



**Submission to Bills Committee on Trade Descriptions
(Unfair Trade Practices) (Amendment) Bill 2012**
(7 June 2012)

1. We refer to the Administration's Response to HKRMA's submission dated 28 May 2012 which was posted on the Bill's Committee website and discussed at the Committee meeting on 4 June 2012.
2. We thank the Government for considering our points but we remain concerned that none of the trade's legitimate concerns have been addressed. The Government states that the HKRMA's concerns arise from misunderstandings of the operation of the Amendment Bill, which we disagree. The examples and observations raised in HKRMA's submission are based on strict interpretation of the current drafting of the Amendment Bill, which is wide enough to cover the situations raised by HKRMA. On the other hand, the Government's response failed to answer HKRMA's questions in many respects, and there were misunderstandings on the part of the Government in relation to the examples, the real market situation and the concerns of the trade.
3. Although the Customs & Excise Department gave assurances that they will enforce the legislation fairly and not indiscriminately, this is of little comfort to the trade as the discretion rests with the investigating officers at the time. The focus should be on clarifying the detailed provisions of the legislation upfront.
4. We would like to follow up on each of the specific points in turn as set out below.

Section 13E Misleading Omissions

5. HKRMA suggested introducing an additional defence for section 13E, but the Government rejected this proposal on the basis that a trader who holds an unreasonable belief will be absolved of liability. However, this does not take account of our proposed wording which states "*the trader honestly and reasonably believed that the consumer does not need the omitted information in order to make a transaction decision*". To repeat for reference, the additional defence (misleading omissions) proposed by HKRMA reads as follows:



“Section 26C Additional Defence (Misleading Omissions)

Without limiting section 26, in any proceedings for an offence under section 13E the person charged is entitled to be acquitted if –

(a) sufficient evidence is adduced to raise an issue that –

(i) the omission relates to information concerning an alternative product or range of products; or

*(ii) the trader **honestly and reasonably** believed that the consumer does not need the omitted information in order to make a transactional decision; and*

(b) the contrary is not proved by the prosecution beyond reasonable doubt.”

6. Furthermore, in paragraph 6 of the Administration’s Response, the Government agreed that it is not required to give information of all types of wines in the bar as it is not practical. It is exactly the proposed defence under section 26C(a)(i) above. While it is not the intention of the legislation that omission of information relating to an alternative product or range of products would constitute an offence, then why the Government rejected our proposal to clarify this in the Amendment Bill?
7. We would respectfully ask the Government to accept our proposed drafting for Section 26C.

Section 13F Aggressive Commercial Practices

8. We remain concerned that the concept of “undue influence” is too vague. The Government states that clear definitions are available in other jurisdictions (e.g. the United Kingdom and other parts of Europe) but gives no examples of such definitions.
9. It is somewhat reassuring that the Government confirmed that our example of public announcements at closing time would not be sufficient to constitute “undue influence”. However, can the Government kindly help to give examples of what circumstances would give rise to a “position of power” and when such position would be exploited? We would also be grateful if the Government could explain what types of conduct would fall within the supposed loophole if the concept of “undue influence” was deleted, i.e. which are not already captured by “harassment or coercion”?



Section 13G Bait Advertising

10. Hon Wong Ting Kwong's Example

10.1 Hon Wong Ting Kwong raised a very topical real life experience at the Committee meeting on 4 June 2012 regarding the case of a credit card promotion at a Bakery where a customer went to the store to buy the advertised \$1 products but found they were out of stock. The Government indicated that if a nearby branch of the Bakery still had stock remaining than it would be a defence under section 26A for the trader to offer such stock to the customer.

10.2 However, we do not consider the Bakery needs to rely on the defence under section 26A because the branch nearby is trading under the same legal entity of the Bakery, so it should not be an out-of-stock scenario and the Bakery is not committing an offence of Bait Advertising. But, if we go further to consider a similar situation, which the Bakery is a stand alone store and does not have any branch, and it could arrange the same product available in the next door bakery, then the Bakery would need to rely on section 26A. Unfortunately, section 26A would not be helpful to the Bakery as the customer in question did not accept the supply of the same product from the bakery next door. The current drafting of Section 26A reads as follows:

“Without limiting section 26, in any proceedings for an offence under section 13G the person charged is entitled to be acquitted if -

(a) sufficient evidence is adduced to raise an issue that -

(i) the trader offered to supply, or to procure a third person to supply, products of the kind advertised to the consumer within a reasonable time, in a reasonable quantity and at the advertised price and, if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the products; or”.....

10.3 In Hon Wong's real life example, everyone would agree that the customer had been acting unreasonably and is sympathetic to the Bakery. However, the Bakery is still liable for a criminal offence of Bait Advertising under the current drafting of section 26A, because the customer in question refused to accept the offer.



10.4 Custom & Excise Department had repeatedly emphasized that it will investigate all consumers' complaints in detail and would exercise its discretion not to prosecute a trader if the consumer has been acting unreasonably. It means that reasonableness of the consumer is a factor to be considered in the defence. This is exactly our point in our proposed amendment to section 26A:

“Without limiting section 26, in any proceedings for an offence under section 13G the person charged is entitled to be acquitted if-

(a) sufficient evidence is adduced to raise an issue that-

*(i) the trader offered to supply, or to procure a third person to supply, products of the kind advertised to the consumer within a reasonable time, in a reasonable quantity and at the advertised price and, **an average consumer acting reasonably would have accepted the offer; or**”.....*

10.5 If section 26A is amended as suggested above, then the Bakery would not be liable for Bait Advertising, as the customer was acting unreasonably.

10.6 The amendment has been proposed several times before. The Government refused to accept it without giving any reason, but repeatedly mentioned that it would be the discretion of the Custom and Excise whether to prosecute. We strongly request the Government to accept our proposed amendment as stated above, which is fair in all circumstances and reflects the true intention of the enforcing authority.

11. Example 3

11.1 We would like to follow up on Example 3 of HKRMA's submission, which relates to both Bait Advertising and Wrongly Accepting Payment.

Section 13I Wrongly Accepting Payment

11.2 We reiterate that it is a real market situation nowadays that retailers would advertise upcoming hot items (especially electronic items), but have no guarantee from the supplier whether stock will be made available to them, or, how many will be delivered, or when the stock will be delivered. However, customers are anxious to place deposit for pre-order, so that they may feel more



assured and to save time for queuing up at the store when stock arrives. When accepting deposits, retailers will make clear to the customers that they give no guarantee whether the item will be available, or indication of the time of delivery; and the retailer will arrange for a refund at any time when the customers do not want to wait any further. On such conditions, customers happily accepted and paid the deposit.

11.3 Under the current broad drafting of the Amendment Bill, the retailer may be guilty of Bait Advertising as well as Wrongly Accepting Payment.

“Section 13G Bait advertising

...(2) Subject of subsection (3), advertising by a trader of products for supply at a specified price is bait advertising if there are no reasonable grounds for believing that the trader will be able to offer for supply those products at that price, or the trader fails to offer those products for supply at that price, for a period that is and in quantities that are, reasonable, having regard to –

- (a) the nature of the market in which the trader carries on business; and*
- (b) the nature of the advertisement.”*

“Section 13I Wrongly accepting payment

...(2) A trader wrongly accepts payment for a product if the trader accepts payment or other consideration for the products and at the time of that acceptance –

...(c) there are no reasonable grounds for believing that the trader will be able to supply the product –

- (i) within the period specified by the trader at or before the time at which the payment or other consideration is accepted; or*
- (ii) if no period is specified at or before that time, within a reasonable period.”*

11.4 We believe that the current market practice mentioned above in 11.2 is an accepted practice which does not harm consumers and should not be an offence under the Amendment Bill. However, the wordings of sections 13G and 13I are very broad and vague. Therefore, in the last submission of HKRMA, the question was raised: “If the authorized dealer put the following notices in the



advertisement: “Coming Soon”, “subject to stock arrival”, and on the invoices: “delivery date to be confirmed”, would the authorized dealer still be caught under section 13G?”

11.5 It is a practical question which directly relates to the everyday trade practices of our members. However, the question is not answered in the Administration’s Responses at all. We would like to have a clear answer to this question for the trade to follow.

11.6 HKRMA has further suggested introducing an additional defence to section 26B, that if the retailer is willing and able to refund, then it would not constitute an offence. The proposed wordings are as follows:

“Section 26B Additional defence (wrongly accepting payment)

Without limiting section 26, in any proceedings for an offence under section 13I the person charged is entitled to be acquitted if –

...

(iii) the trader is willing and able to make a refund at anytime after accepting payment; and....”

11.7 The Government did not adequately explain why it would not accept HKRMA’s proposal for an additional defence of offering a refund. The proposed additional defence is necessary to be added in order to maintain the current accepted market practice. Otherwise, under the current wordings of section 13I, retailers will be guilty of Wrongly Accepting Payment even if the customer is happy to accept the pre-order arrangement. If the proposed additional defence is not added, retailers will no longer accept pre-order in order to avoid possible violation of section 13I. Retailers would only advertise when stock arrives, as it is only at that time retailers are sure about the quantity they are able to supply to the market. In that case, the public would be deprived of up-coming product information, as well as the chance to make pre-orders. Therefore, we urge the government to accept our proposed additional defence to section 26B.

Guidelines

12. We also noted that the Government has posted a draft set of guidelines regarding



interpretation and enforcement of the Bill. By its own admission these are only a very rough outline at this stage and we welcome the opportunity to comment on the detailed guidelines once available.

Conclusion

HKRMA's retail members remain concerned about these issues and the apparent reluctance by the Government to adopt our proposals for minor clarificatory amendments to the Amendment Bill.

We trust that the Bills Committee and the Government will now give these concerns due consideration and take appropriate action to propose the necessary Committee Stage Amendments.

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About HKRMA

The Hong Kong Retail Management Association (HKRMA) was founded in 1983 by a group of visionary retailers with a long-term mission to promote Hong Kong's retail industry and to present a unified voice on issues that affect all retailers. Established for 29 years, the Association has been playing a vital role in representing the trade, and raising the status and professionalism of retailing through awards, education and training.

Today, HKRMA is the leading retail association in Hong Kong with membership covering more than 6,700 retail outlets and employing about half of the local retail workforce. HKRMA is one of the founding members of the Federation of Asia-Pacific Retailers Associations (FAPRA) and is the only representing organization from Hong Kong. FAPRA members cover 17 Asian Pacific countries and regions.