



2010/10/29 14:34

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Subject: TDO Consultation....PCCW Limited Submission

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Please find attached the submission of PCCW Limited in the captioned consultation. If you have any questions please do not hesitate to contact the undersigned.

Regards,



Head, Group Regulatory Affairs SCDOC1456.pdf



PCCW Limited ("PCCW") welcomes the opportunity to submit comments on the Consultation Paper issued by the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau ("The Bureau"). This is a particularly important consultation in that it is proposed to extend the Trade Descriptions Ordinance (the "TDO") to the services sector under which criminal sanctions can apply.

PCCW supports the goal of the TDO in terms of providing accurate information to consumers to enable informed buying decisions. Indeed, in the telecommunications sector PCCW has taken the lead to work with OFTA in the pilot Customer Complaint Settlement Scheme and several consumer oriented voluntary Codes of Practice. Most recently, PCCW issued a Customer Service manifesto on customer best practices.

As the Bureau will be aware, telecommunications licensees now must provide service consistent with Section 7M of the Telecommunications Ordinance ("TO") which bars deceptive or misleading sales practices. This section was enacted in 2000 and the industry now has over ten years of experience with training, compliance, enforcement and related codes of practice. Section 7M provides a similar level of consumer protection to that proposed under the TDO, especially when coupled with associated codes of practice, all of which are compatible with the TDO proposals. PCCW can see no reason to abandon this successful approach which meets the stated goals of the proposed TDO amendments. In addition, the highly technical nature of telecommunications services requires substantial industry-specific and specialized knowledge for proper enforcement activities.

PCCW would note that other sectors with sector specific regulators and sector specific consumer protection requirements are proposed to be exempt from the TDO. PCCW would suggest that the telecommunications industry be treated in the same fashion.<sup>1</sup> In short, the present approach works well as telecommunications is a highly technical sector which is best served in this instance by the existing sector specific regulator. This approach is supported by the Consumer Council and it is noted the Bureau generally shares the thinking of the Consumer Council on this issue (see paras 4.2 and 4.3).

As to specific TDO amendments, PCCW has several comments.

1. The inclusion of criminal sanctions is an excessive penalty for conduct which is now under TO Section 7M and subject to financial penalties or warnings. Most Section 7M cases involve advertisements which fall into a gray area or specific sales transactions where a salesperson perhaps mis-speaks on one of many issues. Yet these would under the proposal become criminal offenses. PCCW would suggest that criminal offenses not apply to services or not apply until after the conclusion of some specified transition period. In the alternative (or in addition), it should be made clear that a criminal case would only be initiated in the most severe instances where fraud or coercive sales practices exist.
2. Misleading omissions is a relatively vague concept. Telecommunications services are often relatively complex offerings reflecting state-of-the-art engineering and new technologies. Should all such information be disclosed in detail? Would the average/reasonable consumer understand such disclosures? Are such disclosures or non-disclosures material, helpful or simply confusing? Are technical explanations unclear or ambiguous because they are complex or may require substantial technical knowledge to understand? Is not disclosing a matter listed in Annex D a material omission? Is an unclear sales presentation mis-leading? Can such a vague concept of misleading omissions be linked to a criminal breach absent some level of fraudulent intent?

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<sup>1</sup> PCCW understands that this approach applies to banking, financial services, real estate, insurance and professional services. See Chapter 4 of the Consultation Paper, including paragraphs 4.2 and 4.3, and 4.4 to 4.10.

It is not clear to PCCW that all services can generically or easily fit into the TDO. Indeed, it is clear that the range of services is broader than the range of goods, and the description of services often more complicated. For example, the proposed definition of “trade description in respect of services” found in Annex D is quite broad. Yet for telecommunications services several of these factors are or may ultimately be outside of the service provider’s control. For example, telecommunications services ranging from simple voice services to more complex internet access services must interconnect with other networks and are directly dependant on the efforts/operations of other service providers and their networks. Further, these other service providers and networks may be located outside of Hong Kong. This fundamental ‘interconnected networks’ characteristic of telecommunications services directly impacts clauses (a), (c) and (g) of the definition of services found in Annex D.

It strikes PCCW to be quite unfair to impose liability, and in particular criminal liability, where service providers employ their best efforts but service provision is outside of their full control. Service providers will be placed in a Catch-22 situation: providing information that may not be accurate due to factors outside their control or heavily caveating all information provided or being accused of making a material omission.

3. In contrast to omissions relating to highly technical services, aggressive or high-pressure practices are more easily understandable. But even here ‘hard core’ cases of duress, threats or intimidation need to be separated from cases of persistent or even perhaps annoying (and nagging) sales practices. Certainly, any per se offenses without any *mens rea* requirement must be specific, well defined and narrow. The fact that some practices may be strict liability offenses elsewhere by itself is not compelling in a jurisdiction such as Hong Kong where light handed regulation is the norm and consumers are required to take primary responsibility for their decisions.<sup>2</sup>

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<sup>2</sup> Bait advertising falls into the same category as a proposed strict liability criminal offence.

4. PCCW supports the introduction of civil measures to deal with enforcement of the TDO. Reliance on criminal sanctions more often than not would entail the use of a hammer (or nothing at all) when something in between is in almost all cases more appropriate (i.e. civil measures). Per our point 1 above, criminal sanctions should be reserved for the most egregious violations (e.g. where an element of intentional fraud exists) which must be clearly described. It is clearly important for the C & ED to have the power and discretion: (a) to obtain commitments from undertakings that they will cease and desist certain practices; (b) to seek injunctions; or (c) to warn/educate sellers of goods or services.
5. Concurrent jurisdiction issues will not arise under PCCW's proposal to maintain the status quo and employ the safeguards found within TO Section 7M and relevant codes of practice. It is unclear whether under the concurrent jurisdiction proposal with the TA and BA that criminal prosecutions would result, a matter which should be clarified. This has clear implications as to how investigations may proceed. Certainly, neither the TA nor BA would appear to be appropriate enforcement bodies for criminal acts.
6. Cooling off periods may arguably be appropriate in certain instances for financially large transactions (e.g., real estate) or where the elderly or vulnerable are involved<sup>3</sup>. However, the consultation paper appears to target specifically neither of these cases. Cooling off periods as proposed are problematic for several reasons:

First, as noted above they are not proposed for financially large transactions where they could maximize consumer protection. While the elderly and vulnerable members of society are noted, the cooling off proposal is much broader in coverage (see section 6.9).

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<sup>3</sup> There is no in-depth discussion in the consultation paper of the costs/benefits of a cooling off period or why a 7 day cooling period is proposed. This should be remedied.

Second, consumers usually want their goods and services immediately, either taken with them or as soon as possible. Cooling off periods (where suppliers logically hold off on the delivery of goods and services) do not meet consumer expectations. Cooling off periods will create cancelled sales and product returns, leading to a large number of disputes regarding administrative fees, the state of the returned goods, wear and tear etc. This will only result in a greater number of complaints and higher prices for all consumers.

Third, for telecommunications and broadcasting (e.g. pay television) services cooling off periods may be particularly problematic. The concern is that provisioning and installation costs have incurred; the 'big game' has been seen; telephone numbers are in the process of being ported; the service has been consumed; the phone, handset, modem, set top box, free gift etc have been received by the consumer and now need to be returned/collected; and so forth. Further, services may be acquired on line, through handsets or via remote control units for immediate use/viewing. All of these factors argue for no cooling off period for these sectors or for cooling off periods that can be truncated upon the occurrence of specified events.

Fourth, waivers of any cooling off period should be positively allowed in any sale of goods or services (except for coercion/duress sales). This allows sellers to provide goods and services upon request, as desired by almost all consumers almost all of the time.

Fifth, a large number of jobs depend upon the sales of goods and services. This should not be placed in jeopardy absent a clear and convincing cost/benefit showing on an industry specific basis. This cost/benefit analysis should be undertaken. The economy of Hong Kong will be adversely affected by broad cooling periods as proposed.

Sixth, reliance on the UK market as an example is not warranted here. The question arises as to what more free, open and light handed markets do?

Seventh, it has usually been the Hong Kong practice to be surgical with its market interventions. If there is a particular industry where a cooling off period would be warranted (and the selection of that industry is based on a rigorous cost/benefit analysis), then that industry and that industry alone should be subject to a cooling off period requirement. A cooling off period is a very intrusive and heavy handed intervention into the market. It also interferes with contract rights. Thus, it should only be used surgically and selectively.

## Conclusion

- Any extension of the TDO to services should allow for the continuation of sector specific regulation, including by the telecommunications and broadcasting regulators. This would be consistent with past practices and the overall approach of the proposal.
- If the TDO is to apply to the telecommunications sector, then the changes outlined above should be considered.
- Certainly a cost/benefit analysis should be undertaken to determine whether the proposed approach is warranted and appropriate.

Respectfully by  
PCCW Limited