” (25 April 2011), online: <<http://www.gpo.gov/fdsys/pkg/FR-2011-04-25/pdf/2011-9736.pdf>>.

⁸⁵ Department of Transportation, “Transparency of Airline Ancillary Fees and Other Consumer Protection Issues” (16 April 2014), online: <<http://www.dot.gov/sites/dot.gov/files/docs/Passenger%20Protections%20NPRM%20April%2016%202014.docx>>.

⁸⁶ Department of Transportation, “Airline Consumer Protection” (31 January 2013), online: <<http://www.dot.gov/mission/performance/airline-consumer-protection>>.

tarmac delay). Violations of the rule can result in a civil fine, which currently stands at a maximum of \$27,500 per violation.⁸⁷

The 2011 rules also increased the compensation to consumers required in the case of involuntary denied boarding due to overbooking. Carriers are required to provide alternative transportation to the denied passenger's original destination, and compensation is based on the delay the passenger incurs relative to their original scheduled arrival time: 200% of the fare up to \$650 for 1-4 hours of delay, or 400% of the fare up to \$1,300 for 4 or more hours of delay, up from 100%/\$400 and 200%/\$800 respectively. Delay under 1 hour is not compensable.

Carriers must also now advertise ticket prices in a particular manner; the most prominent advertised price must be the full cost of the ticket, including taxes, mandatory fees and optional charges. These charges must also be separately disclosed in carriers' advertising. Any baggage fees charged for a flight must now be refunded to the consumer if the baggage is lost (but not delay, even for a delay of days).

Consumer Complaints Process

While consumers can send complaints to the DOT, the DOT does not adjudicate complaints on their merits; it simply forwards complaints to the relevant airline for resolution. The exception is complaints alleging discrimination on the basis of mental or physical disability; the DOT is required by law to investigate these types of complaints, and any such complaints made directly to the airline must be forwarded to the DOT for review.⁸⁸

In general, consumer complaints made directly to airlines do not need to be forwarded to the DOT for review (other than disability-related complaints). Therefore, although the DOT aggregates and publishes complaint statistics, these reports are likely under-representative of the state of the industry.⁸⁹

If a complaint was initially sent to the DOT and the subject matter is covered by a specific DOT regulation, the airline must forward the reply given to the consumer to the DOT for further review. If the DOT decides the response is deceptive, or there is a pattern of violations, the DOT can initiate an investigation, rulemaking, or enforcement action.⁹⁰

⁸⁷ It is currently unclear whether "per violation" represents per passenger or per flight, since "violation" was never defined in the regulations. Thus far, the DOT has been settling violations via consent orders and therefore they have never made a definitive ruling on the scope of the fine. See: masFlight, "Tarmac Rule: Three Years Later" (2013), online: <[http://www.masflight.com/masflight-news/wp-content/uploads/pdf/Operations%20Meeting,%20AGIFORS%20\(2013\)%20Frankfurt,%20Germany%20-%20Reviewing%20the%20US%20Tarmac%20Rule%20after%20Three%20Years.pdf](http://www.masflight.com/masflight-news/wp-content/uploads/pdf/Operations%20Meeting,%20AGIFORS%20(2013)%20Frankfurt,%20Germany%20-%20Reviewing%20the%20US%20Tarmac%20Rule%20after%20Three%20Years.pdf)>.

⁸⁸ 49 USC § 41705.

⁸⁹ The DOT publishes reports monthly which include a section on complaints received by the DOT during the study period. See: Department of Transportation, "Air Travel Consumer Reports" (10 February 2015), online: <<http://www.dot.gov/airconsumer/air-travel-consumer-reports>>.

⁹⁰ Rachel Tang, *supra* note 81 at 11.

DOT regulations also contain processes for “informal complaints”⁹¹ and “formal complaints”⁹² which are types of enforcement proceedings, and appear to be quasi-judicial in nature. However, it does not appear to be a process meant for consumers as the DOT does not provide any description of the process in its consumer-oriented materials, and there are very few enforcement orders made as a result of complaints by those processes.⁹³

Therefore, for the vast majority of issues, a consumer can only use an airline’s internal complaint system.

Enforcement & Available Remedies

The DOT is responsible for enforcing the regulations made under its authority through the Office of Aviation Enforcement and Proceedings, which includes an Aviation Consumer Protection Division. This responsibility includes monitoring complaints sent to the DOT, monitoring airline compliance with the rules, negotiating consent orders, and issuing fines.⁹⁴

The DOT appears to be aggressively enforcing the new consumer protection regulations, with the largest fine of \$1.6 million recently being levied against Southwest Airlines for excessive tarmac delays.⁹⁵ However, overall, recent data suggests the reforms have been effective, with 2014 having the lowest number of excessive tarmac delays on record: 30 domestic flights exceeded the delay threshold in 2014 compared to 868 in 2009 before the rule was put into effect.⁹⁶

As discussed above, there are very few circumstances under which consumers are entitled to compensation or other specific remedies under the rules. Airline policies addressing common problems are described in an airline’s contract of carriage. However, the ‘expectation’ is that issues requiring compensation are resolved immediately after they occur through agreement with airline staff, e.g. consumers agree to the appropriate denied boarding compensation at the time they are involuntarily denied boarding.

Otherwise, consumer complaints made directly to an airline are subject to the airline’s internal processes, and a consumer’s only other recourse is a civil suit. Of significant benefit to consumers, is the prohibition on choice-of-forum provisions enacted in the 2011 set of regulations. Consumers are now able to sue an airline where they live,

⁹¹ 14 CFR 302.403.

⁹² 14 CFR 302.404.

⁹³ See: Department of Transportation, “Enforcement Orders” online: <<http://www.dot.gov/airconsumer/enforcement-orders>>.

⁹⁴ Rachel Tang, *supra* note 81 at 3.

⁹⁵ Department of Transportation, “U.S. Department of Transportation Fines Southwest \$1.6 Million for Violating Tarmac Delay Rule” (15 January 2015), online: <<http://www.dot.gov/briefing-room/us-department-transportation-fines-southwest-16-million-violating-tarmac-delay-rule>>.

⁹⁶ Department of Transportation, “Lowest Numbers of Tarmac Delays on Record in 2014” (10 February 2015), online: <<http://www.dot.gov/briefing-room/lowest-numbers-tarmac-delays-record-2014>>.

as long as the airline does business in that jurisdiction, rather than be forced to sue in the airline's jurisdiction of choice, which in practice is prohibitively expensive or inconvenient for the average consumer to do.

2.2 Analysis of consumer protection systems

The consumer protection systems in the three jurisdictions described above vary widely in nearly every aspect of their design and implementation. Overall, the systems in Australia and the European Union fall at opposite ends of the spectrum, with the United States falling somewhere between the two, but closer to the 'hands-off' Australian model.

2.2.1 Consumer protection model

All three jurisdictions have implemented some sort of complaint resolution or consumer protection system, at the insistence of their respective Governments, in recognition of the nature and number of complaints made by airline passengers. Some of the major differences in the methods and models of consumer protection are their level of flexibility and adaptability to change, the degree of government intervention, and the effectiveness of the consumer complaint resolution regime.

The Australian model has the greatest degree of flexibility and adaptability, since the ACA is funded and structured by agreement between the major Australian airlines. Any deficiency in the structure or operation of the ACA could be remedied through negotiation among the airlines and an amendment to the agreement. In an age of rapid changes in technology, such flexibility could allow the ACA to become more effective over time through better use of technology (e.g. mobile device use) leading more efficient resolution of complaints.

The ACA's annual reports⁹⁷ contain results of a consumer satisfaction survey, suggesting that the ACA is having a positive impact, with the vast majority of consumers saying they were treated fairly (88% in 2012, 92% in 2013), the ACA was easy to use (96% in 2012, 90% in 2013) and that their complaint was managed in a timely way (88% in 2012, 83% in 2013). Due to how recently the ACA was established, there does not appear to be an in-depth analysis of its impact on the airline industry.

Despite the ACA appearing to be a positive influence on the industry, having the airlines in complete control of the consumer protection regime also means that the regime would likely never provide consumers with strong compensation guarantees or incent airlines to operate under a set of consumer protection-oriented principles. Lack of government intervention also reduces the ability of the regime to remedy chronic industry problems. The lack of a legal backstop for failing to follow the advice of the ACA also

⁹⁷ See links at *supra* note 58.

means airlines are not truly accountable for their actions, and therefore the ACA might not provide enough incentive for airlines to resolve complaints to consumers' full satisfaction.

The United States' model shifts the balance more in favour of consumers, with legally-backed financial penalties imposed by a government authority providing a strong incentive for airlines to develop new policies and eliminate poor industry practices for the benefit of consumers. Changes enacted through a public regulatory process allows all interested parties, including individual consumers, public interest groups and airline trade groups alike to provide their views on proposed regulatory changes and promote compromise. The targeted nature of the United States' reforms in response to actual problems allows enough room for airlines to compete and differentiate their services, while still resolving the issues that most affect consumers.

However, as with most legal processes, the time it can take from idea to implementation can be extremely lengthy, and finding consensus among a wide variety of stakeholders can be difficult. For example, the process to enact the Enhancing Airline Passenger Protections regulations began in 2007, and the second set of rules took until 2012 to come fully into effect, due to extensions and legal challenges.⁹⁸ As well, during the commentary period for the second set of rules, the number one consumer suggestion was a ban on peanuts due to allergy concerns; however, a law passed by Congress in 2000 (said to be the result of lobbying by peanut grower trade groups) would cause the DOT to lose funding for their enforcement division if they enacted a regulation prohibiting peanuts on airlines without a series of additional steps.⁹⁹

As well, the lack of an effective consumer complaint and enforcement mechanism appears to be holding back the United States. Despite a reduction in certain industry problems such as tarmac delay, consumer complaints filed with the DOT *increased* between 2009 and 2013, according to a report by the United States Public Interest Research Group.¹⁰⁰ The increase is not surprising, since the new regulations did not provide consumers with additional tools to resolve complaints. Complaints are not reviewed by an independent third party, and the threshold for the DOT to investigate a "systemic problem" appears to be very high, meaning consumers still do not have any leverage in a complaint negotiation with an airline.

⁹⁸ Rachel Tang, *supra* note 81 at 14.

⁹⁹ Harriet Baskas, "Passengers Peeved About Peanuts on Planes" (9 September 2010), online: <http://www.nbcnews.com/id/39068278/ns/travel-travel_tips/t/passengers-peeved-about-peanuts-planes/>. NV Flyer, "DOT extends period for commenting on proposed rule enhancing airline passenger protections " (3 August 2010), online: <<https://nvflyer.wordpress.com/2010/08/03/dot-extends-period-for-commenting-on-proposed-rule-enhancing-airline-passenger-protections/>>. The *Department of Transportation and Related Agencies Appropriations Act, 2000* section 346 would require the DOT to submit a "peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact with very small airborne peanut particles of the kind that passengers might encounter in an aircraft."

¹⁰⁰ US PIRG, "The Unfriendly Skies" (14 April 2014), online: <<http://www.uspirgedfund.org/sites/pirg/files/reports/The%20Unfriendly%20Skies.pdf>> at 5.

The European Union's model is even more inflexible than the United States, though this is partly due to the inherent complexities of the European Union itself. Since Reg 261/2004 was passed, the section of the *Treaty on the Functioning of the European Union* dealing with transportation regulations was amended, where now such regulations must be passed in accordance with the "ordinary legislative procedure."¹⁰¹ While significant public study and consultation is necessary for the imposition of binding rules throughout the European Union, it also means that change will occur extremely slowly. Studies to improve Reg 261/2004 began in 2008-2009, and proposed changes will likely not conclude until 2016 or later.

However the structure of imposing specific compensation in defined circumstances, with the establishment of NEBs where consumers can go to complain and seek enforcement of the regulations, provides strong incentives for airlines to respect passengers' rights. While there has been some criticism of the legal grey areas as a result of decisions by the European Court of Justice, the simplicity and defined thresholds in the rules have generally provided airlines with the certainty and predictability necessary to implement proper policies.

Overall, there is no clear winner among the three models for passenger rights. With increasing degree of government intervention comes a reduction in flexibility and adaptability to changing industry practices, but also appears to improve airline compliance with policy goals through legally-backed enforcement and publication of complaint statistics. Achieving the appropriate balance between all stakeholders will depend on the desired degree of flexibility and government intervention, and the types of incentives imposed on airlines that are necessary to resolve consumer complaints.

2.2.2 Scope of consumer protections

Closely linked to the model of consumer protection is the scope of issues to which the model applies. All three jurisdictions have a different scope of protection, which has a significant impact on how effective their consumer protection systems can be.

The ACA, serving as an independent extension of participating airlines' internal complaint resolution systems, accepts complaints on everything the airline does that could affect a consumer. Presumably this includes circumstances that did not exist when the

¹⁰¹ The ordinary legislative procedure requires agreement between both the European Parliament (i.e. the elected members) and the Council of the European Union (i.e. the ministers of member states' elected governments) through the full debate and amendment process. See: EC, "Ordinary Legislative Procedure" (2013), online: <http://www.europarl.europa.eu/external/appendix/legislativeprocedure/europarl_ordinarylegislative_procedure_howitworks_en.pdf>. At the time Reg 261/2004 was passed, only a "qualified majority" of the Council was required to pass air transportation regulations, see: EC, "Treaty establishing the European Community (Consolidated version 2002)" [2002] OJ, C 325/33, online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12002E/TXT>> at art 80(2).

ACA was initially created, allowing maximum flexibility to respond to consumer complaints as industry practices change.

However, since the ACA's scheme is based on (government-suggested) co-operation among the major airlines, consumers are left without this resource for complaints against non-participating domestic airlines, and all international airlines. Currently non-participating airlines have no real incentive to being participating in the ACA, and if an airline receives too much negative publicity from complaint statistics or otherwise, they could just as easily back out of the scheme (depending on the details of the arrangement). Similarly, if a smaller airline were to grow significantly, there is no clear point determining when they should join the ACA (such as market share), creating a gap in protection for consumers using that airline.

The United States' targeted approach to rulemaking can effectively reduce specific problems (e.g. excessive tarmac delay), but might not address larger systemic issues that cause consumer complaints (e.g. general delay and cancellation). Without the ability for more generalized protections and generalized enforcement powers, consumer may feel their complaints are ignored due to the high threshold required for the regulator to address a systemic issue. Airlines may benefit from increased certainty in regulation with the DOT's targeted approach, but at the expense of the regulator playing 'whack-a-mole' as industry practices change, with consumers caught in the middle.

The European Union appears to have achieved a good balance between the interests of consumers and the interests of the airline industry. Reg 261/2004 provides defined thresholds for general problems (e.g. a maximum hour threshold for delay), and the specific compensation required for a violation of that rule. Defined compensation rules provides both consumers and airlines with an important degree of predictability when problems occur, and defining consumer rights in a general sense gives enough flexibility for the scheme to adapt to changing industry practices. Reg 261/2004 provides airlines with appropriate incentives, such as reduced mandatory compensation for appropriate alternative service (see Table 4 above), and an exception for compensation if the airline could not have reasonably prevented the problem (i.e. extraordinary circumstances). Beyond specific compensation, Reg 261/2004 requires the airline to provide a basic level of care, such as reasonable food and water, in a broad set of circumstances, ensuring that consumers' basic needs are always met.

The scope of protection is a key element of any consumer protection system, and it appears that an appropriate balance can be struck to ensure benefits for both consumers and the industry: generalized rules that can apply as circumstances change, but defined compensation amounts so that airlines are properly incentivized and can manage their risk.

2.2.3 Ease of access for consumers: Complaints and remedies

A critical requirement of any consumer protection scheme is the ability of consumers to easily access and navigate the system. A well-designed scheme can be rendered ineffective if consumers do not understand their rights, if the complaint resolution process is burdensome, or if consumers have no further recourse when an airline refuses to provide the remedy a consumer is owed.

Under Australia's regime, a consumer must first attempt to resolve their complaint through the airline's customer service process. The Australian Government's insistence for airlines to develop complaint handling charters created minimum standards by which each airline would handle complaints (e.g. maximum complaint acknowledgement and response time). These standards are relatively similar among each airline, and each charter includes a description of and link to the ACA.¹⁰²

The ACA was highly publicized at the time it was established, including a statement by the then-Minister of Infrastructure and Transport.¹⁰³ Thus, the ACA should be easily discoverable by consumers looking to make a complaint. The ACA's website clearly explains the scope of complaints the ACA will accept, and the expected time for resolution.¹⁰⁴ The website also has a clear set of steps consumers must use to lodge a complaint.¹⁰⁵ Complaints can be lodged online, and the complaint form is straightforward to use.

Therefore, in terms of usability and discoverability, the ACA's website is clearly designed to be user-friendly and to encourage consumer use. The ACA's 2013 Annual Report states that between the five major airlines, there were 69,014,406 customers (domestic and international), 18,424 visits to the ACA website, and 983 complaints in 2013. The number of visits and complaints compared to the number of airline customers suggests consumers are not yet taking advantage of the ACA's resources, though this could be due to the ACA only being in operation since mid-2012.

The United States, as described above, does not have an independent consumer-focused complaint system. Likewise, airline complaint and consumer protection resources from the DOT do not appear to be designed for simple, transparent, easy access by consumers looking to understand their rights. Navigating the DOT's website to find the "Aviation Consumer Protection" section is relatively straightforward, however the vast majority of resources there are highly technical (e.g. DOT enforcement orders, proposed and final regulation documents).

¹⁰² See *supra* note 52.

¹⁰³ See *supra* note 55.

¹⁰⁴ Airline Customer Advocate, "Eligibility" online:
<<http://www.airlinecustomeradvocate.com.au/General/Eligibility.aspx>>.

¹⁰⁵ Airline Customer Advocate, "The Process" online:
<<http://www.airlinecustomeradvocate.com.au/General/TheProcess.aspx>>.

In fact, the most consumer-friendly description of the 2009 and 2011 consumer protection reforms is on a page that is no longer linked from any page in the “Aviation Consumer Protection” section, it appears, due to a re-design of that part of the website.¹⁰⁶ Other than this page, there does not appear to be a consolidated description of the new protections at all, only the regulatory documents as filed in the federal register. The DOT’s consumer guide series “Fly Rights” and “Plane Talk” discuss industry practices and how best to navigate processes such as airport security and baggage rules, but only make passing mention to consumer rights such as the 2009 and 2011 reforms.¹⁰⁷

As well, the page describing how to file a complaint with DOT does not clearly explain that if a consumer is seeking compensation for their complaint under DOT rules, they must file the complaint directly with the airline.¹⁰⁸ The page does describe that the DOT may take action for non-compliance, but does not specify under what circumstances. The lack of transparency in the process would leave a consumer without a clear sense of whether their complaint will have an impact on an airline’s policies, or how they should proceed if they are seeking compensation for violation of a DOT rule.

Unlike Australia’s and the United States’ recent changes to consumer protection, the European Union has several years of experience in implementing and administrating Reg 261/2004. Contrasting with DOT regulations, the text of Reg 261/2004 is written in relatively simple language¹⁰⁹ without too much legal jargon, such that any consumer could reasonably understand it. Beyond the regulation itself, the official website of the European Union has a travel subsection in the “Your Europe” site, aimed to inform EU citizens of their rights. The travel section prominently displays an “Air passenger rights” article, which clearly explains the rights of Reg 261/2004, when compensation is owed, and how to file a complaint (including a form letter and list of NEBs).¹¹⁰

However, the regime has suffered from poor enforcement due to wide variances in the effectiveness and resources of NEBs across member states. A working document released by the European Commission in 2013 assessing problems with Reg 261/2004 found that airlines are regularly failing to provide consumers with the ‘right to care’ that they are entitled, and only a fraction passengers that were entitled to compensation

¹⁰⁶ The page in question, “Airline Consumer Protection” (31 January 2013), online: <<http://www.dot.gov/mission/performance/airline-consumer-protection>>, was only accessible through a targeted Google search, and is not referenced on the current website. Attempting to follow the ‘breadcrumb’ links results in an error, or a page without a link back to the “Airline Consumer Protection” page.

¹⁰⁷ Department of Transportation, “Fly Rights, A Consumer Guide to Air Travel” (27 January 2015), online: <<https://cms.dot.gov/airconsumer/fly-rights>>; Department of Transportation, “Plane Talk” (5 January 2015), online: <<https://cms.dot.gov/airconsumer/planetalk>>.

¹⁰⁸ Department of Transportation, “File a Consumer Complaint” (23 February 2015), online: <<http://www.dot.gov/airconsumer/file-consumer-complaint>>.

¹⁰⁹ The official English translation, at least. Reg 261/2004 is available in 23 languages.

¹¹⁰ European Commission, “Air passenger rights” (17 December 2013), online: <http://europa.eu/youreurope/citizens/travel/passenger-rights/air/index_en.htm>.

actually received it.¹¹¹ The document identified two main reasons for the lack of compliance: insufficiently effective and uniform enforcement across Europe by NEBs, and certain obligations imposed strong disincentives for compliance.

In essence, Reg 261/2004 required the existence of NEBs, but did not provide enough of a common framework for them to be effective. NEBs across member states interpreted provisions of Reg 261/2004 differently, had different levels of sanctions for the same violation, and had a wide variation in complaint handling procedures. As well, rulings from the European Court of Justice that created unlimited liability for the right to care in extraordinary circumstances disincentivized airlines from informing consumers that had the right to care at all. As a result, consumers were not able to enforce their rights, and airlines would fight attempts by consumers to collect compensation.

A freedom of information response from the United Kingdom's Civil Aviation Authority noted that between 1 January 2012 and 17 December 2013, the Authority received 30,911 complaints, with 2,464 resolved in favour of the complainant, 18,987 denied for extraordinary circumstances, 3,146 pending review, and the remaining concluded otherwise. For reference, the UK handles approximately 230 million passengers per year.¹¹²

Despite the strong consumer protections in Reg 261/2004, it appears that the lack of uniform enforcement across the EU has only resulted in improvements for consumers in the member states where the NEB has the appropriate resources and expertise.

Comparing the three jurisdictions, it appears that a well-defined enforcement body is critical to the success of a consumer protection regime. Whether it is an industry-funded model or a state-run model, clear processes allow consumers and airlines alike to understand their rights and obligations. The ACA's model appears to be functioning well without the ability to make legally binding decisions, however it is likely too early to tell whether this model has a clear advantage over the NEBs of the European Union.

2.2.4 Administrative and compliance costs

As discussed above, details of the ACA's funding model do not appear to be public, however the available information can give some insight into a comparison with

¹¹¹ European Commission, "Impact Assessment Accompanying the document Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air" (13 March 2013) online: <http://www.parliament.bg/pub/ECD/128092SWD_2013_62_EN_DOCUMENTDETRAVAIL_f.pdf> at 12.

¹¹² Civil Aviation Authority, "Air Passengers by Type and Nationality of Operator 2013" (2013), online: <http://www.caa.co.uk/docs/80/airport_data/2013Annual/Table_08_Air_Passengers_by_Type_and_Nat_of_Operator_2013.pdf>.

other jurisdictions' models. The five participating Australian airlines are jointly responsible to fund the ACA. The ACA appears to be a very small operation, with a single person coordinating complaints, and potentially other support staff.

Due to its small size, the ongoing costs of the ACA are likely minimal, and therefore the costs per airline are likely minimal as well. Within the airlines, higher-level customer service representatives ('case managers') are appointed to deal with complaints coming from the ACA. These case managers may be dedicated positions within the organization who require extra training, or simply a second-line support position with extra responsibility. In either case, the incremental compliance costs for the airline would be minimal, since airlines already have customer service divisions.

For consumers and the Australian Government, the ACA requires virtually no costs. Consumers are not charged for filing a complaint with the ACA, and the process does not require detailed submissions written by a professional or a significant investment of time. The Australian Government does not enforce decisions of the ACA and it does not appear to have a specific oversight role over the ACA. Therefore, the Australian Government is simply accountable in a general sense for the political consequences of the success or failure of the ACA, but does not require, for example, a division of the Ministry of Infrastructure and Transport dedicated to oversight.

In the United States, generous time limits on complaint responses (30 days to acknowledge, 60 days to respond substantively) pose the only constraint on consumer complaint handling systems, therefore keep those compliance costs low.

According to the American Aviation Institute, an industry think tank, compliance costs imposed on airlines as part of the Enhancing Airline Passenger Protection rules increased fares by \$1.7 billion per year.¹¹³ These increased costs are said to be caused mainly by the ban on excessive tarmac delay and care requirements (\$270 million per year), and requiring full-fare ticket price advertising (\$108 million in compliance costs, \$1 billion per year in lost revenue).¹¹⁴

The regulatory impact assessments commissioned by the DOT found significantly different costs. For the first set of rules, costs to airlines were estimated to be between \$45 million and \$55 million, with total benefits to consumers between \$106 and \$132 million (\$61 to \$77 million net benefits) over a 10 year period.¹¹⁵ For the second set of rules, costs to airlines were estimated to be between \$30 and \$33 million, with total benefits to consumers between \$45 and \$54 million (\$14 to \$20 million net benefits) over

¹¹³ American Aviation Institute, "Consumer Regulation and Taxation of the U.S. Airline Industry: Estimating the Burden for Airlines and the Local Impact" (16 November 2011), online: <<http://www.aviationinstitute.org/AAIReportNov11.pdf>> at 1.

¹¹⁴ American Aviation Institute *supra* note 113 at 6-7.

¹¹⁵ HDR Decision Economics, "Initial Regulatory Impact Analysis of Proposed Rulemaking on Enhanced Airline Passenger Protections" (11 September 2008) online: <<http://airlineinfo.com/ostpdf72/364.pdf>>.

a 10 year period.¹¹⁶ This assessment found the full-fare ticket price advertising compliance costs will be a one-time cost of \$6.8 million for the industry.

Clearly, the gap between these two analyses is large and depends heavily on the assumptions made in each study. Therefore it is unclear what the financial costs for the airline industry will be as a result of the new consumer protection rules, but they certainly must be balanced with the benefits to consumers, which are broader than the impact on ticket price.

As described above, the United States' model depends on greater vigilance in enforcement from the regulator, with the main incentive for an airline's compliance with consumer protection rules being a DOT-issued fine. The DOT's Office of Aviation Enforcement and Proceedings (a division of the Office of the General Counsel, which itself is a division of the Office of the Secretary of Transportation¹¹⁷) is responsible for monitoring compliance and investigating violations of DOT economic regulations, including consumer protection rules.

In fiscal year 2012, the Office of Aviation Enforcement and Proceedings incurred expenses of \$2,500,000, employing at least 21 lawyers, 18 analysts and 6 support staff.¹¹⁸ The Office of the General Counsel, which is responsible for broader legal and policy work, incurred expenses of \$19,515,000 for 113 direct positions and 105.45 full-time equivalent positions.¹¹⁹ Despite not adjudicating consumer complaints, the enforcement office still requires significant resources to ensure airline compliance with the rules.

Since consumers in the United States must use an airline's internal complaint system to resolve complaints and enforce their rights under the Enhancing Airline Passenger Protection rules, costs to consumers are minimal, other than the time it may take to continually follow up on a complaint. Due to a ban on choice-of-forum clauses, consumers who choose to go to court to enforce their rights can now sue in their home jurisdiction (as long as the airline does business there) which significantly reduces the costs for consumers who seek that course of action.

¹¹⁶ Econometrica Inc, "Final Regulatory Analysis, Consumer Rulemaking: Enhancing Airline Passenger Protections II" (8 April 2011), online: <<http://www.regulations.gov/contentStreamer?objectId=0900006480c3085d&disposition=attachment&contentType=pdf>>.

¹¹⁷ 49 CFR §1.15.

¹¹⁸ Department of Transportation Office of the Secretary, "FY2014 Congressional Budget Justification" (24 April 2013), online: <http://www.dot.gov/sites/dot.gov/files/docs/OST_FY2014_Budget_EstimatesV2_0.pdf> at 152; Lisa Swafford-Brooks, "ADA Overview and Regulatory Updates" (28 August 2012), online: <[https://www.faa.gov/about/office_org/headquarters_offices/acr/eo_training/past_conferences/airport_civil_rights_training_conference/media/ADA_-_Overviewand_Regulatory_Updates_\(Lisa_Swafford-Brooks\).pdf](https://www.faa.gov/about/office_org/headquarters_offices/acr/eo_training/past_conferences/airport_civil_rights_training_conference/media/ADA_-_Overviewand_Regulatory_Updates_(Lisa_Swafford-Brooks).pdf)>.

¹¹⁹ Department of Transportation Office of the Secretary, "FY2014 Congressional Budget Justification" (24 April 2013), online: <http://www.dot.gov/sites/dot.gov/files/docs/OST_FY2014_Budget_EstimatesV2_0.pdf> at 35. See *ibid* at 143 for funding breakdown.

Similar to the differences in the consumer protection model, the complexities associated with the European Union system are largely due to the operation of the European Union itself. Reg 261/2004 applies across the EU, however NEBs may interpret the regulations differently, or choose to enforce the regulations with different degrees of vigour. A European Commission working document identifying issues with Reg 261/2004 noted that non-uniform enforcement “not only reduces the protection of passengers' rights, but it also endangers the level-playing field between EU air carriers.”¹²⁰

Airlines also noted that they are liable for care and compensation when delays are due to third parties, when those third parties have no economic incentive to reduce the severity or frequency of disruptions.¹²¹ Further, airlines criticized a European Court of Justice ruling that held during extraordinary events of long duration, airlines are subject to *unlimited* liability in providing passengers with the right to care. All together, despite Reg 261/2004 being structured as straightforward in its cost implications, the implementation has left airlines without sufficient ability to manage their risk.

A 2010 study evaluating the effects of Reg 261/2004 asked EU airlines for their costs of compliance, and while no airline provided full cost details, five airlines estimated compliance costs in the range of 0.1-0.5% of annual turnover (i.e. gross revenue).¹²² A 2012 study estimated the compliance costs associated with Reg 261/2004 and the effects of recent court decisions extending the liability of carriers, and found that in a typical year of disruptions, the incremental costs for full compliance would range between €821 million and €1,007 million, which corresponds to 0.58% to 0.71% of total annual industry revenues.¹²³ The report notes that airlines' non-compliance with Reg 261/2004 has been a persistent problem, and therefore the actual costs incurred are likely significantly lower.

Like the United States, the European Union relies heavily on state-established regulators to enforce Reg 261/2004. NEBs undertake several measures to ensure airline compliance, including investigating complaints, unannounced airport visits and issuing fines. Administrative costs vary widely between member states due to the differences in their implementation and the volume of passengers the member state encounters per year.

For example, the United Kingdom's regulator, the Civil Aviation Authority, is a public corporation that does not receive any funding from the UK government; all of its operations are funded by the entities it regulates.¹²⁴ During the 2013/2014 operating year, the consumer protection division (which implements both EU and UK regulations) had a

¹²⁰ European Commission *supra* note 111 at 13.

¹²¹ European Commission *supra* note 111 at 13.

¹²² Steer Davies Gleave, “Evaluation of Regulation 261/2004” (February 2010), online: <http://ec.europa.eu/transport/themes/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf> at 29.

¹²³ Steer Davies Gleave, “Exploratory study on the application and possible revision of Regulation 261/2004” (July 2012), online: <<http://ec.europa.eu/transport/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application-and-possible-revision-of-regulation-261-2004.pdf>>.

¹²⁴ Civil Aviation Authority, “Annual Report & Accounts 2014” (16 July 2014), online: <http://www.caa.co.uk/docs/33/CAP1193_Annual_Report_2014_web.pdf> at 14-15.

staff of 58 and operating costs of £6,811,000.¹²⁵ The ‘miscellaneous services’ division, which is responsible for a wide variety of tasks, including “aviation regulation enforcement,”¹²⁶ had a staff of 254 and operating costs of £26,667,000.¹²⁷ Detailed costs related solely to the implementation and enforcement of EU consumer protection regulations are not available. Airports in the United Kingdom serve roughly 230 million passengers per year.¹²⁸

Ireland’s NEB, the Commission for Aviation Regulation, operates on a similar premise to the United Kingdom’s Civil Aviation Authority, with its operating costs recovered through a levy on the entities it regulates. A review of the cost-recovery methodology in 2007 found that the costs of implementing EU consumer protection regulations would be €305,269 in 2008, excluding any legal enforcement costs.¹²⁹ These costs were based on the total number of passengers at Ireland’s nine airports, approximately 29 million in 2006.¹³⁰ The Commission for Aviation Regulation had a total budget of €3.9 million and 20 staff in 2006, which was reduced to €2.2 million and 15 staff in 2013.¹³¹

In Malta, the Office for Consumer Affairs division of the Malta Competition and Consumer Affairs Authority serves as the NEB.¹³² The Complaints and Conciliation Directorate handles consumer complaints made under Reg 261/2004, and the Enforcement Directorate investigates and ensures airline compliance with all consumer protection regulations. Total expenses for the Malta Competition and Consumer Affairs Authority made up €4,746,509 in 2013; costs associated specifically with administering

¹²⁵ *Ibid* at 105.

¹²⁶ See *ibid* at 62: “This includes both the corporate functions of the CAA and other activities, which are either funded or operated by the CAA, but where a degree of independence from the regulatory sector is required. These include: CAA Corporate Centre (including CAA Board, HR, IT, Legal, Aviation Regulation Enforcement, Finance & Corporate Services, and the transformation team); Air Safety Support International Limited (a subsidiary of the CAA); and Other activities (including the UK Airprox Board and the administration of the CAA Pension Scheme).” For a list of other regulations enforced by the CAA, see: Civil Aviation Authority, “Guidance on consumer enforcement” (March 2013), online:

<http://www.caa.co.uk/docs/33/CAP1018_Guidance_on_Consumer_Enforcement.pdf> at Appendix A.

¹²⁷ *Ibid* at 105.

¹²⁸ Civil Aviation Authority, “Air Passengers by Type and Nationality of Operator 2013” (2013), online:

<http://www.caa.co.uk/docs/80/airport_data/2013Annual/Table_08_Air_Passengers_by_Type_and_Nat_of_Operator_2013.pdf>.

¹²⁹ Commission for Aviation Regulation, “Revised Statutory Levy for 2008 and After” (20 December 2007), online: <http://www.aviationreg.ie/_fileupload/Image/ABOUT_PUB_Levy1_CP9_2007.pdf> at 17.

¹³⁰ *Ibid*.

¹³¹ Commission for Aviation Regulation, “Report to the Minister for Transport for the year ended 31st December 2013” (March 2014), online:

<http://www.aviationreg.ie/_fileupload/2013%20Annual%20Report%20Mastercopy_English_Final.pdf> at 35.

¹³² Malta Competition and Consumer Affairs Authority, “Report and Accounts” (2013), online: <<http://www.mccaa.org.mt/loadfile/a4b0cf36-13bc-4ffc-91d4-30c989886b0f>> at 48.

EU airline passenger protection rules are not available. Malta International Airport had approximately 4.3 million passenger movements in 2014.¹³³

Clearly there is wide variation among member states in how NEBs are structured, and how much funding is dedicated towards consumer complaints and enforcement activities. While there is a strong correlation between the funding required to enforce consumer protection rules and the number of airlines and airports operating in the country, and the number of passengers that travel to the member state per year, the NEB implementation structure likely has an impact on how much funding is necessary.

Under Reg 261/2004, consumers can file a complaint directly with the airline, or with the NEB where their plane departed or landed. Thus for a consumer, Reg 261/2004 does not impose extra expenses when they are seeking compensation. NEBs adjudicate consumer complaints on their merits, and therefore consumers are less likely to need to enforce their rights through the court system.

Comparing the three jurisdictions, the ACA clearly has the lowest cost implications for all parties. Despite airline funding for the ACA, providing consumers with an independent third party to assist with dispute resolution could eventually result in lower costs, as fewer and fewer consumers would need to resort to the court system for any compensation they deserve.

However the ACA has obvious limitations in the effect it can have on changing airline policies and practices. With the greater resources available to it, the DOT was able to nearly eliminate excessive tarmac delays in 5 years through vigorous enforcement. It is unlikely that a voluntary dispute resolution system such as the ACA would be able to drive such a change in such a short period of time.

The DOT's effectiveness comes at a significant cost, requiring a highly trained staff and significant resources to effectively monitor airlines for compliance. Some EU member states appear to have reduced these costs by integrating compliance enforcement with existing civil aviation regulation or competition authorities. However it is unclear whether the increased bureaucracy for consumers and lack of independence of these schemes strike the appropriate balance between administrative costs and ensuring airlines are held accountable for violations of consumer protection rules.

¹³³ Malta International Airport, "Annual Statistical Summary" (2014), online: <<http://corporate.maltaairport.com/downloads/970/Annual%20Statistical%20Summary%202014.pdf>>

Part III: Finding a Solution – An Air Passenger Complaints Commissioner

3.1 Need for a renewed passenger complaints process

The notion Canadians require an amended or renewed passenger complaints process is dependent upon the source providing the information. For instance, the Canadian Transportation Agency noted in 2013-2014 a 67% increase in the volume of air travel complaints received for facilitation – 882 compared to 529 in 2012-2013.¹³⁴ The Agency alleges this was due in part to increased awareness of the Agency's ability to assist passengers that encounter problems when travelling.¹³⁵ A total of 744 cases were closed through the facilitation process. 519 cases were successfully facilitated, with 82% of these handled within the Agency's 90-day target.¹³⁶

*Air Passenger Complaints
received by Canadian
Transportation Agency,
2011-2014*

2013-2014	1006
2012-2013	554
2011-2012	518

*Source: Canadian Transportation
Agency Annual Reports*

Meanwhile, at least one media commentator concludes most Canadian air travellers are “too nice or too busy to lodge official complaints, well aware of the black hole where our grievances usually end up.”¹³⁷ *Globe and Mail* columnist Konrad Yakabuski noted “just 554 airline customers formally complained to the Canadian Transportation Agency in 2012-13, which is a rounding error amid the millions of flights we take every year.”¹³⁸ Mr. Yakabuski concludes it is the current air traveller complaint resolution process that is to blame for the low volume of complaints. He poses the question, “Who but a masochist with time to kill would want to endlessly relive a horrible flight experience during a bureaucrat-driven complaint adjudication process?”¹³⁹

The lack of empirical evidence to determine the exact level of satisfaction Canadians have in their domestic airlines was surprising. A number of airlines routinely point out any accolades they receive from third-party organizations, such as Skytrax, Business Traveler and Brand Keys. However, it is rare when Canadian airlines produce any evidence themselves suggesting the level of satisfaction Canadians have with their airline services. For instance, in 2014, in response to media attention stemming from an

¹³⁴ Canadian Transportation Agency, *Annual Report 2013-2014*, p. 22.

¹³⁵ Canadian Transportation Agency, *Annual Report 2013-2014*, p. 22.

¹³⁶ Canadian Transportation Agency, *Annual Report 2013-2014*, p. 22.

¹³⁷ Konrad Yakabuski, “When airline service is this bad, it’s hardly worth complaining,” *Globe and Mail*, April 26, 2014, <<http://www.theglobeandmail.com/globe-debate/service-so-bad-its-hardly-worth-complaining/article18194281/>>.

¹³⁸ Konrad Yakabuski, “When airline service is this bad, it’s hardly worth complaining,” *Globe and Mail*, April 26, 2014, <<http://www.theglobeandmail.com/globe-debate/service-so-bad-its-hardly-worth-complaining/article18194281/>>.

¹³⁹ Konrad Yakabuski, “When airline service is this bad, it’s hardly worth complaining,” *Globe and Mail*, April 26, 2014, <<http://www.theglobeandmail.com/globe-debate/service-so-bad-its-hardly-worth-complaining/article18194281/>>.

informal survey measuring customer satisfaction with in-flight staff, an Air Canada spokesperson noted, “Our monthly customer satisfaction surveys done by an independent organization shows in-flight service satisfaction continue trending upwards.”¹⁴⁰

Air Canada documents found online appear to confirm the spokesperson’s comment, although the list of Global Reporting Initiative (GRI) indicators only acknowledges Air Canada conducts a monthly customer satisfaction survey.¹⁴¹ The 2013 GRI Table notes that Air Canada obtains an estimated 1400 completed survey responses that are targeted on a monthly basis.¹⁴² Moreover, there appears to be no public access to the results of this survey analysis that is described as follows:

Air Canada conducts a monthly customer satisfaction survey (CSM) which measures customer satisfaction through a number of metrics ranging from flight satisfaction to value for money. Data is also collected on key service touch points such as the airports experience and service in the air. The CSM also identifies what is most appreciated by our customers and areas for improvement. On a yearly basis Air Canada identifies key trends from the CSM reports which need to be addressed to improve customer satisfaction. These trends are then translated into a yearly plan with targets which is then distributed to the appropriate internal stakeholders for action.¹⁴³

WestJet occasionally releases the results of surveys it commissions but typically only does so on the broadest of terms. For example, when WestJet released survey results May 2013, the company simply proclaimed it has, “once again been named Canada’s most-preferred airline in a national study of Canadian flyers conducted in April of this year by Leger Marketing. The study also rated WestJet as the most trusted airline and the airline that offers the best customer service.”¹⁴⁴ No figures were provided, or any access to more detailed results of the empirical research. WestJet continuously promotes itself as customer friendly, and that is their prerogative. However, it is challenging for an observer to ascertain the exact level of customer satisfaction Canadians have with WestJet or any other Canadian airline given the lack of evidence produced for public consumption. This lack of evidence displays a potential need for an impartial third-party to provide empirical evidence allowing all stakeholders the opportunity to review customer satisfaction metrics and arrive at their own conclusions.

¹⁴⁰ “Air Canada ranks high for rude flight attendants,” *CTV News*, April 23, 2014, <<http://www.ctvnews.ca/business/air-canada-ranks-high-for-rude-flight-attendants-informal-survey-finds-1.1789350>>.

¹⁴¹ Air Canada, *GRI Table 2013*, Product and Service Labeling, G4-PR5, <http://www.aircanada.com/en/about/gri_app_2013.html>, and Air Canada, *G3.1 Content Index - GRI Application Level B*, Product and Service Labeling PR5, <http://www.aircanada.com/en/about/gri_app.html>.

¹⁴² Air Canada, *GRI Table 2013*, Product and Service Labeling, G4-PR5, <http://www.aircanada.com/en/about/gri_app_2013.html>

¹⁴³ Air Canada, *G3.1 Content Index - GRI Application Level B*, Product and Service Labeling PR5, <http://www.aircanada.com/en/about/gri_app.html>.

¹⁴⁴ WestJet, “WestJet is Canada’s most preferred airline-again,” *Media Release*, May 10, 2013, <<http://www.newswire.ca/en/story/1163217/westjet-is-canada-s-most-preferred-airline-again>>.

The effectiveness of the current air traveller complaint resolution process has been questioned since the Government of Canada wound down the office of the Air Travel Complaints Commissioner in 2006. During the transition to the current air passenger complaints process, Canada's former Air Travel Complaints Commissioner, Bruce Hood, said the proposal could make it increasingly difficult for Canadians to resolve problems with air travel and that complaints will get lost in the Canadian Transportation Agency.¹⁴⁵ Instead of semi-annual reports highlighting airline complaints specifically, these are now included with a myriad of other figures in the Canadian Transportation Agency's Annual Report. The 2006 commentary offered by the *National Post* that "permanently dismantling the Office of the Commissioner, who acted as an advocate for airline passengers to the federal government and the media, could put limits on the Agency's ability to fight for change in the airline industry," was particularly foretelling.¹⁴⁶ From a Canadian Transportation Agency spokesperson remarks in 2006:

*Air Passenger Complaints
received by Air Travel
Complaints Commissioner,
2000-2004*

2004	1100
2003	1058
2002	1770
2001	2747
2000	1248*

*Complaints received from July to December.

Source: Air Travel Complaints
Commissioner Reports

Definitely with a commissioner there was a higher profile for the program, with the reports and public interventions...The commissioner, in his or her role, was in more direct contact with the airline industry, [and] as well as through his or her position was able to identify some trends or to make specific recommendations about some system issues or systemic problems that were observed.¹⁴⁷

The Canadian Transportation Agency spokesperson went on to express the view that the proposed changes will effectively reduce the Agency's role to dealing with airline complaints on a case-by-case basis instead of being able to tackle larger, ongoing problems with airline service or quality.¹⁴⁸

Almost a decade later, and contrary to the view of the Canadian Transportation Agency in its 2013-2014 Annual Report, some critics contend many Canadian consumers don't know much about what rights they can demand of an airline when they're bumped

¹⁴⁵ "Tories would like to divert your airline complaint," *National Post*, May 5, 2006, <http://www.canada.com/story_print.html?id=ed52e9f6-1ad8-43f2-971a-aa759ab56b30&sponsor=>>.

¹⁴⁶ "Tories would like to divert your airline complaint," *National Post*, May 5, 2006, <http://www.canada.com/story_print.html?id=ed52e9f6-1ad8-43f2-971a-aa759ab56b30&sponsor=>>.

¹⁴⁷ Carly Weeks, "Air complaints head could be gone for good: Tories' proposal of dismantling office has former commissioner 'concerned,'" *Ottawa Citizen*, 5 May 2006, p. A3. See also, Library of Parliament, *Bill C-11: Transportation Amendment Act*, LS-527E, May 26, 2006, p. 27.

¹⁴⁸ Library of Parliament, *Bill C-11: Transportation Amendment Act*, LS-527E, May 26, 2006, p. 27.

from overbooked flights, or when their flights are cancelled or their luggage lost.¹⁴⁹ Whether there is a direct correlation between the concerns of Mr. Hood and the Canadian Transportation Agency spokesperson in 2006 to the present day critiques of the current air passenger complaint resolution is an open question.

For instance, it can be argued that contributing to the confusion experienced by air passengers regarding their rights is the manner in which the Canadian Transportation Agency advises air passengers of their existing entitlements as well as the way the Canadian Transportation Agency adjudicates consumer complaints. The Canadian Transportation Agency publishes a *Fly Smart* guide that urges passengers to consult each airline's tariffs or conditions of carriage.¹⁵⁰ From a practical perspective, these conditions of carriage are legal documents not known for their brevity. In addition, the conditions of carriage are different for each airline operating in Canada. As a result, Canadians are left with consulting a lengthy legal document, and then, once satisfied that a term of that document has been violated, attempting to submit a complaint to the Canadian Transportation Agency.

Once submitted, the Canadian Transportation Agency adjudicate consumer complaints on a case by case basis. Therefore, rather than having a single document that all stakeholders, including air passengers, can point to clearly spelling out an air carriers responsibilities and resolutions, we have an quasi-judicial body issuing edicts because each airline has its own unique conditions of carriage. As a result, from a consumer protection standpoint, some Canadian air passengers have effectively been better served when facing complications while travelling on flights originating in other jurisdictions, such as the European Union, than domestic flights.¹⁵¹

Moreover, the resolution of consumer complaints regarding airline service is merely a portion of the overall mandate of the Canadian Transportation Agency. Given the Canadian Transportation Agency's approach to adjudication, the structure of the various conditions of carriage, and their presentation of so-called advice to air passengers, one could be persuaded that processing and adjudicating of air passenger complaints, when weighed against the overall mandate of the Canadian Transportation Agency,¹⁵² may not

¹⁴⁹ Leslie MacKinnon, "Airline passengers in the dark about rights, advocate says," *CBC News*, January 9, 2014, <<http://www.cbc.ca/news/politics/airline-passengers-in-dark-about-rights-advocate-says-1.2489336>>.

¹⁵⁰ Leslie MacKinnon, "Airline passengers in the dark about rights, advocate says," *CBC News*, January 9, 2014, <<http://www.cbc.ca/news/politics/airline-passengers-in-dark-about-rights-advocate-says-1.2489336>>, and Canadian Transportation Agency, *Fly Smart*, 2012, <<https://www.otc-cta.gc.ca/eng/fly-smart>>.

¹⁵¹ Leslie MacKinnon, "Airline passengers in the dark about rights, advocate says," *CBC News*, January 9, 2014, <<http://www.cbc.ca/news/politics/airline-passengers-in-dark-about-rights-advocate-says-1.2489336>>.

¹⁵² The Canadian Transportation Agency is an independent, quasi-judicial tribunal and economic regulator. It makes decisions and determinations on a wide range of matters involving air, rail and marine modes of transportation under the authority of Parliament, as set out in the *Canada Transportation Act* and other legislation. The mandate of the Canadian Transportation Agency includes:

be their highest priority. Thus, it is possible the concerns expressed by the Canadian Transportation Agency itself in 2006 are reflected in the 2014 commentary offered by Mr. Yakabuski regarding endlessly reliving a horrible flight experience during a bureaucrat-driven complaint adjudication process.

The remainder of this section will examine two existing complaint resolution models from other Canadian industries – banking and telecommunications. This exercise will attempt to observe how issues viewed as detrimental to the consumer experience under the current Canadian Transportation Agency system are approached and processed by the banking and telecommunications industry. The aim of these comparative examinations is to explore elements of these complaint resolution processes that could serve as alternatives to enhance the current complaint adjudication process for air passengers in Canada.

3.2 A cautionary tale: Banking industry - OBSI

OBSI Creation and Development

The origins of the Ombudsman for Banking Services and Investments (OBSI) can be found in the early 1990s. At this time, Canadian banks faced considerable public criticism regarding the growth in service charges, tightening credit and executive compensation.¹⁵³ As a result, Canadian banks, fearing the potential for legislative or regulatory action to address these concerns, began introducing ombudsman's offices in 1995. The mandates of these offices were to hear complaints that could not be resolved through a bank's normal processes. The Canadian Bankers Association followed suit in early 1996 by establishing the office of the Canadian Banking Ombudsman (CBO) — to hear appeals of individual bank ombudsman decisions.¹⁵⁴

Two key concerns raised by critics of the CBO-model stood out – their determinations were unenforceable and the perception that an industry-created group

-
- *Economic regulation*, to provide approvals, issue licences, permits and certificates of fitness, and make decisions on a wide range of matters involving federal air, rail and marine transportation.
 - *Dispute resolution*, to resolve complaints about federal transportation services, rates, fees and charges.
 - *Accessibility*, to ensure Canada's national transportation system is accessible to all persons, particularly those with disabilities.

¹⁵³ D. Clarke and K. Webb, *Market-driven Consumer Redress Case Studies and Legal Issues*, (2002) Industry Canada, Office of Consumer Affairs, p.13. See also Consumers Council of Canada, *Canada's Banking Dispute Resolution System*, (2012) p.6.

¹⁵⁴ D. Clarke and K. Webb, *Market-driven Consumer Redress Case Studies and Legal Issues*, (2002) Industry Canada, Office of Consumer Affairs, p.13. See also Consumers Council of Canada (2012), *Canada's Banking Dispute Resolution System*, p.6. Initially, the CBO intended to only review appeals from small businesses, but this was expanded to all consumer complaints in March 1997.

would be biased in its own favor.¹⁵⁵ The perception of bias raised concerns that evidence and complaints from consumers would not be treated fairly.¹⁵⁶ To their credit, until 2007, institutions that participated in the CBO model adhered to its rulings without exception.

Both the McKay Task Force on the Future of the Canadian Financial Services Sector (1998) and a 1999 policy paper from Finance Minister Paul Martin called for a single independent dispute resolution system for all financial institutions.¹⁵⁷ As a result of these studies, in 2002, the CBO was renamed the Ombudsman for Banking Services and Investments (OBSI) to reflect the addition of investment sector members, including all members of the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA).¹⁵⁸ In 2014, the membership of OBSI expanded to include all registered dealers and advisors outside of Québec that had retail investor clients.¹⁵⁹

Complaints Process & Statistics

In order to bring forward a complaint to the OBSI, a consumer must first exhaust all redress and ombudsman options provided by their bank or investment service provider. However, if a consumer remains dissatisfied after pursuing a resolution within their service provider, they can bring forward their case before the OBSI as an alternative to the legal system. If the OBSI determines a firm has acted unfairly, made an error or given bad advice, they can recommend that the firm restore the financial position of the complainant, up to \$350,000.¹⁶⁰ As noted, the OBSI cannot order a firm to follow a recommendation, although they can publicize the name of any firm that refuses a recommendation.¹⁶¹

Recent OBSI Annual Reports contain year over year complaint figures for banking customers for those institutions that still participate under its mandate:¹⁶²

¹⁵⁵ Consumers Council of Canada, *Canada's Banking Dispute Resolution System*, (2012) p.6.

¹⁵⁶ Consumers Council of Canada, *Canada's Banking Dispute Resolution System*, (2012) p.6.

¹⁵⁷ Consumers Council of Canada, *Canada's Banking Dispute Resolution System*, (2012) p.6, and Finance Canada, *Reforming Canada's Financial Services Sector: A Framework for the Future*, (1999) p.56.

¹⁵⁸ Ombudsman for Banking Services and Investments, *History*, <<http://www.obsi.ca/en/about-us/history>>.

¹⁵⁹ Ombudsman for Banking Services and Investments, *History*, <<http://www.obsi.ca/en/about-us/history>>. See also Canadian Securities Administrators, *CSA Notice of Amendments to National Instrument 31-103, Registration Requirements, Exemptions and Ongoing Registrant Obligations and to Companion Policy 31-103CP Registration Requirements, Exemptions and Ongoing Registrant Obligations-Dispute Resolution Services*, December 19, 2013, <http://www.osc.gov.on.ca/documents/en/Securities-Category3/ni_20131219_31-103_amendments.pdf>

¹⁶⁰ Ombudsman for Banking Services and Investments, *About Us*, <<http://www.obsi.ca/en/about-us>>.

¹⁶¹ Ombudsman for Banking Services and Investments, *About Us*, <<http://www.obsi.ca/en/about-us>>.

¹⁶² Ombudsman for Banking Services and Investments, *2014 Annual Report*, p. 87, Ombudsman for Banking Services and Investments, *2013 Annual Report*, p. 67, and Ombudsman for Banking Services and Investments, *2012 Annual Report*, p. 75.

Table 5. OBSI annual complaints statistics

Year	Banking Case Files Opened	Investment Case Files Opened	Total Case Files Opened	Compensation Refusals
2014	225	345	570	8
2013	207	434	641	10
2012	210	346	656	3
2011	397	599	802	
2010	462	562	1024	
2009	391	405	990	
2008	324	446	670	

3.2.1 Limitations of OBSI model

The limitations of employing a model similar to OBSI for commercial airlines are two-fold. For banking customers, the OBSI has limited enforcement powers. In addition, the participation of financial institutions to use OBSI is not mandatory. Currently, Canadian banks have the ability to use an alternative dispute resolution service. In PIAC's view, these two factors undermine the effectiveness of the OBSI for banking consumers to such a degree that it should not be considered an applicable dispute resolution model for Canadian airline passengers at this time.

(a) Limited Enforcement Power

From 1997 until 2006, the inability to compel banks using OBSI as a dispute mechanism to adhere to its rulings was only a theoretical concern from a consumer perspective, since institutions participating under the CBO/OBSI model adhered to its rulings. However, since 2006, banks and investment firms began resisting rulings brought forward by the OBSI, prompting criticism from consumer advocates, as well as the OBSI itself. In fact, the OBSI released a statement to address this disconcerting trend in November 2012, stating:

A firm's refusal to compensate means that OBSI must publicize the refusal as well as our investigation's findings under the so-called 'name and shame' requirements of Section 27 of our Terms of Reference. It is the principal tool that OBSI has to incent firm cooperation, but it was never meant to be used.¹⁶³

¹⁶³ Ombudsman for Banking Services and Investments, *Firm Refusals to Compensate*, November 8, 2012, <<http://www.obsi.ca/en/news-a-publications/e-news-archive/254>>.

Even though the OBSI was created in response to impending government regulation and oversight, it appears firms have forgotten given their increasingly flippant approach to abiding by OBSI rulings. This lack of enforcement has become a fundamental flaw in the excellent work provided by the OBSI since its inception.

(b) Voluntary Nature of Membership

Investment firms in Canada are legally obligated to use OBSI as a dispute settlement mechanism; however, for banking institutions, this is not the case. While the Minister of Finance has the power under the *Bank Act*, subs. 455.1 to have the OBSI designated as the only external complaints body for banks, this power has yet to be applied. As a result, the participation of Canadian banks in the current dispute resolution mechanism is completely voluntarily. It was the sole dispute resolution mechanism until 2008, when the Royal Bank of Canada left the industry-led entity and retained a private company to perform resolution services. Since then, TD Canada Trust has also retained a private corporation for this service. As a result, RBC and TD customers can still avail themselves of the OBSI if they have an unresolved dispute with their investments, but not for their banking disputes.

In July 2012, Canada's Ministry of Finance announced regulations to set requirements that external complaints bodies must meet for approval. When it did so, it did not mandate a specific provider, only reiterating a requirement for Canada's banks to have an external dispute resolution provider.¹⁶⁴ A number of groups, including the Canadian Association of Retired Persons (CARP), the Canadian Federation of Independent Business (CFIB), Canadian Foundation for the Advancement of Investor Rights (FAIR), Option consommateurs (OC), Union des consommateurs, the Investor Advisory Panel (IAP) of the Ontario Securities Commission (OSC), the Consumers Council of Canada (CCC), OBSI's arms-length Consumer and Investor Advisory Council, le Mouvement d'éducation et de défense des actionnaires (le MÉDAC), the Canadian Community Reinvestment Coalition, and the Small Investor Protection Association (SIPA) pointed out the dispute-resolution process that consumers access when in dispute with their banking service provider needs to be credible, independent, and impartial.¹⁶⁵

Moreover, organizations such as the World Bank and the Australia and New Zealand Ombudsman Association (ANZOA) have come out strongly against so-called 'competition' among Ombudsmen, describing it as a choice that:

... presents severe risks to independence and impartiality – because financial businesses may favour the ombudsman they consider likely to give businesses the best deal. It overlooks the role of financial ombudsmen as an alternative to the

¹⁶⁴ Finance Canada, *Harper Government Imposes Tough New Pro-Consumer Oversight on Banking Complaints*, Media Release, July 6, 2012, <<http://www.fin.gc.ca/n12/12-079-eng.asp>>.

¹⁶⁵ Ombudsman for Banking Services and Investments, *OBSI Update*, March 26, 2012, <<http://www.obsi.ca/en/news-a-publications/208-obsi-update-march-26-2012-98806>>.

courts and creates one-sided competition – because, unlike the financial businesses, the consumers are not given any choice of ombudsman.¹⁶⁶

PIAC has previously commented that regulation to allow competing ombudsmen services paid for by a bank “entrench a perceived and an actual conflict of interest between the banks and their customers. Consumers who are in a dispute with their bank cannot afford to play a game where the referee is paid by the other team.”¹⁶⁷

3.2.2 Is the OBSI model for Canadian banking suitable for air passengers?

It is difficult to recommend the dispute resolution model currently in place for Canadian banking customers to address disputes arising between air passengers and airlines. The limited enforcement power held by adjudicators, combined with the perception those adjudicators hired by a single bank have a conflicted position, remain fatal flaws in a system mandated to help consumers resolve disputes in a timely, impartial and transparent manner. Until these concerns are addressed, the story of the OBSI and the dispute resolution model for banking customers should be used as a cautionary tale when considering the appropriate dispute resolution model for Canadian airline passengers. While this situation may be improved with the introduction of a Financial Consumer Code (see more on this possibility in section 4.3 below) such a code as yet has not come into existence and some time may pass if it is created for the OBSI to adapt to using the new tool to the benefit of financial consumers.

3.3 A promising model: Telecom industry - CCTS

CCTS Structure & Mandate

The Commissioner for Complaints for Telecommunications Services (CCTS) was created in 2007 by several telecommunications service providers (TSPs) in response to an order from the Governor in Council (P.C. 2007-533, 4 April 2007). The Order stated that an independent consumer agency with a mandate to resolve complaints from individual and small business retail customers should be an integral component of a deregulated telecommunications market. The Order also stated that all TSPs should participate in and contribute to the financing of an effective consumer agency and that its

¹⁶⁶ Ombudsman for Banking Services and Investments, *OBSI Update*, March 26, 2012, <<http://www.obsi.ca/en/news-a-publications/208-obsi-update-march-26-2012-98806>>. See also D. Thomas and F. Frizon, *Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman*, World Bank (2012), p. 38-39.

¹⁶⁷ PIAC, *Competing Banking Ombudsmen Bad for Financial Consumers*, Media Release, August 13, 2011, <<http://www.piac.ca/our-specialities/competing-banking-ombudsmen-bad-for-financial-consumers/>>.

structure and mandate would be approved by the Canadian Radio-television and Telecommunications Commission (CRTC). In December 2007, following public hearings, the CRTC issued Telecom Decision 2007-130, *Establishment of an Independent Telecommunications Consumer Agency*.

The CCTS operates as a not-for-profit organization and has a mandate to assist consumers with concerns about products and services offered in the telecommunications sector, including:

- Home Telephone;
- Long Distance telephone services (including prepaid calling cards);
- Wireless phone services (including voice, data, and text);
- Wired and wireless Internet access services;
- White page directories, Directory assistance, and Operator services; and,
- Other forborne (unregulated) retail telecommunications services.¹⁶⁸

The types of concerns handled by the CCTS are issues that arise between consumers and service providers, such as:

- Compliance with contract terms and commitments (but not the contract terms themselves).
- Billing disputes and errors (but not the price of the service itself).
- Service Delivery – concerns regarding the installation, repair or disconnection of service; and,
- Credit management. For example, complaints about security deposits, payment arrangements and collections treatment of customer accounts.¹⁶⁹

The scope of the complaints reviewed by the CCTS is limited. For instance, the CCTS does not investigate complaints regarding television and radio broadcasting services, yellow page directories, security services such as alarm monitoring, Internet content and software-based applications.¹⁷⁰ However, in instances where the nature of the complaint is outside of their mandate, CCTS officials will direct the consumer to the appropriate agency and forward their complaint.

The CRTC announced in December 2010 that all telecommunications service providers that provide services within the scope of the CCTS's mandate were to be members of the Agency for a five-year period.¹⁷¹

¹⁶⁸ Commissioner for Complaints for Telecommunications Services, *Mandate*, <<http://www.ccts-cprst.ca/complaints/mandate>>.

¹⁶⁹ Commissioner for Complaints for Telecommunications Services, *Mandate*, <<http://www.ccts-cprst.ca/complaints/mandate>>.

¹⁷⁰ Commissioner for Complaints for Telecommunications Services, *Mandate*, <<http://www.ccts-cprst.ca/complaints/mandate>>.

¹⁷¹ Canadian Radio-television and Telecommunications Commission, *Telecom Regulatory Policy CRTC 2011-46*, January 26, 2011, <<http://www.crtc.gc.ca/eng/archive/2011/2011-46.htm>>.

Governance & Oversight

Governance of the CCTS is provided by an independent Board of Directors consisting of seven directors. According to the CCTS, the Board is structured to provide for the participation of all stakeholders while remaining independent from the telecommunications industry.¹⁷² The directors are allotted in the following manner:

- Four Independent Directors, two of whom are nominees of consumer groups; and,
- Three Industry Directors, one each to represent the Incumbent Local Exchange Carriers (ILECs), the Cable Companies, and the Other Participating Service Providers.¹⁷³

Funding

The costs associated with operating the CCTS are covered by billing participating service providers. Service providers pay a one-time fee based on the amount of their Canadian telecommunications revenues, and then proceed to contribute annually under a funding formula that includes:

- a fee based on each provider's proportion of participating providers' Canadian telecommunications revenues; and
- a fee based on the number of complaints the CCTS receives from each provider's customers.¹⁷⁴

CCTS annual reports suggest their operating budget has grown from \$1.9 million in 2008-2009 to \$3.9 million in 2012-2013.¹⁷⁵

Complaint Process & Statistics

The CCTS requests the information relevant to consumer complaint, such as name, address, contact number, any account number assigned by the telecommunications service provider to a complaint, details of the complaint, specific dates, steps taken to resolve the issue and what the consumer believes would be a reasonable resolution.¹⁷⁶ Depending upon the nature of the complaint (contract dispute, billing, service delivery, etc.), the CCTS will ask for additional information it believes is relevant.

¹⁷² Commissioner for Complaints for Telecommunications Services, *Board of Directors*, <<http://www.ccts-cprst.ca/about/who-we-are#board>>.

¹⁷³ Commissioner for Complaints for Telecommunications Services, *Board of Directors*, <<http://www.ccts-cprst.ca/about/who-we-are#board>>.

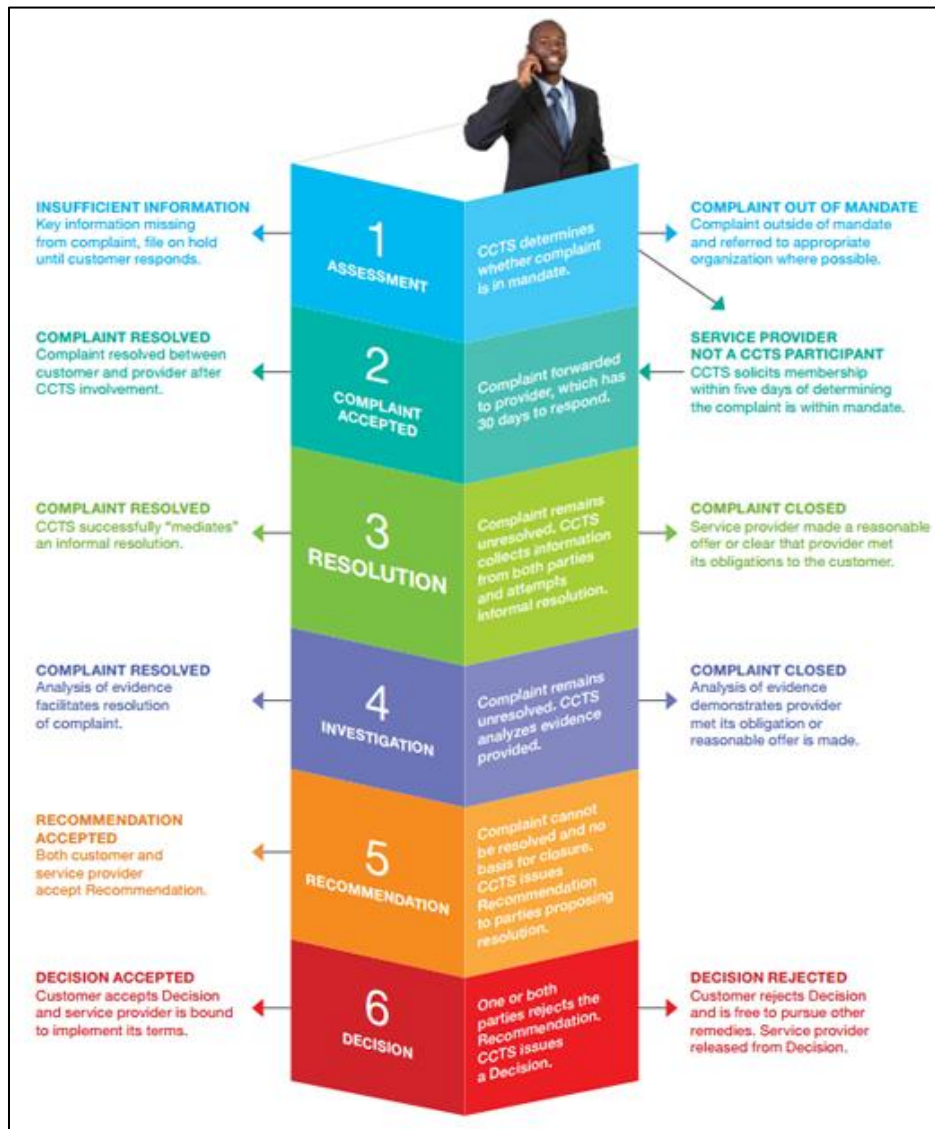
¹⁷⁴ Commissioner for Complaints for Telecommunications Services, *Structure and Funding*, <<http://www.ccts-cprst.ca/about/structure-and-funding>>.

¹⁷⁵ Canadian Commissioner for Telecommunications Services, *Annual Report, 2009-2010*, p. 10, and. Canadian Commissioner for Telecommunications Services, *Annual Report, 2012-2013*, p. 7.

¹⁷⁶ Commissioner for Complaints for Telecommunications Services, *Guide to Making a Complaint*, <<http://www.ccts-cprst.ca/complaints/guide>>.

The CCTS provides a detailed graphic describing the various stages of a consumer complaint and how it is processed at each stage of their investigation:

Figure 5. CCTS complaints process



Source: Commissioner for Complaints for Telecommunications Services website

According to the 2013-2014 Annual Report of the CCTS, 11,340 complaints were accepted, or reached stage 2 in the graphic above.¹⁷⁷ Of those complaints, 11,196 or 99% were concluded before the CCTS was compelled to issue a recommendation to both

¹⁷⁷ Commissioner for Complaints for Telecommunications Services, *2013-2014 Annual Report*, p. 7.

parties proposing a resolution (or before stage 5 in the above graphic).¹⁷⁸ Of the complaints that were concluded, 87% were successfully resolved, and only 7 required the CCTS to make an official recommendation (stage 5) while 1 required a decision (stage 6).¹⁷⁹

The remaining 13% of concluded complaints (1,434) were done so for any number of reasons, including:

- a determination by the CCTS that a service provider reasonably met their obligations to the customer;
- the service provider extended a resolution that was reasonable to the CCTS but rejected by the customer; or,
- the customer withdrew the complaint.¹⁸⁰

The CCTs also noted 77% of complaints to the CCTS in 2013-2014 were concluded within 40 days.¹⁸¹

Review by the CRTC

After its first periodic review of the CCTS in 2010, the CRTC noted “that the degree of public awareness of the CCTS is crucial to its effectiveness – consumers will not seek recourse with the CCTS if they are not aware that it exists or of how it might help them”.¹⁸² Accordingly, the CRTC ordered the CCTS to include in its annual report “measurements of public awareness and customer satisfaction”.¹⁸³ Since 2010, however, the CCTS has only reported on metrics pertaining to “customers” who have used the complaint resolution service.

The CRTC intends to review the mandate and operation of the CCTS in 2015-2016 and will monitor the implementation of any decisions taken during that review the following year.¹⁸⁴ This coincides with the expiration of the directive announced by the CRTC in December 2010 requiring all telecommunications service providers offering

¹⁷⁸ Commissioner for Complaints for Telecommunications Services, *2013-2014 Annual Report*, p. 7.

¹⁷⁹ Commissioner for Complaints for Telecommunications Services, *2013-2014 Annual Report*, p. 7.

¹⁸⁰ Commissioner for Complaints for Telecommunications Services, *2013-2014 Annual Report*, p. 34.

¹⁸¹ Commissioner for Complaints for Telecommunications Services, *2013-2014 Annual Report*, p. 7.

¹⁸² Canadian Radio-television and Telecommunications Commission, *Telecom Regulatory Policy CRTC 2011-46*, January 26, 2011, <<http://www.crtc.gc.ca/eng/archive/2011/2011-46.htm>>.

¹⁸³ Canadian Radio-television and Telecommunications Commission, *Telecom Regulatory Policy CRTC 2011-46*, January 26, 2011, <<http://www.crtc.gc.ca/eng/archive/2011/2011-46.htm>>.

¹⁸⁴ Canadian Radio-television and Telecommunications Commission, *Three-Year Plan 2014-2017*, April 23, 2014, p.16.

services within the scope of the CCTS's mandate are to be members of the agency for a five-year period.¹⁸⁵

3.3.1 Advantages of CCTS model

When compared to alternative industry dispute resolution models, the CCTS model appears to have numerous positive attributes. For instance, CCTS' primary focus is to resolve complaints relating to your telecommunications services. Other organizations of this nature can be given numerous other regulatory tasks and responsibilities that may limit their overall success. The funding model where service providers contribute to the operational budget based on revenues and the volume of consumer complaints also appears to be effective. This model provides an economic incentive for industry players lessen the number of consumer complaints that escalate to the CCTS.

For those complainants that are compelled to contact the CCTS, the agency appears to be very accessible, has a simple process for complaint handling, and attempts to provide resolution in a timely fashion. Complaints are accepted through multiple channels-online, using a telephone or by mail. Once the relevant documentation is provided by complainants, the necessary investigative effort is carried out by CCTS agents. As noted, the vast majority of complaints are resolved before the CCTS is compelled to issue a recommendation, and 77% of complaints to the CCTS in 2013-2014 were concluded within 40 days, while 89% were processed within 60 days.¹⁸⁶

Survey evidence suggests those who use the CCTS are satisfied with their service. For instance, from 2010-2011 to 2012-2013, over 90% responded it was relatively easy to contact the CCTS.¹⁸⁷ In both years, at least 84% of respondents noted the service they received, whether from contact centre agents, complaint resolution agents or investigators, was polite and professional.¹⁸⁸ Finally, over 70% of respondents surveyed each year felt CCTS staff acted impartially and the complaint process was fair.¹⁸⁹

¹⁸⁵ Canadian Radio-television and Telecommunications Commission, *Telecom Regulatory Policy CRTC 2011-46*, January 26, 2011, <<http://www.crtc.gc.ca/eng/archive/2011/2011-46.htm>>.

¹⁸⁶ Commissioner for Complaints for Telecommunications Services, *2013-2014 Annual Report*, p. 3.

¹⁸⁷ Commissioner for Complaints for Telecommunications Services, *2012-2013 Annual Report*, p. 25, Commissioner for Complaints for Telecommunications Services, *2011-2012 Annual Report*, p. 23 and Commissioner for Complaints for Telecommunications Services, *2010-2011 Annual Report*, p. 33.

¹⁸⁸ Commissioner for Complaints for Telecommunications Services, *2012-2013 Annual Report*, p. 25-26, Commissioner for Complaints for Telecommunications Services, *2011-2012 Annual Report*, p. 23-24, and Commissioner for Complaints for Telecommunications Services, *2010-2011 Annual Report*, p. 33-34.

¹⁸⁹ Commissioner for Complaints for Telecommunications Services, *2012-2013 Annual Report*, p. 26, Commissioner for Complaints for Telecommunications Services, *2011-2012 Annual Report*, p. 24, and Commissioner for Complaints for Telecommunications Services, *2010-2011 Annual Report*, p. 34.

The level of transparency provided by the CCTS must also be noted. The agency provides detailed information on structure of organization, senior staff, its complaint process, detailed annual reporting on complaints statistics, as well as the identification of systemic industry issues. This may be a reflection of the composition of the CCTS Board of Directors, where industry stakeholders and independent board members co-exist to produce what appears to be an effective dispute resolution model.

3.3.2 Critique of the CCTS in its current form

A possible criticism of the CCTS model in its current form is the level of awareness it enjoys among the Canadian public. An industry could have an excellent dispute resolution mechanism available to their customers; however, its effectiveness is limited if only a small percentage of the public is aware the dispute resolution mechanism exists. It's possible the CCTS could be even more effective if a greater number of Canadians knew it existed.

In July 2009 the CCTS Board of Directors approved the first “public awareness” plan, including a suite of activities to which the participating telecommunications service providers committed themselves, all designed to ensure that customers were made aware of CCTS and the independent dispute resolution service it offers. The plan was amended in 2012, and current awareness undertakings include:

- The service providers are required to place on their web sites a notice about CCTS and a link to the CCTS web site.
- Service providers are required to place notices about CCTS on customers' bills four times per year. In addition, they will now also provide notice to customers who do not receive bills, such as pre-paid wireless customers;
- A service provider that could not resolve a customer's complaint is required to notify the customer about the right of recourse to CCTS following the second level of escalation in the company's complaints process.¹⁹⁰

From 2010-2011 to 2012-2013, the CCTS included results from a customer survey in their Annual Reports. According to the Commissioner, the survey was designed to assist the CCTS measure customer satisfaction and the success of their public awareness initiatives.¹⁹¹ The customer survey results relating to CCTS's public awareness initiatives were not included in the 2013-2014 Annual Report. Below is a table displaying the results of those surveys:

¹⁹⁰ Canadian Radio-television and Telecommunications Commission, *Telecom Regulatory Policy CRTC 2011-46*, January 26, 2011, <<http://www.crtc.gc.ca/eng/archive/2011/2011-46.htm>>. See also Commissioner for Complaints for Telecommunications Services, *Developing Public Awareness of CCTS – Updated*, <<http://www.ccts-cprst.ca/documents/public-awareness>>.

¹⁹¹ Commissioner for Complaints for Telecommunications Services, *2010-2011 Annual Report*, p. 4.

Table 6. Measurement of CCTS Public Awareness Initiatives – 2010-2011 to 2012-2013¹⁹²

Year	Did your service provider tell you about the CCTS?	Have you seen a notice of CCTS on your bill?	Have you seen a notice about CCTS on your service provider's website?
	% Responding "Yes"		
2010-2011	8.11	9.43	9.59
2011-2012	6.7	14.4	9.8
2012-2013	9.9	15.2	16.7

The table above clearly indicates there is much room for improvement to raise awareness among Canadians concerning the existence of the CCTS as a dispute resolution mechanism.

Thus, while there are many attributes to admire regarding the CCTS as a dispute mechanism model, there remain some challenges as well. The overall effectiveness of any dispute mechanism model can only be measured accurately once a significant proportion of the population is it designed to serve are aware of its existence.

3.4 Applicability of CCTS model to airline industry

Perhaps it is appropriate we examine the applicability of the Canadian telecommunications industry complaints resolution system to Canada's commercial aviation industry. It is difficult to imagine Canada as a united nation without the presence of both of these services. Moreover, both these industries serve Canadians by acting as a gateway to the rest of the world. Canada's airline and telephone industry also share a familiar history as formerly regulated industries subject to deregulation activity in the last half of the twentieth century. Moreover the provision of many services in both of these industries remains subject to regulatory scrutiny. With these similarities in mind, we wish to examine how the CCTS model for the processing of telecommunication complaints would apply to the Canadian airline industry. Through this analysis it may be determined whether the CCTS model is ready for take-off in its application to Canada's airline industry, or it needs to be delayed or even cancelled.

¹⁹² Commissioner for Complaints for Telecommunications Services, *2012-2013 Annual Report*, p. 28, Commissioner for Complaints for Telecommunications Services, *2011-2012 Annual Report*, p. 26, and Commissioner for Complaints for Telecommunications Services, *2010-2011 Annual Report*, p. 35-36.

Structure & Mandate

As noted earlier, the CCTS was created in 2007 as a non for profit organization by several telecommunications service providers (TSPs) in response to an order from the Governor in Council to create an independent consumer agency with a mandate to resolve complaints from individual and small business retail customers. This order dictated all TSPs should participate in and contribute to the financing of an effective consumer agency and that its structure and mandate would be approved by the CRTC. The mandate of the CCTS is limited in scope and its use as a complaint resolution model is subject to a periodic review.

When placed into this context, it is possible to envision the commercial aviation industry in Canada to follow a similar path towards a complaint resolution service. When determining membership into a proposed complaint resolution scheme for air passengers, one could look to Statistics Canada data. In 2013, Statistics Canada reported 90 air carriers located in Canada who, in the calendar year before the year in which information is provided, delivered passengers.¹⁹³

Any proposed mandate for a potential Air Passenger Complaints Commissioner could be limited to those same subject areas subject to the application of section 85.1 of the *Canada Transportation Act*.¹⁹⁴ Alternatively, the mandate of a future Air Passenger

¹⁹³ Statistics Canada, *Aviation: Civil Aviation, Annual Operating and Financial Statistics, Canadian Air Carriers, Levels I to III*, Vol. 47, no. 2, Catalogue No. 51004-X, February 24, 2015, p. 2, <<http://www.statcan.gc.ca/pub/51-004-x/51-004-x2015002-eng.pdf>>. This figure was confirmed through correspondence with Statistics Canada in February 2015.

¹⁹⁴ *Canada Transportation Act*, section 85.1 states:

Review and mediation

85.1 (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint.

Report

(2) The Agency or a person authorized to act on the Agency's behalf shall report to the parties outlining their positions regarding the complaint and any resolution of the complaint.

Complaint not resolved

(3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.

Further proceedings

(4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

Complaints Commissioner could be limited to those policies areas related to air travel regulated in other jurisdictions by an external mechanism. A future Air Passenger Complaints Commissioner can report to the Canadian Transportation Agency in a similar fashion as the CCTS does to the CRTC in the telecommunications industry. The Canadian Transportation Agency, in turn, can initiate a periodic review of the complaints resolution regime on a periodic basis outlined in legislation or regulation.

In terms of the positioning of any future Air Passenger Complaints Commissioner, the history of the Air Travel Complaints Commissioner provides a cautionary tale. We contend that life of the Air Travel Complaints Commissioner's office graphically illustrates anything short of establishing an independent agency subjects an airline complaints resolution mechanism to the political expediency. By establishing the independence of the agency, procuring participation by industry stakeholders, and allowing the mechanism to be periodically reviewed, many of the circumstances preceding the downfall of the of the previous Air Travel Complaints Commissioner can be avoided.

Governance & Oversight

The independent Board of Directors model employed by the CCTS is easily transferable to a future Air Passenger Complaints Commissioner regime. As described above, the Board of Directors for the CCTS is composed a four independent directors, two of whom are nominees of consumer groups, as well as three industry directors, one each to represent the Incumbent Local Exchange Carriers (ILECs), the Cable Companies, and the Other Participating Service Providers. A balanced membership model is key to maintaining the legitimacy of a future complaint resolution mechanism for airline passengers. Board membership by the air carriers will serve to keep any unrealistic aspirations of independent board members in check. In turn, it is hope the presence of independent board members will prevent industry directors from attempting to circumvent their responsibilities under a future complaint resolution regime.

Funding

The costs associated with operating the CCTS are covered by billing participating service providers. Service providers pay a one-time fee based on the amount of their Canadian telecommunications revenues, and then proceed to contribute annually under a funding formula that includes:

- a fee based on each provider's proportion of participating providers' Canadian telecommunications revenues; and
- a fee based on the number of complaints the CCTS receives from each provider's customers.

A similar funding model could be envisioned for a future complaint resolution mechanism for the Canadian airline industry. Air carriers could supply a one-time fee based on air passenger revenues, as well as an annual contribution determined through

an agreed-upon formula that would take into account market share and complaint figures. Given the evidence presented by Statistics Canada, one should be able to determine the proportion of each air carrier's passenger revenue. In addition, the Canadian Transportation Agency, until such time as the proposed Air Passenger Complaints Commissioner could collect its own data, could determine the required complaint figures to implement a funding formula.

Complaint Process & Statistics

By employing the six-step CCTS process outlined, it is predicted the staff of a future Air Passenger Complaints Commissioner could process and resolve a large volume of air passenger complaints in a manner less costly and time-consuming than the current Canadian Transportation Agency process. Moreover, the participation of air carrier representatives on the Board of Directors, as well as funding from all air carriers should provide participating airlines with significant incentive to resolve future consumer complaints in a timely fashion. Serving as additional incentive is the knowledge that the subsequent volume and nature of air passenger complaints will be publicized in a transparent manner. The data compiled by a future Air Passenger Complaints Commissioner would also provide evidence to suggest whether the public's awareness of the Canadian Transportation Agency model was limited, and if so, to what degree. Furthermore, in addition to providing complaint figures, the Air Passenger Complaints Commissioner's office could act as an impartial third-party to provide empirical evidence allowing all stakeholders the opportunity to review customer satisfaction metrics.

Review by the Canadian Transportation Agency

If a complaint resolution model for air passengers is explored and implemented, the model should be subject to a Canadian Transportation Agency review after a set time period, such as 5 years. A review the mandate and operation of a complaint resolution model for air passengers will provide an opportunity for stakeholders to provide input on elements of the system that have been effective. Conversely, the review exercise will also identify outstanding challenges facing a complaint resolution body. For instance, following the first review of the CCTS, it was found that increasing public awareness was an outstanding challenge facing that organization and the telecommunication industry as a whole.

3.4.1 Is the CCTS a suitable dispute resolution model for Canadian air passengers?

The model employed by the CCTS to resolve disputes between service providers and telecommunication service consumers in Canada is worthy of serious scrutiny for policymakers in other sectors. The CCTS has proven itself to be efficient and accessible as a complaints process for those consumers who have used it. In addition, the funding

structure as well as the composition of the Board of Directors allows for multiple stakeholders to contribute to this process in a productive manner. Moreover, the CCTS employs a funding model incentivizing the reduction in the number of complaints the CCTS receives from each provider's customers. We believe this element would be beneficial to Canadian consumers and the Canadian airline industry.

As noted, the CCTS, as an industry dispute resolution model is singularly focused, and CCTS customers appear to be very satisfied with the service they receive. Moreover, the CCTS has made extensive efforts to be transparent regarding the structure of organization, senior staff, its complaint process, detailed annual reporting on complaints statistics, as well as the identification of systemic industry issues.

However, there remains at least one challenge for the CCTS to overcome before one can unabashedly promote it as an industry dispute resolution model. For instance, it is very possible a large percentage of the Canadian population is unaware the CCTS exists. We feel one of the primary tenants of an effective dispute resolution model is awareness among its clients that a dispute resolution is there to serve them. Regardless of the dispute resolution model chosen as a result of the Canadian Transportation Agency review, it would be prudent that any model selected address the question of client/public awareness.

3.5 Role of the Canadian Transportation Agency in consumer protection

As the key regulator of the transportation industry, the Canadian Transportation Agency should maintain a central role in overseeing the airline industry and creating broader policies in a similar way that the CRTC currently interacts with CCTS.

In its 2006 final report,¹⁹⁵ the Telecommunications Policy Review Panel recommended the creation of a "Telecommunications Consumer Agency" (TCA) which would be authorized to resolve complaints from individual and small business retail telecommunications customers.¹⁹⁶ (This agency was later born as the CCTS.) However, the Panel also recommended that certain mandates and responsibilities continue to be fulfilled by the CRTC. These included:

- ◆ Overseeing the ultimate structure and functions of the TCA;
- ◆ Resolving disputes between telecommunications service providers; and
- ◆ Addressing systemic issues faced by consumers – that is, the TCA should refer to the CRTC "significant or recurring problems that cannot be satisfactorily resolved

¹⁹⁵ Telecommunications Policy Review Panel, *Final Report 2006* (March 2006), online: Industry Canada <[https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/\\$FILE/tprp-final-report-2006.pdf](https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/$FILE/tprp-final-report-2006.pdf)>.

¹⁹⁶ *Ibid*, Recommendation 6-2.

based on complains from individual consumers” for further investigation and enforcement.¹⁹⁷

These recommendations were later adopted by the Governor in Council¹⁹⁸ and the CRTC. Through a series of consultations and decisions,¹⁹⁹ the CRTC has established the organization, functions, and membership of the CCTS, and reviewed the structure and mandate of the ombudsman once so far (the next review is forthcoming). As the chief regulator of the telecommunications industry, however, the CRTC continues to craft telecommunications policy, resolve disputes between service providers, and act as the primary enforcer of telecommunications law and regulations.

Similarly, the Canadian Transportation Agency’s authority should continue to encompass other mandates and responsibilities assigned to it in the *Canada Transportation Act*. These include resolving disputes between carriers and addressing, of its own motion, systemic issues raised in customer complaints and identified by the air passenger ombudsman. (By extension, the air passenger ombudsman should have the authority to identify and report systemic issues raised in complaints, as well as to bring applications of its own motion before the Canadian Transportation Agency to address these issues.) The Canadian Transportation Agency should also continue to receive formal applications from individuals who wish to see changes in air carrier tariffs or policies, or who wish to complain about fares or service related to domestic service that is solely provided by one carrier.²⁰⁰ In PIAC’s views, these types of policy changes, which often require a more extensive and detailed consultation process, should continue to be carried out by the Canadian Transportation Agency rather than the air passenger ombudsman, whose primary mandate would be to resolve individual complaints efficiently and effectively.

The Canadian Transportation Agency may also be best placed to oversee the creation, structure and functions of the airline passenger ombudsman, as well as to review these aspects of the organization periodically.

PIAC’s recommendation is that the Canadian Transportation Agency monitor and respond primarily to systemic issues that may arise from complaints by, for instance, creating and implementing new rules and policies. In PIAC’s view, it may be too onerous for the Canadian Transportation Agency to monitor case-by-case compliance of individual air carriers. It may be within the Canadian Transportation Agency’s discretion to order remedies for a group of airline passengers or to impose sanctions on an air carrier where

¹⁹⁷ *Ibid*, ss 6-9 to 6-11

¹⁹⁸ See: Order in Council PC 2007-533.

¹⁹⁹ See, for instance: Telecom Decision CRTC 2007-130, *Establishment of an independent telecommunications consumer agency* (20 December 2007); Telecom Decision CRTC 2010-921, *Review of the Commissioner for Complaints for Telecommunications Services – Decision on membership* (8 December 2010); and Telecom Regulatory Policy CRTC 2011-46, *Review of the Commissioner for Complaints for Telecommunications Services* (26 January 2011).

²⁰⁰ See, for instance: *Canada Transportation Act*, SC 1996, c 10, ss 66 and 67.2.

the Agency has identified an egregious violation of consumer protection rules, such as those that may be found in the Airline Code (elaborated upon below). However, remedies should generally be triggered by individual complaints rather than proactive enforcement by the Canadian Transportation Agency. It is PIAC's view that the Air Passenger Complaints Commissioner should focus on seeking remedies for individual complaints only, and that the Canadian Transportation Agency address broader or systemic compliance issues.

Part IV: Looking to the Future – A Code for Airline Passengers

4.1 The trouble with tariffs

Airline passengers in Canada need a core statement of rules which are accessible and easy to understand. Having a clear, binding central statement of rules would be beneficial to both airline passengers and air carriers themselves, who would have certainty of the rules which apply to their air services in Canada. Moreover, having a code of applicable rules would greatly facilitate the work of the new air passenger ombudsman.

The current system, which consists of a complex patchwork of air carrier tariffs for domestic and international tariffs as well as a smattering of rules found in the *Canada Transportation Act*, the *Air Transportation Regulations* and regulatory decisions made by the Canadian Transportation Agency, is both critically unclear and unworkable for airline passengers.

Similar conclusions were made by the CRTC with regards to telephone service in the 2000s. In Telecom Decisions CRTC 2002-34 and 2002-43, the CRTC found that the white pages and Terms of Service of local incumbent telephone companies:

- Were not always to easy understand;
- Did not contain all the rights of consumers; and
- May not contain all the information necessary for an accurate understanding of consumer rights.²⁰¹

The CRTC then consulted on and created a Statement of Consumer Rights (SOCR), the fundamental objective of which was “to provide consumers a comprehensive, accurate and clear understanding of their rights.”²⁰² The SOCR addressed a range of issues in plain language, including a local telephone consumer’s rights: to local telephone services; to block outgoing long distance calls; regarding deposits for service; and when a telephone company seeks to disconnect a customer.²⁰³

Similarly, following policies which sought to encourage competition and forbearance from regulation in the wireless telephone services market, the CRTC found that consumers cited significant concerns related to issues such as: choice of competitive service providers, cost of mobile wireless services, contract clarity, contract cancellation and phone locking.²⁰⁴ The CRTC thus determined that “market forces alone [could not] be

²⁰¹ Telecom Decision CRTC 2002-43, *Implementation of price regulation for Télébec and TELUS Québec*, at para 333; and

Telecom Decision CRTC 2002-34, *Regulatory framework for second price cap period*, at para 798.

²⁰² Telecom Decision CRTC 2006-52, *Statement of consumer rights*, at para 12.

²⁰³ See: Appendix to Telecom Decision CRTC 2006-52.

²⁰⁴ Telecom Decision CRTC 2012-556, *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services*, at para 7.

relied upon to ensure that consumers have the information they need to participate effectively in the competitive mobile wireless market,²⁰⁵ and considered it appropriate to impose a:

... mandatory code to address the clarity and content of mobile wireless service contracts and related issues, to ensure that consumers have the information and protection they need to make informed choices in the competitive market.²⁰⁶

The Wireless Code²⁰⁷ was subsequently issued in 2013 following a public consultation and hearing and applies to wireless services provided to individual and small business consumers in Canada.

The federal Department of Finance has also initiated a public consultation and is in the process of developing a financial consumer protection code for Canadian banking customers²⁰⁸ while holding a series of in-person stakeholder roundtables across Canada with the Minister of State (Finance) to solicit feedback on the consultation paper and the general initiative. Finance received 40 comments from stakeholders such as the Canadian Bankers Association and Credit Counselling Canada, as well as over 80 individual comments on the public consultation document.

Although the Financial Consumer Code has not yet been made public, even in draft form, the consultation paper noted that:

To achieve a framework that is more adaptable to changes in the financial marketplace, products and technology, the government is considering the merits of adopting standards or principles to anchor the financial consumer code. Standards and principles would set out general expectations and offer a degree of flexibility in implementation. They can be supplemented by rules and guidelines that would give more detailed requirements to allow an objective assessment of whether the principles are being met.

Principles should be meaningful, measurable and fair to both consumers and financial institutions. They should empower consumers to make responsible financial decisions and help financial institutions understand the requirements and expectations for compliance.²⁰⁹

Apart from this general “principles-based” approach (supplemented with “rules and guidelines”) the Department of Finance notably reference all of the disparate regulations

²⁰⁵ *Ibid* at para 26.

²⁰⁶ *Ibid* at para 27.

²⁰⁷ Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code*.

²⁰⁸ See: Department of Finance, *Canada’s Financial Consumer Protection Framework: Consultation Paper* (3 December 2013), online: Department of Finance <<http://www.fin.gc.ca/activty/consult/fcpf-cpcpsf-eng.asp>>; and Department of Finance, “Harper Government Consults With Canadians on a New Financial Consumer Code” (17 April 2014), online: Department of Finance <<http://www.fin.gc.ca/n14/14-060-eng.asp>>.

²⁰⁹ *Ibid*.

and voluntary agreements that consumer banking was subject to in Appendix B of the consultation paper.

The same approach taken by the CRTC and the Department of Finance to creating a consumer code in their respective industries could apply to the air travel industry today. Separate individual tariffs, similar to the ones which incumbent telephone companies used to apply to local telephone service, and akin to the regulations under the *Bank Act*²¹⁰ for financial services, are generally inaccessible and incomprehensible to average consumers. It would be challenging to conceive of how air travel rules, scattered haphazardly either in regulations or tariffs, would empower airline passengers to effectively navigate the airline market.

Conversely, a comprehensive, organized, yet binding statement of rules applying to air travel in Canada could ensure that airline passengers had the information and protection they need to make informed choices and participate effectively in the market. The exact details of how such rules would be expressed (namely, the balance of principles versus rules) and the content of such a code for the airline industry would have to be guided by further process; however, the trend to such a code to assist consumers in federally-regulated industries is clear.

Although it is perhaps too early to analyze the CCTS's experience and management of the Wireless Code, early indications suggest that the addition of a code is complementary to the institution of an ombudsman system, with each element reinforcing the other. We note that the CCTS' most recent Annual Report notes a marked reduction in overall complaints regarding wireless services. Whether this is causal or coincidental to the full implementation of the Wireless Code is not established; however, it is reasonable to speculate that the clear statement of rights and responsibilities of both carriers and consumers may have avoided some service delivery problems being brought to the CCTS as carriers adjusted their practices and perhaps as customers realized the extent of their rights.

PIAC does note, however, that the volume of complaints related to transparency and disclosure were, for wireless, bucking the trend and actually increased in number. Again, while hard to speculate on the exact cause of this trend, it is plausible that the statement of consumer rights emboldened a certain type of complaint being brought to the CCTS, namely those related the requirement to clearly, up-front outline the nature of service offered by carriers to the public, rather than actual service delivery issues. If this is so, the minor trend upward in, or even a creation of a new category of, such transparency and disclosure complaints in the airline industry would be easily outweighed by the consumer benefit from any reduction in service delivery problems for air passengers.

Thus, while it would be possible to launch an airlines complaint commissioner without a companion airline code, it would appear most efficient to institute both, if the

²¹⁰ SC 1991, c 46.

primary goal is transparency for consumers, certainty for carriers and an overall reduction in service complaints.

4.2 Past efforts to create codes for airline passengers

There have been several past, though informal and separate, efforts to develop some code or bill of consumer rights for airline passengers. However, one that is accessible, binding and all-encompassing has yet to be instated.

In 1999, a national coalition of consumer organizations formed the Canadian Association of Airline Passengers (CAAP)²¹¹. In response to the restructuring of the Canadian airline industry, CAAP advocated for the adoption of an *Airline Passenger Bill of Rights*²¹² which proposed rights related to four specific principles: airline safety, service quality, pricing, and public participation in policy development. However, the bill was never adopted by Parliament.

In 2008, the Government of Canada issued *Flight Rights Canada* for airline passengers as well as a voluntary *Code of Conduct of Canada's Airlines*.²¹³ The flight rights principles primarily related to legal provisions already laid out in the *Canada Transportation Act* and the *Air Transportation Regulations*, such as required disclosure of terms and conditions of carriage as well as the availability of the Canadian Transportation Agency complaints resolution process.

The *Code of Conduct of Canada's Airlines* is much more specific and lays out remedies in situations of flight and tarmac delays, lost or damaged baggage, and overbooking. However, the code was voluntary and only applied to Canadian airlines. Moreover, the *Flight Rights Canada* and *Code of Conduct of Canada's Airlines* can no longer be found on current Government of Canada webpages—an Internet search for “*Flight Rights Canada*” takes researchers to a new webpage²¹⁴ that does not set out the specific rules—and PIAC was only able to retrieve them by searching through government archives for old press releases. The Government of Canada states that three Canadian airlines – Air Canada, WestJet, and Air Transat – agreed to incorporate the code into their

²¹¹ The founding members of CAAP were the: Air Passenger Safety Group; Council of Canadians; Option consommateurs; Public Interest Advocacy Centre; and Transport 2000. Subsequent members included the: Manitoba Society of Seniors; Canadian Federation of Students; Rural Dignity of Canada; and Ontario Society of senior Citizen Organizations.

²¹² See: PIAC, *Airline Passenger Bill of Rights* (November 1999), online: PIAC <<http://www.piac.ca/our-specialities/airline-passenger-bill-of-rights/>>.

²¹³ Government of Canada, “Archived – Government of Canada announces Flight Rights Canada for air travelers” (5 September 2008), online: Government of Canada <<http://news.gc.ca/web/article-en.do?mthd=advSrch&nid=419619&ctr.dpt1D=&ctr.tp1D=&ctr.yrndVl=>>>.

²¹⁴ See: Government of Canada, “Air passenger rights,” online: Government of Canada <<http://travel.gc.ca/travelling/air/air-passenger-rights>> (accessed 26 February 2015).

individual tariffs.²¹⁵ However, PIAC's scan of Canadian air carrier tariffs suggests that these provisions were only adopted in their domestic tariffs.

4.3 The path towards a code for airline passengers

The goal of this section is to set out, in very broad and high-level terms at this time, several foundational aspects of a binding code for airline passengers (the "Airline Code") which PIAC considers essential:

- ❖ Objectives of the Airline Code;
- ❖ Consultation process;
- ❖ Substance of the Airline Code; and
- ❖ Enforcement.

4.3.1 Objectives of the Airline Code

PIAC proposes that the Airline Code have the following primary objectives:

- To provide consumers with a comprehensive, accurate and clear understanding of their rights;
- To clarify for industry stakeholders the types of products they can and cannot offer;
- To facilitate and promote complaints resolution by the air passenger complaints commissioner; and
- To harmonize rules applying to airline passengers and air carriers in Canada – thus creating fair, standardized carrier obligations and responsibilities towards their customers.

4.3.2 Consultation process

PIAC submits that the development of the Airline Code should include a broad, formal public consultation process that includes the Canadian public and all relevant stakeholders in the air travel industry. Moreover, in order to encourage the participation of public interest and consumer groups who often have far fewer resources at their disposal than industry stakeholders do, this consultation process should provide for the provision of costs awards for those eligible public interest groups.

²¹⁵ *Ibid.*

4.3.3 Substance of the Airline Code

Although the specific substantive areas which the Airline Code would address should be determined through the public consultation process, PIAC proposes that it be relevant to those covered in the general terms and conditions of carriage, using the *Code of Conduct of Canada's Airlines* as a model starting point. These areas include, for instance:

- Flight delays and cancellations;
- Lost or damaged baggage – including fragile baggage such as musical instruments;
- Refunds;
- Overbooking;
- Ticket reservations;
- Additional charges;
- Disclosure of information; and
- Acceptance of children.

Moreover, the provisions must be specific and prescriptive rather than broad and ambiguous.

PIAC proposes, however, that – similar to other codes implemented or being developed in Canada – the Airline Code should *not* address: pricing, quality of service, or limitation of liability. The Airline Code is not intended to be a tool used to “regulate” the competitive market in the conventional sense with regards to rates and quality of service, but to empower consumers and promote an efficient complaints resolution process.

Two other notable national mandatory codes that have been implemented or are in the process of being developed are the: Wireless Code and Financial Consumer Code. PIAC submits that both should be models to consider in developing the Airline Code – particularly in regards to structure and scope. The Wireless Code, for instance, sets out in details provisions which concern:

- Content and clarity of contracts;
- Changes to and termination of contracts;
- Measures related to reducing “bill shock” – such as notifications, usage monitoring tools, and caps on additional usage fees;
- Unlocking mobile devices;
- Repairs, lost and stolen mobile devices;
- Disconnection;
- Promotion and implementation of the Wireless Code; and
- Reviewing the Wireless Code.²¹⁶

²¹⁶ See: Telecom Regulatory Policy CRTC 2013-271; and

Similarly, the Financial Consumer Code intends to address issues such as:

- Responsibilities of financial institutions towards consumers and the notion of the “best interest of the consumer”;
- Disclosure requirements;
- Access to financial services;
- Solutions and services for vulnerable consumers; and
- Accountability and enforcement powers.²¹⁷

The scope of these two national mandatory codes are similar in that they set out the responsibilities of wireless service providers and financial institutions to their customers from the start of the contract or service to termination, and address the service providers’ responsibilities in specific situations or with regards to a specific segment of consumers. They do not, however, prescribe any rules related to fares or pricing, quality of service (save for certain staff training requirements), or limitations of liability.

4.3.4 Enforcement

In PIAC’s view, the Canadian Transportation Agency, as the air carriers’ chief regulator, would be in the best position to enforce non-compliance with the Code via administrative monetary penalties, changes in policy and regulation, or other sanctions it considers appropriate. On the other hand, the Air Passenger Complaints Commissioner’s primary mandate would be to resolve complaints at the individual case level. As mentioned above, PIAC recommends that remedies for individual cases of Code breaches be primarily triggered by one or a group of complaints rather than proactive compliance enforcement on the part of the Canadian Transportation Agency. However, the Canadian Transportation Agency should be authorized to order redress or policy changes of its own motion, particularly where it has identified systemic non-compliance.

The enforcement experience of the CCTS is instructive in how this two-level system could operate. CCTS deals with day-to-day complaints and can recommend low-value compensation or other remedies as part of its mandate. However, CCTS highlights recurrent problems in its annual report, which are then often brought before the upper-level regulator, the CRTC. The CRTC also retains control of major structural and systematic complaints. The CRTC was able to guide the development of the Wireless Code after a public proceeding to set its parameters, but since then has only had minor call to adjudicate on the outline of the Code. Given PIAC’s view that a code should be complementary to any ombudsman system, the parallels between an eventual airline

CRTC, *The Wireless Code, simplified* (2014), online: CRTC <http://www.crtc.gc.ca/eng/info_sht/t14.htm>.

²¹⁷ Department of Finance, *Canada’s Financial Consumer Protection Framework: Consultation Paper* (3 December 2013), online: Department of Finance <<http://www.fin.gc.ca/activty/consult/fcpf-cpcpsf-eng.asp>>.

complaints commissioner and airline code and the telecommunications arena are close enough to recommend a largely similar system.

Conclusion and Recommendations

On the surface, consumers appear to have access to award-winning air passenger service when traveling on airlines operating in Canada. However, this commitment to excellence may not currently extend to consumer protections and recourse options available to airline passengers in Canada. While this review does not intend to pass judgment on the level of passenger service provided by airlines operating in Canada, the lack of publicly available evidence to indicate Canadians are generally satisfied when they raise an air travel complaint is distressing.

The lack of evidence is especially important in light of the international and domestic rules and regulations that airlines operating in Canada must adhere to in order to provide passenger service. Given this operating environment, it was alarming that in a year (2013) when over 120 million passengers chose to travel by air in Canada, not a single major Canadian airline had an ombudsman office or a transparent and formalized complaint resolution system. Moreover, the evidence provided suggests the existing consumer protection framework for airline passengers in Canada is unclear and, where it operates, not always efficient and effective for consumers. One could easily contend the current Canadian Transportation Agency complaints process is practically invisible to the average Canadian. This complex process, deep within the recesses of the Canadian Transportation Agency, has allowed the fear expressed in 2006 by Canada's former Air Travel Complaints Commissioner, Bruce Hood, to come to fruition—that problems with air travel have become increasingly difficult for Canadians to resolve and complaints will get “lost” in the Canadian Transportation Agency.

This lack of clarity for consumers when it comes to their rights as air passengers results in the ongoing erosion of consumer confidence in, and the company image of, Canada's airlines. Despite the complexity and awareness challenges associated with the current Canadian Transportation Agency complaints process, complaint figures continue to grow. However, rather than criticize the operation of airlines operating in Canada, PIAC suggests these findings present an excellent opportunity for airlines to improve their reputation and increase consumer confidence. This report reviewed existing consumer complaint resolution models for air passenger service in other jurisdictions. It also examined existing complaint resolution models operating in other Canadian industries, such as banking and telecommunications. As a result of this analysis, it is apparent there are solutions which can allow the air travel industry to provide an effective consumer protection framework for airline passengers in Canada.

In order to meet the challenges posed by the existing complaint resolution regime, airline passengers in Canada would be well served by the introduction of two new vehicles:

- ◆ a document to champion the rights of Canadian air passengers; and
- ◆ a body specifically designed to resolve air passenger complaints that applies to all airlines operating in Canada.

The document, potentially dubbed the Airline Code, would be a comprehensive, organized, yet binding statement of rules applying to air travel in Canada. Such an Airline Code would ensure that airline passengers have the information and protection they need to make informed choices and participate effectively in the market. Evidence from the telecommunications and financial sectors suggest a clear trend towards creating such codes to assist consumers in federally-regulated industries. Similar to those sectors, PIAC recommends that the exact content of such a code for the airline industry should be guided by a public consultation process. However, the Airline Code provisions should be specific and prescriptive, and address the following objectives:

- To provide consumers a comprehensive, accurate and clear understanding of their rights;
- To clarify for industry stakeholders the types of products they can and cannot offer;
- To facilitate and promote complaints resolution by the air passenger complaints commissioner; and
- To harmonize rules applying to airline passengers and air carriers in Canada – thus creating fair, standardized carrier obligations and responsibilities towards their customers.

In addition to the creation of an Airline Code, PIAC recommends the creation of an Air Passenger Complaints Commissioner with the primary mandate to resolve complaints at the individual case level. This body, specifically designed to adjudicate air passenger complaints applicable to all airlines operating in Canada, should be modelled largely on the Commissioner for Complaints for Telecommunications Services (CCTS). The CCTS has proven itself to be efficient and accessible as a complaints process for consumers who have used it. Moreover, the CCTS employs a funding model which incentivizes a reduction in the number of complaints they receive from each service provider – an element which could be similarly effective for air passengers and the airline industry in Canada.

This report makes it clear that if the creation of an Air Passenger Complaints Commissioner is undertaken, it is critical that extensive efforts are made to be publicly transparent. This transparency effort should extend to the structure of the organization, senior staff, its complaint process, detailed annual reporting on complaints statistics, as well as the identification of systemic industry issues. Moreover, if a new dispute resolution model is chosen for Canada's airline industry, industry stakeholders must do their utmost to ensure Canadians are made aware that a new dispute resolution regime is there to serve them.

The Air Passenger Complaints Commissioner, as proposed, should also be tasked with identifying any systemic issues that are revealed through the course of its work. PIAC believes this identification capacity will be enhanced through the collection and public production of complaint statistics. The Air Passenger Complaints Commissioner should have the authority to identify and report systemic issues raised in complaints, as well as to bring applications of its own motion before the Canadian Transportation Agency to

address these issues. Through this process, Canadian airline passengers would begin to see an ombudsman figure publicly raising their concerns, while airlines would be provided additional incentive to address outstanding passenger frustration.

Under this proposed model, the Canadian Transportation Agency would maintain a central role in overseeing the airline industry by continuing to uphold the other mandates and responsibilities assigned to it in the *Canada Transportation Act*. These include resolving disputes between carriers and addressing, of its own motion, systemic issues raised in customer complaints and identified by the Air Passenger Complaints Commissioner. The Canadian Transportation Agency should also continue to receive formal applications from individuals who wish to see changes in air carrier tariffs or policies or who wish to complain about fares or service related to domestic service that is solely provided by one carrier. By concentrating on these types of policy changes, which often require a more extensive and detailed consultation process, the Canadian Transportation Agency may find itself reinvesting the resources previously committed to passenger complaint resolution. The Canadian Transportation Agency may also be best placed to oversee the creation, structure and functions of the Air Passenger Complaints Commissioner, as well as to review these aspects of the organization periodically.

Taken together, a future Airline Code and Air Passenger Complaints Commissioner, if functioning as anticipated, would not only clarify the “rules of the road” for air travel passengers in Canada, but would create the lift required for the reputation of the airline industry in Canada to take off.