

Bills Committee on Insurance Companies (Amendment) Bill 2014

**The Administration's Response to Follow-up Actions
Arising from the Discussion at the Meeting on 20 April 2015**

Purpose

This paper sets out the Administration's response to issues arising from the discussion at the Bills Committee meeting on 20 April 2015.

Offences relating to misleading statements, etc. and false information

2. As explained at the meeting on 20 April 2015, the Trade Descriptions Ordinance ("TDO") (Cap. 362) does not apply to goods or services sold or supplied under the regulation of the Insurance Companies Ordinance ("ICO") (Cap. 41). The relevant provisions of the TDO are attached at **Annex**.

3. The criminal offence of inducing or attempting to induce a person to enter into any contract of insurance by deception, dishonest concealment of material facts or knowingly use of false or misleading representation exists in section 56 of the existing ICO. It is transposed to the new section 117 under proposal and is not a new offence proposed in the Bill.

4. The Customs and Excise Department is the main enforcement agency of the TDO, whereas the Insurance Authority will be the enforcement agency of the ICO.

Restriction on the use of certain terms and representations associated with insurance business

5. The purpose of restricting the use of the terms "insurance" or "assurance" (or a derivative of such representations) is to protect the public by ensuring that only regulatees can hold themselves out as carrying on regulated insurance business or regulated insurance intermediary activities. Any non-regulatee who uses the restricted terms for any business without the approval of the independent Insurance Authority ("IA") commits an offence. Similar restrictions on the use of the term "insurance" (including its derivatives) are common in other jurisdictions.

Offences by bodies corporate and partners

6. New section 122 added by Clause 84 of the Bill makes the necessary updates to the existing section 57 of ICO which provides that if a body corporate or a partner of a partnership commits an offence and it is proved that the offence was committed with the consent or attributable to any neglect on the part of the body corporate's controller, director or manager, or any other partner of the partnership etc., the individual concerned also commits the offence. This new provision is similar to relevant provisions in a number of newly enacted Ordinances including section 44 of the Mandatory Provident Fund Schemes Ordinance ("MPFSO") (Cap. 485).

7. At the Bills Committee meeting, a Member opined that the provisions were too stringent as the senior management of insurers or licensed insurance intermediary companies (such as controllers, key persons in control functions or Responsible Officers) would already be subject to certain requirements under the Bill like "fit and proper" requirements and the duties to maintain proper internal controls.

8. The consequence of falling short of the requirements mentioned in paragraph 7 above is disciplinary sanctions by IIA whereas section 122 is about circumstances under which a body corporate's controller, director or manager or any partner of a partnership should not be allowed to hide behind the corporate veil and escape his criminal liability for offences committed by a body corporate or a partner of a partnership as a result of his consent, connivance, negligence or omission.

Use of "lay prosecutors" by IIA

9. Under new section 124(2) added by Clause 84 of the Bill, if IIA prosecutes an offence in its own name, the offence must be tried before a magistrate as an offence that is triable summarily. The proposed new section 124(3) of the Bill originally aims to provide flexibility to allow an employee of IIA who is not a qualified legal professional to act as a lay prosecutor when IIA prosecutes these minor offences in its own name. Although we envisage that the prosecution work would be taken up by IIA's in-house lawyers, we will nonetheless move a Committee Stage Amendment to delete the new section 124(3) in the light of members' concerns.

Status of IIA's codes and guidelines in court proceedings

10. To facilitate the compliance of the requirements under the Bill, the new section 131(1) added by Clause 84 of the Bill provides that IIA may publish non-statutory codes or guidelines. New section 131(4) and (5) (also added by Clause 84 of the Bill) sets out that a failure on the part of a person to comply with the non-statutory codes or guidelines does not by itself render the person liable to any judicial or other proceedings. However, if a provision in the code or guideline appears to the court to be relevant to a question arising in a proceeding under the amended ICO, the court must take into account any compliance or non-compliance of the codes or guidelines. The general rule that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute remains unaltered and the operation of the provisions would not have the effect of shifting the burden of proof from the prosecution to the defendant.

Drafting issue

11. The phrase “counsel or solicitor” appears not only in new section 121 (added by Clause 84 of the Bill), but also in the amended section 53A (Clause 64 of the Bill), new section 119 (Clause 84 of the Bill) and new sections 5 and 9 of Schedule 10 (Clause 94 of the Bill). We consider that the phrase should be kept. We would also like to point out that the phrase “counsel or solicitor” appears in various Ordinances, including the MPFSO, the Securities and Futures Ordinance (Cap. 571) and the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) and that “counsel” is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1).

12. The term “barrister” is used in section 124(3) because it refers to a “barrister under the Legal Practitioners Ordinance (Cap. 159). The term “barrister” is a defined term under Cap. 159. The term “barrister” only appears in new section 124(3) and as we intend to delete that provision (see paragraph 9 above), there will not be any inconsistency within the Bill.

Extract from the Trade Descriptions Ordinance (Cap. 362)

Section 2 - Interpretation

Product (產品) means any goods or service but does not include any goods or service covered by Schedule 4.

Section 7A - Offences in respect of trade description of services

- (1) A trader who—
- (a) applies a false trade description to a service supplied or offered to be supplied to a consumer; or
 - (b) supplies or offers to supply to a consumer a service to which a false trade description is applied,
- commits an offence.

- (2) In this section—

service (服務) does not include any service covered by Schedule 4.

Schedule 4 - Excluded Products

“Goods or services sold or supplied by a person regulated, licensed, registered, recognized or authorized under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485) or the Securities and Futures Ordinance (Cap. 571), being goods or services the sale or supply of which by that person is itself regulated under an Ordinance that is referred to in this item and under which the person is regulated, licensed, registered, recognized or authorized.”