



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

17 April 2012

The Hong Kong Retail Management Association (HKRMA) and its members have always been, and continue to be, committed to fair and honest retail practices, which are essential to ensure a sustainable and vibrant retail sector in Hong Kong. We therefore support the Government's overall objective to clamp down on underhand and obnoxious commercial practices which hurt consumers. However, we have a number of major concerns about the Government's proposals, many of which have been raised previously during the consultation but which have not been addressed in the draft Bill.

Executive Summary

- The Bill does not give sufficient clarity and certainty regarding the new criminal offences and does not make it clear enough as to who is liable in the event of a breach of the new law. Vaguely worded, rushed legislation may backfire by increasing costs for consumers and stifling competition by legitimate businesses and sales staff for fear of committing criminal offences.
- As well as seeking greater clarity in the Bill itself, draft guidelines should be issued now for public consultation and consideration by Legco at the same time as the Bill.
- The proposed timescale to pass this Bill by July is unrealistic and poses serious risks given the severity of the criminal offences being introduced and the amount of work that still needs to be done on the Bill.
- The Government has tried to alleviate concerns about the new criminal offences by saying that minor issues would be resolved using 'compliance-based enforcement'. The Bill should therefore make it mandatory for the enforcement authorities to use the civil enforcement mechanism, including issuing warning notices, before resorting to prosecution, to give traders an opportunity to make representations and to amend their conduct.



Our key concerns are set out in more detail below:

1. Clarity and certainty

One of the main concerns is the lack of clarity and certainty surrounding the new criminal offences, especially in light of the proposed strict liability attaching to these new offences. Criminal offences should be clearly and precisely codified to ensure legal certainty, so that traders know what conduct is, and is not, putting them at risk of criminal prosecution. The offences in the Bill are so broad and vague that they will catch normal commercial activities, rather than focusing on the underhand and obnoxious conduct which the Bill is aimed at. This in turn will deter businesses from bringing innovative products and services to the market and dampen new sales and marketing initiatives, for fear of committing an offence. This will be bad for the economy and bad for consumers as a result of less choice and less innovation.

2. Guidelines

In addition to clarifying the Bill itself, detailed guidance is required, giving as many examples of real life situations as possible, to provide re-assurance to the majority of businesses who want to trade honestly and fairly in compliance with the law. We are disappointed to see that the Government has not yet issued any draft guidelines for public consultation. This process should be done in conjunction with the review of the Bill, rather than waiting until after the Bill is passed (to avoid the difficulties encountered with the Minimum Wage legislation).

3. Misleading omissions

It will be extremely difficult in practice for traders to anticipate what information the ‘average consumer’ (which is not necessarily the one in front of him) would need to know before buying the product (or service). This is especially the case in relation to complex or technical products, such as electronics, as every consumer has a different level of knowledge and expectation. Given this difficulty, it should not be a strict liability offence, but at most should only be an offence if the trader *knowingly or recklessly* omits to provide the information, e.g. where a sales person deliberately hides important information from a customer to secure a sale which he would not have obtained otherwise.

Even if it were to remain as a strict liability offence, as currently drafted, the Bill does not provide any suitable defence to this offence. The current due diligence defence is not appropriate to this type of offence and should be replaced with a ‘good faith’ defence – i.e. that the trader provided all the information it reasonably believed it was important to disclose.



4. Aggressive Commercial Practices

Aggressive practices such as forcing a sale by scaring or bullying tactics, e.g. refusing to leave until the consumer pays for the goods / services, are of course reprehensible and should be stopped. However, the Bill goes much wider than that and also includes “undue influence”. But when does influencing a customer through common sales techniques become “undue” influence? If a sales person follows a customer around the store constantly offering them to try different products and telling them about special offers, could this constitute an offence?

It is so subjective, as what may be perceived as aggressive by one customer may be regarded as simply over-enthusiastic by another. As with misleading omissions, we therefore believe it should not be a strict liability offence and should rely on the fundamental presumption for criminal offences that ‘*mens rea*’ is required for commission of an offence.

5. Bait Advertising

We have previously raised concerns that legitimate businesses could be inadvertently caught by the offence of bait advertising due to factors outside the retailer’s control (e.g. the inherent uncertainties of complex, international supply chains especially in FMCG sector). The Government gave assurances that appropriate defences would be put in place to ensure that businesses acting in good faith would not be inadvertently caught, however, the proposed defence in the new section 26A of TDO does not give sufficient comfort as it relies on the subjective criteria of “*reasonable time*” and “*reasonable quantity*”, upon which no guidance is given.

It has been suggested by some Government representatives that the way for retailers to protect themselves against the risk of allegations of bait advertising, would be to list the quantities of stock on their advertisements. Not only is this wholly unrealistic (in particular in the case of chain stores), it would be meaningless and of no discernable benefit to the consumer.

6. Liability

As regards the question of who is liable for the offence, this is still not clear from the Bill. In the example of the ‘over-enthusiastic’ sales promotion referred to above, would it be the frontline sales person who is liable? Or the store manager? Or the retail company, and / or its directors? Or all of them?



7. Enforcement

The Government has tried to alleviate concerns about the new criminal offences by saying that the majority of minor issues would be resolved under a ‘compliance-based enforcement’. The Bill should clearly specify that the enforcement authorities are obliged to use this civil enforcement mechanism before resorting to prosecution and the Bill should also make it mandatory that a warning notice is issued first, to give traders an opportunity to make representations and to amend their conduct, before any formal undertaking or prosecution.

8. Private Actions

The Bill gives a new right for individuals to bring claims if they have suffered loss. This appears to include “stand alone” actions (i.e. no prior finding of infringement by the court) as well as “follow-on” actions (i.e. only following a finding of infringement by the court). We would remind the Government that during the review of the Competition Bill, the Government withdrew its proposals for stand alone actions (because of concerns from many sectors regarding unnecessary and excessive litigation). Similar concerns apply here and it is also noteworthy that the UK legislation, upon which the Bill is so heavily based, does not include any such right for private actions.

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About HKRMA

The Hong Kong Retail Management Association (HKRMA) was founded in 1983 by a group of visionary retailers with a long-term mission to promote Hong Kong's retail industry and to present a unified voice on issues that affect all retailers. Established for 29 years, the Association has been playing a vital role in representing the trade, and raising the status and professionalism of retailing through awards, education and training.

Today, HKRMA is the leading retail association in Hong Kong with membership covering more than 6,700 retail outlets and employing about half of the local retail workforce. HKRMA is one of the founding members of the Federation of Asia-Pacific Retailers Associations (FAPRA) and is the only representing organization from Hong Kong. FAPRA members cover 17 Asian Pacific countries and regions.