



Law Council  
OF AUSTRALIA

*Business Law Section*

04 February 2022

NSW Government  
Customer Service  
McKell Building  
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SYDNEY NSW 2000

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Dear Sir/Madam

**NSW Fair Trading's Consultation Paper: Proposed Information Standard for NSW Travel Industry (December 2021)**

1. The Competition and Consumer Committee (**Committee**) of the Business Law Section of the Law Council of Australia (**BLS**) welcomes the opportunity to respond to NSW Fair Trading's Consultation Paper on a Proposed Information Standard for the NSW Travel Industry, published in December 2021 (**Consultation Paper**). The SME Business Law Committee of the BLS supports the views expressed by the Committee in this submission
2. The Committee acknowledges that Australian consumers have experienced stress, frustration and confusion when seeking to alter travel bookings in light of the COVID-19 pandemic and agrees with the policy objective of improving consumer awareness regarding their rights and remedies in such situations.
3. Rather than addressing the specific questions raised in the Consultation Paper, the Committee takes the opportunity to provide some observations on the Proposed Information Standard as a state-based solution to this policy problem and its implementation alongside the existing nation-wide consumer protection law (the Australian Consumer Law or ACL).
4. Based on the information provided in the Consultation Paper, the Committee does not support the implementation of a Proposed Information Standard for the NSW travel industry.
5. The impact of the COVID-19 pandemic on Australian consumers and travel businesses has been nation-wide. Similarly, the Committee's preferred approach is that if statutory reform is needed NSW Fair Trading should work with the ACCC, government and other state and territory ACL regulators to develop options that can be implemented through a flexible and economy-wide approach. This will help maintain consistency in the national consumer law framework and avoid unnecessary bespoke variations.
6. If a state-based information standard for the travel sector remains under consideration, the Committee recommends further broad consultation with sector participants and other interested parties regarding how information is currently

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supplied and the most effective content and form for any such a standard. The current proposal risks increasing confusion for consumers, while imposing a further regulatory burden on travel sector businesses.

## Background

7. The Committee appreciates that the COVID-19 pandemic has resulted in unprecedented disruption across the Australian economy, with the travel sector being one where the impact has been felt with particular and on-going significance. The domestic and international travel restrictions, and subsequent cancellation of travel bookings, have had direct consequences for many thousands of Australian consumers and travel businesses. This is reflected in the increase in consumer complaints to both state and federal regulators outlined in the Consultation Paper.
8. The core consumer problem identified in the Consultation Paper is that consumers have often been unable to obtain a refund or other compensation when seeking to alter or cancel their travel plans due to the pandemic and associated border closures. It became clear that available consumer rights and remedies in this unprecedented situation could be variable and were often determined by specific supplier terms and conditions. At the same time, across Australia travel and tourism operators faced unique and difficult operational and financial challenges. These factors and the associated complexity produced stress, frustration and customer confusion.
9. It appears the ACCC, state and territory ACL regulators and other government agencies have worked collaboratively regarding COVID-19 issues since the start of the pandemic, including in relation to the travel sector and the COVID-19 related changes or cancellations. The ACCC has acknowledged that the issues have been particularly complex and often case specific for consumers and the travel industry, given the limited application of the “consumer guarantees” regime under the ACL where services are cancelled due to government restrictions and the complex operating models of many travel businesses.<sup>1</sup>
10. The Committee notes the primary regulatory approach to date has been to educate consumers and businesses in the sector about their rights and obligations. In this regard, the NSW Government has developed online resources, with travel checklists for both consumers and industry that provide valuable information. This includes key information consumers should be aware of before making a travel or accommodation booking and suggested actions for business to improve customer communication and disclosure (Consultation Paper, pages 4 – 5).<sup>2</sup>
11. Travel and tourism operators have been regularly cautioned that consumers must be treated in accordance with their rights and entitlements under both their contractual terms and the ACL, and that consumers cannot be misled about those rights.

## Proposed Information Standard

12. As an additional step to address consumer confusion and lack of awareness, the Consultation Paper proposes an Information Standard (**Proposed Information Standard**) be prescribed under section 47C of the *Fair Trading Act 1987* (NSW)

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<sup>1</sup> ACCC, The impact of COVID-19 on consumer and fair trading, November 2020 at p.8.

<sup>2</sup> Online resources in relation to travel, accommodation and event bookings / cancellations have also been made available by agencies that include the ACCC, Consumer Affairs Victoria and Consumer and Business Services (SA)

(the **Act**) to apply to all travel and accommodation service providers operators in NSW (**travel service providers**).

13. The Proposed Information Standard will specify that all travel service providers prominently display certain information prior to a consumer proceeding to purchase accommodation and travel services, including at the point of sale (Consultation Paper, pages 7 – 10). The Consultation Paper currently proposes nine categories of specific information that a travel business will need to collate and make available at potentially multiple points of the customer journey.

## Committee Comments

### A. Desirability of a national consumer law framework

14. It can be agreed that measures which help ensure that consumers and businesses alike are clear about their rights, responsibilities and remedies in the event of a pandemic or similar event are positive developments. However, the Committee submits that caution should be taken in relation to the Proposed Information Standard, which represents a state-based statutory change to the consumer law framework.
15. As a general rule there should be an in-principle preference for consumer law reforms that apply economy-wide to maintain consistency and avoid bespoke state-based variations. The benefits of a single national consumer law are well known for both consumers and businesses. In 2009, when discussing the forthcoming introduction of the ACL, the General Manager, Competition and Consumer Policy Division, Australian Treasury noted:<sup>3</sup>

*The benefits of a national approach to consumer law have been apparent for some decades. Indeed, there was a largely successful attempt to implement consistent consumer laws in the 1980s through a template legislation scheme based on Part V of the Trade Practices Act 1974.*

*But, the benefits of this consistency were short-lived, and since then individual governments – and I include the Australian government – have all pursued their own improvements to consumer laws, leading to divergence, duplication and complexity. The net result is that businesses and consumers are not able to fully understand their rights and obligations under the law, which leads to costs – in terms of time, money and reduced confidence in markets.*

*These developments are understandable – governments face pressures to address specific concerns every day and the answer is often to do something. However, the consequences of such unilateral action by individual jurisdictions – for both businesses and consumers – are not always fully appreciated.*

16. These benefits were reiterated in the review of the ACL that followed in 2017. The ACL Final Report, while identifying areas where the law could be improved, found that "... on the whole, the introduction of a generic consumer law has benefited consumers and traders and that the law itself is generally 'fit for purpose'. In

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<sup>3</sup> Dr Steven Kennedy (General Manager, Competition and Consumer Policy Division, Australian Treasury), *An Introduction to the Australian Consumer Law*, Forum for Consumer and Business Stakeholders, 27 November 2009 at pp. 2 – 3.

particular, the introduction of the ACL has helped empower consumers, lower the incidence of consumer problems and ease the regulatory burden on traders".<sup>4</sup>

17. In this case, the general preference for a national approach finds further support in the fact that the impact of the COVID-19 pandemic on the Australian travel industry and Australian consumers has been nation-wide. The customer confusion and business challenges identified in the Consultation Paper have not been limited to NSW, nor does the Consultation Paper make a case that the pandemic travel experience in NSW has been sufficiently different so as to warrant a bespoke, state-based statutory response.
18. The ACL Final Report noted that most consumer and industry peak bodies supported economy-wide approaches to law reform and emphasised the importance of flexibility so that the law can keep pace with changes in the marketplace.<sup>5</sup> In keeping with this approach, rather than implementing the Proposed Information Standard in NSW, the Committee would prefer to see NSW Fair Trading continuing to work with the ACCC, government and other state and territory ACL regulators to:
  - a) collectively consider whether any policy reforms may be required to address issues that have arisen in the pandemic, including in the travel sector<sup>6</sup>; and
  - b) where such reforms are identified, develop options for consultation that can be implemented through a flexible and economy-wide approach.
19. This accords with the existing framework for ensuring the ACL remains fit for purpose in response to marketplace changes, while maintaining consistency in the national consumer law framework and avoiding unnecessary bespoke variations. It also reduces the potential for unintended but counterproductive consequences, such as additional complexity and confusion for Australian consumers and travel sector businesses.

#### *B. Practicality of the Proposed Information Standard*

20. The Committee observes that, perhaps reflecting the complexity of the issues highlighted in (6) – (10) above, the categories of specific information presented in the Consultation Paper are broadly described and may be currently contained in various business documents, including existing terms and conditions, company policies and/or separate third party contracts. For at least some travel service providers, this is likely to produce multiple different disclosures to consumers in various locations, both in physical form and electronically.
21. For travel agents or other providers offering package services, these requirements could be multiplied as the Consultation Paper seems to suggest they must provide all categories of information in relation to each contract included in a package (Consultation Paper, p.9). For example, a package involving airfares, car hire and

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<sup>4</sup> Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review – Final Report*, March 2017 at pp. 1 – 8.

<sup>5</sup> *Ibid.* p.16.

<sup>6</sup> This includes whether industry-specific measures are warranted. In general, consumer protections should apply economy-wide rather than to specific industries or sectors. Policy makers have repeatedly recognised that inserting industry-specific measures into consumer laws can make it more difficult for consumers to understand their rights and increases the compliance burden for businesses.

accommodation may require up to four separate information disclosures (i.e. from the airline, car hire company, hotel and travel agent).

22. Travel service providers will naturally be best placed to provide detailed comments on the practicality of the Proposed Information Standard, including its content and how or when the information must be displayed. However, based on the information provided in the Consultation Paper, the Committee believes the current proposal risks increasing confusion for consumers, while imposing a further regulatory burden on travel sector businesses.
23. If a state-based information standard for the travel sector remains under consideration, the Committee recommends further broad consultation with sector participants and other interested parties regarding how information is currently supplied and the most effective content and form for any additional disclosure.<sup>7</sup> Attention should be paid to the way in which that disclosure is tailored, to ensure consumers are being better equipped to make informed choices.

### **Conclusion and further contact**

24. The Committee would be pleased to discuss any aspect of this submission.
25. Please contact the chair of the Committee Jacqueline Downes at [Jacqueline.downes@allens.com.au](mailto:Jacqueline.downes@allens.com.au) if you would like to do so.

Yours faithfully



**Philip Argy**  
**Chairman, Business Law Section**

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<sup>7</sup> For example, if the term “travel services provider”, which currently is defined to include “*anyone ... who sells travel products or services*” (Consultation Paper, page 7), extends to those that offer travel insurance policies, it may be worth considering how exclusions related to pandemic related travel disruptions / cancellations could be best communicated to consumers.