



**Regulation Review Committee
Parliament of New South Wales**

**Report on the Travel Agents
Amendment (Amendment of Trust
Deed) Regulation 2002**

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Table of Contents

REGULATION REVIEW COMMITTEE.....	1
FUNCTIONS OF REGULATION REVIEW COMMITTEE	2
CHAIRMAN'S FOREWORD	3
TRAVEL AGENTS AMENDMENT (AMENDMENT OF TRUST DEED) REGULATION 2002.....	4

Regulation Review Committee

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Functions of Regulation Review Committee

The Regulation Review Committee was established under the *Regulation Review Act 1987*. A principal function of the Committee is to consider all regulations while they are subject to disallowance by Parliament. In examining a regulation the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

1. that the regulation trespasses unduly on personal rights and liberties;
2. that the regulation may have an adverse impact on the business community;
3. that the regulation may not have been within the general objects of the legislation under which it was made;
4. that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
5. that the objective of the regulation could have been achieved by alternative and more effective means;
6. that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
7. that the form or intention of the regulation calls for elucidation; or that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the Guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.


The Committee may, as a consequence of its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable, including reports setting out its opinion that a regulation ought to be disallowed.

Chairman's Foreword

In this report the Committee outlines its concerns with a regulation which amends the trust deed governing compensation which is payable to customers of travel agents. Among other things, the amendment enables emergency compensation to be paid to people dealing with unlicensed travel agents. While the Department of Fair Trading advises that the amendment was made in order to clarify the Board's existing powers to pay emergency compensation in respect of unlicensed agents, the Committee is concerned that such payments will have an adverse impact on the business of licensed agents who will be paying for compensation arising from unlicensed trading.

The Australian Federation of Travel Agents Limited (AFTA), which represents the majority of travel agents, is strongly opposed to the amendment and believes that it was made to cover up the failure by the State Departments of Fair Trading and the Board to take adequate steps to prevent unlicensed agents from trading. While the regulation is technically within the power of the enabling section, the Committee believes that it does not accord with the broader spirit of the Act to ensure that agents are registered.

The Committee believes that direct consultation with AFTA should have preceded the making of the amendments to the trust deed. The Committee recommends that the Minister liaise with AFTA on how best to ensure that the Travel Compensation Fund does not result in licensed travel agents suffering a competitive disadvantage by paying for the compensation covering unlicensed agents, and provides incentives for consumers to only use licensed agents



Gerard Martin MP
Chairman

Travel Agents Amendment (Amendment of Trust Deed) Regulation 2002

The object of this Regulation is to amend the Travel Agents Regulation 2001 to incorporate amendments to the trust deed which establishes a compensation scheme for compensating persons who suffer a pecuniary loss by reason of an act or omission by a person who carries on, or carried on, business as a travel agent. The trustees of the compensation fund have resolved to amend the trust deed to provide:

- (a) that the fund's power to pay emergency compensation extends to those claims where the travel agent was not licensed to carry on business as a travel agent and was not a participant in the fund, and
- (b) for the power to appoint a person to act in the position of Acting Chief Executive Officer.

The Regulation incorporates those amendments and certain other amendments relating to matters such as the giving of notices relating to the Travel Agents Compensation Fund.

This is a form of National Scheme legislation. The Travel Compensation Fund (TCF) was established by four State Governments to provide a system of compensation to consumers who lost money when a travel agent ceased trading due to financial collapse. It was also established as a support system to licensing that would promote financial viability in the travel industry.

In 1986, a 'Participation Agreement' was developed and entered into by New South Wales, Victoria, South Australia and Western Australia and later, the Australian Capital Territory, Queensland and Tasmania. The Agreement establishes a co-operative scheme for the uniform regulation of travel agents and as part of the process, a Deed of Trust was settled and the Travel Agents Acts were formalised.

The Trust Deed is now incorporated into those State Acts of Parliament governing the licensing and operation of a travel agent. The Deed outlines the three purposes of the Trust:

- to provide compensation to certain people who deal with travel agents;
- to provide for the operation of the TCF; and
- to ensure that only persons who have sufficient financial resources to enable them to carry on business as a travel agent are Participants of the TCF.

Compensation

A significant amendment relates to emergency compensation. Under clause 18 of the deed:

18.1 If a participant or former participant or other travel agent fails to meet, or, in the opinion of the Board, is unlikely to meet, an obligation to a person, the Board may pay out of the Fund the amount it determines is necessary to meet in whole or in part the emergency requirements of the person arising from the failure.

If emergency cover is to be extended to persons dealing with unlicensed travel agents the issue of whether the fund is sufficient and whether the amendment accords with the objects and spirit of the enabling Act needs to be considered.

Objects of the enabling section

Section 57(2) states:

(2) The regulations may:

- (a) prescribe a scheme for compensating persons who suffer a pecuniary loss by reason of an act or omission by a person who carries on, or carried on, business as a travel agent,
- (b) prescribe the scheme by reference to a schedule comprising a copy of the trust deed by which the scheme is established, and
- (c) from time to time amend that schedule to incorporate amendments of the trust deed of which the Director-General is notified by the compensation scheme trustees

Section 57 therefore enables the trust to apply to persons who carry on, or carried on, business as a travel agent. The Title, Objects and Purpose of the trust are set out as follows in the Trust Deed:

The Title, Objects and Purpose of the trust

2.1 The trust established by this Deed shall be known as the Travel Compensation Fund.

2.2 The object of the Trust is to provide a trust fund for the benefit of —

- (a) the Crown in the right of a State, and
- (b) any person who entrusts money or other valuable consideration to a travel agent in respect of any travel arrangement or travel-related arrangement if:
 - (i) the travel agent fails to account for that money or consideration, or
 - (ii) the travel agent passes all or part of that money or consideration to another travel agent who fails to account for that money or consideration in the capacity as a travel agent.

3.1 The purposes of the Trust are—

- (a) to provide compensation to certain people who deal with travel agents, and
- (b) to provide for the operation of the Fund, and

(c) to ensure that only persons who have sufficient financial resources to enable them to carry on business as a travel agent are participants of the Fund.

Travel agent is defined as “a person who carries on business as a travel agent in a State within the meaning of the Act of that State”. Whether a person is licensed is not relevant to that definition under the Act.

One of the amendments alters the objects of the trust in 2.2 above to set out a third object to provide compensation if: “it appears likely that the travel agent or other travel agent will fail to account for that money or consideration as set out in clause 2.2 (b) (i) or (ii)”.

Adverse impact on business

It appeared to the Committee that while the regulation complies with the object of the Act to enable the trust to apply to persons who carry on business as a travel agent, it has an adverse impact on the business of licenced agents who would suffer a competitive disadvantage if persons who use unlicensed agents received the same emergency compensation as their clients. Particularly so as licenced dealers have to pay the up front registration fee of \$8,893.50, which comprises the Fund Contribution of \$7,430.00 in addition to annual licence fees, and have to comply with extensive financial and reporting requirements for registration.

The Committee also considered that it makes little sense for a purpose of the Trust to be to ensure that only persons with sufficient financial resources can participate in the Fund if agents who act without such resources can still benefit from the Fund.

Briefing

The Committee obtained a briefing on the regulation from Mr Mike Hatton, Chief Executive of the Australian Federation of Travel Agents Limited (AFTA) which represents the majority of travel agents in Australia, and Mr Brian Given of the Department of Fair Trading on Thursday 24 October 2002.

Mr Hatton advised that the Federation is strongly opposed to the amendment and that it was made to cover up the failure by the State Departments of Fair Trading and the Board to take adequate steps to prevent unlicensed agents from trading by keeping their victims quiet with payments of emergency compensation.

He said that the Federation has recommended that a simple checklist be adopted when agents have their registration cancelled in order to prevent them continuing in business and that this had not been adopted by the Departments. He said the Departments simply fail to follow up cancellations, let alone seek out other unlicensed agents. He considered that the result of the amendment would be that licensed agents would cross subsidise unlicensed agents and that the purpose of the Act to encourage people to deal only with licensed agents would be defeated.

Mr Hatton indicated that the roles and responsibilities of principals and agents were not the same as in other industries. Travel industry wholesalers for example were in fact agents of the airlines, and not the principals of travel agent retailers.

Mr Given tabled points for consideration which stated among other things that the scheme was intended from the start to cover persons dealing with both licensed and unlicensed agents.

While Mr Hatton had said that there was no consultation with AFTA before the amendment was made, Mr Given indicated that there were a number of AFTA members on the Board of the Travel Compensation Fund and that they would be well aware of the amendment.

Mr Given advised that the amendment was made following legal advice in order to clarify the Board's powers to pay emergency compensation in respect of unlicensed agents.

He was only able to point to one case where legal action had been taken against an unlicensed agent and that case was proceeded with on the ground of fraud. He agreed to provide the Committee with details of how many unlicensed operators had been found by his Department and, if possible, a copy of the legal advice. On 6 November 2002, Mr Given wrote to the Committee as follows:

I refer to the Committee's request that the Department provide additional information in relation to its consideration of the Travel Agents Amendment (Amendment of Trust Deed) Regulation 2002.

At the Committee's meeting on 24 October 2002 I was asked to provide to the Committee details of how many unlicensed travel agents had been identified by the Department in the past five years. In that regard the Department's records reveal that since 1 January 1997 there have been 64 investigations involving allegations that a trader has been operating as an unlicensed travel agent. In most of these cases the party alleged to be operating without a licence was found not to be trading as a travel agent within the meaning of the Travel Agents Act 1986 and did not require a licence. In most of the other cases the matters were of a very minor or marginal nature and did not warrant prosecution (eg arrangements made on behalf of a social group by one of the group's members).

As I mentioned to the Committee there have been several cases in which the Department applied to the Supreme Court for injunctions to ensure that travel agents operating illegally were closed down.

The Chairman of the Committee also asked to be provided, if possible, with a copy of the legal advice obtained by the Travel Compensation Fund in relation to clause 18 of the Trust Deed.

The legal advice was obtained during the course of litigation which has not yet been finalised. In the circumstances I have been unable to provide a copy. Nevertheless for the assistance of the Committee I have attached a summary of the legal analysis.

Summary of Legal Analysis

- ◆ *It is an express purpose of the Trust that the Fund be held for the purpose of paying compensation to persons who entrust money to someone carrying on business as a travel agent, irrespective of whether they are licensed or a member of the Fund except that, if they are a member of the Fund, the payment is compulsory under clause 15.1 and otherwise discretionary under clause 15.2.*
- ◆ *Emergency compensation under clause 18 arises in circumstances in which "a participant fails to meet, or, in the opinion of the Board, is unlikely to meet, an obligation to a person".*
- ◆ *Clause 18 is an enabling provision. A requirement to consider paying emergency compensation may arise in circumstances in which money was entrusted to a participant but the failure to account arises after termination or it may be unclear as to whether the money was entrusted while the person carrying on business as a travel agent was a participant. So long as the payment is not prohibited by clause 15 and the Trustees act in good faith, they have an immunity from liability for authorising the emergency compensation.*
- ◆ *There is a separate question as to whether payments made in such circumstances attract a liability on the part of the travel agent or others, including accountants and auditors.*
- ◆ *Payments made pursuant to clause 15.2 or clause 18 are recoverable, notwithstanding the fact that the liabilities may have been incurred after a person carrying on business as a travel agent was terminated from the Fund and/or traded unlicensed, providing there are no circumstances which would suggest that consumers dealing with the person knew or ought to have known of that fact.*
- ◆ *The issue is whether the terms of clause 18 of the Trust Deed, in referring only to a "participant", and not a previous participant, or a non participant, may prevent recovery of clause 15.2 discretionary claims paid as emergency compensation where the travel agent has either ceased to be a participant but carried on trading unlicensed or never been a participant at all.*
- ◆ *There is a stronger case under the Deed for the Fund to be successful in a recovery action where the travel agent has previously been a participant than where the agent had never been a participant.*
- ◆ *It is desirable to amend clause 18 to avoid the matter being left open to argument.*

- ◆ *The Trustees considered it would be anomalous if clause 18 did not cover the full range of circumstances in which the Fund could subsequently pay a claim under clause 15.2*

Committee's view

The long title of the Act is: "An Act to provide for the licensing of travel agents and the regulation of their operations; and for other purposes". The majority of its sections concern the requirement for travel agents to be licensed and deal with the issue of licences, disciplinary proceedings, reviews by the Tribunal and the conduct of business. The compensation scheme is not integral to the Act, it is only enabled by regulation under section 57 as stated above.

While the regulation is technically within the power of this section, the Committee considers that it may not comply with the spirit of the Act to ensure that agents are registered. Extending emergency compensation to those who use unlicensed travel agents from funds provided by licensed travel agents appears to impose an unfair burden on those who comply with the law. At the same time, the Committee notes that the TCF has been and continues to operate under the belief that it has a discretion to provide compensation to those who deal with unlicensed agents. Given this practice, it would be anomalous for that compensation not to be also available in emergency circumstances.

The examination of these issues raised a number of matters of concern. The apparent conflict of views between AFTA and the Department about the purpose of the fund is of concern and may be symptomatic of a lack of communication between the industry and the Department. The Committee was further concerned about claims that the need for the compensation of people dealing with unlicensed travel agents arose from insufficient effort to prevent the trading of unlicensed agents. The relative lack of prosecution of unlicensed agents was consistent with this claim. The fact that licensed travel agents were paying to compensate those who dealt with unlicensed agents raised equity and policy issues. It appeared to the Committee that these matters warranted further attention but, as they did not relate directly to the regulation in question, the Committee did not pursue them.

Conclusion

The Committee concludes that the Regulation has an adverse impact on the business of licensed agents who will suffer a competitive disadvantage because unlicensed agents are now covered by the compensation scheme to the extent that it expressly enables the payment of emergency compensation to their clients. It is also of the view that the Regulation departs from the spirit of the Act to ensure that Travel Agents are registered. The Committee believes that direct consultation with AFTA should have preceded the making of the amendments to the trust deed and believes that there is a need to adequately identify the roles and responsibilities of principals and agents under the scheme.

Recommendation

The Committee recommends that the Minister explore with the industry and other jurisdictions how best to ensure that the Travel Compensation Fund:

- ◆ does not result in licensed travel agents suffering a competitive disadvantage by paying for the compensation covering unlicensed agents;
- ◆ provides incentives for consumers to only use licenced agents; and
- ◆ adequately identifies the roles and responsibilities of principals and agents