



# Advertising Guidelines For ATAS Participants

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# Agenda

Item	Topic
1	Intro of Advertising Guidelines
2	RECAP - Misleading and Deceptive conduct
3	Component Pricing
4	Two-price Comparative Advertising
5	Fine Print/Conditions Apply/Disclaimers
6	'Free'/Bait Advertising/Testimonials



ACCC (Australian  
Competition and  
Consumer Commission)

Schedule 2 Australian  
Consumer Law

Australian Competition and  
Consumer Act 2010

# Advertising and selling guide

November 2017



[www.accc.gov.au](http://www.accc.gov.au)

Most Australian businesses use advertising to promote their goods and services. Whether you advertise through television, radio, the internet or print media, you must ensure that your advertising complies with the Australian Consumer Law.

## Pricing manual for the travel industry



## Travel and accommodation

An industry guide to the Australian Consumer Law





## Advertising Guidelines For ATAS Participants

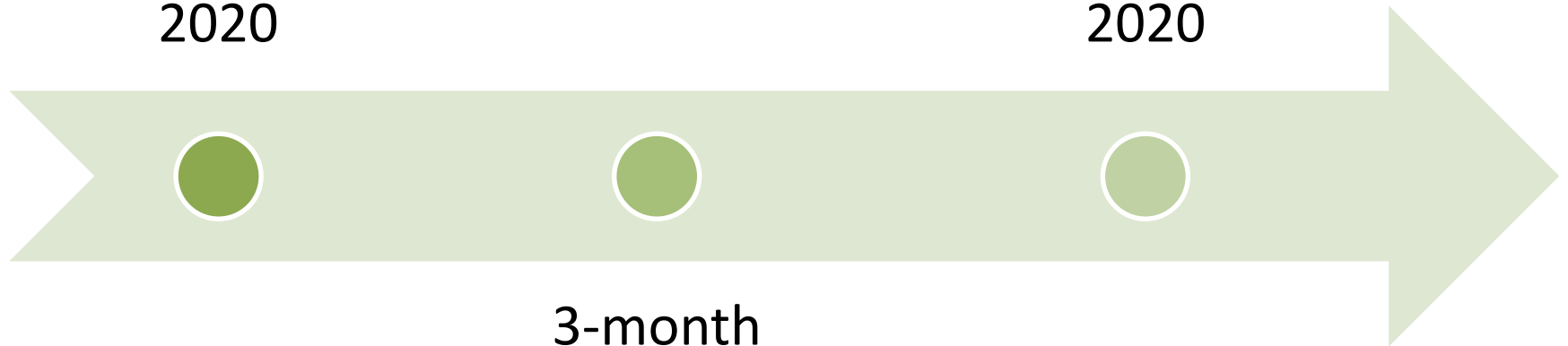


# Purpose

- These guidelines are not complete in detailing all of the obligations under the Australian Consumer Law (ACL) but seeks to highlight common issues in the travel industry. Where applicable, it builds on and clarifies issues specifically related to the travel industry and the requirement set by AFTA for ATAS accreditation.
- Please note, that this webinar and the Advertising Guidelines are not legal advice and all ATAS Participants should seek their own legal advice as required.

Effective Date:  
3<sup>rd</sup> February  
2020

Enforcement  
Date: 3<sup>rd</sup> May  
2020



3-month  
amnesty  
period

# MISLEADING & DECEPTIVE CONDUCT IN ADVERTISING



Two Price  
Comparison



Bait  
Advertising



Fine Print  
or Disclaimer



'Free'



Testimonials



Component  
Pricing

Use of  
'Typically'  
and  
'Valued Up To'



ADDITIONAL ADVERTISING GUIDELINES  
FOR ATAS PARTICIPANTS

All Mandatory  
Costs Including:  
Resort Fees  
Payments to 3rd  
Parties  
Gratuities



# RECAP – GENERAL PRINCIPLES

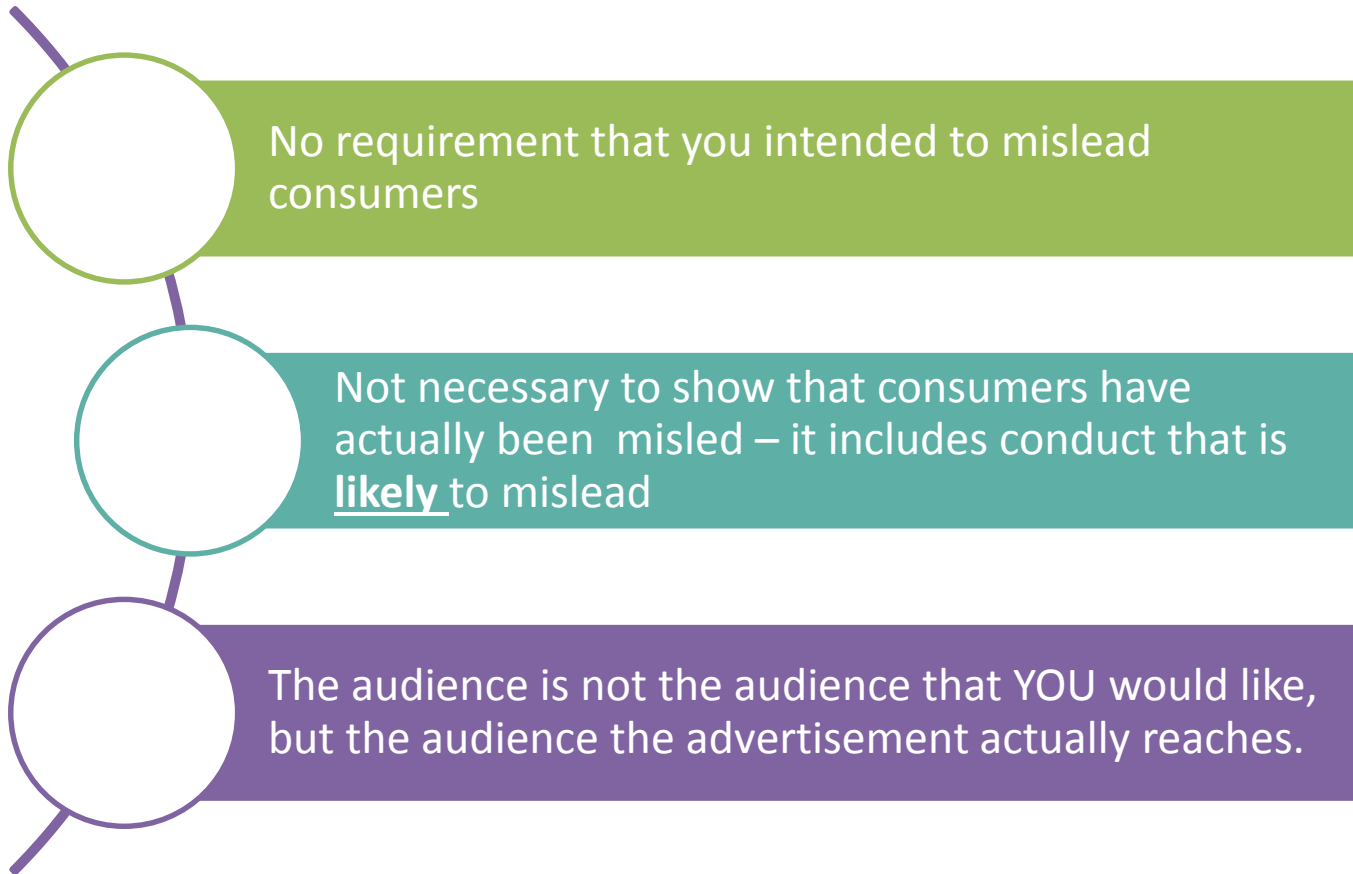
What does misleading or deceptive mean?

The relevant test is the reaction of an **ordinary and reasonable member of the advertisement's audience.**



“the matter is to be tested by its effect on all who come within the relevant section of the public, including the astute and the gullible, the intelligent and the not so intelligent, the well-educated and the poorly educated, men and women of various ages pursuing a variety of vocations”

- Franki J, *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177



## AFTA CHECKLIST

- ✓ Sell goods and services (including travel and any other extras) on their merits
- ✓ Look at the overall impression of your advertisement
- ✓ Who is the audience and what is the advertisement likely to mean to them?
- ✓ Remember, at minimum, it is the viewpoint of a layperson with little or no knowledge or experience in travel that should be considered.

# MISLEADING & DECEPTIVE CONDUCT IN ADVERTISING



Two Price Comparison



Bait Advertising



Fine Print or Disclaimer



'Free'



Testimonials



Component Pricing

Use of 'Typically'  
and 'Valued Up To'

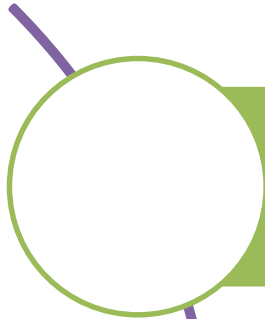


ADDITIONAL ADVERTISING GUIDELINES  
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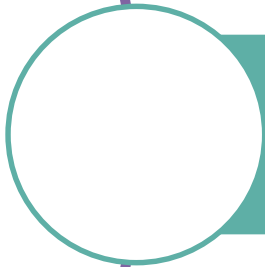
All Mandatory Costs  
Including:  
Resort Fees  
Payments to 3<sup>rd</sup> Parties  
Gratuities

# Component Pricing s 48

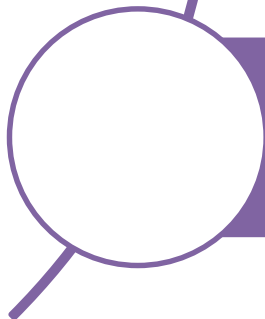
- When you present prices to your customers, you must state the total price of the good or service as a single figure, which is the **minimum total cost** that can be calculated.
- This should include any tax, duty, fee, levy or other additional charges.



The single price means the **minimum total cost** that is able to be quantified (or calculated) at the time of making the representation for a consumer to purchase (and later use) the travel.



An amount is quantifiable if it can be readily converted into a dollar amount.



If it is subject to variation (such as fluctuations in currency or potential changes to government or other statutory charges) you are to calculate it based on information available at that time and clearly advise consumers that it may be subject to change.



# Component Pricing s 48

- If you promote a price that is only **part of the total price**, the total price must also be displayed at least as prominently as the partial price.
- This means customers should be able to identify the total price in the advertisement at least as easily as prices for any component parts.

# ACCC Incorrect Example

**10-Day Get Hot in Hawaii  
package - \$799**

(airfare) + \$1300 (accommodation including buffet breakfasts daily) +  
\$1000 (taxes & charges)  
for a total price of \$3099\*

\*price quoted per person based on twin share;  
airfare quoted departs from Sydney, other cities may cost more

EXAMPLE

Because of the size, font, style, background and placement of the total (\$3099)—it is not able to be as easily identified as the most prominent component (\$799) and is unlikely to comply with the component pricing rules

# What does 'prominent way' mean?

A prominent single price is one that:

- Stands out so that it is easily seen by a consumer;
- Is clear, eye-catching and very noticeable.
- You should consider factors such as size, placement, colour and font of the price, as well as the background of the ad – relative to the medium you are using.

# Components

Need to Include	Don't Need to Include
Charges of any description payable by a consumer to book and purchase the travel	Optional extras
Tax duty fees levy or charge payable by the consumer	Any components which are not 'quantifiable'
	Amounts your business pays to a third party that are not passed on to the consumer.
	Representations exclusively to a business

## AFTA GUIDANCE

- Some tours may have mandatory additional costs that are not payable to the travel agent or tour operator, but need to be paid to a third party. This includes:
  - Resort fees;
  - Gratuities;
  - Direct payments required to a 3<sup>rd</sup> party operator.
- As the above costs are mandatory for a consumer to be able to experience the advertised holiday, these additional costs must be included in the headline price.
- Whilst the amounts are not payable to you, from the consumer perspective this is the total cost to complete the advertised holiday.

# Components

Need to Include	Don't Need to Include
Charges of any description payable by a consumer to book and purchase the travel	Optional extras
A tax, duty, fee, levy or charge payable by the consumer	Any components which are not 'quantifiable'
<b>ATAS Additions:</b> <b>Mandatory gratuities</b> <b>Resort Fees</b> <b>Direct Payments required to a 3<sup>rd</sup> party operator</b>	Amounts your business pays to a third party that are not passed on to the consumer.
	Representations exclusively to a business

# AFTA Examples

~~\$4,990~~

Fine print: AND \$150 payable direct to tour operator in China

CORRECT:

\$5,140

or

**\$4,990** (total cost **\$5,140** including mandatory payment to tour operator)

# ACCC acts against backpacker travel agents for misleading price representations



“Some of these businesses advertised tours to the Whitsundays and Fraser Island for as little as \$299, when that price did not include mandatory charges that consumers had to pay. Those included things such as insurance, national park fees, the Great Barrier Reef environmental charge and administration fees. The charges increased the total price of the tour to about \$450 in some cases.”



# ACCC acts against backpacker travel agents for misleading price representations



- Did not disclose or make it clear that additional mandatory fees of \$130 were payable on top of the advertised price of \$299; and
- the advertised price of \$299 did not reflect the true total price of the package.

## CORRECTIVE NOTICE

# A correction from Wicked Travel Pty Ltd

[Insert Wicked logo]

In the period between at least 25 May 2009 and 18 August 2009 we caused advertisements for tour packages to be published in various backpacker magazines, on our website and on promotional flyers and signs that did not correctly reflect the full total price of the packages.

Advertisements for the *Sanseeker* and *East Coast* packages were misleading because:

- We did not disclose or make it clear that additional mandatory fees of \$130 were payable on top of the advertised price of \$299.
- The true total price of the package was really \$429.

On 25 May 2009, **section 53C** of the *Trade Practices Act 1974* was amended to require that we state the single (total) price of our packages in our advertisements. We did not amend our advertisements to comply with these requirements.

- In some cases, we did not specify that the total price for the packages was \$429.
- When we did specify that the total price of the package was \$429, it was smaller and less prominent than the component price of \$299 stated in our advertisements.

We have given the Australian Competition and Consumer Commission a court enforceable undertaking (details available at [www.accc.gov.au](http://www.accc.gov.au)). The undertaking requires us to publish various corrective notices and implement a Trade Practices Compliance Program to ensure this kind of misleading advertising does not occur again.

[Insert ACCC logo]

This Corrective Notice has been paid for by Wicked Travel Pty Ltd pursuant to Undertakings accepted by the ACCC.

Two-price comparative advertising

~~WAS: \$1,000~~

**NOW: MISLEADING**

# MISLEADING & DECEPTIVE CONDUCT IN ADVERTISING



Two Price Comparison



Bait Advertising



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Component Pricing

Use of 'Typically' and 'Valued Up To'



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All Mandatory Costs  
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Gratuities

From **\$3,199** Typically \$4,842 pp twin share

**A\$1,999**/room

Valued up to A\$7,399

**\$2999**

TYPICALLY \$5699

# Two-price comparison

- Businesses often make comparisons between product prices being charged and:
  - the company's previous pricing (including 'was/now' or 'strike through' pricing or by specifying a particular dollar amount or percentage saving)
  - the 'cost' or wholesale price
  - the competitor's price
  - the recommended retail price (RRP)
  - **'Valued at' or 'typically' prices.**

# Two-price comparison

Businesses that use such statements must ensure that consumers are not misled about the savings that may be achieved.

# Two-price comparison

May be misleading if:

- Not sold at the “was” or other comparison price at significant quantities for a reasonable period immediately prior.
- Never offered for sale at the “was” or other comparison price

What is a reasonable period before the advertisement?

No single answer. Could be 2, 4 or 11 months.



A travel agency increases the price for all package holidays to Asia as part of an 'Escape to Asia' campaign, then crosses this amount out as a 'was' price, while putting the previous price as the 'now' price. The holiday was never advertised at the increased price. One package stated:

## Escape to Asia

– 7 nights incl. airfare, accomm, transfers, taxes and charges\*

**Was ~~\$2990~~ – Now \$1990**

\*taxes and charges subject to change due to currency fluctuations

This gives consumers the impression that the holiday package is genuinely discounted, when in fact the package had never been advertised or sold at the higher price. This advertisement is misleading and is likely to breach the ACL.

## AFTA Guidance

### 'Typically' and 'Valued at'

- The use of the words "Typically" and "Valued at" in advertising, is deemed to be a two price comparison and the above principles are to be applied when using these words in advertising.
- The use of the words may convey to a potential customer that they are getting a good deal because the sale price is less than the 'value' or RRP or what the product is usually or 'typically' sold for. If the product has never been previously sold at the RRP, or the RRP does not reflect a current market price, then this type of comparison may misrepresent the savings that may be achieved and is thus misleading.
- **The ATAS Compliance Manager requires ATAS Participants to retain records where the entity uses "typically" or "valued at" in its advertising to demonstrate compliance.**



### AFTA GUIDANCE - WHAT NOT TO DO

The below explanation for a 'was', 'typically' or 'valued at' price is not acceptable. You must be able to substantiate and demonstrate exactly how the price was calculated.



"When we compare a particular tour package that has similar qualities to ours, our criteria is based on the cities/attractions visited, number of hotel nights stayed, standard of hotels used, airlines used, number of meals provided etc"

## AFTA Checklist

- ✓ The comparison must be genuine and accurate.
- ✓ The price must have been offered in a sufficient and reasonable number and for a reasonable time before being discounted.
- ✓ You need to retain records and be able to substantiate the offer whether that be to the ATAS Compliance Manager or the ACCC. This includes:
  - records of how long the product was offered for sale at the “was” price;
  - what other prices were offered during that period;
  - how many sales were made at the “was” price and how many sales were made at other prices.
- ✓ A ‘sale’ or ‘discounted’ price should only be available for a limited time.
- ✓ Any previous price should be genuine and not inflated, so the discount is real.

## Trivago misled consumers on hotel pricing, court finds, as ACCC warns of wider crackdown

“a hover-over was added in respect of the Strike-Through Price. If a consumer’s mouse cursor hovered over the Strike-Through Price, the following text was displayed:

*The strike-through price corresponds to the cheapest offer we received from the most expensive booking site on trivago for this hotel and your stay dates.”*

# Trivago misled consumers on hotel pricing, court finds, as ACCC warns of wider crackdown

“There is a question whether any statement contained in the hover-over would be sufficient to dispel the impression that the Strike-Through Price and the Top Position Offer were comparable”

- Consumers might not place their mouse cursor over their hover-over
- In any event, it is confusing
- And does not dispel the impression
- Importantly, the hover-over does not actually state that the Strike-Through Price may relate to a different room category.
- Trivago admitted its conduct contravened s18 and s29.

## Trivago misled consumers on hotel pricing, court finds, as ACCC warns of wider crackdown

"They weren't comparing like with like, they were often comparing a luxury room price to a standard room price," Mr Sims said.

“People [mistakenly] thought they were getting discounts when in fact they weren't. It's absolutely outrageous.”

# Furniture chains pay penalties for making alleged misleading 'was/now' price claims

The retailers used advertising statements such as 'was \$2599, now \$2049', or '\$799, save \$200', when the furniture item had never been advertised at the 'was' price, or was only advertised at the 'was' price for a short period of time.

"Consumers rely on comparative pricing to find the best deal available. If there are no genuine savings, businesses are misleading consumers," ACCC Commissioner Sarah Court said.

"Using claims of false savings to induce consumers to purchase products also disadvantages competing retailers which are complying with the law."



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Gratuities

# Headline Claim

- The headline claim must not itself be misleading.
- Statements referring the consumer to another website or webpage, or a document, will not be sufficient to correct a misleading or deceptive headline claim.

# Dominant message test

- the "**dominant message**" test is central to any assessment of **whether advertisements are misleading or deceptive; and**
- qualifying statements (such as in the small fine print) accompanying headline representations must be **sufficiently clear and prominent** so as not mislead consumers, particularly where the representation is **about price**.

# Disclaimers & Fine Print

- ✓ Disclaimers are often marked with an asterisk (\*) or hyperlink
- ✓ Disclaimers should only be used to explain a price representation in further depth.
- ✓ General disclaimers such as 'terms and conditions apply' should be used with caution and **not to conceal important information.**
- ✓ To ensure the disclaimer is effective it must be
  - able to be readily identified by a consumer
  - placed close to the main price representation
  - clear in meaning

# Flight Centre pays \$252,000 in penalties for Christmas and Easter promotions

The ACCC had grounds to believe that these advertisements were liable to mislead, and breached the Australian Consumer Law because Flight Centre failed to disclose to consumers that redeeming the \$250 voucher was subject to certain conditions. These conditions included requiring consumers to book another holiday with Flight Centre worth more than \$5000.

**“Businesses are warned that the terms and conditions of any deal or promotion must be prominent, so that consumers understand what is involved in redeeming the offer,” Ms Court said.**

- ✓ Remember, a consumer should not need to extensively search the advertisement or pages of a brochure for additional disclaimer information.
- ✓ **It is your responsibility to ensure that consumers are clearly directed to and made aware of any fundamental terms and conditions that relate to the travel advertised.**

# 'FREE'

- Businesses should be particularly careful of the use of the word 'free'.
- Free = Absolutely Free
- Businesses may get into trouble with free offers if they do not reveal the complete truth, including any conditions that the consumer must comply with.

#### **AFTA GUIDANCE**

- Where an ATAS accredited entity is advertising something as 'free', be certain that it is truly free.
- Where 'free' cruises or airfares are offered, an ATAS Participant must include in the terms and conditions and make it clear in the offer that the 'free' component only applies if all portions are taken. The terms and conditions should detail what will occur in the event that a component is cancelled. For example, where a river cruise is cancelled due to lower water levels.



# Bait advertising s35

- Bait advertising is the practice of offering items for sale at low prices to attract consumers to a business.
- Must be available in **reasonable quantities** and **for a reasonable period** at that price.
- You must state clearly if the good is in short supply or on sale for a limited time.





## AFTA CHECKLIST

- ✓ Ensure travel advertised is available in reasonable quantities at the advertised price for a reasonable period.
- ✓ You must state clearly if the good is in short supply or on sale for a limited time.

# Reviews and testimonials



## AFTA CHECKLIST

- ☒ **DO NOT** encourage family and friends to write reviews about your business without disclosing their personal connection with your business in that review.
- ☒ **DO NOT** write reviews when you have not experienced the good or service reviewed or which do not reflect a genuinely held opinion.
- ☒ **DO NOT** solicit others to write reviews about your business or a competitor's business if they have not experienced the good or service.
- ☒ **DO NOT** selectively remove or edit reviews, in particularly negative reviews.

# What Next?

1. Review your advertising materials
2. Adjust where required
3. Retain records for price comparisons
4. Not sure? Ask
5. Further resources available in Australian Consumer Law series – available on AFTA website.
6. Remember: 3-month amnesty period

Please fill out the survey, your feedback is valued.

Thank you for your time.

[naomi@afta.com.au](mailto:naomi@afta.com.au)

