

Director
Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
Treasury
Langton Cres
Parkes ACT 2600

29 November 2023

Via email: consumerlaw@treasury.gov.au

Dear Director,

Unfair Trading Practices Consultation

Thank you for the opportunity to make a submission in relation to proposed reforms to address unfair trading practices in the Australian Consumer Law (ACL). The Australian Travel Industry Association (ATIA) is the peak body for a broad array of Australian travel professionals. Our membership base includes the full spectrum of travel intermediary businesses across Australia including retail and corporate travel agents, tour operators, wholesalers and consolidators. Our members range in size from the largest listed organisations through to small independently owned and operated travel businesses.

It is evident that certain commercial practices are occurring that are resulting in significant consumer and business harm, however are not captured by the existing provisions of Australia's consumer laws. This highlights the limitations of the existing provisions, which are challenged even further due to new developments such as digital and technological advancements. This was recognised by former chair of the ACCC, Rod Sims in a recent speech:¹

While we [the ACCC] have had some success with the unconscionable conduct provisions, the courts are showing us clearly the limitations of this provision, in part due to how it is named... [s]uffice to say here that a principles-based prohibition would allow the law to keep up with evolving unfair trading practices, particularly as technology creates new opportunities for unfair conduct.

In the travel industry, it is clear that there is a need for greater protections in relation to unfair trading practices. This is particularly the case where there is a potential for significant market power influence that results in harm to businesses or consumers.

In addition, in recent years, there has been a significant change in the commercial relationships between airlines and their preferred distribution partners. A new system has been put in place, called New Distribution Capability, which is a technology communication standard developed by the International Air Transport Association (IATA) that fundamentally changes how airlines provide fare and ancillary content to travel agencies, travel management companies (TMCs) and other ticket distributors. These changes are enabling airlines to become the sole price makers and therefore increase the margins on their cheapest products with no pressure from the market. Part of this includes not providing access to all airline availability to travel businesses, reserving sales of the cheapest cohort of airlines to its direct channel with consumers, preventing competition. While the industry is supportive of the new standard, its deficiencies are impacting choices for Australian consumers and businesses. Further detail is provided in

Attachment A.

ATIA supports the policy principle that would create a new general prohibition on unfair trading practices that would apply to businesses across all sectors as a separate protection from the existing provisions of the ACL. While we note the paper does not propose a specific definition of unfair within this context and

¹ Rod Sims, Former Chair of the ACCC, Speech at the 2021 National Consumer Congress.

intends to consult further throughout the policy development process, we wish to highlight a key consideration as part of this submission.

We note that while the US, the United Kingdom, the European Union and Singapore each have a general unfair trading prohibition for business-to-consumer transactions, the US also applies a general unfair practices prohibition in the business-to-business context as well. Where there are monopoly operations or market dominant positions in business-to-business transactions, there is a higher probability of unfair conduct occurring. This is also particularly relevant where conduct impacts travel agencies, which act as an agent on behalf of the consumer. Including transactions that may impact business customers as well as individual customers is therefore critical.

We welcome the opportunity to discuss further as the consultation and policy development process progresses. Please contact Ingrid Fraser, Director of Public Policy and Advocacy at ifraser@atias.com.au if you would like to discuss further.

Yours sincerely

Dean Long
Chief Executive Officer

Attachment A – Implementation of New Distribution Technology

In recent years, there has been a significant change in the commercial relationships between airlines and their preferred distribution partners. As air travel and technology evolved, so has the methods of selling air tickets. The most significant change was the introduction of the *Computerised Reservations Systems* or the EDIFACT protocol, which as of 1984, was deemed by the US Department of Transportation as an essential facility. This resulted in guaranteed access to full supply of product for an airlines agent.

Due to the consolidation of major airlines and limited domestic competition (Qantas Group domestic market share; 61.7%) airlines have taken the opportunity to seek to reduce competition for the distribution of airfares. This is done by only making available selected fares through proprietary IT systems which do not contain the same functionality of the EDIFACT protocol.

The new system, which is in various stages of development, is called New Distribution Capability (NDC). It is a technology communication standard developed by the International Air Transport Association (IATA) that fundamentally changes how airlines provide fare and ancillary content to travel agencies, travel management companies (TMCs) and other ticket distributors. These changes are enabling airlines to become the sole price makers and therefore increase the margins on their cheapest products with no pressure from the market, creating the following;

- Parallel airfare markets to the internationally recognised Global Distribution System (GDS) and forcing travel agents to access these proprietary systems to maintain access to the lowest fares. These systems impose reduced 'at-source commissions' for travel agents; and
- Not providing access to all airline availability to travel businesses and reserving sales of the cheapest cohort of airfares to its direct channel with consumers. This prevents any competition from travel agents on the efficient distribution of these highly sought-after tickets. It also prevents the ability of consumers to easily mix and match airlines, a common practice used in the domestic market, enabling consumers to find the best/cheapest flights through their preferred channel.

Indeed, due to the lack of competition, it is clear that airline commitment to the local distribution model is under significant pressure. While the industry is supportive of the new standard, its deficiencies are impacting choices for Australian consumers and businesses.

This is because the travel and aviation industries as a whole were (and remain) largely supportive but unprepared to fully adopt NDC. While internationally, NDC can be somewhat mitigated, domestically, the concentration of market power has caused disruption to the air ticket distribution ecosystem. It has resulted in serious consumer harm in the form of higher airfares and further reduced competition, in terms of both airline travel itself as well as air ticket distribution.

While airlines may be able to increase their margin by distributing more fares through their own direct channels, the above behaviours demonstrate a net loss in competition for distribution across the market. These practices make it even harder for consumers to assess varying price points and trust what is available on fare aggregator websites without navigating to each airline's direct sales channel.

Impacts on consumer service

When consumers are forced to go directly to airlines websites to access fares, they are also missing out on the valuable offerings that travel agents provide in:

- Professional advice to tailor travel to suit specific requests and find packages and products that suit the consumer's needs;
- Advice on critical travelling requirements such as visas, other travel documentation, medical/vaccines and travel insurance;
- Support for the consumer when problems are experienced while travelling; and
- Time-saving and convenience of a consolidated itinerary with airlines tickets, ground transfers, accommodation, tours and activities.

Australians turned to travel industry professionals to help them navigate the multiple challenges of managing COVID impacted travel, credits and refunds. The travel industry has provided this support through many months of closed domestic borders and an international travel ban, often without remuneration.

Consumer frustrations due to difficulties accessing credit and refunds have often been borne by travel agents, even though the policies are controlled by the airlines.

Credits commonly have strict terms and conditions attached (e.g. they can only be used for tickets of an equal or higher value) and have associated fees that erode their value. There are instances where the airline will waive the fee (generally where they are at fault, or a force majeure event) but the process of applying the waiver is convoluted and places risk on the agent. Minor coding errors can result in financial penalties being issued to the agents.

Nevertheless, travel agents have been proactive in supporting consumers understanding their refund and rebooking rights and have created bespoke tools so that consumers can see the value of credits held and facilitate their use.

Credits are held not only by individuals but also by business, including many SMEs. Agents can report credits at the company level allowing these businesses to make decisions on where they may want credits to be availed by other employees.