



2010/11/01 16:01

To <cpr@cedb.gov.hk>

cc

bcc

Subject CSL's Submissions to the Public Consultation Paper on  
Legislation to Enhance Protection for Consumers Against Unfair  
Trade Practices

Urgent  Return receipt  Sign  Encrypt

Dear Sir/Madam

Please find attached the submissions of CSL Limited to the above consultation.

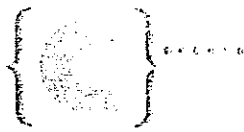
Regards

**Desmond Young**  
Senior Manager, Regulatory Affairs  
Legal & Regulatory Affairs  
**CSL Limited**  
Tel ~ Fax  
Email

Save paper - Print before you print



Submission\_Unfair Trade Practice\_20101031.pdf



---

**The submissions of CSL Limited**  
**in response to the Consultation Paper on**  
**“Legislation to Enhance Protection for**  
**Consumers Against Unfair Trade Practices”**  
**Issued by**  
**the Commerce and Economic Development**  
**Bureau**

---

**31 October 2010**

---

## **1 Introduction**

- 1.1 CSL Limited (“CSL”) is pleased to provide submissions in response to the Commerce and Economic Development Bureau (CEDB)’s consultation paper on Legislation to Enhance Protection for Consumers Against Unfair Trade Practices (**Consultation Paper**).
- 1.2 CSL is willing to expand on any of the issues raised or comments on other issues if requested.

---

## **2 *Unfair Trade Practices to be Prohibited***

- 2.1 CSL in principle supports the CEDB’s proposal of enhancing the legitimate rights of and protection for consumers against unfair trade practices. It is equally important that the proposed legislation would not create unnecessary regulatory risks and burdens of businesses and augment their compliance costs significantly. It is of CSL’s view that the Government must strike a proper balance between the interests of businesses and consumers.
- 2.2 The CEDB proposes to create new criminal offences, some of which are of strict liability, through amendments to the existing Trade Description Ordinance (TDO) in respect of the following unfair trade practices, namely, misleading omissions, aggressive practices, bait-and-switch,

and the practice of accepting payments without the intention or ability to supply the contracted goods and services.

- 2.3 CSL agrees that unfair trade practices should be prohibited. The next question is whether criminalisation is the only and effective way to deal with the issue. CSL urges the Government to take reasonable care and give due consideration before introducing legislation by criminalising such unfair trade practice behaviours which have widespread consequences to businesses. It is of utmost concern that an inadvertent act or omission could attract criminal liability. Instead of criminalising the proposed unfair trade practices, the Government should consider other administrative means to tackle the problem, for example, by imposing financial penalties to businesses who are found to have engaged the unfair trade practices.

#### ***Criminalisation of Unfair Trade Practices***

- 2.4 The proposed legislation is modelled on the Unfair Trading Regulations 2008 and Trade Practices Act 1974 that are currently in force in the UK and Australia respectively. A general observation is that the proposed legislation merely provides a high level description of what the offences are but there is insufficient explanation, particularly in which circumstances acts or omissions will lead to conviction of the offence. It appears that the proposed offences are not clear enough to allow for sufficient certainty as to what amounts to an offence. The regulatory reach is so wide that it creates lots of regulatory risks and uncertainties. Businesses might inadvertently be caught by the legislation even though

they take all reasonable steps and act in good faith to ensure their compliance.

2.5 For instance, the first proposed offence is misleading omission. Liability for omission is not due to some conduct in the form of a positive act but rather is due to a failure to act. From a practicality point of view, it is very difficult to circumscribe the feature of conduct leading to omission. It is always debatable whether there should be a criminal liability for mere omission or failure to act.

2.6 The CEDB proposes that a commercial practice is regarded as a misleading omission *"if, in its factual context, it omits or hides 'material information'...and as a result, it causes an average consumer to take a transactional decision he would not have taken otherwise"*. It is arguable as to what "material information" and "average consumer" means. They are subject to a wide range of interpretation. Information is time sensitive: what is material may be different at different times. What information is material also depends on who receives the information. It is not easy to figure out who an average consumer is. For example, if businesses advertise a product targeting to a group of sophisticated consumers, then what an average consumer refers to – the average of all consumers or the average of the targeted sophisticated consumers?

2.7 Due to limitation of space and time, it is a common practice for businesses to only deliver key messages in their advertisements to promote products and services. Even though there is a disclaimer in the advertisements to the effect that the provisions of products and services

are subject to terms and conditions, it is arguable whether this type of disclaimer is sufficient to discharge the obligation of providing material information in the advertisements. Criminalisation not only exposes businesses to unnecessary risks and uncertainties but also stifles creativity and innovation in promotional activities.

2.8 As for the prohibition of the use of aggressive practices, the CEDB proposes that a commercial practice will be considered to be aggressive "*if ... it significantly impairs the consumer's freedom of choice through the use of harassment, coercion or undue influence.*" Nevertheless, the Consultation Paper is silent as to what might be meant by "harassment", "coercion" and "undue influence" for the purpose of the proposed legislation. There is also no clear indication as to when an action will constitute harassment, coercion and undue influence. Again, the proposal is not precise enough.

2.9 For the foregoing reasons, CSL does not agree with the proposal of making the proposed unfair trade practices criminal offences. In the event that the Government pursues the option of criminalisation, a restrictive approach should be adopted whereby the proposed regulatory offences require the proof of wilful intent of businesses to engage into unfair trade practices. A mere recklessness, mistake or negligence should not attract criminal liability.

### ***Strict Liability***

2.10 The CEDB further proposes that "aggressive practice", "bait advertising" and "accepting payment without reasonable grounds for believing an

ability to supply” are strict liability offences. Strict liability offences are very harsh as the prosecution is not required to prove the *mens rea* against an alleged offence. Other than mentioning that a high level of evidential proof of the *mens rea* is required for criminal proceedings, the CEDB has failed to provide any justifiable reasons as to why strict liability offences are imposed for the proposed three trade practices. Generally, there is a presumption of *mens rea* for criminal offences and it is the responsibility of the prosecution to prove the case. Difficulty of proving *mens rea* is not the reason why strict liability is imposed. CSL remains the view that no strict liability should be imposed unless there are valid grounds to do so.

2.11 If the Government decides to impose strict liability with which CSL does not agree, in order to protect businesses from the harshness and unfairness of strict liability, it is of crucial importance to allow businesses to raise a due diligent defence. Businesses should not receive criminal record if they take all reasonable and practical steps to ensure compliance with the law.

---

### ***Defences***

2.12 The CEDB proposes that all the defences as stipulated in sections 26 and 27 of the TDO are made available for the proposed new offences. One of the defences is for the defendant to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under this control.

2.13 There are circumstances where businesses follow practices which are in conformity with custom and usage and might influence the decision making behaviour of consumers. CSL considers that the due diligence defence should cover situations where businesses comply with practices which are recognised industry standards with which businesses are expected to follow. Businesses should be afforded with this kind of protection.

---

### **3 Sector Specific Regimes**

3.1 In the Consultation Paper, the CEDB proposes that *"the financial services sector, property transactions as well as professional practices regulated by regulatory bodies established by statute need not be brought under the ambit of the expanded TDO"*. They should continue to be regulated under existing sector-specific regimes for the following reasons: *"a.) a significant degree of professional and specialised 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 trade practices"*.

3.2 The CEDB further proposes that *"concurrent enforcement powers be given to the Telecommunications Authority (TA) and the Broadcasting Authority (BA) under the TDO in respect of the telecommunications and broadcasting sectors respectively"*.



- 3.3 CSL considers that the telecommunications sector should be exempted from the ambit of the expanded TDO given that the existing telecommunications regulatory regime has also met the criteria as stipulated in paragraph 3.1 for the following reasons.
- 3.4 Firstly, there are well-established regulatory regimes governing the telecommunications sector which is regulated by the Office of the Telecommunications Authority (OFTA). All telecommunications licensees are required to comply with the Telecommunications Ordinance, its subsidiary legislations, and Determinations, Directions and codes of practice issued by OFTA. OFTA possesses professional and specialised knowledge and expertise in the administration and enforcement of the provisions of the Telecommunications Ordinance.
- 3.5 As far as the protection of customers against unfair trade practices is concerned, telecommunications licensees are prohibited from engaging in misleading or deceptive conduct under section 7M of the Telecommunications Ordinance which provides that *"a licensee shall not engage in conduct which, in the opinion of the [Telecommunications] Authority, is misleading or deceptive in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service"*.
- 3.6 For the purpose of providing practical guidance to telecommunications licensees in respect of what forms of conduct fall within the realm of

misleading or deceptive acts or behaviours, the TA issued guidelines on misleading or deceptive conduct under section 7M on 21 May 2003 (**Guidelines**)<sup>1</sup>. As mentioned in the Guidelines, misleading or deceptive conduct as stipulated in section 7M covers all major business activities which include but not limited to promoting, marketing, advertising, sales practices, oral presentations, product labelling, packaging, guarantees, contents of Internet sites, etc. In addition, the Guidelines provide details in respect of the TA's approach to a wide range of conduct that typically raises regulatory concern including but not limiting to misrepresentations, silence or deception by omissions, fine print disclaimers and qualifications, unsolicited goods and services and opt out clauses, comparative advertising, bait advertising, use of words such as "free", "unlimited" or "no more to pay", prizes, unlawful churn and slamming, cramming, telemarketing, etc.

- 3.7 Since the promulgation of the Guidelines, the TA has been taking strict enforcement action<sup>2</sup> against licensees who have engaged in misleading or deceptive conduct. Licensees who are found to have breached section 7M will be imposed with a financial penalty. The sanction gives deterrence effect to both the defaulting licensees and the telecommunications industry in general. Whilst not all complaints are established, the results of all investigations under section 7M are published on OFTA's website. The enforcement and publication conveys a strong message to the industry that misleading or misleading

---

<sup>1</sup> [http://www.ofta.gov.hk/en/report-paper-guide/guidance-notes/gn\\_20030521.pdf](http://www.ofta.gov.hk/en/report-paper-guide/guidance-notes/gn_20030521.pdf)

<sup>2</sup> [http://www.ofta.gov.hk/en/c\\_bd/completed-cases/misleading-deceptive.html](http://www.ofta.gov.hk/en/c_bd/completed-cases/misleading-deceptive.html)

conduct is strictly prohibited in the course of marketing telecommunications services.

3.8 In addition to the statutory provisions which offer protection to customers against misleading or deceptive conduct, the telecommunications industry is currently discussing an industry code of practice on telecommunications service contract which is intended to further enhance consumer protection by improving the terms and conditions in a telecommunications service contract. For example, the industry adopts in the code of practice a cooling-off period which is in line with the CEDB's proposal.

3.9 In summary, the concept of misleading or deceptive conduct covered by section 7M of the Telecommunications Ordinance crosses a wide spectrum of all major business activities in the provisions of telecommunications services. It basically encompasses all unfair trade practices as prohibited under the expanded TDO. Customers are reasonably protected from the harms of unfair trade practices by virtue of section 7M and the strict enforcement actions undertaken by the TA. Given that the existing regulatory framework in the telecommunications industry proves to be effective in curbing against unfair trade practices and that the industry is contemplating to develop an industry code of practice on service contract to further protect consumer interests, it is absolutely not necessary to introduce other regulatory regime which overlaps with the existing ones and serves the same purpose. The Government should avoid over-regulation which has the undesirable

effect of increasing regulatory compliance costs by the telecommunications industry. For the foregoing reasons, CSL considers that the proposed provisions in the TDO including provisions governing cooling-off period should not apply to telecommunications industry which is regulated by OFTA under the Telecommunications Ordinance.

3.10 Whilst CSL considers that the telecommunications industry should be exempted from the realm of the proposed legislation, if the Government decides otherwise, CSL is of the view that it is unnecessary to give concurrent enforcement powers to the TA. The enforcement power should only be vested with the Customs and Excise Department (C&ED) to oversee all unfair trade practices across all sectors. This arrangement will ensure that unfair trade practices in all sectors in Hong Kong will be treated equally and fairly and the law will be applied consistently. A concurrent jurisdiction will run the risk of different yardsticks being used by C&ED and the TA in taking enforcement actions.

3.11 If the proposed legislation is applicable to the telecommunications industry which CSL does not agree, section 7M of the Telecommunications Ordinance should be repealed given that it is unfair and redundant for the telecommunications industry to subject to two regulatory regimes which serve the same purpose of curbing against unfair trade practices.

---

#### **4 Effective Enforcement**

- 4.1 To ensure that no complaint will be overlooked, the CEDB proposes to *establish a referral mechanism under which the enforcement agency and the Consumer Council can coordinate with each other on the actions to be taken on consumer complaints received at their respective ends.*
- 4.2 It is of no doubt that the Consumer Council has the relevant experience and resources in addressing consumer related matters. As the Consumer Council is an advocate for consumer interests and its primary focus is consumer interests driven, there might be a concern on possible conflicts of interests if the Consumer Council is heavily involved into the enforcement function by virtue of a referral mechanism between the Consumer Council and the enforcement agencies. It is of paramount importance that the enforcement of the proposed legislation must be exercised in a fair manner having regard to the merits of each case. Any enforcement mechanism should exclude possible prejudicial effects upon businesses.

---

#### **5 Confidentiality**

- 5.1 CSL does not regard any part of this submission as confidential and has no objection to it being published or disclosed to third parties.

-END-