

2022 ATAS CHARTER REVIEW

Submission to the Australian Federation of Travel Agents

6 May 2022

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the 2022 ATAS Charter Review. In this submission, the ALA will set out the background of travel related consumer problems that the COVID-19 pandemic highlighted. The ALA will submit that ATAS accreditation should be strengthened to avoid a repeat of these problems.
2. The ALA will also assert that strengthened consumer protections will boost consumer confidence in the travel industry, which is essential to revive tourism.
3. Finally, the ALA will submit that the ATAS Code of Conduct should be amended to set out enhanced standards of good practice. This is with the view of improving consumer protection and providing incentive for consumers to book with ATAS participants.

Consumer problems highlighted by the pandemic

The COVID-19 pandemic highlighted travel industry practices which were already adversely affecting consumers. However, consumers were now experiencing those practices on a mass scale.

In its July 2021 report 'Consumer Protection for Australian Travellers: a plan for clarity, consistency and fairness'², consumer advocacy group CHOICE published key problems that consumers were facing. These included:

1. Poor information about consumer rights
2. Complex agency arrangements making refunds more difficult
3. Fees and charges to get a refund
4. Poor protections when companies become insolvent

The report included case studies which were critical of major travel intermediaries such as Flight Centre and Webjet. Media reports of consumer issues faced by travellers have also been common

² CHOICE Travel Report, Consumer Protection for Australian Travellers: a plan for clarity, consistency and fairness, (July 2021).

since the start of the pandemic. For example, consumer advocate Adam Glezer has worked with the press to draw attention to challenges faced by Australian travellers.³ These have included:

1. Lack of protection when Helloworld outlets have gone into liquidation.⁴
2. Substantial cancellation fees charged by Australian Pacific Tours (APT) and Scenic.⁵

As at 26 April 2022, Flight Centre and Helloworld had 281 and 247 listings as accredited ATAS Travel Agents respectively⁶. Webjet, APT and Scenic are also all accredited ATAS Travel Agents.⁷

Whilst the above consumer issues have by no means been isolated to ATAS participants, the ALA submits that ATAS accreditation should be strengthened to avoid a repeat of these issues and improve consumer protection in the future.

Consumer confidence creates a stronger travel industry

At a time when many consumers feel let down by the travel industry, changes in industry practice and behaviour are needed to boost consumer confidence and revive tourism. This theory is at the core of the International Code for the Protection of Tourists (ICPT) which was adopted by the General Assembly of the World Tourism Organization in December 2021. As noted by Zurab Pololikashvili, UNWTO Secretary-General:

"We can only restart tourism if we restore trust in travel. People want to feel safe and looked after when they travel. "

³ Adam Glezer, *Consumer Advocate*, (Web page), <<https://www.consumerchampion.com.au/news-updates>>

⁴ Jessica Longbottom, 'Helloworld Travel agent goes bust, leaving would-be travellers out of pocket', *ABC News Australia*, (News Article, 7 September 2021) <<https://www.abc.net.au/news/2021-09-07/helloworld-travel-agent-goes-bust-travellers-fight-for-refunds/100435274>>

⁵ ABC News (Australia), *Australian travellers struggle to get refunds for trips impacted by coronavirus* (Video, 11 November 2020) <<https://www.youtube.com/watch?v=aSiCuMySbvs>>

⁶ AFTA Travel Accreditation Scheme, (Web page) <<https://www.atas.com.au/>>

⁷ AFTA Travel Accreditation Scheme, (Web page) <<https://www.atas.com.au/>>

In July 2020, the ACCC published the guide ACCC and ACL Regulators best practice guidance for the Travel Industry for COVID-19 related travel cancellations.⁸ However, as a best practice guide, travel intermediaries are not required to follow it. The ALA therefore submits that strengthened consumer protections in the AFTA Travel Accreditation Scheme and in particular its Code of Conduct will boost consumer confidence to book with ATAS participants. This in turn will benefit ATAS participants and the Australian travel industry more widely.

Suggested amendments to ATAS Code of Conduct

In light of the above, the ALA submits that the ATAS Code of Conduct should be amended as described below.

1. Pre-contractual and contractual information

a. Provision of pre-contractual information

The ALA considers that the pre-contractual information recommended in Chapter Three, Part 1, Section A, paragraphs 1 and 2 of the ICPT is essential information that should be provided to all consumers. For example, means, characteristics and conditions applicable for different fares and categories of transport should be provided. This would ensure transparency and prevent unethical industry practice of charging for more expensive flexible tickets but booking cheaper restrictive tickets.⁹ In this regard, the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to provide consumers with the pre-contractual information recommended in Chapter Three, Part 1, Section A paragraphs 1 and 2 of the ICPT.**

⁸ Australian Competition and Consumer Commission, 'ACCC and ACL Regulators best practice guidance for the Travel Industry for COVID-19 related travel cancellations', *Australian Consumer Law* (Guide, July 2020).

⁹ See, *Travel agency reforms: The need for change for customers*, Adam Glezer, February 2021, 8.

b. Identifying parties in the transaction

Consumers often do not know or understand the legal role that the travel intermediary is playing in the transaction. For example, whether their local travel agent is their agent, agent to the supplier, agent to both them and the supplier, or a buyer for resale. Additionally, consumers are often unaware of the identity of different parties involved in the provision of the travel service such as wholesalers and hoteliers. This affects the legal obligations of the parties and the consumer's remedies against them if something goes wrong.

In this regard, the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to provide consumers with the identity, place of incorporation, principal place of business and legal relationship of all parties involved in the travel contract.**

c. Provision of terms and conditions

Travel intermediaries play a key role in travel contract formation. They have their own terms and conditions for the service that they provide. They also make travel bookings which are usually subject to suppliers' own terms and conditions. Consumers are often either unaware of the various terms and conditions or do not understand them. The facts of *Royal Caribbean Cruises Ltd v Browitt* [2021] FCA 653 are a good example. In that case, Mrs Browitt purchased a Royal Caribbean cruise to New Zealand for her and her family. Her family were subsequently victims of the December 2019 White Island volcano tragedy.

The Federal Court found that a Flight Centre agent had pointed Mrs Browitt to Flight Centre's terms and conditions but not Royal Caribbean's terms and conditions. Mrs Browitt had not read Royal Caribbean's terms and conditions. However, she was bound by them because as agent of the passengers, Flight Centre's knowledge of Royal Caribbean's Australian terms and conditions was attributed to the Browitt family. *Browitt* shows the significant role that travel intermediaries play when travel contracts are formed. A travel intermediary's knowledge of supplier terms and conditions can be

attributed to consumers. With this power comes a responsibility for travel intermediaries to provide relevant information to consumers.

In this regard the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to provide consumers not only with their terms and conditions but also those of the relevant suppliers.**
- **ATAS participants to direct the consumer's attention to all applicable terms and conditions prior to formation of the contract.**
- **ATAS participants to provide copies of all relevant terms and conditions prior to formation of the contract for every booking rather than on request.**

d. Simplification of terms and conditions

The ALA considers that all terms and conditions relating to consumer contracts should be easy to understand. Complex and unclear terms and conditions in travel contracts do not provide the transparency required for travellers to regain confidence with the travel industry. Whilst the format of suppliers' terms and conditions is outside of the travel intermediary's control, ATAS participants' terms and conditions should be clear and comprehensible. In this regard, the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to provide consumers with terms and conditions in clear and comprehensible language.**
- **ATAS participants to provide a simplified summary of their terms and conditions in a Product Disclosure Statement style document.**

2. Fees, commission and mark ups

Consumers have felt particularly aggrieved by the existence and level of cancellation fees since the pandemic. When selling travel on a commission-based model, travel intermediaries have no incentive to process refunds as this results in lost commission and mark ups. However, travel intermediaries can retain revenue by charging cancellation and other non-refundable fees.

Therefore, the ALA submits that the issue of commission, mark ups and cancellation fees are linked. Improvements should be made in this area to increase consumer confidence.

a. Transparency of commission

Paragraph 4.1 of the ATAS Code of Conduct requires ATAS participants to provide full details of 'standard fees and charges' that may apply, 'where available'. This does not include commission. For consumers to regain confidence in using a travel intermediary, there needs to be transparency regarding commission. This would be similar to other industries such as mortgage brokers and other Australian credit licence holder's obligations under the National Consumer Credit Protection Act 2009 (Cth). In this regard the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to disclose at the point of sale a reasonable estimate of the total amount of any commission they are likely to receive in relation to the travel contract and the method for working out that amount.**

b. Transparency of mark ups

Similarly, paragraph 4.1 of the ATAS Code of Conduct does not require ATAS participants to provide details of mark ups. Undisclosed mark ups are legal. However, when revenue is made by travel intermediaries charging secret mark ups rather than transparent service fees, consumers feel ripped off.¹⁰ In order to create transparency and improve consumer confidence, ATAS participants should be encouraged not to charge mark ups. Furthermore, any mark ups charged should be fully disclosed. When mark ups are disclosed, it would then be for the travel intermediary to justify the mark up, for example as remuneration for their advice and time spent making the booking.

In this regard the ALA submits that the ATAS Code of Conduct should encourage:

- **ATAS participants not to charge mark ups.** And require:

¹⁰ Pat McGrath and Jeremy Story Carter, 'Flight Centre accused of 'ripping off' customers, underpaying staff in alcohol fuelled 'cult' workplace', *ABC News Australia* (online, 22 August 2018) <<https://www.abc.net.au/news/2018-08-22/flight-centre-accused-of-ripping-off-customers-underpaying-staff/10051474>>

- **ATAS participants to disclose at the point of sale any mark ups being charged.**

c. Towards a service fee model

The travel industry is already seeing a shift away from commission-based sales. For example, the airlines Qantas¹¹, Emirates¹² and Cathay Pacific¹³ have significantly reduced their agency-based commissions from 5% to 1% since the pandemic. Increased consumer awareness and consumers attitude towards mark ups also makes mark ups undesirable. A new model is therefore required. In our view, for consumers to have confidence to book with travel intermediaries rather than directly with travel providers, travel intermediaries need to sell their experience and expertise as a service for which they charge a reasonable service fee. With ever changing COVID-19 travel requirements and long hold times to contact travel providers' call centres, many consumers will prefer to pay a transparent and reasonable fee for the services of a travel intermediary rather than booking directly. A move away from commission and mark up revenue to a service fee would also remove the lack of incentive to process refunds.

In this regard, the ALA submits that AFTA should encourage ATAS members to use a service fee-based revenue model and the ATAS Code of Conduct should require:

- **ATAS participants to provide a breakdown, at the point of sale, of all fees and charges that apply to the booking.**
- **ATAS participants to disclose at the point of sale, in a clear and comprehensible way, which fees and charges are non-refundable and their total monetary value**

d. Cancellation fees

The existence and size of cancellation fees for travel contracts has been the subject of frequent consumer complaints since the pandemic. In the ALA's view, the solution provided by Chapter Three, Part 1, Paragraph C of the ICPT Termination of the tourism

¹¹ Newsroom, 'Qantas Slashes Agent International Commission from July 2022', *Karryon* (online, 20 May 2021) < <https://karryon.com.au/community/qantas-slashes-international-commission-from-july-2022/>>

¹² Newsroom, "'Time for a change" Emirates to cut travel advisor commissions', *Karryon* (online, 17 December 2021) < <https://karryon.com.au/community/time-for-a-change-emirates-to-cut-travel-advisor-commissions/>>

¹³ 'Cathay cuts commission', *Travel Daily* (online, 14 January 2022) < <https://issues.traveldaily.com.au/2022/Jan22/td140122.pdf>>

service contract before the start of the service is desirable. In short, the ICPT gives consumers the right to cancel travel contracts and be required to pay an appropriate, reasonable and justifiable cancellation fee.

Conversely, under the ICPT no cancellation fees can be charged when tourism service providers (including travel intermediaries) terminate the travel contract. This reflects the position in the UK under The Package Travel and Linked Travel Arrangements Regulations 2018¹⁴ and the European Union under Directive (EU) 2015/2302 on package travel and linked travel arrangements.¹⁵

We appreciate that without legislative change, cancellation fees will continue to exist in Australia. However, ATAS participants can improve consumer protection in respect of cancellation fees, which will encourage consumers to book with them.

In this regard the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to disclose cancellation fees at the point of sale in a clear and comprehensible manner.**
- **ATAS participants to only charge cancellation fees that cover reasonable and justifiable costs.**

3. Refunds

a. Timescale for refunds

There is no required timescale under Australian legislation or the ATAS Code of Conduct for travel intermediaries to pass on refunds to consumers after they have received them from suppliers. For a travel intermediary to hold on to a refund (either openly or secretly) is unfair to consumers. This includes when partial refunds have been recovered, and the travel intermediary is awaiting the balance of funds before remitting to the consumer. The practice of holding on to consumer refunds

¹⁴ *The Package Travel and Linked Travel Arrangements Regulations 2018*. Available at:

< <https://www.legislation.gov.uk/ukdsi/2018/9780111168479/contents> > (Accessed: 5 May 2022).

¹⁵ *Council Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked travel arrangements* [2015] OJ L 326, 1-33.

also poses a risk to consumers in the event of insolvency. In this regard the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to remit refunded monies to the consumer as soon as possible in the circumstances and no later than two business days from receipt.**

b. Refund vs credit note

The ALA appreciates that offering a consumer a credit note rather than a refund will be preferable to many suppliers and travel intermediaries. However, it should be for the consumer to choose whether to accept a credit note rather than a refund. Where credit notes are issued, they should be regulated. Consideration should be given to:

1. No or a very long expiry date
2. Protection in the event of insolvency
3. Protection against unreasonable increases in the cost of the same travel product e.g. flight, cruise or holiday
4. The ability to be transferred into another person's name
5. Being convertible to a refund
6. Availability for use against any travel product sold by the business, and not restricted to the same travel product or service as the original booking.

In this regard the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to give consumers the choice between refunds and credit notes in the event of travel cancellation.**

The ALA also submits that the ATAS Charter should:

- **Regulate credit notes issued by ATAS participants.**

4. Collective bargaining power with suppliers

There is a vast power imbalance between a consumer and a travel supplier. For example, a consumer does not have the power to negotiate standard terms and conditions in their travel contract. ATAS members range from global travel intermediaries to independent small

businesses. Together as a body of approximately 1700 members, they would hold significant bargaining power with suppliers which consumers would benefit from.

a. Communication with suppliers

Since the pandemic, a source of consumer complaint has been that when they have purchased travel products through a travel agent, the supplier has refused to speak directly to the consumer. This has been a source of frustration for consumers and the lack of openness and transparency can cause mistrust. In this regard the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to include in their terms and conditions with suppliers that suppliers are permitted to communicate directly with the consumer.**

b. Indemnity for refunds

A further source of complaint and frustration is travel intermediaries' difficulty in obtaining refunds from suppliers and therefore being able to pass these on to consumers. This is particularly the case with overseas suppliers.

Frustrated contracts legislation does not assist consumers with this problem. For example, in *Kiss v Parsons* [2021] NSWCATAP 217, the Plaintiff sought relief from her Australian travel agent for a cancelled trip to Canada under the Frustrated Contracts Act 1978 (NSW). The Tribunal found that the consumer's right of recourse was against the overseas travel supplier and not the Australian travel agent. In reality, however, the balance of power is against the consumer. Very few consumers would have the skill or funds to sue an overseas travel supplier for a refund.

A travel intermediary on the other hand could incorporate the right to recovery in their contract with the travel supplier with an indemnification clause. If the travel supplier did not agree to such a term, the travel intermediary should not use them and find an alternative supplier to do business with.

If ATAS participants worked together, suppliers wishing to do business in the Australian market would be more likely to agree to indemnification clauses in their supply contracts.

An indemnification clause would mean that in the event that the travel intermediary makes a refund to a consumer, this would be recoverable from the supplier. This would be an incentive for travel intermediaries to do the right thing by consumers and issue refunds, in the knowledge that they would recoup the funds from the supplier.

In this regard the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to include in their terms and conditions with suppliers that refunds made to consumers in the event of cancellation are recoverable from the supplier within a reasonable timeframe.**

5. Protection from insolvency

Solvency is important when considering whether an applicant is fit and proper to be an ATAS participant. However, ATAS participation does not provide any protection to consumers in the event of insolvency. The liquidation of travel intermediaries is devastating on consumers who have made bookings with them. This is particularly so when the consumer has made payment to the travel intermediary, but it has not passed it on to the supplier. The use of trust accounts by ATAS participants would solve this serious issue. Trust accounts are commonplace with other professions such as lawyers and real estate agents. Their use by travel intermediaries would restore confidence in consumers to book with them. The cost of running trust accounts is not exorbitant. A reasonable service fee could be charged by ATAS participants which would be justifiable to consumers as keeping their money safe.

Trust accounts are already used voluntarily by some travel agents such as TravelManagers.¹⁶ This gives their clients security and peace of mind. We submit that rather than being optional, the use of trust accounts should be an industry standard and a requirement for ATAS accreditation.

In this regard, the ALA submits that the ATAS Code of Conduct should require:

- **ATAS participants to operate trust accounts to hold consumers' funds.**

¹⁶ *TravelManagers*, (Web page), < <https://www.travelmanagers.com.au/peaceofmind/> > (Accessed: 5 May 2022).

Conclusion

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the 2022 ATAS Charter Review.
2. The COVID-19 pandemic has brought consumer protection issues faced by Australian travellers into the spotlight. In order to restore consumer confidence and revive tourism, the travel industry and in particular AFTA should use the lessons taught by the pandemic as an opportunity to improve standards of good practice. The ALA is an advocate for change to consumer protections for Australian travellers, including amendment to the Australian Consumer Law.¹⁷
3. In the meantime, strengthened consumer protections and improved standards of good practice in the ATAS scheme will benefit consumers. This in turn will be an incentive for consumers to book with ATAS participants who will ultimately reap the rewards.
4. The ALA is grateful to AFTA for the opportunity to make this submission.

Yours faithfully,



Victoria Roy

Chair, Travel Law Special Interest Group

¹⁷ *Competition and Consumer Act 2010 (Cth)*, sch 2.