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**Report of the Bills Committee on
Trade Descriptions (Amendment) Bill 2007**

Purpose

This paper reports on the deliberations of the Bills Committee on Trade Descriptions (Amendment) Bill 2007 (the Bills Committee).

Background

2. In recent years, there have been repeated incidents in which unscrupulous retailers employ deceptive, misleading and unfair trade practices in the course of their business. These have given rise to much public concern on the seriousness of the problem. In order to protect local consumers and tourists, and to uphold Hong Kong's reputation as a "Shoppers' Paradise", the Government considers it necessary to strengthen the consumer protection regime to ensure that it will continue to afford effective protection to consumers and cater for the wide array of new products and innovative advertisements and marketing.

3. The Financial Secretary (FS) announced in his Budget Speech of February 2007 that the Consumer Council (CC) would conduct a comprehensive review of existing measures to protect consumer rights, including ways to improve the relevant legislation to combat misleading and undesirable sales practices in order to boost the confidence of tourists and citizens in shopping in Hong Kong. While CC was conducting the review, the Government considered it necessary to take urgent action to strengthen the regulatory tools to tackle the prevalent malpractices of the unscrupulous shops and bring charges against them.

4. The Trade Descriptions Ordinance (Cap. 362) (TDO) is a major piece of legislation to protect consumers. It prohibits false trade descriptions and misstatements provided in the course of trade. However, the existing provisions of TDO are inadequate in dealing with certain trade malpractices where dishonest retailers make misleading or deceptive representations to induce consumers to buy goods. A task force comprising representatives from the Customs and Excise Department, the Police, the Department of Justice, CC, Hong Kong Tourism Board and the Travel Industry Council of Hong Kong was formed in 2007 to identify priority legislative changes that could be implemented early to tackle the more prevalent

malpractices. These changes involve making relatively simple and straightforward amendments to existing legislation and concentrate on a few areas that are major subjects of complaints received by CC and relevant Government departments in recent years.

The Bill

5. The relevant legislative changes identified by the task force are incorporated in the Trade Descriptions (Amendment) Bill 2007 (the Bill) which was introduced into the Legislative Council on 9 January 2008. The key elements of the Bill include:

- (a) amending section 2(1) of TDO to expand the definition of "trade description" to include certain matters relating to warranty and after-sale repair and maintenance services for goods. The effect of the amendment is that the provisions of TDO concerning false trade descriptions will apply to false representations relating to after-sale services.
- (b) adding three new provisions to provide for new offences prohibiting retailers from giving misleading price indications and making false or misleading representations to deceive consumers. The three new provisions seek to:
 - (i) prohibit the display, in the course of any trade or business, of signs that fail to give clear information as to the price of the goods set by reference to weight unit;
 - (ii) require retailers to inform customers before they make payment if the price of five types of electronic products, namely digital camera, digital camcorder, mobile phone, digital audio player, and portable multimedia player, does not include basic accessories; and
 - (iii) prohibit persons from making false or misleading representations regarding a retailer's connection with or endorsement by individuals or bodies of good standing and reputation.
- (c) aligning the level of penalties for the above new offences with the existing provisions.

The Bills Committee

6. The House Committee agreed at its meeting on 11 January 2008 to form a Bills Committee to study the Bill. Hon Fred LI Wah-ming was elected Chairman of the Bills Committee. The membership list of the Bills Committee is in **Appendix I**.

7. The Bills Committee has held a total of five meetings, including one meeting with deputations. It has received a total of 12 submissions from 14 organizations/individuals. The list of the organizations/individuals concerned is in **Appendix II**.

Deliberations of the Bills Committee

8. The Bills Committee supports the Bill with objective to enhance protection for consumers by prohibiting prevalent malpractices of retailers of giving misleading price indications and making false or misleading representations to deceive consumers. In the course of scrutinizing the Bill, the Bills Committee has noted and discussed the various issues and concerns raised by deputations concerning the scope of the Bill, and the clarity and effectiveness of the new requirements on retailers in enhancing protection for consumers. The deliberations of the Bills Committee are summarized in the ensuing paragraphs.

Scope of the Bill

9. While the deputations are in support of the Bill, they have expressed concern about the narrow scope of the legislative amendments, as the provisions only target at malpractices in relation to misleading price indications, false and misleading representations on availability of essential accessories and after-sale maintenance services for goods, and false and misleading representations regarding retailers' connection with or endorsement by celebrities or prestigious organizations. Moreover, the Bill regulates the supply of only goods but not services. As the number of consumer complaints relating to the supply of services continues to rise in recent years, members of the Bills Committee consider that the Bill should be extended to cover the supply of services. They also urge the Administration to expedite the introduction of legislative amendments covered under the comprehensive review conducted by CC and support increasing the power of CC to offer comprehensive protection for consumers.

10. The Administration advises that while TDO prohibits false trade descriptions, false marks and misstatements in trade or commerce, it only applies to goods but not services. The objective of the Bill is to introduce relatively simple legislative amendments to strengthen the existing regulatory regime to protect consumers against misrepresentations by retailers in areas subjected to frequent complaints in recent years. Broader issues relating to enhancement of the existing regulatory regime to protect consumers, and regulation of unfair sales practices in the services sectors are covered in the comprehensive review conducted by CC. The Bills Committee notes that CC's report entitled "Fairness in the Marketplace for Consumers

and Business" was published in February 2008. The Administration is examining the report and the recommendations therein. It is the Administration's intention to consult the public on the way forward before the end of 2008.

Expansion of the definition of "trade description"

11. Clause 4 of the Bill seeks to expand the definition of "trade description" in section 2(1) of TDO by adding subsection (k) to (p) to include the availability of after-sale inspection and repair services for the goods, the warranty given on such services, the person responsible for the services, the scope of the services, the period during which the services are available, and the cost for the services. If a seller makes false representations on after-sale services, he will commit an offence in respect of false trade descriptions under section 7 of TDO.

12. The Bills Committee notes deputations' concern that the required information under paragraph 11 would be cumbersome for general retailers. In particular, small-sized retailers may not have the resources to invest in computer systems for providing the information. There is concern that the requirement would increase the compliance cost on retailers.

13. The Administration explains that the required information regarding the availability of after-sale services is very basic and would be readily available to a retailer or could be obtained by him without difficulties. Moreover, the information may be provided by any means, other than by a computer. On the deputations' suggestion to allow retailers to provide the information on importers who are responsible for providing the after-sale services, the Administration considers that merely providing information on the importers may not be of help to the consumers. To allow the retail industry to prepare for the new requirements, the Administration would provide a grace period of about six months before implementing the new requirements. In this regard, clause 2 of the Bill provides that the new Ordinance will come into operation on a day to be appointed by the Secretary for Commence and Economic Development by notice published in the Gazette.

14. Members consider that the availability of spare parts for goods is an important component in the after-sale services for goods. There is ambiguity as to whether the proposed amendments to the definition of "trade description" in section 2(1) of TDO would cover information in this respect. To make it clear that the amended definition of "trade description" would include information relating to the provision of spare parts, the Administration has agreed to move Committee Stage amendments (CSA) to this effect. Moreover, to better reflect the legislative intent and to avoid confusion, CSAs will be made to replace the word "facilities" by "service" and "service of the goods" by "maintenance of the goods" in the proposed section 2(1)(k) to (p).

Proposed Part IIA - Prohibition of false, misleading or incomplete information in the course of trade or business

15. The proposed Part IIA of the Bill includes three new sections, i.e. sections 13A, 13B and 13C, which provide for new offences respectively regulating price signs displayed in the course of trade or business, requiring sellers to inform purchasers of specified products listed in the proposed Schedule 2 if the price of the product does not include basic accessories, and prohibiting sellers from giving false or misleading representations on their connection with other parties. The Bills Committee notes that the offences under Part IIA will apply to all persons in their course of trade or business, including manufacturers, wholesalers, retailers, and their employees. It also notes the Administration's clarification that a defence is already available under section 26 of TDO to persons charged with offences under the Ordinance, and an additional defence is proposed under the new section 13C(4) for persons charged with the offence under the new section 13C(1).

Proposed section 13A - Regulation on price signs for goods

16. The proposed section 13A provides that if a sign fails, by the criteria set out in subsection (2)(b), to give customers clear information as to the actual price of the goods, the person who displays the sign would be subject to criminal sanction. The provision is to address complaints against sales malpractices where sellers use misleading price signs, such as very small characters for weight unit, e.g. tael, on price signs to mislead customers into believing that the price is set by reference to a bigger unit, e.g. catty.

17. Members note that while comparable legislation in overseas jurisdictions such as Australia, New Zealand, and the United Kingdom contain a general provision prohibiting misleading price indication, such a provision is not included in the Bill. With a view to enhancing protection for general consumers, members have requested the Administration to consider including a general provision prohibiting misleading price indication in the Bill. The Administration explains that the legislative intent is to limit section 13A to written price representations only. It has reservation on the proposal of providing a general prohibition against misleading price indication as this would cover verbal representations, and may have implications on the current practice of the retail trade, such as price bargaining between buyers and sellers.

Signs indicating price set by reference to weight unit

18. The Bills Committee notes deputations' concern that as the proposed section 13A only seeks to regulate price signs set by reference to weight unit, unscrupulous retailers may circumvent the section by using other units of measurement, such as length or number of counts, in displaying the price of the goods. The Administration is urged to consider expanding the scope to cover other units of measurement. The Bills Committee notes that to address the concern, the Administration will move CSAs to expand the scope of the proposed section 13A to cover all units of quantity. In the relevant CSAs, "quantity" includes length, width, height, area volume, capacity, weight and number.

Requirements on giving information on price signs

19. Members have expressed concern about the lack of clarity of the phrases "fails to give clear information", "substantially less conspicuous" and "unreasonably far apart" under the proposed section 13A(2)(b) in describing letters, words, characters and numerals in a price sign. They consider that in the absence of objective requirements on price signs, retailers may unwittingly fall foul of the law. The Bills Committee has examined the need to set out clear requirements in the law, such as the size and colour of price signs, the font size of the letters, words, characters and numerals, the distance between them etc. on the sign, in order to facilitate compliance by retailers.

20. The Administration considers that given the very diverse practice in the retail trade, it would be impractical and undesirable to set rigid requirements regarding price signs, which may adversely affect retailers' creativity, and retailers may incur criminal liability inadvertently. In particular, the proposal would create compliance difficulty for small retailers, such as those of wet markets stalls. Members are concerned about the complicated drafting of the proposed section 13A(2)(b). In order to facilitate compliance by sellers, and ensure effective enforcement in future, they have requested the Administration to refine the drafting to better reflect the Administration's policy intent that price signs must indicate the price of goods in a readily comprehensible manner, and improve the clarity of the proposed section 13A. The Administration has taken on board members' views and will move CSAs to the section to this effect.

21. The deputations have expressed concern that the proposed section 13A may not tackle the malpractices where a seller displays a sign which only indicates the price of goods, and another sign indicating that the price shown on the first sign is set by reference to a specific unit of quantity, in order to mislead customers. To address the concern, the Administration will move CSAs to add a new section 13A(3) to provide that if a seller displays different signs to provide information on price and unit of quantity of the goods, the signs will be regarded as a single sign and subject to regulation under section 13A.

Requirement on retailers to display price signs

22. The Bills Committee notes that the proposed section 13A would not impose a mandatory requirement on sellers to display price signs, and accordingly the provision would not prohibit price bargaining. However, deputations are concerned that the provision may discourage retailers from displaying price signs in order to avoid application of the proposed section. Members consider that the Administration should ensure that consumers will be provided with sufficient information on price. The Administration explains that if a retailer does not display any price sign, consumer will likely make verbal enquiries. As such, consumers would be provided with price information to allow them in making informed decisions on purchases.

Proposed section 13B - Requirement on sellers of specified electronic products to inform consumers whether the price of the product includes basic accessories

23. Under the proposed section 13B, if the price of the five types of electronic products do not include any basic accessories of the product that are reasonably expected to be included in the price, the sellers are required to inform customers accordingly. The five types of electronic products are: digital audio players, digital camcorders, digital cameras, mobile phones and portable multimedia players. They are listed and defined in Part 1 and Part 2 of the new Schedule 2 to TDO respectively.

24. The Bills Committee has examined the application of the proposed section 13B on parallel imported goods and the impact of the requirement on retailers. The Administration advises that the proposed section 13B would be applicable to the specified electronic products, regardless of their source of supply. Hence, parallel imported goods are covered. As regards the concern about possible burden on retailers, the Administration explains that there would be no difficulty for retailers to comply with the requirement. Retailers can inform customers of the exclusion of the basic accessories from the price of the product when conveying price information on the product to customers. Retailers who have clearly indicated on a price sign that the price of the product does not include basic accessories would be regarded as having complied with the requirement.

25. The depositions have also raised concern whether software, such as CD-ROM, associated with electronic products should be included as "basic accessories" for the purpose of the proposed section 13B. The Administration explains that "basic accessories" as defined in section 13B(2)(a) refer to accessories essential for the effective performance of the principal function of the goods. Criteria for determining the principal function of the goods are set out in Part 2 of the new Schedule 2. The Administration points out that CD-ROM is normally not considered as "basic accessories". It further advises that section 13B(3) sets out the criteria for determining whether any basic accessories of the goods are reasonably expected to be included in the price of the goods. These include: (a) the prevailing trade practices, (b) the representations made by sellers, (c) the instructions for users provided by the manufacturer or distributor of the goods, (d) the packaging of the goods and the accessories, and (e) whether the price of the goods at which they were supplied to the seller included the accessories. Members consider that flexibility should be provided to allow the court to consider other factors which may be relevant in determining the principal function of the goods, and whether any basic accessories of the goods are reasonably expected to be included in the price of goods. The Administration has taken on board member's view and will move CSAs to amend the proposed section 13B(3) and section 2 of Part 2 of the new Schedule 2 to give the court more flexibility in considering the above matters.

26. The Bills Committee notes depositions' concern that sellers may adopt sales strategy to offer goods at reduced prices by excluding basic accessories or after-sale services for the goods. The requirement under the proposed section 13B may have impact on the above mentioned sales strategy and price bargaining between retailers and buyers. The Administration advises that the provision will not affect proper sales

strategy of retailers or price bargaining between retailers and consumers. It points out that if the price of the goods is reduced through exclusion of certain basic accessories or after-sale services, this should be made known to the consumers. The proposed section 13B seeks to protect consumers in this regard.

Proposed section 13C – Prohibition against false or misleading representations regarding sellers' connection with or endorsement by other persons

27. The proposed section 13C deals with another malpractice in trade, under which potential customers are misled into believing that certain celebrities are closely connected with or have endorsed a seller when that is not the case. The proposed section 13C(1) makes it an offence if a person, who in the course of trade, business, or profession, makes a false representation on a seller's connection with or endorsement by any individual or body. It is also possible that the name of a person represented to be connected with the seller is identical with or very similar to the name of another person who is reputable (the reputable party). To avoid misunderstanding by the customers in this regard, section 13C(2) requires the maker of the representation to take steps to prevent the customers from misbelieving that the seller is connected with or has been endorsed by the reputable party. The maker of representation will commit an offence if he fails to do so.

28. On the scope of the proposed section 13C, the Bills Committee notes that the Administration's intention is to cover all trades, businesses, or professions. In respect of "profession", it would include tour guides. The Administration considers that the provision would protect tourists from misrepresentations by tour guides. The Administration has consulted the relevant trade associations on the legislative proposals.

Rationale for criminalizing false or misleading representations regarding sellers' connection with celebrities

29. The Bills Committee notes deputations' concern that as the civil law of passing-off already provides that celebrities may dispute false or misleading representations regarding their connections with other parties in order to protect their interests, it would be inappropriate to impose criminal liability on persons charged under the proposed section 13C. There is concern about the absence of the requirement for the relevant individual or body to have a reputation in the case of a false representation in the proposed section 13C(1). There is also no need to establish confusion and damage to the individual or body for the offence under the proposed section 13C(1) and (2).

30. The Administration points out that it is already an offence under TDO for a person to make false trade descriptions in respect of goods provided in the course of trade. In order to protect consumers from deceptive acts of sellers making false or misleading representations regarding their connection with others, the Bill seeks to expand the scope of TDO to cover such acts. The proposed section 13C has no direct relevance to the law of passing-off. As regards concern about the lack of requirement for the individual or body referred to in section 13C(1) to be reputable, the

Administration explains that it is necessary to prohibit acts of false representations which are made in relation to persons who are not famous or reputable. For instance, a seller may make a false representation to a customer on his connection with a friend of the customer in order to induce the customer to enter into a transaction. The Administration further advises that the proposed section 13C(1) deals with false representations, while section 13C(2) deals with representations that are capable of misleading the customers. The latter is essentially an anti-avoidance provision to prevent circumvention of section 13C(1).

Need for providing definitions of terms

31. Given that the proposed section 13C involves criminal offence, the Bills Committee considers that terms such as "false representation", "likely to mistake", "widely known to be of good standing and reputation", used in the proposed section 13C should be clearly defined. The deputations have suggested using terms, such as "goodwill", "confusion", and "misrepresentation", provided in the law of passing-off to assist in the interpretation of the section. The Administration points out that the terms used in the proposed section 13C are commonly used in many local and overseas legislation without any definition. The court will look at the facts of each case and use an objective test in determining whether there is a contravention of the section. Furthermore, there is no reason to adopt terms used in the law of passing-off, as section 13C is designed to achieve a different objective. The Administration considers that the terms used in section 13C would achieve the objectives of the section.

32. The deputations have expressed concern whether the proposed section 13C(2) should apply to misunderstanding in connection with the use of photograph, autograph, nickname, or get-up, which may confuse customers. The Administration clarifies that application of the section is limited to the use of names that are identical with or similar to those of reputable individuals or bodies. It considers that the section is sufficient to achieve the intended objective and there is no need to expand the scope.

Defence under the proposed section 13C

33. Members of the Bills Committee have raised concern about the wide scope of the proposed section 13C(2) applying to all circumstances in the course of trade, business or profession. The scope would cover all kinds of representations, including verbal, written or visual, given by the seller or his employees in relation to the sale of the goods. In particular, members are concerned that the proposed section 13C(2) would impose an onerous burden on sellers, as they need to take steps to prevent customers from believing that they are connected with or endorsed by the reputable individual or body when it happens that the two have identical or very similar names. Members have urged the Administration to review the scope of the proposed section 13C(2) in the light of similar provisions in the Trade Practices Act 1974 of Australia. The Administration clarifies that if a seller does not make any representations to the customers on his connection with any parties in the sale of the goods, the proposed section 13C(2) will not apply to the seller. To address the concern about the wide scope of the proposed section 13C(2), the Administration has agreed to move a CSA to

limit the application of the section to representations made in connection with the supply or promotion of the supply of goods.

34. Members also consider it necessary to provide a defence for the offence under section 13C(2). The Administration has accepted members' suggestion and will move a CSA to add a new section 13C(5) to provide a defence to the person charged with the offence, if he can prove that he believed on reasonable grounds that the information recipient did not mistake the individual or body as represented to be connected with the seller for the reputable individual or body. Members support the proposed CSA. Members also note that the proposed section 13C(4) will provide a defence for a person charged with an offence under 13C(1). They support the Administration's proposed CSA to improve the drafting of the provision.

Committee Stage amendments

35. The Bills Committee has examined and supported the draft CSAs to be moved by the Administration. The Bills Committee will not move CSAs to the Bill.

35. The Bills Committee supports the resumption of Second Reading debate on the Bill at the Council meeting on 18 June 2008.

Consultation with the House Committee

37. The Bills Committee consulted the House Committee on 30 May 2008 and obtained its support for the Second Reading debate on the Bill to be resumed at the Council meeting on 18 June 2008.

Council Business Division 1
Legislative Council Secretariat
6 June 2008

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

Membership List

Chairman	Hon Fred LI Wah-ming, JP
Members	Hon Margaret NG
	Hon SIN Chung-kai, SBS, JP
	Hon Audrey EU Yuet-mee, SC, JP
	Hon Vincent FANG Kang, JP
	Hon Andrew LEUNG Kwan-yuen, SBS, JP
	Hon Alan LEONG Kah-kit, SC
	Hon WONG Ting-kwong, BBS
	(Total : 8 members)
Clerk	Ms Connie SZETO
Legal Adviser	Ms Connie FUNG

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

List of organizations/individuals submitted views on the Bill

1. The Civic party
2. The Democratic Party
3. Hong Kong Jade Wholesalers & Retailers Association Ltd
4. The Hong Kong Institute of Trade Mark Practitioners
5. The Hong Kong Chinese Importers' & Exporters' Association
6. Hong Kong Jewellery & Jade Manufacturers Association
7. Hong Kong General Chamber of Commerce
8. The Hong Kong Electronic Industries Association Ltd
9. The Chinese General Chamber of Commerce
10. Dr CHAN Tung, Chairman of Sham Shui Po District Council
11. Hong Kong Trade Services Council
12. The Hong Kong Association of Pharmaceutical Industry
13. Consumer Council
14. The Law Society of Hong Kong