



Australian Competition & Consumer Commission (ACCC)

By email: ota@acc.gov.au

Re: ACCC consultation: Online accommodation booking sector

The Accommodation Association of Australia (AAoA) makes this submission on behalf of its members, in response to the ACCC's request for information about the online accommodation booking sector in Australia.

Member feedback is that, of particular concern, are price parity clauses and last room availability clauses by online travel agents (OTAs) in their dealings with accommodation providers. There are also other issues, notably, brand jacking.

The AAoA's aim is to help the ACCC by providing 'on the ground' feedback. Therefore, this submission will not take a legal approach. Elements of the *Competition and Consumer Act 2010* (Cth.) (**the Act**) have been considered but will not be specifically addressed.

This submission is divided into the following parts:

- A. About the AAoA
- B. About OTAs
- C. The OTA Efficiency Myth
- D. Last room availability
- E. Price parity
- F. Brand jacking
- G. Conclusion

A. About the AAoA

1. The AAoA is a national industry representative body for accommodation providers of all sizes and standards. The purpose of the Association is to provide a unified voice for the tourism accommodation sector.
2. The AAoA's membership is made up of around 1000 properties, including hotels, resorts, serviced apartments, motels, bed & breakfasts, guesthouses, backpacker establishments, caravan parks and timeshare properties in metropolitan, regional and rural Australia.
3. Members range from 'Mum and Dad' franchisees or independent owners, through to the large chains such as Accor, Choice, TFE Hotels, Quest, Golden Chain, Best Western, Marriott, Stamford, Wyndham and Silverneedle to name a few.



B. About OTAs

4. OTAs have come a long way since their launch in the early dotcom days in the year 2000. In the case of Wotif, this was from a humble garage office in Brisbane.¹
5. OTAs originally helped solve the problem of accommodation providers' distressed inventory. They offered consumers the excess rooms that accommodation providers could not offload at discounted rates. In the early days, most OTAs only offered inventory to consumers within a window of seven days from when the consumer searched.
6. This original business structure benefited the OTA, the accommodation provider and consumers. The OTA benefited from a commission for each successful supply; accommodation providers benefited from improved occupancy rates; and consumers benefited from an increased availability of discounted places to stay.
7. Now, OTAs are a main-stream booking channel. What was once a seven day window has turned into a window of at least 30 days. OTAs reap the benefits of a low cost base and comparatively high commissions. OTAs use sophisticated online marketing techniques. They capitalise on their enormous databases. They have their own loyalty programs. OTAs offer discounted rooms to consumers even when accommodation providers cannot do likewise due to price parity clauses. They compete with accommodation providers for "the customer relationship"².
8. The Australian OTA industry has also recently consolidated. AAoA members regard the key players, Wotif / Expedia and Booking.com, to be essentially a duopoly controlling the vast majority of the OTA sector. Feedback obtained from AAoA members includes:

"They are becoming too powerful. Virtually a worldwide duopoly between wotif/expedia and booking.com / priceline"

"This creates a duopoly scenario whereby Expedia / Wotif / Orbitz and Priceline will control the OTA market in AU/NZ. It won't be possible for new OTA companies to enter the market and to allow hotels to diversify their digital distribution mix. Essentially this creates a monopoly in the OTA space which is anti competitive for the industry".

"OTA[s] are taking over – once upon a time they were our agents, not it seems they have us working for them."

"Will review contract again. I am concerned the major OTA[s] are working towards literally throttling the ability of accommodation providers to act independently of the OTA[s] particularly in terms of communicating with

¹ See Wotif website: <https://www.wotif.com/p/about-us>

² Experience tells us that OTAs want the consumer relationship for the acquisition, transaction and re-acquisition phases, but not, say, for the resolution of guest issues even if they relate to booking inaccuracies.



past and prospective guests. The OTA sites are dominant in the online booking arena and will work to dominate in telephone bookings i.e. why remember or look for a motel phone number, just ring 13booking.com. Through OTA domination of all booking and marketing channels, accommodation providers will be the major supplier but the minor partner [in] agreements with OTAs”.

“How long before Expedia and Priceline decide to sit down and cut an agreement? As they control almost 85% of the Online Bookings in Australia, they could easily increase their commissions to 25% and we would have to go along with it.”

“The high commission rates are driving up the cost of accommodation and that money is going overseas”.

“Where does it end. The erosion of NET profit is greatly concerning”.

“We have not received any advise that commission will increase, we are assuming it will, which will greatly impact our small 12 unit business. Plus the virtual card we get slogged 2.25% from our merchant so if commission goes up so will the tariffs”.³

9. Within a fortnight of the ACCC’s approval of Expedia’s acquisition of Wotif, their commissions increased from 11% to at least 15%.

In an AAoA survey conducted of accommodation providers in March 2015 (**March 2015 AAoA survey**), respondents were asked “*As part of the transition [after Expedia’s takeover of Wotif] what has been the result of the commission rate change on Expedia, Wotif, Hotels.com, Hotwire.com, trivago, Egencia, Venere, eLong, Classic Vacations and Expedia Local Expert*”. 55.48% (258 of 511 respondents to question) said that Wotif was higher, 22.71% (94 respondents) said Expedia was higher with the only other double digit response being Hotels.com.

10. Whether the OTA business model is a merchant model (Wotif / Expedia)⁴ or a retail model (Booking.com)⁵, both models involve an OTA receiving a commission in return for a consumer having used the OTA website to arrange a stay at a third party accommodation provider.
11. Both models also involve standard terms and conditions negotiated between OTAs and accommodation providers. The term ‘negotiated’ is used loosely.

³ Source: Sample of quantitative responses to March 2015 AAoA survey.

⁴ The OTA acts as a wholesaler, selling inventory at a rate comprising the hotel’s net rate and the OTA’s commission fee. Hotels are paid by the OTA after the customer has concluded their stay: ACCC Statement of Issues dated 4 September 2014 into Expedia, Inc. – proposed acquisition of Wotif.com Holdings Limited (**ACCC Statement of Issues**).

⁵ The customer books through an OTA and pays directly to the hotel. The hotel will then pay the OTA a commission on the booking: ACCC Statement of Issues.



The experience of AAoA members suggests that the term 'imposition' is more appropriate. Very occasionally a global hotel chain negotiates directly with OTAs on behalf of all its properties. However, the more common experience is that individual franchisees or business owners (often of the 'Mum and Dad' variety) deal with OTAs in relation to these contracts. This inequitable bargaining position invariably leads to minimal or no negotiation of OTA terms before contracts are signed. Further, at least one large chain negotiating in a representative capacity has also reported very limited ability, if any, to negotiate terms with OTAs. Many operators have advised that they have been told these are global agreements without possibility of negotiation.

12. OTA standard terms and conditions are characterised by the following types of requirements:

a. **Price parity**

- i. The accommodation provider must agree with the OTA to maintain a consistent retail price that is available to the end customer of the same room type across its and all other booking channels.
- ii. OTAs require that the accommodation provider give the OTA no less favourable price per same room type than the accommodation provider makes available on its own website or any other public sales or distribution channel (online, offline, direct and indirect, including the accommodation provider's own website).⁶
- iii. Price parity is required even though the OTA collects on average a 15% commission on each booking.

b. **Last room availability**

- i. The accommodation provider must make available to the OTA all rooms in each relevant room type offered to the public until the last room remaining in its inventory is sold.
- ii. That is, any room available on other channels (online, offline, direct and indirect, including on the accommodation's own website) must be made available to the OTA to sell.

c. **Minimum allocation**

- i. The accommodation provider must commit to make available to the OTA a minimum number of rooms for reservation.
- ii. The OTA is entitled to give a discount on the room price at its own cost to its closed user group members.

⁶ Price parity terms will typically include carve outs for accommodation loyalty schemes and non-publicly available corporate rate agreements. In this instance, the accommodation provider can set the price for those rooms without regard to the price parity terms in its agreement with the OTA.



d. **Marketing**

- i. The OTA is expressly able to use the accommodation provider's name(s) and trade marks in online marketing, including pay-per-click advertising and via email.
 - ii. The OTA is permitted reasonable free access to the property to obtain images for its own promotion of the property.
 - iii. The accommodation provider is prohibited from specifically targeting the OTA brand via keyword purchases in online marketing.
 - iv. Some OTAs have prohibited accommodation providers from marketing to guests who booked their rooms via an OTA.
 - v. The ranking of an accommodation provider on an OTA website is entirely at the discretion of the OTA and often dependent on things like the proportion of commission paid.
13. AAoA members report that these contractual terms are, in the main, actively enforced by OTAs. For instance, sometimes this is by way of an email request, sometimes by way of a phone call.

In the **March 2015 AAoA survey**, 27% of 506 respondents to question responded that they had been pressured to sign the new Expedia / Wotif agreement; 10% of 499 total respondents to question responded that they had been advised of a 'stop sell' on their property (in which Expedia / Wotif would stop sales of the property's rooms on their site(s)) if they did not sign the new agreement.

14. The *existence* of the above terms – whether or not they are actively enforced – deters any prospect of breach. Accommodation providers do not want to risk having their OTA contracts suspended or terminated for non-compliance.
15. Staying on top of OTA terms and conditions has become increasingly challenging for accommodation providers over the last six months. Some key terms, such as price parity, have in the case of one OTA changed at least three times, including as recently as 9 September 2015.
16. OTAs are now a top, daily issue on AAoA's agenda. Based on member surveys and feedback over the last 12 months, much of this appears due to the impact of the consolidation of the OTA sector in recent times.



C. The OTA Efficiency Myth

17. OTAs claim to be indispensable to consumers and to industry. On both counts, nothing could be further from the truth:

Australian consumers – As a result of price parity requirements and OTA commissions, the price of accommodation available to Australian consumers via public channels is now artificially inflated by 15%⁷: See Section E below.

Australian accommodation industry – OTAs do not drive demand. OTAs *benefit* from prevailing market conditions by reason of their contractually imposed terms.

18. One method of testing the contribution of OTAs to demand in the Australian accommodation industry is to examine any number of tourism and hotel outlook forecasts. The impact of OTAs on demand is not mentioned once.⁸

19. Reported drivers (or inhibitors) of demand include:

- a. Impact of macro economic factors such as:
 - i. *In positive terms* – the depreciation of the Australian dollar
 - ii. *In negative terms* - the drop in crude oil prices and softening demand in the resources segment (**Example:** Perth has recently seen flat results in both accommodation demand and supply)
- b. Peak periods naturally caused by time of year and vacation periods (**For example:** the month of January or school holidays)
- c. Increased international visitor arrivals from growth markets such as China, Malaysia, Singapore and Hong Kong (leisure travel, in particular)
- d. Increased international visitor spending caused in part by improved economic conditions in the United States and United Kingdom
- e. Increased domestic overnight trips (visiting family and friends)
- f. Major events and conferences (**Examples:** *Melbourne* has experienced stronger demand growth in the convention market following the closure of the Sydney Convention and Exhibition Centre in 2013; *Adelaide* has been able to capitalise on the completion of the Adelaide Oval refurbishment and the Victoria Square redevelopment in early 2014; *Tasmania* benefits from its annual Taste of Tasmania festival from 29 December to 3 January).
- g. International government delegations (**Example:** Brisbane's hosting of the G20 meeting in November 2014)

20. OTAs do not drive demand. They benefit from demand that already exists.

⁷ 15% represents the current OTA commission rate.

⁸ See for example Deloitte Tourism and Hotel Market Outlook 2015; Dransfield Hotel Futures 2015; Austrade Tourism Investment Monitor 2015.



21. To illustrate, on a peak night where all inventory in the market is likely to be sold out anyway through direct channels (e.g. due to a major event or convention), the accommodation provider is compelled to sell through the OTA channels and upon such a booking or sale *will incur a 15% commission*.

In October 2014, Melbourne accommodation was booked out for a Jehovah's Witness international convention held at Docklands' Stadium (65,000 people). The Caulfield Cup was held at the same time. Accommodation providers could have sold rooms without any help whatsoever. Yet they were forced to pay commissions to OTAs, some of which acquired significant inventory as soon as it became available, on-selling it to their own closed groups (often at a discount).

D. Last Room Availability

22. Last room availability clauses compel the operator always to provide OTAs with access to their public inventory. The operator is required, in effect, to hand over its trading stock – its business essence - to OTAs. This *compulsion* on operators to make available inventory in this way benefits no one but OTAs.
23. AAoA members do want to do business with OTAs. Just not at all times. It is only by the exercise of their market power that OTAs can impose these terms on a 'one size fits all' basis.
24. OTAs can be an important help when businesses are new. In a greenfields environment, having an online travel agent help fill up the property can be the difference between a provider being able to pay a rent cheque, or not.
25. However, for a mature business, the reliance on OTAs to this extent disappears. Mature businesses do not want to distribute rooms to everyone pursuant to last room availability clauses. They want to control their customer mix and target particular segments (e.g. corporate or leisure). They want the ability to choose when to switch off particular sales channels depending on demand or other factors.
26. Consider the case of a franchise accommodation network focusing on the corporate market. Its mission is not to offer customers great leisure experiences, but to offer great corporate experiences. Now consider the implications of a last room availability clause. Franchisees subject to these clauses are constrained in their ability to control their inventory and customer mix. The property cannot stop people from, say, booking rooms for a stag night via an OTA, hardly in keeping with the amenities provided to corporate guests. This risks prejudicing the property's reputation by negatively impacting on the experience of corporate guests. The operator's



ability to align its business model and/or marketing strategy is severely compromised.

27. Further, consider the case of people looking for long stay accommodation, or corporate customers required to find urgent accommodation at the last minute. Ideally, the operator would seek to hold rooms to accommodate these customer needs. However, last room availability clauses restrict their ability to do this.

E. Price Parity

28. For accommodation providers, price parity removes the ability of the accommodation provider to be free to set rates, which invariably means that in most cases publicly available prices to the end-consumer will be fixed at the same level across all competing distribution channels. These prices will not reflect the cheapest price that an accommodation provider could offer to the end consumer.
29. For consumers it means they miss out on accessing the lowest possible prices (up to 15%) that an accommodation provider could otherwise make available to them, or the maximum additional add-ons or benefits that might otherwise be incorporated into the end-customer's room rate such as breakfast, late checkout and so on. It can also lead to higher rates per room type to factor in the commission or part thereof.
30. For the avoidance of doubt, this clause constrains the ability of the accommodation provider to provide the end customer with the lowest possible price that it is able to provide, which could be at a discount to the customer of up to 15% to that offered currently on all sales and distribution channels, whilst still remaining profit accretive or neutral to the accommodation provider.
31. To add insult to injury, an OTA can contractually insist on its right to discount the price of a room at its own cost.
32. Consider this: A small accommodation business into which the owners have plunged their life savings might advertise a room at \$200 on its own website due to price parity requirements. The OTA then decides to discount the room generously to the public, which it might do up to the value of the commission (e.g. 15% of the price).⁹ The OTA can afford to do this based on its low cost model and generous margins via commissions. A guest then pays for a discounted room via the OTA. This is the result:
- a. The small business must pay the OTA the full commission.
 - b. The small business has no relationship with the customer.
 - c. The small business has no ability to influence the customer relationship on price due to the price parity clause; even worse, a guest might be

⁹ OTAs did this on the day it was announced that Liverpool would play a soccer game at the MCG in Melbourne.



misled into thinking that an operator is unwilling to discount price, when in fact the true position is that the operator is unable to do so.

- d. The OTA gains the customer goodwill as well as its commission from the small business.
- e. The OTA has successfully fettered the ability of the operator to generate its own goodwill with the customer, thereby competing successfully against the small business.

33. As one person has said: "*We don't like fences being built between us and our customers*".

34. Most, if not all, AAoA members would be prepared to discount the value of a room by up to the full value of the commission.

35. The effect of price parity is further compounded by restrictions via the inclusion of clauses that do not allow for non-financial incentives such as room upgrades, complimentary food & beverage, and so on. The effect of this is to limit product differentiation as well.

F. Brand jacking

36. Brandjacking is an activity whereby someone acquires or otherwise assumes the online identity of another entity for the purposes of acquiring that business's brand equity. The AAoA is of the view that the online marketing activities of OTAs, particularly in the last six months, are directed to achieving this objective.

37. To explain, accommodation providers prefer direct customer bookings (via phone or the operator's website). This is because direct bookings are the lowest-cost method by which rooms are booked. Direct bookings also enable the accommodation provider to build a direct relationship with the customer. It allows for goodwill to develop and for there to be repeat business.

38. Direct bookings also reduce the prospect of misunderstandings. A guest's ancillary dealings with an OTA will sometimes suffer in translation at the front reception desk of a property.

39. It therefore goes without saying, in the context of online marketing, that accommodation providers want their websites ranked at the top of a page after a potential guest conducts an organic online search for, say, a property name and location.

40. However, online search results are now replete with examples where the accommodation provider's website is located at the bottom of a page of organic search results, despite the provider's best efforts to improve these results via search engine optimisation techniques.

41. How this happens is explained below:



- a. Online marketing in the context of accommodation bookings refers to advertising and marketing efforts using the Internet and email to drive sales of rooms to consumers.
 - b. Accommodation providers and OTAs use SEO techniques when engaging in online marketing. 'Search engine optimization' or 'SEO' is the process of maximizing the number of visitors to a particular website by ensuring that the site appears high on the list of results returned by a search engine.
 - c. Accommodation providers and OTAs engage in Pay Per Click advertising. The term 'Pay Per Click' refers to the fact that a business pays a search engine such as Google each time a user clicks on an advertisement following his or her use of particular types of keywords or Adwords. These terms are 'purchased' via an online auction. Accommodation providers and OTAs compete to buy these terms.
 - d. The standard terms and conditions of OTAs typically enable the OTA to use the accommodation provider's name(s) in online marketing, including Pay Per Click advertising and via email. This means that a brand owner is then required to compete against an OTA at an online auction for use of its own name in a Pay Per Click online marketing campaign.
 - e. OTAs have much more money to spend. An OTA can spend the bulk of the commission they receive from a room booking or sale to pay for the clicks they receive on their website to attain it. It has become uneconomic for accommodation providers to bid against OTAs for these words or names.
42. The effect is that accommodation providers are losing the battle of facilitating customer traffic to their own websites. Of course, even if potential guests click through to the property's website, due to OTA price parity clauses they will not find discounted room rates to justify their choice of going direct to source.

Says one accommodation provider: *"Our brand used to be 11 cents – Keywords now cost \$4.50 in Brisbane"*.

43. Further, after Expedia's takeover of Wotif the combined entity commenced a massive online marketing campaign. This has led to a huge downturn in direct bookings via the online websites of AAoA members.
44. The AAoA also has anecdotal feedback from its members that guests have mistakenly believed they have booked directly with a particular property or



accommodation provider when, in fact, they have booked via an OTA. This feedback does not disclose whether such consumer error has been caused by:

- a. the now widespread use of accommodation provider's names in OTA online marketing combined with the prominent ranking of the OTA in search results; and/or
- b. the use of an accommodation provider's names or trade indicia within an OTA website without sufficient disclaimer.

45. Not only is the ACCC urged to consider the immediate effect of such conduct. The ACCC should also consider the impact of such conduct in the medium to long term on the accommodation provider sector as a whole. If OTAs own the online space (in that an accommodation provider's website is ranked so low it is not on the radar for consumers), it will be imperative for an accommodation provider to use an OTA, simply to ensure visibility of a property to consumers who shop online. This will further disadvantage accommodation providers in their ability to negotiate contractual terms with OTAs.

G. Conclusion

46. The AAoA is extremely concerned by the effect of OTAs. Members have little bargaining power against OTAs. Members are making counter-intuitive decisions about their businesses in order to meet onerous contractual requirements of no benefit to anyone but OTAs.

In the **March 2015 AAoA survey**, respondents were asked "*How concerned are you regarding the following OTA matters?*" Of the 453 respondents to the question, 87% (388 respondents) said "*Very Concerned*" with respect to further commission rate increases, 76.38% (346 respondents) said "*Very Concerned*" with respect to current commission rate increases, and 53.77% (228 respondents) said "*Very Concerned*" with respect to the new Expedia contract.

47. Consumers are also adversely affected by terms and conditions imposed on accommodation providers by OTAs. Due to price parity clauses, consumers cannot receive discounted rooms that providers would otherwise offer them. Due to last room availability clauses, consumers may not receive rooms that could otherwise have been held for them, and the customer mix of a particular property may not have been what they were led to expect.



48. It is also important to remember that, even alone, these clauses are of significant concern. Now consider the effect of these clauses as a 'package'. The harm caused to our members is compounded.
49. Finally, OTA brand jacking activities risk immediate consumer error. As for accommodation providers, if OTAs deny them access to online sales channels because they are ranked so low in search results, their dependence on OTAs to obtain online bookings is only going to increase.
50. Consequently, the AAoA invites the ACCC's scrutiny of OTA conduct in the interests of a level playing field.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Richard Munro', written in a cursive style.

Richard Munro

Chief Executive Officer