

SMOKING (PUBLIC HEALTH)(AMENDMENT) BILL 2005

COMMITTEE STAGE

Amendments to be moved by the Secretary for
Health, Welfare and Food

Clause

Amendment Proposed

11

By deleting the clause and substituting -

"11. Offences under Part III

Section 10 is amended -

(a) in subsection (1), by repealing
"level 4" and substituting "level
5";

(b) in subsection (2) -

(i) by repealing "載有" and
substituting "展示";

(ii) by repealing "level 4" and
substituting "level 5";

(c) by repealing subsection (3) and
substituting -

"(3) Any manufacturer of
tobacco products or his agent, or
any wholesale distributor of tobacco
products, who sells, offers for sale
or possesses for the purpose of sale

any tobacco products to which section 8 or 9 applies which have on their packet or retail container -

(a) the words "light", "lights", "mild", "milds", "low tar", "醇", "焦油含量低", "低焦油", "淡味" or "柔和"; or

(b) other words which imply or suggest that those products are less harmful than other tobacco products,

commits an offence and is liable on summary conviction to a fine at level 5.

(4) Subsection (3) does not apply to a person who is exempt from that subsection under Schedule 5A."."

New By adding immediately after clause 22 -

"22B. Schedule 5A added

The following is added -

"SCHEDULE 5A [s. 10(4)]

EXEMPTION FROM SECTION 10(3) OF
THIS ORDINANCE

1. Interpretation of Schedule 5A

(1) In this Schedule -

"appointed day" (指定日期) means the day on

which the Smoking (Public Health)

(Amendment) Ordinance 2006 (of 2006)

is published in the Gazette;

"cigarette" (香煙) means any cigarette to which

section 8 of this Ordinance applies;

"proscribed term" (禁用字眼) means -

(a) the words "light", "lights",

"mild", "milds", "low tar",

"醇", "焦油含量低", "低焦油", "淡

味" or "柔和"; or

(b) other words which imply or

suggest that any tobacco

products are less harmful than

others;

"specified person" (指明人士) means a

manufacturer of tobacco products or his

agent, or a wholesale distributor of tobacco products;

"specified tobacco product" (指明煙草產品) means any cigar, pipe tobacco or cigarette tobacco to which section 9 of this Ordinance applies.

(2) In this Schedule -

(a) a reference to a specified person who sells any tobacco products includes a reference to a specified person who offers for sale, or possesses for the purpose of sale, any tobacco products; and

(b) a reference to any tobacco products sold by a specified person shall be construed accordingly.

(3) In this Schedule, the expressions listed in the left-hand column below shall have the same meaning as defined in, or shall be construed in accordance with, the provisions of the Trade Marks Ordinance (Cap. 559) listed in the right-hand column in relation to those expressions.

Expression	Relevant provision
date of registration (註冊日期)	section 48
owner (in relation to a registered trade mark)(註冊商標的擁有人)	section 2(1)
owner of a well-known trade mark (馳名商標的擁有人)	section 4(3)
The register (註冊紀錄冊)	section 8(1)
registered trade mark (註冊商標)	section 2(1)
registration (註冊)	section 8(2)
trade mark (商標)	section 3
Use (of trade mark) (使用(商標))	section 6
well-known trade mark (馳名商標)	section 4

2. Exemption for certain trade marks and trade names on packet or retail container of cigarettes

For the purposes of section 10(4) of this Ordinance, a specified person who sells any cigarettes which have on their packet or retail container any proscribed term is exempt from section 10(3) of this Ordinance if he

proves that -

(a) the proscribed term is, or
forms part of -

- (i) a registered trade mark that complies with all the requirements specified in relation to such a trade mark in section 4;
- (ii) an unregistered trade mark or trade name that complies with all the requirements specified in relation to such a trade mark or trade name in section 5; or
- (iii) a well-known trade mark that complies with all the requirements specified in relation to such a trade mark in section 6;

- (b) the proscribed term is used on the packet or retail container only as, or as part of, that trade mark or trade name, and in the notation mentioned in paragraph (e), and is not used in connection with any other expression or description on the packet or retail container;
- (c) the specified person is an owner, assignee, successor in title, licensee, agent or authorized user of that trade mark or trade name;
- (d) the cigarettes have been determined under section 16 of this Ordinance and the regulations to have a tar yield of 9 milligrams or less; and
- (e) the packet of the cigarettes, and, if the packet is within a retail container, the container also, bear a notation in the prescribed form and manner.

3. Exemption for certain trade marks and trade names on retail container of specified tobacco products

For the purposes of section 10(4) of this Ordinance, a specified person who sells any specified tobacco products which have on their retail container any proscribed term is exempt from section 10(3) of this Ordinance if he proves that -

(a) the proscribed term is, or forms part of -

(i) a registered trade mark that complies with all the requirements specified in relation to such a trade mark in section 4;

(ii) an unregistered trade mark or trade name that complies with all the requirements specified in relation to such a trade mark or trade name in section 5; or

(iii) a well-known trade mark that complies with all the requirements specified in relation to such a trade mark in section 6;

(b) the proscribed term is used on the retail container only as, or as part of, that trade mark or trade name, and in the notation mentioned in paragraph (d), and is not used in connection with any other expression or description on the retail container;

(c) the specified person is an owner, assignee, successor in title, licensee, agent or authorized user of that trade mark or trade name; and

(d) the retail container of the specified tobacco products bears a notation in the prescribed form and manner.

4. Requirements specified in relation to registered trade mark

For the purposes of sections 2(a)(i) and 3(a)(i), the following are the requirements specified in relation to a registered trade mark used on the packet or retail container of any tobacco products sold by a specified person -

- (a) the date of registration of that trade mark was before the appointed day;
- (b) that trade mark is registered in respect of tobacco products; and
- (c) that trade mark remains registered in the register at the time when the tobacco products are sold by the specified person.

5. Requirements specified in relation to unregistered trade mark or trade name

For the purposes of sections 2(a)(ii) and 3(a)(ii), the following are the requirements specified in relation to an unregistered trade mark or trade name used on the packet or

retail container of any tobacco products sold by a specified person -

(a) that trade mark or trade name was in use by the specified person in good faith in the course of retail sale of tobacco products in Hong Kong immediately before the appointed day, and such use has been continuing since the appointed day;

(b) that trade mark or trade name is capable of -

(i) distinguishing the tobacco products sold by the specified person from the tobacco products of other undertakings; and

(ii) in the case of a trade mark, being represented graphically;

(c) that trade mark or trade name is not subject to a permanent injunction granted by the court

against its use based on fraud or other similar grounds under the common law;

(d) that trade mark or trade name was not previously a registered trade mark the registration of which has been either -

(i) revoked on the ground for being liable to mislead the public under section 52(2)(c) of the Trade Marks Ordinance (Cap. 559); or

(ii) declared invalid under section 53(3) of that Ordinance on the ground that the trade mark was registered in contravention of section 11 of that Ordinance for being likely to deceive the public; and

- (e) that trade mark or trade name has not previously been refused registration under section 11 of the Trade Marks Ordinance (Cap. 559) for being likely to deceive the public.

6. Requirements specified in relation to well-known trade mark

For the purposes of sections 2(a)(iii) and 3(a)(iii), the following are the requirements specified in relation to a well-known trade mark used on the packet or retail container of any tobacco products sold by a specified person -

- (a) that trade mark was well known in Hong Kong in respect of tobacco products immediately before the appointed day;
- (b) that trade mark is not subject to a permanent injunction granted by the court against its use based on fraud or other similar grounds under the common law;
- (c) that trade mark was not

previously a registered trade mark the registration of which has been either -

(i) revoked on the ground for being liable to mislead the public under section 52(2)(c) of the Trade Marks Ordinance (Cap. 559); or

(ii) declared invalid under section 53(3) of that Ordinance on the ground that the trade mark was registered in contravention of section 11 of that Ordinance for being likely to deceive the public; and

(d) that trade mark has not previously been refused registration under section 11 of the Trade Marks Ordinance (Cap. 559) for being likely to deceive the public.

7. Effect of this Schedule

Nothing in this Schedule affects the operation of the Trade Marks Ordinance (Cap. 559) or any other enactment or rule of law.

8. Transitional provision

(1) Despite section 2, a specified person who sells, before the first anniversary of the appointed day, any cigarettes which have on their packet or retail container any proscribed term is exempt from section 10(3) of this Ordinance so long as he proves that all the requirements in section 2(a), (b), (c) and (d) are complied with.

(2) Despite section 3, a specified person who sells, before the first anniversary of the appointed day, any specified tobacco products which have on their retail container any proscribed term is exempt from section 10(3) of this Ordinance so long as he proves that all the requirements in section 3(a), (b) and (c) are complied with."."