

For information

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

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

Purpose

This paper sets out the Administration's responses to the views raised in the submission dated 15 June 2012 from the Hong Kong Bar Association (LC Paper No. CB(1)2201/11-12(01)).

The Administration's Responses

Section 7A

2. In paragraph 5 of its submission, the Bar Association suggests that consideration be given to the implications of the Court of Final Appeal's judgment in *Lee To Nei v HKSAR* (FACC5/2011) regarding section 26(4) (defence provision in respect of the trade mark offence in section 9(2)). The Administration has noted the judgment and will act in accordance with the Court's decision in relation to section 26(4). We shall also consider its implications on the implementation of the Trade Descriptions Ordinance (Cap. 362) in respect of other related provisions therein.

Sections 13E and 13F

3. In its submission, the Bar Association contends that the offences to be created by the proposed sections 13E and 13F (misleading omissions and aggressive commercial practices respectively) are unlikely to be held by the court to be ones where the presumption of *mens rea* is displaced. While we respect the Bar Association's views, we maintain our position that it is justified to have the two new offences cast as ones

where the presumption is displaced, and that the current formulation of the two proposed sections is to this effect.

4. The nature of the offences created by the Bill has been fully canvassed in the public consultation exercise which we conducted in 2010 and has been discussed at the Bills Committee. As we said in the consultation document, there is little dispute that unfair trade practices have attracted widespread social concern in Hong Kong. In 2009, 2010 and 2011, the Consumer Council received 8,276, 3,942 and 3,686 complaints respectively concerning unfair trade practices. Unfair trade practices undermine consumer interests and confidence, thereby hurting honest businesses as well. Displacement of the presumption of *mens rea* will be necessary to encourage traders to be more vigilant to avoid committing the prohibited acts and a proportionate response in promoting the object of the statute, i.e. enhancing protection for consumers against unfair trade practices.

5. As regards the Bar Association's observations in paragraphs 8-10 and 14 of its submission that the words of sections 13E and 13F have to be considered on their own, we wish to point out that while the defences under sections 26(3) and (4) are not applicable to the two proposed new offences, the general defence under section 26(1) is.

Advice Sought

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

**Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
July 2012**