



# CONSUMER LAW ON TOURISM SERVICE IN INDIA AND AUSTRALIA: A COMPARATIVE STUDY

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**Abstract--** Tourism is one of the five largest industries in India generating employment opportunities, earning foreign exchange and thus contributing to the GDP. Nevertheless we have realized the importance of tourism as an important tool for economic development. Tourism is undermined as a luxury and not much importance is paid towards the regulation of tourism and protection of tourists. This paper examines the importance of tourism industry in India and Australia. The author attempts to examine the legal regulation of tourism in Australia which covers the various bodies and Acts related to tourism apart from the protection which is afforded to tourists under Consumer legislations. It evaluates the enforcement machinery in Australia as well. The paper summarizes the protection afforded to tourist consumers in India. A comparative analysis of the provisions in Australia and India is made to better understand what best can be done to afford better protection to tourists in India. At this juncture the researcher has made an attempt to discuss issues like: Whether there is adequate protection for the tourists under Consumer Protection Act, 1986? What is the standard of consumer welfare required to be taken into consideration for the protection of tourists? Is there a need for effective enforcement machinery for the protection of tourists' rights? It is with this backdrop, this research paper examines and makes a comparative analysis of the consumer protection laws in India and Australia and questions the adequacy of consumer protection afforded to tourist consumers in India.

**Keywords:** Consumer Protection, Enforcement, Tourism, Travel, India, Australia

## I. INTRODUCTION

Tourism has been pivotal in social progress as well as an important vehicle of widening socio-economic and cultural contacts throughout human history. Over the past years, many developing and developed countries have considered tourism as an option for sustainable development of their nations. Tourism Industry in India is one of the most lucrative industries and contributes substantially to foreign exchange earnings. India's tourism is thriving, owing to huge flow in both business and leisure travel by foreign and domestic tourists. Augmented tourism in India has created jobs in a variety of associated sectors, both directly and indirectly. Tourism is still undermined as leisure and luxurious industry. Low priority was given to it even after independence. After independence, although there was a good amount of tourism activity in India, it did not find its place in the three lists of Seventh Schedule under Constitution of India except for some components mentioned in union or state lists. The tourists are consumers under Consumer Protection Act, 1986. But to what extent the Act protects the interests of tourists as consumers' remains an unanswered question. At this juncture, the researcher has made an attempt to discuss issues like: Whether there is adequate protection for the tourists under Consumer Protection Act, 1986? What is the standard of consumer welfare required to be taken into consideration for the protection of tourists? Is there a need for effective enforcement machinery for the protection of tourists' rights? It is with this backdrop, this research paper examines and makes a comparative analysis of the consumer protection laws in India and Australia and questions the adequacy of consumer protection afforded to tourist consumers in India.

## II. TOURISM SERVICE AND IT'S IMPORTANCE IN INDIA

Tourism is movement of people from the usual place of residence with an intention to return. According to United Nations World Tourism Organization, Tourism comprises: the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes.<sup>1</sup> "Tourism is a major engine of economic growth in most parts of the world. Several

<sup>1</sup> Prakash Talwar, Travel and Tourism Management :Tourism Business and Products, Vol. 2, p. 1 (2006)



countries have transformed their economies using the tourism potential to the fullest. Tourism has great capacity to create large scale employment of diverse kinds—from the most specialized to the unskilled and all of us know that generation of massive productive employment opportunities is what India needs most.”<sup>2</sup> It is earning for the country the equivalent of Rs.13,000 crore in foreign exchange with only 6% or 7% outgo. It is the third largest earner of foreign exchange in gross terms and the second largest in net terms. The average stay of tourist in India is estimated at 30 days, amongst the highest in the world.<sup>3</sup> Tourism is highly labour-intensive. The rate of employment generation in tourism is 52 persons employed per Rs.10 lakh investment. It is much higher than the rate of employment generation in most other economic sectors.<sup>4</sup>

### III. TOURISM IN AUSTRALIA – CATALYST OF ECONOMIC GROWTH

Tourism has become the major contributor to national economic growth. In 2013, visitor expenditure in the tourism industry exceeded \$98.5 billion.<sup>5</sup> There has been an immense increase in the Australia’s international tourism industry over the past two decades. The number of international visitors has more than doubled, rising from 2.5 million in 1992 to almost 6.7 million in 2014. Tourism is important to Australia’s economy, which contributed 3% to Australia’s GDP, out of which 1/3<sup>rd</sup> was by international visitors. The number of international visitors to Australia is projected to grow by 4.5% on an average until 2022-23. The Australian government has implemented a Tourism 2020 strategy with commitments from all state and territory governments which targets an increase in annual overnight visitor expenditure to \$115-\$140 billion by 2020. With this vast significance and potentiality of tourism to develop, it becomes important to analyze the policies and laws on tourism to know to what extent it protects the interests of tourists as consumers. The tourism industry comprises a wide range of services like accommodation, transportation, tour operators, hospitality etc.<sup>6</sup>

### IV. LEGAL REGULATION OF TOURISM SERVICE IN AUSTRALIA

The tourism industry in Australia has undergone major reform in legal regime to protect the travel consumers. Advancement of digital technology has raised policy and regulatory issues for governments. In Australia consumer protection to travel industry is available in the form of generic consumer protection rules and industry-specific voluntary accreditation schemes.

#### 1. Industry-specific Protection:

The travel agents are governed by industry specific consumer protection. In 1986, the National Co-operative Scheme for the Uniform Regulation of Travel Agents was introduced to promote national industry standards and also establishment of Travel Compensation Fund for aggrieved travel consumers. Various Travel Agents Acts were passed to implement the same. By 2011, there was a significant reform in the travel industry regulation<sup>7</sup>. The key recommendations of the COAG adopted Travel Industry Transition Plan of 2012 included repeal of Travel Agents legislation, increase of reliance on general consumer protection and industry-specific

<sup>2</sup>Per then Prime Minister of India, Shri Atal Bihari Vajpayee, in the Chief Minister’s Conference held on October 30, 2001, Quoted in Shallini Gupta, *Media and Tourism*, p.240(2012)

<sup>3</sup>Prakash Talwar, *Travel and Tourism Management: Emerging Concepts of Effective Tourism Development*, Vol. 3, p. 22, (2006)

<sup>4</sup>Based on 1992-93 Consumer Price Index, quoted in Shalini Gupta, *Media and Tourism*, p.224(1<sup>st</sup> ed., 2012)

<sup>5</sup>Tourism Research Australia - 'State of the Industry 2013' (Update issue 1, 2013) (visited on 29.03.2017 at 4.10 p.m) available at [www.aus.gov.in](http://www.aus.gov.in)

<sup>6</sup>Australia’s International Tourism Industry, Productivity Commission Research Paper, Feb 2015 (visited on 4.4.17 at 1.15 p.m) available at [www.pc.gov.au/research/completed/international-tourism/international-tourism.pdf](http://www.pc.gov.au/research/completed/international-tourism/international-tourism.pdf)

<sup>7</sup>Council of Australian Governments (COAG) Legislative and Governance Forum on Consumer Affairs commissioned a ‘Review of Consumer Protection Measures in Travel Industry’ which was undertaken by Price Waterhouse Coopers during 2010.



legislations, to introduce voluntary industry accreditation and an industry-specific dispute resolution Scheme<sup>8</sup> and lastly to wind up the Travel Compensation Fund<sup>9</sup> in order to avoid duplication of regulation and reduce administrative costs.<sup>10</sup> The Travel Compensation Fund which provides for compensation to travelers in case of insolvency of travel agency for which the travel agents had to keep huge deposits was considered unjustifiably burdensome compared to the consumer protection it afforded.<sup>11</sup>

a) Australian Federation of Travel Agents (AFTA)

It was established in 1957. It represents approximately 70% of Australia's travel intermediaries and controls more than 90% of travel intermediary turnover. It lays down professional standards for travel agents, stimulates travel and builds strong working relationship with suppliers and consumers of travel related services.<sup>12</sup>

b) AFTA Travel Accreditation Scheme (ATAS)

The travel agents licensing scheme is the only industry-specific consumer protection regulation in the travel industry which includes training requirements, administration and disclosure rules and a compensation scheme. Australian Federation of Travel Agents has introduced AFTA Travel Accreditation Scheme, with the intent that travelers should have more confidence when dealing with an ATAS accredited travel agent. AFTA does not stand behind the ATAS accredited travel agents if become insolvent and travelers lose the money they have paid, instead it provides for travel insurance.<sup>13</sup> AFTA advises travelers to pay through credit card, wherein small amount of surcharge, usually 1% or 2% of total travel cost, shall be imposed which acts as the cheapest form of travel insurance.

ATAS is a voluntary scheme introduced to enhance the travel industry standards in order to ensure professionalism. It is a code of practice which the travel agents must follow in their day to day practices. There is an independent dispute resolving machinery to resolve any complaints or disputes. ATAS accredited agents are obligated to meet their obligations under the code. The agents who breach their responsibilities will face sanctions and their accreditation stands cancelled. It provides remedy to the customers in case their travel arrangements are disrupted due to non-trading of travel agents. It advises on relevant alternatives available to tourists based on their particular interests.

Complaint Handling Process under ATAS

Complaints may be made by customers under complaint handling process through participant resolution. It can also be made directly with the ATAS Compliance Manager. It will be resolved by mutual agreement. The Complaints may relate to issues of breach of the ATAS Code like misleading or deceptive conduct,

<sup>8</sup>[Tom Young](#) and [Kurt Winter](#), "Australia: Risking international reputational damage to Australia's tourism industry: the potential fallout of national regulatory reform" (visited on 18.04.2017 at 9.10 p.m.) available at [www.mondaq.com/australia/.../Risking+international+reputational+damage+to+Austra...](http://www.mondaq.com/australia/.../Risking+international+reputational+damage+to+Austra...) (last modified 15<sup>th</sup> may 2014)

<sup>9</sup>Per NSW Minister (Anthony Roberts) while introducing the Travel Agents Repeal Bill 2013 about the abolition of the Travel Compensation Fund: "Given that payments are now frequently made to travel providers and/or by credit card, the Travel Compensation Fund and licensing has become increasingly redundant. The regulatory scheme has placed a costly administrative burden on the industry."

<sup>10</sup> TCF only insured against a travel agent's default in failing passing on money received to suppliers. It did not cover money paid to unlicensed persons such as 'agents' of a licensed travel agent. It did not cover money paid to suppliers such as airlines, hotels, resorts etc. In the era of digital technology, there is transformation in the way consumers purchase flights, hotels, tours and other travel related products, Hence TCF became redundant.

<sup>11</sup>[Review of Consumer Protection in the Travel and Travel Related Services](#) (visited on 06/02/17 at 2.20 p.m) available at [consumerlaw.gov.au/files/2011/03/review\\_protection\\_in\\_travel\\_industry.pdf](http://consumerlaw.gov.au/files/2011/03/review_protection_in_travel_industry.pdf)

<sup>12</sup>Review of Consumer Protection Measures in the Travel and Travel Related Services Market in Australia

Including the Role of the Travel Compensation Fund, Paper submitted by Australian Federation of Travel Agents, (visited on 19.04.2017 at 7.05 p.m.)

available at [https://cdn.tspace.gov.au/uploads/.../Australian\\_Federation\\_of\\_Travel\\_Agents1.pdf](https://cdn.tspace.gov.au/uploads/.../Australian_Federation_of_Travel_Agents1.pdf)

<sup>13</sup>This insurance is known as credit card charge-back which the credit card issuers provide if the travel service for which credit card payment is not provided because the supplier has ceased to operate. The credit card payment which is made is refunded since travel service cannot be supplied.



cancellation, itinerary etc. It will determine if there is breach of obligations under the Code and if not resolved refer the matter to ACCMC (ATAS Code Compliance Monitoring Committee) for review, following which the complaint would be closed. It is an independent review body specifically established under ATAS to review and determine customer complaints, allegations of non-compliance with the ATAS Charter and Code and appeals against unsuccessful applications for or renewal of ATAS accreditation. It can issue binding decisions, including sanctions against a participant. The sanctions may be in the form of Orders for rectification, improvement, warning, publication, public notification, re-training, suspension or cancellation of ATAS accreditation. Apart from decision on suspension or cancellation, the decision of ACCMC is final. If not satisfied with the outcome of appeal, the alternative dispute resolution, such as lodging complaint with the local state or territory consumer affairs agency, court or tribunal can be pursued.<sup>14</sup>

c) Tourism Australia Act, 2004

It provides for the establishment of a body corporate known as Tourism Australia<sup>15</sup>. The objectives of Tourism Australia are to influence people to travel to Australia, increase the economic benefits and help foster a sustainable tourism industry in Australia.<sup>16</sup> It communicates with the Australian tourism industry regarding issues affecting tourism. It will perform the functions in co-operation with tourism industry, Australian Government, its agencies and foreign governments.<sup>17</sup> The Board of Directors of Tourism Australia performs the functions, exercises the powers and determines the policy.<sup>18</sup>

2. *Consumer Protection:*

The Trade Practices Act, 1974 which had regulated competitive and consumer conduct of businesses in Australia for over 36 years was consigned to the annals of history as it was replaced by the Competition and Consumer Act, 2010. Competition and Consumer Act, 2010 is enacted to enhance the welfare of Australians through promotion of competition and fair trading and provision for consumer protection<sup>19</sup>. It covers anti-competitive practices, industry codes of conduct, authorizations, notifications and clearances.<sup>20</sup>

The Consumer Protection provisions formerly found in Trade Practices Act<sup>21</sup> are now found in Australian Consumer Law<sup>22</sup>, which applies to corporations, organizations and individuals in their own right.<sup>23</sup> The **Australian Consumer Law**<sup>24</sup> was introduced as part of the deregulatory reforms of the Council of Australian Governments (COAG) in order to deliver a seamless national economy. It is a single, uniform, most beneficial<sup>25</sup> national law covering consumer protection and fair trading. It is a national legal framework for unsolicited selling including door-to-door trading and telephone sales. It enunciates the most efficient machinery for

<sup>14</sup>AFTA Travel Accreditation Scheme, "Code of Conduct", prepared by Australian Federation of Travel Agents Revision 4, 15<sup>th</sup> July, 2016 (visited on 27.02.2017 at 11.41 p.m.) available at [www.afta.com.au/uploads/atas-code-of-conduct.pdf](http://www.afta.com.au/uploads/atas-code-of-conduct.pdf)

<sup>15</sup> Section 5, Tourism Australia Act 2004

<sup>16</sup> Section 6, Tourism Australia Act 2004

<sup>17</sup> Section 7, Tourism Australia Act 2004

<sup>18</sup> Tourism Australia Act, 2004 (visited on 23/02/17 at 5.05 a.m.)

available at [https://www.legislation.gov.au/Details/C2012C003\\_63](https://www.legislation.gov.au/Details/C2012C003_63)

<sup>19</sup> Section 2 of Competition and Consumer Act, 2010

<sup>20</sup> [Competition and Consumer Act 2010 \(CCA\) - Legislation | ACCC](http://www.accc.gov.au/about-us/australian-competition-consumer-act-2010) (visited on 02.05.2017 at 11.00 a.m.) available at <https://www.accc.gov.au/about-us/australian-competition-consumer-act-2010>

<sup>21</sup> Relocation was necessary to meet the constitutional requirements of Australia's federal system.

<sup>22</sup> Schedule 2 of Competition and Consumer Act, 2010

<sup>23</sup> [Kathryn Edghill](#), [Graham Maher](#) and [Truman Hoyle](#), "The Competition and Consumer Act – Australia's New Competition and Consumer Protection Legislation", (visited on 5.5.2017 at 10.35 a.m.) available at [www.mondaq.com/.../Consumer-act-2010](http://www.mondaq.com/.../Consumer-act-2010) (last updated: 13 January 2011)

<sup>24</sup> ACL is set out in Schedule 2 to the Competition and Consumer Act, 2010. The ACL replaced provisions spread across at least 20 Commonwealth, state and territory consumer laws with one law.

<sup>25</sup> The Productivity Commission estimated that this reform could provide benefits to the Australian Community of between \$ 1.5 billion and \$ 4.5 billion a year.



enforcement and redressal.<sup>26</sup>It has introduced a new national law on information standards, unfair contract terms, consumer guarantees, product safety, unsolicited and lay off consumer agreements.<sup>27</sup>

Australian Consumer Law defines Consumer as a person who acquires goods the value of which does not exceed \$40,000 or greater than that amount provided it is acquired for personal, domestic, household use or consumption. However, it does not apply if the person acquired goods only for the purpose of re-supply or using them in the process of production, repairing, trading in the course of trade or commerce.

ACL provides for two kinds of protections: General<sup>28</sup> and Specific Protection.<sup>29</sup>

- a) General Protection creates standards of business conduct.
  - i. It includes general ban on misleading and deceptive conduct in trade or commerce<sup>30</sup>. Conduct may be in the form of advertisements, promotions, quotations, statements or representations. Puffery is wildly exaggerated, vague and fanciful statement which is misleading. Claiming any tourism place as dream destination may be a mere puffery. Remaining silent, not divulging relevant information is deceptive. Disclaimers, disclosures or a clarification in small, insignificant prints which exonerates the business from liability is deceptive. Promises, opinions and predictions which the person making it knew was not correct, did not care whether true or not or had no reasonable grounds for making it is regarded as misleading or deceptive.<sup>31</sup> Remedies for misleading or deceptive conduct may result in court-ordered civil remedies, including the imposition of pecuniary penalties, injunctions, declarations, damages, compensation orders, disqualification orders, infringement or public warning notices.<sup>32</sup>
  - ii. A general ban on unconscionable conduct<sup>33</sup> in trade or commerce and specific bans on unconscionable conduct in consumer and some business transactions. Unconscionable Conduct may include not properly explaining the conditions of contract, not giving sufficient time to read an agreement or ask questions or get advice, failing to disclose key contractual terms, inducing a person to sign a blank one-sided contract or using high pressure tactics.<sup>34</sup> Maximum civil penalties are \$220,000 for an individual and \$1.1 million for a body corporate.<sup>35</sup>
  - iii. A provision that makes unfair contract<sup>36</sup> terms in consumer contracts<sup>37</sup> is void. The term should be looked into particularly whether the term is reasonably in plain language, legible, presented clearly and readily available to the consumer.<sup>38</sup> Some of the examples of unfair contract terms are those terms which limit the performance of contract, one party terminating contract or being penalized for termination of contract or varying the terms of contract or varying the upfront price payable under the

<sup>26</sup> [Australian Consumer Law - A Framework Overview \(visited on 25.04.2017 at 8.28 p.m.\) available at consumerlaw.gov.au/files/2015/06/ACL\\_framework\\_overview.pdf](http://consumerlaw.gov.au/files/2015/06/ACL_framework_overview.pdf)

<sup>27</sup> [The Australian Consumer Law - A guide to provisions \(visited on 25.04.2017 at 9.30 p.m.\) available at https://publications.qld.gov.au/dataset/1b96f0f9.../aclguidetoprovisions.pdf](https://publications.qld.gov.au/dataset/1b96f0f9.../aclguidetoprovisions.pdf) visited on 20/03/17

<sup>28</sup> Chapter 2 of ACL

<sup>29</sup> Chapter 3 of ACL

<sup>30</sup> Section 18 of ACL

<sup>31</sup> Avoiding Unfair Business Practices Guide prepared by ACCC

<sup>32</sup> Ibid at 31

<sup>33</sup> Under Section 21 of ACL, Unconscionable conduct means conduct that defies good conscience and which is against society's norms and expectations.

<sup>34</sup> Supra 31

<sup>35</sup> Supra 31

<sup>36</sup> A term is regarded as 'unfair' if it causes significant imbalance in the rights and obligations of the parties arising out of contract, when the term is not reasonably necessary to protect the legitimate interests of supplier or it causes financial or non-financial detriment to a party.

<sup>37</sup> According to Section 23 (3), 'Consumer Contract' is a standard form agreement for the supply of goods or services which is wholly or predominantly for personal, domestic or household use or consumption.

<sup>38</sup> Section 24 of ACL



contract without the right of another party to terminate the contract. Section 27 provides for the standard form contracts.<sup>39</sup> In *Director General of Fair Trading v. First National Bank*, it was laid down that transparency requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer.<sup>40</sup>

b) Specific Protections address identified forms of business conduct.

i. Banning unfair practices in trade or commerce. Unfair Practices<sup>41</sup> include false or misleading conduct in trade or commerce in the supply of goods or services, failing to supply gifts and prizes as offered, bait advertising, wrongly accepting payment for goods and services not supplied, pyramid selling schemes, certain pricing practices, using harassment and coercion in connection with business activities. It is unlawful for a business to make false or misleading representation about goods or services when supplying, promoting or offering services. Sections 29-34 and 151-160 deal with provisions of consumer transactions. It provides for guaranteed consumer rights for goods or services in the form of consumer guarantees. It has introduced rules for unsolicited sales transactions and lay-by agreements.<sup>42</sup> Making false or misleading representations is an offence and a maximum fine of \$ 220,000 for an individual and \$ 1.1 million for a body corporate can be imposed. It may relate to standard, quality, value or grade of goods or services. Wrongly accepting payment for goods or services with no intention to supply, supply materially different services or if they knew that they could not supply the services attracts penalty.<sup>43</sup>

ii. Part 2 of Chapter 3 of ACL provides that businesses must comply with statutory consumer guarantees and unsolicited selling law. The ACL provides for consumer guarantees of providing services which cannot be excluded by contract. They are guarantee to use acceptable level of skill or technical knowledge when providing the services, to supply services within a reasonable period of time, supply reasonably fit services.

Failure to meet the consumer guarantee may be major or minor failure. In case of major failure, the consumer can cancel the services and get refund of any unconsumed services or keep the contract and get compensation for the difference in value between the service delivered and what they paid for. If the loss or damage is foreseeable, then the supplier is liable to pay compensation. But if it is minor failure, the supplier is given reasonable time to fix the problem free of charge. Otherwise the consumer can get it fixed, cancel the service and demand for refund.<sup>44</sup> Suppliers automatically provide guarantees to certain services they provide to consumers. These rights exist regardless of any warranty supplied by supplier.<sup>45</sup>

iii. ACL contains law covering unsolicited sales practices including door-to-door selling and telephone sales. The unsolicited selling law contains express supplier obligations about how the consumers should be approached, permitted hours of visit, duty to disclose the purpose of visit, duty to leave

<sup>39</sup> Preventing unfair terms in window and floor covering agreements - A guide for legal practitioners and consumer advocates prepared by ACCC

<sup>40</sup> (2002) 1 AC 482

<sup>41</sup> Part 1, Chapter III of ACL

<sup>42</sup> Avoiding Unfair Business Practices Guide prepared by ACCC

<sup>43</sup> Avoiding Unfair Business Practices Guide prepared by ACCC

<sup>44</sup> [Travel and Accommodation: A Guide for Industry to the Australian \(visited on 15.05.2017 at 9.05 a.m.\) available at https://www.accc.gov.au/.../Travel%20%26%20accommodation%20-%20an%20indus..](https://www.accc.gov.au/.../Travel%20%26%20accommodation%20-%20an%20indus..)

<sup>45</sup> Supplier includes anyone such as trader, retailer or service provider who in trade or commerce sells, leases or hires goods or services.



premises immediately on request and duty to disclose the right to terminate the agreement within 10 business days of making.<sup>46</sup>

3. *Australian Consumer Law Guide for the Travel and Accommodation Industry*<sup>47</sup>:

It contains general information as well as examples to guide travel and accommodation businesses on their obligations under ACL and also gives an insight into the current consumer protection policy applied by ACCC. The Guide highlights three broad areas:

- a) In case of travel advertising, the ACCC provides for component pricing or single pricing advertising. It means the price should be inclusive of any tax, fee, duty etc and the single price must be projected prominently in size and colour.
- b) The hotel/resort must ensure consumer guarantees by providing accommodation which is fit for the specified purpose, failure of which amounts to major failure.
- c) Travelers are entitled for refund in case of cancellation of travel or accommodation. The cancellation policy should be clearly included in the booking conditions. In case of cancellation due to events beyond the control of supplier, cancellation because supplier is not able to go ahead by illness or in case of transfers or modifications, there can be cancellation provided the cancellation charges are reasonable.<sup>48</sup>

Other common consumer issues relate to:

- i. In case of online bookings, the relevant terms, conditions, images should be set out. Incomplete supply of services or not delivering the services as advertised is punishable.
- ii. When travel is sold through tele-marketing, it may involve unsolicited consumer agreement. They should comply with visiting hours, should inform consumers on cooling off rights, agreement should be in writing, accommodation should appear as advertised and restrictions as to when they can take payment.
- iii. Consumer contracts can be entered into by signing, agreeing over phone or clicking on 'I agree' button. It is better to have written contract which includes cancellation policy and the necessary terms and conditions.
- iv. Receipts should be provided as proof of transaction if the consumer has bought services worth \$75 or more.
- v. The consumers can ask for itemized bill as to how the price was calculated. The terms and conditions of cancellation policy and cancellation charges should be spelled out correctly. The customer is entitled to refund of payments already made and all reasonable expenses which he may have incurred before cancellation.
- vi. Excessive cancellation fees may be regarded as unfair contract terms.<sup>49</sup>

<sup>46</sup>[The Australian Consumer Law - A Guide to Provisions \(visited on 17.04.2017 at 12.00 a.m.\)](https://publications.qld.gov.au/dataset/1b96f0f9.../aclguidetoprovisions.pdf) available at <https://publications.qld.gov.au/dataset/1b96f0f9.../aclguidetoprovisions.pdf> visited on 20/03/17

<sup>47</sup>This Guide is prepared in 2013 by ACCC in conjunction with ASIC and the Consumer Affairs/ Fair Trading/ Commerce Departments of the States and Territories around Australia

<sup>48</sup>Anthony J Cordato, "The Australian Consumer Law Guide for the Travel and Accommodation Industry" (visited on 14.04.2017 at 1.42 p.m.) available at [www.tourismlegal.com.au/travel\\_feature\\_articles.htm....\(last](http://www.tourismlegal.com.au/travel_feature_articles.htm....(last) modified on Aug 16, 2013)

<sup>49</sup>[Travel and accommodation: a guide for industry to the Australian \(visited on 12.05.2017 at 10.30 a.m.\)](https://www.accc.gov.au/.../Travel%20%26%20accommodation%20-%20an%20indus..) available at <https://www.accc.gov.au/.../Travel%20%26%20accommodation%20-%20an%20indus..>



V. ENFORCEMENT MACHINERY UNDER AUSTRALIAN CONSUMER LAW

Chapter 5 of ACL includes enforcement powers, penalties and remedies that can be applied in case of breach of the law.

a) National Enforcement Powers:

- i) Enforceable Undertakings- In case of breach, give an undertaking to the consumer agency that they will not repeat it and shall take steps to comply. This undertaking if accepted by the consumer agency becomes enforceable.
- ii) Substantiation Notices- the consumer agencies issue notice to business seeking information and documents about claims made in the market place to determine if they are genuine and whether further investigation is necessary.
- iii) Public Warning Notices- Consumer agencies give public warning notices about businesses which have breached ACL or have failed to respond to substantiation notice.

b) National Consumer Law Remedies:

- i) Civil pecuniary penalties- consumer agencies can seek monetary penalties in case of breach on the balance of probabilities.
- ii) Disqualification orders- consumer agencies can apply to the court for an order disqualifying from managing a corporation for a contravention of ACL.
- iii) Non punitive orders- It is a remedy imposed by the court to redress harm suffered where in consumer agencies may apply to the court for non-punitive orders in case of contravention of ACL. Such orders will help those in breach to comply with the ACL in the future.
- iv) Adverse Publicity Orders- Consumer agencies apply in case of contravention of ACL.
- v) Declarations- ACL provides that a declaration may be made that a term in standard form consumer contract is unfair.
- vi) Injunctions- It is to stop a business from engaging in conduct in breach of ACL or to require the business to do certain things.
- vii) Damages- it can be recovered in case of loss or damage to a person.
- viii) Compensatory orders- Compensation to those who suffer from loss or damage due to breach of ACL.
- ix) Redress for non-parties-sometimes the consumer agencies may seek particular remedies such as refunds or contract variations to remedy a breach of the ACL without first establishing the identity of those persons whom the breach affected.<sup>50</sup>

Consumer protection agencies can issue corrective advertising orders, infringement notices and public warning notices as an alternative to instituting legal proceedings.<sup>51</sup>

In *Australian Competition and Consumer Commission v. Air Asia BerhadCo.*,<sup>52</sup> the Federal Court imposed penalty of \$200,000 against Air Asia for contravening the single pricing provisions. For 10 months Air Asia did not display on its website some airfare prices inclusive of all taxes, duties, fees and other mandatory charges in a prominent way and as a single figure.<sup>53</sup>

<sup>50</sup>The Australian Consumer Law- A Framework Overview ( visited on 12.04.2017 at 12.45 p.m.) available at [consumerlaw.gov.au/files/2015/06/ACL\\_framework\\_overview.pdf](http://consumerlaw.gov.au/files/2015/06/ACL_framework_overview.pdf)

<sup>51</sup>Avoiding Unfair Business Practices Guide Practitioners in the [The Australian Consumer Law - A guide to provisions](#) (visited on 28.04.2017 at 9.05 p.m.) available at <https://publications.qld.gov.au/dataset/1b96f0f9.../aclguidetoprovisions.pdf>

<sup>52</sup> (2012) FCA 1413

<sup>53</sup> Sales Practices- A Guide for Businesses and Legal Practitioners in [the Australian Consumer Law - A guide to provisions](#) (visited on 28.04.2017 at 9.05 p.m.) available at <https://publications.qld.gov.au/dataset/1b96f0f9.../aclguidetoprovisions.pdf>





When court declares unfair term as void, it may grant an injunction restraining the other party from acting upon the term, compensation, an order to provide redress to non-party consumers, any other appropriate order.<sup>54</sup>

#### VI. PROTECTION OF CONSUMER TOURISTS IN INDIA

Consumer Protection Act, 1986 protects the consumers, creates awareness and provides for the enforcement machinery. The Act is in addition to and not in derogation of any other law for the time being in force. In *General Manager, South-eastern Railway v. Anand Prasad Sinha*<sup>55</sup>, it was held that passengers travelling by train on payment of stipulated fare charged for tickets are 'consumers' and facilities of transportation provided by railway administration was 'service' rendered for consideration. In *Mahendra Kumar Routary v. Superintendent, Bhubaneswar*<sup>56</sup>, the complainant got reservation in two-tier AC in train but name was not found on reservation chart on journey date, hence had to travel in second class. It was held, he is 'consumer' and there is 'deficiency of service'.

In *GO Airlines (India) Pvt. Ltd. v. Pradeep Lal*<sup>57</sup>, Complainant had booked two tickets with the original petitioner from Delhi to Goa and back under the scheme of one lakh free tickets. It was paid through credit card and was charged for ordinary tickets. While booking, the website mentioned no terms and conditions and showed as limited available seats. The free tickets scheme only lured them to buy tickets or made them believe that they would pay only surcharges and taxes and not INR charges. Court held it amounted to unfair trade practice, since the airlines by withholding information had adopted deceptive means.

The three-tier enforcement machinery includes district forum, state commission and national commission. It also provides for the establishment of consumer protection councils to promote the rights of consumers. The district forum has territorial as well as pecuniary jurisdiction i.e if the value of the goods or services and compensation is within 20 lakhs.<sup>58</sup> The State Commission apart from territorial, has pecuniary, appellate and revisional jurisdiction<sup>59</sup>. It entertains complaint if the value of goods or services is more than 20 lakhs but below one crore and hears appeals from state commission. It exercises revisional jurisdiction over district forum if it has exercised jurisdiction not vested in it by law, has failed to exercise jurisdiction, has acted beyond law or with material irregularity.<sup>60</sup> Under Section 21 of Consumer Protection Act, 1986, National Commission exercises territorial, pecuniary, appellate and revisional jurisdiction. It entertains complaints if the value of goods or services and compensation exceeds one crore, appeals against the orders of State Commission. It calls for records or pass appropriate orders in consumer dispute pending/decided by Supreme Court if of the opinion that the State Commission has not acted within law or acted irregularly. The orders passed by the District Forum, State Commission, National Commission shall be enforced in the same manner as decree or order by court. The interim order if not complied with, it can be enforced by ordering for attachment of property. However after three months, the attached property shall be sold.<sup>61</sup>

The Act provides for the establishment of Consumer Protection Councils at Centre, State and District level. It is established to promote and protect the rights of consumers such as Rights to safety, information, choice, hearing, redressal and consumer education.<sup>62</sup> The 2002 amendment confers upon the District Forum, the power

<sup>54</sup>Unfair Contract Terms- A Guide for Legal Practitioners in the [The Australian Consumer Law - A Guide to provisions](https://publications.qld.gov.au/dataset/1b96f0f9.../aclguidetoprovisions.pdf) (visited on 22.04.2017 at 3.03. p.m.) available at <https://publications.qld.gov.au/dataset/1b96f0f9.../aclguidetoprovisions.pdf>

<sup>55</sup> I (1991) CPJ 10 (12) at Majumdar, Law of Consumer Protection in India, p.310 (17<sup>th</sup> ed., 2016)

<sup>56</sup> 1992 (1) CPR 248 (Orissa) at Majumdar, Law of Consumer Protection in India, (17<sup>th</sup> ed., 2016)

<sup>57</sup> (2010) CPJ 267 (UP) at Majumdar, Law of Consumer Protection in India, p. 800, (17<sup>th</sup> ed., 2016)

<sup>58</sup>Section 11 of Consumer Protection Act, 1986, p.848, Majumdar, Law of Consumer Protection in India (17<sup>th</sup> ed., 2016)

<sup>59</sup>Section 17 of Consumer Protection Act, 1986

<sup>60</sup> Majumdar, Law of Consumer Protection in India, p.909 (17<sup>th</sup> ed., 2016)

<sup>61</sup> S.P. Sen Gupta, Consumer Protection Act, p.1233-1234 (3<sup>rd</sup> ed., 2014)

<sup>62</sup> Supra 61 at p.570



of attachment of property in case of non-compliance with the order, for a period not more than three months after which it shall be sold. Section 27 provides that penalties in case of failure to comply with the order may be not less than one month up to three months and fine not less than Rs. 2000 up to Rs.10,000 may be imposed.

#### VII. COMPARATIVE ANALYSIS OF INDIAN AND AUSTRALIAN CONSUMER LAWS WITH REFERENCE TO TOURISM

Australia provides industry specific protection as well as consumer protection to the tourists. AFTA promotes tourism and has also laid down professional standards for travel agents. ATAS has laid down code of conduct to travel agents and provides for independent complaint resolving machinery. Tourism Australia is a body established to promote tourism in Australia.

In India, the Department of Tourism, attends to enquiries from various tour sectors and regulates their activities. It has top level expert bodies which advice the central and state government on tourism matters. National Tourism Board is the highest policy making body created in 1972 which advises the minister on matters of policy.<sup>63</sup> Unlike Australia, there is no strict prescribed Code of Conduct for travel agents or a complaint resolving machinery. The CPA, 1986 speaks more about promotion and less about protection.

Australian Consumer Law provides for general and specific protection. The Australian Consumer Law bans certain general practices like misleading conduct, unconscionable conduct and unfair terms in order to promote the interests of consumers by imposing standard conduct on businesses. A mere puffery statement of claiming a destination to be dream destination is misleading. The hotel/resort while marketing should not mislead consumers about its price, quality, amenities or location. They are prohibited from engaging in certain activities when dealing with individual consumers. Under the general protection, there is ban on misleading advertisements and puffery statements which may be made by tour operators. Advertising as "beach view" resort and not providing the same is punishable. The disclaimers in the pamphlets should be prominent and legible. Sufficient time should be given to tourists before they enter into agreement and the terms should be clear with equal rights for termination for both the parties. The travelers are entitled for refund in case of cancellation of travel or accommodation. Excessive cancellation fee is unfair contract term and the alternative booking provided should be of the same standard. The compulsory cooling off period of 10 days gives an opportunity to re-consider the decision. It contains provisions as to how and when the consumers can be approached, disclosure obligations and to inform regarding the right to terminate the contract after the cooling off period. If the agreement was entered over phone, agreement copy should be provided for the same. The information provided in the agreement should be legible, transparent and prominent.

The specific protection is clear that there cannot be component pricing. In order to apply the consumer guarantees broadly, the meaning of trade or commerce is enhanced to include any business or professional activity. The supply of service by business falls under the broad purview of trade or commerce whether online/telephone/in person. The consumers should be guaranteed reasonable care and skill to provide timely and appropriate service. The hotel/resort must provide accommodation which is fit for the specified purpose. Airlines not providing additional leg space even after being requested, missing the flight due to late arrival of shuttle bus, providing rooms with low balcony rails to a family with kids are all deemed to be violating the consumer guarantees. The tourists shall not be subjected to unnecessary harassment and shall comply with certain conditions regarding timings for meeting and disclosure of information. Apart from this there is ACL Guide for travel and accommodation industry which provides how the various provisions in the ACL like component pricing, consumer guarantees, online booking etc. are made specifically applicable to the tourism service.

In India, the Consumer Protection Act, 1986 affords protection to tourists as consumers. Apart from defining consumer, deficiency of service, unfair trade practice etc. it does not elaborate upon the various protections that are available to consumers. There are no detailed provisions as to how the agreement should be, how

<sup>63</sup> Shashi Prabha Sharma, *Tourism Education: Principles, Theories and Practices* p.121-124 (2004)



transparent the terms should be, sufficient time to decide upon the contract and terminate the same. The provisions relating to unfair terms in the contract should find its way into the Act. There are no enforceable guarantees to the consumers.

The main enforcement body in Australia is Australian Competition and Consumer Commission and territory consumer agencies. ACCC reviews and consults the relevant stakeholders in various industries. It takes enforcement action against transgressors and has provided guiding principles for enforcement. It has adopted multi-dimensional approach to tackle the consumer disputes in the form of general and specific protections, civil and criminal sanctions and finally awareness through consumer education. Australian Guide has been developed by the ACCC along with the consumer agencies to help businesses and consumers to understand ACL. It gives the businesses an opportunity not to repeat the mistake by substantiating their claims, by giving an undertaking, giving corrective advertisement or warning the public. Civil pecuniary penalties are injunction, damages, compensatory orders (non-punitive orders) which provides remedy. Adverse publicity orders and disqualification orders are punitive in nature.

In India, the Consumer Protection Act, 1986 provides for three tier enforcement machinery in the form of district forum, state commission and national commission. They are entrusted with powers of civil courts. The orders are enforceable in the same manner as decree. Failure to comply with the order of forums attract penalties<sup>64</sup> with fine not less than Rs. 2,000 which may extend to Rs. 10,000 and imprisonment for a term which is not less than one month but which may extend to three years. The object is to ensure compliance of the orders as distinguished from punishment, any act which ensures compliance would be with the spirit of the provision.<sup>65</sup> This is meagre compared to the penalty provisions in ACL which is \$220,000 for individuals and \$1 million for corporations.

In order to meet the needs of digital era, Consumer Protection Amendment Bill, 2014 which is pending may bring in sweeping changes. Consumer covers those who buy services through online, telephone or direct selling. Deliberate withholding of information is covered under deficiency of service. Unfair trade practice to include representation made through electronic record. Complaint may be made in case of loss suffered due to unfair contract term. In order to ease the complaint and redressal process, online filing of complaint is introduced. The supplier of service is required to provide bill/cash memo/receipt for services rendered. It has introduced a new chapter which provides for the establishment of an executive authority known as Central Consumer Protection Agency to promote, protect and enforce rights and also to prevent exploitation of consumers and prevent violation of their rights.

## VIII. CONCLUSION

The mechanisms adopted to protect the consumers may vary from one country to another depending upon different economic and financial systems prevailing in each country. It is true that the regulatory framework depends upon the country level consumer sophistication. The provisions in the ACL are logically structured with more clarity. It is easily understandable and accessible to the consumers. It has specified in detail the available general and specific protection. The civil and pecuniary penalties are clearly specified in the Law. The enforcement lies with ACCC and other state consumer agencies. The Guide is useful as the tourism industry has clear picture as to what provisions of ACL are applicable to tourism service. Indian consumer law is still in the stage of infancy, detailed provisions should be incorporated to effectively protect the rights of tourist consumers. Penalty should be stringent and not just to ensure compliance with the law.

It becomes important to make certain amendments to the present consumer laws by incorporating more detailed provisions specifying the various kinds of protections available to consumers. An appropriate Schedule needs to be incorporated into the Consumer Protection Act, 1986 which may provide detailed provisions regarding applicability of Consumer Protection Act, 1986 to tourism service. There should be one body at the centre and

<sup>64</sup>Section 27 of Consumer Protection Act, 1986

<sup>65</sup>Moti lal Jain v. Marudhar Services Ltd., 1998 (1) CPR 605



also necessary state consumer agencies to regulate the activities of travel agents and tour operators, code of conduct and customer complaint resolving machinery. The enforcement machinery should be effective and penalties should be enhanced. Tourism is no more regarded as luxury; it has become part and parcel of daily life. The protection afforded to tourists as consumers is no longer sufficient. The major role of government is to ensure that their policies, rules and regulations do not unnecessarily impede the international tourism industry and also protects the tourist consumers.