

立法會
Legislative Council

LC Paper No. CB(1)2547/11-12
(These minutes have been seen
by the Administration)

Ref : CB1/BC/2/11/2

**Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012**

**Minutes of the fifth meeting
held on Tuesday, 15 May 2012, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex**

- Members present** : Hon Fred LI Wah-ming, SBS, JP (Chairman)
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwong, BBS, JP
Hon Starry LEE Wai-king, JP
Dr Hon LEUNG Ka-lau
Hon Paul TSE Wai-chun, JP
Hon Tanya CHAN
- Member absent** : Hon James TO Kun-sun
- Public officers attending** : Agenda Item I
Mrs Alice CHEUNG
Deputy Secretary for Commerce and Economic
Development (Commerce & Industry)³

Mr YAU Kin-chung
Principal Assistant Secretary for Commerce and
Economic Development (Commerce and Industry)
Special Duties

Mr CHEUNG Sai-yan
Head of Trade Controls
Customs and Excise Department

Mr LAM Po-chuen
Head of Consumer Protection Bureau 2
Customs and Excise Department

Mr Eamonn MORAN
Law Draftsman
Department of Justice

Mr Peter SZE Chun-fai
Government Counsel
Department of Justice

Clerk in attendance : Ms YUE Tin-po
Chief Council Secretary (1)3

Staff in attendance : Mr Bonny LOO
Assistant Legal Adviser 3

Mr Joey LO
Senior Council Secretary (1)3

Action

- I. Confirmation of minutes of meeting**
(LC Paper No. CB(1)1822/11-12 -- Minutes of meeting held on
21 March 2012)

The minutes of the meeting held on 21 March 2012 were confirmed.

- II. Meeting with the Administration**
(LC Paper No. CB(1)1824/11-12(01) -- List of follow-up actions
arising from the discussion at
the meeting on 21 March
2012

- LC Paper No. CB(1)1824/11-12(02) -- Administration's response to issues raised at the meeting on 21 March and 12 April 2012
- LC Paper No. CB(1)1689/11-12(01) -- List of follow-up actions arising from the discussion at the meeting on 12 April 2012
- LC Paper No. CB(1)1689/11-12(02) -- Administration's response to issues raised at the meeting on 12 April 2012
- LC Paper No. CB(1)1824/11-12(03) -- Administration's paper in response to letter from Assistant Legal Adviser as set out in LC Paper No. CB(1)1321/11-12(03)
- LC Paper No. CB(1)1321/11-12(03) -- Letter from Assistant Legal Adviser to the Administration dated 15 March 2012
- LC Paper No. CB(3)511/11-12 -- The Bill
- File Ref: CITBCR 05/08/1 -- Legislative Council Brief issued by the Commerce and Economic Development Bureau
- LC Paper No. LS37/11-12 -- Legal Service Division Report
- LC Paper No. CB(1)1510/11-12(01) -- Latest marked-up version showing the proposed amendments to the Trade Descriptions Ordinance and the Telecommunications Ordinance prepared by the Administration)

The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

- Admin 2. The Administration was requested to consider:
- (a) amending the conjunction between paragraphs (a) and (b) of the proposed section 13D(3) under clause 13 of the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 ("the Bill") by replacing "and" with "or", to reflect the legislative intent that the circumstances specified in the two paragraphs were not meant to be cumulative;
 - (b) amending the expression "該損害" in the Chinese text of the proposed Committee Stage amendment (CSA) to the proposed section 13D(3)(b)(ii), in view of the deletion of the proposed section 13D(5) from which the expression "該損害" was quoted;
 - (c) proposing a CSA to explain the legal status and legislative effect of the notes used in the Bill, by making reference to the CSAs on the use of a note in clause 2 of the Competition Bill to be proposed by the Administration, and whether the note under the proposed section 7A under clause 8 of the Bill should be removed or converted to one of general application in order to avoid doubts about the scope of application of the proposed section 21A; and
 - (d) proposing CSAs to replace "the directors" with "all the directors" in the definitions of "principal officer" and "shadow director" under the proposed section 20(3) for clarity purpose, and to replace the expression "一眾董事" with "所有董事" in the Chinese text accordingly.

II. Any other business

3. The Chairman reminded members that the sixth and seventh meetings would be held on 17 May 2012 at 2:30 pm and 21 May 2012 at 2:30 pm respectively.

(Post-meeting note: The sixth meeting originally scheduled for 17 May 2012 at 2:30 pm was subsequently cancelled due to the continuation of the Council meeting on 16 May 2012.)

4. There being no other business, the meeting ended at 6:13 pm.

Council Business Division 1
Legislative Council Secretariat
6 September 2012

**Proceedings of the fifth meeting of
Bills Committee on
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012
on Tuesday, 15 May 2012, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject(s)	Action required
000629 - 000700	Chairman Administration	Opening remarks by the Chairman	
000701 - 001118	Chairman Administration	Briefing by the Administration on its responses to issues raised by the Bills Committee at the meetings on 21 March and 12 April 2012 (LC Paper No. CB(1)1824/11-12(02).	
001119 - 001356	Chairman Assistant Legal Adviser (ALA) Administration	Discussion on false trade descriptions of goods and services and trade puff in the light of the UK Trade Descriptions Act 1968 and the application of <i>Cadbury Limited v Halliday</i> [1975]1 WLR 649 to the proposed definitions of "trade description" under the Bill.	
001357 - 002337	Chairman Administration ALA	<p>Briefing by the Administration on its responses to questions raised by ALA in his letter of 15 March 2012 (LC Paper No. CB(1)1824/11-12(03).</p> <p>In response to the ALA's suggestion to simplify the formulation of the proposed section 13D(3)(b)(ii), the Administration would propose Committee Stage amendments (CSAs) to amend the provision to the effect that "the practice is likely to cause the average member of that group only to make a transactional decision that the consumer would not have made otherwise." (subject to fine tuning) and to remove the proposed section 13D(5).</p> <p>The Administration agreed to consider ALA's suggestion to amend the conjunction between paragraphs (a) and (b) of the proposed section 13D(3) by replacing "and" with "or", to reflect the legislative intent that the circumstances specified in the two paragraphs were not meant to be cumulative.</p>	The Administration to follow up as stated in paragraph 2(a) of the minutes.
002338 - 002742	Chairman Mr Vincent FANG Administration	<p><u>Proposed section 13D – Average consumer</u></p> <p>Discussion on the meaning of "materially distort the economic behaviour" in the proposed section 13D(5).</p> <p>Mr Vincent FANG relayed the trades' concern that a trader might inadvertently commit acts that would be regarded as materially distorting the economic behaviour of the</p>	

Time marker	Speaker	Subject(s)	Action required
		<p>consumer, if a consumer changed his mind to buy a promotion item rather than the one he had originally targeted.</p> <p>The Administration advised that a trader would not commit an offence if no unfair trade practices, such as false trade descriptions, misleading omissions and aggressive commercial practices, etc., were involved.</p>	
002743 - 004530	<p>Chairman Mr Vincent FANG Administration ALA</p>	<p><u>Proposed section 13E – Misleading omissions</u></p> <p>Mr Vincent FANG relayed the trades' concern that frontline salespersons who might not fully master all the features and functions of digital and electronic products would risk committing the offence of misleading omission. He also relayed the concern of the trades whether the failure of a trader to inform consumers of all the current promotion offers would constitute "misleading omission". In this regard, Mr FANG urged the Administration to stipulate clearly what would constitute an offence in the enforcement guidelines to be issued under the proposed section 16BA on matters in relation to which an authorized officer might exercise powers under the Trade Description Ordinance (Cap. 362) (TDO). This would enhance traders' understanding on how the law would be enforced to avoid inadvertent contravention. He also urged the Administration to consult the trades on the formulation of the guidelines.</p> <p>The Administration advised that under the proposed sections 13E(2) and (3), in determining whether a commercial practice was a misleading omission, account had to be taken of all the features and circumstances of the commercial practice, whether there were limitations of the medium used to communicate the commercial practice (including limitations of space or time), and if so, whether any measures had been taken by the trader to make the information available to the consumers by other means. The legislative intent was to guard against the omission of material information in relation to the commercial practice in question. In addition, section 26 of the TDO provided a defence of mistake or accident etc. for traders.</p> <p>The Administration would propose a CSA to the Chinese text of the proposed section 13E(2)(b) to replace “隱瞞” with “隱藏” to avoid any possibility of mistaken understanding.</p> <p>ALA added that under the proposed section 13E(5),</p>	

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		<p>"material information" was defined to mean, among other things, the information that the average consumer needed to make an informed transactional decision, whereas under the proposed section 2(1), a "transactional decision" was defined to mean any decision made by a consumer concerning, among other matters, whether, how or on what terms to purchase, pay for, retain or dispose of <u>a</u> product, rather than <u>any</u> product.</p> <p>The Administration assured members that the Bills Committee and the trades would be consulted on the draft outline of the enforcement guidelines. The proposed section 16BA required that consultation had to be done before the issuance of such guidelines.</p>	
004531 - 005100	Chairman ALA Administration	<p><u>Proposed section 13D – Average consumer</u></p> <p>Discussion on whether financial disadvantage and "specific misfortune or circumstance" should be included as relevant factors referred to in the proposed section 13D(3)(b)(i) in considering whether a group of consumers was particularly vulnerable.</p> <p>Discussion on the appropriateness of the Chinese equivalent "左右" in the context of the expression "vulnerable" under the proposed section 13D(3)(b)(i), vis-à-vis "影響" in the proposed section 13D(3)(b)(ii).</p> <p>The Administration advised that the Chinese expression "左右" also meant "支配、操縱" or "影響、支配" according to《現代漢語詞典》 and《國語活用辭典》. It had wider connotations and was a more suitable rendition for "vulnerable" in the context of the proposed section 13D(3)(b)(i). As the Administration would propose a CSA to the proposed section 13D(3)(b)(ii), the relevant Chinese expression would be carefully crafted to avoid any textual inconsistencies in the various Chinese expressions under the provisions.</p> <p>ALA suggested amending the expression "該損害" in the Chinese text of the proposed CSA to the proposed section 13D(3)(b)(ii) in view of the deletion of the proposed section 13D(5) from which the expression "該損害" was quoted.</p>	The Administration to follow up as stated in paragraph 2(b) of the minutes.
005101 - 005700	Chairman ALA Administration	Discussion on the use of notes and the need for a clause explaining their legal status and legislative effect in the Bill, by making reference to the CSAs on the use of a note in clause 2 of the Competition Bill to be proposed by	

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		<p>the Administration.</p> <p>Discussion on whether the note under the proposed section 7A should be removed or converted to a note of general application to avoid any possible confusion about the scope of application of the proposed section 21A.</p>	<p>The Administration to follow up as stated in paragraph 2(c) of the minutes.</p>
005701 - 011300	<p>Chairman Administration Mr Vincent FANG ALA</p>	<p>Clause-by-clause examination of the Bill (Chinese version)</p> <p><u>Latest marked-up version (LC Paper No. CB(1)1510/11-12(01))</u></p> <p><u>Proposed section 13G – Bait advertising</u></p> <p>Mr Vincent FANG relayed the trades' concern that as the timing of delivery to Hong Kong of certain products (such as popular electronic products manufactured overseas) was outside control of the traders, they might inadvertently commit the offence of bait advertising if they failed to supply such products after launching the advertisement.</p> <p>The Administration advised that the Bill did not stipulate that a mere failure to deliver products was an offence. The Bill required that the trader should offer the products for supply for a period that was, and in quantities that were, reasonable, having regard to the nature of the market and the advertisement. The proposed section 26A provided an additional defence against the offence of bait advertising.</p> <p>Discussion on the legislative intent of the proposed section 13G(2)(a) and 13G(2)(b). The Administration confirmed that the prosecution had to prove that a reasonable person had no reasonable grounds for believing that a person acting in the capacity as a trader would be able to offer for supply the products in question at the specified price, or that the trader failed to offer those products for supply at that price, for a period that was, and in quantities that were, reasonable having regard to the nature of the market and the nature of the advertisement.</p>	
011301 - 012130	<p>Chairman Administration Mr Vincent FANG ALA</p>	<p><u>Proposed section 13H – Bait and switch</u></p> <p>In response to Mr Vincent FANG's enquiry, the Administration advised that it aimed to consult the trades on the draft enforcement guidelines by early 2013.</p>	

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		<p>Discussion on the difference in formulation of the offence under the proposed section 13H from that in paragraph 6 of Schedule 1 to the Consumer Protection from Unfair Trading Regulations 2008 (UK). The Administration confirmed that the prosecution only had to prove an intention of promoting a different product at the time of the trader's refusal or demonstration referred to in the proposed sections 13H(2)(a) to (c) but not at the time of making the initial invitation to purchase.</p>	
012131 - 013111	<p>Chairman Mr Vincent FANG Administration</p>	<p><u>Proposed section 13I – wrongly accepting payment</u></p> <p>In response to Mr Vincent FANG's concern about the criminal threshold of the offence of wrongly accepting payment, the Administration advised that the burden of proof was placed upon the prosecution which had to prove that <u>at the time</u> of accepting payment, the trader had no intention to supply the product or intended to supply a materially different product, or there were no reasonable grounds for believing that the trader would be able to supply the product within the period specified by the trader or a reasonable period.</p>	
013112 - 013140	<p>Chairman Administration</p>	<p><u>Clause 14 – Section 18 amended (penalties)</u></p> <p>Members raised no query.</p>	
013141 - 013441	<p>Chairman ALA Administration</p>	<p><u>Clause 15 - Section 20 substituted (Liability of directors, partners, etc.)</u></p> <p>Noting that in the CSAs that would be introduced to the Competition Bill, "all the directors" was used instead of "the directors" in the definition of "shadow director", the Administration agreed to consider ALA's suggestion whether it would propose CSAs to replace "the directors" with "all the directors" in the definitions of "principal officer" and "shadow director" for clarity purpose, and to replace the expression "一眾董事" with "所有董事" in the Chinese text accordingly.</p> <p>The Administration would also propose CSAs to include "or engaged" in the proposed section 20(2), and to replace "secretary" with "company secretary", which had also been requested by the Bills Committee on Competition Bill.</p>	<p>The Administration to follow up as stated in paragraph 2(d) of the minutes.</p>

Time marker	Speaker	Subject(s)	Action required
013442 - 013600	Chairman Administration	<u>Clause 16 - Section 21 amended (offences due to fault of other person)</u> Members raised no query.	
013601 - 013811	Chairman Administration ALA	<u>Clause 17 – Section 21A added (Extra-territoriality)</u> The Administration advised that it was seeking advice from the Department of Justice and would provide a response to ALA's question raised in his letter of 15 March 2012 on whether it was necessary to include a provision similar to section 7(2) of the Unconscionable Contracts Ordinance (Cap. 458) to pre-empt any attempt by traders to evade the operation of TDO or to oust the jurisdiction of the Hong Kong courts.	
013812 - 013858	Chairman Administration	<u>Clause 18 – Section 26 amended (defence mistake, accident, etc.)</u> Members raised no query.	
013859 - 014200	Chairman Administration	<u>Clause 19 – Sections 26A and 26B added (Additional defence (bait advertising) and Additional defence (wrongly accepting payment))</u> Members raised no query.	
014201 - 014300	Chairman Administration	<u>Clause 20 – Section 33 amended (definition orders)</u> Members raised no query.	
014301 - 014339	Chairman Administration	<u>Clause 21 –Section 34 amended (saving for civil rights)</u> Members raised no query.	
014340 - 014449	Chairman Mr WONG Ting-kwong	Meeting arrangement	