



**SUBMISSION TO THE NSW DEPARTMENT OF
CUSTOMER SERVICE**

Proposed Information Standard for NSW Travel Industry

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About us

CHOICE is the leading consumer advocacy group in Australia. CHOICE is independent, not-for-profit and member-funded. Our mission is simple: we work for fair, just and safe markets that meet the needs of Australian consumers. We do that through our independent testing, advocacy and journalism.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns

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INTRODUCTION

People in New South Wales and throughout Australia have faced considerable consumer problems with travel service cancellations since the onset of the COVID-19 pandemic. Almost 1 in 2 Australians (47%) have had to cancel travel plans since March 2020 due to COVID-19 risks, border closures or lockdowns.¹

CHOICE welcomes the NSW Government consultation on a proposed information standard for the NSW Travel Industry.

When cancellations have occurred, consumers have experienced:

- 1) Poor information about consumer rights;
- 2) Poor customer service and complaints processes, including limited means of communication and significant delay, and complex agency arrangements making refunds more difficult;
- 3) Inconsistent and unfair remedies, including consumers being out of pocket and being provided with impractical or useless credits and vouchers; and
- 4) Poor protections when travel businesses become insolvent.

These problems have greatly affected consumer confidence to book travel and tourism services. In September 2021, only 23% of Australians felt confident about booking flights, accommodation or other travel services in the next 12 months.²

An information standard applying to NSW travel service providers would help improve the experience of people travelling in New South Wales by helping to address poor information about consumer rights. Requiring travel service providers to disclose standardised information before the time of booking will:

- alert a consumer to their rights, remedies and responsibilities in the event of cancellation;
- help a consumer determine whether the terms and conditions of the business applying to cancellation are appropriate and acceptable for their circumstances;

¹ Participants were asked whether their travel plans have been cancelled since March 2020. 47% indicated yes, 28% indicated no and 24% said they haven't made any travel plans. See

<https://www.choice.com.au/travel/on-holidays/airlines/articles/reforms-needed-to-restore-consumer-confidence-in-travel>.

² Nationally representative survey conducted by CHOICE in September 2021, see

<https://www.choice.com.au/travel/on-holidays/airlines/articles/reforms-needed-to-restore-consumer-confidence-in-travel>

- promote competition on cancellation terms by enabling consumers to better compare the policies of different providers; and
- clarify the process and timeframes applying to remedies provided in the event of cancellation, helping to simplify the process for all.

Some 60% of people in nationally representative research conducted by CHOICE in September 2021 indicated that clear and standard information (at time of booking) about what will happen if their booking has to be cancelled would make them feel confident about booking travel again.³ Requiring travel service providers to disclose this information upfront will empower consumers and give them confidence to book travel in and around New South Wales again, despite ongoing uncertainty around the pandemic.

1. Summary of recommendations

Recommendation 1:

The term ‘travel service providers’ should be amended to:

1. include:
 - a. cruise lines/cruise operators;
 - b. tour operators; and
 - c. car hire companies
2. Define ‘online travel booking platforms’ inclusively as including companies selling package holidays and travel services online (such as Luxury Escapes) as well as online marketplaces that enable travel services to be sold (such as AirBNB) (if such platforms are not otherwise captured by the definition of ‘accommodation provider’).

Recommendation 2:

The information standard should require travel service providers to disclose, in effect, a ‘cash in hand’ figure of what a customer will get back and, if not 100% of their deposit or payment, an itemised list of all deductions (including fees, balloon payments and retained commissions etc.).

Recommendation 3:

The information standard should require travel service providers to disclose :

- The process of how a consumer will access their remedy (i.e. refund or credit note) in the event of a cancellation.

³ Ibid.

- How long after a cancellation a consumer can expect to receive their remedy (including a refund).
- How a consumer can lodge a complaint if they have a problem with their travel service provider.

Recommendation 4:

The information standard should require travel intermediaries (i.e. businesses that are not the ultimate provider of some or all of the travel services, such as travel agents and online travel booking platforms) to disclose additional information to enable consumers to understand what remedy they will receive, including in the event that the ultimate service provider cancels the service:

- Who the business is an agent of;
- Any retained commissions, fees or deductions kept in the event of cancellation (in addition to this being in the itemised list of any deductions); and
- Whether and how the terms and/or circumstances of the ultimate service provider would affect the remedy a consumer will obtain (for example, if the service was to be cancelled by the ultimate service provider).

Recommendation 5:

The information standard should require travel service providers to:

- Use a standard form of disclosure that has simple, standardised and consistent language and terms; and
- Provide a copy of the information to the consumer at the time of booking for their records.

Recommendation 6:

Travel service providers should be required to disclose this information into the foreseeable future. The NSW Government should conduct a review of the effectiveness of the information standard in empowering consumers to make informed decisions after 5 years.

Recommendation 7:

The purpose of the information standard be amended to 'The purpose of the information standard is to ensure that travel service providers disclose information to customers, and customers receive this information in a clear, simple and standardised way...'

Recommendation 8:

The NSW Government should undertake a review of penalties under the Fair Trading Act 1987 (NSW), including, in particular, penalties for breach of an information standard, with a view to increasing the penalties to mirror the infringement notice penalty amounts for breaches of the Australian Consumer Law.

Recommendation 9:

The New South Wales Government should, in consultation with the Federal Government and other States and Territory Governments, implement reforms to that would;

- Make it easier to get a refund when a travel service isn't provided;
- Make travel credits and vouchers fairer;
- Lift standards of customer service in the travel and tourism industry; and
- Make it easier to get disputes heard and resolved through establishing a new travel and tourism industry ombudsman.

2. The benefits of an information standard

People in New South Wales and throughout Australia have faced considerable consumer problems with travel bookings since the onset of the COVID-19 pandemic. Nationally representative research conducted by CHOICE in September 2021 found that almost 1 in 2 Australians (47%) have had to cancel travel plans since March 2020 due to COVID-19 risks, border closures or lockdowns.⁴ The same research revealed that only 23% Australians feel confident about booking flights, accommodation or other travel services in the next 12 months.

Although ongoing health concerns and uncertainties are undoubtedly relevant factors, CHOICE believes that the low consumer confidence to book travel services is also a result of negative experiences that people have had with travel and tourism businesses throughout the pandemic.

CHOICE surveyed over 4,400 people in January-March 2021 and published the findings in *Consumer Protection for Australian Travellers: a plan for clarity, consistency and fairness* ('CHOICE Travel Report'). One of four major issues identified was that people had poor information about their consumer rights when making travel bookings and what their rights, remedies and responsibilities were with regard to cancellation, particularly cancellations due to events outside of their control including public health measures introduced in response to the pandemic.

We explained this issue in the CHOICE Travel Report as follows:

Extract: CHOICE, *Consumer Protection for Australian Travellers: a plan for clarity, consistency and fairness*⁵

Seeing the pandemic worsen and in anticipation of their service not proceeding, some people proactively cancelled their bookings through electing to cancel or not pay amounts still owing. They did so in the belief this was the appropriate thing to do. It was only later that many realised doing so made them ineligible for a refund under the terms and conditions of their supplier or travel agent.

⁴ Participants were asked whether their travel plans have been cancelled since March 2020. 47% indicated yes, 28% indicated no and 24% said they haven't made any travel plans. See further *ibid*.

⁵ CHOICE, *Consumer Protection for Australian Travellers: a plan for clarity, consistency and fairness* ('CHOICE Travel Report') (July 2021) <<https://www.choice.com.au/consumer-advocacy/policy-submissions/2021/july/report-on-fairer-consumer-protections-for-australian-travellers>> 11.

Was to go on an 18 day European tour/cruise on March 2020. We cancelled 2 days before we were due to leave Australia, as the coronavirus pandemic had really taken hold of Italy and the cruise was cancelled...Travel company said we were not eligible for a refund as we cancelled.

Because of the virus I waited and waited to see if the agency would contact us as I could not see cruises going ahead by April this year so I just cancelled it and then was told later even though the cruise line had cancelled that cruise that because I cancelled it there would be no refund just a credit note, which I think that sucks, as now my husband refuses to go on anymore cruises as he has emphysema so can't afford to catch anything, so we are out of pocket due to this.

Booked through Booking.com...Governments announced travel restrictions, I rang to cancel for reasons beyond my control and was told nothing could be done except through Booking.com. The only relevant option there was to cancel. Then I was told I had cancelled, it was my decision to do that and no refund would be given...

Analysis

These stories indicate a lack of awareness and clarity among consumers about whether, and in what circumstances, they would be entitled to a refund. Problems were compounded by poor or no communication from travel and tourism businesses. For consumers to lose their deposit and booking, even in circumstances where the service did not proceed, is unjust.

There is a need for measures to help ensure that consumers and businesses alike are clear about their rights, responsibilities and remedies in the event that the contract for a service cannot be fulfilled due to a pandemic or similar event. This is necessary to avoid consumers proactively cancelling their bookings and subsequently losing funds in circumstances where they could otherwise be entitled to a refund, credit or voucher.

Having information upfront will empower consumers and help restore consumer confidence to book

travel. The nationally representative research conducted by CHOICE in September 2021 found that only 23% of Australians feel confident making travel plans in next 12 months.

The research also asked respondents what types of measures would make them feel confident to book travel again. Some 60% of respondents indicated that clear and standard information (at time of booking) about what will happen if their booking has to be cancelled would make them feel confident about booking travel again.⁶

Depending on the scope of the information standard, additional benefits of the information standard will include:

- Requiring businesses to consider, decide and communicate their terms and conditions that apply in different circumstances.
- Requiring clearer internal complaints processes which may mean less reliance on the NSW Fair Trading Commission to resolve complaints;
- Greater clarity around the role and responsibilities of travel agents;
- The ability of the NSW Information Standard to be used and replicated by other jurisdictions;
- To alert consumers, businesses and ACL regulators to potentially unfair contract terms.

⁶<https://www.choice.com.au/travel/on-holidays/airlines/articles/reforms-needed-to-restore-consumer-confidence-in-travel>.

3. Responses to consultation questions

1. Is the definition of what a travel service provider clear and does it capture all appropriate entities involved in selling travel services?

The businesses required to disclose information by the proposed information standard should include all travel service companies selling retail travel services in New South Wales. As identified in the Consultation Paper it should include, for example:

- Travel agents
- Airlines
- Online travel booking platforms
- Hotel and accommodation providers

For completeness and clarity, we recommend that this definition should be broadened to:

- 1) explicitly include:
 - tour operators
 - cruise operators
 - car hire companies
- 2) Define ‘online travel booking platforms’ inclusively as including companies selling package holidays and travel services online (such as Luxury Escapes) as well as online marketplaces that enable travel services to be sold (such as AirBNB) (if such platforms are not otherwise captured by the definition of ‘accommodation provider’).

Recommendation 1:

The term ‘travel service providers’ should be amended to:

1. include:
 - a. cruise lines/cruise operators
 - b. include tour operators
 - c. car hire companies
2. Define ‘online travel booking platforms’ inclusively as including companies selling package holidays and travel services online (such as Luxury Escapes) as well as online marketplaces that enable travel services to be sold (such as AirBNB) (if such platforms are not otherwise captured by the definition of ‘accommodation provider’).

2. Should the proposed Standard require travel service providers to communicate any other information? If so, what?

CHOICE supports requiring travel service providers to disclose the information set out in the Consultation Paper, but recommends expanding the information required to be disclosed to include:

- an itemised list of any deductions to a refund;
- the process for a consumer to get a remedy in the event of cancellation; and
- information specific to intermediary businesses such as travel agents. Each of these issues is discussed below.

1) An itemised list of any deductions to a refund

Most people want to know, ahead of making a booking, the amount of money they will receive back - if not 100% of their payment - and clearly understand any and all deductions. Most potential deductions seem to be captured somewhere in the proposed information standard, including:

- If a refund is offered, whether the travel service providers will retain fees (cancellation fees) relating to expenses incurred.
- Cancellation fees or balloon payments.

However, we believe that requiring travel service providers to disclose a clearly itemised list of any applicable deductions, as well as a 'cash in hand' figure of what a customer will be refunded, would convey this key information clearly and simply for consumers.

Recommendation 2:

The information standard should require travel service providers to disclose, in effect, a 'cash in hand' figure of what a customer will get back and, if not 100% of their deposit or payment, an itemised list of all deductions (including fees, balloon payments and retained commissions etc.).

2) The process for a consumer to get a remedy in the event of cancellation

The CHOICE Travel Report identified many procedural challenges faced by consumers in the event of a cancellation.

Extract: CHOICE, *Consumer Protection for Australian Travellers: a plan for clarity, consistency and fairness*⁷

Many people spoke of frustration attempting to make contact with travel and tourism businesses. This was due to limited options for making contact and long response times, especially for phone calls. Several people reported that some avenues of communication ceased at different times. Many spoke of the frustrating experience of being unable to speak to a customer service representative to discuss their booking. (PAGE 13)

...

One respondent neatly articulated how difficult it was to simply lodge a formal complaint and to escalate issues further.

Jetstar – because I booked a holiday package, neither their holidays area or their flights area would take responsibility for refunding me. They sent me back and forward multiple times, and would not even let me make a formal complaint. Without the ability to make a formal complaint, I was not able to escalate the issue to the Ombudsman. In the end, I managed to get around the process and make a complaint to the Ombudsman who stepped in and directed Jetstar to allow me to make a complaint with them. Once that happened, a refund was processed but it still took weeks and weeks.

The time it took for customers to receive a refund or other remedy also varied significantly. Some businesses were exceptional in the circumstances and did not hesitate to provide refunds. With others, delays have meant that customers have been waiting unacceptably long periods, including 23% waiting over six months.

⁷ CHOICE Travel Report, above n 4, 13-14.

Because of such problems, the information standard would better empower consumers if it also required businesses to disclose information about the process of obtaining a remedy in the event of a cancellation.

Recommendation 3:

The information standard should require travel service providers to disclose :

- The process of how a consumer will access their remedy (i.e. refund or credit note) in the event of a cancellation.
- How long after a cancellation a consumer can expect to receive their remedy (including a refund).
- How a consumer can lodge a complaint if they have a problem with their travel service provider.

3) Information specific to intermediary businesses such as travel agents

The CHOICE Travel Report also detailed numerous additional complexities when their booking was through an intermediary such as a travel agent. While some agents provided great service to their customers, many people had the experience of agents (or intermediaries) passing the buck between themselves and the ultimate provider of the travel services (such as an airline).

Extract: CHOICE, *Consumer Protection for Australian Travellers: a plan for clarity, consistency and fairness*⁸

Travel agency arrangements add a level of complexity to bookings. Agents are intermediaries – a link in the supply chain between the consumer and the ultimate supplier of services. To further complicate matters, there are often a number of intermediaries between the consumer and ultimate supplier.

The way in which funds move through the supply chain is also complicated. The period of time for which an agent or intermediary holds funds before passing them onto a supplier varies and can be quite short. Depending on the way in which an intermediary has booked services, where funds are returned to an agent, they might not necessarily be earmarked as owing to a particular customer.

⁸ Ibid 20.

Agency arrangements also make it more difficult to establish a consumer's rights, because a booking may be subject to the terms and conditions of the agent as well as those of the operator. This situation is exacerbated by a lack of transparency about travel agent commissions and charges. CHOICE is concerned that consumers are not adequately informed about how much an agent is paid or the travel agent's costs. As a result, consumers are not clear about where their money is going (e.g. how much is going to the agent and how much to suppliers). This means that it can be hard for a consumer to understand at the point of booking or when seeking a refund how much the agent might seek to retain. It is also unclear in some cases who a travel agent is working on behalf of – the consumer or the suppliers of travel services.

CHOICE is also concerned that some consumers are under the impression that travel agents act for the consumer, rather than travel service providers.

CHOICE recommends that the information standard should include additional disclosure requirements on travel intermediaries (i.e. businesses that are not the ultimate provider of some or all of the travel services, such as travel agents and online travel booking platforms), in addition to 'any commissions or referral arrangements'.

Recommendation 4:

The information standard should require travel intermediaries (i.e. businesses that are not the ultimate provider of some or all of the travel services, such as travel agents and online travel booking platforms) to disclose additional information to enable consumers to understand what remedy they will receive, including in the event that the ultimate service provider cancels the service:

- Who the business is an agent of;
- Any retained commissions, fees or deductions kept in the event of cancellation (in addition to this being in the itemised list of any deductions); and
- Whether and how the terms and/or circumstances of the ultimate service provider would affect the remedy a consumer will obtain (for example, if the service was to be cancelled by the ultimate service provider).

3. Is there any information that has been included within the proposed Standard that will not be possible for travel service providers to provide to consumers?

CHOICE does not have input on this question.

4. Should the proposed Standard require travel service providers to communicate any of the information listed in a certain manner?

In our survey of over 4,400 people, a recurring issue faced by consumers was confusion over changing terms and conditions. We explained: ‘Consumers also reported various challenges around obtaining documentation from travel and tourism businesses. These issues included not receiving a copy of applicable terms and conditions and not receiving confirmation that a refund had been requested. This left people unclear of where they stood and uncertain about whether their refund was being processed.’⁹

Requiring travel service providers to provide a copy of the information to the consumer at the time of booking would help consumers to access this information easily and simply in the event of a cancellation. It would also reduce conflict over the terms and conditions that applied at the time of the booking.

Recommendation 5:

The information standard should require travel service providers to:

- Use a standard form of disclosure that has simple, standardised and consistent language and terms; and
- Provide a copy of the information to the consumer at the time of booking for their records.

5. How long do travel service providers require to implement the requirements of the Information Standard?

Travel is uniquely vulnerable to disruption. As we observed in the CHOICE Travel Report:

‘Recent decades have also shown the vulnerability of travel to other unexpected events, including natural disasters, terrorism events, civil unrest and conflict.

This difficulty has happened before with Jetstar when they have cancelled flights

⁹ Ibid 14.

due to the volcanic eruption in Bali and also due to an unserviced plane (their excuse).

Policy settings must reflect this reality and provide as much clarity and certainty as possible to consumers and businesses alike, so that when disruptions occur, everyone is better equipped to understand their rights and responsibilities.¹⁰

In these circumstances, and with uncertainties around the COVID-19 pandemic continuing, there is justification to require travel service providers to disclose this information into the foreseeable future. A review of the effectiveness of the information standard in empowering consumers should be conducted after 5 years.

We also recommend that the information standard be implemented immediately, potentially staggered with the requirement applying to large businesses and smaller businesses after a reasonable period.

Recommendation 6:

Travel service providers should be required to disclose this information into the foreseeable future. The NSW Government should conduct a review of the effectiveness of the information standard in empowering consumers to make informed decisions after 5 years.

¹⁰ Ibid 35.

4. Other recommendations

Purpose of the information standard

The Consultation Paper states that: ‘The purpose of the information standard is to ensure that travel service providers disclose information to customers regarding..’. CHOICE recommends clarifying the purpose of the information standard to include also an important intent behind it, namely, that consumers can easily access and understand the terms and conditions that apply should the service be cancelled.

Recommendation 7:

The purpose of the information standard be amended to ‘The purpose of the information standard is to ensure that travel service providers disclose information to customers, **and customers receive this information in a clear, simple and standardised way** regarding...’.

Penalties

The Consultation Paper states:¹¹

Under the NSW Fair Trading Act 1987, failure to comply with the information standard can result in a fine of \$550 for an individual or \$1100 for a corporation. In serious cases, they may be prosecuted under the Act. The maximum penalty if a person is convicted under the Act is \$5,500. This will be a deterrent for those who do not comply.

CHOICE does not agree. The penalties as currently set for failure to comply with the information standard are woefully inadequate to deter individuals and businesses from non-compliance.

For example, if an individual sales agent on a 20% commission books a tour or package holiday for 5 clients at a cost of \$10,000 per person, the total cost of the booking would be \$50,000 and the sales agent stands to receive a commission of \$10,000. In this instance, the individual sales agent has the choice of obfuscating information about any rights or remedies of the clients (i.e. to receive a refund), therefore increasing their chances of keeping their \$10,000. Or they could provide clear information to the clients in order to avoid a fine of \$550 (if fined once) or \$2,750 (if fined \$550 for

¹¹ NSW Department of Customer Service, *Proposed Information Standard for NSW Travel Industry*, Consultation Paper (December 2021)

each individual). Compared to the commissions potentially earned, there is little incentive for a sales agent in that scenario to comply with the information standard based on the current penalties.

Fines for failure to comply with the information standard under the *Fair Trading Act 1987* (NSW) are also significantly less than infringement notice penalty amounts in the Australian Consumer Law (ACL). Although the penalty amount varies depending on the alleged contravention of the ACL, in most cases it is fixed at \$13,320 for a corporation (or \$133,200 for a listed corporation) and \$2,664 for an individual for each alleged contravention.¹²

Penalties for breaches of the NSW information standard should be greater than those currently set in order to effectively deter individuals and businesses from non-compliance with the information standard.

Recommendation 8:

The NSW Government should undertake a review of penalties under the *Fair Trading Act 1987* (NSW), including, in particular, penalties for breach of an information standard, with a view to increasing the penalties to mirror the infringement notice penalty amounts for breaches of the Australian Consumer Law.

¹² Australian Competition and Consumer Commission, *Infringement Notices: Guidelines on the use of infringement notices by the Australian Competition and Consumer Commission* (July 2020) <<https://www.accc.gov.au/system/files/Infringement%20notices%20-%20Guidelines%20on%20the%20use%20of%20infringement%20notices%20-%20July%202020.pdf>> 2.

5. Additional measures needed to restore consumer confidence to book travel

Requiring travel service providers to disclose clearer and standardised information to consumers will be an improvement on the current situation in which consumers face confusing, complex and unclear terms and conditions. However, disclosure has its limitations. A 2019 report published by the Australian Securities and Investments Commission (ASIC) and the Dutch Authority for the Financial Markets (AFM) identified a number of limitations to disclosure requirements applying to financial services, including:¹³

- 1) *disclosure does not solve the complexity in financial services*
- 2) *disclosure must compete with firms for consumer attention*
- 3) *firms can work around and undermine disclosure requirements*
- 4) *one size does not fit all – the effects of disclosure are different from person to person, and situation to situation.*

Although travel services differ from financial services in many respects, disclosure has similar limitations across numerous industries, including travel.

Additionally, the CHOICE Travel Report detailed consumer detriment that will not be improved through disclosure alone, including business terms and conditions that leave customers out of pocket, travel credits and vouchers that are impractical to use and poor standards of customer service.

Recommendation 9:

The New South Wales Government should, in consultation with the Federal Government and other States and Territory Governments, implement reforms to that would;

- Make it easier to get a refund when a travel service isn't provided;
- Make travel credits and vouchers fairer;
- Lift standards of customer service in the travel and tourism industry; and
- Make it easier to get disputes heard and resolved through establishing a new travel and tourism industry ombudsman.

¹³ Australian Securities and Investments Commission (ASIC) and the Dutch Authority for the Financial Markets (AFM) *REP 632 Disclosure: Why it shouldn't be the default* (October 2019)
<<https://download.asic.gov.au/media/5303322/rep632-published-14-october-2019.pdf>>.