

Public Consultation Paper

Legislation to Enhance Protection for Consumers Against Unfair Trade Practices



Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
July 2010

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

This consultation paper can be found on the internet at
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15 July 2010

This consultation paper was prepared by the Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau. We welcome views from the public and interested parties on the proposals set out in this document. Comments should be submitted by mail, facsimile or email on or before 31 October 2010:

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

Fax number: 2869 4420

E-mail address: cpr@cedb.gov.hk

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Commerce, Industry and Tourism Branch
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EXECUTIVE SUMMARY

The Government has completed a review of the existing consumer protection legislation, in particular the Trade Descriptions Ordinance (“the TDO”) (Cap. 362), with the policy objective of enhancing protection for consumers against unfair trade practices and, at the same time, ensuring a level playing field for business. While it is important to safeguard the legitimate rights of consumers, we are also mindful not to create unnecessary regulatory burden on business or fetter the legitimate use of creativity in promotional activities.

2. In the review process, we have carefully considered the recommendations made by the Consumer Council and the impact of developments in the local market on consumer welfare. We have also drawn reference from arrangements adopted in overseas regulatory regimes. We recommend a number of improvement proposals as set out in this Consultation Paper. We would like to seek public views on these proposals.

3. The proposed improvements would be primarily effected through amendments to the TDO. In order to deter and penalize those who are engaged in unfair trade practices, we propose to create new criminal sanctions under the TDO in respect of several types of such common 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 or services. The present prohibition of false trade descriptions of goods in the TDO would be extended to cover trade descriptions of services. Details on the proposed definitions of and penalties for these offences are set out in Chapter Two. Proposed defences to be made available in criminal proceedings are also set out in the Chapter.

4. The proposed prohibitions must be supported by an effective and proportionate enforcement regime. We propose that the Customs and Excise Department be tasked to enforce the proposed offences and be given new enforcement powers. In order to complement criminal sanctions, we propose introducing a compliance-based mechanism under which the Department has the power to seek an undertaking from traders suspected of deploying unfair trade practices to stop and not to repeat an offending act and, where necessary, seek an injunction from the court for the purpose.

We believe that this mechanism would encourage compliance by businesses and achieve a quicker and better outcome for consumers aggrieved by unfair practices. Detailed proposals on enforcement are set out in Chapter Three.

5. Except specified, the legislative proposals cover all sectors. In view of the presence of sector-specific regimes, we propose in Chapter Four that the financial services sector, property transactions and professional practices regulated by regulatory bodies established by statute should not be brought under the ambit of the expanded TDO. As regards the telecommunications and broadcasting sectors, we propose to give concurrent enforcement powers to the sector specific regulators to enforce the fair trade provisions in the TDO.

6. Although the proposed compliance-based mechanism should go a long way in helping to resolve consumer complaints, some consumers may wish to seek redress through the court. To facilitate aggrieved consumers to obtain restorative justice and promote business compliance, we propose that a right to institute private civil action on the contravention of the proposed offences should be created under the TDO. We further propose that the court be empowered to make compensation orders in favour of consumers against persons convicted of offences relating to unfair trade practices under the TDO. Further details of these two proposals are outlined in Chapter Five.

7. In Chapter Six, we propose imposing cooling-off periods on transactions of timeshare rights and long-term holiday products and also transactions concluded during unsolicited visits to consumers' homes and places of work. This proposal has taken into account the special nature of the products being transacted and the circumstances under which the transactions are concluded.

8. We believe that the proposals, the full list of which is set out in Chapter Seven, could strike a fair balance between protecting the legitimate interests of consumers and preserving operational efficiency for businesses. The proposals would benefit both consumers and honest businesses, as well as the overall interests of Hong Kong.

CHAPTER ONE

INTRODUCTION

1.1 The Government is committing to protecting the legitimate rights of consumers in Hong Kong. We want an effective and transparent regime that delivers social justice and economic progress which is fair to both consumers as well as businesses. This will not only protect the rights of local consumers but also strengthen Hong Kong's appeal to tourists as a shopping paradise.

1.2 An effective consumer protection regime, where both businesses and consumers can trade fairly with confidence, entails a number of key elements. First and foremost, consumers should be equipped with the skills, knowledge and information so that they can make informed choices according to their own free will. Appropriate and convenient avenues should be provided to enable consumers to seek restorative justice if their rights have been jeopardised. Publicity and education is important so that consumers are aware of their rights and exercise them responsibly.

1.3 At the same time, 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. Effective and proportionate enforcement of consumer rights will provide a level playing field for honest businesses to compete. Consumers will be more disposed to making purchases which will in turn bolster business volume and receipts.

Existing Legislation

1.4 Specific Ordinances have been enacted to protect different aspects of consumer interests. False trade descriptions of goods, inaccurate measurement and misrepresentations are respectively dealt with by the Trade Descriptions Ordinance (the "TDO") (Cap. 362), the Weights and Measures Ordinance (Cap. 68) and the Misrepresentation Ordinance (Cap. 284). The Unconscionable Contracts Ordinance (Cap. 458), the Sale of Goods Ordinance (Cap. 26) and the Supply of Services (Implied Terms) Ordinance (Cap. 457) deal with contract-related matters. The Consumer Goods Safety Ordinance (Cap. 456) and the Toys and Children's Products Safety Ordinance (Cap. 424) govern

safety-related matters.

1.5 Over the years, the Government has improved the usability of these Ordinances to take account of latest socio-economic developments. More recent improvements include amendments to the TDO to prohibit misleading price indications and to require traders to disclose critical pieces of product information in the sale of certain precious metals and stones. We have also amended the operation of the Toys and Children's Products Safety Ordinance to adopt latest international safety standards or standards applicable in major economies.

1.6 The evolvement of trade practices in recent years, particularly the emergence of certain unfair trade practices which undermine consumer interests, calls for a review of the existing regulatory regime to ensure that it continues to be effective in meeting the needs and aspirations of the community. Unfair trade practices are generally predicated on two elements, namely information asymmetry and undue influence. Commonly seen tactics such as false trade descriptions, misleading omissions, "bait advertising", "bait-and-switch" and accepting payments without the intention or ability to supply the contracted goods and services (hereafter collectively referred to as "products") are unfair practices exploiting the lack of information on the part of the consumer. Aggressive practices, on the other hand, seek to exert undue influence on the consumer so that the person would make a transactional decision he or she would not otherwise have made.

Focus and Approach of the Review

1.7 The Government has considered the recommendations contained in the report on "Fairness in the Marketplace for Consumers and Business" published by the Consumer Council in 2008 in the review of existing legislation related to trade practices. We have also examined proposals raised in the community, latest developments in the market which may have an impact on consumer interests, as well as overseas consumer protection regimes. The findings of our review and proposed improvement proposals are presented in the ensuing Chapters.

1.8 The key focus of our proposals to improve consumer rights is to enhance information flows and to ensure that the consumer can make an informed decision based on free will. Apart from safeguarding consumer rights, we have given due weight to the

importance of preserving the operational efficiency of businesses. We should avoid over-regulation as the majority of businesses trade honestly. Our proposed new measures will be targeted at specified unfair trade practices.

1.9 We have drawn references from relevant legislative provisions and enforcement mechanisms in the United Kingdom (“UK”) and Australia (extracts of relevant legislative provisions are at Annexes A and B respectively). In both places, criminal offences have been established to deter and penalise those who are engaged in unfair trade practices. Furthermore, both jurisdictions have adopted a general and forward-looking approach when defining the prohibited unfair trade practices, so as to cater for different types of consumer transactions and changing market conditions.

1.10 The proposals to strengthen consumer protection will be effected primarily through amendments to the TDO, which already contains provisions prohibiting the unfair practice of applying false trade descriptions to goods. We believe this approach offers a much quicker way to address a pressing problem, when compared to the alternative of enacting an entirely new Ordinance. Indeed, there is strong support in the community for tackling the problem as a matter of priority.

1.11 The proposed new regulatory requirements have to be underpinned by a measured and transparent enforcement regime, which will allow proportionate and targeted interventions to be taken by the enforcement agency to protect consumer interests. Appropriate defences will be made available in criminal proceedings so that honest businesses would not be inadvertently caught.

1.12 Consumer empowerment and raising consumer awareness are equally important as legislative protection. The Government will not spare any efforts, and will continue to work in partnership with the Consumer Council and other stakeholders in this regard, including outreaching to the more vulnerable groups.

CHAPTER TWO

UNFAIR TRADE PRACTICES TO BE PROHIBITED

2.1 This Chapter sets out our legislative proposals to outlaw commonly seen unfair trade practices. It also sets out defences to be made available in court proceedings and the proposed penalty for the new offences. In 2009, the Consumer Council received 34,114 complaints, of which 8,276 concern unfair trade practices. Out of these 8,276 complaints, 4,081 are related to structured financial products, 2,776 to other types of services and 1,419 to goods. The reported cases mostly involved misrepresentation, high-pressure or aggressive practices and “bait-and-switch” tactics.

False Trade Descriptions

Present Control

2.2 False description or misrepresentation undermines consumers’ ability to make informed choices and is therefore unacceptable. At present, the TDO is the primary piece of legislation prohibiting false trade descriptions. Under the TDO, anyone who applies a materially false or a misleading indication of any of the specified aspects of any goods in the course of trade or business (whether applied directly or indirectly, verbal or written, to the goods or in advertisements) commits an offence, which may attract, on conviction on indictment, a fine of \$500,000 and imprisonment for 5 years, or on summary conviction, a fine at Level 6 (which is \$100,000 at present) and imprisonment for 2 years. The TDO, however, does not apply to services. This is a need to plug this loophole given Hong Kong’s status as a service economy.

Proposals

2.3 Suppliers of goods and services should have the primary responsibility of providing truthful information on their products. To plug the gaps in the existing TDO, *we propose to extend its coverage to include trade descriptions in respect of services made in consumer transactions. We propose to define “services” as including “any rights, benefits, privileges or facilities that are, or are to be, provided, granted, conferred or offered” under any consumer contract but excluding rights, privileges or facilities that are, or are to be, provided under a contract of employment.*

2.4 At present, “trade descriptions” in relation to goods are specified in section 2 of the TDO. Any person who applies a false trade description to goods commits an offence. We consider that the current definition is too restrictive and incapable of dealing with evolving trade practices. Pertinent descriptions (such as price indications) presently not listed in the TDO are not subject to regulation. To strengthen protection for consumers, *we propose to broaden the definition of trade descriptions of goods* along the lines set out at Annex C.

2.5 Similarly, *we propose to define the trade descriptions in respect of services made in consumer transactions* along the lines set out at Annex D.

Misleading Omissions

2.6 Another type of unfair trade practices is omissions. The interests of consumers may be hampered if they cannot get hold of critical pieces of information, either because of outright omissions by businesses or unclear presentation which has the effect of misleading consumers. Although consumers have the right and responsibility to seek such information, they may not know the products well enough to raise pertinent questions.

Present Control

2.7 Currently under section 4 of the TDO, the Chief Executive in Council may by order require that any goods be accompanied by certain pieces of information during the course of trade or business. Under this “positive listing approach”, businesses are required to provide essential information to consumers¹. The protection accorded to consumers is limited to those goods that have been designated. It cannot keep pace with the introduction of new goods into the marketplace. This problem will become more complex if the TDO is extended to cover services. Since new products emerge in the market all the time and existing products will undergo enhancements, the existing control regime provided under the TDO cannot effectively deal with the problem of misleading omission.

¹ Five such orders have been made so far, imposing information provision requirements on the sale of gold and gold alloy, platinum, natural “Fei Cui”, diamond and five specified types of electronic products.

Proposals

2.8 Business operators and service providers should have the primary responsibility of presenting accurate, truthful and pertinent information in respect of their products to consumers. We believe that a forward-looking approach capable of dealing with changing market situations would be more effective in tackling the problem of misleading omissions. *We propose to amend the TDO to create an offence of misleading omission in consumer transactions* along the following lines:

- (a) 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 decision² he would not have taken otherwise; and
- (b) when deciding on whether a practice is a misleading omission, all the features and circumstances of the commercial practice should be taken into account³.

2.9 In response to any concerns that may be raised by the business sector about the regulatory reach of the proposed offence, *we propose to make available appropriate defences for the accused in criminal proceedings* (see paragraph 2.22 below). In addition, enforcement guidelines will be issued to promote community awareness. With vigilant enforcement and the building up of case law, both the business sector and consumers will learn to understand the protection afforded by the proposed legislative provisions and what would constitute a breach.

2.10 It should be emphasized that consumers have the right and indeed the responsibility of seeking relevant information before entering into a transaction. They should refrain from entering into a transaction if insufficient information is available for them to make an

² “Transactional decision” means in essence any decision taken by a consumer on whether, how and on what terms to purchase, make payment for, retain or dispose of a product, or to exercise a contractual right in relation to a product.

³ Such features and circumstances may include the limitations of the medium used to communicate the commercial practice, and where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

informed decision. If the information provided by the supplier in response to a consumer's enquiry amounts to a false trade description, it would then be caught by the provisions of the TDO, as to be amended, relating to false trade description.

Aggressive Practices

2.11 The deployment of aggressive or high-pressure practices⁴ is another area of concern. Consumers' freedom of choice is likely to be undermined when they are under undue pressure and as a result, their consumption behaviour may be affected.

Present Control

2.12 Existing common law and statutory criminal offences may tackle some of the above objectionable practices⁵. Nevertheless, a high level of evidence including in most cases proof of the *mens rea* is required to press criminal charges. Separately, aggrieved consumers can resort to private actions for remedies⁶. However, most consumers are reluctant to pursue private redress through the courts. In short, the present criminal law and private law regimes cannot effectively deal with the problem of aggressive practices deployed in the context of consumer transactions.

⁴ Aggressive or high-pressure practices may take various forms, e.g. harassment by sales persons, the belongings of consumers being retained, consumers being subject to lengthy and incessant sales pitches or consumers being prevented from leaving the business premises.

⁵ For instance, if a consumer is subject to physical violence (or the threat of it), common assault or related offences may apply. If the consumer is threatened by words, the offence of intimidation may be relevant. If he is detained against his will, the offence of "forcible taking or detention" may apply. Various deception and fraud offences under the Theft Ordinance (Cap. 210) and the common law offence of conspiracy to defraud may be relevant, in situations where property is obtained by deception or fraud.

⁶ The common law doctrines of duress and undue influence may apply, allowing an aggrieved party to rescind a transaction.

Proposals

2.13 *We propose to enhance protection for consumers by creating a strict liability offence⁷ under the TDO to prohibit the use of 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, coercion or undue influence and it thereby causes him to take a transactional decision he would not have taken otherwise. At the same time, we propose to include in the TDO a non-exhaustive list of the factors which should be taken into account when determining whether a practice uses harassment, coercion or undue influence⁸. We believe that the above approach will provide the necessary flexibility in dealing with different aggressive tactics and, at the same time, give useful guidance to stakeholders on the considerations to be taken into account in the course of enforcement.*

“Bait-and-Switch”

2.14 “Bait-and-switch” refers to the practice of traders advertising or promoting products at bargain prices or on very favourable terms without having reasonable quantities or capacity to meet the demand that should have been foreseen. The promoted item is in fact used as a bait to attract consumers into shop premises, so that the trader has the opportunity to switch them to more expensive products in various guises.

Present Control

2.15 At present, there is limited legislative control over the practice of “bait-and-switch”. If businesses apply a materially false indication or a misleading indication on the performance or strength of goods in an attempt to tempt consumers to switch items, relevant sections on false trade descriptions in the TDO will apply. Services are however not covered under the TDO. There are no statutory

⁷ A strict liability offence does not require proof of a specific state of mind (e.g. an intention to cause the victim to part with his property). In the UK and Australia, contraventions of the provisions prohibiting specified aggressive practices are strict liability offences.

⁸ The factors include the timing, location, nature or persistence of the practice, the use of threatening or abusive language or behaviour, the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment (of which the trader is aware) to influence the consumer's decision.

requirements on businesses to make available a sufficient quantity of an advertised product to meet demand. Pursuing criminal proceedings based on deception offences would require proof of the *mens rea* with a high evidential threshold.

Proposals

2.16 To combat this unfair practice, *we propose to create the following two offences in the TDO in respect of consumer transactions:*

“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.

“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 tactics⁹. The enforcement agency is required to prove the existence of an intention of promoting a substitute.

2.17 To ensure that businesses acting in good faith would not be inadvertently caught by either of the proposed offences, *we propose that appropriate defences be provided in criminal proceedings*, e.g. 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.

⁹ Such tactics may include refusing to show the advertised item, refusing to take orders or deliver the item within a reasonable time, or demonstrating a defective sample of the item.

Accepting Payment without the Intention or Ability to Supply

2.18 Pre-payment for goods or services is becoming an increasingly popular form of consumption. Consumers and businesses stand to benefit from this mode of consumption, as consumers normally enjoy discounts and the cash flow of businesses can be improved. Many problems may arise, however, when traders with no intention or ability to supply the contracted products trick consumers into pre-payment. Due to information asymmetry, consumers may not be in a position to ascertain the bona fides and capability of businesses in delivering the pledged goods or services. Complaints on traders receiving pre-payments when there is already a risk of closure and consistent over-subscription of services are receiving widespread public concern.

Present Control

2.19 Aggrieved consumers can institute civil action to seek contractual remedies from traders for a breach of contract¹⁰. However, most consumers may not have the incentive to seek private law remedies through the courts. Depending on the facts of individual cases, the above unfair trade practices may be caught by criminal offences under the current Theft Ordinance and the common law offence of “conspiracy to defraud”. However, the evidential threshold required is high.

Proposals

2.20 We believe that new legislation specific to consumer transactions, as distinct from offences in the area of general criminal law, should be created to address the inadequacy in existing laws and tackle this objectionable trade practice. *We propose to create an offence in the TDO to prohibit in consumer transactions, the practice of 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. We also*

¹⁰ The seller is under an obligation to deliver the goods or perform the service in accordance with the relevant contract terms. In the event that no time is stipulated in the contract, in the case of goods, section 31(2) of the Sale of Goods Ordinance (Cap. 26) requires the seller to deliver the goods “within a reasonable time”, and in the case of services, the supplier should carry out the service “within a reasonable time” as stipulated under section 6(1) of the Supply of Services (Implied Terms) Ordinance (Cap. 457).

propose to make it a strict liability offence if, at the time of accepting payments, a trader has no reasonable grounds for believing that he will be able to supply the contracted products within the period specified in the contract.

Proposed Penalties and Defences

Proposals

2.21 Section 18(1) of the TDO imposes fine and imprisonment terms on those who breach the current prohibition against the application of false trade descriptions to goods¹¹. For consistent treatment of different types of unfair trade practices in consumer transactions, we *propose that the same maximum penalty should apply to the proposed new offences*. We will review, in the light of actual experience after the introduction of the proposed offences, if any changes to the levels of penalty are called for¹².

2.22 Sections 26 and 27 of the TDO (copy at Annex E) provide a set of defences in proceedings for, among other offences in the TDO, the offence of applying a false trade description to goods. Under section 26, it is 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 provides defences for publishers. We propose that all the above defences should be made available for the proposed new offences.

¹¹ A fine of \$500,000 and imprisonment for 5 years on conviction on indictment, or a fine at Level 6 (presently at \$100,000) and imprisonment for 2 years on summary conviction.

¹² From 2007 up to 2009, 38 companies and 174 persons have been convicted under section 7 of the Ordinance in the Magistrates' Courts. All the convicts were fined, the highest amount being \$100,000, with 27 persons given immediate custodial sentences as well (up to 4 months), 33 given suspended custodial sentences up to 6 months, and 34 ordered to perform community services. The level of penalty handed down by the court in all these cases falls within the maximum penalty level set in the TDO.

CHAPTER THREE

EFFECTIVE ENFORCEMENT

Introduction

3.1 This Chapter sets out our proposal to designate the C&ED as the agency for enforcing the offences proposed in Chapter Two and be given the power to inspect and take copies of books and documents for the purpose of ascertaining whether any offence has been or is being committed. We further propose to introduce a civil, compliance-based mechanism, in addition to criminal sanctions, to promote adherence to the TDO. In the case of the telecommunications and broadcasting sectors, we propose that concurrent enforcement powers be conferred on the Telecommunications Authority (“TA”) and the Broadcasting Authority (“BA”)¹³.

Enforcement Agency

3.2 The C&ED is currently responsible for enforcing the TDO, including the provisions prohibiting the application of false trade descriptions to goods (section 7) and the import of goods to which a false trade description is applied (section 12).

3.3 The C&ED carries out enforcement through conducting regular and random inspections, performing undercover checks and test-purchase of dubious items as well as carrying out investigations into shops suspected of making false trade descriptions in the course of trade. Quick response teams have been set up to attend to urgent consumer complaints. The Department also operates a Product Monitoring Scheme to screen popular consumer goods in the local retail market to ensure that their product descriptions are compliant with the law.

Proposal

3.4 To capitalize on its enforcement experience and expertise, *we propose that the C&ED be tasked to enforce the proposed offences under the TDO*, with concurrent enforcement powers to be conferred on the TA and the BA in respect of the

¹³ See paragraphs 4.11 and 4.12 below.

telecommunications and broadcasting sectors (for details on the latter, see Chapter Four). Suitable training would be put in place to enable the staff of the C&ED (and staff of the TA and BA for the matter) to take on a wider span of responsibilities. We also propose making available new enforcement avenues to the enforcement agency, details of which are set out in the remaining parts of this Chapter.

Compliance-based Mechanism

3.5 We have examined the enforcement regimes in advanced economies and find that civil measures, in addition to criminal sanctions, are available to the enforcement agency to deal with suspected contraventions of fair trade legislation. A compliance-based mechanism is implemented both in the UK and Australia under which the enforcement agency can enter into consultations with a trader suspected of contravening the fair trade legislation and seek an undertaking from him to stop and not to repeat the offending acts. The enforcement agency can apply for an injunction from the court if the trader refuses to cooperate. The modus operandi of the compliance-based mechanisms adopted in the UK and Australia is set out at Annex F.

3.6 At present, we rely on the criminal sanctions in the TDO to penalize and deter non-compliance. The introduction of civil measures would give the enforcement agency more avenues to promote compliance. Specifically, we see the following merits in a compliance-based mechanism –

- (a) criminal prosecution must satisfy a high evidential threshold and is a lengthy process. A compliance-based model has the potential of achieving a quicker and better outcome (e.g. restitution for the affected consumers), and through curtailment of the offending conduct by way of an undertaking or in compliance with a court order, businesses and consumers will both stand to gain;
- (b) when compared to criminal proceedings which are generally lengthy and costly processes, the civil avenues available under the compliance-based mechanism may provide a much more cost-effective way of resolving consumer complaints; and

- (c) undertakings and court injunctions will be published and become public information, hence carrying a punitive and deterrent effect.

Proposals

3.7 *We propose to introduce a compliance-based mechanism* by making suitable amendments to the TDO. The enforcement agency will be empowered to draw on the civil avenues under the mechanism in respect of the proposed offences and the current offences of applying a false trade description to goods and importing goods to which a false trade description is applied.

3.8 Specifically, the C&ED (or the TA or BA, as the case may be) will be empowered under the proposed mechanism to look into complaints¹⁴, 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.

Enhanced Role of Consumer Council

3.9 The Consumer Council has been the Government's staunch partner over the years in safeguarding the legitimate interests of consumers. The C&ED, in particular, has been working closely with the Consumer Council in the context of ensuring product safety and tackling suspected false trade descriptions of goods. We envisage that the Council would continue to play an important mediating role between aggrieved consumers and businesses under the proposed regime. Indeed, we expect that the effectiveness of the Council's mediation work would be enhanced with the back up of the compliance-based mechanism, and ultimately criminal prosecution under the charge of the

¹⁴ These may include complaints referred to the enforcement agency by the Consumer Council or other sources.

enforcement agency. To ensure that no complaint will be overlooked, *we propose 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.

3.10 We believe 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.

Power to Inspect Books and Documents

3.11 Prohibiting unfair trade practices in the supply of services, such as bait-and-switch and accepting payment without the intention or ability to supply, is likely to be more complicated when compared to regulation over goods. Having reviewed the enforcement tools under the TDO and their effectiveness, we consider that the C&ED's power to seek relevant information from businesses needs to be enhanced for effective enforcement.

3.12 Currently, section 15(1)(b) of the TDO empowers the C&ED to inspect any goods and enter into any non-domestic premises for the purpose of ascertaining whether any offence has been or is being committed. The power, however, does not extend to inspecting "books or documents"¹⁵. The power to demand the production of books or documents is only available under section 15(1)(d) when the C&ED has reasonable cause to suspect that an offence under the TDO has been committed. This arrangement has given rise to difficulties for the C&ED in taking proactive

¹⁵ Such a power is already available to the C&ED in product safety matters, namely under section 20(1)(c) of the Toys and Children's Products Safety Ordinance (Cap. 424) and section 19(1)(c) of the Consumer Goods Safety Ordinance (Cap. 456).

enforcement under certain subsidiary legislation made under the TDO¹⁶.

3.13 We envisage that with the proposed introduction of the new offences of bait advertising, bait-and-switch and accepting payment without the intention or ability to supply contracted goods or services, the power of inspecting books or documents during spot checks would be all the more important for the C&ED to take proactive and pre-emptive action to inspect and ascertain whether a business has sufficient stock or has in place suitable arrangements for the supply of products.

Proposal

3.14 *We propose to amend section 15(1)(b) of the TDO to empower the C&ED to inspect books and documents and take copies of them for the purpose of ascertaining whether an offence has been or is being committed.* This proposal broadens the scope of application of section 15(1)(d). The same power should also be given to the TA and BA in relation to the telecommunications and broadcasting sectors (see paragraphs 4.11 and 4.12 in Chapter Four).

¹⁶ For example, C&ED has difficulties in ascertaining whether traders have complied with the requirement of keeping copies of invoices for not less than 3 years as required under the Trade Descriptions (Marking) (Gold and Alloy) Order.

CHAPTER FOUR

SECTOR-SPECIFIC REGIMES

Introduction

4.1 This Chapter sets out our proposal on how sectors with existing regulatory regimes should be dealt with in the context of the proposed legislative amendments to the TDO.

Background

4.2 The Consumer Council suggested in its report 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.

Proposals

4.3 We generally share the Council's thinking. Having examined the operation of major sectors, *we propose 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. *We further propose that concurrent enforcement powers be given to the TA and the BA under the TDO in respect of the telecommunications and broadcasting sectors respectively.*

Financial Services

4.4 There are well-established regulatory regimes in the financial services sector under the auspices of the Hong Kong Monetary Authority ("HKMA"), the Securities and Futures Commission ("SFC"), the Mandatory Provident Fund Schemes Authority ("MPFA"), the Financial Reporting Council and the Office

of the Commissioner of Insurance. These regulators possess specialist knowledge and expertise.

4.5 In respect of activities such as those related to the securities, insurance and Mandatory Provident Fund (“MPF”) businesses, the dealings of market intermediaries with consumers have been covered by the relevant legislation and the codes of conduct issued or approved by the respective regulators. The Government and the SFC have reviewed how the securities and futures regulatory regimes can be further improved to enhance protection for the investing public. The SFC will launch a series of measures in this regard¹⁷. In addition, the Government has just consulted the public on the need to establish an Investor Education Council and a Financial Dispute Resolution Centre. The proposals are meant to strengthen protection of consumers engaged in financial services.

4.6 In respect of general banking activities, authorized institutions’ (“AIs”) dealings with consumers are covered by the Code of Banking Practice (“CoBP”). The CoBP issued jointly by the two banking industry associations¹⁸ is endorsed by the HKMA as supervisory standards to be adopted in the course of banking supervision to ensure good banking practices and a fair and transparent relationship between AIs and their personal customers.

4.7 In the light of the above, *we propose that the fair trade provisions in the TDO should not apply to services and products provided by institutions regulated under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the Securities and Futures Ordinance (Cap. 571), and the Financial Reporting Council Ordinance (Cap. 588).*

Property Transactions

4.8 In respect of property transactions, the Government’s primary concern is that they should be carried out in a fair and transparent manner. In the past two years, the Government has strengthened the regulation of the sale of first-hand uncompleted

¹⁷ These measures include sale disclosure of commissions or other benefits arising from investment sales, prohibition of using gifts to promote specific products, investor characterization and cooling-off period for long-term structured investment products.

¹⁸ The Hong Kong Association of Banks and the DTC Association.

residential properties through the Consent Scheme administered by the Lands Department and the guidelines issued by the Real Estate Developers' Association of Hong Kong ("REDA"). The new measures have helped home buyers obtain information on properties and property transactions, and thereby improved protection afforded to home buyers.

4.9 To further enhance the transparency of information and fairness of transactions related to the purchase of first-hand private residential properties, the Government has introduced nine new enhancement measures in June 2010. The measures include strengthening the regulation on show flats, enhancing the transparency of sales brochures and price lists, and clarifying transactions involving Board members of the developers and their immediate family members. We are beginning to see some positive changes to the arrangements on flat sales as developers comply with the new requirements. As the measures have been in place for just a relatively short period of time, we need to allow time for the new practices to consolidate before we come to a view on whether or not they are effective. We will continue to closely monitor the effectiveness of the measures. We have been taking a pragmatic and step-by-step approach and should the new measures prove to be less effective than we expect, the Government will not hesitate to introduce further measures as appropriate. In this regard, the Government does not rule out the introduction of specific legislative measures to regulate transactions in the first hand property market to enhance protection for home buyers. *We therefore propose not to cover property transactions under the expanded TDO.*

Professional Practices Regulated by Regulatory Bodies Established by Statute

4.10 Regulation over professional practitioners requires specialist knowledge in the respective fields. Major professional practices (such as medical doctors and legal practitioners) are currently governed by statute, in respect of the registration of members, establishment of a professional body to regulate the conduct of members and the issue of codes of practice. *We propose that professional practices regulated by regulatory bodies which are established by statute need not be brought under the ambit of the expanded TDO.* A list of Ordinances establishing the above regulatory bodies is at Annex G.

Telecommunications and Broadcasting Sectors

4.11 There are existing regulatory regimes governing telecommunications and broadcasting services. The former is governed by the Telecommunications Ordinance (Cap. 106) with the TA as the regulator, while the latter is governed by the Broadcasting Ordinance (Cap. 562) and regulated by the BA established under the Broadcasting Authority Ordinance (Cap. 391). To capitalize on the regulatory experience and specialist knowledge of the two sector specific regulators, we propose that the TA and the BA be given concurrent jurisdiction under the TDO to enforce the fair trade provisions in the TDO in respect of telecommunications services and broadcasting services.

4.12 The two Authorities would be given the same enforcement powers as the C&ED in relation to telecommunications and broadcasting services (including the current powers and the new powers proposed in Chapter Three). The two Authorities may also invoke the compliance-based enforcement mechanism. The TA and the BA would closely liaise with the C&ED to exchange operational experience and to ensure consistency in enforcement efforts and standards. For this purpose, *we will request that memoranda of understanding be entered into between the C&ED and the two Authorities.* Furthermore, *we will consider incorporating statutory provisions to avoid duplicity in the exercise of regulatory powers by the C&ED, the TA and the BA.*

CHAPTER FIVE

CONSUMER REDRESS

Introduction

5.1 This Chapter sets out our proposed improvements in respect of consumer redress.

Existing Arrangements

5.2 Currently, the TDO does not expressly provide a right of action by consumers for breach of the provisions concerning false trade descriptions in respect of goods. Depending on the facts of individual cases, consumers may take private actions based on contract law or tort. They may also draw on the doctrines of duress and undue influence if their interests have been undermined by aggressive practices. Such civil actions can take place in the Small Claims Tribunal or other tiers of the court, depending on the amount of claim involved.

5.3 Various suggestions have been floated in the community on further empowering consumers in seeking remedies for unfair trade practices. These include the proposal of establishing a Consumer Tribunal to deal with consumer claims using simpler procedures similar to those adopted in the Small Claims Tribunal; relaxing the means test under the Supplementary Legal Aid Scheme for consumers¹⁹; enhancing the availability of the Consumer Legal Action Fund and creating a right in the law for consumers to institute private action on infringement of fair trade provisions.

Proposals

5.4 Having examined the various suggestions raised in the community, *we propose that an express right be created under the TDO to allow aggrieved consumers to institute private actions on infringements of the fair trade provisions along the following lines –*

¹⁹ The Supplementary Legal Aid Scheme does not cover consumer disputes generally. It is available to claims involving personal injury, death or medical, dental or legal professional negligence, and claims under the Employees' Compensation Ordinance (Cap. 282). The suggestion effectively amounts to expanding scope of the Scheme.

- (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.

5.5 The creation of the above right not only facilitates aggrieved consumers in obtaining restorative justice but also encourage compliance by businesses.

5.6 The suggestion of setting up a specialized Consumer Tribunal means that irrespective of the amount of money involved, simpler procedures would be made available in the adjudication of consumer disputes. As a matter of principle, we do not see sufficient grounds for treating consumer disputes differently from other types of civil actions. We believe that consumer disputes should enjoy the same procedural safeguards as other types of civil claims if they exceed the present monetary limit of \$50,000 applicable to cases under the jurisdiction of the Small Claims Tribunal. Further, the implementation of the compliance-based mechanism (see Chapter Three) would enable more consumer disputes to be settled through mediation and undertakings. Fewer cases may be presented to the courts for adjudication. We therefore do not support creating a Consumer Tribunal.

5.7 The Consumer Legal Action Fund was established in 1994, with the Consumer Council as the trustee, to assist consumers with meritorious cases to pursue legal action. The Government has been rendering full support to the Council in the management and operation of the Fund. In terms of finance, having considered current and anticipated commitments, we have injected \$10 million into the Fund in 2010-11 (its balance currently stands at about \$24 million). We will keep in view if further injection into the Fund is justified. Since a specialized fund is

²⁰ This right should not prejudice existing legal rights that may be available.

already in place to assist consumers, we do not consider it necessary to introduce change to the legal aid scheme solely for consumers.

CHAPTER SIX

COOLING-OFF ARRANGEMENTS

Introduction

6.1 This Chapter sets out our proposal of mandatory imposition of “cooling-off periods” on transactions of timeshare rights, long-term holiday products and consumer transactions concluded during unsolicited visits to consumers’ homes or places of work.

Existing Situation

6.2 At present, cooling-off period (during which consumers may choose to cancel the contracts) is offered by suppliers of certain goods and services on a voluntary basis. We encourage businesses and trade organizations to implement, on their own volition, measures which help to strengthen consumer confidence, including cooling-off arrangements. In the case of telecommunications services, the TA has, after consulting the telecommunications industry and the Consumer Council, issued a voluntary Code of Practice to guide the industry in drawing up service contracts. One of the provisions under the Code is to allow consumers to cancel a contract within a 7-day cooling-off period. The Consumer Council is also in dialogue with the beauty and slimming service sector to encourage voluntary introduction of cooling-off periods.

6.3 There have been calls for introducing mandatory cooling-off periods either generally for all consumer transactions, in specific industries or particular modes of transactions. Public concern is focused, in particular, on pre-payments for club membership, beauty care, fitness and slimming services. There have also been complaints in relation to the sale of timeshare rights and unsolicited visits to consumers’ homes promoting television and telecommunications services and other products where certain unfair practices, such as aggressive tactics or false descriptions, have been deployed.

6.4 The proposal of imposing cooling-off periods cuts into the substance of contracts. Since freedom of contract is a fundamental principle, we believe that only when there are sound

policy rationale and justified circumstances should we mandatorily impose cooling-off periods.

6.5 Cooling-off period gives consumers the opportunity and benefit of reconsidering their decisions and consulting third parties or other sources of information where necessary. On the other hand, it may encourage consumers to take less care before buying, giving rise to moral hazard. Businesses will have to shoulder compliance costs, e.g. in administering cancellation of contracts. If the right of cancellation is exercisable after the consumer takes possession of the goods, suppliers will shoulder additional costs of administering returned goods and suffer from lost values if the goods could not be put on sale again as new. Businesses may need to raise upfront prices and pass on the additional costs to consumers.

Proposals

6.6 The calls for mandatory imposition of cooling-off periods are primarily generated from concerns over certain unfair trade practices (such as false descriptions of the nature of services, aggressive practices and failure to honour contractual obligations) which are deployed in the context of pre-paid rights for goods or services in some sectors. We believe that such problems should best be addressed by the targeted approach proposed in Chapters Two and Three, i.e. by creating specific offences against the practices in the TDO and putting in place an effective enforcement mechanism. In fact, cooling-off period may not help in respect of misrepresentations, omissions and accepting pre-payments without the intention or ability to supply²¹. *We therefore do not see sufficient grounds for imposing cooling-off periods across the board on the pre-payment mode of transactions.*

6.7 After examining cooling-off arrangements available in other jurisdictions and having regard to the local Hong Kong situation, *we propose to impose mandatory cooling-off period on the following types of transactions –*

²¹ Misrepresentation or omission relating to the products may not come to light until the consumer starts using the products after the end of the cooling-off period. Since a cooling-off period is usually of a limited duration, it may not help in situations where the trader accepted pre-payment with no intention or ability to supply the products concerned.

- (a) *timeshare rights and long-term holiday product contracts; and*
- (b) *consumer transactions concluded during unsolicited visits to consumers' homes and places of work.*

6.8 Timeshare rights and long-term holiday products are complex and relatively novel products to the average consumer. The Consumer Council has received an increasing number of complaints concerning unfair trade practices in the sale of these products²². Timeshare rights and long-term holiday products, and contracts of resale and exchange of such rights or products, are subject to cooling-off periods in the European Union²³. We would draw reference to the arrangements in the European Union when formulating implementation plan for imposing cooling-off period on these products in Hong Kong.

6.9 There have also been frequent reports of abuse and unfair treatment in respect of contracts concluded during unsolicited visits to consumers' homes, where the vulnerable and the frail may easily fall prey. Since consumers may be caught off guard and not have the opportunity to consult other sources of information during these circumstances, imposing mandatory cooling-off periods on consumer transactions concluded during unsolicited visits to consumers' homes or places of work should help address possible abuses.

6.10 The proposals on cooling-off periods would entail a number of implementation related considerations –

- (a) length of the cooling-off period – it should be long enough for consumers to be able to consult third parties and think through the matter, but should not be

²² The number of complaints increased from 98 in 2007 to 114 in 2008 and further to 232 in 2009.

²³ European Union Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts is relevant. "Timeshare contract" is defined as a contract of a duration of more than one year under which a consumer, for consideration, acquires the right to use one or more overnight accommodation for more than one period of occupation. "Long-term holiday product contract" is defined as a contract of a duration of more than one year under which a consumer, for consideration, acquires primarily the right to obtain discounts or other benefits in respect of accommodation, in isolation or together with travel or other services".

protracted so much so that the operation of suppliers is unduly affected. *We propose a cooling-off period of not less than 7 working days;*

- (b) information provision – to provide consumers with a meaningful opportunity to exercise the right of cancellation, *we propose that important pieces of information, such as the supplier’s identity and contact details, a notice of the consumer’s right of withdrawal and a withdrawal form itself if applicable, should be provided.* In transactions of timeshare rights and long-term holiday products, *basic information about the rights to be transacted (such as the nature and content of the rights and the period in which the rights are exercisable) should be provided;*
- (c) financial arrangements – we propose to require suppliers to *return to the consumers any money paid, including any security provided within 30 calendar days,* after the consumer has exercised the right of cancellation. In financing a purchase, in particular of high-value products, a consumer may enter into credit arrangements with the supplier or with other entities (e.g. banks) on arrangement by or through the supplier. To deal with such situations, *we propose that any related “credit arrangements”, defined as arrangements under which credit covering the price of the contracted products (in part or in full) is given by the supplier himself or any other person or entity on arrangement by the supplier, should be cancelled automatically* if and when the consumer exercises the cancellation right during the cooling-off period;
- (d) administration fee for cancellation – there are pros and cons as to whether suppliers should be allowed to charge administrative fees for cancellation. If suppliers are allowed to charge a reasonable administration fee, there may be arguments as to what constitutes a ‘reasonable’ level. Furthermore, the existence of such a fee may in effect fetter the consumer’s right of cancellation. On the other hand, if no administration fee is allowed, consumers may exercise less due diligence in considering purchases;

- (e) curtailment – we need to consider whether or not to give the flexibility to consumers and allow them to curtail cooling-off periods. Again, there are pros and cons either way. Consumers may wish to curtail the period under some circumstances, e.g. when they need the goods or services urgently but suppliers are not disposed to providing these during the cooling-off period. On the other hand, suppliers may offer discounts to lure consumers into relinquishing the cooling-off period; and
- (f) return arrangements – another related issue is whether the right of cancellation is exercisable after consumers have taken possession of the goods or consumed the services, and if so, whether suppliers should be allowed to charge consumers²⁴. We do not think that the right of cancellation should be deemed as spent in such circumstances, otherwise the objective for imposing cooling-off periods may be defeated. It then follows that, for the sake of fairness, 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. The detailed terms and amount of such charges and the arrangements for the return of goods should be provided to the consumers before the conclusion of contract.

We welcome public views on the issues set out in paragraph 6.10(a) to (f) above.

6.11 By adopting the approach of deterring unfair trade practices through criminal sanctions and targeting cooling-off requirements at a limited number of transactions where additional protection is required, we hope to minimize the regulatory burden on the majority of businesses. We welcome public views on the proposed scope for the imposition of mandatory cooling-off period and the related implementation arrangements. There are calls in the community for applying cooling-off arrangements on the pre-payment mode of transactions in respect of certain sectors or on

²⁴ In certain case, consumers may take possession of the products and the necessary ancillary work (such as installation of set-top box in the case of broadcasting services) may be done on the spot.

pre-payments that have exceeded a certain amount. Advocates for the former may wish to give their views on how the proposal can be implemented in industries which are not subject to any sector specific registration system. On the latter, proponents may wish to give their views on the appropriate amount to be set. We would like to stress that any proposal relating to the imposition of cooling-off period by law must be fully justified, with a clearly defined scope and operational feasibility.

CHAPTER SEVEN

WAY FORWARD

7.1 We encourage the public to provide views and comments on the Government's proposals to enhance protection for consumers against unfair trade practices as set out in this document. We hope to implement a package of proposals that would strike a balance between safeguarding the legitimate interests of consumers and preserving operational efficiency for businesses.

7.2 Our proposals are recapitulated below –

Chapter Two

1. To extend the coverage of the TDO to prohibit false trade descriptions in respect of services made in consumer transactions (paragraph 2.3);
2. To broaden the existing definition of trade description in respect of goods as set out in Annex C (paragraph 2.4);
3. 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);
4. To create an offence under the TDO prohibiting misleading omissions in consumer transactions (paragraph 2.8);
5. 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);
6. To create offences under the TDO prohibiting the practices of "bait advertising" and "bait-and-switch" in consumer transactions (paragraph 2.16);

7. To provide appropriate defences in proceedings on the proposed offences of “bait advertising” and “bait-and-switch” (paragraph 2.17);
8. 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);
9. 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);
10. To make available the defences set out in sections 26 and 27 of the TDO in proceedings for the proposed offences (paragraph 2.22);

Chapter Three

11. To designate the C&ED as the primary enforcement agency in respect of the proposed offences under the TDO (paragraph 3.4);
12. To introduce a compliance-based mechanism to complement criminal sanctions to promote adherence to the TDO (paragraphs 3.7 and 3.8);
13. To establish a referral mechanism under which the enforcement agency of the TDO and the Consumer Council can coordinate with each other on actions to be taken on consumer complaints (paragraph 3.9);
14. To amend section 15(1)(b) of the TDO to empower the C&ED to inspect books and documents and take copies of them for the purpose of ascertaining whether an offence under the TDO has been or is being committed (paragraph 3.14);

Chapter Four

15. Not to apply the fair trade provisions in the TDO to services and products provided by institutions regulated under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the Securities and Futures Ordinance (Cap. 571), and the Financial Reporting Council Ordinance (Cap. 588), property transactions and professional practices regulated by regulatory bodies established by statute (paragraphs 4.3 to 4.10);
16. To give concurrent jurisdiction to the TA and BA to enforce the fair trade provisions in respect of telecommunications services and broadcasting services under the TDO (paragraphs 4.11 and 4.12);

Chapter Five

17. To expressly provide in the TDO that a person who suffers loss or damage by conduct of another person that was in contravention of the fair trade provisions may recover the amount of loss or damage by action against that other person or against any person involved in the contravention. 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 (paragraph 5.4);

Chapter Six

18. To impose cooling-off periods on transactions of timeshare rights and long-term holiday products, and transactions concluded during unsolicited visits to consumers' homes and places of work (paragraph 6.7); and

19. To further develop detailed arrangements for implementing cooling-off period in the light of public views and suggestions (paragraph 6.10).

7.3 We will examine and consolidate all the comments received during the consultation period and publish a report on the public feedback. Depending on the outcome of the public consultation exercise, we aim to introduce legislative amendments to the TDO into the Legislative Council within the 2010/2011 legislative session.

Annexure

**Relevant Provisions in
the UK's Consumer Protection from
Unfair Trading Regulations 2008**

Regulation 2 Interpretation

- (1) In these Regulations —
- “average consumer” shall be construed in accordance with paragraphs (2) to (6); ...
- “transactional decision” means any decision taken by a consumer, whether it is to act or to refrain from acting, concerning —
- (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or
 - (b) whether, how and on what terms to exercise a contractual right in relation to a product ...
- (2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.
- (3) Paragraphs (4) and (5) set out the circumstances in which a reference to the average consumer shall be read as in addition referring to the average member of a particular group of consumers.
- (4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group.

- (5) In determining the effect of a commercial practice on the average consumer —
- (a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and
 - (b) where the practice is likely to materially distort the economic behaviour only of that group,
- a reference to the average consumer shall be read as referring to the average member of that group.
- (6) Paragraph (5) is without prejudice to the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.

Regulation 6 Misleading omissions

- (1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2) —
- (a) the commercial practice omits material information,
 - (b) the commercial practice hides material information,
 - (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
 - (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

- (2) The matters referred to in paragraph (1) are —
- (a) all the features and circumstances of the commercial practice;
 - (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
 - (c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.
- (3) In paragraph (1) “material information” means —
- (a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and
 - (b) any information requirement which applies in relation to a commercial communication as a result of a Community obligation.
- (4) Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information under paragraph (3) —
- (a) the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;
 - (b) the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;
 - (c) the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;
 - (d) either —

- (i) the price, including any taxes; or
 - (ii) where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
- (e) where appropriate, either —
 - (i) all additional freight, delivery or postal charges; or
 - (ii) where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- (f) the following matters where they depart from the requirements of professional diligence —
 - (i) arrangements for payment,
 - (ii) arrangements for delivery,
 - (iii) arrangements for performance,
 - (iv) complaint handling policy;
- (g) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

Regulation 7 Aggressive commercial practices

- (1) A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances —
 - (a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and
 - (b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

- (2) In determining whether a commercial practice uses harassment, coercion or undue influence account shall be taken of —
- (a) its timing, location, nature or persistence;
 - (b) the use of threatening or abusive language or behaviour;
 - (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment, of which the trader is aware, to influence the consumer’s decision with regard to the product;
 - (d) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and
 - (e) any threat to take any action which cannot legally be taken.
- (3) In this regulation —
- (a) “coercion” includes the use of physical force; and
 - (b) “undue influence” means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision.

Schedule 1

...

5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply, or to procure another trader to supply, those products or equivalent products at that price for a period that is,

and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).

6. Making an invitation to purchase products at a specified price and then —

(a) refusing to show the advertised item to consumers,

(b) refusing to take orders for it or deliver it within a reasonable time, or

(c) demonstrating a defective sample of it,

with the intention of promoting a different product (bait and switch).

...

Relevant Provisions in Australia's Trade Practices Act 1974

75AZJ Bait advertising

- (1) A corporation must not, in trade or commerce, advertise for supply at a specified price, goods or services if there are reasonable grounds for believing that the corporation will not be able to offer those goods or services for supply at that price for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the corporation carries on business, and the nature of the advertisement.

Penalty: 10,000 penalty units.

- (2) A corporation that has, in trade or commerce, advertised goods or services for supply at a specified price must not fail to offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business, and the nature of the advertisement.

Penalty: 10,000 penalty units.

- (3) Subsections (1) and (2) are offences of strict liability.
- (4) In a prosecution of a corporation under subsection (2), for failing to offer goods or services to a person (the customer), it is a defence if the corporation proves that:
- (a) it offered to supply, or to procure another person to supply goods or services of the kind advertised to the customer within a reasonable time, in a reasonable quantity and at the advertised price; or
 - (b) it offered to supply immediately, or to procure another person to supply within a reasonable time, equivalent goods or services to the customer in a reasonable quantity and at the price at which the first-mentioned goods or services were advertised;

and, in either case, if the offer was accepted by the customer, the corporation has so supplied, or procured another person to supply, goods or services.

75AZL Accepting payment without intending or being able to supply as ordered

- (1) If:
- (a) a corporation, in trade or commerce, accepts payment or other consideration for goods or services; and
 - (b) at the time of acceptance, the corporation intends:
 - (i) not to supply the goods or services; or
 - (ii) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted;

the corporation is guilty of an offence punishable on conviction of a fine not exceeding 10,000 penalty units.

- (2) Strict liability applies to paragraph (1)(a).

- (3) If:
- (a) a corporation, in trade or commerce, accepts payment or other consideration for goods or services; and
 - (b) at the time of acceptance, there are reasonable grounds for believing that the corporation will not be able to supply the goods or services within the period specified by the corporation or, if no period is specified, within a reasonable time;

the corporation is guilty of an offence punishable on conviction by a fine not exceeding 10,000 penalty units.

- (4) Subsection (3) is an offence of strict liability.

**Proposed expanded definition of
“trade description in respect of goods”**

(words to be deleted from the existing definition in the TDO are indicated in ~~strike-through~~, and words to be added are indicated in *italics*.)

“trade description” means an indication, direct or indirect, and by whatever means given, ~~of any of the following matters~~ with respect to any goods or parts of goods, ~~that is to say~~, *and includes any indication of any of the following matters –*

- (a) quantity (which includes length, width, height, area, volume, capacity, weight and number), size or gauge;
- (b) method of manufacture, production, processing or reconditioning;
- (c) composition;
- (d) fitness for purpose, strength, performance, behaviour or accuracy;
- (e) any physical characteristics not included in the preceding paragraphs;
- (ea) availability;*
- (eb) the price, the manner in which the price is calculated, and the existence of any price advantage;*
- (f) testing by any person and results thereof;
- (g) approval by any person or conformity with a type approved by any person;
- (ga) that a particular person has acquired or agreed to acquire the goods;*
- (h) place or date of manufacture, production, processing or reconditioning;

- (i) person by whom manufactured, produced, processed or reconditioned;
- (j) other history, including previous ownership or use;
- (k) availability in a particular place of -
 - (i) a service for the inspection, repair or maintenance of the goods; or
 - (ii) spare parts for the goods;
- (l) warranty given in respect of the service or spare parts referred to in paragraph (k);
- (m) the person by whom the service or spare parts referred to in paragraph (k) are provided;
- (n) the scope of the service referred to in paragraph (k)(i);
- (o) the period for which the service or spare parts referred to in paragraph (k) are available;
- (p) the charge or cost at which the service or spare parts referred to in paragraph (k) are available.

**Proposed definition of
“trade description in respect of services”**

“trade description”, in respect of services, means an indication, direct or indirect, and by whatever means given, with respect to any services or parts of services, and includes any indication of any of the following matters-

- (a) nature, scope, quantity (which includes the number of occasions on which and the length of time for which the services are provided or to be provided), standard, quality, value, grade, fitness for purpose, strength, performance, behaviour, effectiveness, benefits, risks, and any other characteristics or attributes of the services;
- (b) method and procedure by which, manner in which and location at which the services are provided or to be provided;
- (c) availability;
- (d) testing by any person and results thereof;
- (e) approval by any person or conformity with a type approved by any person;
- (f) that a particular person has acquired or agreed to acquire the services;
- (g) person by whom the services are provided or to be provided;
- (h) after-sale customer assistance concerning the services;
- (i) the price, the manner in which the price is calculated and the existence of any price advantage.

**Sections 26 and 27
of the Trade Descriptions Ordinance (Cap. 362)**

Section 26: Defence mistake, accident, etc.

- (1) In any proceedings for an offence under this Ordinance it shall, subject to subsection (2), be a defence for the person charged to prove-
 - (a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and
 - (b) 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 his control.
- (2) If in any case the defence provided by subsection (1) involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, within a period ending 7 clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.
- (3) In any proceedings for an offence under section 7(1)(a)(ii) or (b) it shall be a defence for the person charged to prove that he did not know, had no reason to suspect and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.
- (4) In any proceedings for an offence under section 9(2) it shall be a defence for the person charged to prove that he did not know, had no reason to suspect and could not with reasonable diligence have ascertained, that a forged trade mark had been applied to the goods or that a trade mark or mark so nearly

resembling a trade mark as to be calculated to deceive had falsely been applied to the goods.

Section 27: Innocent publication of advertisements

In proceedings for an offence under the Ordinance committed by the publication of an advertisement, it shall be a defence for the person charged to prove that he is a person whose business it is to publish or arrange for the publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence under this Ordinance.

Compliance-based Mechanisms in the UK and Australia

The UK

When the enforcement agency suspects that an infringement has taken place or is likely to take place, it should engage in consultation with the suspected offender. In the process, the enforcement agency may accept an undertaking from the suspected offender not to engage in (or repeat) conduct which contravenes the law, and publish the terms of the undertaking.

However, if the suspected offender refuses to give any undertaking or if it fails to comply with the terms of undertakings previously given, the enforcement agency may apply to the court for an enforcement order. The nature of the enforcement order is similar to an injunction, under which the court may direct a party not to continue with or repeat an offending conduct. Failure to comply with a court order amounts to contempt of court, which could lead to a fine or imprisonment.

Australia

Under section 80 of Australia's Trade Practices Act 1974, on top of other enforcement tools, the enforcement agency may apply to the court for an injunction to stop a person from engaging in, or proposing to engage in, a conduct that constitutes or would constitute an infringement of the relevant provisions of the consumer protection legislation. The enforcement agency is empowered under section 87B of the Act to accept a written undertaking given by a person not to continue with or repeat conduct which is in contravention of such provisions.

If, on application of the enforcement agency, the court is satisfied that a person has breached an undertaking he has given, the court may make an order directing the person to comply with the terms of the undertaking and any other orders that it considers appropriate.

List of Ordinances Governing the Registration of Professionals

Professional Body	Relevant Ordinance
Engineers Registration Board	Engineers Registration Ordinance (Cap. 409)
Surveyors Registration Board	Surveyors Registration Ordinance (Cap. 417)
Planners Registration Board	Planners Registration Ordinance (Cap. 418)
Landscape Architects Registration Board	Landscape Architects Registration Ordinance (Cap. 516)
Land Survey Authority	Land Survey Ordinance (Cap. 473)
Architects Registration Board	Architects Registration Ordinance (Cap. 408)
Social Workers Registration Board	Social Workers Registration Ordinance (Cap. 505)
Hong Kong Institute of Certified Public Accountants	Professional Accountants Ordinance (Cap. 50)
Law Society of Hong Kong, Bar Council of Hong Kong, Council of the Society of Notaries	Legal Practitioners Ordinance (Cap. 159)
Medical Council of Hong Kong	Medical Registration Ordinance (Cap. 161)
Dental Council of Hong Kong	Dentists Registration Ordinance (Cap. 156)
Chiropractors Council	Chiropractors Registration Ordinance (Cap. 428)

Professional Body	Relevant Ordinance
Nursing Council of Hong Kong	Nurses Registration Ordinance (Cap. 164)
Midwives Council of Hong Kong	Midwives Registration Ordinance (Cap. 162)
Pharmacy and Poisons Board	Pharmacy and Poisons Ordinance (Cap. 138)
Supplementary Medical Professions Council (underpinned by Medical Laboratory Technologists (MLT) Board, the Occupational Therapists (OT) Board, the Optometrists (OP) Board, the Physiotherapists (PT) Board and the Radiographers (RG) Board)	Supplementary Medical Professions Ordinance (Cap. 359)
Dental Hygienists regulated under Ancillary Dental Workers (Dental Hygienists) Regulations	Ancillary Dental Workers (Dental Hygienists) Regulations (Cap. 156B)
Veterinary Surgeons Board	Veterinary Surgeons Registration Ordinance (Cap. 529)
Chinese Medicine Council of Hong Kong (for Registered Chinese Medicine Practitioners)	Chinese Medicine Ordinance (Cap. 549)
Chinese Medicine Council of Hong Kong (for Listed Chinese Medicine Practitioners)	Chinese Medicine Ordinance (Cap. 549)
Housing Managers Registration Board	Housing Managers Registration Ordinance (Cap. 550)
Estate Agents Authority	Estate Agents Ordinance (Cap. 511)