

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

**Summary of views of depositions  
made at the meeting on 24 April 2012**

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**I. General issues**

<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"><li>• Concern over the legislative timetable  (Hong Kong General Chamber of Commerce, Hong Kong Retail Management Association)</li></ul>	<ul style="list-style-type: none"><li>• The proposals contained in the Bill were canvassed in the Public Consultation Paper on Legislation to Enhance Protection for Consumers against Unfair Trade Practices published in mid 2010. Generally speaking, these proposals received public support.</li><li>• The public has been asking the Administration to expedite the preparation of legislative amendments. There is a pressing need to address public concerns in this regard so as to consolidate consumer confidence and rid unscrupulous traders to create a level playing field for honest businesses. We will render as much assistance as possible to the Bills Committee in its scrutiny of the Bill.</li></ul>
<ul style="list-style-type: none"><li>• Inclusion of cooling-off period arrangements in the Bill  (Professional Commons, Kowloon West New Dynamic, Mr CHIN Wai-lok, Mr CHENG Tsuk-man, Democratic Party, Mr Andrew CHIU Ka-yin, Public Service Monitoring Group, Civic Party, Democratic Alliance for the Betterment and Progress of Hong Kong)</li></ul>	<ul style="list-style-type: none"><li>• As explained in our response to the Bills Committee on 25 April 2012, legislative proposals relating to the mandatory imposition of a cooling-off period (among others) were included in the Public Consultation Paper published in 2010. In the Public Consultation Report published in January 2011, we proposed that the scope of the cooling-off arrangements should be expanded to cover two types of consumer contracts, namely those involving goods or services (or both) with a contract duration of not less than six months and those concluded during unsolicited visits to consumers' homes and places of work.</li><li>• With the expansion in scope, the proposal would affect a wide range of traders dealing in different goods and services. It would also affect business operation and the process in which consumers enter into contracts. We have met with different stakeholders and discussed detailed arrangements for implementing the proposals. Trade</li></ul>

<b>I. General issues</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
	<p>associations and others have expressed concerns about practical arrangements including the arrangements for consumers to exercise the right of cancellation, the refund arrangements and small-value transactions. We need more time to study how to address these concerns properly by legislation.</p> <ul style="list-style-type: none"> <li>• To ensure that consumer protection could be enhanced as soon as possible, we have proposed to tackle unfair trade practices as our top priority through the introduction of relevant legislative proposals in the Bill. We briefed the Panel on Economic Development on this at its meeting held on 14 October 2011.</li> </ul>
<ul style="list-style-type: none"> <li>• Concerns over the drafting of Enforcement Guidelines and related consultation arrangements</li> </ul> <p>(Hong Kong General Chamber of Commerce, Hong Kong Retail Management Association, Hong Kong Small and Medium Enterprises Association, The Hong Kong Chinese Importers' &amp; Exporters' Association)</p>	<ul style="list-style-type: none"> <li>• The Bill provides that before issuing any Guidelines or amendments of Guidelines, the enforcement agencies must consult any persons that they consider appropriate. We will consult stakeholders including consumer advocates and relevant industry and trade organizations.</li> <li>• While the draft Guidelines for consultation could only be finalized after the enactment of the Bill, we are prepared to provide a framework of the draft Guidelines for the reference of the Bills Committee.</li> </ul>

<b>II. Drafting issues</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"> <li>Concern over the approach to crafting the proposed offences</li> </ul> <p>(Hong Kong General Chamber of Commerce, Hong Kong Retail Management Association, The Hong Kong Chinese Importers' &amp; Exporters' Association, Communications Association of Hong Kong)</p>	<ul style="list-style-type: none"> <li>We have proposed to adopt a forward looking approach by couching the proposed offences in general terms, in line with the regimes in the United Kingdom and Australia, so as to cater for different types of transactions and changing market conditions. An over-prescriptive approach will bring about rigidity and open up loopholes for circumvention. We believe that these concerns may also be addressed by issuing Enforcement Guidelines to assist the trade and consumers in understanding the operation of the provisions, which are indeed modelled very much on overseas precedents.</li> <li>The enforcement agencies will also closely communicate with the businesses so as to assist them in understanding the requirements of the legislation and facilitate their compliance.</li> </ul>
<ul style="list-style-type: none"> <li>Concern over the scope of various definitions (such as "material information", "undue influence" and "harassment") under the Bill</li> </ul> <p>(Hong Kong General Chamber of Commerce, Hong Kong Retail Management Association, Hong Kong Small and Medium Enterprises Association, Civic Party, Consumer Council, The Cosmetic &amp; Perfumery Association of Hong Kong)</p>	<ul style="list-style-type: none"> <li>Most of the proposed new offences, and the proposed compliance-based enforcement mechanism, are modelled on either Australian or United Kingdom equivalents. Their jurisprudence and enforcement guidelines will be of reference. Separately, we will also address the relevant terms in the Enforcement Guidelines to be issued under the proposed new section 16BA.</li> <li>We have also responded to the comments on some of the terms made by the Assistant Legal Advisor (ALA).</li> </ul>

<b>II. Drafting issues</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"> <li>• Drafting of section 13D regarding the definition of “average consumer”  (Law Society of Hong Kong, Consumer Council)</li> </ul>	<ul style="list-style-type: none"> <li>• We have duly considered the suggestions with a view to ensuring that the formulation of the Bill will safeguard consumer rights and at the same time give due weight to the importance of preserving the operational efficiency of honest traders and avoid over-regulation. In particular, we have suggested (in our response to the ALA on 9 May 2012) minor adjustments to the definition of “average consumer” under the proposed section 13D.</li> <li>• In relation to the word “only” in proposed section 13D(3)(b)(ii), we have explained in our response to the ALA on 9 May 2012 that if the practice is likely to materially distort the economic behaviour of the average member of the group (e.g. old aged) and (for example) the general public, even if the standard of the average member of the general public is to be applied, the practice would also be in breach of the law. We therefore consider that the word “only” can be retained.</li> </ul>
<ul style="list-style-type: none"> <li>• Views over the power to award compensation and action for damages under proposed sections 18A and 36 respectively  (Consumer Council)</li> </ul>	<ul style="list-style-type: none"> <li>• We will provide a response separately.</li> </ul>

<b>III. Issues in respect of specific offences</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"> <li>High-pressure sales practices against consumers should be prohibited</li> </ul> <p>(Kowloon West New Dynamic, The Cosmetic &amp; Perfumery Association of Hong Kong, Mr Andrew CHIU Ka-yin, Mr YEUNG Wai-sing)</p>	<ul style="list-style-type: none"> <li>The proposed offence “aggressive commercial practices” (proposed section 13F) seeks to deal with the use of harassment, coercion or undue influence in commercial practices which significantly impair consumers’ freedom of choice.</li> </ul>
<ul style="list-style-type: none"> <li>Traders should be prohibited from imposing unreasonable barriers aimed at frustrating consumers in their attempt to terminate contracts</li> </ul> <p>(Public Service Monitoring Group)</p>	<ul style="list-style-type: none"> <li>Under the proposed section 13F, existence of any onerous or disproportionate non-contractual barrier fettering the consumer’s exercise of rights under the contract is one of the factors which the Court will take into account when determining whether a commercial practice uses harassment, coercion or undue influence.</li> </ul>
<ul style="list-style-type: none"> <li>Pre-payment should be regulated under the Bill</li> </ul> <p>(Mr Andrew CHIU Ka-yin, Democratic Alliance for the Betterment and Progress of Hong Kong)</p>	<ul style="list-style-type: none"> <li>The proposed offence “wrongly accepting payment” (proposed section 13I) sanctions traders with no intention or ability to supply the contracted products who trick consumers into pre-payment.</li> </ul>
<ul style="list-style-type: none"> <li>Unfair trade practices such as confusing price units should be prohibited</li> </ul> <p>(Mr YEUNG Wai-sing)</p>	<ul style="list-style-type: none"> <li>Pursuant to section 7 of the existing Trade Descriptions Ordinance (Cap. 362) (“the Ordinance”), any person who, in the course of any trade, applies a false trade description to any goods commits an offence. Section 13A also prohibits the display of a sign which indicates a price set by reference to any unit of quantity for any goods</li> </ul>

<b>III. Issues in respect of specific offences</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
	<p>that are exposed for sale but fails to indicate the price per unit of quantity in a readily comprehensible manner.</p> <ul style="list-style-type: none"> <li>• While section 13A will be repealed under the Bill, the proposed offence “misleading omission” will provide better protection for consumers as it will prohibit trader from omitting or hiding material information, providing material information in an unclear or ambiguous manner, or failing to identify its commercial intent, and as a result of which the economic behaviour of the average consumer will be altered.</li> </ul>
<ul style="list-style-type: none"> <li>• Control over price indications, misrepresentation in advertisements and other types of trade descriptions should be strengthened</li> </ul> <p>(Supervisory Group, Public Service Monitoring Group, 全港豬肉零售業聯席會議)</p>	<ul style="list-style-type: none"> <li>• Trade descriptions in respect of services will be subject to control under the Bill (proposed section 7A). Furthermore, amendments to the existing definition of “trade descriptions” are proposed in the Bill to the effect that false indications of any matters with respect to goods will be prohibited.</li> </ul>
<ul style="list-style-type: none"> <li>• Products akin to financial services products which are not regulated by the existing financial regulatory regimes should be subject to the control under the Bill</li> </ul> <p>(Public Service Monitoring Group)</p>	<ul style="list-style-type: none"> <li>• Pursuant to the proposed definition of the Bill, “product” means any goods or service but does not include any goods or service covered by Schedule 4. Schedule 4 mainly covers financial services goods or services sold or supplied by a person regulated, licensed, registered, recognized or authorized under the relevant legislation, being goods or services the sale or supply of which by that person is itself regulated under an Ordinance that is referred to in this item and under which the</li> </ul>

<b>III. Issues in respect of specific offences</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
	<p>person is regulated, licensed, registered, recognized or authorized.</p> <ul style="list-style-type: none"><li>• Subject to the proposed section 2(4) and taking into account all the facts and circumstances of the cases concerned, any goods and services which are not covered in Schedule 4 should be regarded as “products” and hence subject to the control under the Bill.</li></ul>



<b>IV. Enforcement matters and liability of parties</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"> <li>• Concern over the deterrent effect of undertakings</li> </ul> <p>(Professional Commons, Federation of Beauty Industry (HK) Ltd)</p>	<ul style="list-style-type: none"> <li>• We consider that there are merits in establishing a compliance-based enforcement mechanism with the main objectives of encouraging compliance and facilitating quicker settlement. Under the proposed mechanism, the enforcement agencies are empowered to seek undertakings from traders suspected of deploying any unfair trade practices to stop and not to repeat an offending act and, where necessary, seek injunctions from the court for the purpose. Undertakings will generally be published for public information.</li> <li>• The enforcement agencies will take account of a number of factors before accepting an undertaking from a trader, which include the available evidence, the nature and seriousness of the conduct in question, the number of consumers affected, the impact on the community at large and the trader's past conduct. The enforcement agencies will instigate prosecution actions against more serious contraventions.</li> </ul>
<ul style="list-style-type: none"> <li>• Compliance-based mechanism should be designated as the preferred enforcement option</li> </ul> <p>(Hong Kong General Chamber of Commerce, Hong Kong Retail Management Association, Communications Association of Hong Kong, PCCW)</p>	<ul style="list-style-type: none"> <li>• The compliance-based mechanism will become one of crucial tools for the enforcement agencies to protect consumer rights under the Bill. Nevertheless, it is necessary for the agencies to retain flexibility in choosing the most suitable enforcement tool according to the circumstances of the cases concerned.</li> <li>• As explained above, the enforcement agencies will take account of a number of factors before accepting an undertaking from a trader. They will instigate prosecution actions against more serious contraventions.</li> </ul>

<b>IV. Enforcement matters and liability of parties</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"> <li>• Concern over liability of various parties involved in a commercial practice</li> </ul> <p>(Hong Kong General Chamber of Commerce, Hong Kong Retail Management Association, PCCW)</p>	<ul style="list-style-type: none"> <li>• Under the proposed part IIB, it is an offence if any natural person / legal person who falls within the definition of “trader” breaches the relevant provisions. The proposed section 2(5) provides that the definition of “trader” also include any person acting in the name of, or on behalf of, a trader. Section 21 also provides that where the commission by any person of an offence under this Ordinance is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first-mentioned person.</li> <li>• Hence, taking into account all the fact and circumstances of the case concerned and the applicable law, various parties involved in a commercial practice (including but not limited to frontline staff, managerial officers, suppliers or consigners) might be regarded as a “trader” who is liable to the proposed offences. Nevertheless, according to section 26, it is a defence for the person charged if he/she can prove that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.</li> <li>• Section 20 as amended by the Bill stipulates that if an offence under the Ordinance is committed by a body corporate or by a person as a member of an unincorporated body, and it is proved that the offence has</li> </ul>

IV. Enforcement matters and liability of parties	
Views (deputations by which the views were raised)	Administration's response
	been committed with the consent or connivance or is attributable to the neglect of a specified person acting with a managerial role, that person also commits the offence.
<ul style="list-style-type: none"><li>Concerns over the displacement of the presumption of <i>mens rea</i> in certain proposed offences</li></ul> <p>(Hong Kong Retail Management Association, PCCW)</p>	<ul style="list-style-type: none"><li>The Bill proposes that the presumption of <i>mens rea</i> will be displaced in the new offences of false trade descriptions of services, misleading omissions, aggressive practices, bait advertising, and wrongly accepting payment without the ability to supply the goods or services contracted for.</li><li>While the common law presumption is that <i>mens rea</i> is required before a person can be held guilty of a criminal offence, the courts have recognized that this presumption can be displaced where the statute is concerned with an issue of social concern, and where it can be shown that the creation of strict liability will be effective in promoting the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited acts.</li><li>Unfair trade practices undermine consumer interests and confidence, thereby hurting honest businesses as well. The proposal will induce traders to be more vigilant to prevent the commission of the prohibited acts, thereby promoting the object of the statute, i.e. enhancing protection for consumers against unfair trade practices. Moreover, traders should have reasonably good knowledge of the goods or services they supply, so they have the responsibility of exercising reasonable care and due diligence to avoid committing any of the proposed offences. We therefore consider that the criteria referred above for</li></ul>

IV. Enforcement matters and liability of parties	
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	<p>dispensing with <i>mens rea</i> are applicable to the proposed offences. In fact, applying a false trade description to goods, contrary to section 7 of the existing Ordinance, is already offence with which the presumption of <i>mens rea</i> is displaced. Similar trade practices offences in Australia and the United Kingdom also displaced the presumption of <i>mens rea</i>.</p>
<ul style="list-style-type: none"> <li>Concerns over the proposed level of sanction (Communications Association of Hong Kong, Mr YEUNG Wai-shing)</li> </ul>	<ul style="list-style-type: none"> <li>For consistent treatment of different types of unfair trade practices, we propose that the current maximum penalty under the Ordinance, i.e. a fine of \$500,000 and imprisonment for five years, should apply to the proposed new offences.</li> <li>We also propose in the Bill that a compliance-based enforcement mechanism be established with the main objectives of encouraging compliance and facilitating quicker settlement.</li> <li>The enforcement agencies will make use of the most appropriate enforcement tool taking into account the circumstances of every case in accordance with the guidelines to be published.</li> </ul>
<ul style="list-style-type: none"> <li>Concerns over the new power under the proposed section 15(1)(ca) about production of books or documents (The Hong Kong Chinese Importers' &amp; Exporters' Association)</li> </ul>	<ul style="list-style-type: none"> <li>There are provisions in the Ordinance which require traders engaged in the sale of specified goods to keep invoices and to provide specified information thereon related to the transactions. To help the enforcement agency ascertain if the provisions are being complied with, we consider it appropriate to amend the Ordinance to empower the enforcement agency to inspect books and documents that are required to be kept under the Ordinance without being subject to the reasonable suspicion threshold.</li> </ul>

<b>V. Sector-specific regime</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"><li>• The telecommunications sector should be exempted from the control of the Bill; if an exemption is impossible, the Communications Authority should be the sole enforcement agency in respect of the telecommunication sector</li></ul> <p>(Communications Association of Hong Kong, PCCW)</p>	<ul style="list-style-type: none"><li>• Currently, section 7M of the Telecommunications Ordinance (Cap. 106) contains a general prohibition against misleading and deceptive practices. Nevertheless, our proposed fair trade provisions under the Bill are more specific and extend its coverage to other types of unfair trade practices including aggressive practices. We consider that the repealing of section 7M and applying the Bill to the telecommunications industry is appropriate.</li><li>• With a view to utilizing the expertise and knowledge of the newly established Communications Authority (CA) (i.e. the then Office of Telecommunications Authority and Broadcasting Authority) in the regulation of licencees, we propose to confer enforcement power on the CA in respect of the licensed telecommunications and broadcasting services.</li><li>• Our intention is that no matter which agency receives a complaint, the CA will be responsible for the follow-up and investigation of cases under its purview. As regards the cooperation between the Customs and Excise Department and the CA, the two enforcement agencies will enter into a memorandum of understanding to ascertain the detailed enforcement arrangement. They will also maintain close liaison, exchange operational experience and ensure the consistency of enforcement standards.</li></ul>

<b>V. Sector-specific regime</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"><li>• Coverage of the Bill should be more extensive with minimum exemption  (Professional Commons)</li></ul>	<ul style="list-style-type: none"><li>• Regulation over professional practitioners requires specialist knowledge in the respective fields, and we believe that the trade practices of professional practices regulated by regulatory bodies established or sanctioned by statute under the proposed Schedule 3 should best be regulated by the respective professional bodies. We will encourage the relevant professional bodies to keep up with the times and consider suitable measures whenever necessary to enhance protection for their clients.</li><li>• As regard financial services product and the property sector, there are well-established and tailor-made regulatory regimes under the auspices of the relevant regulatory bodies.</li></ul>

<b>VI. Other issues</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
<ul style="list-style-type: none"> <li>• Concern over the role of the Consumer Council</li> </ul> <p>(Professional Commons, Supervisory Group, Public Service Monitoring Group)</p>	<ul style="list-style-type: none"> <li>• The Consumer Council will continue to perform its statutory function to forestall and mediate disputes between consumers and businesses and to empower consumers through education. The Council and the enforcement agencies will also exchange information on market practices and intelligence so as to protect consumers' right in general and provide the best assistance to consumers in need for settlement of dispute and/or restorative justice.</li> <li>• If additional resources are required, the Government will consider such requests in accordance with the existing mechanism.</li> </ul>
<ul style="list-style-type: none"> <li>• Education for consumers and traders facilitating the understanding on the Bill</li> </ul> <p>(The Cosmetic &amp; Perfumery Association of Hong Kong, Kowloon West New Dynamic)</p>	<ul style="list-style-type: none"> <li>• As elaborated above, the Consumer Council will continue to empower consumers through education. As a complement to the implementation of the Bill, the Council will strengthen its consumer education and publicity to raise public awareness of commonly found unfair trade practices. We will also keep in view the need for enhanced publicity.</li> <li>• The enforcement agencies will closely communicate with businesses so as to assist them in understanding the requirements of the legislation and facilitate their compliance.</li> </ul>
<ul style="list-style-type: none"> <li>• Concern over the proposed provision on private right of actions</li> </ul> <p>(Hong Kong Retail Management Association)</p>	<ul style="list-style-type: none"> <li>• To facilitate aggrieved consumers to seek restorative justice, we propose that an express right be created under the Ordinance to allow any person who suffers loss or damage because of conduct which constitutes the current offence of false trade descriptions of goods or any of the proposed offences, and that is directed to him to institute private actions</li> </ul>

<b>VI. Other issues</b>	
<b>Views (deputations by which the views were raised)</b>	<b>Administration's response</b>
	<p>for damages (i.e. a private right of actions).</p> <ul style="list-style-type: none"> <li>The proposal of creating the private right of actions merely aims to codify the existing right of consumers to claim under the law of contract, law of tort, statute law and common law. Such existing law has not led to frivolous and vexatious legal proceedings or abuse. The proposal has received wide support from the public.</li> </ul>
<ul style="list-style-type: none"> <li>Concern over the existing control over unfair terms</li> </ul> <p>(Civic Party)</p>	<ul style="list-style-type: none"> <li>At present, the Unconscionable Contracts Ordinance (Cap. 458) provides for a range of relief measures for aggrieved consumers who enter into contracts that are found to be unconscionable. Together with the Misrepresentation Ordinance (Cap. 284) and the Supply of Services (Implied Terms) Ordinance (Cap. 457), the existing law already accords certain protection to consumers aggrieved by unfair contract terms.</li> <li>In April this year, the Consumer Council published a Report on Unfair Terms in Standard Form Consumer Contracts, the purpose of which is to encourage and assist traders in avoiding the use of unfair terms. The Council takes the beauty industry as a sample case, and provides a set of guidelines on drafting standard form consumer contracts and a model contract for reference by the industry. We welcome the Consumer Council's initiative and hope that the business sector will have regard to the guidelines suggested by the Council in drawing up standard consumer contracts.</li> </ul>