

# Improving Legal Protection 加強法律權益保障

## WHY THIS IS IMPORTANT

Consumer rights should be protected by law. The Council continually keeps abreast of developments in the law that may affect consumers' positions and welfare as users of goods and services. The Council is also active in taking the initiative to improve and protect consumers' legal rights by submitting our views in that regard to the Government and other relevant bodies.

## WHAT WE HAVE DONE

### Report on Unfair Terms in Standard Form Consumer Contract – Follow-Up Action

Since the release of the Report on Unfair Terms in Standard Form Consumer Contract in April last year, the Council has been closely following up with the matter, on an on-going basis, by reviewing the standard form consumer contracts adopted by major traders of different industries.

Letters setting out the unfair terms under their standard form consumer contracts with reasons for the unfairness and suggestion for their eradication were sent to a number of telecommunications and pay TV services providers and beauty service providers. Much to the disappointment of the Council, no positive response had been received from the traders concerned.

### Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012

The Council welcomed and fully supported the Ordinance, which sought to regulate six typical types of unfair trade practices commonly found in consumers' transactions, and extended the application of the Ordinance from goods to services. With the introduction and provision of such enforcement tools as undertakings, injunctions, private right of action and so on, the enforcement mechanism was expected to be effective. The Ordinance was a positive and pragmatic response to the recommendations made by the Council in its Report entitled 'Fairness in the Marketplace for Consumers and Business' issued in 2008.

## 加強法律權益保障的重要性

消費者權益應受法律保障。本會一向關注影響消費者權益的法律發展。此外，本會積極向政府和有關機構表達意見，以改善及保障消費者的法律權益。

## 我們完成的工作

### 標準格式消費者合約不公平條款報告 — 跟進行動

本會自去年四月發表標準格式消費者合約不公平條款報告後，一直密切跟進有關情況，審視不同行業的主要商戶所採用的標準格式消費者合約。

本會去信若干電訊及收費電視供應商與美容服務供應商，指出它們的標準格式消費者合約中存在的 unfair 條款，解釋其所引致的不公平情況，並建議將其剔除。遺憾地，有關商戶並未有對本會的建議作出正面回覆。

### 2012年商品說明(不良營商手法)(修訂)條例

本會歡迎及全面支持條例，因為它致力規管六項在消費者交易中普遍出現的典型不良營商手法，並將原先條例的適用範圍由貨品擴大至服務。在引入承諾、強制令、民事訴訟權措施後，可期望一個有效的執法機制。此法例正面及實際地回應了本會於二零零八年發表標題為《公平營商 買賣共贏》報告中的建議。

In its submission to the Bills Committee in April 2012, the Council called for the extension of specific circumstances to be considered in determining the effect on the average consumer of a commercial practice to vulnerability due to specific misfortune or circumstances, low educational level or financial incapacity.

Further, the Council raised concerns over another circumstance, namely, 'the practice is likely to materially distort the economic behavior only of that group', which was to be considered in determining the effect on the average consumer of a commercial practice.

The Ordinance set out the matters to be considered by the court in determining whether harassment, coercion or undue influence had been used in a commercial practice. However, it was not clear whether the court might consider matters other than those set out under the Ordinance. The Council urged for the removal of this ambiguity. It was also noted that the Ordinance defined coercion and undue influence but not harassment. The Council believed that a clear definition would help enforcement authority, trader and consumer comprehend the scope and application of the Ordinance.

The Council also submitted that compensation order should be granted not only to compensate financial loss, but also loss or damage of other kinds resulting from the unfair trade practice offences.

It was provided in the Ordinance that a person seeking to recover loss or damage resulting from the conduct prohibited under the Ordinance had to commence legal action within six years from the day on which the cause of action relating to the conduct accrued. The Council was of the view that the limitation period should in appropriate circumstances, such as those involving fraud or misrepresentation, be extended, with reference to the relevant provisions of the Limitation Ordinance.

The Bill was passed in July 2012 and the Ordinance so enacted came into effect on 19 July 2013. The Council was also invited by the Government to and has provided comment on the draft Enforcement Guidelines of the Customs and Excise Department and the Office of the Communications Authority before the final version was published.

於二零一二年四月提交草案委員會的書面意見中，本會提倡在決定某營商手法對一般消費者的影響時，將應考慮的指定情況擴大至消費者因個別不幸事件或情況、教育水平低及無財政能力而導致的易損性。

此外，在決定某營商手法對一般消費者的影響時，本會指出在考慮「此手法很可能關鍵性地扭曲唯獨該群組的經濟行為」的情況時的關注。

此條例列出法庭在決定某營商手法是否採用了騷擾、威迫手段或施加不當影響時應考慮的事項，但就法庭可否考慮條例沒有列出的事項，則沒有說明。本會希望條例澄清這點。另外，條例只有對威迫手段及施加不當影響作出定義，而沒有對騷擾作出定義，本會相信一個清晰的定義可幫助執法機關、商戶及消費者了解條例的適用範圍。

本會亦提出補償命令應不限於補償金錢損失，亦應包括因不良營商手法引致的其他損失及損害。

條例訂明任何人士如要追討因違例行為而招致的損失或損害，須於訴訟權產生日起的六年內開展訴訟，本會認為在適當情況下（如涉及欺詐或失實陳述），應參考《時效條例》的有關條文延長訴訟時限。

條例在二零一二年七月通過，並於二零一三年七月十九日生效。消委會亦獲政府邀請，在最後版本公布前，對海關及通訊事務管理局的執法指引提供了意見。

## Land Titles Ordinance: Proposed Two-Stage Conversion Mechanism

In May 2011, the Administration proposed a Two-Stage Conversion Mechanism for the implementation of the Land Titles Ordinance. After discussing with the Land Registry on several occasions, the Council submitted its views on the proposed mechanism.

The Council welcomed the proposal that a bona fide purchaser who acquired the property for value after full conversion would enjoy the protection of immediate indefeasibility, whether or not the vendor from whom he purchased was a voluntary transferee.

However, the Council has reservation on some major aspects of the proposed mechanism. The incentive of the vendor to fulfill his duty to disclose overriding interests, which could be onerous and costly, was one of the main concerns of the Council. On the other hand, the purchaser would tend to conduct thorough investigation of the property and title in order to protect his own interest. As a result, the conveyancing process would not be simpler than that under the current deeds registration system.

To address the above problems, the Council suggested that (i) the legal liability and consequence for non-fulfillment of the disclosure requirements by the first vendor should be clearly and expressly set out in the Ordinance; and (ii) holders of overriding interests with actual or constructive knowledge of the interests should be required to register the interests for protection.

The Council also expressed concern over the practicality of the proposed opt-out caution. It would lead to the preservation of the deeds registration regime and concurrent operation of two registration regimes. It was noted that the proposed measure was purported to address the conflicting views of major stakeholders on the rectification and indemnity provisions for fraud cases. However, the Council did not consider that such a purpose should be attained at the expense of the certainty secured by a uniform title registration system which is the primary objective of the Ordinance.

It was noted that the protection of Indemnity Fund was limited to innocent displaced owner who has lost title of property due to fraud that took place after the primary conversion. The Council was of the view that there was no reason why such protection should not be extended to innocent former owners victimised by pre-conversion fraud. Further, the cap of indemnity of HK\$30 million should be reviewed.

## 土地業權條例：建議的「兩階段轉換機制」

在二零一一年五月，政府為土地業權條例的實行建議採用一個「兩階段轉換機制」，經過與土地註冊處代表多次交換意見後，本會就建議的機制提交了意見書。

本會歡迎建議提出，不論賣方是否自願承讓人，一名在轉換全面完成後為購入有關物業而付出價值的真誠買方，應即時享有不可廢除權益的保障。

但是，本會就建議的機制某些重要範疇有所保留，其中重點之一便是賣方在履行凌駕性權益的披露責任時的積極性，這可是繁重及成本高昂的。另一方面，買方為保障其利益，會傾向對物業及業權進行徹底的調查。最終樓宇買賣的過程並不會較現時的契約註冊制度簡單。

為解決上述問題，本會建議（1）條例應清楚列明首名賣方在未有符合披露要求下的法律責任及後果；及（2）應要求擁有凌駕性權益並實際知道或推定知道擁有該權益的人士，將該權益註冊以作保障。

本會亦就建議的抗轉換警告書的實際可行性表示關注，因它會引致契約註冊制度的保留，及兩個不同的註冊制度同時運作。本會知悉這建議是為了回應一些主要持份者就欺詐個案的更正及彌償的不同意見，但是本會不認為為達此目的而犧牲統一業權註冊制度所帶來的確定性——這才是條例的基本目標。

本會留意到彌償基金的保障，限於因在第一階段轉換後發生的欺詐，因而失去業權的無辜業主，本會認為沒有理由不將此保障擴大至因轉換前發生欺詐因而受害及無辜的前業主，此外彌償上限定於三千萬港元亦應檢討。

Last but not least, the Council reiterated that the broad-brush exclusion of volunteers from the protection of immediate indefeasibility rule disregarded the fact that there were different types of volunteers, and that the denial of protection might be justified in some cases but not the others.

## **The Draft Revised Code of Practice for Authorised Seller of Poisons**

The Council has provided comments to the Department of Health on the Draft Revised Code of Practice for Authorised Seller of Poisons issued by the Pharmacy and Poisons Board. We have made a number of suggestions for improving the draft code.

With regard to premises of authorised seller of poisons, the requirements for maintenance of registered premises should ensure not only a safe and effective working environment, but also safe storage for pharmaceutical products in good condition. The requirements on temperature and humidity shall be so controlled to suit each of the pharmaceutical products stored in the premises.

Access to dispensing area should be restricted and reserved for dispensing purpose only. Customers should have no right of access to such area. Management and control of equipment, storage and stock should help avoid any inadvertent dispensing of wrong medicine. As regards staff and supervision, we have made suggestions for (1) ensuring consumers being aware of the time when registered pharmacist would be available in the premises, and (2) the training requirements on staff. For the protection of patients and consumers, to ensure the strict observance of the prescription requirements set out in the code is always important.

## **Working Draft of the Contracts (Rights of Third Parties) Bill 2013**

The Council has responded to the consultation paper issued by the Department of Justice on the working draft of the proposed Bill. The Bill aims at enabling a third party i.e. a person not a party to a contract, to enforce the contractual terms, subject to the contracting parties' manifest intention.

Under the proposed Bill, the parties are free to agree on (i) whether a benefit under the contract is to be conferred on a third party or if the benefit is to be so conferred, (ii) whether it is to be enforceable by him. In view of the inequality in bargaining power between consumers and traders, it is envisaged that traders would impose terms on consumers with standard form consumer contracts to avoid such potential liability. As a result, it is likely that

最後，本會重申，一刀切的把所有自願者從即時享有不可廢除權益的規定中摒除，是忽略了現實中存在不同類別的自願者，而不給予保障在某些情況下可能是適當，但在其他情況可能未必合適。

## **認可毒藥售賣商執業守則修訂草擬本**

本會向衛生署提供了有關由藥劑業及毒藥管理局制訂的認可毒藥售賣商執業守則修訂草擬本的意見，我們作出了若干改善守則草擬本的提議。

就認可毒藥售賣商的處所，對登記處所的保養要求不應只限於確保一個安全及有效的工作環境，亦應確保藥劑製品貯存的狀況安全及良好，對溫度及濕度的要求應控制至適合貯存於處所之各種藥劑製品。

配發區的出入應受限制及只預留作配發用途，亦應禁止顧客出入該區，有關器材、貯存及存貨的管理及控制可有助防止不慎的配錯藥情況。就員工及監察方面，我們作出了以下的建議：(1) 確保消費者知道註冊藥劑師在處所駐場的時間；及(2) 對職員的培訓要求。為保障病人及消費者，須時常確保嚴謹遵從守則列明的配藥要求。

## **2013年合約(第三者權益)條例草案工作草擬本**

本會對由律政署制訂有關條例草案工作草擬本的諮詢文件作出了回應，條例草案目的是讓第三者(即非合約方人士)在不抵觸合約方表明意圖的情況下行使合約條款。

根據條例草案，合約方可自由就以下事宜達成協議：(1) 是否向第三者賦予合約下的權益；(2) 假使會賦予該權益，它是否可由第三者行使。考慮到消費者與商戶間議價能力的的不平等，可以預期商戶會將標準格式消費者合約強加於消費者，以避免此潛在的法律

most consumer third parties would be left outside the ambit of the proposed legislation.

Given that any comprehensive consumer protection legislation which provides protection of consumer third party in the event of breach of contract will not be in place in the near future, and that the proposed two-limb test mentioned above may not be effective in consumer protection, the Council suggested that the proposed Bill should give consideration to include specific provision for consumer protection.

## Consultation Paper on Adverse Possession

The Council has submitted its views to the Law Reform Commission on the Consultation Paper on Adverse Possession published by the Law Reform Commission's Adverse Possession Sub-committee.

In general, the Council was supportive of the principle that under the title registration framework, significant protection should be given to registered owners, and adverse possession should be substantially restricted, if not abolished.

The Council in principle agreed that the proposed scheme set out in the Consultation Paper was an improvement to the existing adverse possession provisions under the Limitation Ordinance, which to certain extent may enhance protection to consumers as registered owners and bona fide purchasers of real property. Nevertheless, the Council found certain operational issues, such as the requirement for notice to be given to registered owner and the reasons required for application for adverse possession, should be addressed. To conclude, the Council agreed to the recommendation that the law of adverse possession should be recast under the prospective registered land system for better protection of registered owners and consumers. In the meantime, it called for consideration given discreetly on how the protection could be put in place effectively.

## Proposed Regulatory Regime for Stored Value Facilities and Retail Payment System in Hong Kong

The Hong Kong Monetary Authority has issued an industry consultation on the subject matter, and the Council was invited to provide comments.

From the perspective of consumer protection, we have concentrated our comments on the issues relating to stored value facilities (SVF).

責任。因此，很有可能大部分的消費者第三者會被拒於擬訂法例的範圍以外。

考慮到為消費者作為第三方在違約情形下提供保障的全面消費者保障法律並不會在短期內立法，而上述建議的雙重測試對消費者保障未必有效，本會建議擬訂草案應包括消費者保障的具體條文。

## 有關逆權管有的諮詢文件

本會向法律改革委員會提交了有關由該會逆權管有小組委員會發布的逆權管有諮詢文件的意見。

大致上，本會支持在業權註冊框架下對登記業主給予重大保障的原則，而逆權管有若不廢除，亦應以大幅度的限制。

本會原則上認同諮詢文件中提出的建議制度，是改善了現行時效條例下逆權管有的條文，在某程度上可為作為物業的登記業主及真誠買方的消費者加強保障。然而，本會注意到一些有關運作上的問題有待處理，例如有關給予登記業主的通知要求，及申請逆權管有所須符合的要求等。綜合而言，本會認同應在未來的註冊土地制度下重新訂定逆權管有的法律的建議，以給予註冊業主及消費者更佳保障。同時，就怎樣才能提供有效的保障，應小心仔細考慮。

## 香港儲值支付產品及零售支付系統的建議監管制度

香港金融管理局就此事宜發表了一份業界諮詢文件，並邀請本會提交意見。

從保障消費者角度出發，我們提出的意見集中在有關儲值支付產品（簡稱'SVF'）的問題上。

To ensure proper protection and management of the users' float maintained by SVF issuers, we agreed to the proposal that a mandatory licensing regime for SVF be introduced by legislative amendment.

The Council was of the view that the proposed licensing regime should be built on rights and obligations clearly defined and fair of all the stakeholders of the SVF. Such rights and obligations should also be adequately disclosed.

On the other hand, we noted that single-purpose SVF was not registered under the current regulatory framework, and would not be required to be licensed under the proposed licensing regime. In other words, users of single-purpose SVFs are without any protection under both the existing regulatory framework and the proposed licensing regime. We urged that single-purpose SVFs, in particular for those involving substantial amount of money, should also be regulated, for the sake of consumer protection.

The Council was given to understand that a public consultation would be conducted shortly after the reporting period. The Council would further study the matter and respond in due course.

為了確保使用者存放於SVF發行人的儲值能得到妥善的保障及管理，本會認同以立法修訂方式，強制為SVF訂立發牌制度的建議。

本會認為建議的發牌制度應建基於所有SVF持份者權利及責任能得到清晰及公平的界定的基礎上，而此等權利及責任應給予充分披露。

另一方面，我們注意到單一用途SVF在現有監管制度下毋須註冊，而在建議的發牌制度下亦毋須領取牌照，亦即單一用途SVF的使用者在現時監管框架以及新建議的發牌制度下，皆沒有保障。我們促請單一用途SVF，特別是牽涉重大金額的，應同樣受規管，以保障消費者。

本會獲悉公眾諮詢會在本年報期後的短期內展開，屆時本會將就事情再作研究及在適當時作回應。