

**Government's Overall Response to
the Views Expressed by Deputations and Individuals
at the Meeting of the Bills Committee on Travel Industry Bill
held on 9 May 2017 and through Written Submissions**

Purpose

This paper sets out the Government's overall response to the views expressed by deputations and individuals at the meeting of the Bills Committee on Travel Industry Bill (the Bill) held on 9 May 2017 and through written submissions.

Need and Urgency to Establish the Travel Industry Authority (TIA)

2. The proposal of establishing the TIA has undergone years of extensive consultation and discussion since 2011. The Government has pressed ahead with formulating different legislative proposals and the Bill, maintained dialogue with the travel trade, Panel on Economic Development of the Legislative Council (LegCo) as well as other relevant stakeholders, and refined the contents of the Bill having regard to the views collected and latest trade developments. During the past consultation and the meeting of the Bills Committee on the Bill held on 9 May 2017, different stakeholders including the majority of travel trade members, political parties, the Consumer Council, etc. support the Government to establish a statutory regulatory body for the industry as soon as possible.

3. Therefore, laying a legal basis for industry regulation, establishing a regulatory body through the Bill and strengthening efforts in combating unscrupulous practices in the trade brook no delay. Whilst some people suggest that the setting up of a tourism bureau should be explored first, we consider that this proposal cannot replace the legislative work for setting up a regulatory body and that both should not be confused with each other. Indeed, the early establishment of the TIA will be conducive to safeguarding consumer interests, enhancing the professionalism of the travel trade and fostering the healthy long-term development of the industry.

Regulation of Mainland Inbound Tour Groups

4. We note some opinions that the Bill only focuses on the Mainland inbound tour group market. In fact, regardless of carrying on inbound or

outbound travel business, all travel agents will come under the regulation of the Bill. Nonetheless, there were incidents of improper operation of Mainland inbound tour group business in recent years, some of which even involved injuries and deaths, seriously tarnishing the image and reputation of Hong Kong's travel industry. Therefore, we need to introduce targeted measures into the Bill to strengthen the regulation of the market concerned. The measures seek to stipulate basic and reasonable regulatory requirements in relation to Mainland inbound tour groups and criminalise the following unscrupulous practices –

- (a) breaching licence conditions, mainly as a result of coercing tourists into shopping¹;
- (b) co-operating with unauthorised travel agents in the Mainland; and
- (c) not displaying the required information on the vehicles arranged for transporting tour groups².

— The provisions in the Bill in relation to the above are at the [Annex](#).

5. On the other hand, the Bill similarly subjects those that carry on outbound travel business to regulation in such aspects as requirements for obtaining and renewing licences, financial surveillance, as well as the licence conditions, guidelines, directives, etc. formulated by the TIA, to ensure that the outbound travel market continues to operate in an orderly manner.

Co-operation Relationship between Travel Agents and Front-line Practitioners

6. The Government understands that the travel trade holds different views on whether the co-operation relationship between travel agents and tourist guides as well as tour escorts should be regulated through the Bill, and has yet to reach a consensus. As Hong Kong is a free market and there is no legislation mandating for any particular sector that all practitioners providing services must be employees, we consider it inappropriate to mandate the co-operation relationship between travel agents and tourist guides as well as tour escorts to be an employer-employee one across the board through the Bill.

¹ The relevant provisions in the new legislation apply to all inbound tour groups (i.e. from the Mainland and places other than the Mainland).

² The relevant provisions in the new legislation apply to all inbound tour groups (i.e. from the Mainland and places other than the Mainland).

7. Indeed, as in the case of other sectors, to avoid any misunderstanding or dispute, the most important thing is that travel agents and tourist guides or tour escorts, before entering into co-operation, should understand clearly their mode of co-operation according to their intention, and that the tourist guides or tour escorts should identify their identities as employees or self-employed persons, to safeguard mutual rights and benefits. In differentiating the two identities, all relevant factors of the case should be taken into account. The court has set out different factors for distinguishing an employee from a self-employed person in past cases³.

8. On the other hand, a travel agent should cautiously assess the risks involved before entering into a contract to engage a tourist guide or tour escort as a self-employed person. Even though the tourist guide or tour escort is called a self-employed person or has been labelled as a self-employed person in the contract, if in essence there exists an employer-employee relationship between the travel agent and tourist guide or tour escort, the travel agent is still required to fulfil its responsibilities under the relevant legislation, including the Employment Ordinance (Chapter 57), Employees' Compensation Ordinance (Chapter 282), etc., by paying statutory benefits retroactively to the tourist guide or tour escort who is falsely labelled as a self-employed person. Furthermore, the travel agent may be liable to criminal sanctions under the relevant legislation.

9. We note that some members of the travel trade are concerned about the issue of "false self-employment". The Labour Department has been educating the public and employers on the differences, pros and cons as well as legal rights and obligations of the two contractual relationships of employment and self-employment. It has also adopted different measures to deter the malpractices of evading liabilities by purposely and falsely labelling an employee as a self-employed person. Such measures include providing consultation and conciliation service to those involved in "false self-employment" disputes, and taking enforcement actions against any employers who fail to fulfil their responsibilities under labour legislation.

10. We understand that tourist guides and tour escorts, as front-line practitioners, hope that the new regulatory regime can enhance the protection of their rights and interests. We have proposed that the TIA should introduce

³ The common important factors include: control over work procedures, working time and method; ownership and provision of work equipment, tools and materials; whether the person is carrying on business on his own account with investment and management responsibilities; whether the person is properly regarded as part of the employer's organisation; whether the person is free to hire helpers to assist in the work; bearing of financial risk over business (e.g. any prospect of profit or risk of loss); responsibilities in insurance and tax; traditional structure and practices of the trade or profession concerned; and other factors that the court considers as relevant.

administrative measures to require that a travel agent must sign a service agreement with its tourist guide(s) or tour escort(s) before entering into co-operation, whereby the travel agent (a) must pay service remuneration to the tourist guide(s) or tour escort(s); (b) must not require its tourist guide(s) or tour escort(s) to bear or unreasonably advance any payment for a tour group received; and (c) must not delay the reimbursement for any advance payment made by its tourist guide(s) or tour escort(s). A travel agent contravening any of the administrative measures will also be subject to a disciplinary order.

11. Meanwhile, we notice that some trade members have expressed their views about clause 41 of the Bill (the clause that prohibits travel agents from employing, or otherwise engaging, unlicensed tourist guides or tour escorts) and enquired whether the drafting concerned will confine the co-operation relationship between travel agents and tourist guides as well as tour escorts to an employer-employee one. Indeed, the clause adopts the wording “employ, or otherwise engage”, which can accommodate different co-operation relationships between travel agents and tourist guides or tour escorts, including the one where the tourist guides or tour escorts are self-employed persons.

Legal Responsibilities of Travel Agents and Front-line Practitioners

12. Under the new regulatory regime of the travel industry, travel agents, tourist guides and tour escorts must comply with the new legislation and will be liable for any of their illegal conducts or acts. We understand certain travel trade members’ concern about whether the legal responsibilities between travel agents and front-line practitioners will be unclear when a suspected offence case arises, particularly so with a tourist having been coerced into shopping in Hong Kong.

13. As a front-line practitioner that directly receives an inbound tour group, regardless of his or her co-operation relationship with the travel agent or whether the travel agent has instructed him or her to coerce members of a tour group into shopping, a tourist guide must not commit any member of the tour group into shopping under any circumstances. Otherwise, he or she may be held liable as a result of breaching the relevant licence condition under the new regulatory regime. If the tourist guide committed the act of coerced shopping at the travel agent’s instructions, the travel agent may also be held liable as a result of breaching the relevant licence condition.

14. On the other hand, if the travel agent had taken all reasonable steps (including but not limited to: providing clear guidelines and proper training, and conducting regular reviews and making adjustments as necessary; prior to

employing or otherwise engaging a tourist guide for receiving an inbound tour group, checking whether he or she has committed any coerced shopping act before, etc.) to prevent its tourist guide from committing the act of coerced shopping, but the tourist guide still coerced the inbound tour group member into shopping, the tourist guide may be held liable as a result of breaching the relevant licence condition. The travel agent has not breached the relevant licence condition and accordingly will not be held liable.

15. When formulating the subsidiary legislation in relation to licence conditions, the TIA will consider the views collected from the travel trade to ensure that the legal responsibilities between travel agents and front-line practitioners can be clearly delineated so as to prevent both parties from shoving their responsibilities to each other.

Regulation of On-line Travel Agents

16. The travel trade and Consumer Council generally support the Government's proposal of bringing those on-line travel agents that carry on outbound travel business activities targeted at Hong Kong citizens under the regulation of the Bill, with a view to according greater protection to Hong Kong outbound travellers and creating a level playing field between traditional travel agents with physical presence and on-line travel agents.

17. As in the case of other industries, upon the advancement of information technology, new modes of operation will come on stream in the travel industry. Nevertheless, as carrying on travel business activities (obtaining travel services for visitors to Hong Kong and/or outbound travellers of Hong Kong) involve the interests of the visitors/travellers and the overall reputation of Hong Kong's travel industry, it is necessary to subject all persons that carry on travel business activities, regardless of their mode of operation (traditional one with physical presence or on-line), to appropriate regulation. Moreover, we need to maintain a fair business environment for those carrying on business with physical presence and those on-line.

18. We notice that nowadays some persons personally engage with visitors to Hong Kong through the on-line platform and provide them with guiding service in person. Indeed, operators of this kind are required to obtain licences under the regulatory regime underpinned by the Travel Agents Ordinance (Chapter 218) at present and will also be required to obtain licences under the new regulatory regime. To this end, they need to be subject to the following two layers of regulation –

- (a) the first layer of regulation is the licensing regime for tourist guides, which seeks to ensure that the persons who directly provide guiding service to tourists are equipped with the professional knowledge and standard as well as service quality; and
- (b) another layer of regulation is the licensing regime for travel agents, which seeks to ensure that the persons who obtain travel service for visitors to Hong Kong are committed to carrying on business (particularly on the financial front).

19. Some members of the Committee and some members of the travel trade have raised concern about the issue of enforcement involving on-line travel agents. Although the business or physical location of some on-line travel agents is outside Hong Kong, the TIA will strive to follow up offence cases involving them. Upon knowing their business or physical location, the TIA will attempt to contact the tourism regulatory authorities of the jurisdictions concerned to take appropriate action. The TIA will also publish up-to-date lists of licensed travel agents from time to time and assist local consumers in identifying and choosing licensed travel agents through public education, publicity activities, etc. to ensure that tourists' interests can be appropriately safeguarded.

Financial Arrangements for the TIA

20. Some travel trade members are concerned whether the new regulatory regime will increase their financial burden. To reduce the impact brought about by the new regulatory regime on the trade, we have proposed maintaining the various fees and Authority levies (except registration fees on Mainland inbound tour groups⁴) for five years at the prevailing levels upon the full commencement of the new legislation and making suitable adjustments in an incremental manner thereafter. In addition, to support the initial operation of the TIA, the Government will apply to the LegCo for funding to provide the TIA with a one-off capital grant as seed money in due course.

21. We are now conducting a detailed study on the resource requirements for the TIA and will engage a consultant for assistance, with a view to ensuring

⁴ The registration fees currently charged by the Travel Industry Council of Hong Kong on travel agents receiving Mainland inbound tour groups are low, i.e. a lump sum of \$30 for a group of 40 members or below, and a lump sum of \$60 for a group of 41 members or above. We envisage that the TIA will increase the registration fees with different rates prescribed based on the numbers of members in a tour group. The exact rates will be drawn up by the TIA having regard to the prevailing market situation, the TIA's regulatory experience, etc.

that the TIA will run on a self-financing basis in the long run and at the same time taking into account the financial affordability of the trade when the new regulatory regime is being implemented.

Preparations for Implementing the New Regulatory Regime

22. After the passage of the Bill by the LegCo, we will immediately commence preparations for implementing the new regulatory regime, including seeking necessary resources to set up the TIA and enable it to recruit staff to handle tasks including, among other things, formulation of subsidiary legislation, guidelines, directives, codes of conduct and other administrative arrangements⁵. In the preparatory process, the Government will closely co-operate with the TIA and maintain liaison with the travel trade (including the Travel Industry Council of Hong Kong (TIC)) and other relevant stakeholders to ensure that the new regulatory regime can be implemented in full swing as soon as possible.

Tourism Commission
Commerce and Economic Development Bureau
June 2017

⁵ These include training matters of the trade, the scope of the newly established Travel Industry Development Fund, the administrative scheme for regulating shops that inbound tour groups are arranged on itineraries to patronise, the mechanism to handle disputes between consumers and licensees that do not involve disciplinary matters, etc. as mentioned during the meeting held on 9 May 2017 and through written submissions.

**Provisions involving Strengthening of Regulation of
Mainland Inbound Tour Group Market in the Bill**

Provision	Remark
<p>(1) <u>Combating the act of coerced shopping</u>^{6*}</p> <p>Clause 6(2)(b) – “A licensed travel agent must not carry on travel agent business— (b) otherwise than in accordance with the conditions imposed on the travel agent licence or any branch licence concerned.”</p>	<p>In the past, there were cases where members of Mainland inbound tour groups were coerced into shopping through the use of harassment, coercion (including the use of force), etc. They seriously jeopardised not only the safety and interests of the inbound tour group members, but also the image and reputation of Hong Kong’s travel industry.</p> <p>To combat the unscrupulous act of coerced shopping in the travel trade, the TIA will prescribe conditions against coerced shopping on the licences of travel agents and tourist guides (also see LC Paper No. CB(4)955/16-17(02) that we have submitted to the LegCo, and paragraphs 12 to 15 above).</p>
<p>(2) <u>Combating co-operation with unauthorised travel agents in the Mainland</u></p> <p>Clause 6(3) – “A licensed travel agent must not obtain any of the services described in section 5⁷ for a</p>	<p>This provision seeks to combat the obtaining of inbound travel services by Hong Kong travel agents for Mainland inbound tour groups organised by Mainland travel agents that are not approved by the Mainland tourism regulatory body (i.e. the China National Tourism Administration (CNTA) or the relevant regional tourism regulatory authorities).</p>

⁶ The meaning of “coerced shopping” will be prescribed by subsidiary legislation and refers to the use of harassment, coercion or undue influence to significantly impair the freedom of choice or conduct of another person with a view to causing that person to make a purchase or other transaction that he or she would not otherwise have made.

⁷ Clause 5 of the Bill reads, “A person carries on Mainland inbound tour group business if the person obtains any of the following services for a Mainland inbound tour group organized by a person in the Mainland— (a) a service providing sightseeing or visits to local places of interest; (b) a service providing restaurant meals or other catered meals; (c) a service providing shopping trips; (d) a service providing local transport in connection with any of the services described in paragraphs (a), (b) and (c).”

Provision	Remark
<p>Mainland inbound tour group organized by a person in the Mainland unless the person is approved to organize the tour group by a regulatory organization in the Mainland that regulates the travel industry of the Mainland.”</p>	<p>In view of the concern raised by the trade earlier, we have incorporated a defence provision (i.e. clause 6(5) and (6)) into the Bill. It is a defence for a travel agent as defendant charged with an offence against clause 6(3) to establish that all practicable steps were taken by the defendant to determine whether the person in the Mainland was approved to organise the Mainland inbound tour group by a regulatory organisation in the Mainland that regulates the travel industry of the Mainland, and it was reasonable for the defendant to conclude that the person was approved to organise the tour group by the regulatory organisation. The determination of whether the travel agent took all reasonable steps will depend on the circumstances of the case.</p> <p>In fact, the TIC has imposed a similar regulatory requirement that, if Mainland inbound tour groups received by Hong Kong travel agents are organised by Mainland travel agents, such Mainland travel agents must have been approved by the CNTA.</p> <p>The CNTA has released on its website a list of approved Mainland travel agents⁸ with updates from time to time. Hong Kong travel agents can verify the details of the Mainland travel agents with which they plan to co-operate against the list in order to check the latter’s status.</p>
<p>(3) <u>Imposing the requirement of displaying required information on vehicles arranged to transport</u></p>	<p>According to the TIC’s regulatory experience, some travel agents contravened its regulatory requirement by failing to display the required information including their licence numbers, etc. on the vehicle arranged to transport</p>

⁸ See the “list of organising agents” in the designated section on outbound travel on the CNTA’s website (www.cnta.gov.cn/ztwz/cjyzt/).

Provision	Remark
<p><u>tour groups*</u></p> <p>Clause 37(1) – “If a licensed travel agent arranges a vehicle for transporting a tour group, it must display, in the prescribed way, the prescribed information about the tour group on the vehicle.”</p>	<p>inbound tour groups. In addition, some members of inbound tour groups, despite being unsatisfied with the Hong Kong travel agents’ reception arrangements, could not lodge a substantiated complaint with the TIC for their lack of any information about the travel agents concerned. This also posed difficulties to the TIC’s follow-up and investigation.</p> <p>This provision seeks to assist inbound tour groups (whether from the Mainland or places other than the Mainland) in grasping the basic information about Hong Kong travel agents, and at the same time enable the TIA to identify the vehicles arranged by the travel agents for transporting tour groups in the course of inspection and investigation. The information to be displayed on the vehicles (expected to include the travel agent’s name and licence number, tour group number, etc.) and the way in which such information is to be displayed (expected to include the format of the information, location of display, etc.) will be prescribed by subsidiary legislation.</p>

*Note: The relevant provisions in the new legislation apply to all inbound tour groups (i.e. from the Mainland and places other than the Mainland).