TRADE PRACTICES ACT 1974

UNDER-taking to the AUSTRALIAN COMPETITION AND CONSUMER COMMISSION GIVEN FOR THE PURPOSE OF SECTION 87B

BY

KOREAN INBOUND TOUR OPERATOR COUNCIL OF AUSTRALIA INCORPORATED

INC 9882027

PERSONS GIVING THIS UNDERTAKING

1. These undertakings are given to the Australian Competition and Consumer Commission (ACCC) by the Korean Inbound Tour Operator Council of Australia Incorporated (INC 9882027) (KITOCA) of Suite 8E, 38 Rowe Street, Eastwood, in the State of New South Wales, under section 87B of the Trade Practices Act 1974 (TPA).

BACKGROUND

2. KITOCA is an incorporated association which was established in May 2004. KITOCA's members are inbound tour operators which operate tours in Australia for Korean travel agents and/or wholesalers. Those travel agents/wholesalers are based in the Republic of Korea and sell packaged tours at retail to Korean tourists wishing to travel to Australia and New Zealand. The packages generally include, among other things, airfare, accommodation, transportation, hospitality and entry to tourists sites. They also include opportunities to shop in Australia. The inbound tour operators generally have agreements with Korean outbound tour operators, who in turn, have agreements with the Korean travel agents and/or wholesalers. The Korean outbound tour operators are members of an association which, for ease of reference, is referred to as the Korean Outbound Association.

3. Prior to and following April 2007, some Korean travel agents and wholesalers advertised, in the Republic of Korea, packaged tours to Australia at retail prices which did not cover the total cost of conducting the tour in Australia. As a result, the inbound tour operators were faced with a shortfall of funds to cover some of the expenses including accommodation, transportation, hospitality and entry fees when dealing with those Korean travel agents and wholesalers. In the past, it was common for inbound tour operators to supplement their income by taking tourists to businesses which pay commissions to the inbound tour operator. However, in circumstances where the payment to the inbound tour operator from those Korean travel agents and wholesalers reduced substantially and the cost of providing the services has increased, some businesses have introduced unethical business practices.

4. Since at least 2005, KITOCA has been working with the Australian Government and various other organisations to improve the perception of Australia as a destination for Korean tourists and to improve the standing of the industry. This includes taking steps
towards eliminating what may be regarded as unethical business practices by some inbound tour operators. To this end, KITOCA has worked with the Commonwealth Government, through the Korean Action Plan Implementation Group, to implement a voluntary Code of Conduct for Korean inbound tour operators to comply with. The Code of Conduct was announced in April 2007.

5. The ACCC is concerned that KITOCA may have engaged in the following conduct:
   (a) agreed that its members would not provide tour services to Korean travel agents and wholesalers, whom KITOCA considered advertised packaged tours below certain minimum retail rates; and
   (b) sought to arrange for certain duty free stores and Korean restaurants in Australia to not allow entry to tourists on tours conducted by those operators.

The ACCC's position is that the decision as to whether or not an inbound tour operator should accept the terms and conditions offered by a Korean travel agent or wholesaler is a matter for each individual operator and not something that should be decided collectively by KITOCA and its members.

6. The ACCC is concerned that KITOCA's conduct may amount to a contravention of the Trade Practices Act 1974 (Cth), and in particular, sections 45 and 45A. In consequence of the matters referred to above, and without any admission of liability, KITOCA has cooperated with the ACCC to resolve the ACCC's concerns and has offered undertakings pursuant to section 87B of the TPA to resolve this matter as expeditiously as possible. KITOCA is still committed to eliminating unethical business practices and improving the perception of the industry.

UNDERTAKINGS OFFERED BY KITOCA

Refrain from conduct

7. KITOCA undertakes to the Commission that it will not, by any of its officers, employees or agents, procure, or seek to procure that:
   (a) its members enter into an agreement, arrangement or understanding which has the substantial purpose of preventing, restricting or limiting the supply of tour services by a member or members to a Korean travel agent and/or wholesaler; or
   (b) restaurants and/or operators of duty free shops located in Australia, not supply goods and/or services to the tourists of any particular Korean travel agent and/or wholesaler,

for the reason that the Korean travel agent and/or wholesaler has offered for sale, or sold, in the Republic of Korea, packaged tours below a retail price, whether that price was specified by KITOCA, the Korean Outbound Association or any KITOCA member.

8. KITOCA further undertakes that it will not, by any of its officers, employees or agents, procure, or seek to procure, that its members enter into an agreement, arrangement or understanding as to the wholesale price they will charge Korean travel agents and/or wholesalers for tour services.

9. For the avoidance of doubt, nothing in this Undertaking shall be read as preventing:
(a) any KITOCA member from unilaterally deciding not to supply tour services to a Korean travel agent and/or wholesaler for any reason including that the Korean travel agent and/or wholesaler is not paying sufficient wholesale fees to enable the inbound tour operator to recover its costs of providing tour services;

(b) KITOCA or its members from continuing to discuss with any person:
   (i) the need for reform of the Australian inbound tourism industry for Korean tourists;
   (ii) ways to encourage and support members to adopt the Code of Conduct; and

(c) KITOCA or its members taking any lawful steps directed towards reforming the Australian inbound tourism industry for Korean tourists or improving the perception of Australia as a holiday destination for Korean tourists.

**Letter to members**

10. Within 14 days of the acceptance by the ACCC of this undertaking, KITOCA will send a letter to each of its members in the form set out in Annexure A to these undertakings which:

   (a) sets out KITOCA's responsibilities in terms of sections 45, 45A and 45(4D) of the *Trade Practices Act 1974* (Cth) and reminds its members to make individual business decisions; and

   (b) advises its members that if they did reach any agreements that were likely to breach the *Trade Practices Act 1974* (Cth), then those agreements should be immediately discontinued.

**Trade Practices Compliance Program**

11. KITOCA undertakes that within 3 months of the commencement of this undertaking, it will conduct training for its officers, employees and members, using a suitably qualified compliance professional or legal practitioner with expertise in trade practices law, which seeks to raise awareness of Part IV of the TPA. The identity of the compliance professional or legal practitioner, the content of the training and the arrangements for the provision of the training will be agreed with the Commission.

12. KITOCA will ensure that the compliance professional or legal practitioner who conducts the training referred to above, provides a written statement to the Commission within 14 days of completion of the training, verifying that such training has been completed.

13. KITOCA undertakes that within 12 months of the first trade practices training program referred to above, it will conduct further training for its officers, employees and members, using a suitably qualified compliance professional or legal practitioner with expertise in trade practices law, which seeks to raise awareness of Part IV of the TPA.

**COMMENCEMENT OF UNDERTAKING**

14. These undertakings come into effect when:

   (a) These undertakings are executed by KITOCA; and
(b) The ACCC accepts the undertakings so executed.

ACKNOWLEDGEMENTS

15. KITOCA acknowledges that the ACCC will make this Undertaking available for public inspection and may, from time to time, publicly refer to this Undertaking.

16. KITOCA further acknowledges and accepts that these undertakings in no way derogate from the rights and remedies available to any other person arising from the alleged conduct.

IN WITNESS TO THESE UNDERTAKINGS

Signed for and on behalf of Korean Inbound Tour Operator Council of Australia Incorporated (INC 9882027).

Signature of authorised person:  

Office held: 86/8 Rowe st Eastwood N.S.W 2122

Name of Authorised Person: SUNG MOON AN

This day of 14/12/2007

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 87B OF THE TRADE PRACTICES ACT 1974.

Chairperson  
This day of 4/1/2008
Dear [Member]

KITOCA and the Trade Practices Act

As an industry association, KITOCA seeks to represent the interests of all its members, and to further those interests as much as possible. To that end, since at least 2005, KITOCA has been working with the Australian Government and various other organisations to improve the perception of Australia as a destination for Korean tourists and to improve the standing of the industry.

This includes taking steps towards eliminating what may be regarded as unethical business practices by some inbound tour operators. These unethical business practices involve some inbound tour operators having arrangements with duty free stores in which the duty free stores agree to pay large commissions to the inbound tour operators on the products purchased by tourists in their stores. The commissions are not disclosed to the tourists and result in the tourists paying substantially higher prices than they would otherwise pay to purchase the products.

To this end, KITOCA has worked with the Commonwealth Government, through the Korean Action Plan Implementation Group, to implement a voluntary Code of Conduct for Korean inbound tour operators to comply with. The Code of Conduct was announced in April 2007.

Despite this, it is important to keep in mind that as inbound tour operators, KITOCA members are still competitors. As such, members must make their own business decisions, and be aware of the ways in which acting collectively might breach various laws, including the Trade Practices Act 1974 (Cth). The purpose of this letter is to remind you of some of your responsibilities under the Trade Practices Act.

Recently, KITOCA has had discussions with the Australian Competition & Consumer Commission (ACCC) regarding members’ obligations under the Trade Practices Act. The ACCC acknowledges that KITOCA is working with the Australian Government, through the Korean Action Plan Implementation Group, to reform the Korean inbound tourism industry, but would like to ensure that any steps KITOCA and its members take to achieve that objective, comply with the Trade Practices Act. In this respect, the ACCC has asked KITOCA to send a letter to its members which:

1. sets out KITOCA’s responsibilities in terms of sections 45 and 45A of the Trade Practices Act and reminds its members to make individual business decisions; and
2. advises its members that if they did reach any agreements that were likely to breach the Trade Practices Act, then those agreements should be immediately discontinued.

The attached Schedule provides an outline of some of the relevant provisions of the Trade Practices Act, and provides suggestions to members about how they can seek to limit their trade practices exposure.

It is your responsibility to ensure that you comply with the Trade Practices Act. It is also important to be aware that you can be liable for involvement in a contravention of the Trade Practices Act, even where you were not a party to the relevant agreement. If you did reach any agreements that were likely to be a breach of the Trade Practices Act, you should immediately discontinue the agreement and take no further steps to enforce it. If you are concerned about particular conduct,
you should make your concerns known and, if necessary, seek your own legal advice. To assist you, KITOCA will shortly arrange for a lawyer to conduct trade practices training for all its members.

Yours sincerely

Sung Moon An
Chairman
Limiting Trade Practices Exposure

This Schedule provides a brief summary of some of the provisions in Part IV of the Trade Practices Act 1974 (Cth). It is not comprehensive or exhaustive. It does not deal, for example, with all the provisions in Part IV of the Trade Practices Act 1974 (Cth); nor does it deal with the provisions relating to consumer protection. If a question arises, or you are concerned about certain conduct, please obtain legal advice. This is because whether conduct ultimately breaches the Trade Practices Act depends upon the specific situation being considered.

1.1 The Trade Practices Act

As competitors, there are certain provisions of the Trade Practices Act that members need to be careful about, particularly when issues are being discussed at meetings of KITOCA. These provisions are:

1. **Price fixing** is absolutely prohibited by the Trade Practices Act. Price fixing involves a contract, arrangement or understanding between competitors which fixes, controls or maintains the price at which they supply or acquire goods or services in competition with each other. This can include the giving of a special deal such as a 'discount, allowance, credit or rebate'. There does not need to be agreement on a specific price in order for an agreement to amount to price fixing. Even agreeing on a range of prices may amount to price fixing. In addition, agreeing on a minimum price may also amount to price fixing.

2. **Anti-competitive agreements** are prohibited by the Trade Practices Act. These are agreements which have the purpose or have the effect or likely effect of substantially lessening competition in a market in Australia.

3. **Secondary boycotts and exclusionary provisions** are prohibited by the Trade Practices Act. These provisions generally prohibit persons, such as competitors, from engaging in conduct which is directed towards preventing, restricting or limiting the supply of goods or services to particular persons.

1.2 Verbal arrangements such as 'gentleman's agreements' are caught

The Trade Practices Act applies to a broad range of contracts, arrangements or understandings. For example, it applies to agreements that are in writing as well as those which are reached verbally in the course of discussions. It can also apply to a 'nod and a wink' understanding or 'gentleman's agreement'. Whether parties have entered into an agreement depends upon the circumstances.

For example, it is common for industry associations to conduct regular meetings which are attended by members. It is also common for members to vote separately on a proposal at those meetings. Although members have voted separately on a proposal, a court may still find that the members reached an agreement. This is particularly where a resolution is passed indicating that the members have, by majority or otherwise, resolved to do certain things and all the members comply with that resolution.
1.3 Limiting trade practices exposure

KITOCA's members should make individual business decisions. To limit your exposure under the Trade Practices Act, it is preferable that:

1. You do not agree with other members as to the wholesale price, or any percentage of that price (for example, 80% or some other figure) you will charge Korean travel agents and/or wholesalers to provide packaged tour services in Australia. You can, however, decide independently what price you will charge for your own services, and independently refuse to offer your services for less than this price even if asked to do so by a Korean outbound operator. For example, if you are not able to recover a substantial proportion of your costs from a Korean travel agent and/or wholesaler, including 80% of your costs, you can then decide independently whether you would like to continue doing business with that Korean travel agent and/or wholesaler. While you are free to make such a decision individually, it is preferable that you do not discuss your decision with other members;

2. You do not discuss with other members commercially sensitive information in relation to pricing such as:
   (a) your cost of conducting packaged tours in Australia;
   (b) the wholesale price you have offered to a Korean travel agent and wholesaler to win their business; or
   (c) how much commission, if any, you are receiving or will receive from duty free shops and other retail stores.

3. You do not agree with other members as to which Korean travel agents and wholesalers you will each do business with.

4. You do not agree with other members that you will not deal with any particular person such as a particular restaurant, duty free store, inbound tour operator or a Korean travel agent and wholesaler, whether they are based in Korea or elsewhere. You are, however, free to decide independently that you will not deal with a particular person such as a travel agent and/or wholesaler including because they do not agree to pay you sufficient wholesale fees to enable you to recover your costs. While you are free to make such a decision individually, it is preferable that you do not discuss your decision with other members.