



HKRMA's Comments on the Consultation Paper:
'Legislation to Enhance Protection for Consumers
Against Unfair Trade Practices'

22 October 2010

On behalf of the Hong Kong Retail Management Association ("the HKRMA"), we write to present our members' views on the Government's current consultation on 'Legislation to Enhance Protection for Consumers against Unfair Trade Practices'.

1. Introduction

The HKRMA and its members have always been, and continue to be, committed to fair and honest retail practices, as embodied by the HKRMA's Code of Practice. We therefore support the Government's overall objective of targeting specified unfair trade practices, whilst at the same time avoiding over-regulation for the majority of businesses which trade honestly.

However, we do not feel that the Consultation Paper ("CP") gives sufficient detail to make informed judgments about the impact of the proposed changes, so as to ascertain whether a fair balance is struck between safeguarding the legitimate rights of consumers and avoiding an unnecessary regulatory burden on honest businesses (see Section 2 below).

In the interests of proportionality, new offences should only be created if the existing law is demonstrably insufficient to address an identified, existing (as opposed to hypothetical) problem. The CP states that there is a 'pressing' problem to be addressed (para 1.10) but does not state what this problem is, and why the existing law is insufficient to deal with it.

2. Lack of Clarity and Certainty

We set out below some examples of the key areas of concern:

- It is not clear which of the proposed new offences are 'strict liability'. Is it safe to assume that if it is not expressly stated, then the proposed offence is NOT intended to be 'strict liability'? In any event, it is not proportionate to



HONG KONG
RETAIL MANAGEMENT
ASSOCIATION

香港零售管理協會

impose absolute legal responsibility on individual/business irrespective of fault or negligence, especially for subjective offences like misleading omissions, bait advertising and aggressive practices. A trader should only be liable if it acted 'knowingly or recklessly'.

- There is a lack of clarity regarding the concept of the 'average consumer' – in reality there is no such person: each customer is different and what may affect one customer's behaviour may not in the case of another.
- It is not clear who is liable for the new offences - would it be the company, the directors or officers, or the person who actually commits the offence (e.g. the sales person in the shop who inadvertently omits to tell a customer something which is later deemed material)? Or is it a combination of them all?

3. Extending False Trade Descriptions to Services

The HKRMA has no objection in principle to extending the TDO to services, to the extent that the services are not covered by existing sector-specific regulation, e.g. telecommunications and broadcasting services.

4. Compliance-based mechanism

If new legislation on unfair trading practices is justified, the HKRMA would support the introduction of the civil enforcement approach which the CP envisages would give '*more avenues to promote compliance*' and which '*has the potential of achieving a quicker and better outcome*' for consumers. This reinforces the argument that no new criminal offences are necessary, at least at this stage and the focus instead should be to work with businesses and consumers to resolve disputes without recourse to the criminal law.

5. Misleading omissions

It will be extremely difficult in practice for traders to anticipate what information the 'average consumer' will consider material to a 'transactional decision', in particular in relation to complex or technical products, such as electronics, as every consumer has a different level of knowledge and expectation. We are concerned that this proposal will just provide an incentive and encouragement to customers to renege on transactions freely entered into, adding unnecessarily to the costs of doing business.

The CP itself states in paragraph 2.10 that customers are responsible for seeking relevant information and should not enter into the transaction if insufficient



HONG KONG
RETAIL MANAGEMENT
ASSOCIATION

香港零售管理協會

information is available; and also that if information provided by the supplier in response to customers' enquiry amounts to a false trade description, it would be caught by the other provisions of the TDO. This provides a further argument against, not for, a new offence of 'misleading omissions'.

6. Aggressive commercial practices

The line between 'aggressive' and 'enthusiastic' sales practices is too difficult and subjective to draw in practice: what may be perceived as aggressive by one customer may be regarded as simply enthusiastic by another. The subjective nature of what constitutes 'aggressive' sales practices would conflict with the human rights principle that criminal offences must be defined with sufficient precision to enable those subject to them to know what they need to do to comply.

In any event, conduct which crosses the line into the field of what is socially-unacceptable is already addressed by existing criminal offences, as the CP itself recognizes. Even if this new criminal offence were to be created (which it should not), it should certainly NOT be an offence of strict liability, given the uncertainties referred to above.

7. Bait advertising

The proposed expanded definition of 'trade description' for goods and services (Annex C and D to the CP), will cover false and misleading representations as to *availability*, which would cover bait advertising. Therefore we do not see any need for this new offence.

In addition, what constitutes offering the goods/services for a 'reasonable period' and 'reasonable quantities' are also too subjective. How can legitimate businesses therefore avoid being caught by this offence when they simply go out of stock of an advertised product? Although the CP suggests it would be a defence to immediately replenish the stock, this does not take into account the inherent uncertainties of complex, international supply chains, particularly in the FMCG sector.

8. Extension of C&ED inspectors' powers

C&ED should only have the power to inspect books and documents if they have reasonable cause to suspect an infringement, otherwise it constitutes a gross invasion of privacy for legitimate traders, raising serious issues of compliance with the Hong Kong Bill of Rights.



HONG KONG
RETAIL MANAGEMENT
ASSOCIATION

香港零售管理協會

The comparison that the CP makes with the Ordinances on product safety is mis-placed, and does not support the CP's proposal. Under those Ordinances, the power to inspect books and records is exercisable only if the officers have already satisfied a magistrate that there is reasonable cause to suspect that there are on the premises goods which do not comply with the relevant safety requirements. This provides the necessary safeguard against 'fishing expeditions'. No such prior requirement exists under the TDO (except for domestic premises). This is why a reasonable cause for suspicion is necessary before the power to inspect books and records can be exercised.

9. Conclusion

Although we understand the Government's overall objective, more detail is required to enable proper evaluation of the need for the proposed new offences, and if it is determined that such new offences are justified due to inadequacies in the existing law, then the scope of such new offences needs to be more carefully considered taking into account the issues raised above. In this way, the Government can ensure that a fair and appropriate balance is struck between protecting the legitimate interests of consumers and avoiding over-regulation of honest businesses (which, as admitted in the CP, is the majority of businesses). On the other hand, education plays an important role in enhancing consumer protection, and therefore we urge the Government to promote awareness of consumer's own rights and responsibility.