

Consumer protection in the travel and travel related services market

Consultation paper

March 2011

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GLOSSARY

ACL	Australian Consumer Law. The ACL commenced on 1 January 2011 as an applied law of the Commonwealth and all States and Territories. The provisions of the ACL are contained in Schedule 2 of the <i>Competition and Consumer Act 2010</i> (formerly the <i>Trade Practices Act 1974</i>)
COAG	Council of Australian Governments
MCCA	Ministerial Council on Consumer Affairs
National Scheme	The National Cooperative Scheme for the Uniform Regulation of Travel Agents, introduced in 1986 and subsequently adopted by all States and Territories
The Study	<i>Review of consumer protection in the travel and travel related services market</i> , prepared by PricewaterhouseCoopers
RIS	Regulation Impact Statement, prepared in accordance with the COAG <i>Best Practice Regulation Guide for Ministerial Councils and National Standard Setting Bodies</i>
SCOCA	Standing Committee of Officials of Consumer Affairs
TCF	Travel Compensation Fund
Travel intermediaries	For the purposes of this paper, travel intermediaries refers to businesses required to be licensed as ‘travel agents’, in accordance with the various Travel Agents Acts of each State and Territory. The relevant instruments of each state are the following legislation, together with their associated regulations: <i>Travel Agents Act 1986</i> (NSW); <i>Travel Agents Act 1988</i> (Queensland); <i>Travel Agents Act 1986</i> (SA); <i>Travel Agents Act 1987</i> (Tasmania); <i>Travel Agents Act 1986</i> (Victoria); <i>Travel Agents Act 1985</i> (WA); <i>Agents Act 2003</i> (ACT); and <i>Consumer Affairs and Fair Trading Act</i> (NT)
Compensation arrangements	For the purposes of this paper, compensation arrangements refer to the compensation functions of the TCF, as part of the National Scheme

PURPOSE OF THIS CONSULTATION PAPER

SCOCA seeks views from those engaged in and interested in the travel and travel-related services markets to inform its recommendations to the Ministerial Council on Consumer Affairs (MCCA).

SCOCA wants information on the potential costs and benefits of reforming the regulatory arrangements for travel intermediaries under the National Cooperative Scheme for the Uniform Regulation of Travel Agents (National Scheme).

The views expressed in this consultation paper do not reflect an agreed position of MCCA, nor do they necessarily reflect the policy position of any of the Australian, State or Territory governments.

SCOCA last reviewed the National Scheme in 2004. Since then, significant changes have occurred in the travel and travel-related services markets, in terms of their structure and the way in which consumers seek out and obtain these services. This review of the National Scheme coincides with the start of the Australian Consumer Law (ACL), which took effect across Australia on 1 January 2011 and the development of the National Tourism Accreditation Framework (NTAF).

In this context, MCCA has asked SCOCA to consider whether the National Scheme continues to be the most appropriate form of consumer protection in the travel and travel-related services markets.

In late 2009, SCOCA commissioned PricewaterhouseCoopers (PwC) to conduct a study of consumer protection in the travel industry. PwC undertook consultations and research during 2010, and prepared a report titled *Review of consumer protection in the travel and travel related services market* (the Study).

This consultation paper draws on the Study as well as other sources. The Study is available on www.consumerlaw.gov.au. Appendix A of this paper contains a summary of the Study.

REQUEST FOR COMMENTS

Responses are requested by Friday, 1 April 2011. Submissions should be addressed to:

The Chair
Policy and Research Advisory Committee of SCOCA

and can be submitted to:

australianconsumerlaw@treasury.gov.au

or sent by post to:

The Chair
Policy and Research Advisory Committee of SCOCA
c/- The Manager
Consumer Policy Framework Unit
Infrastructure, Competition and Consumer Division
Department of the Treasury
Langton Crescent
PARKES ACT 2600

Confidentiality

It will be assumed that submissions are not confidential and may be made publicly available on the Treasury website (www.treasury.gov.au) and the Ministerial Council on Consumer Affairs website (www.consumerlaw.gov.au). If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked confidential to be made available will be determined in accordance with that Act.

1 CONTEXT FOR THIS CONSULTATION

OVERVIEW OF THE TRAVEL INDUSTRY

The travel industry is diverse, with differing characteristics, trends and circumstances across the sector. With some exceptions, travel services markets are typically highly competitive and have a large small business presence.¹

Since the early 1990s the travel industry has changed greatly due to the advent and uptake of technology, in particular, the internet. The pace of change has increased in recent years. Australians travel more frequently due to, among other things, the declining relative cost of travel. Consumers now have greater access to information and the ability to contract directly with suppliers through electronic payments and the internet. This has also coincided with a broad trend towards consolidation in sectors of the market, most notably, travel intermediaries.

The traditional role of travel intermediaries as ‘gatekeepers’ to the travel industry is increasingly under challenge, particularly for domestic travel. Consumers can now by-pass travel intermediaries and contract directly with suppliers.

Recent data on entry, exit and external administration in the travel intermediaries sector suggests that business failure in this sector is not significantly higher or lower than in other industries.²

Travel intermediaries

In the past, most consumers, particularly those travelling overseas, purchased travel products supplied, for example, by tour wholesalers and travel service suppliers (airlines, hotels) through a travel intermediary, such as a travel agent. The nature of the activities of travel intermediaries gave rise to consumer protection concerns, such as:

- **information asymmetry** — consumers being at a substantial information disadvantage as to costs and other factors of travel, thereby leaving them vulnerable to exploitation by travel intermediaries, in the form of booking more expensive or elaborate travel arrangements than those sought by the consumer;
- **restrictions on choice** — consumers being, to some degree, reliant on travel intermediaries to purchase travel products; and
- **carriage of monies** — consumers paying large sums of money to travel intermediaries, who then passed payments on to suppliers.

1 According to the Jackson Report, *Informing the National Long-term Tourism Strategy* (2009), 93 per cent of businesses in Australia’s tourism industry are small businesses.

2 For further information on the volatility of travel agents, see the Study, page 66.

The combination of these circumstances gave rise to concerns about the vulnerability of consumers to financial loss, particularly if a travel intermediary collapsed. This concern, coupled with a number of high-profile collapses, was the main driver for the introduction of the current regulatory approach.³

The National Scheme seeks to address two consumer protection objectives:

- inadequate service, either as a result of incompetence on behalf of the travel intermediaries or inappropriate conduct; and
- financial loss arising from the failure of travel intermediaries to account for prepayments.⁴

These risks exist, to a greater or lesser extent, in most industries. A key issue for the Study lay in the quantification of these risks and whether these risks have changed since the introduction of the National Scheme.

Inadequate service

Inadequate service can occur in any industry. Consumers, when contracting with a service provider, expect a level of quality based on a range of factors, including the price, supplier representations and the offering made. If this standard is not met, consumers should expect an appropriate mechanism for obtaining redress.

Under the ACL, suppliers of goods and services must meet statutory consumer guarantees, which give consumers a comprehensive set of rights for the goods and services they acquire. In this way the ACL can address inadequate service concerns.

Recent developments in the travel industry have reduced the vulnerability of consumers to inadequate service by travel intermediaries. For example, the information and choice available to consumers has greatly increased and the use of the internet and electronic payments has removed the need for intermediaries in many cases.

A recent consumer survey⁵ found little evidence that consumer dissatisfaction is more prevalent in the travel industry than other industries. It found that travel intermediaries account for less than one per cent of consumer complaints in most States and that 88 per cent of consumers were either 'satisfied' or 'very satisfied' with the service they received on their most recent purchase.

Loss of prepayments

Business insolvency creates a risk of detriment to all creditors, including consumers, because its assets may be insufficient to repay creditors fully. This risk was the main driver for the introduction of the National Scheme in the 1980s.

³ Centre for International Economics (2000), 'National Competition Policy review of the National Scheme for the Regulation of Travel Agents' (page 23).

⁴ Centre for International Economics (2000: page 23).

⁵ Survey conducted on PwC's behalf by TNS Group involving a survey of a random sample of over 800 travel consumers.

The magnitude of insolvency risk to consumers is related to:

- the risk of financial collapse or the volatility of the industry;
- the extent of prepayments or carriage of money;
- the extent of possible consumer detriment — that is, the size of the relevant purchase; and/or
- the availability and adequacy of measures by which consumers can protect themselves from these risks.

Since the introduction of the National Scheme a number of developments have occurred:

- Market consolidation and the declining market share (in terms of revenue) of smaller agencies have encouraged greater stability in the industry.
- Consumers have greater access to information and the ability to contract directly with suppliers through electronic payments and the internet. More and more consumers are doing so, in which case their funds are not at risk from travel intermediary collapse. The popularity of credit card usage also reduces the amount of funds exposed to this risk.
- Increasing household incomes and consumers' familiarity with travel, combined with the declining real cost of travel, make travel purchases a less significant household purchase.
- Private sector options are available to consumers to protect themselves against insolvency risks, including the 'charge-back' mechanism offered by credit cards. 'Charge-back' is a common security feature of credit cards 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. The availability of charge-back is not a regulatory requirement and is provided at the discretion of card issuers. The terms and conditions on which charge-back is available to consumers, such as time limits on when claims can be made, varies among card issuers and products.

Prepayments and carriage of monies are common in the travel industry and these arrangements do not differ in their commercial nature from many similar industries. Data relating to market entries and exits, businesses entering external administration and the probability of business distress, indicates that the risk of insolvency in the travel intermediary industry is no higher than other comparable industries.⁶

Consideration by the Ministerial Council on Consumer Affairs

In May 2009, SCOCA commissioned a study of consumer protection measures in the travel and travel-related services market, including the role of the Travel Compensation Fund (TCF) from PwC. The study considered competency and conduct requirements as well as compensation under the National Scheme. A summary of the study is at Appendix A. The

⁶ This is based on estimates of the risk of financial distress prepared by business information firm Dun and Bradstreet for PwC.

review was intended to provide analysis of the effectiveness of the National Scheme in the light of the fact that:

- some sections of the travel services industry have consistently argued strongly for reform to the TCF or its removal; and
- macroeconomic conditions at the time, particularly the global financial crisis, suggested a greater than usual possibility of large business failures, which could have a detrimental impact on consumers.

MCCA last considered the operation of the National Scheme in May 2004. It considered recommendations to introduce a competitive insurance system so that private insurers could compete with the TCF. It also considered abolishing the mandatory qualification and experience requirements for travel intermediaries as a condition of licensing. This modification of the licensing framework would limit it to a 'fit and proper person' test and a check to ensure that compulsory insurance requirements are satisfied.

MCCA did not accept the recommendations of the 2004 review on public interest grounds. MCCA's principal concern was that the review did not sufficiently consider any proposal to retain existing regulation as a comparative base case, and accordingly, had not sufficiently considered the intangible benefits of existing regulation.

In the light of the discussion above, including the role and purpose of consumer protection measures and the existing regulatory landscape in the travel industry, the objectives for reform are to:

- implement a consumer protection framework that is well targeted and proportionate to the risks being addressed;
- minimise the regulatory burden on business while achieving an appropriate level of consumer protection;
- promote consistency in the approach to consumer protection across sectors and industries; and
- imbed a flexible framework that is responsive to the changing circumstances and needs of the sector.

2 CURRENT PROTECTIONS FOR CONSUMERS

AUSTRALIA'S OVERALL CONSUMER PROTECTION FRAMEWORK

Consumer protection rules redress failures in markets that leave consumers particularly vulnerable to financial or other risks. Consumer protection, properly designed, can remove or mitigate the risks to consumers, while still allowing markets to function efficiently.

Since the start of the ACL on 1 January 2011, Australia has had a single national fair trading and consumer protection law. The ACL regulates the conduct of all businesses in all sectors, including the travel sector. A generic consumer protection framework provides certainty to all businesses and consumers as to their rights, expectations, responsibilities and obligations regardless of where and in which industry they operate.

Some industries or sectors may have particular circumstances that give rise to a need to supplement the generic provisions with additional specific consumer protection measures. Whether such a need exists should be assessed with reference to the circumstances of each market or industry.

Poorly targeted departures from generic consumer protection rules may be costly, by increasing compliance costs, restricting competition, limiting innovation and creating regulatory uncertainty.⁷

Travel intermediaries are covered by the overall framework

Any reforms to the National Scheme need to be considered in the context of the generic fair trading and consumer protection framework in the ACL.

The ACL is enforced by the Australian Competition and Consumer Commission and state and territory fair trading agencies. Australia's corporations and criminal laws, rules governing the Australian Securities Exchange and activities of regulators (such as the Australian Securities and Investment Commission) also provide prudential oversight of incorporated travel agent businesses and address insolvency issues.

Regulatory and non-regulatory measures supplement the generic rules in the travel industry, providing, either directly or indirectly, an additional layer of protection to consumers. They include:

- codes of conduct instituted and enforced by industry associations⁸;
- commercial arrangements — such a credit card merchant agreements; and

⁷ Productivity Commission (2008), 'Review of Australia's Consumer Policy Framework'.

⁸ For example, the Australian Federation of Travel Agents Code of Ethics, Council of Australian Tour Operators Code of Ethics and the Australian Tourism Export Council Member Code of Ethics and Business Practice.

- private protections — most importantly, travel insurance and credit cards ‘charge-back’ mechanisms.

National Tourism Accreditation Framework

The Australian Government’s National Tourism Accreditation Framework (NTAF) was developed in consultation with industry and state and territory governments. It provides an umbrella framework under which independent accreditation programs that operate in the different parts of the tourism industry can apply to co-brand with a common national brand and standard. It aims to improve tourism industry standards and practices by providing tourists with a means of identifying quality tourism businesses and providing incentives for businesses to improve the quality of their products.

The Australian Government has announced that NTAF will be launched in April 2011. It intends that NTAF will become an internationally recognised mark, giving accredited businesses a symbol of quality assurance. Participating accreditation programs are to be strengthened by offering co-branding with NTAF. At the same time, to maintain and promote the reputation of NTAF, participating accreditation schemes will be required to meet certain criteria, including complying with general principles that must be addressed in the NTAF assessment process.

To achieve consistency of quality for a framework that will encompass a number of programs that specialise in different areas and sectors and that take different approaches to assessing quality, the NTAF will make a number of requirements of participating programs. Programs must:

- meet certain criteria in order to participate;
- require that businesses they accredit, rate or certify meet certain threshold criteria; and
- comply with general principles that must be addressed in the program’s assessment process.

The NTAF is being run as a co-operative initiative with: the Tourism Quality Council of Australia (TQCA), responsible for decision making and setting overall policy direction of the NTAF; Tourism Australia, responsible for development and implementation of a marketing strategy; and the Department of Resources, Energy and Tourism providing administrative, secretariat and policy support.

Further information about the NTAF is available from www.ret.gov.au/tourism.

CONSUMER PROTECTION SPECIFICALLY APPLYING TO TRAVEL INTERMEDIARIES

On top of the ACL, travel intermediaries are subject to industry-specific consumer protection regulation. In each State and Territory, travel intermediaries are licensed under relevant laws. These laws are broadly aligned under the National Scheme, which was introduced in 1986 to promote nationwide industry standards. Initially adopted by Victoria, New South Wales, Western Australia and South Australia, it now applies in all States and the ACT. It

does not apply in the Northern Territory.⁹ Under the National Scheme, participating jurisdictions must enact uniform rules,¹⁰ including requiring that travel intermediaries be licensed and participate in the insolvency protection arrangements administered by the TCF.

The regulatory regime for travel intermediaries, including licensing and insolvency protection measures, has three key parts:

- **Competency** — protecting consumers from poor service from travel intermediaries, to the extent this is the result of incompetence.
 - **Conduct** — improving business conduct in the industry through the disciplinary powers vested in the relevant licensing authority.
- (i) These two parts are currently incorporated in the licensing regime.
- **Compensation** — providing compensation to consumers who lose funds in the event of a travel intermediary collapse, including prudential oversight to minimise the risk of business failure.
- (ii) This part is currently incorporated in the insolvency protection arrangements administered by the TCF.

Competency

All state and territory licensing regimes have entry requirements for those wanting to operate as a travel intermediary.

Applicants must establish their suitability to hold a license (for example, that they are over 18 years of age, are of good reputation and character and are otherwise fit and proper persons to be licensed). Travel intermediaries, or certain employees (such as a site manager), must have a specified level of experience and/or qualifications. These requirements require that person to have:

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

The required training must be provided or assessed by a nationally recognised organisation. While the relevant qualifications and experience requirements are broadly equivalent across jurisdictions, there are some differences. For example, in some States the licence holder is required to have met the requirements personally, while in others the requirements are imposed on the business's day-to-day manager.

⁹ While the National Scheme has been adopted in the Northern Territory, businesses in this jurisdiction are exempted from participating in the Travel Compensation Fund.

¹⁰ The relevant laws in each State and Territory are the *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).

Conduct

The National Scheme allows the relevant authority (usually a State or Territory consumer agency) to take disciplinary action against travel intermediaries. The grounds for action 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.

Disciplinary action may include:

- suspension of a license for a period of up to 12 months;
- imposing a condition on the licence; or
- disqualification of the licensee.¹¹

Some States and Territories have further behaviour requirements, which cover additional areas of business conduct and operations, including:

- ‘unjust’, ‘deceptive’ or ‘misleading’ conduct rules¹²;
- advertisements — for example, requiring a business disclose its licence name and/or number on published advertisements¹³;
- notices in premises — outlining prescribed particulars such as business name and/or licence number;¹⁴ and
- online trading — including licence number and jurisdiction on the business’s home page.¹⁵

Compensation

The National Scheme requires that licensed travel intermediaries are participants in the TCF.¹⁶

11 *Travel Agents Act 1986* (NSW), section 21.

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

13 Such provisions are enacted in all States and Territories.

14 Such provisions are enacted in all States and Territories except the ACT.

15 *Travel Agents Regulation 2007* (Victoria), section 7.

16 While the National Scheme has been adopted in the Northern Territory, businesses in this jurisdiction are exempted from participating in the TCF.

The TCF has two functions: prudential oversight and compensation. Its prudential oversight function is provided by the terms of the TCF trust deed, which make an individual eligible to participate in the TCF if the TCF Board considers the individual has, and is likely to continue to have, sufficient financial resources to carry on business as a travel intermediary. In formulating its opinion, the TCF can consider a number of factors, including any previous involvement of the person in the industry. However, the primary indicator is the person's financial position.

The TCF has developed guidelines according to which it determines whether or not a participant, or potential participant, has sufficient financial resources. These 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.

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

- maintaining a 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 (including audited financial accounts).

The TCF requires all participants to submit audited financial accounts annually and imposes a requirement of a bank guarantee and an insurance arrangement for participants who do not, or cease to, meet the capital requirements.

The TCF may also compensate consumers who suffer loss from a travel intermediary collapse in certain circumstances. The TCF pays compensation, up to \$25,000, to a person who:

- enters into travel or travel-related arrangements with a TCF participant (directly or indirectly);
- suffers direct pecuniary loss directly resulting from a failure to account by a TCF 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 TCF participant's failure to account;

- for similar losses from a failure to account by someone who is not a TCF participant; or
- beyond the \$25,000 limit.

Compensation payments have been made for travel-related losses by businesses that are not participants of the TCF. The TCF suggests this typically occurs in instances where a consumer believes they are dealing with a licensed travel agent.¹⁷

The TCF pays compensation of a total value of between \$500,000 and \$4 million a year, with an average of about \$2 million a year. This represents a typical payment of between \$500 and \$2,000 per claimant. Data collected by the TCF suggests that an average of 22 travel intermediaries fail each year, with associated compensation. This represents a failure of approximately 0.7 per cent of all TCF participants a year.¹⁸

The principal exception in the past 10 years was the collapse of Ansett Airlines and its subsidiary Traveland (a travel agency) in 2001. While the number of agency collapses was not abnormally high in that year, the TCF paid out more than \$11 million in compensation in 2002. The TCF received additional funds from Commonwealth, State and Territory governments to meet the cost of the Traveland collapse.

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

18 Travel Compensation Fund Annual Reports (2000-2009).

3 OPTIONS — COMPETENCY AND CONDUCT

This paper outlines three options for the reform of the competency and conduct requirements of the National Scheme. Option 1A involves the consumer protection laws in the ACL in addition to accreditation through the NTAF, which can be characterised as a cooperative industry and government approach to regulation. Option 1B is a mandatory travel agents registration scheme, administered by governments. Option 1C is maintaining the status quo (that is, the current licensing regime in the National Scheme), which can be characterised as ‘mandatory government regulation’.

Although prudential regulation is currently undertaken by the TCF, it is a conduct requirement and can be considered as a policy action separate to the operation of the TCF, and is therefore considered in this section of the consultation paper.

PwC also identified a range of potential reform proposals for the reform of competency and conduct elements of the National Scheme. These are not raised as distinct options in this consultation paper but could be incorporated into variations of either of the options presented in this section, either on a transitional or ongoing basis. The additional reform proposals identified by PwC include:

- **An aviation ombudsman.** The Australian Government canvassed the setting up of a national aviation ombudsman by the aviation industry in its National Aviation Policy White Paper (released on 16 December 2009). The White Paper addressed a range of issues in the aviation sector including consumer protection. The ombudsman would provide an external dispute resolution avenue by which consumers could seek redress for inadequate service. PwC recommended that it would be desirable to expand the role of this body to provide a dispute resolution mechanism for the entire travel and travel related services sector. However, PwC acknowledged that the development of this body is still in its infancy and significant work is still required to realise this proposal. Accordingly, including travel intermediaries under the responsibility of an expanded Aviation Ombudsman may not be feasible in the short term. The PwC Study did not identify a need to create an industry specific dispute resolution mechanism specifically for travel agents. Currently, consumer complaints about travel agents are dealt with by state and territory fair trading agencies. The study found that the level of complaints to fair trading agencies about travel agents is no greater than for other industry sectors. However, as the Aviation Ombudsman proposal is developed, there the activities of travel agents should be considered as part of that process, at least insofar as they relate to the aviation industry.
- **Industry code of conduct.** The Australian Government can prescribe voluntary or mandatory codes of conduct under Part IVB of the *Competition and Consumer Act 2010*. Industry codes may be employed where the structure of an industry means that commercial arrangements (usually in industries characterised by a small number of powerful parties negotiating with a large number of less powerful parties) are not sufficient to resolve disputes. Mandatory codes are currently in place in respect of the franchising, petroleum wholesaling, horticulture wholesaling and retail grocery unit pricing sectors. PwC found that there may be some merit in developing an industry code

of conduct for the travel industry to promote industry standards if the current licensing requirements were abolished. PwC also stated that this measure may be an appropriate alternative to voluntary accreditation under the NTAF (recommended under Option 1A) if the NTAF fails to generate sufficient industry participation or acceptance by consumers. The NTAF is a similar quasi-regulatory option to a voluntary industry code. It will impose standards of conduct on businesses that choose to be bound by and thereby provide a signal to consumers about member businesses. A mandatory industry code would only be appropriate where it is unlikely that industry participants would have sufficient incentive to abide by the standards set out in the code.

OPTION 1A: INDUSTRY-LED REGULATION

Option 1A would comprise the broad consumer protection provisions in the ACL, combined with the protections offered by the participation criteria for accreditation under the NTAF.

Option 1A is linked to potentially winding down the TCF (see Chapter 4). Maintaining the TCF requires close prudential oversight of travel agents' accounts to ensure it does not become insolvent. Without this prudential oversight requirement, however, the need for licensing is also greatly reduced.

Accreditation under the NTAF will be voluntary, although eligibility criteria will apply. Using NTAF accreditation as a basis for determining who was operating in the industry also avoids the regulatory duplication that would occur if a separate licensing scheme were maintained for travel intermediaries.

The ACL has an extensive range of consumer protections and is predicated on a removal by all Australian governments of all laws which are inconsistent with it or which alter its effect.¹⁹ Sectoral regulation has, in many cases, this effect. For example, the ACL prohibits accepting payment for services without being able to supply the services ordered and imposes both civil penalties and criminal sanctions for this conduct.

Option A would remove the current State and Territory licensing regimes, which are enacted under the National Scheme, and replace them with an 'industry led' regulatory scheme. This would remove or reduce the costs associated with the character, competency and prudential oversight requirements that travel agents currently must meet in order to hold a licence.

Impacts

Consumers

Accreditation with NTAF

NTAF accreditation encourages good practice and conduct by travel intermediaries and gives consumers a clear signal of service quality. It is likely that while those travel intermediaries that pose the greatest risk to consumers would be the least likely to participate in voluntary arrangements, NTAF nonetheless provides a good support

¹⁹ *Intergovernmental Agreement for the Australian Consumer Law* (2009), clause 3.2.

mechanism for the ACL, especially as a consumer feedback management system will be a feature of the NTAF.

A key benefit to consumers is that programs applying to join the NTAF must have an internal complaints handling policy and process to be licensed which must be clearly advertised in their literature and on their website. The accreditation program must also ensure that all operators it accredits, certifies or rates, has a complaints handling process and dispute management system.

A higher number of complaints may indicate an accreditation program's quality procedures are no longer meeting the NTAF standards. It is the TQCA's role to monitor quality issues under the NTAF. If the TQCA receives an unusually high number of complaints or a complaint of a very serious nature about a licensee, the TQCA may review the conduct of the accreditation program against the NTAF assessment criteria. Depending on the outcome of that review, the TQCA may ask the organisation to undertake certain actions or use its power to revoke the licence.

Australian Consumer Law

The ACL currently applies to travel intermediaries. The ACL prohibits a range of unfair business practices, including false or misleading representations, accepting payment without intending or being able to supply, and bait advertising.

The ACL currently applies to travel intermediaries, in addition to the National Scheme. Option 1A would remove the National Scheme, but retain application of the ACL to travel intermediaries.

Removing licensing

Through participation in NTAF, travel agents and other travel service providers will be able to provide a clear signal to consumers about the level of service they can provide. However, the extent to which this offsets the removal of licensing is dependent on consumer acceptance of NTAF.

Potentially, consumers would stand to benefit from reduced compliance costs for travel intermediaries if greater competition and innovation, particularly from new business models, leads to cost savings being passed on to consumers. However, the amount of these potential savings is difficult to quantify.

PwC considered that consumers derive little benefit from current training requirements under the National Scheme. Training requirements for purchasing international airfares are either unnecessary (for those businesses who rely on ticket consolidators) or likely to be undertaken by businesses. In either case, the requirements impose a regulatory burden on business with few benefits for consumers.

Given that travel industry training is practically focused, it does not relate to the key consumer protection risks in the industry, namely inadequate service and business insolvency.

For ticket issuers, the National Scheme's training requirements are arguably unnecessary as it is practical training that is required to issue tickets with the required skills and know-how. Where the travel agent uses a ticket consolidator practical knowledge of international flight

bookings is not necessary as these services are performed by the consolidator. The training requirements appear to reflect the increasingly outmoded 'gatekeeper' role of travel intermediaries.

Consumers may be exposed to greater risk of travel intermediaries' incompetence or misconduct if the removal of licensing (including character and education requirements) results in a reduction in effective consumer protection. However, given the significant changes to the travel industry since the National Scheme was created, it is not possible to quantify to the extent to which the Scheme has contributed to current service quality in the industry. Limiting this risk is the ongoing requirement of travel intermediaries to comply with the ACL and other business conduct laws, and the criminal sanctions which can apply to breaches of these laws and fraudulent activities. The ACL prohibits activities such as accepting payment without intending or being able to supply or making false or misleading representations to consumers.

Poor service by travel intermediaries does not reflect a major consumer protection concern as indicated by complaints to consumer agencies. In most jurisdictions, travel intermediaries account for less than one per cent of complaints received, and there is no evidence that compulsory training has any impact on this.²⁰

Removing prudential oversight

The effectiveness of prudential oversight under the National Scheme is difficult to determine. While the Study found that there is a broad perception that the TCF's prudential oversight has improved the financial viability of industry members, its nature and structure has changed dramatically in recent years.

Industry

Accreditation with NTAF

Accreditation with NTAF is voluntary and would not impose compliance costs on travel intermediaries that chose not to participate. Travel intermediaries that do chose to participate would incur costs to achieve and retain NTAF accreditation. The size of these costs would clearly depend on the actual requirements (which would be determined in consultation with industry) of accreditation.

Existing industry associations (AFTA, ATEC, and others) have a substantial membership base and enforce codes of conduct. A voluntary accreditation scheme could potentially come at a small additional net cost to businesses that are associated with the major professional associations.

While there is no existing alternative dispute resolution (ADR) scheme for the travel industry, industry associations could look to establish an ADR process to facilitate compliant handling. Further, under NTAF, a licensee must have an internal complaints mechanism in place in order to be accredited. As such, membership of NTAF could help to address this concern.

²⁰ Based on consumer complaints data from consumer protection agencies. See PwC (2010: page 86).

Removing licensing

The benefits of Option 1A are a reduction in the administrative burden of the National Scheme. The Study estimated that licensing and associated requirements accounts for around \$6 million of the cost of the National Scheme.

Removing the National Scheme's training requirements would reduce business costs by removing a need to undertake unnecessary or irrelevant training. Travel intermediaries may still incur costs for commercially necessary training, including training about the ACL and NTAF.

Removing prudential oversight

The TCF's prudential oversight function imposes substantial financial and administrative cost on travel intermediaries (these costs are set out in the table in Appendix A).

Removing prudential oversight would remove its associated costs, but, as with training costs, travel intermediaries may still incur some of these costs for commercial reasons (such as reporting to shareholders) or to satisfy generic regulatory requirements (particularly for incorporated businesses).

Consolidation in the travel market has led to the presence of large travel agency businesses, including ASX200 publicly listed companies. As listed entities, these businesses are subject to general corporate laws, as well as, to the listing rules of the ASX, which set standards of behaviour for listed entities. Further prudential oversight duplicates these requirements.

Government

Accreditation with NTAF

Option 1A could reduce the level of government enforcement that is required in respect of the travel agent industry if the NTAF is successful in maintaining responsible business practices among travel intermediaries. A robust voluntary accreditation process can send clear signals to help consumers make decisions about which travel intermediaries, or travel providers to transact with.

The NTAF has been developed to apply to the tourism industry broadly, so general costs associated with NTAF would not be affected by this change to the National Scheme.

Removing licensing

State and territory governments recover the costs of licensing travel intermediaries through license fees. Some jurisdictions also use licensing fees to fund conciliation and compliance activities in the travel industry. In the absence of license fees as a source of revenue, these activities may need to be funded from alternative sources or levels of activity reduced.

Consumer agencies will continue to administer the generic consumer protections of the ACL. These activities are generally funded through general government revenues. The extent to which agencies are able to direct general consumer law enforcement activities to the travel industry may be impacted by the loss of license revenue.

Removing prudential oversight

Prudential oversight is currently undertaken by the TCF, with costs recovered from industry. Accordingly, there would be no direct government costs.

Implementation

The Australian Government is already committed to implementing the NTAF by April 2011.

Implementing Option 1A would allow each State and Territory to wind down its National Scheme legislation. Amendments to the TCF trust deed would also be necessary. In addition, the travel industry would need to be encouraged, through the Australian, State and Territory governments' tourism agencies, to participate in NTAF.

In implementing Option 1A, should the TCF be wound down (an option discussed in chapter 4), some form of regulatory oversight of travel intermediaries could operate while this occurred to ensure that travel intermediaries who posed a risk to the financial integrity of the TCF continued to be excluded from the industry.

This regulatory oversight could, for example, allow any person to operate as a travel agent without a need to obtain a license, but see people prohibited from operating as travel agents in certain circumstances such as where they are insolvent, under administration or recently have been convicted or found guilty of an offence involving fraud or dishonesty. However, regulatory resources would be necessary to police any regulatory oversight. In the absence of a positive licensing or registration scheme, these costs would need to be met by general government revenues.

Marketplace surveillance is likely to prove difficult. Detecting such instances without a positive requirement to self disclose or a licence revenue stream to fund specific intelligence gathering in this sector would be an impediment.

Regulatory oversight of travel intermediaries could also be extended beyond the period of winding down the TCF. If the TCF was wound down, a permissions system administered by each State will be necessary to mitigate any unforeseen impacts that may arise.

Questions

- 1.1 What transitional arrangements, if any, would be necessary to implement Option A?
- 1.2 Should regulatory oversight of travel intermediaries only apply during a transition period?

OPTION 1B: MANDATORY REGISTRATION SCHEME

Option 1B replaces the current licensing scheme with a mandatory registration scheme administered by governments. The registration scheme would include the following elements:

- registration of all travel agent businesses for the purposes of:
 - recording the participants who are active in the sector;
 - if necessary, mandating participation in any ongoing compensation scheme (discussed in Chapter 4);
- screening industry participants for basic character requirements;
- collecting registration fees, appropriate to:
 - recovering the costs of the registration body for processing and administration; and
 - funding compliance activities by the administering agency or agencies.

Option 1B would also remove the disciplinary powers associated with the current licensing requirements (such as license cancellation or suspension). Fair trading agencies would otherwise rely on the provisions of the generic consumer protections of the ACL to enforce good industry standards.

Impacts

Consumers

Replacing licensing with registration

Option 1B would retain a key strength of the current licensing regime, that is the ability to exclude persons from the travel intermediaries sector who pose an unacceptable risk of mismanaging consumers' funds. The basic elements of a fit and proper person test included in the current National Scheme require an applicant to:

- be at least 18 years of age;
- be of good reputation and character;
- be likely to carry on a business honestly and fairly; and
- not be in any other way not a fit and proper person to be a travel agent.

These, or similar requirements would continue to be enforced before an application for registration would be accepted. In addition, a registered travel intermediary who subsequently fails to meet the registration criteria could be deregistered, subject to appropriate principles of procedural fairness.

Registered travel agents would no longer be required to comply with the training or other competency criteria required by the National Scheme. The Study found that these criteria, as currently applied, do not add significantly to consumer protection. However, the potential for removal of compulsory competency criteria to lower industry standards of professionalism would be mitigated to some extent by voluntary accreditation through the NTAF or other industry-based mechanisms for travel agents to distinguish their brand quality.

Accreditation under NTAF

Under Option 1B registered travel agents could still choose to participate in the NTAF. This would provide travel agents that want to distinguish their brand in terms of a commitment to complying with externally evaluated competency and training criteria, which go beyond basic character requirements.

Industry

Compared to the status quo, Option 1B would reduce the administrative burden of the National Scheme. In addition to removing training requirements, a less onerous scheme could be expected to reduce administrative compliance and licensing fees. At present, the costs associated with licensing total approximately \$6 million per annum, including:

- administrative compliance (\$270,000 per annum);
- mandated training courses (estimated total cost of \$4.3 million per annum); and
- licensing fees (\$1.4 million per annum).

Under Option 1B, training costs would be abolished and or licensing fees and administrative costs of compliance (such as ensuring and reporting compliance with training requirements) could be substantially reduced.

Government

Under Option 1B, government would continue to collect registration fees, which could be used to fund industry-specific compliance activities and recover the costs of administering the registration scheme. It is likely that the costs of administering a registration scheme would be lower than the current licensing arrangements under the National Scheme, as it would comprise fewer regulatory requirements.

Implementation

This measure would involve an amendment to the National Scheme and/or the relevant legislation in each participating State and Territory to remove completion of a relevant training requirement and/or experience as a precondition for licensing.

Licensing arrangements under the National Scheme are currently administered separately by each state and territory fair trading agency. A registration scheme could continue to be administered in this way or alternatively a national body, either the TCF (discussed at Chapter 4) or a new national body could be established.

Questions

- 1.5 Are the current character requirements imposed under the National Scheme appropriate? Should different character requirements be adopted for a registration scheme?

OPTION 1C: MANDATORY GOVERNMENT REGULATION

Option 1C maintains the current licensing system, including its competency and conduct requirements, under mandatory government regulation. The National Scheme establishes similar competency and character requirements for travel intermediaries across all States and Territories. A description of the National Scheme is set out in Chapter 2 and in the Study.

Option 1C covers the implications of maintaining the National Scheme competency and conduct requirements in substantially the same form as they operate now. SCOCA seeks comments on whether any specific changes should be made to the requirements of the National Scheme if this approach was to be adopted (such as reviewing the content of the training requirements imposed on travel intermediaries).

Impacts

Consumers

Option 1C's benefits for consumers are difficult to quantify. As noted earlier, significant changes in the travel industry since the creation of the National Scheme suggest that it is difficult to compare it with standards of competency and conduct prior to the National Scheme's introduction. When compared with other sectors, the Study did not find that there is a particularly high level of consumer dissatisfaction or concern with travel intermediaries under the current arrangements. Statistics from consumer agencies suggest that travel-related complaints make up a relatively low proportion of fair trading and consumer protection issues, relative to other industries.

Industry

Based on the Study, there would be benefits in reviewing the effectiveness of the training requirements imposed by the National Scheme. These account for the majority of costs borne by industry of around \$4.3 million. However, current industry practice seems to exceed the minimum training requirements required by the National Scheme, so the total cost of \$4.3 million may be overstated for businesses that exceed the minimum requirements.

There may also be some benefit in reviewing the administrative arrangements for the National Scheme. With the exception of the operation of the TCF, which is discussed in Chapter 4, States and Territories individually administer and enforce their own largely harmonised licensing regimes. Intuitively, moving to a single or joint licensing system may reduce industry costs in the long run, but there may be short term transitional costs.

Government

State and territory governments currently collect license fees from travel intermediaries. Approaches to funding the National Scheme vary across jurisdictions, but it is not administered on a full cost recovery basis.

Implementation

Changes to the National Scheme would be achieved through amendments to each State and Territory's National Scheme legislation.

Questions

- 1.6 If it is desirable to retain a detailed competency and conduct regulatory framework for travel intermediaries, are any specific changes to the current arrangements desirable?**

4 OPTIONS — COMPENSATION

The TCF provides insolvency protection insurance for consumers. There are two options for reform of the compensation arrangements. Option 2A involves consumers continuing to benefit from the ACL while decreasing costs by closing the TCF. Option 2B is to retain the compensation arrangements in their current form. The following analysis examines the impacts of Option 2A and Option 2B for consumers, the travel industry and government.

The Study also identified two potential reform proposals for the compensation arrangements, which are not discussed further in this paper.

- **Industry-led compensation.** PwC noted that governments could replace the existing government-provided (but industry-funded) compensation arrangements with mandatory or voluntary industry-led compensation arrangements. The Study pointed to the Travel Agent's Association of New Zealand Bonding Scheme as an example of industry run compensation arrangements. If the existing compensation arrangements were to be removed (discussed at Option 2A), industry would have the opportunity to develop compensation arrangements of its own initiative. The Study found that the private market for travel insurance in Australia is well established. The travel insurance market includes direct sales of policies by insurers, bypassing the traditional sales role of travel agents. While the private market for travel insurance typically does not currently extend to travel agent failure (due to the existence of the TCF), there is no prime facie evidence that it would be desirable for governments to require the travel industry to develop its own compensation arrangements if the TCF was abolished. Such a requirement could be considered if there is evidence of an unwillingness of the private insurance market to offer this kind of cover (in the absence of the TCF) and there was a clear demand from consumers for this kind of cover.
- **Enhancing the existing regulatory structure.** The Study found that if the current compensation arrangements are retained (discussed at Option 2B), there would still be scope for improvements to those arrangements. PwC considered that the scope of the TCF could be limited to outbound travel only, more focused prudential arrangements, provisions for exemptions from the TCF and reform of the TCF governance. Options to improve the operation of the TCF are not discussed in any detail in this consultation paper on the basis that the threshold issue for consideration is not the enhancement of the TCF, but its retention. However, this issue could be considered further if it is decided to retain the TCF.

OPTION 2A: UTILISE THE NATIONAL CONSUMER PROTECTION FRAMEWORK AND OTHER SAFEGUARDS

Option 2A involves consumers relying on their rights under the ACL and ending the TCF's compensation function. Consumers would still have a number of avenues available to them to obtain their own protection against the risk of travel intermediary insolvency. These may include non-regulatory measures, such as:

- use of credit cards and the charge-back mechanism;
- a ‘flight to quality’ — that is, with consumers using more trusted and reliable businesses to mitigate the risk of insolvency, assisted by the NTAF; and
- where available, obtaining private insurance.

The trend of consumers transacting directly with travel suppliers in itself also provides some protection against the risk of any one supplier becoming insolvent or otherwise not providing the services that have been paid for.

Impacts

Consumers

The main beneficiaries of the current compensation arrangements are those consumers who would otherwise lose their prepayment for travel services. The key economic benefits of Option 2A relate to removing the \$19.3 million annual cost burden of the current arrangements to travel intermediaries. The high level of competition in the sector would be likely to ensure that the majority of these savings would be passed on to consumers.

The National Scheme’s compensation arrangements protect consumers’ funds only when they are in the hands of a travel intermediary. Only a very small component of the travel industry supply chain is covered by the TCF. Increasingly, consumers’ travel purchases are not covered by the TCF because they do not use intermediaries. In 2009, consumers paid \$9.2 billion for travel products to travel intermediaries in the TCF. In 2007-08, consumers spent \$28 billion on travel products, including for example travel, accommodation, car hire and travel agency services.

Removing the current compensation arrangements would end confusion as to what monies are covered and when they are covered, which was raised as a concern by some consumers during the Study.

Consumers will still be able to insure themselves against potential losses and, either directly or indirectly (through their insurer) pursue redress for monies lost due to fraud, misappropriation of funds and other misconduct under existing generic consumer and criminal laws. For those consumers who purchase from large travel intermediaries this option may not be a diminution of protection, since in the event such a large business did collapse, the TCF may not be able to compensate all consumers — at least not immediately.

Under Option 2A it is foreseeable that consumers would alter their behaviour to reduce the potential for insolvency risk by, for example, using privately offered insurance products. However, the Study found that few people knew about the TCF and, accordingly, most consumers are unlikely to change their behaviour if the TCF is removed.

Consumers who book with a travel intermediary that subsequently fails may have a diminution of consumer protection under Option 2A, as they would no longer have the ability to receive compensation. Based on experience in the last 10 years, this would amount to approximately 4,000 consumers potentially not receiving \$2.9 million of compensation

from the TCF per year (between \$500 and \$2,000 each). However, this potential loss may be mitigated by the development of private insurance products for consumers.

Consumers would also need to take action to follow-up on credit card charge-back facilities and potentially take legal action if they believe there is scope to recover funds against the owners/directors/auditors of travel intermediaries. Legal recourse is likely to be more expensive to consumers, compared to claims against the TCF. However, where private insurance products exist, these claims may be pursued by the insurer and aggregated.

Industry

Option 2A would remove a significant regulatory burden on travel intermediaries. The Study estimated the cost burden of the compensation arrangements to be \$19.3 million. This represents a significant saving to businesses operating within the market and removes a competitive disadvantage they have with those not covered by the National Scheme. It would also remove a substantial barrier to entry and allow for increased competition and innovation.

Option 2A would bring the regulation of travel intermediaries in line with:

- the remainder of the travel industry — therefore avoiding confusion, definitional issues and unfair differences in regulatory burdens; and
- regulation of most other industries of comparable risk to consumers and systemic importance.

The cost of Option 2A to industry would mainly relate to potentially reduced consumer confidence. However, since it would bring travel intermediaries into line with the rest of the travel industry, it is unlikely that it would lead to a significant reduction of business for those travel intermediaries now in the TCF.

It is important to note that, in addition to NTAf, some private sector oversight, including bank merchant arrangements and IATA accreditation, which serves to protect businesses' commercial interests, will continue.²¹

Government

The Study found that the National Scheme's compensation arrangements are unduly burdensome relative to the risk of consumer detriment from travel agent collapses.

The benefit of Option 2A for governments would be the removal of regulation and its administration, which, based on the evidence presented, represents a disproportionate regulatory response considering the relative economic and systematic importance of the industry.

While the number of consumers who would no longer have the ability to receive compensation is small relative to the economic cost of the arrangements, the losses are concentrated on a small number of consumers. Accordingly, policy considerations other than

²¹ For further information about IATA, see the Review, page 46.

economic efficiency may dictate government intervention in the market in these consumers' interests.

Additionally, the adoption of Option 2A may lead to an increase in complaint levels to consumer agencies. This may occur if consumers lose money when a travel intermediary collapses, as they would have previously received compensation. As such, Option 2A could lead to requests for governments to compensate consumers.

Implementation

Option 2A involves considerable change to compensation arrangements applying to a subsector of the travel industry.

Governments could consider consumer awareness raising measures in advance of removing the TCF. The Study found that consumer awareness of the TCF is currently low, however, the TCF generally makes itself known to consumers in the event of a travel intermediary failure. In the absence of the TCF consumer protection agencies will need to consider whether they would make contact with consumers in the event of a travel intermediary failure or alternatively rely on consumers making contact with them.

If a transition period for introducing Option 2A was to be adopted complex implementation issues would need to be addressed, such as:

- how the compensation arrangements for consumers would be wound down;
- when the industry would stop making payments into the TCF; and
- the treatment of new entrants during the transition period.

An alternative would be to end the TCF's functions on a prospective date and then distribute the TCF's assets in accordance with its trust deed. The Trust Deed provides that any residual money standing to the credit of the TCF upon termination, after payment of all liabilities of the TCF, are to be distributed to member States and Territories in proportion to the total number of participants in the fund in each State or Territory on the date of termination.²²

Questions

- 2.1 Should transitional arrangements be provided if the current compensation arrangements were removed?
- 2.2 Should new travel intermediaries be requested to contribute to compensation arrangements during the transition?

²² Travel Compensation Fund Trust Deed (effective 4 December 2009), clause 27.2

OPTION 2B: MAINTAIN THE CURRENT COMPENSATION ARRANGEMENTS

The TCF undertakes the current compensation arrangements. It compensates consumers who suffer loss from a travel intermediary's collapse in certain circumstances.

The TCF was set up in 1986 as part of the National Scheme, which applies in all States and the ACT (but not the Northern Territory).²³ Under the National Scheme, participating jurisdictions must implement uniform rules,²⁴ including requiring that travel intermediaries be licensed and participate in the compensation arrangements administered by the TCF. The licensing rules in the National Scheme require that all travel intermediaries, as a precondition for licensing, are participants in the TCF.

Impacts

Consumers

The primary benefit of the National Scheme is the provision of compensation to consumers who would otherwise lose their prepayments for travel services. For the last ten years, these payouts average about \$2.9 million per year. The current arrangements allow for a quick and costless resolution of claims, with the average turnaround time for claims on the TCF being between five and seven days.

While the National Scheme is effective, its coverage is limited. Travellers' funds are only directly protected when they are in the hands of a travel intermediary and only part of the travel industry supply chain is covered. While there is indirect protection available (for example, chargebacks and travel insurance), consumers are not protected when they do not use travel intermediaries or where their money has been passed on by a travel intermediary to travel suppliers.

Importantly, the arrangements do not protect consumers from losses as a result of insolvency of travel service suppliers such as airlines and tour companies. Accordingly, the National Scheme's compensation arrangements cover only a small portion of the insolvency risk to consumers in the travel industry, and this amount is shrinking due to the increasingly direct engagement of consumers with travel services suppliers.

The definition of what money is to be compensated in the event of a business failure in the travel industry may not be understood by consumers and the potential for a travel services supplier collapse occurring when that business is outside the TCF may lead to concern about the scope of the TCF's activities and the level of consumer protection.

The existence of the TCF may serve to stifle the development of private insurance and compensation arrangements to protect consumers from insolvency risk. These might be

²³ While the National Scheme has been adopted in the Northern Territory, businesses in this jurisdiction are exempted from participating in the Travel Compensation Fund.

²⁴ 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).

provided at less cost and may better suit changing market conditions. Having said that, in the absence of the TCF, consumers may need to take action to follow-up private protections such as credit card charge-back facilities and potentially take legal action if they believe there is scope to recover funds. Legal recourse is likely to be more expensive to consumers, compared to claims against the TCF. However, if private insurance products existed, these actions may be taken by insurance providers and also aggregated.

The TCF might also pursue legal actions even where it is not likely to result in a net gain to the fund (for example, the cost of legal action exceeds the funds recovered). While this incurs a net cost, it also provides a deterrent against similar future actions by businesses.

The Study found that consumers are largely unaware of the TCF's existence and functions. A survey of consumers conducted for the Study suggested that only 14 per cent have at least some awareness of the TCF, with only 3 per cent having a good understanding of the fund and its functions. Improved consumer awareness of the TCF could highlight these benefits for consumers. The advantages of the TCF may be enhanced if consumers were informed of the TCF's existence and furthermore its functions and benefits. By informing consumers, this would ensure that consumers acknowledge and value the additional consumer protection that the compensation arrangements afford them. However, this may increase costs for the TCF, and therefore travel providers, if it leads to a greater number of claims.

Industry

The TCF ensures a level of quality assurance for its member travel intermediaries, which maintains standards and can serve to increase consumer confidence and participation in the market. However, the Study found that the current compensation arrangements are unduly burdensome to industry relative to the risk of consumer detriment from travel intermediary collapses. This represents a disproportionate regulatory response considering the relative economic and systematic importance of the industry.

The cost to industry centres on the cost of compliance with relevant laws, and in regards to compensation, predominately on the fees charged to be a member of the TCF.

A total of \$8,190.00 is payable by a business on application to the TCF for a principal or only location, and an additional \$5,470.00 for each branch location. Additionally, TCF participants are subject to an annual renewal fee of \$390 for a principal or only location and \$290 for each additional location.

The initial fee payable by new entrants required when entering the travel market may discourage new businesses to enter, specifically where they are looking at opening several locations. More locations give rise to a higher initial fee, creating a higher barrier to entry.

The TCF is currently consulting with fund participants over a proposal to restructure its funding arrangements to reflect more closely the individual risk that specific travel intermediaries present to the TCF.

Government

The TCF handles complaints that might otherwise be directed to, and resolved by, the consumer agencies and a benefit of the current arrangements is a reduction in the call on government resources.

The emergence of large travel intermediaries has meant that the TCF can no longer guarantee to compensate consumers in the case of all collapses. This was made clear by the collapse of Ansett and consequently its subsidiary travel agent Traveland. The TCF's capital reserves at the time meant it could not compensate consumers fully for their losses. Initially, the TCF paid only 40 per cent of each claim. Full payment of consumers' claims was then made once subsequent government funding was provided. These funds were recouped from remaining travel agent businesses through a special levy.²⁵

While the TCF's capital reserves have been built up since then, it would be unable to bear the cost of claims that would eventuate in the event of the collapse of one of the major travel intermediaries. These businesses account for a substantial proportion of industry revenues (46 per cent of the travel agency market revenues are captured by the top four players) and, therefore, consumers' funds.

As such, a cost of the compensation arrangements to governments is the risk that additional funds may be required in the event of a travel agent collapse larger than the current level of funds held. In this situation state and territory governments may need to allocate additional resources to the TCF. Further, if the travel industry continues its trend of consolidation, this risk will continue to grow.

Implementation

Option 2B maintains the current compensation arrangements. The Study found that consumers are largely unaware of the TCF's existence and functions. It is important that consumers know of the existence, function and benefits of the compensation arrangements to ensure that they value the consumer protection it provides. Hence, consideration could be given to education activities to promote the existence and benefits of the TCF if Option 2B was to be adopted.

Over the medium term, the market for travel intermediaries could continue to be assessed to determine whether:

- the demand for travel intermediaries remains, increases or declines;
- the current trend for consumers to manage their own travel arrangements continues; and
- the increase in total travel by consumers continues due to declining travel costs.

²⁵ Travel Compensation Fund (2002) Annual Report.

Questions

- 2.3 Does the potential inability of the TCF to be able to compensate consumers in the event of a major travel intermediary collapse pose a significant concern?
- 2.4 Are there additional benefits or costs of maintaining the current compensation arrangements, which have not been considered here? Please provide evidence.

5 CONCLUSIONS

COMPETENCY AND CONDUCT

Option 1A: Industry-led regulation in Chapter 3 has merit and should be further considered in the light of stakeholder views.

The ACL prohibits a range of unfair practices, such as misleading or deceptive conduct, by suppliers of any kind, including travel agents.

Australia's generic consumer protection framework, which is underpinned by the *Intergovernmental Agreement for the Australian Consumer Law* means that the Australian, State and Territory governments can monitor jointly the effectiveness of the ACL and modify it if appropriate for all industries that deal with significant consumer deposits. All jurisdictions are also committed to ensuring that industry-specific regulation does not duplicate or unnecessarily alter the effect of the ACL.

Some oversight of the travel intermediary industry may be warranted because consumer deposits continue to be held by travel intermediaries for a period of time. Replacing a licensing scheme with voluntary accreditation with NTAF would benefit consumers by reducing compliance costs, particularly by reducing the excess regulatory compliance costs imposed on travel intermediaries above other travel businesses. This could lead to greater competition and more innovation by travel intermediaries, although this is difficult to quantify.

The nature of the current training courses is essentially practical, dealing with the mechanics of booking and selling international flights. They do not relate to the key consumer protection risks identified in the industry, such as those associated with inadequate service and business insolvency. The benefits of Option 1A are a reduction in the administrative burden of the scheme. In addition to removing training requirements, removing all licensing requirements would remove mandatory compliance costs.

NTAF provides clearer signals to consumers about the credibility of industry participants. Rather than relying on the current regulatory licensing and conduct regime, parts of which appear to be outdated, the NTAF will provide an incentive for tourism businesses to examine and improve the quality of the products and services they offer. The NTAF will recognise quality tourism products and services and assist consumers to choose high quality tourism operators, steering them away from unscrupulous operators. **A more flexible regulatory approach could also provide potential gains to consumers through new business models, given the impact of technological changes in this sector.**

State and territory governments could retain some form of regulatory oversight of travel intermediaries if there were remaining concerns about the potential for persons who present an unacceptable residual risk of consumers losing deposit funds.

COMPENSATION

Option 2A: Utilise the national consumer protection framework under the ACL and other safeguards in Chapter 4 has merit and should be further considered in the light of stakeholder views.

Option 2A involves basing consumer protection in the travel industry on the national consumer protection framework. Consumers would also have a number of non-regulatory protection mechanisms available to them.

The current compensation arrangements appear to impose significant regulatory burden on travel intermediaries and a cost on consumers relative to the risk of consumer detriment from travel agent collapses. The Study also found that consumers are largely unaware of the TCF's existence and functions.

Option 2A would allow more travel agents to set up business, increasing competition and travel intermediaries will no longer be required to pay the entry and ongoing fees associated with membership of the TCF. Where these costs are incurred by travel intermediaries, the high level of competition in the travel sector would ensure that the majority of these savings are passed on to consumers.

Option 2A would bring the regulation of travel intermediaries in line with the remainder of the travel industry and the regulation of most other industries of comparable risk to consumers and systemic importance.

Additionally, consumers will be able to rely on the generic consumer protection provisions of the ACL, which imposes restrictions on the conduct of all businesses relating to competition, fair trading and consumer protection legislation.

The ACL, which applies nationally, in all states and territories, and to all Australian businesses, provides certainty to consumers and businesses as to their rights, expectations, responsibilities and obligations regardless of where and in which industry they operate.

Consumers will still be able to pursue redress for monies lost due to fraud, misappropriation of funds and other misconduct under existing generic consumer and criminal laws.

APPENDIX A: SUMMARY OF THE STUDY'S ANALYSIS

PwC estimated the cost of the National Scheme — including licensing, prudential oversight and compensation — to be \$25.3 million per annum. The directly observable benefit (as measured in terms of the average pay-out to consumers) is \$2.9 million (averaged over the last 10 years). PwC’s estimated costs are set out in the table below:

Cost (per annum)		Industry
Licensing —	Administrative compliance (staff time)	\$300,000
	Mandated training courses	\$4.3 million
	Licensing fees	\$1.4 million
Prudential oversight —	Administrative compliance activities	\$3.2 million
	Provision of securities	\$2.5 million
	Preparation of audited financial accounts	\$4.8 million
	Retention of excess capital reserves	\$6.0 million
TCF	Administration costs	\$2.8 million
Total		\$25.3 million

LICENSING REGIME

The current travel intermediaries licensing regime is aimed at achieving four outcomes:

- ensuring participants fulfil certain minimum criteria related to establishing their bona fide nature (for example, greater than 18 years of age, fit and proper person, not previously disqualified from holding a licence) and disclose certain business details;
- ensuring a minimal standard of competence through training and/or experience requirements;
- collecting revenue to fund compliance and enforcement activities by the relevant authority; and
- mandating participation in the compensation arrangements.

Minimum criteria

Minimum criteria for licensing are a relatively inexpensive means of regulating entry into the travel intermediaries market, imposing relatively minor administrative costs on business while enabling licensing authorities to easily and efficiently impose and enforce regulations. The cost of these requirements relate to the time taken by a travel agent (or their employee) to complete the required paper work and other tasks to comply with the National Scheme. The majority of travel intermediaries (65 per cent) believe that licensing requirements are duplicated to some degree by the membership requirements of the TCF.²⁶

²⁶ Based on a survey of Australian travel agents conducted by PwC. See PwC (2010: page 84).

Training requirements

A typical training course that meets the training requirements costs approximately \$800,²⁷ although travel intermediaries report spending approximately \$2,000 per course. The nature of the training courses is essentially practical, dealing with the mechanics of booking and selling international flights. The courses merely ensure the licensed travel agent (or designated manager) is competent in the basic skills necessary to sell international travel.²⁸

Revenue collection

At present, licensing fees range between \$50 and \$750 for initial application and between \$55 and \$600 for annual renewal, depending on the state in which the business is licensed. Further costs are payable for additional branch locations, processing fees and penalties (for example, late submission of forms).

Licensing authorities collect revenue from industry to finance the administration of the National Scheme and compliance and enforcement activities by the relevant body. Revenue collection via this mechanism is appropriate, as costs incurred by government in relation to a particular industry are funded by that industry and, therefore, reflected in the business' cost structure.

Mandating participation in the compensation arrangements

The licensing scheme is also the mechanism by which travel intermediaries are required to participate in the industry compensation scheme arrangements.

CONDUCT

There is little evidence of a significant problem in business conduct in the industry. In most states the travel industry accounts for no more than five per cent of complaints to consumer protection bodies and travel intermediaries typically make up less than one third of these.

The Study found a body of opinion amongst stakeholders that the industry-specific disciplinary powers, currently incorporated into licence conditions, are important in ensuring good conduct in the industry.²⁹ PwC noted however, that this could also be achieved through negative licensing or a registration scheme rather than a full licensing scheme.

²⁷ Based on the advertised price of qualifying training units.

²⁸ Based on a survey of Australian travel agents conducted by PwC. See PwC (2010: page 86). PwC's survey of Australian travel agents found that only 18 per cent of travel agents consider the training somewhat or very effective at achieving consumer protection outcomes. See PwC (2010: page 86).

²⁹ For example, PwC's survey of Australian travel agents found that 65 per cent of agents considered the licensing authorities' disciplinary powers important to ensuring good conduct in the industry. See PwC (2010: page 106).

INSOLVENCY PROTECTION

The Study found that the opinions of stakeholders on the ongoing relevance and appropriateness of insolvency protection, in light of the historical developments of the travel industry, differ widely. The National Scheme has two components: prudential oversight and compensation.

Prudential oversight

Suggested benefits of prudential oversight of the industry are:

- reducing the risk of travel agency insolvency — limiting the financial loss to consumers, and consequently, the TCF, and other creditors;
- promoting consumer confidence in the travel agent market and the tourism industry more broadly; and
- providing a form of accreditation — that is, membership in the TCF testifies, to some degree, to the business' solvency and bona fide nature.

The extent to which the prudential oversight function is currently reducing the risk of travel agency insolvency is difficult to ascertain. While there is a broad perception that the TCF's prudential oversight has reduced the financial volatility of the industry, the nature and structure of the industry has changed dramatically since that time. Even if failures did increase, a six-fold increase in the current value of lost funds would be required before the value of lost funds exceeded the economic cost of the National Scheme.

Compensation

Suggested benefits of compensation arrangements are:

- the compensation of consumers who would otherwise lose their prepayments for travel services;
- a swift and costless resolution of claims — the average turn-around time for claims on the TCF is between five and seven days;³⁰ and
- handling complaints that might otherwise be resolved by the relevant fair trading body.

³⁰ Information provided to PwC by Travel Compensation Fund.

APPENDIX B: STAKEHOLDER CONSULTATION³¹

STAKEHOLDER CONSULTATION

This consultation paper has benefited from PwC's study and other sources. In conducting its study, PwC held various meetings with stakeholders. These stakeholders, and others, were encouraged to make formal submissions to the Issues Paper and contribute to appropriate surveys.

These meetings discussed the nature and process of the Study and provided key stakeholders with an opportunity to discuss their concerns and provide comments on consumer protection in the travel industry. The meetings were relatively informal and focussed on the key issues of concern for the relevant stakeholder.

Stakeholders consulted are identified below.

Industry associations

- Australian Federation of Travel Agents (AFTA)
- Australian Tourism Export Council (ATEC)
- Council of Australian Tour Operators (CATO)
- Insurance Council of Australia
- International Air Transport Association (IATA)
- Queensland Tourism Industry Council
- South Australian Tourism Commission
- South Australian Tourism Industry Council
- Tourism NSW
- Tourism Tropical North Queensland
- Travel Agents Association of New Zealand (TAANZ)

³¹ Full details of the consultation process conducted by PwC in its review are provided in the PwC Report. See PwC (2010: page xii and Appendices).

Government departments and agencies

- Australian Government
 - Department of Education, Employment and Workplace Relations (Commonwealth)
 - Department of Resources, Energy and Tourism (Commonwealth)
 - Department of the Treasury (Commonwealth)
 - Office of Best Practice Regulation (Commonwealth)
- Consumer Affairs and Fair Trading (Tasmania)
- Consumer Affairs Victoria
- Department of Commerce — Consumer Protection (WA)
- Department of Employment, Economic Development and Innovation (Queensland)
- Department of Industry and Investment (New South Wales)
- Department of Justice — Consumer Affairs (NT)
- Department of Justice — Licensing, Regulation and Alcohol Strategy (NT)
- Office of Consumer and Business Affairs (South Australia)
- Office of Fair Trading (NSW)
- Office of Fair Trading (Queensland)
- Office of Regulatory Services (ACT)
- Tourism Victoria

Consumer bodies

- CHOICE (Australian Consumers Association)
- Queensland Consumers Association

Travel agents

- Carlson Wagonlit Travel
- Flight Centre
- Stella Travel Services (owner of Harvey World Travel)
- Traveller's Choice — Darwin
- Webjet
- Wotif Group
- various travel agents through state-based discussion forums (see below)
- various tour wholesalers through a discussion forum (see below)

Insurers

- Chartis Insurance
- CoverMore
- QBE Australia
- VERO (Suncorp Group)

Travel providers

- Intrepid Travel
- Qantas

Others

- Travel Compensation Fund (TCF)
- Financial Ombudsman Service — Banking Department
- Financial Ombudsman Service — General Insurance Department

Travel agents' discussion forums

PwC worked with AFTA to host a representative sample of travel agents from each state at a series of discussion forums. These forums enabled travel agents to contribute further to the Study and bring forward their views and experiences of the travel industry and its regulation. Almost all of the attendees were small travel agents, typically working as part of a chain under an umbrella arrangement.

PwC held the discussion forums in Melbourne, Adelaide, Brisbane, Sydney and Perth. PwC also contacted travel agents from the Northern Territory and held telephone discussions with them.

A forum of tour operators was also conducted, arranged by the Council of Australian Tour Operators (CATO) and with representatives of tour wholesaler businesses.

ISSUES PAPER

The Issues Paper intended to provide a factual overview of the context of the Study; consumer protection in the travel and travel related services industry. It also identified, and sought comment on, 22 key issues in relation to consumer protection in the travel industry.

With the cooperation of the TCF, the Issues Paper was distributed to all TCF participants. It was also distributed to AFTA, CATO, ATEC and other identified stakeholders. Through the Issues Paper, 32 formal submissions were received. A full list of submissions received is provided in the PwC Report.

SURVEYS

PwC conducted two surveys, one of Australian travel agents and the other of consumers of travel services. The results from these surveys were used as information to inform the Study.

Travel agents' survey

PwC released a survey of Australian travel agents utilising the database of all TCF members. The survey covered the main issues in our review relating specifically to travel agents, with questions concerning entry requirements, insolvency protection and conduct requirements. The survey's primary focus was on travel agents, as they are specifically regulated under the current scheme. We received over 300 responses to the survey.

Consumer survey and willingness-to-pay study

PwC, with the assistance of market research firm TNS, conducted a survey of over 800 consumers which included broad questions relating to consumer protection in the travel industry and questions designed to gauge consumers' willingness to pay for consumer protection measures in this context.

The broad survey questions related to various aspects of consumer behaviour, such as purchasing patterns, means of payment, uptake of travel insurance and perception of risk. The willingness-to-pay questions were aimed at valuing consumers' desire for protection from the risk of financial loss resulting from travel intermediary insolvency.