

TOURISM SERVICES BILL 2003

EXPLANATORY NOTES

GENERAL OUTLINE

Reasons for the Bill

Concerns about the provision of tourism services by some inbound tour operators and tour guides operating in Queensland have been raised in recent years by tourism industry associations, retailers and tourists. Extensive consultation into these concerns revealed four main types of undesirable and unfair trading practices including:

- controlled shopping;
- misrepresentations;
- overcharging for goods and services; and
- unconscionable conduct.

Consultation revealed that tourists from the emerging Asian economies are most vulnerable to these practices. Language differences, cultural influences and limited travel experience make tourists from these countries heavily reliant on their inbound tour operator and tour guides while in Australia.

The unfair trading practices described above are driven by the desire to capture and direct a greater share of the tourist's shopping budget. The need to do this might flow from the sale of the tour package at cost or less than cost. The initial losses incurred must then be recouped by limiting tour participants to shops and restaurants that pay commissions to inbound tour operators and associated tour guides.

These practices lead to reduced holiday enjoyment for tourists who pay highly inflated prices in controlled shopping situations and also result in loss of business to retailers because of misrepresentations made about them or their refusal to pay excessive commissions.

Other impacts include fewer repeat visits by tourists, lower rates of recommendation to other potential tourists and lack of tourist confidence in Queensland as a travel destination. Queensland's image as a tourism

destination may be tarnished by such conduct and this could create an impediment to growth in tourism in Queensland.

Policy Objectives of the Bill

The Government made a commitment in the “New Directions Statement” released prior to the 1998 State election, to address problems in the inbound tour industry by introducing licensing of inbound tour operators.

The key policy objectives of the Bill are to address the undesirable and unfair practices outlined above and provide protection for consumers by regulating the conduct of inbound tour operators and tour guides. The Bill will achieve this by:

- requiring inbound tour operators to be registered before they can conduct business in Queensland, while providing an exemption to those inbound tour operators who also sell travel packages to the domestic market and whose overseas sales account for less than 20% of the total number of travel packages sold during a 12 month period;
- ensuring only suitable persons are registered as inbound tour operators;
- requiring inbound tour operators (whether they are registered or not) to adhere to a Code of Conduct which will contain minimum business conduct standards to complement the draft Tourism Export Code of Conduct, a voluntary industry-based code; and
- prohibiting unconscionable conduct by inbound tour operators (whether they are registered or not) and tour guides when providing services to tourists.

The Bill is considered to be a reasonable and appropriate way of achieving the objectives. This is because existing laws have failed to curb exploitation of tourists and have not been adequate to protect the interests of those tourism-based businesses who do not participate in undesirable and unfair trading practices.

Compliance with Fundamental Legislative Principles

Clause 89 of the Bill requires the executive officers of a corporation to ensure the corporation complies with the Bill. If a corporation commits an offence, an executive officer commits the offence of failing to ensure the

corporation complies with the Bill. This is so unless an executive officer is in a position to influence the conduct of the corporation in relation to the offence and has exercised reasonable diligence to ensure the corporation complies with the provision. It is also a defence for an executive officer to show the officer was not in a position to influence the conduct of the corporation in relation to the offence.

Clause 90 is a similar provision applying to a contravention of, or an offence against, a provision of the Bill by a partner in a partnership. Similar defences that are available to executive offices of a corporation are also available to partners in a partnership.

It could be argued that these provisions fail to pay sufficient regard to the rights and liberties of a person in that they effectively reverse the onus of proof. These clauses are included because provisions which a corporation or partnership may contravene have the potential to cause substantial detriment to consumers and to Queensland's tourism industry. In these circumstances, it is appropriate that an executive officer or partner who is in a position to influence the conduct of the corporation or partnership, and who is responsible for a contravention, should be accountable for such a contravention. This is especially relevant to the inbound tour industry, because many of the people who use the services of an inbound tour operator have little or no knowledge of English or of how business operates in Australia.

The Bill provides, for the offence of carrying on the business of an inbound tour operator while unregistered, that it is a defence that less than 20% of travel packages sold by that operator are sold to overseas entities over a 12 month period. This provision requires the person seeking to rely on that exemption to prove the existence of the circumstances making out the defence. It could be argued that this provision fails to pay sufficient regard to the rights and liberties of a person because it reverses the onus of proof to the extent of requiring a charged person to establish the defence. This is appropriate because the person seeking to rely on the defence will be in the best position to prove the number of sales made to overseas entities or otherwise, and the time those sales were made. Evidence of these facts is peculiarly within the defendant's knowledge and is not something the prosecution could reasonably obtain or disprove to the required standard.

The Bill also includes investigative powers consistent with those in other legislation administered by the Department of Tourism, Racing and Fair Trading. The usual safeguards against abuse of power recommended by the Scrutiny of Legislation Committee have been included. For example, a

warrant is required to enter premises except in very limited circumstances. Additionally, investigators must immediately identify themselves and explain the purpose of their entry and provide receipts for seized documents or things.

Estimated Cost for Government Implementation

The introduction of a registration system for inbound tour operators will place an additional administrative burden on the Office of Fair Trading which, to some extent, will be covered by registration fees.

On 18 December 2002, the Honourable the Treasurer advised that, as a result of the 2002-03 Mid-Year Review, the Cabinet Budget Review Committee had approved additional funding of \$200,000 for 200203 and \$400,000 ongoing to support the implementation of new marketplace regulatory regimes, including the regulation of inbound tourism.

Consultation

On 12 August 2002, the policy proposal underpinning the Bill and a draft Public Benefit Test and Regulatory Impact Statement (henceforth jointly referred to as “the policy proposal”) were released for public comment. The policy proposal was also forwarded to interstate tourism and fair trading agencies. The availability of the policy proposal was extensively publicised through media releases, newspaper advertisements and the websites of Tourism Queensland and the Office of Fair Trading. Approximately 270 stakeholders received a notice of the availability of the policy proposal.

Following consultation on the policy proposal, the draft Bill, together with the draft Regulation and draft Code of Conduct proposed to be made under the draft Bill (henceforth jointly referred to as “the draft proposed legislation”) were released for public consultation during March 2003.

A letter advising of the availability of the draft proposed legislation on the Office of Fair Trading website was sent to approximately 300 community and industry stakeholders, including those who had provided feedback in August 2002 on the policy proposal. The draft proposed legislation was also forwarded to the Commonwealth and to fair trading and tourism agencies in the other States and Territories.

More than 35 responses were received from community, industry and Government stakeholders and these responses have substantially informed the development and finalisation of the Bill.

The draft proposed legislation was generally supported and in some cases received strong support from community and industry stakeholders.

A number of stakeholders suggested that tour guides should be subject to further regulation under the draft proposed legislation. However, further regulation of tour guides would require a rigorous and time-consuming National Competition Policy public benefit test and would significantly delay implementation of the proposed legislation. If the current rogue elements in the inbound tour industry are not removed through action taken under the proposed legislation, the Bill is drafted in such a way as to facilitate, if required, the future further regulation of tour guides by way of a registration system and/or a mandatory code of conduct.

While the Bill does not require tour guides to be registered, it does prohibit tour guides from engaging in unconscionable conduct. A tour guide found to have engaged in unconscionable conduct will be subject to civil penalties and compensation orders.

The definitions of “inbound tour operator”, “tour guide”, “travel package” and the registration requirements for inbound tour operators have been refined following feedback from stakeholders during consultation. The nature of the currently unregulated inbound tour industry means that major industry stakeholders are unclear about the reach of the proposed definition of “inbound tour operator”. Accordingly, a provision has been included in the Bill stating that the Minister must review the operation of relevant provisions within 18 months after the commencement of the Bill.

Concerns were raised by some businesses that the requirement on an inbound tour operator to register adds an additional cost to operating a tourism business. This concern is the primary reason why the Bill provides that no application or registration fees are payable under the proposed legislation by those businesses that are licensed under the *Travel Agents Act 1988* or equivalent legislation in any Australian jurisdiction. These concerns have also been addressed by providing an exemption to registration for those inbound tour operators who also sell travel packages to the domestic market and whose overseas sales account for less than 20% of the total number of travel packages sold during a 12 month period.

Several stakeholders noted that the success of the draft proposed legislation is largely dependant upon industry education and effective enforcement of the legislation. A compliance strategy and communication strategy are being developed to ensure that inbound tour operators and tour guides are aware of, and understand, their obligations under the Bill.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Bill.

Clause 2 provides that the Bill commences on a day fixed by proclamation.

Clause 3 clarifies that the Bill binds the State of Queensland and as far as the legislative power of the Queensland Parliament permits, the Commonwealth and the other States. The clause clarifies this does not mean the State of Queensland, the Commonwealth or other States are liable to be prosecuted for an offence or proceeded against for a relevant contravention.

Clause 4 states the main purpose of the Bill is to provide for fair trading in the tourism services industry. The Bill does this by:

- establishing a registration system for inbound tour operators;
- providing for the making of codes of conduct containing minimum standards for inbound tour operators and tour guides;
- prohibiting unconscionable conduct by both inbound tour operators and tour guides; and
- promoting sound business practices by inbound tour operators and tour guides.

It is not proposed at this stage to require tour guides to be registered, nor to prescribe a mandatory code of conduct for tour guides. However, the Bill is drafted in such a way as to facilitate, if required, the future further regulation of tour guides by way of a registration system and/or a mandatory code of conduct.

Clause 5 clarifies that the Bill does not apply to those who provide services to tourists on a not-for-profit basis or if the net proceeds gained are applied solely for a community purpose. The clause provides definitions of “community purpose” and “not for profit basis” to assist in the interpretation of this clause.

Clause 6 makes it clear that the Bill does not limit other laws. An example is provided of how the Criminal Code could apply to conduct that may be relevant to this Bill.

PART 2—INTERPRETATION

Clause 7 notes the dictionary in Schedule 2 to the Bill defines certain words used in the Bill.

Clause 8 defines “associated person” and “effective control”:

- the definition of “associated person” refers to persons other than applicants for registration or registrants, but who are in “effective control” of the applicant’s or registrant’s business
- what is meant by “effective control” is defined by the clause and includes executive officers of corporations to be taken as “associated persons”

Clause 9 defines what is meant by “inbound tour operator” and “carry on the business of an inbound tour operator”. The definition of inbound tour operator refers to a travel package which is defined in the dictionary. A person carries on a business as an inbound tour operator only if they sell travel packages to an overseas entity. The term “overseas entity” is defined in the dictionary to the Bill.

Clause 10 provides a definition of “tour guide”. The definition includes persons who personally supply guiding services for reward whether by payment or other benefit. Examples are provided of what is meant by a benefit other than money. The term “guiding services” is defined in the dictionary.

Clause 11 provides that a note in the text of this Bill is also part of the Bill.

PART 3—REGISTRATION

Division 1—Requirement of registration

Clause 12 requires that a person cannot carry on the business of an inbound tour operator, unless the person is registered and their registration has not been suspended. If a person contravenes this clause, they are liable to a maximum fine of 200 penalty units.

However, it is a defence to this offence for the person to prove they are an “exempt person” as defined by this clause. To be an exempt person, a person must carry on the business of an inbound tour operator and also sell travel packages to persons in Australia that include visiting or travelling in Queensland. Also, such a person must either:

- where the person has carried on the business of an inbound tour operator for 12 months prior to the date of the alleged offence - sell less than 20% of their travel packages as an inbound tour operator over that 12 month period; or
- where the person has carried on the business of an inbound tour operator for less than 12 months prior to the date of the alleged offence, having regard to the business already carried on and the business likely to be carried on by the person over a 12 month period starting from the time the person started to operate as an inbound tour operator - it is likely that the person will sell less than 20% of their travel packages as an inbound tour operator over that 12 month period.

Examples are provided to assist in the interpretation of the clause.

Division 2—Suitability for registration

Clause 13 provides that the commissioner may only grant or renew registration if the person is suitable to hold registration. The commissioner may, in deciding whether a person is suitable, consider any issue relevant to the person’s ability to be a competent and ethical inbound tour operator.

Clause 14 outlines circumstances where a person would not be suitable for registration as an inbound tour operator. The circumstances include where the person is under age, is insolvent, has been convicted of certain offences, has breached an undertaking given under the *Fair Trading Act 1989* or is a corporation that is an externally administered body corporate.

Clause 15 notes that the commissioner may make inquiries about the applicant or associated person to help decide whether such a person is suitable to be an inbound tour operator. The commissioner of police must provide a criminal history to the commissioner if requested by the commissioner. An appropriate level of confidentiality must be kept by the commissioner with regard to any information supplied under this clause.

Division 3—Conditions on registration

Clause 16 includes a definition of “change” for the purposes of the division.

Clause 17 provides that registration may be granted or renewed by the commissioner on conditions necessary or desirable for the proper carrying on of the business of an inbound tour operator or for another purpose consistent with the achievement of the main purpose of the Bill. Such a condition may restrict activities otherwise permitted by the Bill. The clause includes an example of a condition the commissioner could impose on registration.

Clause 18 allows the commissioner to amend the conditions of a registration certificate on the application of a registrant, on order of a court, on order of the tribunal in a disciplinary hearing or on the commissioner’s own initiative.

Applications by registrants must be made on the approved form and be accompanied by the fee prescribed in the Regulation. If an application is refused, the commissioner must give the registrant an information notice within 14 days of the making of that decision.

If the conditions are to be amended on the commissioner’s own initiative, the commissioner must give written notice to the registrant of the particulars of the proposed amendment and advise the registrant they may make written submissions to the commissioner about the proposed amendment. The commissioner must have regard to submissions made by the registrant.

If the commissioner decides to change the conditions of registration on the commissioner’s own initiative, the commissioner must give the registrant an information notice within 14 days of the making of that decision.

The term “information notice” is defined in the dictionary.

Clause 19 provides that if the commissioner changes conditions of registration under clause 18, the commissioner may require the registrant to produce the registration certificate for the purposes of changing that certificate. A penalty applies to a contravention of this requirement.

Division 4—Applications for registration

Clause 20 outlines what is required in an application for registration. The applicant must apply to the commissioner:

- in the approved form;
- state names and addresses, including business addresses of all associated persons; and
- pay the application and registration issue fee prescribed under the regulation.

The application can be for a period of either one or three years. The commissioner may also require an applicant to provide further information or documents relevant to the application. If this requirement is not complied with, the application is taken to be withdrawn and the registration issue fee, though not the application fee, must be refunded to the applicant.

If an applicant is licensed under the *Travel Agents Act 1988* or an equivalent law in another State, no fees are required to be paid under this clause. This is to avoid inbound tour operators who are also licensed travel agents having to pay fees under both regulatory regimes.

A note to the clause refers to clause 82(1)(b), which creates a ground for starting a disciplinary proceeding against a registrant if false or misleading information is used to obtain registration.

Clause 21 provides that the commissioner must consider the application and may grant registration with or without conditions or refuse to grant registration to an applicant. The commissioner may only consider an application for registration if the application is properly made under clause 20.

If the commissioner refuses to grant registration, the commissioner must give the applicant an information notice about the decision within 14 days after the decision is made and refund the registration issue fee.

Division 5—Renewal of registration

Clause 22 states a registrant may apply for renewal of the registration before the certificate expires. The application for renewal must:

- be in the approved form;

- state the names and addresses including business addresses of all associated persons;
- be accompanied by the renewal fee prescribed under the Regulation;
- the registrant must state whether the term of the registration applied for is 1 or 3 years.

The commissioner may, by written notice given to the registrant, require the registrant to provide information or material the commissioner considers relevant to the application within a stated reasonable time of at least 14 days.

The applicant is taken to have withdrawn the application if, within the stated reasonable time, the applicant fails to comply with the commissioner's requirement to provide information or material. If this occurs, the renewal fee will be refunded. If a registrant is licensed under the *Travel Agents Act 1988*, or an equivalent law in another State, no fees are required to be paid under this clause. This is to avoid inbound tour operators who are also licensed travel agents having to pay fees under both regulatory regimes.

Clause 23 provides that the commissioner must consider the application for renewal and may grant the renewal of registration with or without conditions or refuse to grant the renewal of registration. The commissioner may only consider an application for renewal of registration if the application is properly made under clause 22.

If the commissioner grants the application for renewal of registration, the registration is to be granted in the terms stated in the application.

If the commissioner refuses to grant registration, the commissioner must give the applicant an information notice about the decision within 14 days after the decision is made and refund the renewal fee.

Clause 24 states if an application for renewal is made, the registration is taken to continue in force from the day it would have expired until the day on which any of the following first happens:

- the commissioner renews the registration;
- renewal is refused and the commissioner gives the applicant an information notice;
- the registrant is deemed to have withdrawn the application because the applicant fails to comply with the commissioner's

requirement in clause 22(5) to provide information or material requested by the commissioner.

If the registration is renewed, it is taken to continue from the date it would have expired but for this clause. However, this clause does not continue a registration already cancelled or suspended.

Division 6—Surrender of registration

Clause 25 enables a registrant to surrender registration by giving a signed notice, and returning the certificate, to the commissioner. Registration stops having effect on the day it is surrendered or on a day after this time as stated in the notice. The registration certificate must be returned to the commissioner within 14 days of surrender, unless the registrant has a reasonable excuse. A penalty applies if a registrant fails to return a certificate.

Division 7—Registration certificates

Clause 26 provides that the commissioner must give the registrant a registration certificate as soon as practicable after granting or renewing registration. The certificate must be in the approved form and contain the particulars prescribed by the clause.

Clause 27 states a registrant may apply for the replacement of a registration certificate that has been lost, damaged, destroyed or stolen. The application for replacement must be made in the approved form and be accompanied by the fee prescribed by regulation. If the commissioner decides not to grant the application, the commissioner must give the registrant an information notice about the decision.

Division 8—Register about registrations

Clause 28 requires the commissioner to keep a register about registrations. The register must contain the particulars prescribed by the clause and may be kept in a form and in a way decided by the commissioner. The register can be inspected by any person on the payment of the prescribed fee.

Division 9—Immediate suspension and cancellation of registration

Clause 29 provides that if the commissioner believes, on reasonable grounds, that the registrant has contravened or is contravening this Bill, the *Fair Trading Act 1989*, the *Travel Agents Act 1988*, the *Trade Practices Act 1974 (Cth)* or a corresponding law and as a result of this contravention, tourists may suffer or have suffered detriment, the commissioner may suspend a registrant's registration. An example is provided to assist in interpretation of the clause.

Registration may be suspended for a period not more than 28 days.

Once the commissioner makes the decision to suspend, this is effected by the commissioner giving the registrant an information notice about the decision. The suspension commences immediately upon the giving of the information notice.

As a consequence of suspension, the registrant must return the registration certificate to the commissioner within 14 days after being given the notice, unless the registrant has a reasonable excuse. A penalty applies for failure to return the registration certificate.

Clause 30 states if registration is suspended under clause 29 and during the suspension the commissioner applies to the tribunal to start disciplinary proceedings for the contravention and detriment that gave rise to the suspension or to the District Court in relation to that contravention and detriment, the suspension continues until:

- the disciplinary proceedings are decided by the tribunal;
- the commissioner withdraws the application; or
- the tribunal or District Court, on application by the registrant, orders the suspension to end.

The tribunal is defined in the dictionary.

Clause 31 provides that if a registrant's registration certificate is returned to the commissioner because of a suspension under clause 29 and the registration is still current at the end of the suspension, the commissioner must return the certificate to the registrant.

Clause 32 requires registration to be cancelled if the person is convicted of a serious offence or an order is made against the person under part 9 (unconscionable conduct). "Serious offence" means an offence under part 3 of the *Fair Trading Act 1989* or a law of another State or country that provides for the same, or substantially the same, matter as part 3 of the *Fair*

Trading Act 1989 provided the penalty provided for such an offence is at least 100 penalty units, or the equivalent value of 100 penalty units, or imprisonment.

It is an offence not to return the registration certificate after cancellation unless the person has a reasonable excuse. A penalty applies for failure to return the certificate.

Division 10—Other provisions about registrations

Clause 33 provides that a registrant must notify the commissioner within 30 days of any change in the registrant's circumstances as prescribed under a regulation. A penalty applies for failure to notify.

Clause 34 notes registration is not transferable or able to vest in another person by operation of law.

PART 4—UNCONSCIONABLE CONDUCT

Clause 35 provides that an inbound tour operator or tour guide must not engage in unconscionable conduct when providing services to tourists. If an inbound tour operator or tour guide engages in such conduct, a penalty applies. In deciding whether unconscionable conduct has been engaged in, regard can not be had to circumstances not reasonably foreseeable at the time of the alleged contravention. The clause makes clear that it is not in substitution of any right, entitlement or remedy available to a person under common law or otherwise.

Clause 36 includes matters that may indicate unconscionable conduct. The tribunal or District Court will be able to take into account all of the circumstances of a particular case in determining whether there has been unconscionable conduct. Nevertheless, this clause sets out some of the matters which the tribunal or District Court may have regard to. The matters set out are:

- the relative bargaining strengths of the inbound tour operator or tour guide (the “service provider”) or their business associate and the tourist;

- whether there was any undue influence or pressure;
- the extent to which the service provider unreasonably failed to tell the tourist about intended conduct of the service provider that might affect the interests of the tourist and any apparent risk to the tourist from that conduct;
- the extent of the failure by the service provider to disclose to the tourist a relationship between the service provider and another entity involved in providing services to tourists – examples are provided of such relationships to assist in the interpretation of the clause;
- whether the tourist’s ability to protect their own interests was affected by any cultural, language or religious characteristics;
- the amount that, and the circumstances under which, a tourist could have acquired the same or similar services from someone other than the service provider or without the help of the service provider;
- if the service provider sells goods or services or takes the tourists to places to purchase goods or services, the amount that, and the circumstances under which, a tourist could have acquired the same or similar services from someone other than the service provider or without the help of the service provider;
- whether the service provider acted to stop or prevent the tourist from making a free choice about where to eat, shop or stay where it would be reasonable to allow the tourist to make such a choice. An example of a way in which a service provider may act to prevent a choice being made is included to assist in the interpretation of the clause;
- the consistency in the treatment of the tourist by the service provider compared to their treatment of other tourists in similar circumstances;
- whether the service provider deceived or misled the tourist - examples are provided of misleading and deceptive conduct to help in interpretation of the clause;
- whether the service provider has contravened a code of conduct;
- the provisions of any applicable industry code the service provider has agreed to be bound by. This may include, for

example, codes of conduct developed by inbound tour operators or tour guide associations.

The clause also defines “apparent risk”, “business associate” and “help” for the purposes of this clause.

Clause 37 states an inbound tour operator or a tour guide does not engage in unconscionable conduct only because the inbound tour operator or a tour guide commences legal proceedings against a tourist or seeks to resolve a matter with the tourist through a dispute resolution process.

PART 5—CODES OF CONDUCT

Clause 38 provides that a regulation may prescribe a code of conduct for inbound tour operators and a code of conduct for tour guides about supplying services to tourists. Codes of conduct may:

- set minimum business standards for inbound tour operators or tour guides;
- establish principles to encourage and assist fair dealing between inbound tour operators and tourists or tour guides and tourists;
- establish principles to encourage and assist fair dealing between inbound tour operators and businesses or other entities likely to come into contact with tour guides and those businesses or other entities;
- provide for a system of dispute resolution by requiring an inbound tour operator or a tour guide to have a written policy about resolving disputes.

Although a mandatory code of conduct has been developed for inbound tour operators, no such code has yet been developed for tour guides. This clause is drafted in such a way as to facilitate, if required, the future further regulation of tour guides by way of a mandatory code of conduct.

PART 6—INVESTIGATION AND ENFORCEMENT

Division 1—Inspectors

Clause 39 states that a person who is an inspector under the *Fair Trading Act 1989* is an inspector for the purposes of this Bill.

Clause 40 provides that an inspector's powers under the Bill may be limited by a notice signed by the commissioner or by a regulation.

Clause 41 requires the chief executive to give each inspector an identity card. The identity card must contain a recent photo of the inspector, a copy of the inspector's signature, identify the person as the inspector, and the expiry date of the card.

Clause 42 requires an inspector to produce the inspector's identity card or have the identity card clearly displayed for anyone to see, when exercising a power in relation to a person under the Bill.

Clause 43 states that the identity card must be returned to the chief executive within 21 days of the person ceasing to be an inspector. A penalty applies to contravention of this clause.

Division 2—Powers of inspectors

Subdivision 1—Entry of places

Clause 44 provides that an inspector may enter a place if:

- the occupier consents;
- it is a public place and entry is made when it is open to the public;
- the inspector has a warrant;
- it is a place where a inbound tour operator carries on business of an inbound tour operator and it is open for carrying on the business or otherwise open for entry;
- it is a place where a tour guide carries on business and the place is open for carrying on the business or otherwise open for entry; or

- the inspector reasonably believes records relating to carrying on the business of an inbound tour operator or a tour guide are kept at the place and the place is open for carrying on business or otherwise open for entry.

The clause provides that the inspector does not need consent or a warrant to enter land around the premises to contact the occupier, or enter part of the place where the public enters, in order to contact the occupier.

This clause also provides that an inspector is not authorised to enter a part of a place where an individual resides, unless the occupier consents to the entry or the entry is authorised by warrant.

Subdivision 2—Procedure for entry

Clause 45 applies when an inspector intends to request consent to enter under clause 44(1)(a). In such a case, the inspector must tell the occupier, prior to asking for the consent, the purpose of the entry and that the occupier is not required to consent. The inspector may ask the occupier to sign an acknowledgment of the consent if given, and the acknowledgment must include certain prescribed information. The inspector must give a copy of the acknowledgment to the occupier. The clause further provides that in certain circumstances the onus of proof will be on the person relying on the lawfulness of the entry to prove that the occupier consented.

Clause 46 permits an inspector to apply to a Magistrate for a warrant for a place and sets out the application procedure. The Magistrate may require that additional information be provided.

Clause 47 limits the situations where a Magistrate may issue a warrant. There must be reasonable grounds for suspecting there is a particular thing or activity that may provide evidence of an offence against the Bill or of a relevant contravention and the evidence will remain in place for the next seven days. The clause also provides that a warrant must state certain information including the:

- inspector's rights to enter;
- offence or relevant contravention for which the warrant is sought;
- evidence that may be seized;
- hours when the place may be entered; and
- date the warrant ends (within 14 days after issue).

Clause 48 provides that an inspector may apply for a warrant by phone, fax, radio or other form of communication because of urgency or other special circumstances and outlines the procedure involved in obtaining and using a special warrant.

Clause 49 sets out the procedure for an inspector named in a warrant to comply with prior to entry. Before entry, the inspector must or must reasonably attempt to:

- identify himself or herself with an identity card or other document;
- give the person a copy of the warrant or warrant form;
- tell the person the warrant authorises the inspector to enter; and
- give the person an opportunity to allow the inspector to enter immediately without force.

However, the inspector need not comply with this procedure if the inspector has reasonable grounds to believe compliance would frustrate the effective execution of the warrant.

Subdivision 3—Powers after entry

Clause 50 provides on entering a place the inspector may do certain specified things for monitoring or enforcing compliance with the Bill. However, if an inspector enters a place simply to obtain the occupier's consent to enter, this clause only applies if that consent is given or entry is otherwise authorised.

Clause 51 provides that a person required to give reasonable help under clause 50(3)(e) must comply unless answering a question or producing a document might tend to incriminate the person. A penalty applies to a breach of this clause.

Subdivision 4—Power to seize evidence

Clause 52 provides that evidence may be seized by an inspector when entering a place under the Bill without consent or warrant if the inspector reasonably believes the thing is evidence of an offence against the Bill or of a relevant contravention.

Clause 53 provides for the seizure of evidence where entry is made by consent or warrant. Where entry is made by consent an inspector may seize a thing if the inspector reasonably believes it is evidence of an offence against the Bill or of a relevant contravention and its seizure is consistent with the purpose of entry as told to the occupier. An inspector may seize evidence under a warrant and anything else the inspector reasonably believes is evidence of an offence against the Bill or of a relevant contravention if its seizure is necessary to prevent its loss or destruction or use in continuing or repeating the offence or relevant contravention or has just been used in committing an offence against the Bill or a relevant contravention.

Clause 54 provides that the power to seize things under clause 52 or 53 does not permit an inspector to seize things the inspector knows or suspects is the property of a tourist or is in the possession of a tourist. This clause does not stop a tourist from giving such things to an inspector to help an inspector if the tourist so chooses.

Clause 55 requires an inspector to provide a receipt for anything seized. The clause also sets out the procedure for giving a receipt, the information to be included, and circumstances where the procedure does not apply.

Clause 56 provides for forfeiture to the State of a seized thing if its owner cannot be found, it cannot be returned after making reasonable efforts or it is reasonably necessary to keep the thing to prevent it being used to commit an offence against the Bill or a relevant contravention. In such a case, the owner must be given an information notice unless the giving of such notice would be impracticable or unreasonable.

The clause does not require an inspector to make unreasonable enquiries to find the owner or to make unreasonable efforts to return the thing to its owner. In deciding whether it is reasonable to make inquiries or efforts or give an information notice regard must be had to a thing's nature, condition and value.

Clause 57 provides for forfeiture to the State of anything used to commit the offence or anything else the subject of the offence and the circumstances in which such an order may be made without limiting the court's powers under the *Penalties and Sentences Act 1992* or another law.

Clause 58 states that on the forfeiture of a thing to the State it becomes the State's property and may be dealt with as appropriate by the commissioner.

Clause 59 provides that until a seized thing is forfeited or returned, the person who would normally be entitled to it may inspect it or make copies of it, unless this would be impracticable or unreasonable.

Clause 60 requires an inspector to return a seized thing if it is not forfeited within 6 months or at the end of any proceedings started within 6 months or appeal from that proceeding. The inspector must return the thing sooner if its retention as evidence is no longer necessary and its return is not likely to result in the repetition of an offence against the Bill or a relevant contravention.

Subdivision 5—Power to require information

Clause 61 gives inspectors power to ask for the name and address of persons they reasonably believe have just committed or are committing an offence against the Bill or a relevant contravention. The inspector must warn the person that to refuse is an offence. However, the offence is not committed if, at a later time, it is not proved the person committed the suspected offence or relevant contravention.

Clause 62 gives inspectors powers to require a person to give information, including a document, about an offence or a relevant contravention and to give information at a reasonable place and time if they reasonably believe an offence against the Bill or a relevant contravention has been committed and the person may be able to give information about the offence or relevant contravention. It is an offence to refuse to comply with such a requirement by an inspector unless doing so might tend to incriminate the individual or implicate the individual in a relevant contravention.

Subdivision 6—Compensation

Clause 63 provides for notice of particulars of any damage caused to property in the course of the exercise by an inspector of powers under the Bill to be given as soon as practicable to the owner of the property. Any damage believed to have been caused by a latent defect in the property or circumstances beyond the inspector's or other person's control, may be stated in the notice. If necessary the notice may be left in a conspicuous position and in a reasonably secure way where the damage happened. Damage of a trivial nature is exempt from this provision.

Clause 64 enables a person to claim compensation from the State if loss is incurred because of exercise or purported exercise of powers under division 2, subdivision 1, 3 or 4. Such a claim may be made in a court of competent jurisdiction or during a proceeding for an offence under this Bill. A court may only order compensation if it is just to make the order in the circumstances of the particular case.

Subdivision 7—General enforcement matters

Clause 65 makes it an offence to make false or misleading statements to an inspector.

Clause 66 makes it an offence to knowingly give documents to an inspector which contain false or misleading information, unless the person tells the inspector of this fact and if possible, gives the correct information.

Clause 67 makes it an offence to obstruct an inspector without reasonable excuse. There are requirements for an inspector to warn a person of this.

Clause 68 makes it an offence for a person to pretend to be an inspector.

PART 7—UNDERTAKINGS

Clause 69 provides that the commissioner may seek an undertaking if the commissioner believes an inbound tour operator or tour guide has contravened the Bill. The commissioner may, by written notice, state the act or omission the commissioner believes is the contravention and ask the inbound tour operator or tour guide to provide an undertaking not to continue or repeat the act or omission.

A person can not commence an offence proceeding, a disciplinary proceeding or a proceeding under Part 9 of the Bill (eg. civil penalties for unconscionable conduct), if such an undertaking has been entered into and the conduct has stopped and/or is not repeated. This is subject to the commissioner not having withdrawn acceptance of the undertaking.

Clause 70 allows the commissioner to vary or withdraw undertakings in certain circumstances.

Clause 71 provides for enforcement of undertakings. If the commissioner believes an undertaking has been contravened, the commissioner may apply to the District Court for an order under this clause. If satisfied a term of the undertaking has been contravened, the District Court may make an order:

- directing compliance with the term;
- directing payment to the State an amount not more than the financial benefit obtained due to the contravention;
- directing the payment of compensation to someone who has suffered loss or damage because of the contravention;
- directing the giving of a security bond to the State for a period;
- considered appropriate by the District Court.

The District Court may order forfeiture to the State of all or part of the security bond if the commissioner applies for such an order and the court is satisfied there was a contravention of the undertaking during the currency of the bond.

Clause 72 requires the commissioner to keep a register of each undertaking accepted. This register is to be kept in the form and in the way decided by the commissioner and must contain a copy of the undertaking. A person may inspect the register and obtain a copy of an entry on payment of any prescribed fee at the department's head office or at another place decided by the commissioner.

PART 8—INJUNCTIONS

Clause 73 allows the commissioner or a person aggrieved by the conduct of an inbound tour operator or tour guide to apply for an injunction in the District Court.

Clause 74 provides that the District Court may grant an injunction if satisfied a person has engaged, or is engaging, in conduct:

- contravening the Bill;
- attempting to contravene the Bill;

- aiding abetting, counselling or procuring a person to contravene the Bill;
- inducing or attempting to induce a person to contravene the Bill;
- being knowingly concerned or a party to a contravention of the Bill; or
- conspiring with others to contravene the Bill.

Clause 75 provides that the District Court may exercise the power to grant an injunction to restrain a person from engaging in conduct whether or not it appears to the court the person intends to engage again, or to continue to engage in, the conduct that has given grounds for the grant of an injunction, and whether or not the person has previously engaged in that kind of conduct.

The court may exercise the power to grant an injunction requiring the person to do something whether or not it appears to the court the person intends to fail again, or continue to fail, to do the act or thing that has given grounds for the grant of an injunction, and whether or not the person has previously failed to do the act or thing.

The court may grant an interim injunction until an injunction application is finally decided and the District Court may rescind or vary the injunction at any time.

Clause 76 provides that the District Court may grant an injunction in the terms the court considers appropriate, including restraining a person from carrying on the business of an inbound tour operator, regardless of whether that person is a registrant or the business is carried on as part of another business. The injunction may be for a stated period or except in accordance with stated terms and conditions. An injunction may also require a person to take specified action, such as disclosing or publishing information to remedy adverse consequences caused by the contravention.

Clause 77 states that when the chief executive applies for an injunction, no undertaking as to damages or costs may be required or made.

PART 9—CIVIL PENALTIES, COMPENSATION ORDERS AND OTHER ORDERS FOR UNCONSCIONABLE CONDUCT

Clause 78 provides that this clause only applies if an inbound tour operator or tour guide contravenes clause 35(1) (unconscionable conduct). This clause also provides that the commissioner or a person claiming to have suffered financial loss (the “injured person”) because of the contravention, may apply to the District Court for an order that a monetary penalty be paid to the State or that compensation be paid to the injured person as compensation. A note in the clause refers to certain other clauses of the Bill as a reminder that the commissioner or the injured person may seek to take action for contravention of clause 35(1) (unconscionable conduct) by way of disciplinary proceedings or under this clause, but not both.

The clause provides that notice must be given by the commissioner or the injured person to certain specified persons that they intend to make an application under this clause. The clause also provides that the commissioner or the injured person may make a joint application.

Clause 79 provides that if the District Court is satisfied that an inbound tour operator or tour guide has contravened clause 35(1) (unconscionable conduct), the Court may order the payment to the State of an amount up to the limit of the court’s civil jurisdiction for each contravention. Currently that limit is \$250,000. The Court may also order payment by way of compensation for financial loss of an amount up to the limit of the court’s civil jurisdiction.

If there are insufficient funds to cover both an order for compensation and a money penalty, the Court must prefer to make an order for compensation.

If a corporation does not have sufficient resources to pay penalties and/or compensation, the executive officers of the corporation will, subject to specified defences, be jointly and severally liable to pay any amount not paid by the corporation.

In determining the liability of a person to pay a money penalty or compensation, the Court only has to be satisfied of relevant matters on the balance of probabilities.

The District Court may also make any order against a registered inbound tour operator that the tribunal could make in a disciplinary proceeding for a contravention of clause 35(1) (unconscionable conduct).

Clause 80 provides that when deciding the amount an inbound tour operator or tour guide may be ordered to pay by way of money penalty or compensation under clause 79, the District Court may consider any or all of the following:

- the inbound tour operator’s or tour guide’s conduct before and after the contravention;
- whether the conduct was deliberate;
- the period over which it happened;
- the financial loss caused;
- similar prior conduct including such conduct before the commencement of this clause;
- whether the conduct could have been prevented;
- when the inbound tour operator is a corporation, the extent the executive officers knew or should have known about the contravention;
- action taken by the inbound tour operator to remedy the situation;
- cooperation by the inbound tour operator or tour guide with the commissioner to remedy the situation and to prevent future contraventions;
- the inbound tour operator’s or tour guide’s financial position;
- any other relevant matter.

PART 10—DISCIPLINARY PROCEEDINGS

Clause 81 states the tribunal may, on application by the commissioner, conduct a disciplinary proceeding to decide whether a disciplinary ground has been established.

Clause 82 provides that the grounds (referred to as a “disciplinary ground”) for starting a disciplinary proceeding are where a registrant:

- has contravened the Bill;

- has obtained registration because of a false and misleading representation or declaration;
- is not, or is no longer, a suitable person to be registered;
- has contravened a condition of registration;
- the contravention and detriment relating to a suspension of registration under clause 29.

Disciplinary proceedings may also be commenced against an unregistered inbound tour operator or a tour guide who is alleged to have contravened the Bill, for example, clause 35(1) (unconscionable conduct).

A note to the clause provides that if the contravention of the Bill by a registrant, tour guide or inbound tour operator is also an offence against the Bill, under clause 97 the person may then be prosecuted for the offence or dealt with under this part, but not both.

Clause 83 outlines what orders the tribunal may make and include an order:

- reprimanding the registrant, inbound tour operator or tour guide;
- that a fine be paid to the commissioner;
- suspending the registrant's registration;
- cancelling the registrant's registration;
- imposing conditions on or amending or revoking conditions on the registration;
- directing the registrant, inbound tour operator or tour guide to make payment to a person who has suffered financial loss because of an act or omission by the registrant, inbound tour operator or tour guide;
- to ensure a further disciplinary ground does not happen.

The tribunal may only make an order requiring payment of a fine or directing the registrant, inbound tour operator or tour guide to make payment to a person as noted above on the basis of evidence and other information received in accordance with the evidentiary law and practice applicable to a civil proceeding in a Magistrates Court.

If the tribunal proposes to fine a registrant, inbound tour operator or tour guide and also make an order for compensation, and the registrant, inbound tour operator or tour guide does not have enough resources to pay both, the tribunal must prefer to make an order for compensation.

Clause 84 provides that when deciding the amount a registrant, inbound tour operator or tour guide may be ordered to pay by way of fine or compensation under clause 83, the tribunal may consider any or all of the following to the extent they are relevant:

- the registrant, inbound tour operator or tour guide's conduct before and after the disciplinary ground happened;
- whether the conduct was deliberate;
- the period over which it happened;
- the financial loss caused;
- similar prior conduct including such conduct before the commencement of this clause;
- whether the conduct could have been prevented;
- when the person is a corporation, the extent the executive officers knew or should have known about the conduct;
- action taken by the registrant, inbound tour operator or tour guide to remedy the situation;
- cooperation by the registrant, inbound tour operator or tour guide with the commissioner to remedy the situation and to prevent future contraventions;
- the registrant, inbound tour operator or tour guide's financial position;
- any other relevant matter.

PART 11—REVIEW OF CERTAIN DECISIONS

Clause 85 allows an applicant for registration to apply to the tribunal for a review of the commissioner's decision to refuse to register the applicant. The following decisions of the commissioner may also be subject to review by the tribunal;

- suspension of registration;
- cancellation of registration;
- refusal to renew registration;

- imposition of a condition on registration;
- refusal to replace a registration certificate.

Also, the owner of a thing forfeited to the State because of a decision of an inspector under clause 56(1)(c) may apply to the tribunal for review of the decision.

PART 12—OFFENCES AND EVIDENCE

Clause 86 provides that a proceeding for an offence against the Bill must be taken in a summary way under the *Justices Act 1886*. A proceeding must be started within 1 year after the offence is committed or 1 year after the offence comes to the complainant's knowledge, but within 2 years after the offence is committed.

Clause 87 applies if a court convicts a registrant, tour guide or inbound tour operator of an offence against the Bill. In addition to any penalty for the offence, the court may, if the offender is a registrant, make an order:

- suspending the registration for a stated period;
- cancelling registration;
- imposing, amending or revoking conditions on registration.

In any case, the court may order the registrant or tour guide or inbound tour operator pay compensation to a person who has suffered financial loss because of conduct by the registrant or tour guide or inbound tour operator relating to the offence. Such an order may be made on application of the prosecution or by the person who has suffered financial loss. This clause does not limit the court's powers under the *Penalties and Sentences Act 1992* or another law.

A note to the clause refers to the clause 82(1)(a) and (2) which provides that a contravention of this Bill is also a ground for starting a disciplinary proceeding in the tribunal. However, because of clause 97, a person cannot be both prosecuted and dealt with by way of disciplinary proceeding for the one contravention.

Clause 88 provides that in proceedings under this Bill, authority of an inspector is presumed unless a party requires proof. It also provides that a signature purporting to be that of the commissioner does not have to be

proved and that a certificate purporting to be signed by the commissioner stating certain matters is evidence of those matters.

Clause 89 requires executive officers of a corporation to ensure the corporation complies with the Bill. If a corporation commits an offence against the Bill, each executive officer of the corporation commits the offence of failing to ensure the corporation complies with the provision. Evidence the corporation has been convicted of an offence is evidence that each of the executive officers of the corporation committed the offence of failing to ensure the corporation complies with the provision. The liability of executive officers is subject to specified defences.

PART 13—OTHER MATTERS

Clause 90 provides that the Bill applies to the partnership as if the partnership was a person. For example, it deems each partner to be an applicant for the purposes of suitability for registration.

Obligations imposed on persons by the Bill are deemed to be imposed on each partner of the partnership. Liabilities imposed on persons by the Bill may be discharged by any of the partners of the partnership.

Subject to specified defences, the clause also imposes joint and several liability on partners in relation to amounts payable or contraventions/offences specified under the Bill.

Clause 91 provides that a person aggrieved by another person's conduct that contravenes the Bill may complain to the commissioner about that conduct. The commissioner may investigate that conduct and start proceedings for the contravention. Such a complaint may be made and action taken against a person even though the person is no longer a registrant, inbound tour operator or tour guide.

Clause 92 makes clear a complaint may be in another language, if the person complaining is unable to make it English.

Clause 93 enables the Minister or commissioner to make a public statement identifying and giving warnings or information about any of the following:

- contraventions of the Bill resulting in disciplinary proceedings and persons who commit the contraventions;

- conduct engaged in by inbound tour operators or tour guides that in all the circumstances the Minister or commissioner considers unconscionable;
- commission of offences against the Bill and the persons who commit them.

The statement may provide certain particulars. The public statement or warning should not be issued unless it is in the public interest to do so.

Clause 94 provides a person must not disclose information gained by the person in the administration of the Bill. A penalty applies to breach of this clause. However, disclosure of information can be made:

- with consent of the person it relates to;
- because it is a public statement under clause 93;
- in the administration of the Bill;
- to the commissioner of police;
- to someone administering a corresponding law, with the commissioner's approval;
- in a proceeding under this Bill or in a report about the proceeding;
- in a proceeding before a court in which the information is relevant to the issue before the court.

The clause does not limit the *Freedom of Information Act 1992*.

Clause 95 protects the Minister, the commissioner or an inspector from liability for an act done or an omission made honestly and without negligence under this Bill. If this clause prevents civil liability attaching to the abovementioned officials, it instead attaches to the State.

Clause 96 provides that the commissioner may delegate the commissioner's powers under the Bill to an appropriately qualified officer of the Office of Fair Trading established under the *Fair Trading Act 1989*, or appointed under that Act

Clause 97 provides that if a registrant, inbound tour operator or tour guide is alleged to have contravened the Bill and contravention is an offence, the registrant, inbound tour operator or tour guide may be prosecuted or dealt with in disciplinary proceedings, but must not be dealt with in both ways.

Clause 98 requires the Minister to review the operation of clauses 9 (meaning of inbound tour operator and carry on the business of an inbound tour operator) and 12 (requirement to be registered) within 18 months after the commencement of this provision.

Clause 99 gives the commissioner power to approve forms for use under the Bill.

Clause 100 provides that regulations may be made under the Bill. Any contravention of a regulation may provide a maximum penalty of not more than 20 penalty units.

PART 14—TRANSITIONAL PROVISIONS

Clause 101 provides that inbound tour operators who are carrying on the business of an inbound tour operator have 3 months to become registered before they will be liable under clause 12 (requirement to be registered).

SCHEDULE 1

DISQUALIFYING OFFENCE PROVISIONS UNDER THE CRIMINAL CODE

Schedule 1 lists the offences under the *Criminal Code* that are disqualifying offences for the Bill. (See also definition of “disqualifying offence” in Schedule 2).

SCHEDULE 2

DICTIONARY

Schedule 2 defines the terms used in the Bill. For example:

- Guiding services is defined to mean services that involve both accompanying the tourists and doing something else for the tourists including, for example, translating for them, giving them information or advice or coordinating or leading their activities. Tour guide is defined in clause 10.
- Relevant contravention is defined to mean a contravention of clause 35(1) (unconscionable conduct) or a contravention of a code of conduct that is not an offence against the Bill.
- Tourist is defined as an individual who is visiting or travelling in Queensland and in that context uses a travel package arranged by an inbound tour operator or a service provided by an inbound tour operator or a tour guide. This would include Australian tourists visiting Queensland or overseas tourists visiting Queensland. An inbound tour operator or tour guide may contravene this Bill if they act unconscionably towards any tourist as defined.
- Travel package is defined as the prearranged provision of a combination of activities, goods or services for 1 person that includes at least 2 of a specified list. Travel package is an integral part of the definition of an inbound tour operator in clause 9. If such a package includes, for example, guiding services (eg. leading a tour group) and visiting tourist attractions (eg. prearranged visits to theme parks) and that travel package is sold by a person to an overseas entity (wholesaler, retailer or a corporate buyer) for an inclusive price, the person who sold that package overseas will be deemed to be carrying on the business of an inbound tour operator (see clause 9).
- Tribunal is defined as the Commercial and Consumer Tribunal established under the *Commercial and Consumer Tribunal Act 2003*. That Act is anticipated to commence before this Bill.

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