

**PC response to
Trade Descriptions (Unfair Trade Practices)(Amendment) Bill 2012**

1. In July 2009, the Government issued a public consultation paper on legislation to enhance protection for consumers against unfair trade practices. In response to the consultation, The Professional Commons issued in October 2009 a document namely “Submission on the Consultation on Legislation to Enhance Protection for Consumers against Unfair Trade Practices”,¹ giving a very detailed description of principles that should be incorporated into the possible extension of coverage of Trade Descriptions Ordinance to service industry. It has been stressed by our response that as the principle of paramount importance, the proposed legislation should attach greater importance on safeguarding the wellbeing of ordinary citizens, particularly their basic right as a decent consumer.
2. The Trade Descriptions (Unfair Trade Practices) Bill was eventually tabled to the Legislative Council for its first reading in February this year. We are disappointed that the Bill does not take much our input into account, which we had careful thought to strike a viable balance between effective running of business and empowerment of consumers. Even as far as the amendments are concerned, they are far from satisfactory in fulfilling its stated objective to protect consumer rights. Our comments are suggested as follows:

Extensive coverage with minimum exemption

3. Given that the objective of the Bill is “to enhance the scope of consumer protection by expanding the definition of trade description in relation to services in the same manner”, there should be no justified reason that some specific sectors can be off the hook. As highlighted by our proposal, the proposed legislation should serve as a building block so that minimum common standard to all sectors in service industry is possible and no single sector would be able to be in exemption, therefore better protecting the consumers when they are engaging in buying all kinds of goods and services. To demonstrate government’s determination to tackle the issue, declaration in the form of lower common standard for all service sectors is a must, which is critical in relevant legislation of

¹ See The Professional Commons, “Submission on the Consultation on Legislation to Enhance Protection for Consumers against Unfair Trade Practices”, October 2009.
<<http://www.procommons.org.hk/wp-content/uploads/2010/11/trade-practice-text-english.pdf>>

Britain where compliance-based mechanism the Bill has largely referred to hinges on. Unfortunately, the Government budges to act in this direction. Without any amendment from its original consultation document, the Government continues to allow certain sectors not to be governed under the ambit of the expanded Ordinance, despite the fact that these sectors account for a considerable share in the local economy, making citizens skeptical of government's real intention to introduce the Bill, which could be nothing but just muddling through.

Turning the “compliance-based mechanism” into a real deterrence

4. Regarding enforcement, it is stressed by our response that without a real powerful enforcement agency (“the agency”) and reinforcement of the unique role of the Consumer Council, the self-proclaimed declaration of its adherence to compliance-based mechanism represents nothing but tissues of empty talk. To achieve so, it was suggested by our proposal that the “undertakings” tendered to the agency should be a formal legal-binding document, whereas the proposed amendment that the agency can inspect books and documents that are required to be kept under the Ordinance is not enough to avoid the agency from becoming a “toothless tiger”.²
5. More importantly, the Consumer Council should be designated a more proactive role, including case referral and spokesperson for consumers, to ensure real empowerment of consumer rights and their powerful protection. Such an arrangement could enable consumers a ground of a relative symmetry of information, rather than relying on dispute resolution as their inevitable choice. Unfortunately, our view in this aspect has been ignored by the Bill. Furthermore, it is indicated by the expertise and rich experience of the Consumer Council that it is able to accurately identify cases that are strong enough to bring to the attention of courts. Its competent role of case referral is also helpful in strengthening the role of Customs and Excise Department as the designated enforcement agency.

² “Under the proposed mechanism, the enforcement agency is 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. It can be implied that the court can only issue injunction even these businesses failed to fulfill their undertaking, which is seriously speaking not regarded as penalty of any sense because no punitive measures has been laid out when in violation of any undertakings businesses previously committed, which is far from the principle underlying the “compliance-based mechanism” of the UK”.

Details please check The Professional Commons, “Submission on the Consultation on Legislation to Enhance Protection for Consumers against Unfair Trade Practices”, October 2009, para. 9.

Two-pronged approach to deal with aggressive commercial practices

6. To deal with issues concerning aggressive commercial practice, we welcome what the Bill proposes to include a non-exhaustive list of the factors which must be taken into account when determining whether a practice uses harassment, coercion or undue influence. In so doing, it would be somewhat effective to prohibit the use of aggressive practices in consumer transactions in respect of which the *mens rea* requirement is displaced. However, the provision is just not able to quench the instant thirst of wide-spreading and imminent public concern to put beauty/slimming and gymnastic services under scrutiny by imposing cooling-off period of reasonable length, which the consultation has once suggested but the Government finally retracted from huge backlash of relevant businesses. Both frequent revision of what should be incorporated into the non-exhaustive list that defines aggressive trade practice as well as introduction of cooling-off period is what we consider a two-pronged approach that prohibits the use of aggressive practices in consumer transactions on one hand, and ensures real customer empowerment on the other.

7. Last but not least, remedial measures should not be confined to combating unfair trade practices as suggested in the Bill, as their ultimate goal should be to safeguard consumer interests in service consumption. In this sense, The ProCommons suggests the Government to adopt multiple perspectives in a more holistic manner, utilizing the amendment of the Personal Data (Privacy) Ordinance and the legislation of the Competition Law so as to better facilitate the protection of consumer rights.