

立法會
Legislative Council

LC Paper No. CB(1)1387/99-00

(These minutes have been
seen by the Administration)

Ref: CB1/BC/17/98/2

Bills Committee on Trade Marks Bill

**Minutes of fourteenth meeting held on
Saturday, 26 February 2000, at 9:30 am
in the Chamber of the Legislative Council Building**

Members present : Hon Margaret NG (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon HUI Cheung-ching
Hon FUNG Chi-kin

Members absent : Hon MA Fung-kwok
Hon James TO Kun-sun
Hon CHAN Kam-lam
Hon Mrs Sophie LEUNG LAU Yau-fun, JP
Hon SIN Chung-kai

Public officers attending : Mr Stephen SELBY
Director of Intellectual Property

Mr Rayman PERERA
Assistant Director (International Registration)
Intellectual Property Department

Mrs Teresa GRANT
Assistant Director (Registration)
Intellectual Property Department

Mr Philip CHAN
Principal Assistant Secretary for
Trade and Industry

Mr Johann WONG
Assistant Secretary for Trade and Industry
Mr Jeffrey E GUNTER
Senior Assistant Law Draftsman

Attendance by invitation : Radio Association of Hong Kong

Mr Brian LI
President

Mr John YEUNG
Director

The Cosmetic & Perfumery Association of Hong Kong Ltd

Mr Jacky CHOI
President

Mr Homer YU
Honourary Life President

Mr Joe HUNG
Chairman

Hong Kong & Kowloon Electrical Appliances
Merchants Association Limited

Mr Michael FAN
Chairman

Mr Raymond H K WAT
Director

Mr LI Kam-fung
Director

Hong Kong Photo Marketing Association

Dr Dennis SUN Tai-lun
Vice-Chairman

Mr Jimmy YEUNG
Secretary

The Hong Kong Association of the Pharmaceutical Industry

Mr Robert SIU
Executive Director

Ms Alice CHIN
President

Mr Stephen LEUNG
Vice-President

The Hong Kong Brewers Association

Mr Dennis HEIJN
General Manager, Heineken Hong Kong Limited

Mr Ben WONG
General Manager - Corporation Development
San Miguel Brewery Hong Kong Limited

Mr Vincent KELLY
General Manager, Carlsberg Hong Kong Limited

Mr Richard BURN
Managing Director, Batey Burn Hong Kong Limited

The Hong Kong Food Council

Mr LEE Kwong-lam
Chairman

Mr Simon WONG
Co-opted Executive Committee Member

Consumer Council

Mrs CHAN WONG Shui
Chief Executive

Mr Ron CAMERON
Head of Trade Practices Division

Hong Kong Retail Management Association (HKRMA)

Mr Logan TAYLOR
Regional Managing Director of Park'n shop
Executive Committee Member of HKRMA
(Key Spokesman Representing HKRMA)

Mr Andrew VAGG
Executive Director of the Dairy Farm Co Ltd
Wellcome

Miss Anita BAGAMAN
Executive Director of HKRMA

Miss Amanda YU
Solicitor - Group Legal Counsel of
A.S. Watson & Co Ltd

Mr Charlie WOOD
Legal Counsel of the Dairy Farm Co Ltd

Clerk in attendance : Miss Odelia LEUNG
Chief Assistant Secretary (1)1

Staff in attendance : Miss Anita HO
Assistant Legal Adviser 2

Ms Rosalind MA
Senior Assistant Secretary (1)6

I. Meeting with deputations

The Chairman welcomed the attending organizations and invited each of them to present views on the issue of parallel importation.

(a) Radio Association of Hong Kong (Radio Association)
(LC Paper No. CB(1)1037/99-00(02))

2. Mr Brian LI of Radio Association said that the Association supported the free trade policy of Hong Kong but objected to the international exhaustion of trade mark rights at the present stage because the existing laws were inadequate to protect consumers' rights. Parallel imports generally had a shorter shelf-life and their quality might have deteriorated or been damaged in the course of improper transportation or storage. Moreover, with liberalization of parallel importation, it would become more difficult to trace the suppliers of the wide range of products on sale in Hong Kong, making it harder to detect and prevent counterfeit goods. He was worried that Hong Kong would become a dumping ground for low quality and expired goods if parallel importation was liberalized. He said that in considering whether parallel importation should be liberalized, the following issues should be examined:

- (i) Many major trading partners of Hong Kong, for example the United States and the European Union, did not adopt international exhaustion of trade mark rights. The Administration should assess the reasons behind this.

- (ii) The impact of liberalization of parallel importation on mainstream imports should be carefully examined to ensure that the legitimate business interests of trade mark owners and the licensed distributors would not be compromised.
 - (iii) Whether a central body should be set up to handle complaints from consumers who had purchased sub-standard, unsafe or counterfeit products, and if so, who should bear the costs for running such a body.
3. Mr LI called on the Administration to critically assess the implications before introducing the policy of international exhaustion of trade mark rights.
- (b) The Cosmetic and Perfumery Association of Hong Kong Ltd. (Cosmetic Association)
(LC Paper No. CB(1)1037/99-00(02))
4. Mr Homer YU of Cosmetic Association said that he agreed with the views of Radio Association. He stressed that trade mark owners and their authorized distributors had invested considerable sum of money in advertising and marketing to build up the reputation of their trade marks. It would be unfair to them if parallel importers were allowed to take advantage of their massive overheads. With liberalization of parallel importation, licencees and authorized importers might have to reduce investment in advertising and promotion in order to make the price of mainstream products more competitive. This would result in a general shift of employment from high value-added activities to lower value-added activities which would change the economic structure of Hong Kong. He pointed out that the cosmetic trade had been suffering seriously from the unfair competition from parallel imports. A big international cosmetic company had just wound up its business in Hong Kong. He urged the Administration to introduce statutory requirements for labelling of importers of goods so that consumers could identify the source of products.
- (c) Hong Kong and Kowloon Electrical Appliances Merchants Association Ltd. (Electrical Appliances Association)
(LC Paper No. CB(1)1037/99-00(02))
5. Mr Michael FAN of Electrical Appliances Association said that he supported the free trade policy of Hong Kong but disagreed with the introduction of liberalized parallel importation since there was inadequate legislative protection for consumers at present. He explained that authorized distributors and importers had spent time and money to introduce a product to a particular mark by undertaking a whole spectrum of activities, including product development, testing, promotion and advertisement. Testing of a product was particularly important but this was unlikely carried out by parallel importers. To make their products competitive with parallel imports, mainstream importers would be forced to spend less on the above activities, notably in advertisement, in order to reduce costs. This would affect the employment opportunities in the relevant trade. Another problem of parallel-imported goods was

the unavailability of user manuals in the local language. Danger might arise for improper use of the products and repair and maintenance of the products would be difficult.

(d) Hong Kong Photo Marketing Association Ltd (Photo Marketing Association)
(LC Paper No. CB(1)1037/99-00(02))

6. Dr Dennis SUN of Photo Marketing Association said that the quality of film would deteriorate if proper precautionary measures were not taken during transportation and handling of the products. Authorized importers and distributors provided quality guarantee and after-sales services to customers. To maintain the reputation of the trade mark, they always assisted customers who had bought parallel imported goods. Since it was hard to trace the origin of parallel imported goods, this would leave room for flooding of cheap counterfeits into Hong Kong, adversely affecting its development towards high value-added industries.

(e) The Hong Kong Association of the Pharmaceutical Industry (HKAPI)
(LC Paper No. CB(1)814/99-00)

7. Mr Robert SIU of HKAPI said that clause 19 of the Bill would take away trade mark owners' right to prevent parallel importation unless certain prescribed conditions were fulfilled. This had the potential effect of encouraging entry of parallel imported pharmaceuticals into Hong Kong. Since parallel-imported pharmaceuticals were unregistered pharmaceuticals, they might pose a health hazard. He pointed out that the Health Department required the keeping of proper records on controlled drugs and these drugs could only be sold upon the production of a doctor's prescription. It was well-known that local dispensaries readily sold parallel-imported pharmaceuticals under this category without a prescription. The present enforcement actions taken by the Health Department were ineffective in prohibiting the sale of unregistered pharmaceuticals in dispensaries. Manufacturers of pharmaceuticals and authorized distributors took all appropriate measures to ensure the quality of pharmaceuticals and they were liable for damages arising from use of these products. Parallel importers of pharmaceuticals, on the other hand, would not shoulder such responsibilities. It would also be difficult to recall parallel-imported pharmaceuticals should any problem be found. Mr SIU also pointed out that pharmaceuticals with infringed trade marks were registered by the Health Department. This struck a blow to the trade mark owners who had spent considerably on registering the trade mark with the Intellectual Property Department. For the protection of intellectual property rights and consumer safety, he called for the exclusion of pharmaceuticals from the application of clause 19 of the Bill.

(f) The Hong Kong Brewers Association (Brewers Association)
(LC Paper No. CB(1)887/99-00)

8. Mr Ben WONG of the Brewers Association said that the Brewers Association represented a majority of the brewers which manufactured or marketed their proprietary products in Hong Kong. The Brewers Association objected clause

19 of the Bill to liberalize parallel importation as this would adversely affect the economy of Hong Kong and the interest of consumers in the long run. Liberalization of parallel import discouraged investment of trade mark owners in Hong Kong, resulting in reduced employment opportunities. Trade marks represented guarantee of quality. For perishable items like food and beverages, trade mark owners and authorized distributors took great care to preserve their quality from manufacture to selling of the products to consumers. Parallel importers, however, would be less able and willing to do the same. Given the shorter shelf-life of parallel-imported goods in general, the quality of parallel-imported beers was of particular concern. Mr WONG said that if parallel importation were to be liberalized, the labelling requirements had to be strengthened. For pre-pack food and beverages, information such as the "best before date for consumption", the name and address of the importer or distributor should be included on the label so that consumers who had bought defective goods could contact the relevant parties for complaint.

(g) The Hong Kong Food Council (Food Council)
(LC Paper No. CB(1)1037/99-00(01))

9. Mr LEE Kwong-lam of the Food Council said that before making a decision to liberalize parallel importation, the Administration should put in place adequate legislative measures, such as labelling requirement, to ensure the quality of parallel imports and to protect consumers' interest. At present, parallel importation of pre-packed food was affecting the food trade. As the quality of parallel-imported canned food varied greatly and counterfeits were mixed among them, the reputation of the trade marks as well as the health of consumers were both at risk. The Administration should not hastily liberalize parallel importation before strengthening the labelling requirement and improving the existing food inspection system. He requested the Administration to draw reference to overseas legislation on parallel importation, such as the Lanham Act of the North America. He said that under the Lanham Act, a label was attached on parallel-imported goods stating that the products were not imported by the authorized licensees and that their quality might be different from that of mainstream imports. This arrangement would enable consumers to readily distinguish parallel imports from mainstream imports.

(i) Hong Kong Retail Management Association (HKRMA)
(LC Paper No. CB(1)676/99-00(01))

10. The speaking note of Mr Logan TAYLOR of HKRMA was tabled at the meeting and circulated to members after the meeting at LC Paper No. CB(1)1076/99-00(02).

11. Mr TAYLOR said that HKRMA was founded in 1983 and was the major retail association in Hong Kong. Liberalization of parallel importation would allow a wide variety of products to be introduced to the local market at lower prices. Products which were not introduced by the licensed suppliers due to low volume or low margin would also be supplied to local consumers. Liberalization of parallel importation would enable retailers to cater for all segments of the local community

and to meet the demands of all consumers. He emphasized that parallel imports were genuine products and not counterfeits or sub-standard goods. All products, whether parallel imports or not, must comply with safety and health laws and regulations in Hong Kong. Liberalization of parallel importation would bring about wider choices and lower prices and would further enhance Hong Kong's image as a shoppers' paradise. HKRMA fully supported clause 19 of the Bill and the Administration's stance that additional labelling was not required. It would continue to further promote its Code of Practice amongst retailers to achieve the best trade practices in the interests of consumers.

(j) Consumer Council (CC)
(LC Paper No. CB(1)660/99-00(01))

12. A further submission of CC was tabled at the meeting and circulated to members after the meeting vide LC Paper No. CB(1)1076/99-00(01).

13. Mrs CHAN WONG Shui of CC said that parallel imports were genuine products and should not be equated with counterfeits or products of inferior quality. Liberalization of parallel importation would enable importers to source goods from different places to suit different tastes. At present authorized distributors and licensees were undertaking a whole spectrum of value-added activities, such as product development, testing, advertisement and after-sales services to enhance the competitiveness of their products. They could continue to promote the unique features of mainstream imports after the passage of the Bill. Mr WONG stressed that there were already legislation governing safety of consumer goods. CC would continue education and publicity work to enhance the awareness of consumers of their rights and the importance of obtaining accurate information such as the price and the availability or otherwise of after-sales service before purchase. CC was also discussing with the Administration on ways to improve regulation of misleading advertisements. Moreover, it was liaising with trade associations on the promotion of honest and fair trade practices.

Discussion

14. In response to Mr Kenneth TING's enquiry on the application of the Lanham Act, Mr LEE Kwong-lam of the Food Council said that as far as he knew, the Act applied to all types of parallel imports coming into Canada and the United States.

15. Upon the Chairman's invitation, the Director of Intellectual Property (DIP) explained briefly the Lanham Act. He said that the Lanham Act was the US trade mark law. Section 42 of the Lanham Act (15 USC Sec 1124) provided that no imported article could copy or simulate an US registered trade mark nor carry a name calculated to deceive the public that the article was manufactured in US. Trade mark owners thus had strong control over the importation of goods bearing his trade mark into US. The provision was interpreted by the US court in a case in 1993. The court ruled that parallel importation of foreign goods bearing a trademark identical to a US trademark was not allowed if the goods were physically different.

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Imported goods that were identical to those goods on the US market are not barred. By a US Customs ruling in 1999 issued in the light of the court decision, physically different goods bearing a trade mark identical to a US trademark could be imported into the US subject to the fixing of a label on the goods stating that the importation was not authorized by the US trademark owner and that the goods were not the same as the goods on the US market. He undertook to provide members with an information paper on the Lanham Act. In this connection, the Chairman drew members' attention to the information paper provided by the Administration on the position regarding parallel importation of trade mark goods in Australia and Singapore (LC Paper No CB(1)676/99-00(02)).

16. Mr HUI Cheung-ching shared the concern of the representatives of deputations about the quality of parallel imports and the possibility of Hong Kong becoming a dumping ground of inferior goods. He enquired about how the quality of goods would be guaranteed upon liberalization of parallel import.

17. The Principal Assistant Secretary for Trade and Industry (PAS/TI) said that parallel imports were genuine products which were authorized by the trade mark owners for manufacture in different places. The Administration's stance had always been that there should not be any obstacle to the free flow of genuine goods. It should be a matter of choice for consumers to choose between parallel imports and mainstream imports. The Administration did not consider it appropriate to make additional labelling requirements for the purpose of differentiating parallel imports from mainstream imports. PAS/TI pointed out that with or without clause 19, parallel importation existed as a matter of fact. With the growing popularity of Internet and electronic commerce, globalization of world market was an irreversible trend. It was neither feasible nor desirable to set territorial boundaries to restrict the circulation of goods. It had been proven in the past that competition brought about wider choices and cheaper prices of goods. The Administration believed that an open market would benefit both consumers and the economy of Hong Kong in the long run.

18. Mrs Selina CHOW asked whether representatives of the deputations would accept clause 19 if consumers were provided with information on the source of the goods and the channel for complaint. The Chairman added that for pre-packed food and cosmetics, information should also include the best before date for consumption.

19. Dr Dennis SUN of Photo Marketing Association responded that apart from the said information, it was equally important to define clearly the legal responsibility of manufacturers, importers, distributors and retailers and to clarify whether after-sale service would be provided.

20. Mr LEE Kwong-lam of the Food Council said that proper labelling was particularly important for food products. Besides, an effective food inspection system was also necessary to ensure that the good imported was safe for consumption. Provided that responsibilities of different parties were clearly defined and proper labelling and inspection systems was put in place, he would accept parallel

importation.

21. Mr Ben WONG of the Brewers Association said that it was important to show details of importers on the label on goods. Consumers would then know where to seek redress when a product was found to be defective or have been deteriorated. For pre-packed food and beverages, the information on the best before date for consumption was necessary.

22. Mr Homer YU of Cosmetic Association agreed that delineation of responsibility among the various parties was important. He however was of the view that even with the provision of the relevant information on a label on goods, he would only accept liberalization of parallel importation reluctantly. He considered it unfair that parallel importers were allowed to take unfair advantage once the reputation of the trade mark had been built up through the effort of trade mark owners, authorized licencees and distributors.

23. Since different parties were involved in the supply of goods including manufacturers, importers, distributors and retailers, the Chairman enquired who would be held responsible should the relevant ordinances be breached. PAS/TI said that all consumer goods sold in Hong Kong had to comply with the requirements on product safety under the existing legislation, regardless of whether they were mainstream imports or parallel imports. There were specific legislation governing the safety and other requirements in respect of specific categories of goods. The Administration had provided an information paper to the Bills Committee in this regard (LC Paper No CB(1)859/99-00). As to the legal responsibilities of the concerned parties, PAS/TI advised that all parties involved in the supply of consumer goods had the legal responsibility for ensuring that the products sold on the market complied with the safety requirements as provided under the Consumer Goods Safety Ordinance (Cap. 456).

23. In response to the Chairman, Mrs CHAN WONG Shui said that as far as electrical products were concerned, retailers had the legal responsibility for ensuring safety. Whether manufacturers had the same responsibility would need to be confirmed. The Chairman requested the Administration to provide written information to clarify the legal responsibility of the various parties concerned in the supply of a product for compliance with the statutory requirements.

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24. Mrs Selina CHOW agreed that it would be crucial to clearly define the legal responsibilities among the concerned parties. She acknowledged the concern that trade mark owners or authorized distributors should not monopolize the circulation of goods. On the other hand, she considered it odd that the Administration had been objecting to the call for provision of information on the source of the goods. She doubted whether the intellectual property rights of the trade mark owners would still be protected in any slightest sense upon liberalization of parallel importation. Mr HUI Cheung-ching opined that the trade mark registration system might not serve its original purpose if trade mark owners' right to control the distribution of their goods by licensing would be taken away completely.

25. DIP explained that traditionally, the purpose of trade marks was to identify the origin of goods, not importers or distributors or the place where the goods was imported. The legislative provisions regarding parallel importation in overseas jurisdictions might not be relevant to Hong Kong as such place had its own development. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) did not contain specific provision in respect of parallel importation. Policy on parallel importation should be decided by each individual jurisdiction.

26. Noting that many deputations had called for the provision of information on importers and distributors of goods on label to enable consumers to know the source of goods and the channel for complaint, the Chairman asked if CC would support such labelling requirements. Mrs CHAN WONG Shui said that CC supported the provision of more information to consumers but whether this should be in the context of a trade mark law or a labelling law should be decided by the Administration and members.

27. PAS/TI reiterated that protection of consumer right should be effected through education, not additional labelling requirements. The Administration had been cooperating with CC in this aspect. The establishment of code of practices for the trade such as that issued by HKRMA, would also be effective means.

28. Mrs Selina CHOW commented that members of HKRMA were responsible retailers who had been adhering to good trade practices to maintain their reputations. Unfortunately, there were other retailers who were not providing the same quality of service to customers and consumers might find it hard to trace the party responsible should they have bought defective products. She sought clarification from HKRMA on the reasons for objecting additional labelling requirements.

29. Mr Logan TAYLOR of HKRMA explained that labelling was generally done by the manufacturers or the importers who introduced the product to the local market. For those products which catered for the demand of a small segment of the community and only a small quantity were imported, manufacturers might be unwilling to take the burden of additional labelling as it would incur cost. If the labelling had to be done by the importers in Hong Kong, it would also involve cost. Further labelling requirement would make Hong Kong become a high cost port of destination. Moreover, given the large number of products available on the market, the logistics involved in the labelling process would be very complex in particular for small items. Nevertheless, importers or retailers had been complying with the labelling requirements under the existing law of Hong Kong.

30. Mr Michael FAN commented that labelling might not be a complete solution to the issue of parallel importation. He pointed out that at present electrical appliances had warning labels where necessary which stated that the voltage was not suitable for use in Hong Kong. Such information did not serve much purpose. He requested the Administration to make reference to the laws on parallel importation in

the North America and Europe which had not adopted international exhaustion of rights.

31. Representatives of the deputations generally felt that the safety and labelling requirements under the existing legislation were inadequate in protecting consumers. They drew members' attention to the following points:

- (i) There was inadequate control on the safety of electrical appliances under the existing legislation. Electrical products could be supplied locally on condition that a certificate of safety compliance was issued and that a warning label be attached where the voltage was not suitable for direct connection to the local electrical supply system. Testing on mainstream electrical products would invariably be done by the authorized distributors. However, whether safety testing had been done on parallel imported electrical products was uncertain.
- (ii) At present, the registration requirements did not apply to parallel imported pharmaceuticals. Parallel-imported pharmaceuticals were neither registered nor assigned with a registration number. The information set out in paragraph 3 of the Administration's response to the submission from HKAPI (LC Paper No CB(1)1037/99-00(03)) was incorrect. The sale of unregistered drugs posed a health hazard. Moreover, unlike other consumer products, consumers were generally unable to detect expired drugs or drugs the quality of which had been changed.
- (iii) For certain types of products such as cosmetics, authorized distributors had the knowledge to select products which suited local consumers. Apart from ensuring product safety, they would provide services such as professional advice during and after purchase to facilitate consumers to make a proper choice and use of the cosmetic products. Parallel importers normally lacked the professional knowledge of the products.

32. Mrs CHAN WONG Shui of CC pointed out that there were statutory requirements under the existing law to ensure safety of electrical appliances supplied to local consumers. The Customs and Excise Department conducted random checking of these products. CC also carried out tests on product safety regularly.

33. Upon the Chairman's invitation, PAS/TI clarified that there were already legislations governing product safety and labelling requirements. He referred members to an earlier information paper on parallel importation of trade mark goods and labelling requirements (LC Paper No CB(1)859/99-00). He explained the statutory safety and labelling requirements in respect of different types of consumer goods as follows:

- (i) Under the Pharmacy and Poisons Ordinance (Cap. 138), no person

should sell, offer for sale or distribute or possess for the purposes of sale, distribution or other use any pharmaceutical product unless it was registered with the Pharmacy and Poisons Board. This ensured that all pharmaceutical products complied with the safety, efficacy and potency requirements. If a pharmaceutical product was imported into Hong Kong by more than one importer, each of them was required to apply for registration separately and would be assigned different registration numbers.

- (ii) All pre-packed food sold in Hong Kong were subject to specific requirements, including labelling, set out in the Food and Drugs (Composition and Labelling) Regulations under the Public Health and Municipal Services Ordinance (Cap. 132). Food labels would need to include, among other things, the name of the food, a list of the ingredients and the name and address of the manufacturer.
- (iii) Under the Electrical Products (Safety) Regulation of the Electricity Ordinance (Cap.406), there were specific safety and labelling requirements governing electrical products. The Gas Safety Ordinance governed the safety of gas appliances.
- (iv) The Consumer Goods Safety Ordinance (Cap.456) imposed a statutory duty on manufacturers, importers and suppliers of consumer goods to ensure that the goods they supplied for local consumption were safe.

34. PAS/TI reiterated that parallel imports were genuine goods and should not be equated with goods of inferior quality or counterfeit items. Under the free trade policy of Hong Kong, free circulation of genuine goods should not be stopped. He emphasized that the Administration was not rushing through the liberalization of parallel importation. On the contrary, this proposal was made timely to tie in with the irreversible trend of globalization of the world market and for the long term benefit of Hong Kong's economy. He believed that local consumers were sophisticated enough to make informed choices in their purchase. Improvements to consumer protection should be achieved through consumer education and the promotion of good trade practices in the various industries, and not additional labelling requirements.

35. The Chairman said that whether the existing labelling requirements were adequate and whether these should be further strengthened were relevant to the consideration of liberalization of parallel importation.

36. Mrs Selina CHOW suggested that the Administration and Assistant Legal Adviser consider the technical feasibility of including the labelling requirements under clause 19(2).

Way forward

37. Members agreed to continue clause-by-clause examination of the Bill at the next meeting on Monday, 28 February 2000 at 2:30 pm and discuss clause 19 after completion of clause-by-clause examination.

(Post-meeting notes: Members agreed to discuss the issue of parallel importation at the meeting scheduled for Monday, 17 April 2000, at 8:30 am)

38. There being no other business, the meeting ended at 11:30 am.

Legislative Council Secretariat

14 April 2000