

CONSUMER COUNCIL

Good Corporate Citizen's Guide II – Rules

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INTRODUCTION

The Government has given the Consumer Council a statutory responsibility to, amongst other things, collect and disseminate information and tender advice on matters that affect the interests of consumers, and to encourage business and professional associations to establish appropriate codes of practice to regulate the activities of their members.

The Council believes it is important for the entire community that business and consumers know their rights and responsibilities in the marketplace. Having an informed marketplace and fair trade practices ensures that effective competition can occur across the dimensions of price, product choice and product quality, to the benefit of the economy as a whole. Fair trade practices also lead to greater trust by consumers in the use of market based mechanisms for the supply of goods and services, and a mutually beneficial relationship between consumers and business.

These Rules are divided into three parts:

- ÿ Trade Practices Rules;
- ÿ Complaint Handling Rules; and
- ÿ Fair Competition Rules

which seek to fulfil two objectives:

- (1) They set a benchmark for best business practice, and provide an easy reference of those benchmarks for the community at large. Whilst there are some laws in Hong Kong that cover the issues discussed, they are scattered amongst a range of different pieces of legislation, and are not comprehensive when compared to safeguards in comparable advanced economies. For example, the Trade Practices Rules highlight what the Consumer Council considers to be unfair trade practices, but also provide references to existing legislative provisions. This should provide a useful reference for all members of the community, including business, government officials and consumers.
- (2) They can assist professional and trade associations in considering what matters should be incorporated into their rules and codes of conduct. In March 2005, the Council produced a 'Good Corporate Citizen's Guide' that addresses corporate rights and responsibilities. These Rules address some of the principles set out in the Guide as a resource for the many professional and trade associations in Hong Kong that cover a variety of different goods and services, and which operate in different commercial environments. The Council encourages associations to use the Rules in whole or in part and amend them to suit their own particular circumstances.

In summary, the Rules provide a set of principles upon which business can perform their role in the marketplace, in harmony with the wider community, for mutual benefit. The Rules, when applied voluntarily by business through relevant codes, can also complement existing legislative

safeguards, or provide a safeguard where no legislation exists but a need for safeguards is nonetheless required.

1. TRADE PRACTICES RULES

1.1 INTRODUCTION

- 1.1.1 These rules are an indication as to what the Council considers unfair trade practices. As such they can be used as a guide for business to consider when dealing with consumers in the marketplace, and for professional and industry associations to consider when constructing codes of practice.
- 1.1.2 These rules outline principles of consumer protection including but not limited to that currently provided through legislation. Reference is being made to trade practices legislation similar to that existing in other comparable advanced economies. For example, laws in the United States, United Kingdom, Canada and Australia, upon which the Council's rules are based. To a certain extent the rules also reflect principles found in the Mainland.
- 1.1.3 They are premised on the basis that being truthful and honest in operating a business has not only positive benefits for the business itself, through establishing corporate goodwill, but enhances consumer confidence in the industry as a whole, which in turn brings about benefits to the wider economy and the community. The common term "person" is used throughout the rules to cover individual traders,

partnerships, corporations or other entities engaged in trade or commerce.

- 1.1.4 The rules are divided into six broad categories:

Rule 1. Misleading or Deceptive Conduct

Rule 2. False or Misleading Representations

Rule 3. Unconscionable Conduct

Rule 4. Undesirable Advertising and Selling Techniques

Rule 5. Unfair Selling Practices

Rule 6. Conditions and Warranties in Consumer Transactions

1.2 MISLEADING OR DECEPTIVE CONDUCT

- 1.2.1 This rule requires business not to do things that actually mislead or deceive; or are likely to mislead or deceive customers (including other business) in trade or commerce. Existing statutory provisions and the common law take a general approach in relation to deceit and deception. This rule, on the other hand, sets out in specific detail misleading or deceptive conduct relating to such matters as price, product attributes, employment services, future performance etc.

- (a) Misleading or deceptive conduct generally: A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.
- (b) Misleading conduct in relation to employment: A person shall not, in relation to advertising employment opportunities, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to the employment.
- (c) Partial price indications: A person shall not, in connection with the supply of products or services, make a representation that constitutes part consideration for the supply of goods or services unless the person also specifies the total price for the goods or services (including whether commission or service charge is payable and the amount involved).
- (d) Representations as to future matters: Where a person makes a representation with respect to any future matter (including the doing of, or the refusing to do of, any act) and the person does not have reasonable grounds for making the

representation, the representation shall be taken to be misleading.

1.3 FALSE OR MISLEADING REPRESENTATIONS

1.3.1 This rule requires business not to make false or misleading representations. The approach taken in this rule is highly comprehensive and prescriptive. Refrain from making false or misleading representations applies not only in relation to goods, but also in connection with the supply of services, or in connection with the promotion of the supply of services. In general, a person shall not:

- (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- (b) falsely represent that services are of a particular standard, quality, value or grade;
- (c) falsely represent that goods are new;
- (d) falsely represent that a particular person has agreed to acquire goods or services;
- (e) represent that goods or services have sponsorship, approval, performance, characteristics,

accessories, uses or benefits they do not have;

- (f) represent that the person has a sponsorship, approval or affiliation the person does not have;
- (g) make a false or misleading representation with respect to the price of goods or services;
- (h) make a false or misleading representation concerning the availability of facilities for the repair of products or of spare parts for goods;
- (i) make a false or misleading representation concerning the place of origin of goods;
- (j) make a false or misleading representation concerning the need for any goods or services; or
- (k) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

1.4 UNCONSCIONABLE CONDUCT

1.4.1 A person shall not in connection with the supply or possible supply of goods or services to another person (referred to as

"consumer") engage in conduct that is, in all the circumstances, unconscionable. The *Unconscionable Contracts Ordinance* (Cap. 458) empowers courts to give relief in certain contracts found to be unconscionable. Whether any undue influence or pressure has been exerted on a consumer, or whether unfair tactics have been employed by traders, are amongst the non-exhaustive list of matters to be considered by the court in determining if a contract is unconscionable.

1.4.2 The *Unconscionable Contracts Ordinance* has similar provisions and considerations as this rule. In determining whether a person has contravened this rule, the following matters shall be taken into account:

- (a) the relative strengths of the bargaining positions of the person and the consumer;
- (b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interest of the person;
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person or a person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the person.

1.5 UNDESIRABLE ADVERTISING AND SELLING TECHNIQUES

1.5.1 This rule requires that advertising and selling methods in trade or commerce do not include undesirable techniques. Existing legislation, such as the *Summary Offences Ordinance* (Cap. 228), imposes restrictions on some trade practices that are regarded as undesirable. For example, it makes touting and causing annoyance in the public place unlawful. The *Theft Ordinance* (Cap. 210) or the common law of conspiracy to defraud also protects consumer interests against misleading or deceptive conduct. However, there are no criminal sanctions in Hong Kong's laws to prohibit conduct such as failing to supply after accepting payments, bait and switch but harassment and coercion

which amount to intimidation are punishable under the *Crimes Ordinance* (Cap. 200).

- 1.5.2 Offering gifts and prizes: In connection with the supply or possible supply of goods or services or in connection with the promotion of the supply or use of goods or services:
- (a) If gifts, prizes or other free items are promised, they should be made available to consumers;
 - (b) A person shall not offer gifts, prizes or other free items with the intention of not providing them, or of not providing them as offered; and
 - (c) A lottery should be conducted in the conditions and manner set out in the *Government Lotteries Rules* (Cap 334A).

1.5.3 Accepting payment: A person must supply the goods or services in respect of which the payment or other consideration is accepted. If at the time of the acceptance the person is aware that it will not be able to supply the goods or services, the person should not accept payment or other consideration for the goods or services. The following practices are undesirable selling practices that should be prohibited:

- (a) A person accepts payment or other consideration for goods or services where at the time of acceptance the

person intends not to supply the goods or services;

- (b) A person accepts payment or other consideration for goods or services where at the time of acceptance the person is aware that the goods or services to be supplied will be materially different from the goods or services in respect of which the payment or other consideration is accepted; or
- (c) There are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing that the person will not be able to supply the goods or services within the period specified by the person or, if no period is specified, within a reasonable time.

1.5.4 Bait and switch: A person must supply at a specified price as advertised. The goods or services to be supplied must also be available for a reasonable period and in reasonable quantities. The following practices are undesirable selling practices that should be prohibited:

- (a) A person shall not advertise for supply at a specified price goods or services if there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing that the person

will not be able to offer for supply those goods or services at that price; or

- (b) A person shall not advertise for supply at a specified price goods or services if there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing that the person will not be able to offer for supply those goods or services 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 person carries on business and the nature of the advertisement.

1.5.5 Harassment and coercion: A person shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.

1.5.6 In addition, if a person receives any payment by way of commission, rebate or otherwise from suppliers of goods or services for recommending the goods or services for purchase by a consumer, the person, before the consumer makes the purchase, should declare any relevant financial interest or commercial interest which the person may have in the purchase, for reason of fairness to consumers.

1.6 UNFAIR SELLING PRACTICES

- 1.6.1 This rule requires business not to engage in selling practices that take unfair advantage of consumers, such as pyramid selling and unsolicited goods or services.
- 1.6.2 Pyramid selling: A pyramid selling scheme is defined as one under which a person promotes a trading scheme and another person who is a participant in that trading scheme, or has applied or been invited to become a participant in that trading scheme, makes any payment to or for the benefit of the first person, being a payment that he or she is induced to make by reason that the prospect is held out to him or her of receiving payments or other benefits in respect of the introduction (whether by himself or herself or by another person) of other persons who become participants in that trading scheme. The *Pyramid Selling Prohibition Ordinance* (Cap.355) prohibits the promotion of pyramid selling schemes.
- 1.6.3 Unsolicited goods or services: There is no statutory provision in Hong Kong dealing with unsolicited goods or services. In offering unsolicited goods or services, the following matters should be taken into account:
- (a) Reasonable belief as to rights: A person shall not assert a right to payment from another person for unsolicited goods or services unless

the person has reasonable cause to believe that there is a right to payment. For example, if a person offers unsolicited goods or services to another person who will be deemed to have agreed to the offer if the person does not choose to "opt out" of the offer, the person shall not assert a right to payment from that other person.

- (b) Reasonable belief of authorization: A person shall not assert a right to payment from any person for the making in a directory of an entry relating to the second-mentioned person or to his profession, trade or occupation unless the person knows or has reasonable cause to believe that the second-mentioned person has authorized the making of the entry. A person shall not be liable to make any payment, and shall be entitled to recover any payment made by the person, in full or part satisfaction of a charge for the making of an entry in a directory, unless the person has authorized the making of the entry.
- (c) Liability of recipient of unsolicited goods: A person to whom unsolicited goods are supplied shall not be liable to make any payment for the goods and shall not be liable for the loss or damage to the goods other

than loss or damage resulting from the doing by him or her of a wilful and unlawful act in relation to the goods during the prescribed period.

- (d) Unsolicited credit facility: Though there is no legislation on unsolicited credit facilities, in general, a person shall not supply or continue to supply a facility that provides credit to another person except in pursuance of a request by the second-mentioned person. The "*Code of Banking Practice*" issued by the Hong Kong Association of Banks and the DTC Association has a provision on the issuing of credit cards. Paragraph 23.2 of the Code reads, 'Card issuers should issue cards to customers only when (a) in the case of new cards they have been requested by the customers to do so; or (b) to replace or renew cards that have already been issued'.

1.7 CONDITIONS AND WARRANTIES IN CONSUMER TRANSACTIONS

1.7.1 This rule requires business to imply into consumer transactions certain conditions and warranties.

1.7.2 Merchantable quality: Where a person supplies products to a consumer in the course of a business, there shall be an

implied condition that the goods supplied under the contract for the supply of the goods are of merchantable quality, except:

- (a) where the contract is a contract for sale by auction;
- (b) as regards defects specifically drawn to the consumer's attention before the contract is made; or
- (c) if the consumer examines the goods before the contract is made, as regards defects which a reasonable examination ought to reveal.

1.7.3 Fitness for purpose: Where a person supplies goods to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the person any particular purpose for which the goods are being acquired, there shall be an implied condition that the goods supplied under the contract are reasonably fit for that purpose whether or not that is a purpose for which such goods are commonly supplied; except

- (a) where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of that person; and
- (b) in the case of sale by auction.

1.7.4 Sale by description: Where there is a contract for the supply (otherwise than by way of sale by auction) by a person in the course of a business of goods to a consumer by description, there shall be an implied condition that the goods will correspond with the description. If the supply is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

1.7.5 Sale by sample: Where in a contract for the supply by a person in the course of a business of goods to a consumer there is a term in the contract, express or implied, indicating that it is a contract for sale by sample:

- (a) there shall be an implied condition that the bulk will correspond with the sample in quality;
- (b) there shall be an implied condition that the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
- (c) there shall be an implied condition that the goods will be free from any defect, rendering them unmerchantable, that would not be apparent on reasonable examination of the sample.

1.7.6 Implied undertaking as to title, encumbrances and quiet possession: In

every contract for the supply of goods by a person to a consumer, there shall be:

- (a) an implied condition that, in the case of a supply by way of sale, the supplier has a right to sell the goods, and, in the case of an agreement to sell or a hire-purchase agreement, the supplier will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the consumer will enjoy quiet possession of the goods except so far as it may lawfully be disturbed by the supplier or by another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made; and
- (c) in the case of a contract for the supply of goods under which the property is to pass or may pass to the consumer - an implied warranty that the goods are free, and will remain free until the time when the property passes, from any charge or encumbrance not disclosed or known to the consumer before the contract is made.

1.7.7 Implied terms and warranty in relation to the supply of services: The *Supply of Services (Implied Terms) Ordinance* (Cap. 457) prescribes the terms to be implied in contracts for supply of services. This rule follows the Ordinance and requires that in

every contract for the supply by a person in the course of a business of services to a consumer, there shall be an implied term that:

- (a) the services will be rendered with reasonable care and skill ;
- (b) the services will be rendered within a reasonable time if the time for the service to be carried out is not fixed by the contract;
- (c) the party contracting with the supplier will pay a reasonable charge if the consideration for the service is not fixed or determined by the contract; and
- (d) where a person supplies services to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the person any particular purpose for which the services are required, or the result that he or she desires the services to achieve, there shall be an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connection with those service will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result; except where the circumstances show that the consumer does not rely, or that

it is unreasonable for him or her to rely, on the person's skill or judgement.

- 1.7.8 Exclusion or modification of provisions: Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) shall not purport to exclude, restrict or modify or have the effect of excluding, restricting or modifying, the exercise of a right conferred by such a provision; or any liability of the person for breach of a condition or warranty implied by such a provision. The *Control of Exemption Clauses Ordinance* (Cap 71) limits the extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided by contract terms or other means, and a contract term must be a fair and reasonable one to be included in order to satisfy the requirement of reasonableness. As a result, a seller's liability for breaches of the obligations arising from section 14 of the *Sale of Goods Ordinance* (Cap 26) cannot be excluded.

2. COMPLAINT HANDLING RULES

2.1 INTRODUCTION

- 2.1.1 Hong Kong, similar to many other advanced economies, has laws aimed at ensuring a degree of protection for consumers, which therefore engender consumer confidence, when they are faced with a problem of one sort or another in the marketplace. The Hong Kong court system and the Small Claims Tribunal are important institutions that provide a forum for resolving consumer disputes.
- 2.1.2 Regulators, such as the Estate Agents Authority and Office of the Telecommunications Authority examine complaints lodged by consumers, while private commercial arbitration schemes are also available to resolve disputes.
- 2.1.3 Irrespective of the existence of laws and the availability of other forums to resolve disputes, it can be beneficial for industries and the public in general for industry associations to also provide alternative means of dispute resolution. Example is the Insurance Claims Complaints Bureau.
- 2.1.4 This document sets out basic principles that the Council considers essential for industry associations, or other groups of business to incorporate into their complaint handling schemes, where the schemes are aimed at providing a forum for the resolution of

disputes regardless of whether the disputes are between consumers and business or business to business. For ease of reference in the following principles, the Council has used the term 'complaint handling committee' to denote the relevant body that would be tasked with examining complaints within the relevant industry association or group of business.

2.2 INDEPENDENCE AND IMPARTIALITY

- 2.2.1 A complaint handling scheme can be neither credible nor effective unless it is conducted by individuals who are truly independent and impartial with respect to the disputing parties. A fundamental principle is that members of a complaint handling committee should not have any current or future commercial interest in the outcome of the matter under examination.
- 2.2.2 In addition, whilst experienced persons familiar with the profession, industry or trade would undoubtedly be highly qualified to provide advice on technical aspects of a complaint, and lawyers can provide advice on existing laws, there may be other aspects of a complaint that are not as easily quantified or defined. For example, 'professional misconduct' is commonly referred to in some professional or industry codes to provide broad coverage of unethical behaviour that offends standards of behaviour that would not be tolerated by the wider community.

2.2.3 Whether conduct amounts to professional misconduct, and is therefore unethical, cannot be solely determined by professional colleagues but must be subject to the perception of a wider group which comprises both lay and professional members to ensure the decision making process recognises the views of the wider community. This wider approach is preferable to the narrow scope of interest that would arise if a person or business complained about were to be judged solely by peers.

2.2.4 As far as complaints alleging anticompetitive conduct are concerned, in most circumstances it will be impossible to construct an appropriate committee to examine an allegation of anti-competitive conduct by including a person who is a member of the relevant industry association because all members of the association would be actual or potential competitors with each other, and therefore have a commercial interest in the outcome.

2.2.5 In general, whether the complaint concerns allegations of anticompetitive conduct, or unfair trading with consumers, it would be preferable for the persons who make up a complaint handling committee to be selected from those who:

(a) are not members of the association;

(b) are impartial in that they do not have a commercial interest in the outcome of the committee's inquiry;

(c) can faithfully represent the wider community interest; and

(d) have relevant industry, economic and legal skills that would be of relevance in assessing the subject matter of the inquiry and achieving a resolution to the complaint.

2.3 TRANSPARENCY

2.3.1 An essential criteria is that information on all aspects of the complaint service be readily available to potential users of the service. Such transparency is also needed so that those outside the trade, as well as potential users, can assess the independence and effectiveness of the service on an ongoing basis.

2.3.2 Publication of past rulings is important in this respect. The complaint handling committee should ensure that its inquiries are carried out in such a way as to give all members of the association and other affected persons with sufficient interest in the outcome of the inquiry, an opportunity to make submissions on the inquiry.

2.3.3 The complaint handling committee should ensure that there are appropriate safeguards

applied for the protection of 'commercial in confidence' information.

- 2.3.4 The complaint handling committee should ensure that outcomes of the committee's inquiries, its decisions to grant exemption, or decisions not to pursue a complaint, are reported in the association's newsletter (if such a newsletter is published) and made available for publication or reporting in media that is disseminated to the wider public.

2.4 VISIBILITY

- 2.4.1 A complaint handling scheme, to be useful, should be well-publicised, such that interested consumers and business can become aware of it when the scheme is put into operation. For example, the website of the industry association, trust mark scheme or accreditation scheme that examines complaints should be easily found via Internet search engines, and should be publicised by the business that use it.

2.5 AFFORDABILITY

- 2.5.1 A complaint handling service should, optimally, be free. Any consumer charge, or a 'loser pays' rule will deter consumers in particular from using a service. If there is a user fee charged to a consumer or complainant generally, it should be low relative to the amount in dispute, and should be refundable in the event that the complainant prevails in whole or in part.

- 2.5.2 In order to safeguard the integrity of a scheme that is freely available to the public, the Council understands it will be necessary to have rules preventing the expenditure of resources on frivolous complaints, or those that do not raise a material question to be answered. However, in these circumstances it will be necessary for the relevant body administering the scheme to clarify the reasons for not proceeding with complaints.

2.6 SPEED/TIMELINESS

- 2.6.1 In order to provide an effective alternative to courts, and to protect the interests of both sides, a final decision on a complaint should be made in a timely fashion, and decisions aimed at redressing a wrong should be implemented as quickly as possible.

2.7 COMPETENCE OF APPROPRIATE OFFICERS

- 2.7.1 Those conducting dispute resolution must have sufficient skills and training to fulfil the function in a satisfactory manner. For example, with consumer disputes raising trade practices complaints, formal legal training is not required, but complaint officers should be familiar with basic legal concepts, consumer rights, and the workings of industry.
- 2.7.2 With regard to allegations of anticompetitive conduct, it is helpful to have access to persons experienced in the relevant

business. However, it is critical that the relevant decision makers should be competent in understanding that the purpose of resolving competition complaints is to satisfy fundamental economic principles of economic efficiency and consumer welfare. In other words, that the purpose of examining allegations of anticompetitive conduct is not to protect individual competitors but to protect the process of competition.

2.8 ACCESSIBILITY/EASE OF USE

2.8.1 The complaint handling service should be easily accessible, non-intimidating, and convenient to use. For example, the administrators of a complaint handling scheme should provide guidance to complainants in filling in applications and filing submissions, and produce guidelines on how it intends to process complaints.

2.9 SECURITY

2.9.1 The administrators of a complaint handling scheme should take measures to ensure that any confidential communications in the context of the complaint are appropriately secure from unauthorised access.

2.9.2 For allegations of anticompetitive conduct in particular, there should be mechanisms available that protect commercial in confidence information provided by complainants and those complained against.

2.9.3 Moreover, where complainants are alleging anticompetitive conduct, the relevant industry association should provide the complainant and any other persons providing information, with an assurance that their identity will not be disclosed in the early stages of collecting information prior to referring the matter to the complaint handling committee for deliberation. This is essential, to safeguard any possibility of reprisal against the complainant by a firm or firms being complained against, that could prevent the matter proceeding to the deliberative stage by a complaint handling committee.

2.9.4 It would also be ideal, if possible, for the identity of a complainant or witnesses to be kept confidential during the deliberative stage of the complaint handling process, so as not to discourage persons from providing information to the complaint handling committee.

2.10 ENFORCEABILITY

2.10.1 The key to success of a complaint handling mechanism of an industry or professional association or a trust mark scheme is that all members subscribe to the scheme and abide by the decision of the complaint handling committee. The relevant code should set out disciplinary provisions and give the complaint handling committee the power to take any necessary action, under the disciplinary provisions, if the committee

has decided that an unfair trade practice or anti-competitive conduct has taken place. The committee should issue a notice publicizing the fact that a person has engaged in conduct in breach of the association's code. It should also make orders requiring:

- (a) a person/the company to cease and desist from engaging in the conduct the subject of the complaint handling committee's inquiry;
- (b) the making of restitution for any damage that may have been caused to a competitor, or any other person; or
- (c) the entering into of a compliance program whereby the person's staff are educated as to the principles behind the complaint handling committee's decision that the conduct complained of was against best business practice or the spirit of the pro-competition ideals.

2.10.2 Members of the relevant association or industry group that participate in the complaint handling scheme should be required to assist in the work of the complaint handling committee by providing whatever information is sought by the committee that is necessary, in the opinion of the committee, to determine whether unfair trade practices, or anti-competitive conduct has taken place.

2.10.3 Because membership of an industry association, a trustmark program or other form of accreditation schemes can provide a commercial benefit to members, through engendering consumer confidence in the administration of a complaint handling scheme for consumers, it would be expected that failure by a business member to comply with a complaint handling committee's decision should be grounds for expulsion and/or denial of future services, where appropriate.

2.11 DUE PROCESS

2.11.1 As with all adversarial processes, complaint handling schemes should provide both parties with a reasonable opportunity to make their case, and to hear and respond to the opposing party's arguments. As far as consumers making complaints of unfair trade practices are concerned, the scheme should not be administered in a way that an average consumer would need legal representation in order to use the process effectively. Nevertheless, complainants should not be precluded from being represented by a legal or other representative.

2.12 LEGALITY/LIBERTY

2.12.1 Notwithstanding the difficulties associated with taking legal action, participation in complaint handling schemes should be a truly voluntary option for consumers and

should not impinge in any way on their right to legal redress if dissatisfied with the results of a complaint handling committee. Importantly, complainants' use of complaint handling schemes should not in any way limit their right to lodge complaints or share information with government agencies. Nor should it prevent law enforcement authorities, code enforcers, or other bodies from bringing law enforcement actions or from using the complaint in legal actions or other efforts to protect society from unfair or anticompetitive business practices.

3. FAIR COMPETITION RULES

3.1 INTRODUCTION

3.1.1 The driving force of free enterprise is competition, and that when competition works, the market economy functions to the overall benefit of business and consumers alike. The Hong Kong Government, in its "*Statement on Competition Policy*" issued in May 1998 noted that it would:

- (a) support the Consumer Council's work in drawing up codes of practice that promote competition and its stated objective of enhancing economic efficiency and free trade; and
- (b) work together with the Council to encourage the private sector to adopt pro-competition measures, such as self regulatory regimes that preserve and enhance free competition.

3.1.2 The Competition Policy Advisory Group (COMPAG) established in 1997 and chaired by the Financial Secretary promulgated the "*Statement on Competition Policy*" in 1998 and in 2003, published the Guidelines on Competition Policy. In June 2006, a Competition Policy Review Committee appointed by COMPAG to review Hong Kong's competition policy concluded that 'legislative backing is needed for the effective enforcement of Hong Kong's competition policy' and recommended that a

cross-sector competition law be introduced to safeguard markets against anti-competitive conduct. The Government will embark on a public consultation exercise towards the latter part of 2006.

3.1.3 Notwithstanding the existence of the Government's official policy and guidelines it has formulated to compliment that policy, or future intentions with regard to a cross-sector competition law, it is hoped that the following rules will provide practical assistance in furthering the Government's policy of providing competitive safeguards in the economy, by setting standards:

- (a) against which allegations of anti-competitive behaviour can be assessed by industry and professional associations under their codes of practice; or
- (b) that can be observed unilaterally by business entities, including government or semi government entities that are engaged in trade or commerce.

3.1.4 These rules, which are partly based on those sections of the Hong Kong *Telecommunications Ordinance* (Cap. 106) and *Broadcasting Ordinance* (Cap. 562) that prohibit anti-competitive conduct, cover three areas:

- (a) Conduct substantially lessening competition;
- (b) Abuse of dominant position; and
- (c) Public benefits that outweigh free market competition.

3.1.5 The Council considers that as far as possible, existing legal terms that are used to examine competition issues in Hong Kong should be retained in industry rules and future competition legislation. Ensuring consistency in wording will not only assist in creating a useful body of legal precedents, but will make it easier for persons in industry to become familiar with the relevant concepts involved in assessing competition complaints.

3.1.6 Again, the common term "person" is used to cover individual traders, partnerships, corporations or other entities engaged in trade or commerce.

3.2 CONDUCT SUBSTANTIALLY LESSENING COMPETITION

3.2.1 A person shall not engage in an activity with a competitor, competitors, or other persons that distorts the operation of markets by way of limiting the role that individual entrepreneurial activity plays in serving the goals of consumer welfare and economic efficiency.

3.2.2 Unless there is a justifiable reason, a person shall not enter into an agreement, arrangement or understanding with a competitor, competitors, or other persons with the purpose or effect, or likely effect, of substantially lessening competition in a relevant market in Hong Kong. For the purpose of considering whether an agreement, arrangement or understanding has the purpose or effect, or likely effect, of substantially lessening competition, the following can be taken into account:

- (a) Agreement, arrangement or understanding between a person and a competitor or competitors fixing, controlling or maintaining the price for goods or services provided by the person and the other party or parties to the agreement, arrangement or understanding.
- (b) Agreement, arrangement or understanding between a person and a competitor or competitors to share any market between them on agreed geographic or customer lines.
- (c) Agreement, arrangement or understanding between a person and a competitor or competitors preventing or restricting the supply of products or services to competitors, or other persons.

3.2.3 In determining whether a person is fixing, controlling or maintaining the price for goods or services, and it is claimed by the person or persons engaged in the conduct that the fixing, controlling or maintaining of price is a necessary function of a joint venture, the following analytical procedure may be applied:

- (a) When the joint venture between the person and a competitor or competitors, and the restraint on prices may be useful but is not essential to the joint venture, in the sense that cooperation on prices is not the essence of the activity, then the joint venture and its ancillary restraints should not be regarded as a breach of the rule.
- (b) The parties are cooperating in an economic activity other than the elimination of rivalry in the whole of the relevant market, and the agreement is capable of increasing the effectiveness of that cooperation to compete in that wider market and is no broader than necessary for that purpose.

3.2.4 It is the degree to which competition has been lessened which is critical, not its proportion to the whole of the competition which exists in the total market. Therefore, a lessening in a significant section of the market, if it is a substantial lessening of otherwise active competition will be a substantial lessening of competition. It is

important, therefore, to assess if conduct engaged in by a person which is intended or has the effect of preventing, restricting or distorting competition, has or has not substantially lessened competition. To apply the concept of substantially lessening competition, it is necessary to:

- (a) assess the nature and extent of the relevant market, and the probable nature and extent of competition which would exist in the market but for the conduct in question;
- (b) assess the way the market operates and the nature and extent of the contemplated lessening of competition;
- (c) examine the relevant significant portion of the market; and query to what extent there would have been competition in that portion but for the conduct in question;
- (d) assess what is left; and
- (e) determine whether what has been lost in relation to what would have been, is seen to be a substantial lessening of competition.

3.2.5 For the purpose of constructing a self regulatory code of practice to prohibit conduct that substantially lessens competition, there is a need to define the meaning of "competition" and "market".

(a) The meaning of "competition" can be derived from the following three perspectives:

- i. Competition refers to the rivalry that exists for the conduct in offering better prices, quantities, qualities, services or other attributes to consumers with the aim of making a deal.
- ii. Competition in a market is taken as being a situation in which no firm is able to act independently of any other firms competing in that market, or a market in which a firm's behaviour is effectively constrained by the threat of entry from firms outside the market. In this situation no firm should be able to raise and sustain its prices above the competitive level, or act in such a way that affects competition by foreclosing market entry or foreclosing competition.
- iii. Competition refers to the rivalry that exists as to the range of prices on offer; the extent to which choices of different goods or services or suppliers exist; and the ability for consumers to choose between different service levels for substitutable goods or services offered to consumers.

- (b) Market refers to a market for goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.

3.3 ABUSE OF DOMINANT POSITION

3.3.1 A person in a dominant position in a market in Hong Kong shall not abuse its position and engage in conduct that serves the purpose or effect of undermining the operation of competition in a market. As such this rule is not designed to protect individual competitors, but to protect the basis upon which competition functions in a market.

3.3.2 A person is in a dominant position when it is able to act without significant competitive restraint from its competitors and customers. In considering whether a person is dominant, relevant matters to be taken into account include, but are not limited to:

- (a) the market share of the person;
- (b) the person's power to make pricing and other decisions independently of any other firms competing in the relevant market;
- (c) whether the person's behaviour is effectively constrained by the threat of entry from firms outside the market;
- (d) any barriers to entry to competitors into

the relevant market; or

- (e) the degree of product differentiation and sales promotion.

3.3.3 In considering whether a person that is in a dominant position has abused its position, the following conduct may be taken into account:

- (a) predatory pricing behaviour such as selling below cost for the purpose of driving out competition followed by substantial price increases in an area of economic activity where there are constraints to market accessibility and contestability;
- (b) setting retail price minimums for products where there are no ready substitutes; or
- (c) conditioning the supply of specified products to the purchase of other specified products or to the acceptance of certain restrictions other than to achieve assurance of quality, safety, adequate service or other justified purposes.

3.4 PUBLIC BENEFITS THAT OUTWEIGH MARKET COMPETITION

3.4.1 An agreement, arrangement or understanding between a person and its competitor or competitors that has the

purpose or effect, or likely effect, of substantially lessening competition, should be prohibited. However, if there are public benefits emanating from the agreement, arrangement or understanding and those benefits outweigh the detriments to public constituted by the substantial lessening of competition, an exemption may be justified. Without limiting the public benefits that may be considered as justification to exempt a person or persons, the following benefits can be taken into account:

- (a) expansion of employment or prevention of unemployment in efficient industries;
- (b) economic development, e.g. through encouraging research and capital investment in industries that would not be achieved without the subject agreement;
- (c) continuity of an essential service that cannot be achieved without the agreement;
- (d) improvement in the quality and safety of products and services; and
- (e) supply of better information to consumers and business to permit informed choices in their dealings.

3.4.2 The onus of demonstrating that a public benefit outweighs the detriment to

competition arising from an agreement, arrangement or understanding, rests with the person or persons entering into the agreement, arrangement or understanding.

3.4.3 In granting an exemption under this rule, specific conditions on the grant of exemption may be made.

3.4.4 The exemption may be revoked if the exemption was granted on the basis of evidence or information that was false or misleading in a material particular; that a condition to which the exemption was expressed to be subject has not been complied with; or that there has been a material change of circumstances since the exemption was granted.