

SUBMISSION TO THE BILLS COMMITTEE ON TRADE MARKS BILL

BY THE HONG KONG BREWERS ASSOCIATION

Introduction

This submission to the Bills Committee is made by the Hong Kong Brewers Association ('HKBA'), an Association comprised of a majority of the brewers which manufacture or market their proprietary products in Hong Kong, and whose principal members are San Miguel, Carlsberg and Heineken. All eligible brewers have been or will be invited to join the HKBA, which is currently being established as a legal entity.

The purpose of this submission is to express HKBA members' opposition to Clause 19 of the current Trade Marks Bill, which is designed to introduce the "international exhaustion" of trade mark rights in Hong Kong. The HKBA is in full agreement with the submission to the Bills Committee already presented in the name of five multi-national companies (Unilever, Colgate-Palmolive, Johnson and Johnson, Levi Strauss and PepsiCo) and with the submission made by the Liquor and Provision Industries Association ('LPIA'). This submission does not repeat arguments already made but amplifies the concerns already expressed as they pertain to the brewing industry, and in particular the effect of introducing "international exhaustion" for trade marks relating to perishable food products such as beer.

Economic Impact

The HKBA believes that a detailed assessment of the economic impact of introducing "international exhaustion" of trade marks should be made before existing legislation is changed. Evidence already submitted to the Committee shows that legislators in the UK, the EU and elsewhere are by no means convinced that the economic benefits outweigh the disadvantages. The same applies to Hong Kong.

The arguments put forward by the Trade and Industry Bureau ('TIB') to justify the liberalisation of parallel imports demonstrate a complete lack of understanding of the costs to a trade mark owner in creating a market. The trade mark owners in the brewing industry in Hong Kong directly employ over a thousand people and spend millions of dollars each year in office, factory and warehouse rental, brewing, marketing, distribution and sales. The advertising spend of the brewing industry alone is over HK\$200 million annually. The HKBA believes that there is no justification whatever for the TIB's assertion that "With the proposed liberalisation, we expect that there will be an increase

of businesses specialising in parallel imports, thereby boosting employment and the economy." Indeed, the reverse is very likely to occur.

It is well known that most parallel importers operate low cost businesses, employing as few people as possible and spending very little money, if any, on marketing or advertising the products they sell. Their whole *modus operandi* depends upon selling products at significantly lower costs than the trademark owners because they have none of the costs of creating the market which are borne by the trade mark owner. By importing product bought in other lower cost markets on a marginal cost basis, and selling them at lower prices than the trade mark owner can reasonably afford in a high cost market like Hong Kong, they are simply parasitising on the investment made by the trade mark owner at the same time as undermining the brand value of the trade marks in which the owner has invested.

To suggest that the parallel importers will invest more in Hong Kong's economy or employ more people than the trademark owners of most consumer products on sale in Hong Kong, is patently absurd. The multi-national companies which have so far made submissions to the Bills Committee, on their own, undoubtedly invest more in Hong Kong and employ more people than all the parallel importers.

In the long term, the result of the liberalisation of parallel importing will be a reduction of investment in brands by trade mark owners, leading to a decline in sales and the eventual withdrawal from the market by trade mark owners. This investment will not be replaced by the parallel importers, who cannot afford it without putting up their prices. If they do that, the alleged benefits to the consumer of liberalising parallel imports will disappear: if they do not, the brands, without investment to support them, will disappear. From either perspective, the impact on the economy and on employment will be negative.

Consumer choice

The main arguments put forward by the Consumer Council and the TIB in support of the liberalisation of parallel imports boil down to the simple proposition that free trade provides greater consumer choice: the control of parallel imports restricts consumer choice, so parallel imports should be liberalised.

In its comments in response to the argument that consumers will be confused by goods sold under the same trade mark but manufactured for other markets (frequently with different characteristics), the Consumer Council states "The ability for [sic] Hong Kong consumers to differentiate between goods of all types cannot be underestimated." The

Consumer Council is therefore relying on the ability of the Hong Kong consumer to make such a judgement about such things as the origin, age and quality of the product, in the absence of any comprehensive legal requirement that sufficient information is provided on trade marked products to enable him or her to make such a judgement. In the view of the HKBA, this is unrealistic. If a consumer has to choose between products sold under the same trademark but differentiated solely by price, he does not have the means to make an informed choice.

Role of trade marks

A trade mark should be seen by the consumer as a guarantee of quality (not a "badge of control", as the TIB believes). But the trade mark owner can only guarantee that the quality of the product has been maintained as long as he remains in control of the manner and area in which the product is distributed and sold. This is particularly true of food products such as beer, whose quality deteriorates over time. Parallel importers buy beer in the lowest cost markets in the world, where the sale prices are correspondingly lower than in Hong Kong, and sell them in Hong Kong, often long after the trade mark owners intended them to be sold and consumed in the markets for which they were originally produced. The consumer has no means of telling when the beer was meant to be drunk, and yet if he finds it of inferior quality, he is likely to complain to the trade mark owner in Hong Kong, who has had no control over the product's distribution and sale. This is unfair to both the consumer and the trade mark owner.

Labelling requirements

If parallel imports of perishable trade marked products are liberalised to the point that the trade mark owners lose control of their distribution and sale, it is in the interests of both consumers and trade mark owners to require that products are labelled with information indicating both the name of the importer and the 'best before' consumption date. Only then can the consumer make an informed judgement about the age and possible deterioration in quality of the product (and also about why it is being sold more cheaply). He will also know who to complain to if he is unsatisfied with the product's quality. It only makes sense for the Government to use consumer choice as the justification for liberalising parallel imports if at the same time it introduces labelling requirements to provide the consumer with the means to make an informed choice.

Exemptions under Clause 19

While we believe that the exemptions provided under Clause 19 of the Bill are designed to safeguard trade mark owners when the condition of the goods has been "changed or impaired" after they have been put on the market or where the use of the trade mark in relation to those goods is "detrimental to the distinctive character or repute of the trade mark", we do not believe that these exemptions have been drawn widely enough to safeguard trade mark owners such as brewers against the kind of deterioration in product quality which naturally affects foodstuffs such as beer. The HKBA requests that the Bills Committee considers whether this Clause might be redrafted to provide wider safeguards for trade mark owners.

Dennis Heijn

On behalf of:

THE HONG KONG BREWERS ASSOCIATION

24 JANUARY 2000