

TCF DISCRETION TO PAY CLAIMS FOR UNLICENSED TRADING AND TO RECEIVE CLAIMS AFTER 12 MONTHS FROM LOSS

This Guideline has been developed and published by the Board of the TCF under clause 15.3 of the TCF Trust Deed.

1.0 Introduction

- 1.1 The TCF's primary purpose is to compensate consumers when a licensed travel agent and TCF participant defaults (or "fails to account") in providing travel services, or a refund, where the consumer has handed over money (see cl.15.1 of the TCF Trust Deed). It must pay such claims, if proved. However, such claims must also be received not later than 12 months after the travel agent fails to account (cl.16.1).
- 1.2 However, the TCF also has discretion to pay claims when a consumer has given money to an unlicensed agent who fails to account (cl.15.2). This is exercised in limited circumstances. Generally, consumers should take care to ensure that they deal only with licensed travel agents.
- 1.3 The TCF also has discretion to accept a claim (whether against a licensed or unlicensed travel agent) after 12 months from the failure to account (cl.16.2).

2. How the TCF Decides Unlicensed Trading Claims

- 2.1 In deciding whether to pay a claim where a consumer loses money in the hands of an unlicensed agent, the TCF will take into account all of the circumstances relating particularly to the issue whether the consumer knew, or had any reason to suspect, that the travel agent was unlicensed, or that the transaction might not be genuine. If the consumer should have appreciated that the agent was unlicensed, or was not a bona fide travel agent, the TCF will not pay the claim.
- 2.2 The following factors will be relevant to the TCF's decision:
 - any advertising by the agent which the consumer might have seen. The TCF will consider whether such advertising creates the impression that the agent is carrying on a bona fide travel agency business. Where the claimant has made arrangements through a web site, the TCF will consider the content and layout of the site;
 - the transaction itself, including price. The TCF will closely examine a transaction where the price paid is greatly below what a person might reasonably expect to pay, to determine

whether, in the circumstances, the consumer could not reasonably have expected to purchase the travel for the price;

- whether the consumer took reasonable steps to protect his or her own interests (for example, if the consumer entered into any unusual payment arrangements by sending money to a person who was clearly not a relevant travel provider, and who did not issue a receipt referring to the consumer's travel)
- whether the consumer had experience in purchasing travel, or was otherwise reasonably commercially astute, or due to inexperience, language or cultural factors, or a relevant disability, could not be expected to appreciate that the transaction might not be genuine;
- the general nature and appearance of documentation given to the consumer, including any letterhead or receipts, and reference to licence numbers;
- if the transaction was with a friend, work acquaintance, or family member, or otherwise appeared to be a private rather than a business arrangement;
- any history of dealing between the consumer and the agency when the owner (whether the current or a previous owner) was licensed, but had become unlicensed;
- whether the consumer otherwise had any reason to believe that the agency was unlicensed;
- the length of time between the agent becoming unlicensed and the consumer's payment. The TCF is less likely to pay a claim if a substantial time has passed.
- the nature and appearance, including the furniture and fit out, of the premises used by the agent. The TCF would not ordinarily pay a claim for travel purchased in a workplace, domestic residence, or other premises where a person would not usually do travel business.

3. Whether TCF will accept a claim after 12 months

- 3.1 While the TCF would not normally accept a claim after 12 months from when an agent failed to account, it has discretion to do so if there are special circumstances.
- 3.2 If a claim is accepted after 12 months, it may be either a mandatory cl.15.1 claim, or a discretionary cl.15.2 claim, depending on whether the agent was licensed or unlicensed at the time of failing to account. Generally, the TCF calculates the 12-month time period for failing to

account, for a licensed agent, as starting from the time when TCF terminates the agent's TCF participation. However, the TCF will consider the circumstances of each claim if the 12-month time limit is critical.

- 3.3 The TCF claim form (which can be downloaded from the TCF web site at www.tcf.org.au) refers prominently to the 12-month time limit for making claims.
- 3.4 When a claim is received after 12 months, the claim is not eligible for acceptance unless the claimant establishes reasons for the TCF to exercise the discretion to accept the claim. The TCF therefore requires a detailed explanation from the claimant concerning the reasons for delay in making the claim.
- 3.5 The TCF may accept a claim where the claimant can establish one or more of the following (the list is not exhaustive):
 - prolonged serious illness or incapacity;
 - extended absence from Australia;
 - protracted attempts to obtain compensation through other avenues;
 - reasonable reliance on other persons to pursue the claim;
 - particular personal circumstances (including a disability) which made it especially difficult for the claimant to make the claim; or
 - prior contact with, or enquiries of, the TCF regarding the claim which involved the claimant pursuing another avenue of recovery.
- 3.6 A claim is more likely to be accepted if it is lodged as soon as possible after the 12-month period expires.
- 3.7 However,
 - unexplained delay;
 - failing to make appropriate enquiries about avenues of compensation;
 - if the delay is likely to prejudice the TCF in obtaining necessary information to determine whether the claim should be admitted; or;
 - if the delay has deprived the TCF of the opportunity for recovery of the claim amount

will make TCF acceptance of the claim less likely. The State and Territory fair trading/consumer protection authorities, licensed travel agents, and the TCF web site, can all assist claimants with information on claiming when money is lost by a travel agent.

4. No appeal against TCF decision

- 4.1 The TCF Trust Deed does not provide for an appeal against a TCF decision not to pay compensation for an unlicensed trading claim under cl.15.2, or declining to accept a claim after 12 months under cl.16.2.

(Note: This Guideline was approved by the TCF Board on 20 May 2004)