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(Commerce and Industry Special Duties)  
Commerce and Economic Development Bureau  
8/F West Wing  
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Ice House Street Central  
Hong Kong

9 January 2008

**BY FAX**

Fax No. : 2530 2984

Dear Mr Au Yeung,

**Trade Descriptions (Amendment) Bill 2007**

I am scrutinising the above Bill with a view to advising Members and should be grateful if you could clarify the following matters:

**Proposed Part IIA**

- (a) Since the proposed section 13C prohibits false as well as misleading representations, would the Administration consider amending the heading of the new Part IIA to “FALSE, MISLEADING OR INCOMPLETE INFORMATION” to reflect the content of Part IIA more accurately? Please also consider whether the same amendment should also be made to clause 3(a).
- (b) Please clarify whether it is intended that an employee of a retailer acting in the course of his employment would be charged for an offence under the proposed Part IIA. If so, please consider whether it is necessary to provide for a defence to such employee. Please refer to the approach adopted in section 6 of the Broadcasting Ordinance (Cap. 562).

**Proposed section 13A**

- (a) The way the proposed section 13A is drafted would suggest that the application of the section is confined to signs which indicate price per weight unit. If a sign contains other information (such as name of goods) apart from price per weight unit, is it intended that the new section will apply? If so, should the reference to a sign which “indicates a price set by reference to any

weight unit” in section 13A(1) be amended to “a sign which includes information indicating a price set by reference to any weight unit”?

- (b) In the proposed definition of “sign” in section 13A(2)(a), what does “a similar purpose” refer to when there is no prior reference to any purpose in the proposed definition?
- (c) In the proposed section 13A(2)(b)(i), if any letter, word, numeral or character on the sign that indicates the price or the weight unit is completely obscured, under what circumstances will some other such letters, words, numerals or characters be visible? Is it really necessary to include the phrase “while some other such letters, words, numeral or characters are visible” in the said section at all?
- (d) Please explain the circumstances under which the proposed section 13A(2)(b)(ii) will apply. Is it intended to compare the size, distinctiveness and colour of the letter, word, numeral or character on the sign that indicates the price with the letter, word, etc. that indicates the weight unit? If so, please consider drafting this section along the line adopted in the proposed section 13A(2)(b)(iii).
- (e) As it is proposed to make failure to give clear information as to the actual price of the goods an offence, it is important that the offence should be drafted with a sufficient degree of certainty; otherwise the public would not be able to know what they should do in order not to contravene the law. On this basis, please consider defining failure to give information as to the actual price of the goods in more objective terms, instead of using terms like “substantially less conspicuous” and “unreasonably far apart” in the proposed section 13A(2)(b)(ii) and (iii) respectively which may carry different meanings to different persons. In this regard, will the Administration consider defining failure to give clear information with reference to matters such as the font size of the letter, word, numeral or character on the sign concerned, and the minimum actual distance between the letters, words or characters on the sign that indicates the weight unit and the letters, etc. on the sign that indicates the price? As you know, this approach is adopted in the Air Pollution Control (Volatile Organic Compounds) Regulation (Cap. 311 sub. leg. W) with regard to the specification requirements relating to the volatile organic compound content of regulated paints.
- (f) It is noted that the application of the proposed section 13A is to be confined to “signs indicating price per weight unit”. If the legislative intent of the proposed section 13A is to tackle the problem of misleading price indication, is there any reason for adopting such a restrictive approach? Please consider the effectiveness of the proposed section in protecting consumers against misleading price indication in situations where the price of goods is not set by weight unit but by other units such as “item” and “piece”, etc., and where the price and weight unit are indicated on more than one sign.

Proposed section 13B

- (a) The proposed section 13B(3), as drafted, suggests that apart from the factors set out in paragraphs (a) to (e), it is not open to the courts to consider other factors which may be relevant in determining whether any basic accessories of any goods are reasonably expected to be included in the price of the goods concerned. Is there any reason for adopting such a restrictive approach? Would it be desirable to provide that in making the determination, regard shall be had to, but not limited to, the factors set out in paragraphs (a) to (e)?
- (b) While the proposed section 13B(2)(a) refers to “the principal function of the goods”, there is no provision under the proposed section that defines the phrase. Is it necessary to stipulate how the principal function of the goods is to be determined for the purposes of the proposed section by making reference to section 2 of Part 2 of the proposed Schedule 2?
- (c) In the proposed section 13B(3)(b), in what manner is the representation to be made? Is it to be made orally, in writing or by other means? Please consider whether it is necessary to specify this to avoid unnecessary arguments on what amounts to a representation for the purposes of the proposed section and whether a representation has been made. Reference may be made to similar provisions in other Ordinances. For example, in section 383(1) of the Securities and Futures Ordinance (Cap. 571) which provides for the offence of making false or misleading representations, it is specified that the representation can be in writing, orally or otherwise.

Proposed section 13C

- (a) The proposed section 13C prohibits any person from making false or misleading representations, in the course of any trade, business or profession, as regards a seller’s connection with another individual or body. Please clarify who are to be covered under persons “in the course of any profession”. Are tour guides included, for example? If so, have they been consulted on the Bill?
- (b) If a person makes a false or misleading statement or furnishes false or misleading information regarding a seller’s connection with another individual or body, is it intended that the proposed section 13C should apply? If so, please consider amending the section to reflect this intention.
- (c) According to the LegCo Brief and the Explanatory Memorandum of the Bill, the purpose of the proposed section 13C is to deal with the trade malpractice relating to false or misleading representations regarding a seller’s connection with or endorsement by individuals or bodies of good standing and reputation. However, while the proposed section 13C(1) refers to “connected with or endorsed by any individual or body”, there is no provision which requires that the individual or body concerned must be of good standing and reputation. Please consider whether the proposed section 13C(1), as drafted, accurately reflects the Administration’s policy intent.

- (d) In the proposed section 13C, does “body” include a body corporate incorporated or established in Hong Kong or other places, a partnership or other unincorporated body of persons formed or established in Hong Kong or other places? Please consider defining the word for the sake of clarity.
- (e) Please consider whether the introduction of the references to “body” in the proposed section 13C would have implications on the interpretation of the references to “person” which appear in other sections of the Trade Descriptions Ordinance. Is it necessary to add a provision to the effect that for the avoidance of doubt, references to “body” in the proposed section 13C shall not be construed as implying that references to persons in the Ordinance do not include companies, bodies corporate, partnerships or other bodies of persons? Please refer to the Unsolicited Electronic Messages Ordinance (9 of 2007) where a similar provision (i.e. section 2(5)) is provided.
- (f) In the proposed section 13C(1), is there any reason for confining the offence to false representations? If a person makes a misleading representation as regards a seller’s connection with another individual or body, will he be subject to any sanction under the Bill?
- (g) Where a person is charged with an offence under the proposed section 13C(1), does the prosecution need to prove that the person knows that the representation is false? If it is intended that the offence proposed in section 13C(1) is to be a strict liability offence, would it be more appropriate that the defence proposed for such offence should be in line with that commonly adopted for strict liability offences relating to making false statements under other Ordinances, namely, to require an alleged offender to prove that he did not know and had no reason to believe that the statement was false? Please refer to the defence provisions for similar offences under various Ordinances, for example, section 41A of the Tate’s Cairn Tunnel Ordinance (Cap. 393) and section 53A of the Western Harbour Crossing Ordinance (Cap. 436). The proposed section 13C(4), as drafted, appears to impose a more onerous burden on an alleged offender in order that he can establish the defence.
- (h) In the proposed section 13C(2), what are the criteria for “good standing and reputation”? Please consider the need to set out the criteria in the Bill.
- (i) In the proposed section 13C(3), in what manner is the suggestion to be given? Is the suggestion to be given orally or in writing? Is it sufficient if the suggestion is given in an indirect manner? Is it necessary to specify this in the Bill? In section 11 of the Trade Descriptions Ordinance which provides for the offence of giving false indication as to supply of goods, it is specified that the indication may be given directly or indirectly.

## Proposed Schedule 2

- (a) In section 1 of Part 2 of the proposed Schedule 2, in the definition of “mobile phone”, what is meant by “a cellular radio network” and “public switched telephone network”? Is it necessary to define these terms in the Bill? Since the transmission, emission or reception of communication by mobile means is subject to the control of the Telecommunications Ordinance (Cap. 106), please consider whether it would be more appropriate to draft the definition of “mobile phone” in terms consistent with those used in the Telecommunications Ordinance. Further, please clarify how paragraphs (a) and (b) of the said definition are related. Should “and” or “or” be added before paragraph (b)?
- (b) In section 2 of Part 2 of the proposed Schedule 2, is it intended that the factors for determining the principal function of a product are to be exhaustive; if so, why? In paragraph (b) of the said section where reference is made to “document”, is it intended that “document” includes document in forms other than in writing? If so, should this be provided expressly?

## Drafting matters

### (a) Clause 4

In the proposed definition of “trade description”, reference is made to “facilities”. Since no definition is proposed for “facilities”, it is necessary to look at the ordinary meaning of “facilities” in order to ascertain its meaning. According to *The New Shorter Oxford Dictionary* (1993 edition), “facilities” means “favourable conditions for the easy or easier performance of something, especially the physical means or equipment required in order to do something”. Based on this definition, the Chinese text for “facilities” should be “設施” instead of “服務” as proposed. If it is considered that “服務” reflects the policy intent more accurately, please consider replacing “facilities” with “services”. To avoid confusion with the word “service” used in the context of “service of the goods” in paragraph (k) of the proposed definition of “trade description”, please consider amending “service of the goods” to “maintenance of the goods”.

### (b) Proposed section 13C(3)

In the proposed section 13C(3)(a)(i), should the Chinese text of “whether as the proprietor, a shareholder, a partner or otherwise” be in terms like “不論是否屬該賣方的東主、股東、合夥人或以其他身分對該賣方具有產權權益” to reflect the meaning of the English text more clearly and to make the Chinese text more comprehensible?

(c) Proposed Schedule 2

In section 1 of Part 2 of the proposed Schedule 2, should the Chinese text of “portable multimedia player” be “便攜式多媒體播放器” instead of “便攜式數碼多媒體播放器” as the word “digital” does not appear in the English text? Alternatively, please consider adding “digital” to the English text.

I would appreciate it if you could let me have the Administration’s reply in bilingual form *on or before 21 January 2008*.

Yours sincerely,

(Connie FUNG)  
Assistant Legal Adviser

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