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cc

bcc

Subject Consultation Paper on Legislation to Enhance Protection for Consumers against Unfair Trade Practices

Urgent Return receipt Sign Encrypt

Dear Sir/Madam,

Please find attached a reply letter from Ms. Joyce Wong of the Law Society of Hong Kong with submissions, the contents of which are self-explanatory.

Kind regards,

Lillian Chau

secretary to Joyce Wong

The Law Society of Hong Kong



submissions on Legislation to enhance protection for consumers against unfair trade practices.pdf



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29 October 2010

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Level 29, One Pacific Place, 88 Queensway, Admiralty
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Dear Sir/Madam,

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

I refer to the Consultation Paper and attach the submissions on the captioned consultation. Please note the document will be posted onto the public page of the Law Society's website and as such we have no objections to the Bureau making public reference to the same.

Yours sincerely,

Joyce Wong
Director of Practitioners Affairs
e-mail: dpa@hklawsoc.org.hk

Encl.



Law Society's Submissions
Consultation Paper by the Commerce and Economic Development Bureau
"Legislation to Enhance Protection for Consumers against Unfair Trade Practices"

1. Introduction

The objective behind the Consultation Paper is the enhancement of protection for consumers against unfair trade practices. The proposal is to amend the Trade Descriptions Ordinance (Cap 362) (TDO) to create criminal sanctions in respect of misleading omissions, aggressive practices, bait and switch tactics, bait advertising and accepting payments without the intention or ability to supply the contracted goods or services. The arguments for amending the TDO rather than enacting new legislation are persuasive:

- the TDO is in place
 - it provides a basic structure which can be built upon by the proposed new offences
 - avoids the time and expense of drafting new legislation
 - ensures it does not conflict with or contradict the TDO.
2. The expressed intention is to enhance protection for consumers against unfair trade practices without throwing an unnecessary burden upon business or fetter legitimate use of creativity in promotional activities.

Chapter 2 – Unfair Trade practices to be Prohibited

3. The Consultation Paper sets out the protection proposals which can be summarised as follows:
- (a) To extend the coverage of the TDO to prohibit false trade descriptions in respect of services made in consumer transactions (paragraph 2.3);
 - (b) To broaden the existing definition of trade description in respect of goods as set out in Annex C (paragraph 2.4);
 - (c) To adopt the proposed definition of trade description in respect of services made in consumer transactions as set out in Annex D (paragraph 2.5);
 - (d) To create an offence under the TDO prohibiting misleading omissions in consumer transactions (paragraph 2.8);

- (e) To create an offence under the TDO prohibiting aggressive practices in consumer transactions and to include a non-exhaustive list of factors which should be taken into account when determining whether a practice uses harassment, coercion or undue influence (paragraph 2.13);
- (f) To create offences under the TDO prohibiting the practices of "bait advertising" and "bait-and-switch" in consumer transactions (paragraph 2.16);
- (g) To provide appropriate defences in proceedings on the proposed offences of bait advertising and bait-and-switch (paragraph 2.17);
- (h) To create an offence under the TDO prohibiting the practice of "accepting payment without the intention or ability to supply the contracted products" in consumer transactions (paragraph 2.20);
- (i) To apply the maximum penalty prescribed under section 18(1) of the TDO to the proposed offences , i.e. on conviction on indictment, a fine of \$500,000 and imprisonment for 5 years, or on summary conviction, a fine at Level 6 (presently at \$100,000) and imprisonment for 2 years (paragraph 2.21);
- (j) To make available the defences set out in sections 26 and 27 of the TDO in proceedings for the proposed offences (paragraph 2.22);

4. Proposed new consumer protection offences

(a) Misleading omission in consumer transactions:

Omitting or hiding "material information", providing material information in an unclear or ambiguous manner, *and* as a result, it causes the average consumer to take a transactional decision he would not have taken otherwise. A commercial practice is considered as a "misleading omission" if, in its factual context, it omits or hides "material information", provides material information in an unclear or ambiguous manner, *and* as a result, it causes the average consumer to take a transactional decision he would not have taken otherwise; when deciding on whether a practice is a misleading omission, all the features and circumstances of the commercial practice should be taken into account.

(b) Using aggressive practices in consumer transactions:

A commercial practice will be considered as aggressive if, in its factual context, taking into account all relevant circumstances, it significantly impairs the consumer's freedom of choice through the use of harassment, co-ercion or undue influence and it thereby causes him to take a transactional decision he would not have taken otherwise.);

(c) Bait advertising:

This offence prohibits a person 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 those products for sale 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. This is intended as a strict liability offence.

(d) Bait-and-switch:

This offence prohibits a person from making an offer to sell products at a specified price with the intention of promoting a different product through various tactics. The enforcement agency is required to prove the existence of an intention of promoting a substitute.

(e) Accepting payment or other consideration with the intention, at the time of acceptance, not to supply the contracted products or to supply materially different products.

Section 26 of the TDO provides a defence for the accused to prove that the commission of the offence was due to, among other things, a mistake or information supplied by a third party or an accident, and that he had exercised due diligence to avoid committing the offence. Section 27 TDO provides defences for publishers. It is proposed that those defences should be made available for the proposed offence.

5. Proposed offence of "bait advertising and bait and switch offences"

The following defence has been proposed in relation to this offence "*.....it will be a defence for the accused to prove that it has taken immediate remedial action by either replenishing the stock, causing another supplier to supply the same goods or service at the same terms, offering equivalent goods or service on the same terms, or it has stated clearly and truthfully in the relevant advertising materials the size of stock available at the specified price and offered all of them for sale.*"

It may be suggested that the proposed offences are imprecise, especially in relation to the bait advertising and bait and switch offences. Logically if a customer is drawn to a shop by an advertisement for a product on advantageous terms and is then informed that the product is no longer available and is offered another product (at a higher price) questions must arise about the seller's conduct. The prosecution has to prove the base facts of the offence. Once that has been done, imposing a burden of proof on a balance of probabilities, upon the seller to show genuine reasons why the product is not available is a practical common sense approach.

To be effective, consumer protection offences should be premised upon the lowest common denominator of the unscrupulous business operator. The Consultation Paper recognises this by proposing the creation of strict liability offences and by building in limited defences. The Law Society does not see anything per se objectionable in strict liability offences in consumer protection situations.

The Law Society is of the view that the proposed new offences present as a genuine attempt to counter some of the more unscrupulous tactics adopted by businesses. However, whether it is possible to counter these unscrupulous tactics and meet the expressed concern that "*— regulatory requirements on business should be clear and kept to the minimum so as not to affect operational efficiency or fetter the legitimate use of creativity in marketing activities.*" is doubtful.

Similar remarks apply to each of the proposed new offences. The standard of proof for the seller will presumably be the usual balance of probabilities.

6. Proposed offence of *accepting payment with no intent to supply*

We note it will be a defence for the seller to show a reasonable belief, again we suggest on a balance of probabilities, that he will be able to supply the contracted product within the period specified in the contract. This should protect the legitimate and increasingly common

practice of sellers not having the product in stock but being able to supply it within a specified time.

Logically if the product is not supplied within the specified time an adverse inference may be drawn. In that case there is nothing wrong in principle with expecting the seller to explain. What is, or is not, a reasonable belief must depend upon the circumstances of each case and cannot be defined in the proposed offence.

Overall the Law Society considers the proposals for new offences and the ambit of these offences are supportable.

Chapter 3 - Effective enforcement

7. Role of Customs and Excise Department ("C&ED")

The Consultation Paper proposes to designate C&ED as the agency for enforcing the offences proposed in Chapter Two. The proposal to give C&ED power to inspect and take copies of books and documents (paragraphs 3.12 et seq.) for the purpose of ascertaining whether any offence has been or is being committed present as practical and well thought out.

The same is noted for the proposal in the case of the Telecommunications and Broadcasting sectors, to confer concurrent enforcement powers on the Telecommunications Authority ("TA") and the Broadcasting Authority ("BA").

The Law Society notes that designating the C&ED as the enforcement agency positively builds upon and utilises C&ED's experience and expertise gained in enforcing the TDO and supports the proposal.

8. Proposal to introduce a Civil Compliance-Based Mechanism (paragraphs 3.2 to 3.10)

The proposal is to empower the C&ED (or the TA or BA, as the case may be) to look into complaints, and if justified, seek undertakings from businesses, as appropriate, to stop or refrain from continuing an offending act. The enforcement agency will be empowered to publish the undertakings, and to apply to the court for an injunction if a business has breached any undertaking it has given, or in other circumstances as the enforcement agency sees fit. The court may make an order directing the business to comply with the undertaking, or directing it to refrain from engaging in conduct that constitutes or might constitute a fair trade offence, or make any other orders as it thinks fit.

We note the Bureau has examined the regime in comparable jurisdictions but consider the proposal in paragraph 3.7 to introduce a *compliance-based system* as cumbersome, potentially time consuming and an expensive process.

The Law Society does not support the concept of "mixing" criminal and civil enforcement. Simply because an offence has been committed does not necessarily mean there must be a prosecution. The enforcement agency can advise, accept promises not to do it again and, if there is a further breach, prosecute the further offence. The issue is whether, even allowing for time limits, the original offence could be prosecuted. Overall these proposals are imprecise.

The proposals in paragraph 3.8 require clarification, particularly the effect and consequences of undertakings by businesses and then the role of the court in reviewing and compelling the business to comply with the undertaking. We question the proposal of resorting to civil proceedings simply because the criminal standard of proof is higher. The venue for the civil measures will presumably be the District Court. What are the implications of this for time and expense?

In paragraph 3.3 of the Consultation Paper the Bureau notes

".....that with the introduction of the compliance-based mechanism, many consumer complaints would be successfully resolved after mediation by the Consumer Council, and that remaining cases could be dealt with by the C&ED, the TA or the BA (as the case may be) through undertakings. In respect of businesses which have given undertakings or whose conduct has been restrained by court injunctions, the enforcement agency still reserves the power to press criminal charges. When deciding on the appropriate (or a combination of) tools to be invoked, the enforcement agency will be guided by all relevant circumstances surrounding the case, including the nature of the breach (such as the seriousness of the conduct involved and the impact of the conduct on the community) and the history of complaints and enforcement action taken against the business."

These suggestions do not appear practical. Consumers on the receiving end of sharp practices, which it is proposed to criminalise, are unlikely to be enthusiastic about mediation. Time and effort will likely be expended to no useful purpose in such situations. The introduction of anything resembling formalised mediation into criminal situations needs careful review and further debate.

9. Enhanced Role of the Consumer Council (paragraphs 3.9 to 3.10)

The proposals to enhance the role of the Consumer Council as the prime source of education of the public is sensible but duplication of effort or response should be avoided. Both the C&ED and the Consumer Council should ensure that those convicted of the new offences receive the maximum publicity which would include individual names and business or trade names and the business or trade address.

Those convicted of these offences should not be sheltered by considerations of privacy and/or data protection.

Chapter 4 Sector-Specific Regimes

10. The Law Society supports the suggestion by the Consumer Council that existing sector specific regulatory regimes should remain unaffected by new legislative proposals if they meet the following criteria –

(a) a significant degree of professional and specialized knowledge is required for enforcement; and

(b) a similar level of protection has already been provided by such statutory frameworks parallel to and compatible with the new legislative proposals to tackle unfair practices.

11. Property Transactions (paragraph 4.8)

The Law Society notes the new measures do not address false advertising in the property sector and the CEDB recommends exclusion of property transactions in the expanded TDO. The Consultation Paper cites the recent measures introduced by the Government in relation to property transactions. However, the issue of false advertising and manipulation of the market is a live issue as the purchase of a residential property is one of the most important transactions in the lives of Hong Kong citizens. The Law Society considers as a matter of principle property transactions should be included provided it does not delay implementation of the new legislation.

Chapter 5 – Consumer Redress

12. We note the Bureau proposes the following in paragraph 5.4:

“.....to allow aggrieved consumers to institute private actions on infringements of the fair trade provisions along the following lines –

(a) a person who suffers loss or damage by conduct of another person that was in contravention of the fair trade provisions in the TDO may recover the amount of loss or damage by action against that other person or, against any person involved in the contravention²⁰; and

(b) where a person is convicted of an offence relating to unfair trade practices under the TDO, the court may, in addition to passing a sentence, order the person so convicted to pay to any aggrieved person such compensation for loss or damage sustained as a result of the offending conduct as the court thinks appropriate, or make any other orders as it thinks fit.”

The Law Society questions how effective these proposals will be. The Small Claims Tribunal (SCT) procedures are not that satisfactory - for example when it comes to enforcement of an award which is (eventually) made.

Problems of costs, opportunity and capability arise about going to the District Court (DC). Would/could a tourist benefit from the SCT or DC procedures for example? These practical considerations are not addressed in the Consultation Paper. No discussion has taken place on the impact on the existing resources of the civil courts to handle the increase in their workloads as a result of the proposals. The proposals seem good in principle but will likely prove ineffectual in practice.

The Law Society notes that in order for the new legislation to be effective then enforcement procedures must be thoroughly reviewed and suggests the following alternative procedures for consideration: a fast track system involving the Magistrate's court by creating procedures whereby tourists (who will shortly leave Hong Kong) or local consumers can give evidence on oath or affirmation (in effect a deposition) and then to adjourn the trial where necessary. Questions of compensation and/or incidental expenses incurred by the tourist/consumer could be addressed upon conviction.

Consideration could be given to providing Magistrates, or at least Principal Magistrates some limited civil powers rather than resorting to the civil courts as suggested. This could contribute to a cohesive response and have advantages of speed and saving of expense. Magistrates do have limited "civil powers" for example under the Mental Health Ordinance (Cap 136). Section 98 of the Magistrates Ordinance (Cap 227) gives authority to Magistrates to award compensation of sums not exceeding HK\$100,000.

13. Consumer Tribunal

The Law Society does not support the proposal to establish a separate Consumer Tribunal as it would simply duplicate the work of the SCT and/or the DC and perpetuate the problems of access to justice for the ordinary person in the street who is most likely to be the victim of the malpractices identified in the Paper.

Chapter 6 Cooling-Off Arrangements

14. Mandatory cooling-off periods

(a) Problem areas of time-shares and transactions at places other than of business premises

The Law Society supports the proposal to introduce a cooling-off period as set out in paragraph 6.7 as these are problem areas:

(a) timeshare rights and long-term holiday product contracts; and

(b) consumer transactions concluded during unsolicited visits to consumers' homes and places of work.

The Law Society notes that a cooling-off period presents as the cheapest and quickest way for resolving the issues that frequently arise in (a) and (b) above and is a justifiable inroad into the freedom of contract.

We recommend that:

Sub paragraph (b) above should be amended to cover "*any transaction not concluded at the premises of the supplier*".

The CEDB consider widening the ambit of the cooling-off provisions to cover *any* transactions entered into as a result of unsolicited telephone calls and unsolicited emails.

(b) Implementation of Cooling-Off period (Paragraph 6.10)

The Law Society agrees with the following proposals:

- A cooling-off period of 7 days is acceptable
- Consumers should be provided with the necessary information to enable them to exercise the right of cancellation
- Suppliers should return any money paid to the consumer within 30 days of cancellation and for the automatic cancellation of any related credit arrangements
- "Administration fee" on cancellation by the consumer:
 - This would be regarded as fettering the right to cancel. The costs to the supplier of the exercise of the right of cancellation should be seen as a business expense of the supplier

- curtailment – consumers should be given the right to curtail cooling-off periods
- a right of cancellation should be exercisable where the consumer has taken possession of the goods: any other approach would negate the cooling off period and the purpose of cooling off period.

In relation to the situations above the supplier should be allowed to charge the consumer reasonable costs of the services consumed or any damage to the goods under the custody of the consumer if the contract is cancelled during the cooling-off period. This would be a matter for the supplier to quantify and pursue such costs from the consumer after the return of the goods.

The Law Society of Hong Kong
Review of Proposed Legislation Committee
Criminal Law and Procedure Committee
29 October 2010
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