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19 April 2012

Mr. Joey Lo,
Office for Clerk to Bills Committee,
Legislative Council Complex,
11 Legislative Council Road,
Central, Hong Kong.

Dear Mr. Lo,

**Re: Bills Committee on Trade Description (Unfair Trade Practices)
(Amendment) Bill 2012**

I refer to your letter dated 23 March 2012 in connection with the captioned Bill.

I attach the Law Society's submissions on the Bill for distribution to Members of the Bills Committee. The Law Society has no objection to the publication of its views.

The Law Society will not be sending any representatives to attend the Bills Committee meeting on 24 April 2012.

Yours sincerely,

Joyce Wong
Director of Practitioners Affairs

Encls.

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Law Society's Submissions

Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

The Law Society has reviewed the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 (Bill) and has the following comments:

Part IIB: Unfair Trade Practices

Clause 13 D. Average consumer

1. 'Average consumer'

We have the following concerns over the term "*Average consumer*" and question whether it is good policy:

- Would Clause 13D be more or less effective if the word "average" was removed and the court had to consider the effect upon the (particular) consumer?
- What if the "actual consumer" is, in fact, less well informed etc than the mythical "average consumer"?
- Does this mean that consumer is not protected?
- How does this fit in with the definition of consumer in section 3 of the Ordinance?

2. Clause 13D(1)

We have concerns over how the courts will interpret "reasonably".

- Will there be a consistent approach by the courts to "reasonableness"?
- Is it possible to have a consistent approach to "average consumer", or "reasonably well informed", "reasonably observant and circumspect"?

3. Clause 13D(3)

“particularly vulnerable”

We query what is intended to be covered by “particularly vulnerable”? Does this imply a double standard of vulnerability depending upon whether the consumer is “an average consumer” or is within “a particular group of consumers”?

“credulity”

We query the use of the word “credulity” in “a “clearly identifiable group of consumers”.

4. Clause 13D(3)(b)(ii)

This clause provides: “the practice is likely to materially distort the economic behaviour *only* of that group.” (emphasis added).

The use of the word “*only*” attempts to narrow down the effect of the commercial practice to one group of consumers. If “*only*” is retained we consider it weakens the legislation and switches the protection from the consumer to the trader.

We recommend deletion of “*only*” from this clause.

In our opinion the revised draft will protect the consumer and not be a trap for unwary traders. Traders dealing with a ‘particular group’, (see clause 13D(3)(a)), should be alert to its particular characteristics. In our view this will prevent traders from asserting the practice does not in fact distort the behaviour of several clearly identifiable groups of consumers.

5. Clause 13D(4)

We query how the “average consumer” can judge whether the statement is

- (i) exaggerated and/or
- (ii) not meant to be taken literally.

The purpose of the Bill is to enhance protection of consumers and it appears odd to do so by blatantly recognising “caveat emptor”. When are words a “Puff” as opposed to a “Representation” upon which the consumer relies? Where will the burden of proof lie?

We consider the burden should surely be on the person claiming it to be “*the common and legitimate practice of making exaggerated statements which are not meant to be taken literally*”.

We recommend this subsection should be deleted.

6. General Comments

We consider the remaining sections in Part 2 of the Bill are on the right track as vulnerable consumers need protection. However, as noted above the current drafting of clauses 13D (1), (2), (3), (4) and (5) need to be reviewed and redrafted if consumers are to be adequately protected. The Bill as drafted appears to place more emphasis on safeguarding business interests rather than protecting the consumer.

The Law Society of Hong Kong
Criminal Law and Procedure Committee
19 April 2012
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