

For discussion on
4 June 2012

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

**Administration's Responses to Submission from the Hong Kong
Retail Management Association**

Purpose

This paper sets out the Administration's responses to suggestions raised in the submission dated 28 May 2012 from the Hong Kong Retail Management Association (HKRMA).

The Administration's Responses

2. We welcome HKRMA's in-principle support for the enactment of the Bill to penalize unscrupulous traders who engage in unfair trade practices against the interests of consumers. We fully appreciate the concerns of HKRMA over the operation of certain provisions of the Bill. To ease these concerns and promote a proper understanding of the operation and effect of the provisions, we have been actively engaging stakeholders including HKRMA. As we have advised the Bills Committee at previous meetings, we have met with a number of trade associations and explained to them the proposals in the Bill. We have had the benefit of their suggestions which have proved useful in drawing up our implementation plans and enforcement guidelines. We will step up these public engagement efforts and consumer empowerment initiatives, before and after the commencement of the Bill (if enacted).

3. In its submission, HKRMA indicated its request for further clarifications over a few provisions in the Bill. In our view, most of the concerns arise from misunderstandings of the operation of the Bill. We are therefore pleased to have this opportunity to explain in the ensuing paragraphs.

Misleading Omissions

4. In paragraph 5.1 of the submission, HKRMA quoted an example: a consumer asks for “a glass of wine” and the bar (as a trader), through a sales person, recommends wines from Italy, France and Spain (as products) from which the consumer chooses one from Italy. HKRMA asked, in effect, whether the salesperson in the example would commit the offence of “misleading omission” by omitting price information on other types of wines.

5. “Commercial practice” is defined under clause 3(9) of the Bill to mean “any act ... by a trader which is directly connected with the promotion of a product to consumers ...”. Under the proposed new section 13E(2), a commercial practice is a misleading omission if, *in its factual context*, taking account of the matters in the proposed new section 13E(3), it omits “material information” and as a result, it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise. The “matters” referred in the proposed new section 13E(3) include “*all the features and circumstances of the commercial practice*”, the limitations of the medium used to communicate the practice (including limitations of space or time), and if there are limitations of space or time, any measures taken by the trader to make the information available by other means. “Material information” is defined under the proposed new section 13E(5) to include the information that the average consumer needs, according to the context, to make an informed “transactional decision”.

6. As the recap above has shown, in determining whether a commercial practice is in breach of the offence of misleading omission, the factual context as well as all the relevant circumstances and factors have to be taken into account - simply put, sensitivity to the context and the actual circumstances lies at the very heart of the proposed provisions. In our view, the example given does not seem to trigger a criminal offence in the light of what is said to have actually happened when the consumer is engaged. In fact, it is appreciable that the circumstances of the commercial practice are such that it is impractical in the light of the

time limitations for the sales person to communicate verbally to the consumer price information on all types of wines available in the bar. Furthermore, “the average consumer” should look for the bar’s wine list for price information if the consumer is sensitive to price.

7. In paragraph 5.6 of the submission, HKRMA suggested that an additional defence, *viz.* an honest belief on the part of the trader that a consumer did not need a particular piece of information, be provided for for the offence of misleading omissions. The core element of the proposed provisions is the availability of information (ascertained in the light of the actual context and all circumstances and features of the relevant commercial practice) necessary for the average consumer (being a reasonably well informed, reasonably observant and circumspect person) to make an informed decision. The additional defence proposed is, in our view, not appropriate, as it introduces a subjective standard of test based on the trader’s belief, and a trader who holds an unreasonable belief will be absolved of liability.

8. In paragraph 5.7 of the submission, HKRMA suggested that the element “refraining from acting” be removed from the definition of “transactional decision”. We consider that the element must be retained because the phrases “to act” and “to refrain from acting” refer not only to the decision of entering or not entering into a transaction, but also to the matters set out in paragraphs (a) and (b) under the definition, e.g. the terms of the transaction to be entered into and the exercise of rights under a transaction. These aspects are integral parts of a consumer’s behaviour, and omitting the element “refraining from acting” would render the whole regime ineffective.

Aggressive Commercial Practices

9. In paragraph 6.2 of the submission, HKRMA suggested that the use of undue influence be omitted from the proposed definition of “aggressive commercial practices”, on ground that the concept “undue influence” was too vague. HKRMA quoted an example where “pressure” was allegedly exerted on consumers by public announcements towards the closing time of a shop premises.

10. The proposed new section 13F(2) provides that a commercial practice is aggressive if it *significantly impairs ... the average consumer's freedom of choice or conduct ... through the use of harassment, coercion or undue influence*, and it therefore causes or is likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise. The proposed section requires that when determining if a commercial practice is an aggressive commercial practice, account must be taken of *all of the features and circumstances* of the practice. The proposed new section 13F(3) sets out the factors that must be taken into account in determining whether a commercial practice uses harassment, coercion or undue influence. Among the factors listed are “timing, location, nature or persistence” and “the use of threatening or abusive language or behaviour”. The proposed new section 13F(4) goes on to define “undue influence” to mean “*exploiting a position of power* in relation to the consumer so as to apply pressure ... in a way which *significantly impairs* the consumer’s ability to make an *informed* decision”.

11. We do not consider that the example quoted by HKRMA would trigger a criminal offence. Taking into account the nature of the public announcements on the closing time of the shop and all other features and circumstances of the case, we consider that the making of the public announcements does not amount to exploiting a position of power, let alone significantly impairing the average consumer’s freedom to make free or informed choices. Separately, we consider that the definition of “undue influence”, adopted elsewhere in the United Kingdom and other parts of Europe, is not vague, and that removing it from the proposed offence would give rise to a significant loophole where practices falling short of using physical forces or verbal abuses might escape sanctions.

Bait Advertising

12. In paragraph 7 of the submission, HKRMA contended that the provisions against “bait advertising” (under the proposed new section 13G) and “bait and switch” (under the proposed new section 13H) were overlapping. In fact, they prohibit different acts. The offence of “bait

advertising” prohibits a trader from advertising for the supply of products at a specified price if there are no reasonable grounds for believing that he will be able to offer for supply those products at that price for a reasonable period and in reasonable quantities, having regard to the nature of the market and the nature of the advertisement. The offence of “bait and switch” prohibits a trader from making an offer to sell a product at a specified price *with the intention* of promoting a different product (usually more expensive products) through any of the defined tactics. The proposed creation of the two different offences will help strengthen consumer protection and received wide support during the public consultation on the proposed legislative amendments that was conducted in late 2010.

13. In paragraph 8 of the submission, HKRMA expressed the concern that traders might refrain from taking pre-orders if they were not certain about the actual delivery date of the products in question, for fear that they might be in breach of the proposed offence of bait advertising. The proposed new section 13G on bait advertising does not mandate a trader to supply the relevant product immediately upon accepting orders. Neither does it forbid a trader from contracting with a consumer for a future delivery date. The proposed new section seeks no more than to prohibit a trader from advertising a product at a specified price if there are no reasonable grounds for believing that the trader will be able to offer for supply the product for a period and in quantities that are both reasonable. The proposed new section requires that in determining whether the offence has been committed, the nature of the market and that of the advertisement have to be taken into account.

Wrongly Accepting Payment

14. In paragraph 9 of the submission, HKRMA asked if a trader would commit the proposed offence of wrongly accepting payment (under the proposed new section 13I) if the trader failed to supply a product for which the trader had accepted payment, but promptly offered refund to the consumer upon discovering that the product was not available. HKRMA quoted as an example the failure of a fast food shop to supply a chicken leg after the cashier had received payment.

HKRMA suggested that an additional defence (that the trader was willing and able to make a refund) be provided for defendants in proceedings for the proposed offence.

15. In proceedings for the offence, the prosecution is required to prove beyond reasonable doubt, among other elements of the offence, that at the time of accepting the payment, the trader intends not to supply the product (or to supply a product that is materially different); or the circumstances are such that a common sense, right thinking member of the community would consider that there are no reasonable grounds to lead a person in the position as the trader to believe that he would be able to supply those products at that price.

16. The enforcement agency will take into account all the facts and circumstances of the case concerned. The Code for Prosecutors requires that the prosecutors consider the sufficiency of the evidence, i.e. evidence to make out the case and evidence to rebut any defence which might be available and which might be raised. In the example quoted, it is common practice for the cashier of the fast food shop to be advised when a certain food item is out of stock. This due diligence arrangement and communications failure (as a kind of mistake) which presumably gives rise to the failure to supply the product in the example quoted would of course be taken into account.

17. While the defence provisions have provided sufficient and reasonable protection for traders who commit an offence due to mistake, the additional defence proposed by HKRMA will give rise to a loophole for unscrupulous traders, in that requests for refund might not be made by all affected consumers.

18. The proposed amendments to the relevant provisions shown in Appendix I to the submission seek to implement HKRMA's counter-proposals. As in our view they are based not on a proper understanding of the operation of the provisions and HKRMA's concerns have been properly addressed through the preceding clarifications, we consider that the proposed amendments are neither necessary nor appropriate.

Advice Sought

19. Members are invited to note our responses to the submission.

**Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
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