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FOUR YEAR REVIEW ATAS CHARTER AND CODE OF CONDUCT

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FOUR YEAR (SECOND REVIEW) OF ATAS GOVERNANCE REGIME

ARE WE THERE YET?

Terms of Reference

The ATAS Eligibility Criteria *- Are the criteria sufficient to ensure the objectives of ATAS are achieved? Should changes be made to the criteria? If so what changes are recommended?*

The ATAS Charter *- Does the Charter set out the objectives, rules and participation arrangements appropriately? Should consideration be given to amending the Charter? If so, what amendments are recommended?*

Code of Conduct *- Does the Code of Conduct set out appropriately the standards of good practice that participants must follow in their day to day practices? Should consideration be given to amending the Code? If so, what amendments are recommended?*

The ACCMC *- The effectiveness of the ACCMC in:*

- *the resolution of Complaints referred to it;*
- *the monitoring of the ATAS Code of Conduct; and*
- *overseeing the disciplinary process in relation to breaches of the Code.*

Should consideration be made to amending the ACCMC's Terms of Reference or role within ATAS? If so, what is recommended?

ATAS – what is it?

The AFTA Travel Accreditation Scheme (ATAS) is an industry accreditation scheme that aims to set the benchmark of quality for the travel industry.

AFTA is committed, through ATAS, to elevating travel industry standards in Australia by driving increased and continued participation by travel intermediaries in ATAS and raising consumer awareness of the benefits of booking travel through an ATAS accredited agent.

The accreditation scheme is open to all travel intermediaries (those that buy and sell travel) in Australia. However, the On-line travel agents (OTA's) are not covered and have not joined as Allied Members.

Those that meet the accreditation requirements are awarded national accreditation and receive the right to use the 'ATAS - travel accredited' branding, a symbol of quality and professionalism.

Through this industry endorsement, ATAS provides a strong platform for consumer recognition of professional conduct and business ethics.

There are currently 1400 ATAS accredited entities with around 2900 locations.

This is out of approximately 3500 travel agents in Australia.

The industry tends to be highly concentrated at the supplier and agents ends. Flight Centre and Hello World are the largest players at the travel agents level and Qantas and Carnival at the supplier level.

Preamble to the Review.

In undertaking this review there were some important underlying environmental issues, namely-

- *The regime is self-regulatory.*
- *It arose from a very unusual situation where the regime was born of a move from a mandatory regulatory to a self-regulatory one. This creates a special responsibility .*
- *Any review must look to the future as well as learn from the past. A snapshot view of the regime at present is based on current economics and practices of the sector and the current individuals in the sector, but that will change over time.*
- *In its submission to the review AFTA understandably recommends issues relating to a tidying up the language and clearing up duplication. This is most welcome but in this review such changes will not be specifically addressed.*
- *However as there is tidying up I have made some recommendations of lesser importance that might assist some tidying up.*
- *In undertaking this review, I have considered the relevant ACCC and ASIC Guidelines and recent developments on ADR arising out of the financial services sector.*
- *Fair Trading authorities regularly refer travel matters to the ATAS regime for resolution.*
- *ATAS accreditation is a valuable commercial asset and should be protected and supported by all stakeholders.*

The Review processes

The Reviewer has considered the submissions, met with AFTA and the ACCMC, reviewed several of the Compliance Manager and ACCMC decisions, considered the previous review and the AFTA Boards response.

The Reviewer also drew on his own experience in similar self-regulatory schemes.

The Reviewer has taken account of the criteria and experiences with self -regulatory regimes as the ATAS regime is a very important and special such regime.

Self-regulation

This is the underlying basis of the regime and needs to be specifically addressed and bench- marked accordingly.

Good practice in self-regulation can be understood as significantly improving market outcomes for consumers at the lowest cost to businesses. but not necessarily to the businesses involved.

A self-regulatory scheme may not be appropriate in circumstances where other forms of regulation are able to provide better outcomes at a lower cost. For example, the costs involved with a complex customer dispute resolution mechanism may not be justified if the scheme only receives a few complaints per year.

Further, the costs involved in administering such a scheme may be translated into higher prices for consumers so, in this case, would not constitute a better market outcome for either business or consumers.

Self-regulation is very broad and covers guidelines, quality management systems, standards, codes, and dispute resolution schemes. Although there is no one model for good self-regulation, there are elements of good practice that are consistent amongst schemes.

Consultation

Consultation between industry, consumers and government can help ensure that specific problems and social policy objectives are identified and addressed.

Coverage and publicity

Increased industry coverage of schemes ensures that the benefits from standards of practice flow to consumers. Wide coverage also ensures that consumers can identify self-regulatory schemes.

Clarity

Clarity in the schemes' documentation can help industry understand their obligations and assist dispute schemes interpret legal rights. Clarity can also help consumers understand their rights.

Consumer awareness of schemes ensures that consumers know where to lodge complaints.

Administration

A good administrative body can identify issues, collect data, monitor the scheme, enhance credibility and ensure compliance costs are at an effective minimum level.

Data collection by an industry scheme is a valuable tool in identifying systemic issues and allows industry to address these problems, which in turn, can improve market outcomes for both businesses and consumers.

Dispute procedures and sanctions

Industry adherence to self-regulatory schemes is essential to ensure that the benefits flowing from the standards of practice set by schemes are passed onto the consumer.

Where the standard of conduct has been breached, self-regulatory schemes should incorporate complaint handling and dispute resolution mechanisms to provide appropriate redress to consumers. The appropriate redress mechanisms will depend on the nature of the specific problem and the consequences of non-compliance.

Industry needs to manage the risk of any anti-competitive practices in schemes, particularly where sanctions are involved.

Monitoring and reviewing

Monitoring and reviewing of self-regulation is essential to ensure that it is still relevant to the industry, addressing specific problems and improving market outcomes. In this context, reviews and annual reporting are important tools for monitoring schemes and can also assist in the transparency and accountability of schemes. Preferably, reviews should be periodic, independent and results made publicly available.

Cost effectiveness

Self-regulation comes at a cost, in administration, promotion and compliance. However, self-regulation can be cheaper (in terms of compliance costs) and more flexible than Government regulation and the court system. Ultimately, the consumer bears the cost of regulation in most cases.

Any funding arrangement for self-regulation should be transparent and designed so as not to put businesses at a competitive disadvantage through excessive compliance costs.

Disciplinary processes.

ADR processes should link into disciplinary processes and maintain the arm's length processes and not allow the industry bodies to ignore disciplinary recommendations.

Self-regulatory regimes- short comings and some solutions

- Seen as lacking independence

The underlying role of the regime should be to both foster/ensure ethical behaviour by members in the community interest and handle complaints and breaches of the regime.

Complaints and breaches of the regime can disclose unethical behaviour and should not be handled as purely individual disputes.

In other words, both a disciplinary and dispute resolution regime.

Investigators are ideally at arms- length from those being regulated and fully transparent/ accountable- yet the regime must be fair to the members as well as the wider community. If they are not at arm's length there needs to be a review body.

There should be no unnecessary filter or procedural barriers on matters referred to the investigators.

Investigators to be able to initiate matters to be investigated.

Investigators findings to be adjudicated by an independent tribunal with no limitation on sanctions to be imposed.

Strong enforcement of orders.

- Coverage of industry

Unlike a legislative regime, coverage is voluntary and hence may not cover the whole industry. This leads to lack of public acceptance and unfair and anti-competitive dynamics between industry participants.

A way of overcoming this is for upstream players in the sector to demand that those they deal with are part of an acceptable self - regulatory regime and that intermediaries demand the same.

This would enhance enforcement as being a member of the regime would be essential to being in business and loss of that membership is a great lever for compliance with a code.

This approach used to be hampered by the third line forcing prohibition of the CCA, but that Act was changed late 2017 to remove the per se element of the prohibition

and have it subject to a competition test. I doubt that insisting on being part of a self-regulatory regime breaches the competition test.

- Education of members.

Member education should be more than symbolic, on- line training courses should be complimented by face to face, including a language competence test.

A comprehensive CPD system should be in place and enforced.

- Collection of information

Information from those being investigated- a firm approach is needed and well publicised to members. Failure to provide information can result in expulsion or other severe penalties.

From upstream suppliers- this has been a major issue in some regimes and if they are members of the regime they must agree to provide necessary information and not hide behind issues such as privacy.

- Enforcement of orders

In relation to those under investigation failure to comply with a Tribunal order can result in expulsion, but that may not be enough. The Rules members agree to, should provide that legal action can be taken for the recovery of moneys etc. in the courts because of a breach of contract,

Also, intermediaries who recruit those in default should be liable to meet enforcement orders on a default basis.

Rules to prevent members from resigning, if under investigation.

- . Disciplinary processes

Associated with the resolution of disputes there needs to be interaction with disciplinary processes to act as a deterrent and to weed out those that do not warrant being part of the regime.

- Seamless administration of regulation

It is critical that all concerned in the industry keep each other informed and cannot be gamed.

Statutory regulators should inform self-regulatory regimes of action taken against those in the industry.

Self-regulatory regimes must tell the statutory regulators of action taken by them. Industry participants should inform both statutory and self-regulatory regimes when they become aware of ‘misconduct’ by others,

Competitor associations should not, without very careful assessment, accept as members any person who has been expelled or otherwise disciplined by another association.

Submissions

There were 4 submissions. There were 9 in the first-year review.

The submissions were all of substance and each is reflected in the recommendations, comments or observations.

The submissions were from-

- AFTA
- ACCMC
- House of Travel
- Destination Africa

There was a letter from the WA Minister for Consumer Affairs expressing some concern about the issue of the collapse of travel agents.

As the main submissions come from inside the regime it can be assumed that the external stakeholders are generally satisfied with the regime. However, there is much of value in the two internal submissions.

The Reviewer will focus on substantive recommendations and not on drafting or tidying up amendments.

Recommendations (these are based on the current documents and not a tidied up redraft that, amongst other issues, takes out duplication.)

(Furthermore, there are a larger number of recommendations than might be expected but as AFTA has been tidying up the documentation this is a time to look at some changes that might be regarded as minor, as well as major changes)

The ATAS Eligibility Criteria

This is a vexed issue. Ideally the regime would only allow in those who clearly warrant accreditation. In a commercial environment. It is difficult to totally assess applicants.

In a public interest sense, as many industry participants as possible should be members as that leads to consumer protection and puts participants on a level playing field.

Entry should be easy but so should exit. Having said that, entry should have objective and fair criteria like the type that are there now. Exit should be fair as well.

A difficult issue is solvency- not too much can be changed from what is there now, but I would suggest that applicants be asked to provide a police check and a statement from relevant State and Territory authorities that they are not under investigation for any 'misconduct' issues.

AFTA has suggested changes to solvency criteria– they add to transparency and safeguards. **Recommendation (1)** agreed.

I would add that no filtering can be perfect and consequently loss of accreditation should be a real and quick option- albeit subject to natural justice considerations,

Background checks- **Recommendation (2)-** that these be done by a third party and at the applicant's expen*se.* That accepts an AFTA suggestion*.*

Work place Development-**Recommendation (3)** AFTA recommends and the Reviewer agrees that 50% of consumer dealing staff should hold a Cert III- but there is always a concern about the on-line undertaking of such Certificates. AFTA might consider face to face refreshers of staff with Cert III.

One of the submissions raised the issue of voluntary loss of accreditation and the language used on the AFTA website. The concern is understood, and it is **Recommended (4)** that the term "cancellation is not used in that instance and a less prejudicial term such as "relinquished accreditation'.

Clause 2.4 of the Charter has an appeal in relation the rejection by the Compliance Manager of the application for ATAS accreditation going to the AFTA CEO – that does not seem to accord with natural justice and it is **Recommended (5)** that such reviews, with strict time limits, go to the ACCMC or to the ACCMC Chair.

Clause 2.5 (d) (iv) these cover "fit and proper person" issues. It is **Recommended (6)** that conviction of <u>civil actions</u> be added to <u>criminal actions</u> as many of the relevant regulators have both civil and criminal sanctions.

The Charter (other than Eligibility criteria)

<u>Recommendations</u>

Who can complain? It is **Recommended (7**) that anyone can complain or refer matters to the Compliance Manager under the Code, not just customers.

If we are to foster ethical conduct it is important that anyone can complain and industry participants (as they know more than customers) and can pick up systemic issues. There will need to be some safeguards to make sure that competitors do not misuse the regime and the Compliance manager and ACCMC need to be aware of competition impacts.

It is **Recommended (8)** that the ACCMC should not be bound by the Rules of evidence but must be sensitive to natural justice and fairness.

Time limits - Clause 4.2 of the Charter, these are important, but it is **Recommended (9)** tha**t** a time stopping provision be added where information is requested from third parties and where they delay in providing information.

Suspension of membership. Clause 3.1 of Charter- this is arbitrary, and it is suggested that there be fair processes for suspension or expulsion. It **i**s **Recommended (10)** that criteria be laid out for expulsion or suspension and that an appeal be possible to the ACCMC or ACCMC Chair.

Pre-escalation - Clause 4 of the Charter. It is **Recommended (11)** that participants must keep details and send to Complaints Manager details of all matters that are resolved pre-escalation. This gives Complaints Manager a better picture of what is happening and may pick up systemic issues. Such information to be provided to the ACCMC as well.

Eligible and Ineligible complaints- Clause 4.5 of the Charter.

Eligible complaints - I do not see a need for this List- any breach of the Code should be eligible- it is **Recommended (12)** that this list be deleted. See later comments on the Code.

Ineligible complaints

The following changes to the list of ineligible complaints are **Recommended (13)-**

- Take out" 6 months blanket limitation" unless it would be unreasonable to pursue a matter that is more than 6 months old.
- Take out- "identical incident' unless it is the same complainant.
- Take out- "Criminal offence" as the matter may never be taken up by Police.
- Take out- "finding of dishonesty by Court or Tribunal" as there will often still be an issue of compensation and/or compliance orders.
- Take out "disciplinary actions by a law enforcement agency" as there as there may still issues of compensation and/ or compliance orders.,
- In relation to vexatious complaints- there should be a safeguard. Where this is given as the reason for "ineligibility" that should be after consultation with Chair of the ACCMC. Vexatious matters have a habit of being difficult.

Clause 4.9 (b)(i)(ii) of the Charter, this allows the ACCMC to re -open a closed matter. That seems to open issues of uncertainty. It is **Recommended (14)** that matters can only be re-opened if the Complaints Manager or ACCMC have been misled by any party involved in a matter.

Clause 5.4 (c) of the Charter, it is **Recommended (15)** that the ACCMC should be able to impose any other sanctions, it deems appropriate.

Clause 5.5(b) of the Charter allows suspension by the AFTA Board with immediate effect – somewhat arbitrary, see my earlier Recommendation (10**)** about safeguards and appeal to ACCMC,

Clause 5.7 of the Charter. It is **Recommended (16)** that there should there be a requirement to inform fair trading authorities in relation to expulsion or suspensions of ATAS members.

The Code

Much of the Code is duplicated elsewhere in the Regime documents and AFTA is attending to that.

The Code sets the professional and ethical standards that ATAS members are expected to meet. It is also the basis for complaints.

However, whilst in the Charter there is a list of Eligible complaints that can be pursued by the Complaints Manager and the ACCMC, the Code does not set out such criteria. This seems to be an oversight.

It is expected that the following conduct would be in breach of the Code,

- breach of the Australian Consumer Law – this is in the Deed Poll signed by members but needs to be part of the Code as well.;
- unreasonably failing or refusing to provide information to the Compliance Officer or ACCMC.
- conflict of interest
- lack of care, skill and due diligence, and
- failing to deal in good faith with consumers and other ATAS members.

It is **Recommended (17)** that the Code be amended to include the above and maybe add a catch all category of unethical /unprofessional conduct.

Furthermore, it is **Recommended (18)** that a member will be vicariously liable for the actions of their staff or representatives.

ACCMC

The ACCMC is the only arm's length part of the regime and as such is critical to the regime. It appears to be effective but with some inherent tensions within the regime.

Query though, whether it needs TOR's, as much of its functions result from rules in the Charter and Code. Query also, whether the ACCMC should have a life of its own through its own budget and some mandated roles, in addition to be a review body.

Its monitoring role is a bit odd as any monitoring of the whole regime would include the ACCMC itself. An audit role has been suggested but that has the same tension as the monitoring role.

Whilst it is proper for the ACCMC to assess the decisions of the Complaints Manager, it is the view of the Reviewer, that it is not appropriate for the ACCMC to have a role to open cases. There may be instances where this is appropriate, but it is suggested that such issues should be ones referred to the ACCMC by the Complaints Manager where there has been misleading information. The Committee should be able to make comments on closed matters to assist future issues and consider disciplinary action.

There is however, a void in some data within the regime and that is in relation to matters that are resolved before escalating. It is suggested that information be obtained on those and reviewed by the Committee and report to AFTA on how these are being handled by participants.

Having said that, the ACCMC in addition to reviews should also have a role to undertake special projects. but only in agreement with AFTA and not on its own volition.

As will be seen from earlier parts of this report, some additional review functions are recommended for the ACCMC.

The ACCMC should be at arm's length but not remote. The CEO of the AFTA should not be part of the ACCMC but can attend at the request of the Chair. As can the Complaints Manager.

Further, the Committee should be properly funded to undertake its role, and this should be agreed between the Chair and AFTA CEO but not a fixed budget. It should be on an as needs be basis but tending on the generous side. The budget issue seems to cause tensions.

There should not be fixed meeting dates, but meetings as the Chair decides and most should not be facing to face- although at least two annually should be face to face.

Consideration should be given to change the name to ATAS Review Panel and widen the membership with a panel of members using the same business/consumer balance as now but the Chair to choose, to say three, plus the Chair to attend any meeting. This can bring in wider expertise, diversity and the regions.

Finally, the Reviewer has a concern about the intersection of resolution of disputes and a possible flow -on to disciplinary processes. Disputes will often expose disciplinary short comings, and this cannot be ignored. It is **Recommended (19)** that the ACCMC should have a strong and independent role in that regard,

ACCMC Terms of Reference

In addition to, or complimenting, what is said above the following recommendations are made in relation to clauses in the ACCMC TOR.

Clause 1 of the TOR-AFTA suggests that this clause be simplified and that only Clause 1.6 be retained. The Reviewer agrees with AFTA recommendation as it simplifies issues but would **Recommend (20)** either here or elsewhere that it is stated that the ACCMC is independent of AFTA and that its formal decisions cannot be overruled by the AFTA Board.

Clause 2.1 (a)(iv) it is **Recommended (21**) that there should not be a formal power for the AFTA Board to ask the ACCMC to review an ACCMC determination.

Clause 2.1 (I) **Recommend (22)** that recommendations by the ACCMC to the AFTA Board on disciplinary process should be independent and the power should be to direct that the AFTA board take the suggested disciplinary action. This is somewhat along the lines with what AFTA has submitted to the Review but goes further.

Clause 2.1(h)**- Recommend (23**) that sanctions that can be imposed by ACCMC to include a monetary contribution to AFTA for non co operation or actions adding to costs.

Clause 3.1 **Recommendation (24)-** consideration might be given to add a provision whereby even where a matter is dismissed that some orders can be made to foster future compliance.

Clause 5.1 (c))- **Recommend (25)** add 'legal or public administration' to criteria.

Clause 5.1(d)- **Recommendation (26)** -as part of the desire that the ACCMC be at arm's length to the AFTA the CEO of AFTA should not be an ex- officio member, but can attend at the request of ACCMC Chair, as can the Compliance Manager.

Clause 5.3- **Recommendation (27**) -add "the member has been guilty of misconduct in the view of the Board and the Chair of ACCMC"

Clause 7- **Recommend (28)** that consideration be given to a proper indemnity for ACCMC members and perhaps the Compliance Manager.

Clause 8.7- AFTA suggests that this be changed to make it clear that decisions can be made by circular resolution or in person where a quorum is present. **Recommendation (29)**- agree to the AFTA suggestion but would also delete Clause 8.6 and leave it to the Chair how and where meetings are conducted, Modern technology facilitates many options. ACCMC has raised this issue.

Definitions

Australia – why exclude external Territories?

Observations outside of TOR

Coverage

As mentioned earlier in the section on Self-Regulation- serious consideration should be given for the main suppliers in the industry to demand that any agent who deal with them directly or indirectly must have ATAS accreditation.

Until recently, section 47 (6)(7) (third line forcing) of the CCA per se prohibited this type of demand but that section was changed in late 2017 and is now subject to a "competition" test. This will mean that such conduct is far less likely to fall foul of the law.

Qantas and Carnival should be asked to act accordingly.

The more that can be done to expand ATAS coverage the better.

Misleading conduct

One of the submissions to the Review has made the point that some agents claim that "we have consumer protection"-the submitter says that those whom claim this should spell out what that means. That has some merit.

This is not an issue for the Review as such. It is potentially a misleading conduct issue but as the Code exists now the Compliance Manager has little scope for any action.

Education

The ACCMC has made the point that education of the industry and the consumer is lacking, this is not unusual for many industries with self-regulatory regimes.

One suggestion is that AFTA prepare, if it has not already done so, a one-page flyer and that the ATAS rules provide that such a flyer must be attached to every booking made by ATAS accredited members.

Shorter time limits.

The ACCMC has suggested a shortening of some time limits - that seems sensible but there needs to be a time stopping mechanism.

Overview

In the view of the Reviewer the ATAS regime appears to be working well- the marketplace does not say otherwise.

Nevertheless, this is time for stock taking, AFTA has done that in terms of editing the rules and avoiding duplication and has made many other recommendations.

What the Reviewer sought to do, is to focus on the following important factors that the ATAS regime should recognise.

- Make the regime more inclusive with rights for ATAS members, as well as customers.
- A much wider range of eligible complaints and limit the ineligible.
- Build in some more natural justice safeguards
- Ensure that there is an independent review body but that that body does not intrude into policy unless in agreement with AFTA.

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