

**Bills Committee on
Trade Descriptions (Amendment) Bill 2007**

Proposed Committee Stage Amendments

Introduction

This paper explains the Administration's proposed Committee Stage Amendments ("CSAs") to the Trade Descriptions (Amendment) Bill 2007 in response to suggestions made by Members.

Proposed CSAs

2. The rationale for the proposed CSAs (at the Annex) are as follows:

Clause 3 and 7

3. The Bill proposes to amend the long title of the Trade Descriptions Ordinance (Cap. 362) by adding "misleading or incomplete information" after "false trade descriptions". We intend to move a CSA to add "false," before "misleading". The heading of Part IIA under Clause 7 should also be amended accordingly.

Clause 4(2) – Section 2(1)

4. We intend to move a CSA to give greater clarity to the amended definition of "trade description" such that after-sale inspection and maintenance service would also include provision of spare parts.

5. We also suggest replacing "facilities" by "services" in the proposed section 2(1)(k) to (p) to better reflect our legislative intent. To avoid confusion, "service of the goods" in section 2(1)(k) will be replaced by "maintenance of the goods".

Clause 7 – Proposed Section 13A

6. We intend to move a CSA to expand the scope of the proposed section 13A to cover all units of quantity instead of weight only.

Clause 7 – Proposed Section 13B

7. Proposed section 13B(2)(a) defines “basic accessories” as accessories essential for the effective performance of the “principal function” of the goods, and the factors for determining “principal function” are given in section 2 of Part 2 of the proposed Schedule 2. We intend to move a CSA in section 13B(2)(a) to make this cross reference expressly.

8. Proposed section 13B(3) sets out the criteria for determining whether any basic accessories of any goods are reasonably expected to be included in the price of goods. It is not our intention to limit the factors for consideration to those set out in paragraphs (a) to (e). Hence, we intend to move a CSA to amend section 13B(3) to give the court more flexibility in considering other factors.

Clause 7 – Proposed Section 13C

9. In view of Members’ concern that the scope of application of this section (i.e. in the course of trade, business or profession) would be too wide, we intend to move a CSA to limit the application to those representations made in connection with the supply or promotion of goods. A section will also be added to provide a defence under section 13C(2).

10. As for the defence under the proposed section 13C(4), we agree to Members’ suggested wordings i.e. “to prove that he did not know and had no reason to believe that the representation was false”.

11. To avoid any inconsistency in meaning between the two texts, we intend to move a CSA to amend the Chinese version of section 13C(3)(a)(i) with “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”.

Schedule 2

12. Section 2 of Part 2 of the proposed Schedule 2 sets out the criteria for determining the principal function of specified goods. It is not our intention to limit the factors for consideration to those set out in paragraphs (a) to (c). Hence, we intend to move a CSA to amend this section to give the court more flexibility in considering other factors when determining the principal function of specified goods.

13. We also intend to make the following minor amendments to Schedule 2:

- (a) Add “and” between paragraphs (a) and (b) under the definition of “mobile phone” in Part 2. The amendment aims to reflect more clearly that both functions under paragraph (a) and (b) must be taken together to define a “mobile phone”.
- (b) Delete “數碼” from the Chinese text of “Portable Multimedia Player” to avoid inconsistency between the two texts.

14. Members are requested to note the proposed CSAs in the form of a marked-up version of the Bill at the Annex.

Commerce and Economic Development Bureau
April 2008

A BILL

To

Amend the Trade Descriptions Ordinance.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title

This Ordinance may be cited as the Trade Descriptions (Amendment) Ordinance 2007.

2. Commencement

This Ordinance shall come into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

PART 2

AMENDMENTS TO TRADE DESCRIPTIONS ORDINANCE

3. Long title amended

The long title to the Trade Descriptions Ordinance (Cap. 362) is amended -

- (a) by adding "false, misleading or incomplete information," after "false trade descriptions,";
- (b) by adding "or suppliers of such goods" after "in the course of trade".

4. Interpretation

(1) Section 2(1) is amended by repealing the definition of "goods in transit" and substituting -

"goods in transit" (過境貨品) means goods which -

- (a) are brought into Hong Kong on a vessel or aircraft for the sole purpose of taking them out of Hong Kong; and
- (b) remain at all times while they are in Hong Kong on the vessel or aircraft;"

(2) Section 2(1) is amended in the definition of "trade description" by adding -

- "(k) availability in a particular place of -
 - (i) facilities-service for the inspection, repair or maintenance service of the goods; or
 - (ii) spare parts for the goods;
- (l) warranty given in respect of the service-facilities or spare parts referred to in paragraph (k);
- (m) the person by whom the facilities-service or spare parts referred to in paragraph (k) are provided;
- (n) the scope of the facilities-service referred to in paragraph (k) (i);
- (o) the period for which the facilities-service or spare parts referred to in paragraph (k) are available;
- (p) the charge or cost at which the facilities-service or spare parts referred to in paragraph (k) are available;"

5. Special provisions applicable

to goldware

Section 3(2)(a) is amended by repealing "the Schedule" and substituting "Schedule 1".

6. Marking orders

(1) Section 4 is amended in the heading by adding "**and provision of information, etc.**" after "**Marking**".

(2) Section 4 is amended by adding -

"(4) Without prejudice to subsection (2), an order under this section may provide that a contravention of any provision of the order is an offence punishable with a fine at level 6 and a term of imprisonment for 3 months.

(5) For the avoidance of doubt, information required by 2 or more orders made under subsection (1) to be contained in an invoice or receipt may, where the information is provided in respect of the same item of goods, be contained in one single invoice or receipt."

7. Part IIA added

The following is added -

"PART IIA

FALSE, MISLEADING OR INCOMPLETE INFORMATION

13A. Signs indicating price per ~~weight~~ unit of quantity must give clear information

(1) Any person who, without reasonable excuse, displays in the course of any trade or business a sign which -

- (a) indicates a price set by reference to any weight-unit of quantity for any goods that are exposed for sale; but
- (b) fails, within the meaning of subsection (2) (b), to give clear information as to the actual price of the goods,

commits an offence.

(2) For the purposes of subsection (1) -

(aa) "quantity" (數量) includes length, width, height, area, volume, capacity, weight and number;

- (a) "sign" (標誌) includes notice, placard, label and any other article that serves a similar purpose;
- (b) a sign which indicates the price set by reference to any weight-unit of quantity for any goods fails to give clear information as to the actual price of the goods if -
 - (i) any letter, word, numeral or character on the sign that indicates the price or the weight-unit of quantity is partially or completely obscured while some other such letters, words, numerals or characters are visible;
 - (ii) any letter, word, numeral or character on the sign that indicates the price or the weight-unit of quantity is, having regard to -

- (A) the size and distinctiveness of the letter, word, numeral or character; and
 - (B) the colour of the letter, word, numeral or character as contrasted with the colour of the background on which it is marked, substantially less conspicuous than other letters, words, numerals or characters on the sign that indicate the price; or
- (iii) the letters, words or characters on the sign that indicate the ~~weight~~-unit of quantity are unreasonably far apart from the letters, words, numerals or characters on the sign that indicate the price.

13B. If price does not include basic accessories, purchaser to be informed before payment

- (1) Any person who -
 - (a) exposes any goods specified in Part 1 of Schedule 2 for sale in the course of any trade or business at a price which does not include any basic accessories of the goods that are reasonably expected to be included in the price; and
 - (b) fails to communicate, in the specified manner, to a person who offers to purchase the goods, the information that the price does not

include the accessories before the person pays for the purchase, commits an offence.

(2) In subsection (1) -

(a) "basic accessories" (基本配件), in relation to any goods specified in Part 1 of Schedule 2, means accessories that, though not being an integral part of the goods in structural terms, are nevertheless essential for the effective performance of the principal function (as determined in accordance with section 2 of Part 2 of Schedule 2) of the goods;

(b) "specified manner" (指明方式) means the manner in which the price of the goods is communicated to the person who offers to purchase the goods.

(3) For the purposes of subsection (1), in determining whether any basic accessories of any goods are reasonably expected to be included in the price of the goods as communicated to a person who offers to purchase the goods, regard shall be had to -

- (a) the prevailing trade practice;
- (b) the representation, if any, made to the person by the person who exposes the goods for sale ("seller");
- (c) whether the instructions for users provided by the manufacturer or distributor of the goods show that the goods and the accessories are

treated as a single item for the purpose of sale;

(d) whether the packaging of the goods and the accessories is such that they are treated as a single item for the purpose of sale; and

(e) whether the price of the goods at which they were supplied to the seller included the accessories; and

(f) any other relevant considerations.—

(4) The Secretary for Commerce and Economic Development may by notice published in the Gazette amend Schedule 2.

13C. False or misleading representation as regards seller's connection with another person

(1) Any person who, in the course of any trade, business or profession, makes a false representation to any other person that a particular seller (whether or not the seller is the person who makes the representation) who sells any goods in the course of any trade or business is connected with or endorsed by any individual or body commits an offence.

(2) Any person who —

(a) in connection with-

(i) the supply or possible supply of any goods in the course of any trade or business; or

(ii) the promotion of the supply of any goods
in the course of any trade or business,
~~in the course of any trade, business or~~
~~profession,~~

makes a representation to any other person
("information recipient") that ~~a~~ the
~~particular~~ seller who ~~sell~~ supplies any the
goods ~~in the course of any trade or business~~
is connected with or endorsed by any
individual or body ("subject individual or
body");

- (b) ought reasonably to expect that the
information recipient is likely to mistake the
subject individual or body for another
individual or body who or which is widely
known to be of good standing and reputation
("reputable individual or body") because the
name of the subject individual or body is
identical with, or very similar to, that of
the reputable individual or body; and
- (c) fails, where the seller is not connected with
or endorsed by the reputable individual or
body, to take reasonable steps to prevent the
information recipient from believing that the
seller is connected with or endorsed by the
reputable individual or body,

commits an offence.

- (3) For the purposes of subsections (1) and (2) -

- (a) a representation that a seller is connected with an individual or body is made if it is suggested that -
 - (i) the individual or body has a proprietary interest (whether as the proprietor, a shareholder, a partner or otherwise) in the seller;
 - (ii) the individual or body is in any form of close business association with the seller; or
 - (iii) the seller is the agent or principal of the individual or body;
- (b) a representation that a seller is connected with a body is made if it is suggested that the seller and the body are owned by, or under the control of, the same person;
- (c) a representation that a seller is endorsed by an individual or body is made if it is suggested that -
 - (i) the individual or body makes a positive evaluation specifically of the seller; or
 - (ii) the seller has the permission, authorization or consent of the individual or body without which the seller would not be able to sell the goods concerned lawfully.

(4) It is a defence for a person charged under subsection (1) to prove that he ~~had reasonable cause to~~

believe that the representation was true did not know and had no reason to believe that the representation was false.

(5) It is a defence for a person charged under subsection (2) to prove that he believed, on reasonable grounds, that the information recipient did not mistake the subject individual or body for the reputable individual or body".

8. Penalties

(1) Section 18(1) is amended by repealing "11 or 12" and substituting "11, 12, 13A, 13B or 13C".

(2) Section 18(1)(b) is amended by repealing "a fine of \$100,000" and substituting "a fine at level 6".

(3) Section 18(1A) is amended by repealing "a fine of \$5,000" and substituting "a fine at level 2".

(4) Section 18(2) is amended by repealing "a fine of \$10,000" and substituting "a fine at level 3".

9. Schedule amended

The Schedule is amended by repealing "SCHEDULE" and substituting "SCHEDULE 1".

10. Schedule 2 added

The following is added -

"SCHEDULE 2 [s. 13B]

GOODS SPECIFIED FOR PURPOSES OF
SECTION 13B

PART 1

1. Digital audio player
2. Digital camcorder
3. Digital camera
4. Mobile phone
5. Portable multimedia player

PART 2

1. **Definitions of products**

In this Schedule -

"digital audio player" (數碼音響播放器) -

- (a) means any portable device the principal function of which is to play digital audio files in one or more audio encoding formats from any storage medium;
- (b) includes the product commonly known as an MP3 player; and
- (c) does not include a portable optical disc player;

"digital camcorder" (數碼攝錄機) means any portable device the principal function of which is to make a recording in digital format on any medium from which a moving image may by any means be reproduced;

"digital camera" (數碼相機) means any portable device the principal function of which is to record and store an image in digital format on any medium from which a still image may by any means be reproduced;

"mobile phone" (手提電話) means any portable device the principal function of which is for mobile communication through a cellular radio network with -

- (a) standard voice function of a telephone; and
- (b) interconnection to the public switched telephone network (PSTN);

“portable multimedia player” (便攜式數碼多媒體播放器) -

- (a) means any portable device the principal function of which is to play digital multimedia files in one or more media recording formats from any storage medium;
- (b) includes the product commonly known as an MP4 player; and
- (c) does not include a portable optical disc player.

2. **Determination of principal function**

In determining the principal function of a product for the purposes of this Schedule, regard shall be had to -

- (a) the description applied to the product on its package;
- (b) the description applied to the product in any document relating to the supply of the product; ~~and~~
- (c) the description applied to the product in any promotional material and advertisement concerning the product; and
- (d) any other relevant information.”.