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Issues Paper

Review of consumer protection measures in travel and travel related services market in Australia

February 2010



Introduction

On 8 May 2009, the Ministerial Council on Consumer Affairs (MCCA) directed the Standing Committee of Officials on Consumer Affairs (SCOCA) to commission a review of consumer protection in the travel and travel related services market, with a particular focus on the role of the Travel Compensation Fund (TCF).

In accordance with the terms of reference agreed by the MCCA, the review will:

- identify and review the effectiveness of, or need for, consumer protection measures in the travel and travel related services market, particularly in relation to consumer prepayments for services
- consider the relevance, effectiveness and viability of the current travel agency regulatory scheme, with a particular focus on the operation of the TCF, and
- identify and consider regulatory and non-regulatory options within a cost/benefit framework to address the identified consumer protection issues at a Commonwealth and State/Territory level.

PricewaterhouseCoopers (PwC) has been appointed by SCOCA to undertake this review. The final report is due June 2010. As the first step in the consultation process, PwC has released this issues paper to:

- test the validity of the factual claims concerning the travel and travel related services industry made in this paper, and
- encourage submissions from interested parties on current issues of importance relating to consumer protection in the industry (including the issues identified in this paper).

This issues paper briefly discusses the consumer protection framework in the travel industry in Australia. The remainder of the paper is structured as follows.

- Section 1 outlines the broad context of this review, including the consumer protection framework in Australia generally and in the travel industry specifically.
- Section 2 outlines the existing competency requirements for travel agents.
- Section 3 outlines the existing insolvency protection measures, which are primarily provided by the TCF.

This document was prepared for the Standing Committee of Officials on Consumer Affairs (SCOCA). In preparing this report we have only considered the circumstances of SCOCA. This document is not appropriate for use by persons other than SCOCA, and we do not accept or assume responsibility to anyone other than SCOCA in respect of this document.

- Section 4 outlines the existing conduct requirements applicable to the travel industry, incorporated in both the generic fair trading legislation and travel agent licensing regimes.
- Section 5 outlines possible reform approaches in order to stimulate stakeholder views on the merits of alternative reforms available to governments.
- Section 6 outlines the key issues identified in this paper.

Making a submission

Any interested business, entity or individual is invited to make a submission on the issues presented in this paper. This section details how such contribution can be made.

There is no specified format for submissions. They may range from a short letter outlining your views to a much more substantial document covering a range of issues. They may address some or all of the issues identified in this issues paper.

Where possible, you should provide evidence to support the views outlined in your submission. Such evidence could include statistical data and other specific information.

This is a public review and, as such, it is our intent to have as much information as possible on the public record. Submissions will become publicly available documents once placed on SCOCA's website, which will normally occur shortly after receipt of the submission, unless it is marked confidential.

Confidential material should be provided under a separate cover and clearly marked 'IN CONFIDENCE'. It is our approach to accept material as confidential if it is commercially sensitive or affects privacy, but not personal views or other evidence.

Lodgement

Interested parties should lodge their submission by **9 April 2010**.

Submissions should be emailed to: **pwc.economics@au.pwc.com**

Alternatively, you may also make submission by fax **(03) 8613 2011** or by mail, marked:

Submission to Review of Travel Related
Consumer Protection Measures
PricewaterhouseCoopers
2 Southbank Boulevard
Southbank VIC 3006

Questions regarding lodgement of submissions can be directed to PwC on **(03) 8603 3133**.

1 Context of this review

The travel industry is an important component of the Australian economy, contributing \$40 billion to Australia's GDP and employing almost half a million people.² The travel industry supports trade and business within and across Australia's states and territories, and internationally. The industry provides a broad range of products and services; including:

- travel services (flights, shipping/cruises, rail and road transport)
- accommodation (hotels, motels, resorts and hostels)
- travel intermediary services
- tourism services (tour operators, hospitality and entertainment), and
- ancillary travel services such as travel insurance.

The travel industry is governed by government regulations and policies that cover a diverse range of matters, including OH&S, planning, product and service safety (e.g. food standards, airline safety), customs, the environment and border security. Businesses are also subject to regulatory and non regulatory measures targeted at consumer protection.

PwC has been commissioned to review consumer protection in the travel and travel related services market, with a particular focus on the role of the Travel Compensation Fund (TCF).

Consumer protection in Australia

There are a range of government regulations and policies that deal with consumer protection relating to the purchase and use of goods and services in Australia. They are intended to promote better outcomes for consumers by:

- protecting from unfair, unjust or deceptive conduct and unsafe or somehow defective goods or services
- providing with assistance when they suffer loss from such conduct or products, and
- assisting in making better purchasing decisions (e.g. by providing certain information or mandating certain terms or conditions).³

In this way, consumer protection regulation complements other regulatory measures, such as Occupational Health & Safety (OH&S)

² The Jackson Report (2009) 'Informing the National Long-term Tourism Strategy'.

³ Productivity Commission (2007) 'Review of Australia's Consumer Policy Framework'.

and product safety rules; although these wider regulatory obligations are not the subject of this review.

Consumer protection includes a range of generic and industry-specific regulatory and non regulatory measures. While the most obvious measures are laws and regulations, other measures include self-regulation or co-regulation schemes (such as industry accreditation), or non regulatory tools (such as providing information).

Consumer protection in the travel industry

While businesses in the travel industry are subject to the generic consumer protection measures (in, for example, the Commonwealth Trade Practices Act and state Fair Trading Acts), industry-specific consumer protection regulation in the travel industry is primarily centred on travel agents. Some consumer protection is also provided by non regulatory means, such as travel insurance and certain credit card arrangements.

Travel agents regulation

Travel agents are governed by the applicable regulatory regime in each Australian state and territory. These regimes are broadly aligned by the *National Co-operative Scheme for the Uniform Regulation of Travel Agents* (the National Scheme). The National Scheme was introduced in 1986 in order to promote nation-wide industry standards. Initially adopted by Victoria, New South Wales, Western Australia and South Australia, it now applies to all Australian states and territories except the Northern Territory.

Under the National Scheme, all participating states and territories are required to enact a series of uniform rules, including requiring that travel agents be licensed and members of the compensation scheme. It is suggested that the key objectives of the scheme are to protect consumers from:

- inadequate service from travel agents, perhaps as a result of incompetence on behalf of the travel agent, and
- financial loss arising from the failure of travel agencies to account for monies deposited with them.⁴

As a result of the scheme, the regulatory regime applicable to travel agents provides consumer protection in three broad categories:

- competency requirements, including requirements for licensing
- insolvency protection measures (including a compensation scheme), and
- conduct requirements.

⁴ National Competition Policy review (2000).

Travel agents (and other travel businesses) are also subject to the generic consumer protection rules, including the Commonwealth *Trade Practices Act 1974* and various state and territory fair trading legislation. These rules impose a number of additional conduct requirements. In addition, a number of self-regulation measures, such as industry codes of conduct, are also in place.

Together, these instruments make up the consumer protection context in which travel agents and other travel related businesses operate.

Issue:

1. Has the scope of industry-specific regulation in the travel industry appropriately addressed the major consumer protection issues in the industry?

Travel agent licensing

All persons carrying on business as a travel agent must be licensed by relevant state and territory regulatory bodies.⁵ The licensing of travel agents is intended to improve industry standards (through a series of competency and conduct requirements) and ensure travel agents participate in the compensation scheme.

‘Carrying on business as a travel agent’ is defined in most states and territories as carrying on a business of selling (or arranging, making available, purchasing for resale or advertising to sell) travel or travel and accommodation.⁶ Exemptions from licensing are available for persons who carries on such business:

- in the course of their employment, or
- in relation to travel services or travel services and accommodation that the person owns.

Further exemptions are available in some states and territories, such as for:

- persons only arranging travel that begins and ends on the same day,⁷ or
- persons only arranging domestic travel and their annual turnover being less than \$50,000.⁸

⁵ The National Co-operative Scheme for the Uniform Regulation of Travel Agents – Participation Agreement (Schedule).

⁶ The definition of ‘travel agent’ in the ACT includes businesses that only sell accommodation (Agents Act 2003 section 11).

⁷ Such provisions are enacted in all states and territories except NT.

⁸ Such provisions are enacted in NSW, Queensland, SA and Tasmania.

This definition of a ‘travel agent’ identifies relevant businesses by the functions they perform (e.g. selling tickets), rather than the nature or identity of the business. There is some suggestion that this definition, and the exemptions, have led to uncertain or incongruous outcomes. Certain businesses commonly understood to be travel intermediaries may be excluded from this definition; such as accommodation booking services, tour, cruise and coach operators and/or online agents that merely perform a brokerage service.⁹ Alternatively, certain businesses that are not commonly considered travel intermediaries (e.g. airlines) may be required to be licensed as travel agents.

Issue:

2. Is the definition of ‘travel agent’ for the purposes of licensing appropriate?

Subsequent changes to the travel industry

Since the introduction of the National Scheme there have been significant developments that may have impacted the appropriateness of the scheme. These include, but may not be limited to:

- increased usage of, and reliance upon, the internet (including enabling quick and cost effective travel research and online purchasing)
- increased usage of credit (and debit) cards, which provide some consumer protection via a charge-back mechanism (discussed below), and in some instances, including explicit travel insurance
- developing practices such as consumers bypassing travel agents and transacting directly with travel service providers (airlines, hotels, etc.), and
- trends in the travel agent industry, such as a growing prevalence of franchise business models and increasing market share amongst the larger providers.

A review of the appropriateness of the consumer protection measures is therefore timely in light of these changes.

The consumer protection measures in this industry have been the subject of several reviews, including a National Competition Policy review in 2000¹⁰ and a review of the TCF’s capital adequacy and

⁹ AFTA (2009) Discussion Paper: Better Regulating Travel and Travel-Related Services (page 23).

¹⁰ This review can be obtained from the National Competition Policy website: <http://ncp.ncc.gov.au/>

capital requirements in 2004,¹¹ driven by the collapse of Ansett/Traveland in 2001. This review is intended to revisit the analysis and recommendations of these reviews, particularly in light of more recent developments.

Issue:

3. What major changes have occurred in the travel industry since the introduction of the National Scheme and/or reviews of consumer protection in the industry? What impact have they had on the appropriateness of the scheme?

¹¹ Unpublished report held by the TCF.

2 Competency requirements

Industry-specific consumer protection regulations in the travel industry are primarily concerned with travel agents. One component of travel agent regulations relates to competency or industry entry requirements. These requirements are incorporated in the criteria which a person must meet in order to obtain a travel agent licence. The purpose of these requirements is to ensure minimum industry standards.

Licensing criteria

Under the National Scheme, certain persons are deemed ineligible for a travel agent licence. These include persons who:

- have not attained the age of 18 years
- are disqualified from holding a licence
- are not of good reputation or character
- are not likely to carry on business honestly and fairly, or
- are in any other way not a fit and proper person to be a licensee.

These restrictions have been adopted by each participating state and territory and, as such, the preconditions for licensing in each state are broadly similar.¹²

Licence fees differ from state to state. Initial application fees vary between \$50 (NT) and \$753.20 (Victoria). Annual licence fees vary between \$55 (NT) and \$1,115 plus \$95 for each place of business (Queensland).

In a range of other sectors (e.g. building, plumbing and property agents), state and territory governments have collectively sought to reduce administrative costs (and overcome jurisdictional differences) by moving towards national licensing. This policy shift aims to create a single national licensing system, thereby improving labour mobility and reduce red tape.

¹² The relevant instruments of each state are the following legislation, together with their associated regulations: Travel Agents Act 1986 (NSW); Travel Agents Act 1988 (Queensland); Travel Agents Act 1986 (SA); Travel Agents Act 1987 (Tasmania); Travel Agents Act 1986 (Victoria); Travel Agents Act 1985 (WA); Agents Act 2003 (ACT); and Consumer Affairs and Fair Trading Act (NT).

Issue:

4. How effective has the current licensing regime been in promoting good standards and behaviour in the industry?
5. To what extent does having to be licensed in each state impose additional costs on businesses operating in multiple jurisdictions?

In addition to licence eligibility rules, all states and territories require that travel agents, or certain employees (e.g. day-to-day manager), have a specified level of experience and/or qualifications. These requirements require that person to:

- have completed a specified training course, and/or
- have worked in the industry for a specified period of time (typically one year).

In most states and territories these requirements are only imposed if the travel agent arranges international travel.

The required training, commonly referred to as the 'Construct Normal International Airfares' unit, must be provided or assessed by a nationally recognised organisation (of which there are many). Typically, the course can be completed in around 40 hours, and covers such topics as:

- the structure and workings of the international aviation industry
- international rules governing travel fares
- calculating fares
- international taxes and government charges, and
- the International Air Transport Association's ticketing system.

While the relevant qualifications/experience requirements are broadly equivalent across states, there are differences. For example, in some states the licence holder is required to have personally met the requirements, while in others the requirements are imposed on the business' day-to-day manager. In the ACT, the day-to-day manager must be a licensed travel agent. In Victoria, the relevant person (manager) is required to have completed both the training and experience requirements.

Issue:

6. Are the experience/qualification requirements for travel agents appropriate?

3 Insolvency protection measures

The second broad category of consumer protection measures are designed to compensate consumers for losses from the bankruptcy or insolvency of travel agents. These measures are primarily incorporated in and executed by the Travel Compensation Fund (TCF).

Travel Compensation Fund

The TCF was set up in 1986 as part of the introduction of the National Scheme. It is the primary body by which consumers are protected against financial losses arising from the financial collapse of a registered travel agent.

The licensing rules in the National Scheme require participation in the TCF as a precondition for being licensed. The fund's purposes are:

- to ensure that only persons who have sufficient financial resources may join, or continue to participate in, the fund and therefore may carry on business as a travel agent, and
- to provide compensation to eligible consumers who have suffered financial loss as a result of the bankruptcy of registered travel agent.¹³

Prudential oversight

The TCF may impose a number of requirements in order to ensure that travel agents hold sufficient capital prior to joining, or continuing to participate in, the TCF.

A relevant person is eligible to participate in the TCF if the TCF's Board considers the person has, and is likely to continue to have, sufficient financial resources to enable the person to carry on business as a travel agent. In formulating its opinion, the TCF may consider a variety of factors, including any previous involvement of the person in the industry. However, the primary indicator is the person's financial position.

¹³ Travel Compensation Fund Trust Deed.

The TCF has developed guidelines by which it determines whether or not a participant's, or potential participant's, financial resources are sufficient. The guidelines include minimum capital requirements (based on gross annual turnover) and two financial ratio tests:

- net tangible assets relative to gross turnover, and
- net working capital relative to monthly overhead expenses.

The financial ratio tests are used as an indication of the adequacy of the business' financial resources by a points system. Businesses are awarded points, in a range from negative three (-3) to eight (+8), according to their individual ratios. In addition, an agent that maintains a fully funded trust or client account is awarded 4 points. Businesses must pass the TCF's minimum capital requirements and achieve a score of at least 10 for approval of the initial application and for renewal of participation.

Issue:

7. To what extent is there overlap between the regulatory requirements of the licensing framework and those for participation in the TCF? To what extent does this overlap place undue costs on businesses?
8. Are the financial adequacy tests applied by the TCF appropriate in light of the ongoing occurrence of travel agent failure (discussed below)? What could be done to improve the effectiveness of these financial adequacy requirements?

In addition to allowing/refusing or furthering/cancelling participation in the fund on the basis of financial resources, the TCF may also impose financial requirements on participants, including:

- maintaining a trust or client account for received monies
- increasing the capital/reducing the debt of the business
- providing security in favour of the Board
- obtaining insurance or a guarantee, or
- accounting requirements (e.g. audited financial accounts).

In practice, the TCF requires all participants to submit audited financial accounts annually and imposes a requirement of a bank guarantee and an insurance arrangement for some participants (namely those who do not, or cease to, meet the capital requirements outlined above).

Issue:

9. Is the cost burden on businesses in complying with TCF requirements appropriate and proportional?

Compensation

In addition to prudential oversight, the TCF is also charged with compensating consumers who suffer loss from the collapse of a travel agent business in certain circumstances. The TCF pays compensation, up to \$25,000, to a person who:

- enters into travel or travel related arrangements with a fund participant (directly or indirectly)
- suffers direct pecuniary loss directly resulting from a failure to account by a fund participant, that arises from an act or omission of that participant (or its employee), for money paid by the person, and
- is not protected against loss by an insurance policy.

The TCF Board also has discretion to compensate a person:

- for other pecuniary loss resulting from the participant's failure to account
- for similar losses from a failure to account by someone who is not a participant, or
- beyond the \$25,000 limit.

A number of compensation payments have occurred in relation to the second dot point (i.e. travel related losses in relation to businesses that are not participants of the fund). TCF suggests this typically occurs in instances where a consumer believes they are dealing with a licensed travel agent.¹⁴

TCF data suggests that an average of 22 travel agents have failed each year over the last ten years,¹⁵ including 40 and 31 in 2008 and 2009 respectively. These figures equate to approximately one per cent of all TCF participants.

Over the past ten years, over \$31 million have been paid out by the fund in relation to over 20,000 claims; an average of \$2.8 million and 1,800 claims per year.¹⁶ Over the past five years, average annual

¹⁴ Centre for International Economics (2000) 'NCP review of the National Scheme for the Regulation of Travel Agents (page 20).

¹⁵ TCF (2010) 'Preliminary Submission to the Review of Consumer Protection in the Travel and Travel related Services market (page 29).

¹⁶ TCF (2010: page 29). Please note that these figures include an extraordinary year (financial year 2002) which included the collapse of Ansett Airlines.

figures have decreased to approximately \$2.1 million of payouts from 800 claims.

Issue:

10. Is the current rate of failure amongst travel agents acceptable?
11. What benefit do consumers gain from the TCF in addition to compensation in the case of failure (e.g. confidence, advocacy)?

TCF funding and costs

The TCF's compensation payouts, and its operating expenses, are funded by income from the following sources:

- initial contributions by new participants of \$8,173 and \$5,500 for each additional location
- initial administration fees by new participants of \$821.70 and \$508.20 for each additional location, and
- ongoing annual renewal fees of \$420.70 and \$313.50 for each additional location.¹⁷

The fund receives approximately \$2.5 million in new participant fees and \$2.0 million in renewal fees per annum. The fund also receives funds from claims against company directors, auditors and banks as guarantors (approximately \$1 million per annum) and interest from funds invested (approximately \$1.9 million).

Both initial contributions and annual fees are constant across all travel agents, regardless of size or other factors. The TCF is considering the introduction of 'risk-based' fees and charges, but as yet such changes have not been implemented.

The administration cost (i.e. non claim expenses) of the TCF amounted to approximately \$2.8 million for the year ending 31 December 2008.¹⁸

Issue:

12. Is the TCF's funding structure appropriate?

¹⁷ TCF (2010: page 31).

¹⁸ TCF 2008 Annual Report.

Non regulatory insolvency protection

The extent to which the TCF's role is required is influenced by a number of factors beyond the direct control of the TCF, including:

- credit cards, in particular the charge-back mechanism
- the length of time the agent holds customers' funds, and
- travel insurance.

Credit cards

Credit cards are an increasingly frequent means of payment for consumers, particularly in the travel sector. Credit cards offer advantages, as compared to cash or other payments methods, including deferring cash payment, online or over the telephone purchases, timely and convenient access to funds and security (e.g. reducing the amount of cash a consumer carries with them). For these reasons, over the past decade credit (and debit) card payments have become increasingly common.¹⁹

One common security feature of credit cards is a process known as 'charge-back', by which consumers can request their financial institution to 'reverse' a transaction where the goods/services are not supplied, are defective or transactions are unauthorised.²⁰ In some instances therefore, consumers may be able to reverse the charge in the event that they did not receive the goods or services for which they had previously paid.²¹

In line with broader market trends, the use of credit cards is particularly common in the travel industry. The Reserve Bank of Australia (RBA) estimates that credit cards account for 42 per cent of payments in the holiday/travel sector, with debit cards (which may, in some circumstances, also benefit from the charge-back mechanism)²² accounting for a further 20 per cent of payments.²³

The charge-back mechanism may substantially reduce the risks to consumers of supplier (including travel agent) insolvency. To cite a high profile example, when Ansett Airlines collapsed, customers who had booked flights on credit cards were able to apply for

¹⁹ RBA (2009) 'Research discussion paper: Price incentives and consumer payment behaviour' (page 1).

²⁰ Consumer Affairs Victoria (2004) 'Online shopping and consumer protection: Discussion paper' (page 15).

²¹ Specific conditions vary depending on credit card supplier and product.

²² Consumers using some debit cards are able to select the 'credit' or 'debit' option on purchases. When 'credit' is selected, the payment is made via the 'scheme debit' system' (this system is operated by Visa and MasterCard), which offers the same protection as people who use Visa or MasterCard credit cards; including, where available, access to the charge-back mechanism.

²³ RBA (2009) 'Research discussion paper: Price incentives and consumer payment behaviour' (page 13).

charge-back, under which the National Australia Bank reversed several million dollars worth of payments.²⁴ It is also understood to have reduced the number of compensation claims made on the TCF,²⁵ as the TCF does not typically compensate a credit card payment unless a claimant can demonstrate that a charge-back application was made and denied.

Issue:

13. To what extent can reliance be placed on credit cards' charge-back mechanism to provide ongoing consumer protection?

Holding funds

A further industry trend is the growing number of transactions in which the consumer bears no risk from travel agent insolvency, as the agent does not take carriage of the customer's money. This is increasingly important with the growth of electronic transactions (such as credit and debit card payments).

Consider the following diagram, which shows two possible fund-flow scenarios under credit card payments.²⁶

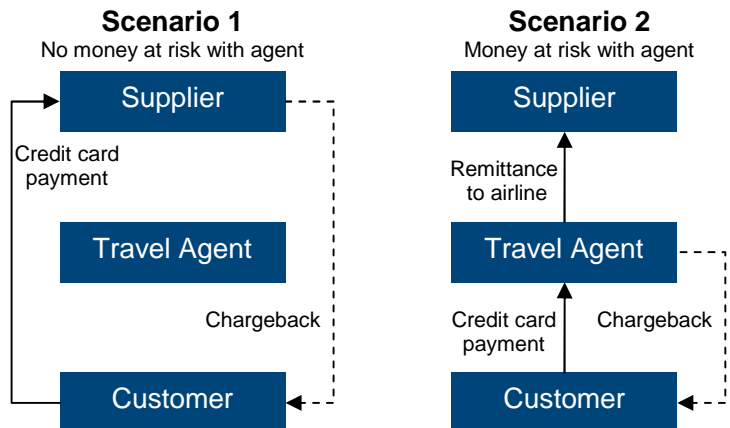
- **Scenario 1** involves money being paid directly to the supplier (for example, via an airline's credit card merchant facilities) and, as such, there is no money at risk with the travel agent.²⁷
- **Scenario 2** involves money being paid to a travel agent, and then being passed on to the supplier.

²⁴ John Kavanagh, 'Chargeback to the Rescue', Business Day, 29 April 2009

²⁵ TCF (2010) 'Preliminary submission to Review of Consumer Protection in the Travel and Travel related Services market' (page 13).

²⁶ This diagram is sourced from AFTA (2009) Discussion Paper: Better Regulating Travel and Travel-Related Services (page 17).

²⁷ AFTA estimates that this mechanism accounts for 65 per cent of airline tickets sold in Australia.



Under Scenario 1, the travel agent is essentially a broker between the customer and supplier and takes no carriage of funds. As such, the customer bears no travel agent insolvency risk and may be entitled to charge-back relief in the event of supplier insolvency. Under Scenario 2, the travel agent acts as an intermediary between customer and supplier and, therefore, takes some carriage of funds. While travel agent insolvency risk is present, the customer may be entitled to charge-back relief if the agent bankrupts.

Issue:

14. Are there reduced instances of travel agents holding customers' cash (for example, on deposit or in trust)? Has this materially altered the risk to consumers from travel agents' insolvency?

Travel insurance

Travel insurance protects consumers against losses that occur before or during travel. Insurance potentially provides additional consumer protection at a cost (i.e. premiums) to the consumer.

Australia's insurance market includes a variety of travel insurance products from a number of different providers. These products differ with respect to coverage, excess on claims and price, according to the terms of each policy's product disclosure statement.

Travel insurance is common amongst overseas travellers.²⁸ PwC understands however that the coverage (and associated premiums) of travel insurance policies can differ widely; ranging from relatively expensive comprehensive coverage through to cheaper more limited policies. Significantly, most travel insurance policies do not protect

²⁸ AFTA (2009: page 16) and TCF (2010: page 18) agree that between 60 and 70 per cent of overseas travellers obtain travel insurance.

against losses from travel agent (as opposed to supplier) insolvency.²⁹

Opinions differ as to the extent of supplier insolvency protection; that is, insurance against losses incurred as a result of the provider of the services (airlines, hotels, etc.) becoming insolvent. The Australian Federation of Travel Agents suggests that 95 per cent of policies taken out by Australians travelling overseas provide travel services supplier insolvency protection.³⁰ However, the TCF suggests that the most commonly sold policies in Australia do not provide this coverage.³¹

Issue:

15. Is it likely that the private sector can provide effective and affordable travel agent insolvency insurance coverage for travellers? What risks are there in leaving such insurance to the private sector?

²⁹ AFTA (2009: page 16), supported by PwC's primary research.

³⁰ AFTA (2009: page 16).

³¹ TCF (2010: page 18).

4 Conduct requirements

Businesses in the travel industry are required to comply with the generic consumer protection rules applicable to all industries. Industry-specific conduct requirements however are limited to travel agents. These requirements are incorporated in the licensing provisions of each state and territory.

Generic consumer protection

Australia's State and Commonwealth jurisdictions provide protection to consumers under generic consumer protection rules that apply to all industries. These rules are incorporated in the Commonwealth's *Trade Practices Act 1974* and the various state-based Fair Trading Acts.

Trade Practices Act 1974

The *Trade Practices Act 1974* is the Commonwealth's primary competition, fair trading and consumer protection legislation. It covers the relationships between suppliers, retailers, wholesalers, customers and competitors, and covers a full range of consumer protection and competition matters, including:

- anti-competitive conduct
- unfair market practices
- industry codes of practice
- mergers and acquisitions
- product safety and labelling
- price monitoring, and
- the regulation of certain industries, including airports.

Under Australia's federal system, the Trade Practices Act applies only to businesses that operate as incorporated entities or across state jurisdictions and, as such, may not apply to some travel agents. However, many of its provisions are mirrored in state fair trading legislation (discussed below).

The provisions of the Trade Practices Act most relevant to the tourism and travel industries include the following.

- Unconscionable conduct provisions (Part IVA). Examples of these provisions include varying key terms of an agreement without notice, and failing to disclose the key terms in a contract to consumers.
- Consumer protection provisions (Parts V). These provisions relate to misleading or deceptive conduct, false or misleading

representations, displaying the single price of packaged goods and services, 'bait advertising',³² accepting payment for a good or service without intending or being able to supply as ordered, and harassment and coercion.

Part VC mirrors Part V and provides for criminal prosecution to be brought for breaches of Part V. Offences under Part VC can be given penalties of up to \$220,000 for individual traders and up to \$1.1 million for companies.

The Trade Practices Act is administered by the Australian Competition and Consumer Commission (ACCC), an independent statutory authority charged with promoting compliance with competition, fair trading and consumer protection laws. Its role complements the activities of consumer affairs agencies in each state and territory, who administer their applicable fair trading legislation. The ACCC's activities include enforcing certain prohibitions in the Trade Practices Act, including those in Parts IVA and V.

Fair Trading Acts

Further consumer protection is provided by the Fair Trading Acts in each state and territory.³³ While their provisions are broadly equivalent to the measures of Part V of the Commonwealth's Trade Practices Act, the Trade Practices Act is limited by Australia's Constitution and therefore generally applies only to corporations and enterprises trading across state and international borders.³⁴ In this way, the state acts extend the operation of these provisions to all businesses in Australia.

The Fair Trading Acts impose restrictions on the conduct of all businesses intended to protect consumers from unconscionable trading conducts. Examples of behaviour that is prohibited by these acts relevant to the travel industry are:

- misleading or deceptive conduct
- unconscionable conduct
- false or misleading representations
- harassment and coercion

³² An example of bait advertising is when a travel agent advertises a travel package at a very low price, but when a consumer goes to purchase the product there are none available and the agent tries to sell the consumer a higher priced package. Under the Trade Practices Act, an advertised product must be available for a reasonable amount of time, to a reasonable number of consumers.

³³ Fair Trading Act 1992 (ACT); Fair Trading Act 1987 (NSW); Consumer Affairs and Fair Trading Act (NT); Fair Trading Act 1989 (Queensland); Fair Trading Act 1987 (SA); Fair Trading Act 1990 (Tasmania); Fair Trading Act 1999 (Victoria); and Fair Trading Act 1987 (WA).

³⁴ Productivity Commission (2007) 'Review of Australia's Consumer Policy Framework (page 18).

- bait advertising, and
- accepting payment without intending or being able to supply.

Following the Productivity Commission's 2007 *Review of Australia's Consumer Policy Framework*, the Council of Australian Governments (COAG) has agreed to implement a uniform national consumer law scheme.³⁵ This reform is currently underway and is intended to culminate in the introduction of a single national consumer law for Australia, called the Australian Consumer Law (ACL). The ACL will be a schedule in the Trade Practices Act, and will replace the Fair Trading Acts in all states and territories.

Issue:

16. Do the provisions of the Trade Practices Act and state-based Fair Trading Acts provide sufficient consumer protection in relation to the supply of travel and travel related services? If not, in what way are the Trade Practices Act and state-based Fair Trading Acts inadequate?

Aviation industry specific protection

Over the past twenty years, Australia's aviation industry has seen growth in passenger numbers, as cheaper airfares make flying accessible to more and more people. Over this period, amongst other things, Australia has seen the arrival of low-cost airline businesses (the most recent of which being Tiger Airlines in 2007).

The airline industry has presented a number of consumer protection challenges. Cited examples include bait advertising, failing to display the single price of packaged goods and services, unfair contract terms in a ticket's standard form contract and inadequate handling of complaints.

The Australian Government recently released the *National Aviation Policy White Paper*,³⁶ which outlines the Government's intentions on a variety of issues relating to the industry, including consumer protection. In addition to the upcoming changes to generic consumer protection laws (discussed above), the white paper suggests two consumer protection measures to be implemented by the industry.

The measures, which improve the handling of complaints, are:

- firstly, the development of 'Corporate Charters' by each airline, setting out minimum standards of complaints handling such as

³⁵ SCOCA (2009), 'An Australian Consumer Law: Fair Markets – Confident consumers'

³⁶ Australian Government (2009): 'Flight Path to the Future: National Aviation Policy White Paper', available at <http://www.infrastructure.gov.au/aviation/nap/>

response times and offering full refunds in certain circumstances, and

- secondly, establishing a mechanism for complaints to be examined by an independent third party or ombudsman.

Some action has taken place already in this respect, including Jetstar launching its Corporate Charter (named the Jetstar Customer Guarantee) in February 2010.

Issue:

17. Are the self-regulation measures outlined in the Aviation White Paper likely to provide adequate consumer protection in the aviation industry? Should these measures be extended to travel agents?

Specific conduct requirements for travel agents

The National Scheme includes provisions that allow the relevant authority to institute disciplinary action against travel agents on various grounds. These include:

- a licence was improperly obtained
- a licensee has been convicted of an offence
- the business is being conducted in an unfair or dishonest manner
- a person involved in the management of the business is not a fit and proper person, or
- the licensee does not have, or is unlikely to continue to have, sufficient financial resources to carry on the business.

Such disciplinary action may include:

- suspension of a travel agent's license for a period of up to twelve months
- imposing a condition on the licence, or
- disqualification of the licensee.³⁷

³⁷ Travel Agents Act 1986 (NSW) – section 21.

In addition to these provisions, other states and territories have set out further behaviour requirements in their regulations. These rules cover a variety of areas of businesses' conduct and operations, including:

- 'unjust', 'deceptive' or 'misleading' conduct rules³⁸
- advertisements – for example, requiring a business disclose its licence name and/or number on published advertisements³⁹
- notices in premises – outlining prescribed particulars such as business name and/or licence number,⁴⁰ and
- online trading – including licence number and jurisdiction on the business' home page.⁴¹

Issue:

18. What conduct requirements are necessary to adequately protect consumers?

19. To what extent do the conduct requirements of the various licensing schemes duplicate the provisions of the Trade Practices Act and Fair Trading Acts? Does this duplication improve compliance?

Industry codes of conduct

Finally, some industry associations in the travel and travel related services industry have a Code of Ethics to which their members should comply. While such codes do not impose legally binding obligations on association members, they impose some commercial or business incentive for meeting conduct requirements.

For example, AFTA, of which approximately 70 per cent of travel agents are members,⁴² requires its members to comply with its Code of Ethics. The code contains guidelines such as:⁴³

- being factual and accurate when providing information about their services, and the services of any organisation that they represent
- treating every client confidentially

³⁸ Such provisions are enacted in NSW, Victorian, WA, NT and the ACT.

³⁹ Such provisions are enacted in all states and territories.

⁴⁰ Such provisions are enacted in all states and territories except the ACT.

⁴¹ Travel Agents Regulation 2007 (Victoria) section 7.

⁴² AFTA (2009) Discussion Paper: Better Regulating Travel and Travel-Related Services (page 2).

⁴³ AFTA Code of Ethics

- use every effort to protect their clients against fraud, misrepresentation or unethical practices, and
- provide complete details about terms and conditions of any travel service, for example, cancellation fees, before accepting payment for a booking.

In addition, the Council of Australian Tour Operators (CATO) has a Code of Ethics which is made up of three parts.⁴⁴

- Relations with the public – which closely mirrors AFTA’s Code of Ethics.
- Relations with travel agents, carriers and other principals – for example, prohibiting false or misleading statements when giving opinions regarding another travel agent.
- Relations with fellow members – for example, conducting business in a way which avoids confrontation with other tour operators.

A further example is the Australian Tourism Export Council (ATEC), whose Member Code of Ethics and Business Practice also includes three parts.⁴⁵

- Professional business standards – which includes a statement requiring members to inform customers of all terms and conditions of a contract.
- Lawful business practices – which outlines the relevant legislation, for example, the Trade Practices Act.
- Compliance – which describes the disciplinary action that may be taken for a breach of the code, for example, suspension from the ATEC.

Issue:

20. What role do industry association codes of ethics play in ensuring good conduct by travel agent businesses? Are they sufficient to ensure good conduct?

⁴⁴ CATO Code of Ethics

⁴⁵ ATEC Member Code of Ethics and Business Practice

5 Possible reform approaches

As with all regulatory reforms, the introduction of the National Scheme was driven by the relevant economic, social and political circumstances of the time. Changing circumstances in the industry may mean that reform of the consumer protection regime is appropriate.

Consumer protection measures can include a range of generic and industry-specific regulatory and non regulatory measures. While the most obvious measures are laws and regulations, other measures include self-regulation or co-regulation schemes, and non regulatory tools. In this way, measures to achieve an appropriate level of consumer protection in the industry can be considered along a spectrum, as follows.

- At one end, consumer protection is left entirely to the market. Consumer protection voluntarily arises in response to consumers' demand, and willingness to pay, for such protection. Current examples of market-based measures include privately provided travel insurance and voluntary codes of conduct established by industry associations.
- At the other end, consumer protection is enforced by prescriptive, industry-specific regulations to which all travel agents must comply. Current examples include participation in the TCF and entry requirements under the travel agent licensing regime.

Along this spectrum could include generic regulations (such as the Trade Practices Act and Fair Trading Acts), self-regulation or co-regulation regimes, accreditation schemes, 'negative' licensing and other measures.

All regulation imposes a degree of cost on businesses. In many cases, such regulation is necessary to achieve desired policy goals (such as protecting consumers). However, inappropriate or poorly designed regulation can unnecessarily hinder economic activity. Reducing the burden of regulation on business is an important policy priority for Australia's Commonwealth and state and territory governments. As such, regulatory measures should be carefully considered and appropriately designed to minimise unnecessary burden on businesses.

Developments in the travel industry since the introduction of the National Scheme have been identified, including the influence of the internet, changing payment methods, changes in the industry's structure, etc. These developments, and others, may have an impact on the appropriateness of the current consumer protection framework. In light of these developments therefore, reform may be appropriate.

Considering the foregoing, possible reform decisions should be made in light of the following broad principles.

- Government should not act to address problems unless a case for action is clearly established.
- The policy intent of any intervention should be clear.
- All feasible (both regulatory and non regulatory) options should be considered.
- The option that generates the greatest net benefit to the community of all possible regulatory and non regulatory options should be adopted.

In a national industry such as the Australian travel industry, regulatory burden can be reduced by harmonising state and territory regimes. Differences in regulatory parameters and administration impose costs on, and create uncertainty for, businesses operating across multiple jurisdictions. Australia's national and state and territory governments, through COAG, are actively engaged in improving the harmonisation of state and territory based regimes in various industries and subject matters.

Issue:

21. What are the appropriate means of ensuring adequate consumer protection, in each of the three categories (competency, insolvency protection, conduct)?

Implementation of any reform should be carefully considered. This includes:

- the impact of reform on various stakeholders (e.g. businesses, consumers, government)
- the relative costs and benefits of changing the status quo
- structural barriers to achieving the best outcome, and
- any possible unintended consequences of reform.

Issue:

22. What are the key issues associated with the implementation of any regulatory reform in this industry? Are there any barriers to reform? If so, what are they?

6 Summary of key issues

The key issues identified in this issues paper are outlined below.

The list represents PwC's preliminary understanding of the key issues regarding consumer protection in the travel industry. There may be other consumer protection issues of importance to interested parties. We would welcome submissions on these issues also.

Overarching themes

1. Has the scope of industry-specific regulation in the travel industry appropriately addressed the major consumer protection issues in the industry?
2. Is the definition of 'travel agent' for the purposes of licensing appropriate?
3. What major changes have occurred in the travel industry since the introduction of the National Scheme and/or reviews of consumer protection in the industry? What impact have they had on the appropriateness of the scheme?

Competency requirements

4. How effective has the current licensing regime been in promoting good standards and behaviour in the industry?
5. To what extent does having to be licensed in each state impose additional costs on businesses operating in multiple jurisdictions?
6. Are the experience/qualification requirements for travel agents appropriate?

Insolvency protection

7. To what extent is there overlap between the regulatory requirements of the licensing framework and those for participation in the TCF? To what extent does this overlap place undue costs on businesses?
8. Are the financial adequacy tests applied by the TCF appropriate in light of the ongoing occurrence of travel agent failure (discussed below)? What could be done to improve the effectiveness of these financial adequacy requirements?
9. Is the cost burden on businesses in complying with TCF requirements appropriate and proportional?
10. Is the current rate of failure amongst travel agents acceptable?
11. What benefit do consumers gain from the TCF in addition to compensation in the case of failure (e.g. confidence, advocacy)?

12. Is the TCF's funding structure appropriate?
13. To what extent can reliance be placed on credit cards' charge-back mechanism to provide ongoing consumer protection?
14. Are there reduced instances of travel agents holding customers' cash (for example, on deposit or in trust)? Has this materially altered the risk to consumers from travel agents' insolvency?
15. Is it likely that the private sector can provide effective and affordable travel agent insolvency insurance coverage for travellers? What risks are there in leaving such insurance to the private sector?

Conduct requirements

16. Do the provisions of the Trade Practices Act and state-based Fair Trading Acts provide sufficient consumer protection in relation to the supply of travel and travel related services? If not, in what way are the Trade Practices Act and state-based Fair Trading Acts inadequate?
17. Are the self-regulation measures outlined in the Aviation White Paper likely to provide adequate consumer protection in the aviation industry? Should these measures be extended to travel agents?
18. What conduct requirements are necessary to adequately protect consumers?
19. To what extent do the conduct requirements of the various licensing schemes duplicate the provisions of the Trade Practices Act and Fair Trading Acts? Does this duplication improve compliance?
20. What role do industry association codes of ethics play in ensuring good conduct by travel agent businesses? Are they sufficient to ensure good conduct?

Possible reform options

21. What are the appropriate means of ensuring adequate consumer protection, in each of the three categories (competency, insolvency protection, conduct)?
22. What are the key issues associated with the implementation of any regulatory reform in this industry? Are there any barriers to reform? If so, what are they?

