



香港消費者委員會 CONSUMER COUNCIL

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21 October 2010

Special Duties Division
Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
Level 29, One Pacific Place
88 Queensway
Admiralty, Hong Kong

Attn: Mr. K.C. YAU

Dear KC,

Re: Consultation Paper on Legislation to Enhance Protection for
Consumers Against Unfair Trade Practices

Attached please find Council's submission in response to the public consultation of the captioned paper for the consideration of the Bureau.

Should you have any queries, please feel free to contact me at :

Yours sincerely,

Connie YAU
Chief Executive
Consumer Council

Encl.

Submission on the Consultation Paper on Legislation to Enhance Protection for Consumers Against Unfair Trade Practices

Introduction

1. The Consumer Council welcomes the opportunity to provide feedback on the legislative proposals set out in the above Consultation Paper.

2. Unfair trade practices are always a key concern for the Council. The Council welcomes and appreciates the Government's initiative in reviewing consumer protection legislation and policy and consulting the public on safeguarding consumers' rights against unfair trade practices.

3. The Council notes that the recommendations in the Consultation Paper have to a large extent responded to the Council's Report entitled "Fairness in the Marketplace for Consumers and Business" published in 2008 ("the Council's Report"). Nevertheless, it is also noted that the Council's proposal of enacting a comprehensive trade practices statute with both general and specific prohibitions has not been adopted.

Framework and direction of the proposed legal reform

4. The Council understands that it takes time to enact a new statute, and thus, to extend the scope of the Trade Description Ordinance ("TDO") and to give concurrent jurisdiction to Telecommunications Authority ("TA") and Broadcasting Authority ("BA") to enforce the proposed trade practices provisions would be a quick and expedient approach to combat those unfair trade practices that have aroused grave concerns.

5. Given the immediate need to improve the position of vulnerable consumers in the marketplace, such as tourists and the aged, the Council hopes that the proposed amendments to the TDO, as imminent measures against the prevalent unfair trade practices, will be introduced as early as possible to deter unfair trade practices.

Comprehensive statutory regime

6. That said, the Council urges the Government to consider further developing the proposed legal reform with a view to establishing in the long run a comprehensive statutory regime for protection of consumers against

unfair trade practices. The Council believes that such a statutory regime will be more effective in protecting consumers against unfair trade practices which are multifarious and fast-changing in such a vibrant and creative economy as Hong Kong.

First-hand property transactions

7. The Council notes that Government has introduced enhancement measures to regulate first-hand private residential property transactions in June 2010. However, the Council opines that such measures serve to enhance the transparency and clarity of information on those properties and transactions. They were not devised to address the unfair trade practices in the sale of residential properties. While the Council holds the view that consumer transactions of real property should be regulated in the long run by a comprehensive trade practices statute, it urges the Government to consider enacting a new piece of legislation in the interval specifically regulating unfair trade practices occur in those transactions. While preparing this submission, the Council is pleased to note that the Government has taken further initiative, as announced in the Policy Address, in setting up a steering committee to discuss specific issues on regulating the sale of first-hand residential properties by legislation and put forward practicable recommendations within one year, including the use of saleable floor area as the only basis for listing the price per square foot to avoid misleading buyers and eradicate the problem of "shrunken flats".

Unfair terms

8. Adoption of unfair terms in standard consumer contracts is a prevalent unfair trade practice. While consumers should be fairly treated in the process leading to contract, it is equally vital that the substantive rights and obligations under the contract are fairly distributed. Therefore, the Council calls for legislation regulating unfair terms in standard consumer contracts which may be modeled upon the *UK Unfair Terms in Consumer Contracts Regulations 1999*.

Excluded sectors

9. It is noted that the proposed exclusion of financial sectors and professional bodies which have already had established statutory or regulatory frameworks is in sync with the Council's recommendation made in its Report. It is advisable that a review on the existing statutes and/or codes of practice

regulating the excluded sectors would be conducted to ensure that they are in line with the proposed trade practices provisions; and, if necessary, amendments to them should be made accordingly. Consumers of those sectors should be assured that they will be given the protection equivalent to that afforded by the proposed provisions.

Enforcement and improvement of consumer access to redress

Private right to sue

10. The Council supports the recommendation of the Consultation Paper that consumers should be given a private right to sue for contravention of the proposed trade practices provisions under the TDO. We concur with the Report that the creation of such a right "not only facilitates aggrieved consumers in obtaining restorative justice but also encourage compliance by businesses".

11. Presently, consumers aggrieved by the practices prohibited by the existing TDO provisions may be inhibited from taking legal action by the lack of an appropriate cause of action. The private right to sue if introduced will create a new cause of action with which aggrieved consumers would be emboldened to seek redress through litigation. It would tend to increase significantly the number of consumer lawsuits seeking public legal assistance, which may be filed either individually or in group. Distinguished from the Legal Aid, the Consumer Legal Action Fund has no means test and is specifically mandated to provide legal assistance to the consumers aggrieved en masse and individual consumers whose claims involved significant consumer interest. Aggrieved consumers who do not satisfy the means test of the Legal Aid may turn to the Fund. The obvious possibility is the rise of number of applications for the Fund and a surge in its caseload. The strain on the Fund both in administrative and financial terms could only be eased off by the support of the Government with adequate resources.

12. Apart from enhancing the availability of the Fund, the enforcement of this private right to sue will become more attainable by the expansion of the scope of the Supplementary Legal Aid Scheme and the establishment of a Consumer Tribunal as proposed in the Council's Report. The Council believes that these recommended measures will provide effective means for consumer protection and deserves serious consideration by the Government.

Enforcement agency

13. The Council agrees to the Consultation Paper's proposal that the Customs & Excise should be the enforcement agency of the proposed trade practices provisions under the TDO and concurrent jurisdiction should be given to the TA and the BA to enforce the said proposed provisions. These authorities with their expertise and experience in respective areas of work will be in a better position to enforce the proposed provisions.

"Compliance-based mechanism"

14. The Council pledges support for the proposed "compliance-based mechanism", which is in line with the "measured approach" proposed in the Council's Report. Such a mechanism would allow flexibility in using the enforcement tools or sanction options so that the matter may be resolved expeditiously and pragmatically in accordance with the nature and gravity of the misconduct. The Council further suggested that this mechanism could be reinforced by adding more appropriate enforcement tools and/or sanction options, such as court enforceable cease and comply notice, financial penalty and court declaration in case of breach of a cease and comply notice or an undertaking.

Council's part in "compliance-based mechanism"

15. It is the Council's pleasure to contribute to the task of tackling unfair trade practice by playing an active role in the mediation as part of the proposed "compliance-based mechanism" and believes that the proposed referral mechanism will ensure a high operational efficiency of that mechanism.

Cooling-off arrangements

16. The Council welcomes the Government's proposal to impose mandatory cooling-off periods for timeshare rights and long-term holiday product contracts and consumer transactions concluded during unsolicited visits to

consumers' homes and places of work.

17. Nevertheless, the Council considers that the narrow scope of application of mandatory cooling-off arrangements limited only to the said two specific areas will fail to meet the expectation of the general public. The Council strongly calls for the extension of this statutory scheme to contracts with prepaid arrangements, such as contracts for beauty care, slimming, fitness and yoga, where

i) the time between the commencement of negotiation for the contracts and when the contracts are entered into is limited, so consumers have no sufficient time to reflect on the goods or services they purchase; and

ii) it is not an uncommon complaint that the consumer was induced or pressurized to make short-sighted or emotion-based decision which tied the consumer to a commitment that the consumer does not want or cannot afford. As consumer may cancel the contract for any reason during the cooling-off period, it is likely that cooling-off period will encourage traders to restrain themselves from using unfair trade practice.

18. The Council takes note of the divergent views on the *operational features of cooling-off arrangements* as mentioned in the Consultation Paper. There may not be a straitjacket rule for the design of a cooling-off arrangement, which would depend on the circumstances of the transaction, such as the nature of the goods or services concerned. Nevertheless, the Council would like to draw the attention of the Government to the following *basic principles* when designing the features of cooling-off arrangements for a particular industry:

i) The timeframe of a cooling-off period would be adequate for a consumer to collect new information or to consider his/her genuine need and financial ability while not imposing unreasonable costs and uncertainty on the business;

ii) The rights and obligations regarding the cooling-off period should be stated clearly in the contract and brought home to the consumers before they enter into the contract;

iii) Clear and sufficient information about the product should be given to

consumers so that they can consider their purchase thoroughly during the cooling-off period;

iv) The cancellation process must *not be so onerous* that it discourages consumers from exercising their right to cancel during the cooling-off period;

v) The procedure and requirements for exercising the cancellation right should be clearly stated in the contract and explained to the consumers before they enter into the contract;

vi) The trader is entitled only to compensation *reasonable in all the circumstances* when the goods in the possession of the consumer are damaged or the service or part of it has been used during the cooling-off period;

vii) Any measure that might be abused and defeat the purpose of cooling-off period must be avoided. For instance, if waiver of the cooling-off rights is provided for in the contract, there will be a significant risk that a consumer's waiver may be procured unfairly by the trader with tactics such as undue pressure and deliberate omission to draw the consumer's attention to the waiver.

viii) Consumers should have their payments made for the transaction returned and any credit arrangements made for the payments cancelled *as soon as practicable* after they have exercised their right of cancellation.

Conclusion

19. The Council reiterates that a piece of comprehensive trade practices legislation containing both catch-all and specific provisions would be more effective than remedial statutory amendments. Such an all-embracing statute would be more responsive to the unfair trade practices which are growing both in range and complexity. It is the hope of the Council that the legal reform proposed by the Consultation Paper will signify the first, but not the last, stride towards the establishment of a comprehensive legal framework for consumer protection against unfair trade practices.

October 2010
Consumer Council

消費者委員會對有關打擊不良營商手法以保障消費權益的

立法建議諮詢文件之意見

前言

1. 消費者委員會（“消委會”）樂於對諮詢文件所提出的立法建議發表意見。
2. 不公平營商手法一向都是消委會密切關注的問題。消委會歡迎政府主動檢討與保障消費者有關的法例和政策，並就打擊不公平營商手法，維護消費者權益，諮詢公眾。
3. 消委會注意到諮詢文件的建議，相當程度上回應了消委會於 2008 年發表題為《公平營商，買賣共贏》的報告（“消委會報告”），然而，消委會在報告中建議，制定一條涵蓋一般性及特定禁制條文的全面營商手法法例，未被採納。

建議法律改革框架及方面

4. 消委會明白訂立全新的法例需時。因此，擴大《商品說明條例》（“該條例”），以及給予電訊管理局和廣播管理局同等管轄權，執行建議中的營商手法條文，對打擊較受公眾關注的不公平營商手法，是一個快捷及權宜的方案。
5. 誠然市場上弱勢消費者，如遊客和長者，在市場上的處境急需改善。諮詢文件建議修訂法例，是打擊猖獗橫行的不公平營商手法之應急措施，消委會希望修訂儘早落實，以收阻嚇之效。

全面的法例體系

6. 長遠而言，消委會促請政府考慮進一步發展建議中的法律改革，建立一個全面的法例體制，遏止不公平營商手法，保障消費者。香港是個充滿活力和創意的城市，當中的不公平營商手法，五花八門、日新月異，消委會相信此法例體制，將較有效地在營商手法的問題上保護消費者。

一手物業交易

7. 消委會注意到，政府於 2010 年 6 月推出改善措施，監管一手私人住宅物業交易。可是，消委會認為這些措施之目的，是提升物業資訊的透明度和清晰

度，而非處理住宅物業交易中不公平營商手法的問題。消委會認為，長遠而言，在物業方面的消費者交易應該納入全面營商手法法例的規管中，但是在這條例得以訂立之前，政府應考慮制定新的法例，針對在這些物業交易中的不公平營商手法。在撰寫此意見時，消委會欣悉政府採取進一步行動，在施政報告中宣佈成立督導委員會，研究立法管制一手住宅物業；並在一年內推出切實可行之方案，包括使用實用面積作為公布價格的唯一標準，以防止誤導買家及全面杜絕“縮水樓”的問題。

不公平條款

8. 一項常見的不公平營商手法，是在標準消費者合約內採用不公平條款。在訂立合約的過程中，消費者應得到公平的對待，同樣重要的是，在合約條文中，消費者和企業須各自公平地承擔合約中的實質權利和責任。因此，消委會促請政府立法管制標準消費者合約中的不公平條款，有關法例可仿效英國《消費者合約不公平條款規例 1999》(Unfair Terms in Consumer Contracts Regulations 1999)。

獲得豁免的行業

9. 諮詢文件建議，對具備已確立的法定或監管框架的金融界別及專業團體，予以豁免，這與消委會報告所建議的一致。然而，消委會建議檢討行業現存的相關條例及/或實務守則，保證它們與建議的營商手法條文並行不悖，若有必要，應作適當修改，確保消費者得到的保護，跟他們從建議條文所得到的無異。

執法及改善消費者追討補償的途徑

私人訴訟權

10. 諮詢文件建議，給予消費者可就違反營商手法條文的行為提出訴訟。消委會對此表示支持。我們同意諮詢文件所言，確立這權利「不僅可幫助受屈的消費者討回公道，也會鼓勵企業守法」。
11. 現時，受到《商品說明條例》所禁止的行為侵害的消費者，可能礙於沒有合適的訴訟因由而打消興訟念頭。這私人訴訟權一旦確立，將產生新的訴訟因由，進而鼓勵受屈的消費者，透過訴訟去尋求補償。這情況下，申請公共法律援助的消費者訟案數目，無論以個人或羣組名義作出的勢必大增。與法律援助計劃不同，申請「消費者訴訟基金者」無須接受資產審查，而且基金的使命是在涉及重大消費者利益的事件中，向眾多或個別受屈消費者提供法律協助。因此未符合法律援助計劃資產審查的受屈消費者，有可能轉向基金尋

求協助，最終基金的申請數目和工作量會因此增加。而基金在行政和財政兩方面所承受的壓力，只有在政府充足支援下，才得以紓解。

12. 除了增加基金的可用度，消委會報告所建議的，擴展法律援助輔助計劃及成立消費者審裁處，均可讓消費者更有效地行使這私人訴訟權。消委會相信這些上述建議會為保護消費者提供有效方法，政府應當慎重考慮。

執行機構

13. 消委會同意諮詢文件建議，由海關負責執行建議中《商品說明條例》裏的營商手法條文，以及給予電訊管理局及廣管局共同管轄權，執行上述條文。這些部門在其工作領域，擁有專業知識及經驗，由它們去執行建議的營商手法條文是較合適的。

“遵從為本機制”

14. 消委會支持建議中的“遵從為本機制”，它與消委會報告建議的漸進執法策略，目標是一致的。機制讓執法機構較靈活地使用執法工具或制裁手段，使事情得以按不當行為的性質和嚴重性，快捷及務實地處理。此外，消委會進一步建議加入合適的執行工具或制裁手段，例如當企業違反終止及遵從通知或承諾時，執法機構者可向企業發出由法庭執行的終止及遵從通知，罰款及申請法庭宣示等。

消委會在遵從為本機制的角色

15. 消委會樂意為打擊不公平營商手法而盡一己之力；在遵行為本機制的調解部分扮演積極角色，相信建議中的轉介機制，可確保上述執法機制高效率地運作。

冷靜期

16. 消委會歡迎政府為時光共享使用權及長期度假產品合約，以及以非應邀形或到訪消費者住所或工作地點期間訂立的消費交易，設立強制冷靜期的建議。
17. 然而，消委會認為強制冷靜期的安排只限於上述兩個特定界別，其應用範圍過於狹窄，未能符合公眾的期望。消委會大力促請政府擴展這法定方案至其他行業，例如美容、纖體、健身和瑜珈等時常出現預繳式消費合約的行業。

原因是這些合約之訂立有以下特點：

- i) 從開始商討合約到簽訂合約時間有限，以致消費者沒有足夠時間考慮有關的貨品或服務；
- ii) 不少消費者投訴在店員游說或施壓下，作出短視或衝動的消費決定；

之後便被一些他們不願或不能承擔的責任所網綁住。在冷靜期內，消費者可以以任何理由，撤銷合約，而冷靜期的實施亦有助鼓勵企業避免採用不公平營商手法。

18. 諮詢文件提及社會對冷靜期安排應有的運作特色有不同意見，消委會認為冷靜期的安排應因應個別交易的具體情況，如相關貨品或服務的性質而定，沒有一套硬性的設計規則。然而，在設計冷靜期的安排時，本會建議可遵從以下各項基本原則：
- i) 冷靜期的時限應一方面足夠讓消費者搜集新的資訊或考慮交易是否符合其真正需要及財務能力，另一方面，不會使企業承擔不合理的營運成本及不確定性；
 - ii) 有關冷靜期的權利和責任應清楚地在合約中羅列出來，使消費者在訂立合約之前得以明白；
 - iii) 企業應給予消費者清晰和足夠的資訊，好讓他們在冷靜期內考慮有關交易；
 - iv) 撤銷合約的程序須避免繁苛，以免妨礙消費者在冷靜期內行使撤銷合約的權利；
 - v) 企業應在合約中訂明，並在訂立合約前，向消費者解釋行使撤銷合約的權利之程序及條件；
 - vi) 在冷靜期內，當貨品在消費者的管有下破損，或者服務或部分服務被耗用，在任何的情況下企業祇可獲得合理的補償；
 - vii) 任何可能被濫用和違反冷靜期設立原意的措施一定要避免。例如，若合約訂明消費者可放棄冷靜期的權利，很可能企業會用其技倆取得消費者的“同意”，或對消費者施以不當壓力及故意隱瞞有關係款存在。
 - viii) 消費者在行使撤銷合約權後，應在實際可行的情況下，可盡快收回為交易所支付的款項及取消有關的信貸安排。

結論：

19. 消委會重申，一條涵蓋一般性及特定條文的全面營商手法法例比起補救性的法例修訂較為有效。全面性條例更能回應種類日益繁多、性質日益複雜的不公平營商手法。消委會希望諮詢文件提出的法律改革建議，將標誌著邁向建立一個打擊不公平營商手法，以保障消費者權益的全面性法律框架，而踏出的第一步。