

Bills Committee on Trade Descriptions (Amendment) Bill 2007

Summary of deputations' views on individual clauses of the Bill
(as at 3 April 2008)

Abbreviations: The Civic party (CP) (LC Paper No. CB(1)840/07-08(02))
The Democratic Party (DP) (LC Paper No. CB(1)885/07-08(01))
Hong Kong Jade Wholesalers & Retailers Association Ltd (HKJWRA)
The Hong Kong Institute of Trade Mark Practitioners (HKITMP) (LC Paper No. CB(1)808/07-08(03))
The Hong Kong Chinese Importers' & Exporters' Association (HKCIEA) (LC Paper No. CB(1)840/07-08(03))
Hong Kong Jewellery & Jade Manufacturers Association (HKJJMA)
Hong Kong General Chamber of Commerce (HKGCC) (LC Paper No. CB(1)808/07-08(04))
The Hong Kong Electronic Industries Association Ltd (HKEIA) (LC Paper No. CB(1)808/07-08(05))
The Chinese General Chamber of Commerce (CGCC) (LC Paper No. CB(1)808/07-08(06))
Dr CHAN Tung, Chairman of Sham Shui Po District Council (Dr. CHAN) (LC Paper No. CB(1)808/07-08(07))
Hong Kong Trade Services Council (HKTSC) (LC Paper No. CB(1)808/07-08(08))
The Hong Kong Association of Pharmaceutical Industry (HKAPI) (LC Paper No. CB(1)840/07-08(04))
Consumer Council (CC) (LC Paper No. CB(1)939/07-08(01))
The Law Society of Hong Kong (LSHK) (LC Paper No. CB(1)993/07-08(01))

Clause/Issue	Concern/View	Administration's responses/ proposed amendments
General	1.1 CP expresses the following concerns: (a) While supporting the Government's initiative in introducing amendments to existing legislation to protect consumers, CP considers that care should be taken to avoid over-legislation and imposing compliance burden on honest traders; and	Agreed. We believe that compliance with the provisions in the Bill should not be unduly onerous.

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	<p>(b) The Administration should expedite the introduction of legislative amendments covered under the comprehensive review (the Stage Two Review) currently being undertaken by the Consumer Council (CC) with a view to regulating sales malpractices in various trades, including real properties transactions and the services sector, as well as examining the need to increase the power of CC to offer comprehensive protection for consumers.</p> <p>1.2 DP expresses support for the Bill in general. DP urges that legislative amendments relating to regulation of the services sectors, with priority given to paid-TV service, telecommunication service, and beauty service, should be expedited to deter malpractices of inducing consumers into transactions through misrepresentation in advertisements. As regards regulation on the sale of residential properties, DP suggests that information contained in the sales descriptions should be subject to legal control. DP also opines that the Stage Two Review should cover the examination of CC's role, its functions and powers.</p> <p>1.3 HKITMP queries about</p> <p>(a) The reason for criminalizing under the Bill certain conduct of retailers which have traditionally been a civil concern. It is unclear how the new criminal offences under the Bill will interact with the law of passing off. Moreover, the scope of the criminal offences is uncertain and vague since they are expressed in terms unfamiliar to the courts and for which there is no history of case law and jurisprudence;</p>	<p>We will examine the Consumer Council's Report entitled "Fairness in the Marketplace for Consumers and Business" and the recommendations therein. We aim to consult the public on the way forward before the end of this year.</p> <p>The issues have been included in the Consumer Council's Report entitled "Fairness in the Marketplace for Consumers and Business". We will examine the Report's recommendations, and we aim to consult the public on the way forward before the end of this year.</p> <p>Currently, it is already an offence under the Trade Descriptions Ordinance for a person to make false trade descriptions in respect of goods provided in the course of trade, and the Bill only seeks to expand the scope of the offence to cover, inter alia, false or misleading representations regarding a</p>

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	<p>(b) Why the provisions in the Trade Descriptions Ordinance (Cap. 362) only applies to goods but not services. Given the intention of the Administration is to protect consumers, it will be advisable to include "the provision of services" under the Bill; and</p> <p>(c) The enforceability of the proposed amendments since they required many subjective assessments. For instance, what is a "representation", when is a "representation" misleading, and what constitutes "good standing or reputation"? The Bill coupled with vague and untested language needs to be considered seriously.</p> <p>1.4 HKCIEA welcomes the proposed amendments to strengthen protection for consumers and tourists, boost business of the retail</p>	<p>seller's connection with or endorsement by others. The objective is to protect consumers from such deceptive acts. It has no direct relevance to the law of passing-off, which is more concerned about the rights of the celebrity whose name is used without his/her consent. As for the lack of case law, it should not be a concern as all new legislation would face similar problems.</p> <p>The issue has been included in the Consumer Council's Report entitled "Fairness in the Marketplace for Consumers and Business". We will examine the Report's recommendations, and we aim to consult the public on the way forward before the end of this year.</p> <p>It would not be possible to lay down scientific criteria for the terms. Similar to many overseas legislation in this area, the court would need to adopt an objective reasonable man test in deciding whether a particular act has contravened this provision or not.</p> <p>The issue has been included in the Consumer Council's report. We will</p>

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	<p>and tourism industries, and reinforce Hong Kong's reputation as a "Shoppers' paradise". Moreover, consideration should be given to expand the definition of "trade description" to cover the services sectors so as to combat malpractices of the services providers.</p> <p>1.5 HKJJMA is worried that the enforcement of the proposed amendments may affect the operation of the retail industry and cause unnecessary disputes between the retailers and consumers.</p> <p>1.6 HKGCC supports the Bill in general</p> <p>1.7 HKEIA gives full support to the Bill.</p> <p>1.8 CGCC supports the Bill in general.</p> <p>1.9 Dr. CHAN supports the Bill as it will help strengthen regulation of sales practices of the retailers and restore consumers' confidence. The Bill should be enacted and implemented as soon as possible.</p> <p>1.10 HKTSC supports the Bill which helps combat the malpractices of a small group of unscrupulous traders. However, the proposals should avoid imposing compliance burden on small and medium-sized retailers and negative impact on the sale of parallel imported goods.</p>	<p>examine the report's recommendations, and we aim to consult the public on the way forward before the end of this year.</p> <p>We believe that compliance with the provisions in the Bill should not be unduly onerous and should not affect the operation of the retail industry. In addition, the provisions should enhance communication between retailers and consumers and minimize disputes.</p> <p>Noted.</p> <p>Noted.</p> <p>Noted.</p> <p>Agreed.</p> <p>Agreed. We believe that compliance with the provisions in the Bill should not be unduly onerous.</p>

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	<p>1.11 CC expresses full support to the Bill to strengthen consumer protection. It considers that the amendments should be enacted and implemented as an expeditious and practical tool to address some of the inadequacies in the existing Trade Descriptions Ordinance and the trade practice issues arising from these inadequacies.</p> <p>1.12 LSHK expresses concern about the possible impacts of the Bill on retailers and enquired whether the Administration would consider providing "grace period" in implementing the new requirements. It further supports extending the scope of the Trade Descriptions Ordinance to cover services.</p>	<p>Agreed.</p> <p>We intend to allow retailers a grace period of say, six months, to enable them to prepare for the new requirements before implementation of the new legislation. The issue of provision of services has been included in the Consumer Council's Report entitled "Fairness in the Marketplace for Consumers and Business". We will examine the Report's recommendations, and we aim to consult the public on the way forward before the end of this year.</p>
<p>Clause 4</p>	<p>2.1 CGCC opines that the proposed amendment requiring sellers to record in sale invoices details including the availability of after-sale services for a product, the places where the services are provided etc, may be cumbersome for general retailers. In particular, small-sized retailers may not have the required resources to run computer systems. CGCC suggests requiring the retailers to provide information on the importers who are responsible to provide the after-sale services.</p>	<p>The required information regarding the availability of after-sale services is very basic, which should be readily available to the retailer or can be obtained by him without difficulties. The information may be provided by any means, other than by a computer. Merely providing information on the importers may not be of help to the consumers.</p>

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	<p>2.2 CC suggests adding "or parts of the goods" after "facilities for the inspection, repair or service of the goods" in the amended section 2(1)(k) to reflect the extent of protection more clearly and to keep in line with the existing definition of "trade description" which covers prescribed indications with respect to "any goods or parts of goods".</p>	<p>Noted.</p>
<p>Clause 7 – Proposed section 13A</p>	<p>3.1 CP is concerned that</p> <p>(a) As the proposed section 13A only seeks to regulate price signs set by reference to weight unit, unscrupulous retailers may circumvent the regulation by using other units of measurement, such as length or number of counts, in displaying the price of the goods. The Administration should consider extending the scope of the proposed section to cover other units of measurement;</p> <p>(b) The lack of clarity of the phrases "substantially less conspicuous" and "unreasonably far apart" under the proposed section 13A(2)(b) may adversely affect retailers' creativity and honest retailers may unwittingly fall foul of the law. CP urges that the said phrases should be clearly defined; and</p>	<p>Agreed. We will expand the scope of this section to “units of quantity”.</p> <p>The existing practice of the vast majority of retailers would not constitute an offence. Given the very diverse practice in the retail trade, it will not be feasible nor desirable to set rigid requirements regarding the size of price signs or the words therein lest many retailers may incur criminal liability inadvertently. Similar to many other legislation, the court would need to adopt an objective reasonable man test in deciding whether a particular act has contravened the law or not.</p>

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	<p>(c) While the Administration has no intention to require mandatory display of price signs by retailers or prohibit price bargaining, the Bill has made detailed provisions for display of price sign and on the need to inform potential customers whether the price of the goods included any basic accessories of the goods. There was concern that the provisions may discourage retailers from displaying price signs in order to avoid contravention of the new requirement. The Administration should ensure that consumers will be provided with sufficient information on price to make informed decision on purchases.</p> <p>3.2 Regarding the requirement on price signs for goods, HKCIEA suggests that consideration should be given to set out the relevant requirements, such as the size and colour of the price sign, the font size of the characters, the size of the price indication in relation to the weight unit or other units of measurement and the distance between the two. This will facilitate compliance of the new requirements by retailers and provide clarity to consumers.</p> <p>3.3 CGCC supports the proposed amendment to regulate misleading price indications.</p> <p>3.4 CC is concerned about the effectiveness of the proposed section 13A in protecting consumers against misleading price indication. Retailers may indicate the price in a sign and deliberately omit information such as weight unit, but give such information only</p>	<p>If a retailer does not display any price sign, consumer will likely make verbal enquiries. In such circumstances, the retailer is still obliged to make it clear to the consumer if the price does not include certain basic accessories.</p> <p>We are examining the proposal, especially its implications for small retailers (such as wet markets stalls) who may have difficulties in following the requirements.</p> <p>Noted.</p> <p>We are examining the proposal, especially its implications for small retailers (wet market stalls) who may have difficulties in following the requirements.</p>

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	<p>verbally upon consumers' enquiries. Consideration should be given to extend the scope of the proposed section 13A to cover omission of essential information concerning the weight unit or price from the signs displayed.</p>	
<p>Clause 7 – Proposed section 13B</p>	<p>4.1 CP expresses the following concerns:</p> <p>(a) The proposed section 13B may have impact on the sale of parallel imported goods as the "basic accessories" connected with these goods are usually not usable in the local environment. The Administration should clarify whether "basic accessories" referred to in the proposed section 13B(2)(a) is applicable to parallel imported good;</p> <p>(b) Software like CD-Rom that associated with electronic products should be included as "basic accessories" in the proposed section 13B(2)(a) and amendments should be considered to clearly spell out the inclusion in the provision; and</p> <p>(c) Sellers may adopt sales strategy to offer goods at reduced prices by excluding basic accessories of or after-sale services for the concerned goods. The proposed section 13B(3)(e), where "the price of the goods at which they were supplied to the seller included the accessories" will be one of the considerations in determining whether any basic accessories of any goods are reasonably expected to be included in the price of the goods, may have impact on the above mentioned sales strategy. The Administration should ensure that the</p>	<p>The proposed section 13B is applicable to the prescribed electronic products, regardless of their source of supply. Hence, parallel imported goods are covered.</p> <p>CD-Roms are normally not considered as "basic accessories".</p> <p>The provisions do not affect proper sales strategies of retailers or price bargaining between retailers and consumers. If the prices of goods are 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.</p>

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	<p>Bill could safeguard the interest of consumers in making informed purchase decisions while allowing room for price bargaining.</p> <p>4.2 HKTSC suggests that the sellers should be regarded as complying with the requirement under the proposed section 13B(1) if they have clearly indicated in the price signs that the price is not inclusive of certain basic accessories.</p>	<p>Agreed. Such indication is acceptable under the Bill.</p>
<p>Clause 7 – Proposed section 13C</p>	<p>5.1 HKJWRA is concerned about whether a seller referred an artificially coloured jadeite jade as natural Fei Cui will commit an offence of making a false representation under the proposed section 13C(1).</p> <p>5.2 HKITMP expresses concerns or makes suggestions as follows:</p> <p>(a) Concern about the impact of the proposed section 13C as misrepresentations are normally disputed by the celebrities themselves or competitors and making out a case in passing off can be difficult. It queries about the appropriateness to impose criminal liability in such an area where certainty is highly in issue;</p>	<p>A piece of jadeite jade that has been artificially coloured should not be described as natural Fei Cui.</p> <p>Currently, it is already an offence under the Trade Descriptions Ordinance for a person to make false trade descriptions in respect of goods provided in the course of trade, and the Bill only seeks to expand the scope of the offence to cover, inter alia, false or misleading representations regarding a seller's connection with or endorsement by others. The objective is to protect consumers from such deceptive acts. It has no direct relevance to the law of passing-off, which is more concerned about</p>

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	<p>(b) There is no requirement that the individual or body referred to in the proposed section 13C(1) is reputable. A criminal offence could be committed even if the individual or body actually has no protectable goodwill under the common law;</p> <p>(c) There is no need to establish confusion and damage to the plaintiff for the purpose of an offence under the proposed section 13C(1) and (2);</p> <p>(d) The difference between the offence under the proposed section 13C(1) and (2) is unclear;</p> <p>(e) The terms "false" and "representation" in the proposed section 13C(1) should be clearly defined;</p> <p>(f) Whether the proposed section 13C(2) only applies to misunderstanding arising from the use of names and not other indications of a connection such as the use of a photograph or get-up, and whether the use of names means legitimate identical or similar names;</p>	<p>the rights of the celebrity whose name is used without his/her consent.</p> <p>Same as above.</p> <p>Same as above.</p> <p>Section 13C(1) deals with false representation, while section 13C(2) deals with representations that are capable of misleading the recipient. The latter is essentially an anti-avoidance provision to prevent circumvention of section 13C(1).</p> <p>The terms are commonly used in many local and overseas legislation without being defined.</p> <p>The proposed section 13C(2) only applies to the use of names that are identical with or similar to those of reputable individuals or bodies.</p>

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	<p>(g) Suggestion to use "confusion" under passing off instead of "likely to mistake" in the proposed section 13C(2) if they are intended to be equivalent;</p> <p>(h) The test of "widely known to be of good standing and reputation" under the proposed section 13C(2) is not the same as "goodwill" under passing off; and</p> <p>(i) The phrase "prove that he had reasonable cause to believe that the representation was true" under the proposed section 13C(4) appears to be vague. It is more appropriate to have a positive requirement for knowledge since it is a defence for a criminal offence.</p>	<p>The two expressions are not intended to be equivalent. We believe the expression "likely to mistake" would better achieve the objective of section 13C(2) because the identity of person is at issue.</p> <p>There is no reason to adopt an expression used in the law of passing off, as the section 13C(2) is designed to achieve a different objective. We believe the term "widely known to be of good standing and reputation" would better achieve the objective of section 13C(2).</p> <p>We are examining the wordings of section 13C(4).</p>
5.3	CGCC agrees that a defence should be provided in proposed section 13C(4) for a person charged under 13C(1).	Noted.
5.4	As the Bill has not defined "widely known to be of good standing and reputation ("reputable individual or body")", and that celebrities and prestigious organizations could already prohibit unauthorized use of their names or trade marks under relevant existing legislation, HKTSC does not consider it necessary to	The objective of section 13C is to protect consumers from misleading representations. Actions available to celebrities and prestigious organizations would not offer consumers such protection

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	<p>introduce new control regarding sellers' connection with reputable individual or body, and suggests to delete the proposed section 13C.</p> <p>5.5 CC urges the Administration to consider amending the proposed section 13C(4) to add "when it was made" after "the representation was true".</p> <p>5.6 LSHK expresses views and makes suggestions as follows:</p> <p>(a) The scope of the proposed section 13C goes further than passing off;</p> <p>(b) The proposed distinction between "false" and "misleading" representation in the proposed section 13C is unclear. There is no need to distinct between "false" and "misleading" representation;</p> <p>(c) In the case of "false representation" in the proposed section 13C(1), there is no requirement that the relevant individual or body has a reputation. There is no point making a false representation if the individual or body is unknown or does not enjoy some level of recognition or fame;</p>	<p>and are irrelevant to them.</p> <p>Noted. We are examining the wordings of section 13C(4).</p> <p>The objective of section 13C is to protect consumers from deceptive acts. It has no direct relevance to the law of passing-off, which is more concerned about the rights of the celebrity whose name is used without his/her consent.</p> <p>Section 13C(1) deals with false representation, while section 13C(2) deals with representations that are capable of misleading the recipient. The latter is essentially an anti-avoidance provision to prevent circumvention of section 13C(1).</p> <p>Disagree. There are cases where false representations are made in relation to persons who are not famous or reputable, e.g. friends of the customer.</p>

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	<p>(d) The reference to "good standing and reputation" and "reputable" in the proposed section 13C(2) requires moral and social evaluation. The term "reputation/goodwill" used in passing off is relatively neutral. The proposed section 13C should be reviewed by using familiar terms in passing off cases such as "misrepresentation" and "reputation" so that the dicta in passing off cases can be used to assist with the interpretation of this section; and</p> <p>(e) The proposed section 13C(2)(b) refers to misunderstanding or confusion caused by identical or very similar names only. The scope should be expanded to cover other forms such as photograph, autograph or nickname that could lead to confusion.</p>	<p>There is no reason to adopt an expression used in the law of passing off, as section 13C(2) is designed to achieve a different objective. We believe the term "widely known to be of good standing and reputation" would better achieve the objective of section 13C(2).</p> <p>The proposed section 13C(2) only applies to the use of names that are identical with or similar to those of reputable individuals or bodies. It is sufficient to achieve its intended objective. We do not see the need to expand its scope.</p>
Other issues	<p>6.1 HKJWRA proposes to introduce three definitions for Fei Cui to reflect their different qualities and enquires about how retailers should record the descriptions of the articles bearing Fei Cui in the invoice or sale receipt.</p> <p>6.2 HKGCC expresses concerns as follow: (a) The proposed amendments to be introduced under subsidiary legislation seem in effect putting all the legal responsibilities</p>	<p>The definition of natural Fei Cui, which will be introduced by way of subsidiary legislation, will provide the necessary protection for consumers. Particulars to be recorded in invoices will be set out in the subsidiary legislation.</p> <p>The objective of the Bill is to protect consumers. Retailers selling such items to</p>

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	<p>upon the sellers of specialty items like diamond, gold, and natural fei cui, to make full and clear product description to general consumers. The proposed amendments may prohibit the sale of such specialty items by general retailers. It is suggested that manufacturers and/or importers of these specialty items should also assume such responsibilities.</p> <p>(b) The proposed amendments to be introduced under subsidiary legislation will require sellers to provide technical and cumbersome information in the sales invoices. There will be difficulty for general retailers to comply with the new requirements.</p> <p>6.3 CGCC expresses concern on proposed legislative amendments in the Administration's consultation paper issued in July 2007 regarding misrepresentation of natural Fei Cui, diamond, platinum and on core features of electronic products, as well as inadequate information provided in invoices for gold and platinum. For details, please refer to paragraphs 4 to 9 of CGCC's submission (LC Paper No. CB(1)808/07-08(06)).</p> <p>6.4 HKTSC considers that the Government should step up consumer education and publicity through the Internet and electronic media, and at border control points so as to increase the awareness of consumers and visitors of sale malpractices and enhance their alertness to protect their own interests.</p> <p>6.5 HKAPI highlights the harmful effect of counterfeit drugs and</p>	<p>consumers have an obligation to inform the latter what exactly the items are. Manufacturers and importers do not interact with consumers direct.</p> <p>The required information is very basic, which should be readily available to the retailer or can be obtained by him without difficulties. The information may be provided by writing or computer printout.</p> <p>Noted. The current provisions in the Bill have already taken into account comments received during the consultation exercise.</p> <p>Agreed. We will work closely with the Consumer Council on consumer education and publicity.</p> <p>It is already an offence under the Trade</p>

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	expresses grave concern on the low levels of fines for the offence. Pointing out that countries like the United States, European Union member states and many Asian countries have enacted special legislation against counterfeit pharmaceutical, HKAPI suggests consideration be given to adding provisions on pharmaceuticals under the Bill for regulating the sales of counterfeit pharmaceuticals.	Descriptions Ordinance to sell counterfeit goods.

Council Business Division 1
Legislative Council Secretariat
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