Thursday, 4 November 1999

National Council meeting, Tourism Council Australia

Level 3, Melbourne Convention Centre

Cnr Spencer and Flinders Streets

Melbourne

Launch of "Travel and tourism – and the *Trade Practices Act*"

Professor Allan Fels

Chairman

Australian Competition and Consumer Commission

Ladies and Gentlemen

It is a pleasure to be here today to launch the Australian Competition and Consumer Commission's new publication, *Travel and tourism – and the Trade Practices Act*. It is particularly appropriate to launch this in the presence of so many industry members - as the aim of this publication is to inform the industry of the rights created and obligations imposed by the *Trade Practices Act*.

This is also an appropriate occasion for me to formally extend the Commission's thanks to the numerous industry associations and individuals who generously gave their time and advice, to help create and distribute a publication relevant and useful to the industry as a whole. This assistance is gratefully acknowledged. Such cooperation gives me confidence that the industry is increasingly committed to complying with the *Trade Practices Act*, and that consumers and businesses alike will reap the benefits.

As the statutory authority responsible for administering the *Trade Practices Act*, the ACCC has a responsibility to educate the commercial community about the impact and role of this legislation. By producing this publication and speaking to the industry about the Act, it is our hope that industry awareness of the Act will be heightened. This afternoon, I will take the opportunity to discuss some of the ways in which the Act impacts upon the travel and tourism industry.

Purpose of the Act

What is the purpose of the *Trade Practices Act*? The Act itself answers this question. Its stated purpose is to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection. Generally speaking, then, the Act allows each business to compete on its merits, making its own decisions and trading efficiently and fairly.

This style of trading allows industry members to prosper while still protecting the interests of consumers. Fair trading also helps to protect the industry's good reputation.

Reputability and integrity in travel dealings have never been more important than they are now, as the Olympics draw near. Recent events surrounding Olympic games ticketing have highlighted this fact. Over the next year, increasing numbers of consumers are going to be using Australian travel and tourism services. They have a right to expect fair dealing from industry members. It is therefore essential that industry members understand the principles in the Act and apply them in all of their business activities.

It is definitely in a business' best interests to take trade practices compliance seriously. We all know that non-compliance can lead to a variety of negative impacts upon corporate performance (such as having to pay stiff penalties or compensation claims). But it should also be stressed that compliance can produce positive benefits for a business.

The business that has a progressive attitude to trade practices compliance will probably also have a competitive edge. It is more likely to consistently meet consumer expectations. It will fix problems and complaints as they arise, before they escalate and damage its reputation. It will also know when its competitors are acting in breach of the Act, and how to best react to that knowledge. All of these are convincing reasons to get to know the Act a little better.

So which parts of the Act are relevant to industry members?

The provisions of the *Trade Practices Act* that are most relevant to this industry are those that relate to:

- fair trading and consumer protection;
- unconscionable business conduct;
- anti-competitive trade practices;
- access to infrastructure of national importance; and
- GST price monitoring provisions.

The Commission's new publication contains examples illustrating the operation (either actual or potential) of these provisions. It provides practical guidance as to how to comply with these provisions, while still maintaining a competitive edge. I have selected a few of the issues covered by the publication to share with you today.

Consumer protection

The consumer protection provisions of the Act are designed to protect consumers against 'sharp' business practices. The consumer protection concepts enshrined in the Act are so important that they should be understood by every industry member. Here are a handful of these concepts:

Prohibition against misleading or deceptive conduct

Businesses carrying out commercial activities must not engage in misleading or deceptive conduct, or even in conduct that is **likely** to mislead or deceive. This is a very broad prohibition. It affects a wide range of commercial activities, including negotiations with customers and suppliers, and advertising and selling activities.

The bottom line is this: if you create an impression about goods or services that does not reflect reality, you may mislead or deceive.

Conduct can be misleading or deceptive even though there is no intention to break the law. It is possible to mislead or deceive through inadvertence or carelessness. And failing to do something, or even staying silent, can be misleading.

To avoid misleading or deceiving during commercial activities, it is a good idea to keep in mind your 'target audience' (i.e. those affected by your conduct). Does the impression you give disclose the full and true picture? If part of your target audience is likely to believe something about your goods or services that is not true, it is time to change your approach.

Common problematic industry practices include the following:

Using fine print in advertising

Fine print is often used in travel or tourism advertisements to qualify the key message. Care must be taken when employing this practice.

It is the overall impression created by the advertisement that counts. The main selling points of an advertisement may make such a strong impression that associated fine print will not dispel it. If the overall impression is misleading, fine print qualifications are unlikely to rectify the situation. Important factors which are highly relevant to a consumer's purchasing decision should be located in the advertisement's main text.

One airline learnt this lesson the hard way. It had advertised a free Asian side flight upon purchase of a ticket to the UK or Europe. In the ad's fine print were conditions that qualified this offer. For example, frequent flyer points accrued on the flight to Europe had to be applied to the 'free' flight – making the flight a lot less 'free'. The airline undertook to change its conduct and take corrective action (including refunding the frequent flyer points in question).[1]

Free offers

The word 'free' has a particularly strong attraction to consumers. As indicated by the previous example, businesses like to take advantage of that fact. But businesses court trouble when they do not reveal the whole truth about free offers.

A recent example of this occurred in the car rental industry. One company placed Internet advertisements about its car rental services. The advertisements referred to 'free insurance'. But in reality the insurance was subject to a substantial excess, for which the consumer had to provide a credit card bond or additional payments. The Federal Court wasn't too happy with this situation. In interim orders, it required the company to add the words 'excess applies' to its advertisements. Final orders in this matter have not yet been handed down.[2]

---

[1] The airline in this matter was British Airways. The matter was settled by a sec 87B undertaking in 1998.
[2] These interim orders were handed down on 23 March in the Federal Court in Brisbane (*ACCC v Abel Rent-a-Car Pty Ltd* (1999) FCA 314, unreported). No final orders have been handed down in this matter.

Silence

Failure to disclose relevant information can be misleading. Courts will look at all the circumstances of the case, but if it was reasonable to expect that certain information would be disclosed, silence can mislead. For example, the Court found that it was misleading for a vendor not to tell the purchaser of a restaurant that the restaurant was licensed to hold fewer people than the seating indicated. Because the vendor had created a misleading impression, it was ordered to compensate the purchaser.[3]

False representations

Specific types of false claims or representations are unlawful under the *Trade Practices Act*. They are prohibited because they unfairly influence customers' buying decisions. There are a number of prohibited false representations, too many to outline here. But the following stand out:

False representations about the standard, quality, value or grade of goods or services

Travel and tourism businesses routinely make statements and claims about the standard, quality and value of goods or services that they offer. This is a fundamental part of travel advertising. Industry participants are of course at liberty to do so, but they must ensure that these statements are true and accurate. This means, for example, that a hotel advertising certain amenities must be in a position to deliver these to the consumer. And an airline that has code-share arrangements in place needs to advise passengers of the terms attached to these code-share arrangements. Any material differences between the policies and standards of the code-share partners should be pointed out, as these may vary.

Proceedings will not continue against Abel as it has gone into liquidation. However, proceedings will continue against the relevant director.

[3] *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) ATPR ¶40-968.

False representations about price

False claims about price are unlawful because they can persuade consumers to buy goods or services that they might otherwise not be interested in. All statements about price should be clear, complete and unambiguous.

False representations about price come in a variety of forms. In the travel industry, promotional material sometimes obscures 'extra' costs. (For example, a quoted airline ticket price might only be available when a consumer departs from a certain city.) This practice should be avoided. So should the inflation of a usual selling price to subsidise a special offer. For example, promoting a 'free flight to Fiji' to join a cruise could be unlawful if the cost of the cruise has been inflated to cover the cost of the 'free' flight.

The introduction of the GST obviously presents major pricing issues for all businesses, which brings me to my next subject.

GST

You are all well aware that the Commonwealth Parliament recently passed laws giving effect to A New Tax System for Australia. As part of the tax changes, a goods and services tax was introduced (to take effect in July next year) and other indirect taxes (including Wholesale Sales Tax) are being eliminated.

The New Tax System changes will affect the prices that businesses charge for goods and services in virtually all industries. The travel and tourism is of course affected. The effects will vary, with some prices falling and some prices rising. The Government intended that consumers should benefit fully from reductions in indirect tax, and that they should not be exposed to greater than necessary price rises. There is to be no exploitation of consumers in this regard. Wise industry members will now be taking the time to familiarise themselves with the new law and how it will affect the setting of prices after the introduction of the GST.

The Government has established — during a transition period — a prices oversight regime. This is contained in the *Trade Practices Act*, and it prohibits price exploitation in

relation to price changes brought about by the New Tax System changes. The ACCC has special powers in relation to this legislation.

The penalties for breaches of the new legislation reflect the Government's concern to ensure that no business takes unfair advantage of the New Tax System changes. The Federal Court may impose penalties up to $10 million for corporations and $500,000 for individuals who breach the price exploitation provisions.

In line with the Government's intention that consumers should not suffer price exploitation, the ACCC will examine how prices move in relation to the New Tax System changes. The Commission's focus is on prices set by individual businesses and is primarily on *changes* in prices resulting from the tax changes, not on the *level* of prices. The ACCC has created Guidelines on when it will consider price exploitation to have occurred, and travel and tourism businesses should refer to these.

The Guidelines, in summary, state that:

- prices should be reduced immediately to pass on the full effect of the tax reductions;
- any increase in price based on the GST should include a full offset for other indirect tax reductions;
- no markup should be applied to the GST component of price;
- prices should reflect only actual, not anticipated, tax increases; and
- businesses should not take the opportunity to increase the difference between cost and prices in dollar terms (the dollar margin rule).

The legislation does not prevent businesses from adjusting prices to reflect the New Tax System changes. However, it seeks to prevent overrecovery of tax changes either from raising prices too high or not reducing them enough. This translates into a simple rule that businesses should not increase the net dollar margins on their goods and services as a result of the New Tax System changes alone. Net margin refers to the sale price less operating and selling costs.

Particular issues affect travel and tourism businesses before 1 July 2000 (when Wholesale Sales Tax is abolished and the GST comes into effect). In relation to goods or services supplied before this date, be aware that it may be misleading to:

- claim or imply that a consumer is required to pay an amount for GST;
- claim that the business is required to increase its price and that the increase in price is because it is collecting the GST;
- encourage consumers to buy now to 'beat the GST' if prices may reduce rather than increase after the introduction of the GST; and
- raise prices and claim that the increase is due to an anticipation of the effect of tax changes when there is no reasonable basis for the claim.

Restrictive trade practices provisions

I now turn to the provisions of the Act that deal with anti-competitive conduct. The Act prohibits a variety of anti-competitive commercial practices. The consequences of breaching these prohibitions are again fairly fierce, with financial penalties the same as the GST penalties just mentioned.

So what are some of these prohibited practices? This afternoon I can touch on only a couple. One that is simple to recognise is price fixing.

Price fixing

It is unlawful to fix prices for goods or services with competitors unless the Commission has authorised this. Price fixing occurs where a business and its competitor/s enter into an arrangement or understanding that has the purpose, effect or likely effect of fixing prices. This conduct is unlawful even if the agreement is only to maintain or control prices.

Price fixing does not have to be in writing to be unlawful — a handshake, nod or wink can be enough. Price fixing can occur where competitors meet to discuss prices and create an expectation that certain price policies will be followed. Discussing prices at industry association meetings is also very dangerous, particularly if setting a nominated service fee is on the agenda.

An example of price fixing occurred at the Alice Springs airport. There, a car rental business arranged with competitors not to offer discounts to 'walk up' customers. The

price fix participants were fined a total of approximately $1.5 million dollars and had to offer refunds to affected customers.[4]

Third line forcing

A number of times, travel businesses have fallen foul of the prohibition against third line forcing. It is therefore worth briefly outlining this prohibition. Third line forcing occurs when a business allows a purchaser to buy its goods or services *only* if the purchaser will *also* buy a third party's goods or services. Refusing to supply because the purchaser will not agree to this condition is also third line forcing.

To illustrate: it would be unlawful for a travel retailer to sell an airline ticket to a consumer *only* if the consumer also agreed to purchase travel insurance from an insurer nominated by the agent. Such arrangements are therefore best avoided.

Conclusion

The foregoing discussion highlights some of the trade practices issues that affect travel and tourism businesses. It is evident that sometimes these issues are complicated. It is my hope that the new ACCC publication will clarify the way Australia's trade practices law affects industry members, and will assist the industry to trade in a fair and competitive manner. Given that it was drafted in close consultation with industry members, I am confident that the publication will be relevant and useful to the industry.

This publication will be available from all ACCC State or Territory offices at a cost of $10. Alternatively, it can be downloaded free of charge from the ACCC's website.

It gives me great pleasure to officially launch the new ACCC publication, *Travel and tourism – and the Trade Practices Act*.

(PAUSE)

Thank you very much.

---

[4] *ACCC v Alice Car and Truck Rentals Pty Ltd* (1997) ATPR ¶41-582