

UPDATE ON ACCC AND ONLINE TRAVEL AGENTS

Tourism Accommodation Australia has been leading efforts on behalf of the accommodation sector to have the Commonwealth Government address a range of issues associated with Online Travel Agents (OTAs), online rate parity and unfair contracts. The ACCC initiated an inquiry into OTAs in 2016 and while we are concerned that this inquiry has still not concluded we are working with the ACCC towards an outcome.

The work we have undertaken and an update on the ACCC's progress is outlined in this bulletin.

Background

In early 2016, the Australian Competition and Consumer Commission commenced an investigation into online travel agents after TAA, on behalf of its members, raised a range of concerns around online rate parity, unfair contracts and other anti-competitive behaviour.

From 1 September 2016, Expedia and Booking.com removed contractual requirements for Australian accommodation providers to:

- offer room rates that are equal to or lower than those offered on any other online travel agent
- offer room rates that are equal to or lower than those offered on an accommodation provider's offline channel
- make all remaining room inventory available

Throughout 2017 TAA continued to prosecute the issue of 'online rate parity' and 'unfair contracts' with the ACCC, advising that the ACCC had not gone far enough.

Following the industry roundtable on the 28 March 2017, the ACCC reinforced their need to continue to focus on both 'cartel conditions' and 'substantial lessening of competition'. They launched a formal submission process with other entities such as wholesalers and travel agents in May 2017. In September 2017 the Enforcement Committee advised the SLC unit that the inquiry would be a priority for the ACCC.

Establishment of the Substantial Lessening of Competition Unit

On the second half of 2017, two important legislative amendments to Australian competition law were passed into law by the Parliament, following recommendations from the 2015 Harper Competition Policy Review.

These amendments - the [Competition and Consumer Amendment \(Competition Policy Review\) Bill 2017](#) and the [Competition and Consumer Amendment \(Misuse of Market Power\) Bill 2017](#) – came into effect in November 2017.

The Competition Policy Review legislation contains a broad range of amendments to the Competition and Consumer Act 2010 in areas such as cartels, price signalling and concerted practices, exclusionary provisions, third line forcing, resale price maintenance, merger authorisations and non-merger authorisations, notifications and class exemptions, access and evidentiary provisions.

MEMBER BULLETIN

The Misuse of Market Power legislation is intended to strengthen the prohibition on the misuse of market power by corporations. Crucially, the previous 'purpose' test was replaced with a 'purpose or effects test', prohibiting a corporation with a substantial degree of market power from engaging in conduct with the 'purpose, effect or likely effect' of substantially lessening competition.

To facilitate effective compliance with, and enforcement of the legislation, the ACCC established a Substantial Lessening of Competition Unit (SLC Unit) in late 2017, which has responsibility for misuse of market power and concerted practices investigations and litigation within the ACCC.

Status of the Inquiry into Online Travel Agents

One of the major projects of the newly formed SLC unit is the inquiry into Online Rate Parity.

TAA met with the ACCC throughout 2017 to provide insights and information into the industry from an accommodation member perspective. We have also provided introductions to key personnel in the industry to assist ACCC explore the myriad contracts and behaviours that exist in this space. Our key concern has been ensuring that any exploration of this issue is not restricted to OTAs but includes our members.

2018 ACCC Priorities - ACCC continues to reinforce the importance of the inquiry into OTAs

On 20th of February, the Chairman of the Australian Competition and Consumer Commission (ACCC) Mr Rod Sims gave a speech to the Committee for Economic Development of Australia (CEDA) regarding the ACCC's 2018 Compliance and Enforcement Policy and its 2018 priorities.

This speech highlighted the continued importance of the implementation of the Harper Reforms and the role of the SLC, and reinforced the ACCC's ongoing commitment to executing its 2017 priorities, including continuing the Inquiry into online rate parity clauses.

Conclusion

The ACCC SLC unit has advised TAA that the Inquiry into Online Rate Parity has been prioritised in 2018 and will remain an ongoing commitment until there is clarity on a resolution.

TAA wrote to Rod Sims post his announcement of the ACCC's 2018 priorities to thank him for his prioritisation of the implementation of the Harper reforms and to acknowledge the current efforts of the SLC in relation to the inquiry into online travel agencies (OTAs) and online rate parity.

In response, the ACCC has advised TAA that they will be approaching hotels throughout the first half of 2018 and undertaking a witness management approach to progressing their investigation. Ultimately the industry's responsiveness in this phase will be critical in improving the pace of progress.

TAA welcomes the ACCC's ongoing engagement and will continue to work with the SLC unit to ensure their queries are addressed and any outcomes are fact based.