

Fairness

*in the Marketplace for
Consumers and Business*



公平營商 買賣共贏



消費者委員會
CONSUMER COUNCIL

CONTENT

EXECUTIVE SUMMARY	1
CHAPTER 1: INTRODUCTION	13
Unfair Trade Practices in Hong Kong	13
Current Legal Regime for Consumer Protection	16
<i>Inadequacies in Existing Legal Regime regarding Trade Practices</i>	16
Need for Improvement	22
Purpose of the Report	23
Members of the Working Group on Improvement of Consumer Protection	23
Laws	
CHAPTER 2: A COMPREHENSIVE TRADE PRACTICES STATUTE	25
Introduction: Justification	25
Issues to be Addressed	27
What should be the Scope of the Statute?	27
<i>Nature of Unfair Practices</i>	27
<i>Transactions to be Regulated</i>	28
<i>Context in which the Law should Apply</i>	28
<i>Effect of Unfair Practices on Consumers' Decision relating to a Purchase</i>	29
<i>Recommendation 1 - Scope of the Statute</i>	30
What is the Basic Approach to Formulating the Statutory Prohibitions?	31
<i>Recommendation 2 - Basic Approach to Formulating Statutory Prohibitions</i>	32
What is an Appropriate Enforcement Mechanism?	33
<i>Enforcement Strategy</i>	33
<i>Enforcement Mechanism</i>	35
<i>Recommendation 3 - Enforcement Mechanism</i>	39
<i>Improvement of Private Right of Action and Access to Redress</i>	40
<i>Recommendation 4 - Right to Sue under the Proposed Statute</i>	41
<i>Recommendation 5 - Right to Redress</i>	42
What Attributes should the Enforcement Agency have?	43
<i>The Customs and Excise Department</i>	43
<i>The Consumer Council</i>	44
How should the Statute fit within the Existing Legislative or Regulatory Framework?	47
<i>Recommendation 6 - Fitting within the Existing Legislative or Regulatory Framework</i>	49
<i>Other Parallel Regimes</i>	50
Subsidiary Legislation and Guidelines on Specific Trade Practices Issues	51
<i>Guidelines</i>	51
<i>Guidelines for Misleading or Deceptive Advertisements</i>	52

<i>Recommendation 7 - Guidelines for Misleading or Deceptive Advertisements</i>	54
<i>Guidelines on Discount Sales Price Indications</i>	55
<i>Recommendation 8 - Guidelines on Price Comparisons</i>	56
CHAPTER 3: PROPOSED IMPROVEMENTS TO CURRENT LEGISLATIVE AND REGULATORY FRAMEWORKS	57
Introduction	57
Measures Rectifying the Deficiencies of the Trade Descriptions Ordinance (the “TDO”)	57
<i>Consumer Council’s Position</i>	60
<i>Trade Descriptions in Sales Receipts - Time of Application</i>	60
<i>Recommendation 9 - Trade Descriptions in Sales Receipts</i>	62
Measures Regulating Unfair Terms in Standard Consumer Contracts	62
<i>Review of Unconscionable Contracts Ordinance</i>	63
<i>Australian Experience</i>	64
<i>United Kingdom Experience</i>	64
<i>Proposed Regulation for Hong Kong</i>	66
<i>Recommendation 10 - Measures Regulating Unfair Terms in Standard Consumer Contracts</i>	67
Improvement on the Regulation of Unfair Practices in Telecommunications and Broadcasting Industries	68
<i>The Unfair Trade Practices</i>	68
<i>Factors for Exclusion from Enforcement of the Proposed Trade Practices Statute</i>	69
<i>Improvement of the Co-regulatory Frameworks</i>	71
<i>Deficiencies</i>	71
<i>Proposed Improvements</i>	76
<i>Short Term Telecommunications Measures</i>	76
<i>Recommendation 11 - Expansion of s.7M of the TO</i>	76
<i>Short Term Broadcasting (i.e. Pay TV) Measures</i>	77
<i>Recommendation 12 - Adding a New Licence Condition for Prohibition of Unfair Trade Practices or Introduction of a New Code of Sales Practices to the same effect</i>	78
Conclusion	79
CHAPTER 4: CONCLUSION AND SUMMARY OF RECOMMENDATIONS	80

Executive Summary

Introduction

1. This Report examines the various laws and administrative procedures that currently serve the interests of Hong Kong consumers, and makes recommendations that the Council believes are critically important to upholding consumer rights. The Council's research, and its experience in working with consumers and businesses through its complaints handling and other services, indicates that there are deficiencies in the current consumer protection framework.

2. Some of the areas that have come to attention are

- (a) *False or Misleading Descriptions of goods and services* – Inducing consumers, by a false or misleading description, into purchasing goods or services that are not actually worth the price paid, or they are not what consumers want. Whilst the Trade Descriptions Ordinance (“**TDO**”) prohibits false trade descriptions, false marks and misstatements in trade or commerce, it only applies to goods and not services.
- (b) *Insufficient Information* - The TDO only requires gold and platinum articles to be marked with prescribed information but there are no statutory information requirements for the supply of diamonds, natural Fei Cui (天然翡翠) and electronic products, which are commonly the subject of complaints.
- (c) *Misleading Advertisements* - Dubious and exaggerated claims in advertisements are common causes of complaint, where consumers are led into error with their purchases.
- (d) *Aggressive or High Pressure Tactics* - Harassment by salespersons is not an uncommon experience for consumers. S.6A of the Summary Offences Ordinance (“**SOO**”) covers harassment, however, it does not cover marketing activities at private places such as doorstep sales, inside a consumer's home or at private clubs.
- (e) *Bait and Switch* - This concerns traders advertising goods at a bargain price without having reasonable quantities or amounts available to meet the demand that would be reasonably expected. This practice amounts to a ‘con trick’ where the advertised bargain is used as a bait to attract consumers into

the store, with the intention of switching them to other more expensive products.

- (f) *Accepting Payment without Ability or Intention to Supply* - Prepaid coupons or prepaid services schemes are a subject of complaint where traders fail to provide the prepaid goods or services, or to provide them within a reasonable time. The suspicion has been that there was either no intention to provide the goods or services into the foreseeable future, or that due regard was not given to the trader's ability to supply the prepaid goods or services.
- (g) *Adopting Unfair Terms in Standard Contracts* - Unilateral variation clauses allowing traders to vary unilaterally, in any circumstances, the length of termination notices, the monthly fee payable, or the goods or services supplied under the contracts are typical examples of unfair terms causing consumer complaint.

3. The Council considers that the deficiencies of the existing legal framework in addressing the above unfair practices place Hong Kong's consumer protection efforts below the standards found in comparable advanced economies; and should therefore be addressed.

4. A major concern is that despite the efforts of Government, the current framework not only fails to address longstanding unfair trade practices but also fails to keep up with rapid changes taking place in the market. As a result, consumers continue to suffer loss resulting from unfair trade practices. Moreover, the damage is not confined to Hong Kong's consumers. Allegations of retailing scams targeting Mainland tourists have resulted in significant public outcry against unfair sales tactics perpetrated on Hong Kong's visitors. The Council believes that urgent action needs to be taken so as not to exacerbate an emerging problem that can be harmful to Hong Kong's reputation as a tourist destination.

5. The Council's primary recommendation to address the majority of issues is to create a comprehensive consumer protection law (the "**Trade Practices Statute**") administered by a public enforcement agency. This basic framework will provide general consumer safeguards against unfair marketplace conduct in the form of a basic 'safety net' that can adapt to the many situations that arise in a vibrant and creative economy. Industry self-regulation, and common law rights currently available to consumers would also continue to exist within the recommended framework.

A Comprehensive Trade Practices Statute

6. The current legislative framework available to consumers for counteracting unfair trade practices is sector-specific and formulated in what could be described as a 'piecemeal' and 'uncoordinated' fashion. It therefore leaves gaps for unscrupulous practices to slip through the net. In particular, the uncoordinated nature of the various laws poses difficulties for consumers to understand the extent of their legal rights and for traders to comprehend the extent of their obligations to consumers.

7. Moreover, enforcement of the existing laws by public agencies is typically through criminal sanctions, which are difficult to achieve. As a result, they are not often used, and in any event can be inappropriate as a mechanism for effecting overall change in marketplace behaviour. As far as aggrieved consumers are concerned, they are faced with the daunting task of taking civil action on their own as the only redress option; apart from seeking the assistance of the Council for mediation.

A Comprehensive General law and General Enforcement Agency

8. The current mechanism lacks a variety of enforcement tools and redress options. This makes for less flexible enforcement at both private and public levels. Given the challenges posed by rapid changes in the marketplace, and the increasing complexity of sales tactics and business models, it is necessary, for the purpose of maintaining a fair marketplace, to establish a mechanism that is more flexible and inclusive in sanctioning unfair trade practices. The Council is of the view that in order to establish such a mechanism, a general and comprehensive Trade Practices Statute and a general enforcement agency should be introduced. In the interests of regulatory efficiency, this option is preferable to continuing with a piecemeal approach to addressing the broad range of consumer issues that arise in the economy.

9. A number of questions arise as to how this new framework should operate.

What Practices should be Regulated?

10. The Council considers that the practices to be regulated must be unfair in that they impinge on the basic consumer rights to safety; the right to be informed; and the right to choose. Essentially, these involve misleading or deceptive acts or omissions regarding matters essential for an informed decision; aggressive or high pressure sales practices that significantly impair or are likely to significantly impair a

consumer's freedom of choice or conduct; and other improper or unfair trade practices by a trader that fall short of the general principle of good faith and honest market practice.

What Transactions should be Covered?

11. The Statute is intended to offer comprehensive protection to consumers and set out uniform trading standards across industries. Therefore, the scope of the term 'product' should be wide-ranging to cover all manner of goods and services purchased by consumers, including simple low cost items to valuable items such as a car, private residential property, and contractual rights and obligations.

In what Context should the Law Apply?

12. The context in which the law should apply in relation to an unfair practice must be one of business (a trader) to consumer. Therefore, the Statute shall only concern transactions between a provider (including the Government) of product in the course of business or trade and a consumer. It does not cover commercial transactions between two traders or private transactions between two consumers. Accordingly, the practice has to be performed by a person carrying on a business and engaged in trade or commerce before, during or after the transaction.

How should the Statutory Prohibitions be Formulated?

13. Having regard to the manner in which other jurisdictions have constructed their general consumer protection laws, the Council considers that the best approach to creating prohibited conduct under the proposed Statute is to combine a general 'catch all' prohibition against unfair trade practices in trade or commerce, in addition to specific unfair conduct prohibitions. While there may be some uncertainty for both consumers and business as to whether acts not expressly prohibited under specific provisions, or not in a list of unfair practices, would nevertheless be considered as falling under the general catch-all provision, the Council believes that this uncertainty can be removed by proper guidelines issued by the relevant enforcement agency.

What is an Appropriate Enforcement Mechanism?

14. The Council considers that an appropriate enforcement mechanism should seek the most cost-effective outcomes for the enforcement agency and be responsive to the needs of consumers for a swift resolution to their problem, while at the same time offering traders who find themselves at risk of a breach of law, an uncomplicated way to resolve the issue. The Council therefore recommends an

enforcement approach that relies heavily on administrative measures, with backing of court sanction, to secure improvements in market place behaviour. The Council sees this approach as being measured in steps; as follows

- (a) Attempting, as a first step, the reconciliation of disputes between traders and consumers.
- (b) Accepting written, court enforceable, undertakings from traders who in the opinion of the agency have breached the law, to comply with a requirement not to engage in further 'at risk' conduct and if necessary to provide other redress.
- (c) If acceptable undertakings are not given, carrying out a formal investigation and issuing court enforceable 'cease and comply' notices.
- (d) Having the right to publicize the names of traders that the enforcement agency considers have infringed the Statute, and to whom it may have issued cease and comply notices, or from whom it has accepted undertakings.
- (e) Where necessary, applying to the court for declarations, injunctions, orders and/or financial penalties, if an undertaking or a cease and comply notice has not been adhered to, or in any case if the agency considers the measures noted above have not, or will not achieve a desirable outcome.
- (f) Alternatively, the enforcement agency may, as the urgency or situation of the matter requires, seek immediate court injunction without going through the processes of reconciliation and cease and comply notice.

15. The trader concerned should be given reasonable opportunities to make representations at various stages (including investigation) and appeal against cease and comply notices or any part of a notice.

16. The Statute should mainly provide for civil liabilities except for unfair practices that are so morally reprehensible or have caused so great a social harm, that criminal sanction is justified. Because the proposed Statute will be an unprecedented legislative framework for addressing unfair trade practices in Hong Kong, adjustments will be required in the course of implementation. If necessary, criminal offences can be created in the future for those unfair practices which regulation under the proposed Statute proves unsatisfactory. In addition, consumers should also be given a private right to sue for a contravention of the proposed Statute and to seek damages. In order to improve consumer access to legal redress,

the Council also suggests that consideration should be given to a number of options. For example, establishing a Consumer Tribunal to consider matters under the proposed Statute and existing legislation that currently provides rights of private action regarding consumer transaction disputes. Consideration can also be given to expanding the scope of the Supplementary Legal Aid Scheme; or enhancing the availability of the Consumer Legal Action Fund to a wider range of consumers.

What Attributes should an Enforcement Agency have?

17. Both the Consumer Council and the Customs and Excise Department have experience and resources currently devoted to addressing consumer protection matters. The C&ED in particular has vast experience in administering the criminal provisions of the Trade Descriptions Ordinance and the current resources devoted to that work could be adapted to the investigation role envisaged under the proposed Statute.

18. Whether the Council should take on the role of enforcing the proposed Trade Practices Statute raises questions as to the appropriateness to do so, given the Council's role as a strident advocate for consumers, and its functions in product research and testing, and selling that information in the marketplace. On the other hand, it has the resources and expertise to take on the function.

19. However, as the author of this Report, the Council believes that in order to avoid criticisms of conflict of interests, and perceptions of bias, one way or the other, that may arise from any recommendations regarding the role of the Council under the proposed Statute, that the matter is best left open for further public deliberation.

How should the Proposed Statute fit within the Existing Legislative Framework?

20. Much of the existing statutes that cover consumer protection, such as provisions in the Banking Ordinance and the Telecommunications Ordinance, address important sector-specific issues, and the relevant agencies have the expertise and resources to administer the law.

21. Accordingly, the Council is of the view that trade practices provisions in existing statutes regulating specific sectors should remain unaffected by the enactment of the proposed Statute, provided that a significant degree of professional and specialized knowledge is required for enforcement of such provisions or statutes, and a similar level of protection has already been provided by such statutory frameworks, parallel to and compatible with the proposed Statute. If necessary, amendments should be introduced to these existing statutes to ensure that they will

cover the range of unfair trade practices that the proposed Statute will regulate. Further, consideration may also be given to whether it is necessary for the relevant agencies to submit a report, when reasonably required by the Government, on their regulatory consumer protection work for public scrutiny.

22. With regard to the existing self-regulatory regimes of professional bodies, the Council considers it is more appropriate for the trade practices of members of these bodies to continue being regulated by their respective rules and procedures because enforcement requires specific professional expertise or knowledge that the new enforcement agency under the proposed Statute would not have. “Professional bodies”, for the purpose of the proposed Statute should mean a well-recognised and established organization (not being a general trade association) the practice of which requires distinctive skills and knowledge and which has an effective self-regulatory mechanism closely monitoring the trade practices of its members and providing easy access to consumers’ complaints, and adequate sanctions for breaches of rules. The Council suggests that a referral system should be established between the new enforcement agency and the professional bodies so that complaints filed with the new enforcement agency against professionals will be duly and speedily referred to the bodies concerned. Moreover, in drafting the Statute, the Government may consider supplementing the relevant provisions of the proposed Statute by a list of professional bodies.

23. Although the application of false or misleading trade descriptions on goods regulated by the TDO will fall within the ambit of the proposed Statute, given that the TDO and proposed Statute are different in terms of scope, objective and enforcement as mentioned, the Council is of the view that the trade descriptions provisions and their enforcement under the TDO should remain unaffected by the enactment of the proposed Statute.

The Need for Guidelines

24. There are some specific trade practices issues that are of serious social concern and which the Council considers need either further or more detailed regulation through subsidiary legislation, and/or guidance to clarify how certain matters will be dealt with by the agency enforcing the prohibitions under the proposed Statute. Of particular concern are misleading and deceptive advertising, and false representations as to price. The Council is of the view that in principle, the regulation of these specific issues should be first addressed by guidelines that promote compliance with the general prohibitions in the proposed Statute. The Council suggests that the guidelines can be drafted with reference to those guidelines currently administered by the Telecommunications Authority and the

Broadcasting Authority. If compliance is subsequently considered to be unsatisfactory, formal control may need to be imposed by setting out specific rules, with legal force in the form of subsidiary legislation.

25. The Council is also concerned that in some cases, misleading or deceptive advertising claims may induce consumers into improper self-medication and thereby delay proper treatment. This is clearly a public health matter that needs to be addressed under the Undesirable Medical Advertisements Ordinance (Cap. 231). Since improvement of the Ordinance is primarily a public health issue, it is outside the ambit of this study. The Council will propose amendments in a separate submission to the Government.

Proposed Improvements for Current Legislative and Regulatory Frameworks

26. Notwithstanding the introduction of the proposed Statute, the Council considers that improvements are necessary to the existing consumer protection statutes that will run in parallel with the new framework, and to some areas that are currently subject to industry licensing. Accordingly, the Council has examined issues regarding relevant sectors that fall into this category, and makes the following recommendations.

Measures necessary to Rectify Deficiencies in the Trade Descriptions Ordinance

27. A number of amendments have been put forward by a Government Working Group, of which the Council has been an active member, examining the need for amendments to this Ordinance, such as:

- (a) prohibitions against misrepresentations as to price;
- (b) expanding the definition of “trade description” to cover “warranty and availability of after-sale repair and maintenance services”;
- (c) imposing obligations on traders of regulated electronic products to state in invoices or receipts any representation relating to the availability of after-sale repair and maintenance services;

- (d) adding a provision prohibiting false or misleading representation in the course of trade, business or profession, for the sale of goods, as regards seller's connection with another person; and
- (e) introducing a definition regulation on natural Fei Cui (天然翡翠), diamonds, gold alloy and platinum to set out clearly the conditions for the use of these terms, and information standards regarding certain electronic products.

28. The Council supports the amendments proposed under the TDO Amendment Bill and the Proposed Subsidiary Amendments. The Council hopes these (comparatively) simple and straightforward amendments will soon be approved and implemented as an expeditious and practical tool to address the deficiencies and the unfair trade practice issues not presently covered. In addition, the Council has identified a potential problem regarding uncertainty with the timing of trade descriptions in sales receipts, and whether putting information on sales receipts comes within the meaning of applying trade descriptions in the course of trade or business under the TDO. The Council has therefore recommended that appropriate amendment(s) should be made to make it clear that trade descriptions contained in sales receipts are covered, to remove any uncertainty in the legal application of the provisions.

Measures Regulating Unfair Terms in Standard Consumer Contracts

29. Given the rapid growth of the service economy and proliferation in the use of standard form consumer contracts, the Council has found that the rights and interests of consumers have been seriously jeopardized by the inclusion of unfair terms in these types of contracts. As such, it considers that more stringent regulation of traders' activities in this area is considered necessary. This is notwithstanding the existence of the proposed Statute that will regulate unconscionable conduct, in order to secure fair and basic protection for consumers. Such protection is particularly important where unfair terms are widely adopted by all major traders in a sector and as a result, consumers (who invariably lack bargaining power) find they have no choice but to accept the terms in order to obtain the services needed.

30. The Council recommends that legislation should be introduced to regulate unfair terms in standard consumer contracts (i.e. those contracts not individually negotiated). The legislation may be modeled upon the UK Unfair Terms Regulations, with an indicative and non-exhaustive list of potential unfair terms. The list can be constructed with reference to the UK Unfair Terms List, but should also take into account the differences in culture and marketplace between Hong Kong and the UK.

The enforcement agency under the proposed Trade Practices Statute should also be responsible for administering, monitoring compliance of and enforcing this legislation.

Improvement in the Regulation of Unfair Practices in the Telecommunications and Broadcasting Industries

31. The Council and the relevant sector regulators, the Telecommunications Authority (“**TA**”) and the Broadcasting Authority (“**BA**”) are concerned with the prevalence of unfair sales tactics involving aggressive, harassing and deceptive practices being perpetrated on consumers by sales people in the relevant sectors. The legislative framework for both sectors is currently not adequate to deal with all the problems that are emerging and some efforts need to be made to increase the powers of the TA and BA to address the consumer distress that is occurring.

32. The distinction between telecommunications and broadcasting sectors is rapidly diminishing, and this is recognised through Government proposals to establish a unified regulatory framework for both sectors through new legislation and the creation of a Communications Authority. The Council supports the Government’s initiatives, and sees the new framework, working in parallel with the proposed Trade Practices Statute, as an opportunity to address many of the deficiencies in consumer protection that currently exist in Hong Kong. However, the new legislation will take time to come to fruition, and there is a need for urgent action to stop the problems that are occurring. Accordingly, the Council is proposing a number of short term measures to address the problems that currently exist.

33. With regard to telecommunications, the Council recommends the expansion of s.7M of the Telecommunications Ordinance (“**TO**”) to include *any unconscionable or improper conduct* in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service.

34. The Council further believes that in view of the fact that enforcement of the telecommunications sector will not come under the proposed Trade Practices Statute, it is important to ensure that the protection conferred by the TO on consumers against unfair trade practices will not be less than that of the proposed Trade Practices Statute. As such, the Council also recommends that s.7M should be further amended to the effect that it expressly covers all unfair trade practices as prohibited under the proposed Trade Practices Statute, before, during and after transaction, and that it covers the conduct of the licensees and their agents or servants.

35. With regard to the broadcasting sector, the BA is not specifically empowered by the Broadcasting Ordinance (“**BO**”) and the Broadcasting Authority Ordinance to deal with trade practices issues. Nevertheless, formal control over unfair trade practices for broadcast services can be facilitated by statutory and/or licence condition amendments within the established co-regulatory framework. Any problems in the existing framework can therefore be addressed through introducing certain changes to the law and to administrative procedure, thereby providing an expedient solution. The Council is therefore recommending that because of the immediate need for a solution to the prevalence of unfair sales tactics noted above, the Government should consider either exercising its power in the public interest or seeking the consent of the individual licensees under existing licences to add a new licence condition:-

- (a) to prohibit unfair trade practices, before, during and after transactions, by the licensee or its agents or servants; or
- (b) to require the licensee, after consultation with the BA, to prepare a code of best sales practices prohibiting unfair trade practices, before, during and after transactions, by the licensee or its agents or servants.

36. The Council does not consider that the prospective establishment of the Communications Authority, and future unified legislation, should inhibit the proposed improvements to the TO and BO, as noted above. For example, an improved s.7M as proposed may be easily transposed into the new unified legislation, covering the conduct of both telecommunications and broadcasting licensees. Constructing a revised provision to cover the complete range of unfair sales tactics and misleading or deceptive conduct, at this stage, would not be redundant but merely early drafting of a provision that would need to be included in the powers of the Communications Authority.

Conclusion

37. The Council believes that the combination of various existing and future proposed safeguards outlined in its Report, and recommendations, will produce a synergy where the actions of separate agencies and laws working with the proposed Trade Practices Statute, and its public enforcement agency, will together have greater total effect on consumer protection than would otherwise be available.

38. This approach will serve the interests of not only consumers but also those of business, for the ultimate well being of the Hong Kong economy and overall community of interests.

Fairness in the Marketplace for Consumers and Business

CHAPTER 1: INTRODUCTION

1.1 In the last few decades, Hong Kong has undergone tremendous economic growth and technological development. There emerge a range of creative business models and retailing schemes involving such devices as prepayment and membership schemes, the bundling of diversified goods and services, and sales and marketing outside the typical shop front environment. In this complex market environment, consumers have found themselves exposed to various kinds of unfair trade practices by a handful of unscrupulous traders. The complaints received by the Council represent only the tip of the iceberg. A table setting out the Council's "Complaints Statistics on Alleged Deceptive, Misleading and Unfair Trade Practices in Consumer Transactions for 2005 - 2007" is attached as "**Annexure 1**".

Unfair Trade Practices in Hong Kong

1.2 These unfair trade practices can be divided into three main categories, namely, misleading or deceptive practices, aggressive or high pressure tactics, and other improper or unfair practices ("**unfair trade practices**")¹. The following are some common examples found in the marketplace:-

Misleading or Deceptive Practices

- (a) Falsely claiming that the goods or services are of a particular standard, quality, grade, style, model, origin or method of manufacture (e.g. claiming that a deluxe watch is made in Switzerland when in fact it is not; and the quality of goods or services actually provided is far below that appeared in the promotional material).
- (b) Falsely claiming that the goods or services have sponsorship, approval, performance, characteristics, accessories, ingredients, components, qualities, uses or benefits (e.g. falsely claiming that a health food has a particular

¹ For the purpose of discussion, this Report will refer to these acts or practices as "unfair trade practices". Aggressive or high pressure trade practices, for the purpose of this Report, include sales tactics using improper acts such as harassment, coercion and undue influence, which are intended to impair consumer's freedom of choice or conduct.

curative effect; and that a “high-tech” health device has been approved by the US Food and Drug Administration when in fact it has not).

- (c) Falsely representing that the price displayed gives a price benefit or advantage to consumers (e.g. representing that the price has been reduced from \$12 to \$10, implying that the original price was \$12 when in fact it was only \$10).
- (d) Promoting goods similar to those made by a famous manufacturer in such a manner as to deliberately mislead consumers into believing that the goods are made by that manufacturer when they are not.
- (e) Falsely describing an item as a gift to consumers for the purpose of inducing them to purchase a different item; but subsequently including the charge for the “gift” in the invoice.
- (f) Falsely claiming that after-sales services in relation to goods are also available at certain locations other than the one at which the goods are purchased.
- (g) Misleading consumers into believing that attractive employment opportunities will be offered to them if they subscribe for services involving pre-employment training or other employment related services (e.g. these practices are found in some notorious modeling agency cases).
- (h) Falsely representing that a product will only be available for a short period of time, or that it will only be available on preferential terms for a short period of time, in order to prompt consumers to make an immediate decision (e.g. falsely claiming that the discounted price will only be effective on a particular day and urging the consumer to make an immediate decision).

Aggressive or High Pressure Tactics

- (i) Taking advantage of consumers by exerting undue pressure or undue influence on them to enter into transactions involving goods or services (e.g. making the consumers stay in the premises as long as possible by keeping their vital personal belongings, besieging them with lengthy and incessant sales pitches and urging them to make immediate decision).
- (j) Making insulting or offensive statements designed to shame consumers into making purchases.

- (k) Visiting consumers at their residences at late hours and promoting goods or services in a persistent manner, causing disturbance.

Other Improper or Unfair Practices

- (l) Making an invitation to purchase goods or services at a very attractive price with the only intention of promoting different goods or services.
- (m) Accepting payment from consumers without intending, or without having due regard to the ability to supply the goods and services pursuant to the consumer's order or within a reasonable time (e.g. accepting payment for prepaid packages from consumers without having due regard to the resources necessary to fulfill the orders and thereby failing to meet the reasonable demand from consumers).
- (n) Hindering consumers from exercising their right to terminate a contract (e.g. making it difficult for consumers to obtain the necessary termination form; or receiving a consumer's informal termination notice and not informing the consumer that such a notice is ineffective and not reminding the consumer of the correct procedure).

Other Trade Practices Issues

- (o) Adopting unfair terms in standard consumer contracts to the detriment of consumers (e.g. a clause giving the trader the exclusive right to interpret any term of the contract).

1.3 Some of the complaints that have come to the notice of the Council involve more than one of the unfair practices noted above, with different permutations, and which together are more powerful in subjugating the intentions of consumers. On some occasions, an unfair trade practice may bring about not only individual loss or damage, but also widespread social harm. For example, a false description on a food product which is widely available in the market may affect a substantial number of consumers. Unfair trade practices, no matter in what form they take, are unacceptable as they are contrary to the social values of probity and fairness. Social justice in the marketplace calls for efforts to assist consumers to participate effectively in the market and prevent them from being victimized by scams and unfair trade practices. If these unfair practices become prevalent and entrenched in the economy, they will undermine consumer confidence and in turn undermine economic prosperity.

Current Legal Regime for Consumer Protection

1.4 Despite efforts by the Government in the past, the protection afforded by existing laws to safeguard consumers is not sufficient. Currently, consumers aggrieved by unscrupulous practices may seek redress under various common law principles, mainly in tort and contract, such as those regarding misrepresentation, undue influence, duress, mistake, breach of contract, false imprisonment, assault and battery.

1.5 In addition to common law protection, there are a number of statutes enforced by public authorities or legal action by consumers with provisions that have the effect, direct or indirect, of enhancing consumer protection against unfair trade practices and supporting legitimate traders (see “**Annexure 2**”). Trade practices related codes or guidelines, with implications on licensing or authorization for businesses in the case of non-compliance, are provided for in the self-regulatory regimes of some specific industries; such as telecommunications, banking, estate agents, travel agency and insurance.

1.6 However, these trade practices related laws and rules cannot effectively address all current unfair trade practices. They are scattered, uncoordinated and limited in the scope of conduct covered. In addition, some of them are also sector specific. Therefore, they leave gaps for unscrupulous practices to slip through legislative loopholes.

1.7 The existence of legislative loopholes in consumer protection also raised concern of the Government, where in the 2007-08 Budget, the Financial Secretary invited the Consumer Council:-

“To review existing measures to protect consumer rights, including ways to improve the relevant legislation to combat misleading and undesirable sales practices.”

Inadequacies in Existing Legal Regime regarding Trade Practices

Uncoordinated and Scattered Legal Provisions and Rules

1.8 Unlike many countries, including advanced economies, Hong Kong does not have a comprehensive statute regulating unfair trade practices in general. Examples of the comprehensive trade practices statutes in other countries can be found at

“Annexure 3”. Consumers aggrieved by unscrupulous practices have to seek redress, if in fact redress is available, either relying on different common law principles, or on different unconnected and uncoordinated statutes, that more often than not are sector specific rather than of general application. In terms of consumer empowerment, it is not easy for a consumer without legal training to understand corresponding legal rights and to take advantage of the protection that is afforded by the existing law. Of equal importance is the fact that the current unconnected and uncoordinated system leaves many traders in the dark as to what their legal obligations are, thereby placing them at risk, notwithstanding their desire to fully comply with the law.

Loopholes in Existing Statutes

1.9 In addition, the current legal framework has loopholes in the control of unfair trade practices, owing to the limited scope of some of the consumer protection provisions, and the statutory constraints placed on the various enforcement mechanisms. The following are some examples²:-

Misleading or Deceptive Practices

False or Misleading Description³

- (a) As noted above, false description of goods or services either made orally or in writing, is one of the more common misleading or deceptive practices found in the marketplace. Accordingly, consumers are often induced by a false or misleading description into purchasing goods or services that are not actually worth the price paid, or they are not what the consumers want. The Trade Descriptions Ordinance (“**TDO**”) is the primary legislation in Hong Kong prohibiting false trade descriptions in trade or commerce. However, it is limited in its scope, as follows:-
 - (i) It only prohibits the application of false trade descriptions to goods and not services, residential properties and other rights and benefits. Moreover, the definition of “trade description” is also limited and does not cover price, after-sale repair and maintenance services and representations as to sponsorship or affiliation⁴. False trade descriptions on these matters are

² The specific industries mentioned below are only examples and not exhaustive. Similar sharp practices can also be found in other industries.

³ Despite the limited scope of the TDO mentioned below, the statistics of the Customs and Excise Department show that there were 782 cases and 720 cases under the TDO in the first 9 months of 2007 and 2006 respectively.

⁴ Some of these inadequacies have been addressed by the Trade Descriptions (Amendment) Bill 2007 gazetted on 21 December 2007. The amendments proposed in the Bill will be summarized in Chapter 3.

currently left outside the ambit of enforcement by public authorities and are only subject to civil action (such as misrepresentation and breach of contract), taken by aggrieved consumers. In these circumstances, there is a lack of deterrent effect that would be otherwise available if measures could be taken by a well resourced and efficient public authority.

- (ii) It is not absolutely clear whether the existing provisions of the TDO are wide enough to cover all trade descriptions applied at any time after the conclusion of contracts e.g. information contained in the sales receipts issued after payment and delivery of goods.

Insufficient Information

- (b) The TDO only requires gold and platinum articles to be marked with or accompanied by information prescribed in the relevant marking orders⁵, such as fineness of the articles. Despite such requirements, there are still complaints from consumers regarding confusion in the use by the trade of the terms “white gold” and “platinum”. Moreover, there are no statutory information requirements under the TDO for the supply of diamonds, jades and electronic products, which are commonly the subject of complaints partly due to the lack of information provided by traders that properly describe what consumers are in fact purchasing.
- (c) Even if the TDO requires a trader to state prescribed information in sales receipts, it is doubtful whether the information will be helpful to consumers who wish to seek civil remedies through legal action, on the grounds of misrepresentation, because the sales receipts are issued after the conclusion of the contract. Therefore, consumers still have to prove that the false representations, recorded in the receipts, have actually been made before the purchase and have induced them to enter into the contracts.

Misleading Advertisements

- (d) Dubious and exaggerated claims in advertisements are common causes of complaint, where consumers are led into error with their purchases. However, there is no general statutory regulation on misleading advertising; except that there are a few specific statutory provisions on advertising that might apply in certain areas, and some medical advertisements are prohibited, under the Undesirable Medical Advertisements Ordinance. Advertising through broadcasting media is, in the main, subject to the formal schemes of regulation enforced by the Broadcasting Authority. Yet, there is no similar

⁵ The Trade Descriptions (Marking) (Gold and Gold Alloy) Order and the Trade Descriptions (Marking) (Platinum) Order.

formal regulatory scheme over other media such as printed media and electronic media (e.g. the Internet and email). Advertising activities via these media are only subject to self regulation through simple voluntary commitments.

Misleading Conducts regarding Employment Opportunities

- (e) From time to time, there have been cases concerning misleading conduct on the part of traders, whereby consumers have been induced into subscribing for services relating to pre-employment training or other employment related matters, for the purpose of obtaining attractive job opportunities that are claimed by the traders to exist if the training or other matters are undertaken. Currently, there is no specific statutory provision allowing a public authority to regulate this type of unfair practice, unless the case clearly involves criminal fraud. As a result, the aggrieved consumers have to take private legal action in order to seek redress e.g. on the grounds of unconscionability under the Unconscionable Contracts Ordinance. However, the burden of proof is onerous and the outcome is highly uncertain.

Aggressive or High Pressure Tactics

Harassment and High Pressure Sales Tactics

- (f) Harassment by salespersons is not an uncommon experience for consumers in Hong Kong. In cases where the alleged acts involve toutting causing annoyance to consumers in a public place, then s.6A of the Summary Offences Ordinance (“**SOO**”) provides criminal sanction. However, this provision does not cover marketing activities at private places such as doorstep sales, inside a consumer’s home⁶ or at private clubs. Therefore, in many cases, private action is left as the only option for redress against these improper conducts.
- (g) There are, from time to time, cases where consumers are allegedly asked to deliver their identity cards and mobile phones to traders purportedly for safe keeping, and thereafter being subjected to a lengthy and incessant sales pitch and not given the chance to leave the premises. These tactics obviously impair consumers’ judgement in purchasing what they actually need or want. Tortious and criminal liability may arise in cases where the tactics involve

⁶ For example, alleged cases where sales people gain access into a consumer’s home for the claimed purpose of inspecting certain facilities or devices, but who end up unrelentingly pitching new offers to the hapless consumers who are ‘captured’ by the sales person’s actions.

assault, battery or false imprisonment⁷. However, some high pressure tactics are so subtle that no restraint on physical liberty or infliction of force is involved. These tactics, although detrimental to consumers, are not sanctioned by tort or criminal law; except for touting under s.6A of the SOO, which as stated above, only applies to a public place. Legal action by consumers is again the only option left.

Other Improper or Unfair Practices

Bait and Switch

- (h) There are also alleged cases where traders have advertised goods or services at a bargain price without having reasonable quantities or amounts available to meet the demand that would be reasonably expected. This practice amounts to a 'con trick' where the advertised bargain is used as a bait to attract consumers into the store, with the intention of switching them to other more expensive products, under the pretence that the advertised item has sold out or is otherwise not available. However, this practice is difficult to prosecute under the evidentiary burdens of criminal law of deception or the Theft Ordinance, unless intent to clearly defraud is proven.

Accepting Payment without Ability or Intention to Supply

- (i) Prepayment schemes are prevailing business models in Hong Kong; commonly in the form of prepaid coupons or prepaid services schemes. From time to time, there are complaints from consumers against traders who allegedly fail to provide the prepaid goods or services or to provide them within a reasonable time. The suspicion has been that there was either no intention to provide the goods or services in the foreseeable future, or that due regard was not given to the trader's ability to supply the prepaid goods or services. This practice is currently left unsanctioned by public authorities unless the trader is proven, through lengthy and complicated legal proceedings, to have had the intention to deceive and thereby criminally liable under s.16A of the Theft Ordinance (Cap.210). If no intention to defraud is proved, civil action by the aggrieved consumers for breach of contract will be the only option against this unfair trade practice.

Hindering Consumers from Exercising Termination Rights

- (j) Other unfair trade practices on the part of traders, such as hindering consumers from exercising their rights to terminate contracts, also harms

⁷ Assault means the act causing apprehension of infliction of immediate and unlawful force on the consumer; battery means the act of actually inflicting unlawful force on a consumer; false imprisonment means unlawful imposition of restraint on a consumer's freedom of movement from a particular place.

consumers' interest. However, under the existing legal regime, consumers often find that the only channel for redress available to them is to take legal action by themselves.

Other Trade Practices Issues

Adopting Unfair Terms in Standard Contracts

- (k) The practice of adopting unfair terms in standard consumer contracts to the detriment of consumers prevails in some industries. Unilateral variation clauses⁸ giving traders a unilateral right to vary, in any circumstances, the length of termination notices, the monthly fee payable, or the goods or services supplied under the contracts are typical examples of unfair terms. Allegations have been made against the inclusion of these clauses in that they are unfair and unconscionable. However, it is not clear whether the inclusion of such clauses alone, without involving other unconscionable tactics, can be considered as unconscionable under the Unconscionable Contracts Ordinance.

Inadequate Enforcement Mechanism

Reliance on Legal Action by Consumers

- (l) Currently, aggrieved consumers may seek redress through civil action in the court. Alternatively, consumers may try to resolve disputes through mediation. The Council is a popular avenue where consumers and traders can arrive at settlement with the assistance of its officers. However, given the lack of power to enforce and sanction, the outcome of mediation depends entirely on the cooperation of the traders under complaint. Therefore, aggrieved consumers have to rely heavily on legal action taken on their own in seeking redress against unfair trade practices. However, they are not typically active in enforcing their rights through legal action because of, amongst other things, the heavy burden of proof on their part. For instance, in a misrepresentation action, a consumer has to prove not only that the representation was false but that it also constituted a material factor inducing the consumer to enter into the contract. Moreover, litigation is a stressful task for most lay persons given the risk of losing and the substantial amount of legal costs that could be involved. Therefore, many consumers would find it not worthwhile to pursue their claims, especially where the amount concerned is modest.

⁸ The total number of complaints received by the Council concerning unilateral variation of contractual terms was 187 in 2005, 134 in 2006 and 182 in 2007.

Limitation of Enforcement by Public Authorities

- (m) Given the limitations in scope of existing trade practices related statutes, there are still some areas out of the reach of enforcement by public authorities e.g. false representations on services, residential properties and other rights and benefits. In any event, as far as the areas under regulation are concerned, such as false trade descriptions on goods, the sanctions imposed are, in the main, criminal. Given the evidentiary requirement to prove guilt beyond reasonable doubt, criminal proceedings are difficult to sustain and sanctions are not always cost effective. There is, on the whole, no enforcement mechanism by public authorities for imposing administrative or civil sanctions against unfair trade practices. The limitation in enforcement by public authorities, in terms of sanction options, restrains the flexibility available to them in taking swift and appropriate action that may be required, given the nature and gravity of the issue at hand. This compromises the effectiveness of public law enforcement, falling short of expectations from consumers who, as the more vulnerable in society, feel they should be protected from unfair trade practices.

Need for Improvement

1.10 It appears to the Council that improvements have to be made to the current legal regime in order:-

- (a) to meet the challenges posed by unscrupulous trade practices which keep evolving and changing alongside changes in the market place; and
- (b) to maintain consumer confidence and protect the interests of legitimate traders from the unfair competition that arises from such practices and as a result, to achieve fairness in the marketplace.

1.11 The Council believes that such improvements would also contribute to the continuous growth of the retail and tourism sectors⁹ which form two essential pillars of Hong Kong's economy, and are crucial to maintaining Hong Kong's international image and reputation of a shoppers' paradise.

1.12 The Council is of the view that in order to achieve the objectives mentioned in Paragraph 1.10, it is necessary to expand the statutory ambit of consumer protection to cover the unfair practices that are currently unregulated and to set up a coherent

⁹ For 2007, the total number of visitor arrivals exceeded 28 million. The value of total retail sales for 2007 was around HK\$247.7 billion.

mechanism with flexible enforcement tools and a clear policy for tackling unfair trade practices issues across different sectors.

1.13 In principle, the legislative reform may be accomplished in two main ways:-

- (a) a piece-meal approach by which amendments can be made to various pieces of existing trade practices related legislation;
- (b) a comprehensive approach consisting of a comprehensive statute and a single enforcement agency to administer it and regulate against unfair trade practices.

1.14 The piece-meal approach may involve a lengthy and complicated legislative exercise to achieve the goal of a consistent and coherent consumer policy regarding trade practices. Such a legislative exercise has to be conducted in a well-planned and coordinative manner. Despite best efforts, there is still a possibility of leaving gaps between different pieces of legislation. Further, as mentioned, the enforcement of the existing public agencies relies mainly on criminal sanctions. If improvement is to be made in the existing legislative framework, so as to cure this inflexibility, there will also need to be a tremendous change not only in the sanction options available to the agencies, but also a revamp of the existing enforcement procedures. The amount of reshuffling required for the purpose of maintaining consistency across the board makes this approach a less cost-effective option.

Purpose of the Report

1.15 In this connection, the Council will recommend, in Chapter 2, the introduction of a comprehensive trade practices statute and the relevant legislative framework and enforcement mechanism necessary to provide a comprehensive approach to consumer protection.

1.16 In addition, the Council will also recommend, in Chapter 3, improvements to existing legislative and self-regulatory regimes which it considers should either be excluded from or co-exist with the comprehensive trade practices statute.

Members of the Working Group on Improvement of Consumer Protection Laws

1.17 This study has been conducted by the Legal Affairs Division of the Consumer

Council under the guidance and supervision of a Working Group on Improvement of Consumer Protection Laws.

1.18 The Committee consists of:

Prof the Hon Anthony CHEUNG Bing-leung, BBS, JP (Chairman, from 13.7.07)

Prof K C CHAN, SBS, JP (Chairman, up to 30.6.07)

Mr Ambrose HO, SC

Mr Larry KWOK Lam-kwong, JP (up to 6.10.07)

Prof Johannes M M CHAN, SC (Hon)

Mr William CHAN Che-kwong

Mr Joe LAI Wing-ho (from 1.11. 07)

Mr Allen MA Kam-sing

Ms Anita MA Wing-tseung

Dr John WONG Yee-him (up to 31.12.07)

Ms Priscilla WONG Pui-sze, JP

Ms Wendy W Y YUNG

1.19 The Consumer Council would like to thank all the individuals and organizations which have provided information and valuable advice on this report.

CHAPTER 2: A COMPREHENSIVE TRADE PRACTICES STATUTE

Introduction: Justification

2.1 As noted in Chapter 1, consumer protection against unfair trade practices encounters the following problems:-

- (a) the existing piecemeal and uncoordinated legislative provisions and common law doctrines pose difficulties for consumers to understand and enforce their rights and for traders to understand their obligations and comply with the laws;
- (b) some of the existing trade practices related statutory provisions are so restrictive and specific that certain areas of concern are beyond the power of the relevant public authorities. For example, given that the Trade Descriptions Ordinance (the “**TDO**”) covers only supply of goods, the Customs and Excise Department cannot take action against traders making false or misleading representations on services. As a result, private legal action becomes the only option for sanctioning unscrupulous trade practices in those areas;
- (c) the constrained scope and flexibility of enforcement by public authorities has compromised the effectiveness of public law enforcement, and fallen short of expectations from consumers;
- (d) enforcement of consumers’ rights against unfair trade practices relies heavily on legal action taken by consumers themselves. However, consumers who wish to seek redress through legal action are often daunted by the expensive legal costs, risk of losing and heavy burden of proof.

2.2 The Council is of the view that the above problems can be effectively addressed by a comprehensive legislative approach which will involve the formulation of a comprehensive Trade Practices Statute:-

- (a) encompassing all unfair trade practices and areas of concern; and
- (b) establishing a new flexible and responsive mechanism with a specified agency for enforcement.

2.3 It is expected that the Statute will provide a consistent and coherent legislative framework that is more comprehensible and convenient for consumers to understand their legal rights against unfair trade practices. On the other hand, traders will find that

a comprehensive set of general trade practices rules will clarify their obligations in regard to consumer rights, and provide a basic set of marketplace rules for them to follow, and thus enhance their understanding as to compliance.

2.4 Moreover, the comprehensiveness of the proposed Statute, in terms of scope, will fill the loopholes left by the existing piecemeal legislative provisions and common law doctrines. For example, as intended, the proposed Statute will cover the false or misleading representations on services presently not regulated by the TDO.

2.5 It is also expected that the comprehensive Statute will provide for a flexible and responsive enforcement mechanism that will become a useful tool for resolving the said problems. Under this, there shall be a specified agency with powers to take various measures to assure correct marketplace behaviour, and to avail itself of a more cost-effective and flexible enforcement policy that is responsive to the nature and gravity of the issues at hand. In urgent and serious cases, the agency will also be empowered to seek orders from the court for timely remedies.

2.6 This enforcement mechanism will provide a useful alternative to costly legal action by providing access for aggrieved consumers to resolve their disputes with traders, through reconciliation. This alternative will be a time and money saving device for consumers to resolve their disputes. A failure to bring about reconciliation by a trader who is considered by the agency to be at fault, will be followed by robust enforcement procedures should the agency consider it necessary. The fact that enforcement action will exist as a back-up to reconciliation efforts, will make fruitful results more likely.

2.7 The Council believes that the Statute and enforcement agency proposed above will provide an effective mechanism to address the problems referred to in Paragraph 2.1. From an overall perspective, a comprehensive/omnibus trade practices statute enforced by a general enforcement agency will provide for a general and basic level of protection that will meet the challenges facing consumers in the marketplace from time to time. In addition, such a statute would also set out a uniform baseline across all businesses and industries; and create a consistent and coherent legislative framework. This will facilitate the implementation of effective consumer policies and compliance efforts so as to achieve overall economic benefits.

2.8 Such a statute would also be conducive to meeting the growing social awareness of consumer rights and social expectation of fair dealing. It would also be of benefit in upholding the reputation of Hong Kong as a “shoppers’ paradise” and enhancing Hong Kong’s image as a city that attaches great importance to consumer protection.

Issues to be Addressed

2.9 In its proposal for a comprehensive Trade Practices Statute, the Council will address the following issues:-

- (a) What should be the scope of the Statute?
- (b) What should be the basic approach to formulating the statutory prohibitions?
- (c) What is an appropriate enforcement mechanism?
- (d) What attributes should the enforcement agency have?
- (e) How should the Statute fit within the existing legislative or regulatory framework?

What should be the Scope of the Statute?

2.10 In defining the scope of the Statute, four aspects will be considered, namely the nature of unfair practices, the transactions to be regulated, the context in which the law should apply; and the effect of unfair practices on consumers' decisions relating to purchases.

Nature of Unfair Practices

2.11 The practices to be regulated must be unfair in that they impinge on the basic consumer rights to safety; the right to be informed; and the right to choose¹⁰. They can be divided into 3 categories:-

- (a) misleading or deceptive acts or omissions regarding matters essential for an informed decision¹¹;
- (b) aggressive or high pressure sales practices that significantly impair or are

¹⁰ These three rights, together with the right to be heard, form the basic concept of consumer rights originating from a declaration by former US President John F. Kennedy, which were added to by the international consumer association, Consumers International, to include the right to satisfaction of basic needs; the right to redress; the right to education; and the right to a healthy environment. Together, these eight consumer rights were embraced in the UN Guidelines for Consumer Protection adopted on 9 April 1985 in the United Nations' General Assembly.

¹¹ For example, misleading claims in advertisements.

likely to significantly impair a consumer's freedom of choice or conduct; and

- (c) other improper or unfair trade practices by a trader that fall short of the general principle of good faith and honest market practice, for example those that infringe on a consumer's right to choose.

2.12 The Council believes that the scope set out above should be wide enough to cover all unfair trade practices found in the marketplace, including, in particular, misleading advertisements, harassing sales conduct, bait and switch and acceptance of payment without ability or intention to supply.

Transactions to be Regulated

2.13 The Statute should apply to the promotion, sale or supply of any 'product' to a consumer. The Statute is intended to offer comprehensive protection to consumers and set out uniform trading standards across industries. Therefore, the scope of the term product should be wide-ranging to cover all manner of goods and services purchased by consumers, including simple low cost items such as pencils, to valuable items such as a car, private residential property such as an apartment unit, and contractual rights and obligations¹².

Context in which the Law should Apply

2.14 The context in which the law should apply in relation to an unfair practice must be one of business (a trader) to consumer. Therefore, the Statute shall only concern transactions between a provider (including the Government) of product (including goods, services, private residential property, and contractual rights and obligations) in the course of business or trade and a consumer. In other words, it does not cover commercial transactions between two traders or private transactions between two consumers. The practice has to be performed by a person carrying on a business and engaged in trade or commerce before, during or after the transaction, directly connected with:-

- (a) the promotion, sale or supply of a product to a consumer or a consumer's exercise of contractual rights in relation to a product;

¹² For example, the rights or obligations contained in membership of a fitness club.

- (b) the buying back of goods from consumers, such as goldwares and second hand cars, in the “second hand” market.

2.15 The contractual relation between traders and consumers should not end upon the completion of the purchase. The contracts under scrutiny might include some after-sale rights and obligations such as the right to a refund or replacement or to termination. It is not an uncommon experience for consumers that some traders try to deprive or hinder their exercise of those rights by unfair trade practices. Therefore, the arm of the statute should also be extended to unfair practices occurring after a transaction.

2.16 As far as pre-contractual unfair practices are concerned, the common example is misleading claims made ‘face to face’ by traders or in advertisements. They are likely to impair significantly a consumers’ ability to make an informed decision. Therefore, they are as detrimental as unfair practices during a transaction.

2.17 The Statute should cover unfair trade practices by individuals or corporations, as well their directors, employees or agents, acting in trade or commerce. Where the infringer is a corporation, its officer (e.g. director) may also be liable under the Statute if the contravention is committed with the officer’s consent or connivance, or is attributable to the officer’s negligence.

Effect of Unfair Practices on Consumers’ Decision relating to a Purchase

2.18 Apart from the requirement that an unfair practice takes place in a transaction between a business and a consumer, to attract liability under the Statute, it should be further required that the practice causes or is likely to cause the consumer to take a decision relating to a purchase he would not have taken otherwise¹³. “Decision relating to a purchase” should be taken to mean a decision as to whether, how, and on what terms a consumer purchases a product or exercises a contractual right (such as the right to termination or right to refund or replacement) in relation to a product¹⁴.

¹³ For example, that a consumer has been ‘led into error’ in relation to making a purchasing decision based on false information and would not have otherwise made the purchase.

¹⁴ Cf. Unfair Commercial Practices Directive of the European Union.

Recommendation 1 - Scope of the Statute

2.19 As recommended, the scope of the Statute should be extended to:-

- (a) misleading or deceptive acts or omissions;
- (b) aggressive or high pressure practices that significantly impair or are likely to significantly impair a consumer's freedom of choice or conduct; and
- (c) other improper or unfair trade practices by a trader that falls short of the general principle of good faith and honest market practice

AND

the practices are performed by traders (or their employees or agents) acting in trade or commerce, before, during or after a transaction, directly connected with:-

- (i) the promotion, sale or supply of a product to a consumer or a consumer's exercise of contractual rights in relation to a product;
- (ii) the buying back of goods from consumers, such as goldwares and second hand cars, in the "second hand" market.

AND

such practices cause or are likely to cause a consumer to make a decision relating to a purchase the consumer would not have otherwise taken.

2.20 Where the infringer is a corporation, its officer (e.g. director) may also be liable under the Statute if the contravention is committed with the officer's consent or connivance, or is attributable to the officer's negligence.

2.21 Further, "product" should include services; goods; private residential property; and rights and obligations.

What is the Basic Approach to Formulating the Statutory Prohibitions?

2.22 The formulation of statutory prohibitions against unfair trade practices commonly takes three forms:-

- (a) general and all embracing prohibitions;
- (b) specific conduct prohibitions;
- (c) a combination of (a) and (b).

2.23 The first form means a general provision that all unfair practices in trade or commerce are unlawful. The reliance on broad context rather than only specific prohibitions of isolated forms of conduct keeps the statutory context of “unfair trade practices” fluid and relevant, and more readily able to adapt to changes in unscrupulous tactics that arise from time to time. The difficult task of determining exactly what constitutes an unfair trade practice can be avoided because there is a general principle for determining whether a particular practice is unfair. However, in some circumstances, the possible vagueness that is inherent in this general provision might bring into doubt whether a particular practice is regulated under the statute. In these circumstances, it would not be until the vagueness is clarified by a court decision, that both traders and consumers will be aware of the extent of their rights and obligations.

2.24 The second form refers to a number of distinct and narrowly defined unfair trade practices, such as misleading a consumer that after-sale services in relation to a product are available in a particular area, or falsely claiming that a product is able to cure specific illnesses. This approach can result in a set of clear and definite rights and obligations for clarity of enforcement and compliance. However, in the absence of an all-embracing provision, this approach restricts the scope of statutory control over unfair trade practices and could leave gaps where conduct warranting sanction is not covered.

2.25 The third form is a combination of the above two, that is to say, a general prohibition supplemented by a number of specific prohibitions. This form has the advantage of being both open-ended and illustrative, as it allows the court to prohibit genuine unfair trade practices arising in different circumstances. The specific

prohibitions also help to illustrate the general provision and serve as clear guidance for the compliance of traders.

2.26 The formulation of specific prohibitions in this combined approach may take the form of several distinct statutory provisions or a non-exhaustive list of specific unfair practices. The former approach is adopted in the Australian Trade Practices Act. The general prohibition against '*misleading or deceptive conduct in trade or commerce*' in that Act is followed by a number of statutory provisions prohibiting specific unfair practices in trade or commerce, such as making a false or misleading representation with respect to the price of goods or services and offering gifts or prizes with the intention not to provide them or not to provide them as offered.

2.27 The approach of supplementing the general prohibition with a non-exhaustive list is adopted by both the Consumer Protection (Fair Trading) Act 2003 of Singapore and the Draft Consumer Protection from Unfair Trading Regulations 2007 of the UK¹⁵. The Singapore Act, in effect, imposes a general prohibition against unfair practices, including any false claim; any acts or omissions that might reasonably deceive or mislead a consumer or taking unfair advantage of a consumer. Apart from this general prohibition, the trader will also be liable for specific acts set out in a non-exhaustive list ¹⁶ of prohibited practices in a Schedule (see "**Annexure 4**"). On the other hand, the UK Regulations contain a general prohibition of unfair trade practices, including misleading and aggressive practices. The Regulations also prohibit 31 specific trade practices that are listed in a Schedule (see "**Annexure 5**").

Recommendation 2 – Basic Approach to Formulating Statutory Prohibitions

2.28 In light of the above, the Council recommends that an approach combining a general prohibition against unfair trade practices in trade or commerce, with specific unfair conduct prohibitions, should be adopted in the formulation of the proposed Statute. It is noted that there is still a possible element of uncertainty for both consumers and business as to whether acts not expressly prohibited under specific provisions, or in a list of unfair practices, would be considered as falling under the general catch-all provision, by the relevant enforcement agency, and therefore at risk

¹⁵ Annex A to Consultation on the draft Consumer Protection from Unfair Trading Regulations 2007 (May 2007).

¹⁶ The Act also empowers the Minister to amend the Schedule by order published in the Gazette.

of enforcement action. However, the Council believes that this uncertainty can be removed by proper guidelines issued by the relevant enforcement agency.

What is an Appropriate Enforcement Mechanism?

2.29 Formulation of statutory prohibitions is only part of the task in establishing a comprehensive legislative framework against unfair trade practices. Of equal importance is the development of an appropriate enforcement mechanism that consists of sanctions for contravention (whether criminal and civil) and the administrative procedures for pursuing the goals of the enforcement strategy.

Enforcement Strategy

2.30 The Council considers that an appropriate enforcement mechanism should be built upon a strategy that seeks the most cost-effective outcomes for the enforcement agency, consumers and traders alike. The strategy should also be responsive to the needs of consumers for a swift resolution to their problem, while at the same time offering traders who find themselves at risk of a breach of law, an uncomplicated way to resolve the issue. These goals cannot be achieved through criminal sanctions that rely mainly on court proceedings in enforcement. The sanction is deterrent-oriented. The severe penalties, including stigmatization and imprisonment, as a result of conviction make it particularly important to reduce the risk of wrongful conviction. Therefore, the evidentiary threshold and other conditions for establishing criminal liability tend to be more exacting than those in other processes. As a result, criminal proceedings could be lengthy and costly regardless of the gravity of contravention. A quick resolution of the matter could not be achieved. Therefore, in certain circumstances, criminal sanctions are not the most appropriate means for consumer protection.

2.31 The Council therefore recommends an enforcement approach that is heavily reliant on administrative measures to secure improvements in market place behaviour. This strategy is more likely to establish mutually beneficial cooperation between the enforcement agency and the traders whose conduct is considered at risk of breaching the law. The Council sees this approach as being measured in steps, as follows:-

- (a) Attempting, as a first step, the reconciliation of disputes between traders and consumers.
- (b) Accepting written, court enforceable, undertakings from traders who in the opinion of the agency have breached the law, to comply with a requirement not to engage in further 'at risk' conduct and if necessary to provide other redress.
- (c) If acceptable undertakings are not given, carrying out a formal investigation and issuing court enforceable 'cease and comply' notices.
- (d) Having the right to publicize the names of traders that the enforcement agency considers have infringed the Statute, and to whom it may have issued cease and comply notices, or from whom it has accepted undertakings.
- (e) Applying to the court for declarations, injunctions, orders and/or financial penalties¹⁷, if an undertaking or a cease and comply notice has not been adhered to, or in any case if the agency considers the measures noted above have not, or will not achieve a desirable outcome.

2.32 It is envisaged that the enforcement measures should escalate from persuasion (such as facilitating reconciliation and accepting written undertakings) to sanction by court (e.g. injunction or financial penalty) only for the more serious cases. For example, court action would be more appropriate where a trader repeatedly engages in unfair trade practices, after initially being cautioned, and/or refuses to co-operate with the enforcement agency in seeking an administrative resolution of a matter. In some cases, the urgency and situation of a matter may require seeking an immediate court injunction. However, this should be seen as the exception, rather than the rule. With this strategy in mind, complaints can be settled in a timely fashion, at an administrative level, and compliance with the law by the alleged infringing traders can be secured before legal costs are incurred by bringing them to court. This strategy is particularly cost-effective for cases where contraventions are inadvertent and where the alleged infringing trader reacted positively and quickly after the breach; such as to compensate affected consumers.

2.33 The Council believes that this measured approach to resolving market place

¹⁷ Cf. S. 82 of the Sex Discrimination Ordinance (Cap. 480), s.78 of the Disability Discrimination Ordinance (Cap. 487) and s.60 Family Status Discrimination Ordinance (Cap. 527).

problems is more preferable to a purely deterrent approach, that is reflected in some of the current trade practices laws, which are inflexible in that they mainly involve criminal sanctions (such as fine and imprisonment). In cases where traders are cooperative and willing to undertake remedial action, such as compensating aggrieved consumers, a clearly defined procedure should be available to assist both the agency (with its obligations to the public to enforce the law) and the trader (to find an expedient solution) to resolve the matter. In these circumstances, costly and time consuming court proceedings can be avoided and limited to appropriate contraventions with a high degree of seriousness and culpability.

2.34 In line with this measured compliance strategy, the Council recommends that the Statute should mainly provide for civil liabilities¹⁸ except for unfair practices that are so morally reprehensible or have caused so great a social harm, that criminal sanction¹⁹ is justified. For example, as has been the case with some outrageous matters involving making consumers stay in business premises as long as possible (in one case up to 6 hours) by keeping their vital personal belongings, besieging them with lengthy and incessant sales pitches and pressing them to make an immediate decision. In addition, deceptive acts or omissions in serious nature can also be considered as a subject of criminalization. Because the proposed Statute will be an unprecedented legislative framework for addressing unfair trade practices in Hong Kong, adjustments will be required in the course of implementation. If necessary, criminal offences can be created in the future for those unfair practices which regulation under the proposed Statute proves unsatisfactory.

Enforcement Mechanism

Reconciliation

2.35 As the fundamental goals of this measured approach are cooperation and compliance, the primary measure to be taken by the enforcement agency should be reconciliation. It should be a statutory duty for the enforcement agency to facilitate reconciliation on a voluntary basis between consumers and traders, in the first instance, except in very urgent cases. To encourage and facilitate a settlement

¹⁸ A civil liability may attract private action for damages or other remedies and enforcement by public agency through court proceedings for injunction, declaration or financial penalties. Cf. S. 82 of the Sex Discrimination Ordinance (Cap. 480), s.78 of the Disability Discrimination Ordinance (Cap. 487) and s.60 Family Status Discrimination Ordinance (Cap. 527).

¹⁹ A criminal liability may lead to much more serious consequences such as, not only fines but also imprisonment. It will also attach stigma on the defendant and has relevantly long term implication on his personal future e.g. disqualifying from the office of director or restraining from professional practices.

between the parties, the information obtained during the reconciliation should be kept confidential and should not be admissible as evidence in any proceedings under the Statute, except with the consent of the party from whom the information was obtained.

Formal Investigation

2.36 If the reconciliation fails to achieve a resolution between the respective trader and the consumer or consumers, and the enforcement agency forms an opinion that the conduct of the trader is likely to have amounted to a breach of the Statute, it may then proceed to a formal investigation. In order to accomplish this task, it should be empowered to obtain information, documents and other matters that can be used as evidence, and to summon the trader under investigation for examination. To ensure that the investigation can be effectively carried out, the agency should be able, where a person resists or hinders the exercise of these powers regarding information and examination, to apply to the court for an order to comply with its request for information and examination. Non-compliance of the court order would amount to an offence. Furthermore, a person should also be liable for an offence if the person willfully alters, suppresses, conceals or destroys a document that the agency has required or the court has ordered, or the person knowingly or recklessly makes any statement which is false or misleading in a material respect in complying with such a request or order. The Council is of the view that such non-compliance should be subjected to financial penalty. However, imprisonment should also be reserved for the more serious cases.

Voluntary Undertakings

2.37 In the course of an investigation, when the agency has decided to go further than simply facilitate reconciliation, the Statute should provide that the enforcement agency may accept written court enforceable undertakings from traders to cease or to change its current practices; to make arrangements so as to comply with the Statute; and in appropriate cases, make restitution to consumers. This voluntary assurance of compliance and redress can be a highly cost-effective means of dispensing with the need to incur substantial costs in seeking the same compliance and redress through administrative measures and the court system. It also provides an easy way for the trader to settle a matter without incurring costs in defending a matter in court or responding to further administrative measures.

Cease and Comply Notice

2.38 After investigation, if the agency is satisfied that the trader has breached the Statute and the trader has not given any undertaking, the agency should have the power to issue a court enforceable cease and comply notice to that trader. In the notice, the agency should be able, depending on the circumstances of each case, impose different requirements on the trader, such as to cease and not to repeat the unfair practice concerned; and to issue or publicize a corrective statement.

2.39 Breach of the undertaking previously given or non-compliance of the cease and comply notice should allow the agency to apply to the court for financial penalty, declaration and injunction restraining the trader from continuing or repeating the unfair practice referred to in the undertaking, or in the cease and comply notice. In these circumstances, the court will have two functions. First, it will need to examine the matter to determine whether a breach of the unfair trade practices prohibitions in the Statute has been committed. Second, in the case of an alleged breach of undertaking, previously given to the enforcement agency, or non-compliance with a notice to cease and comply, to determine if there has been non-compliance with the undertaking or notice. Following a hearing on the matters, the court would then be in a position to confirm that a breach of the Statute has occurred, and issue an injunction ordering the cessation of the conduct, and compliance with appropriate orders. It follows that in case of breach of an injunction, the trader may then be subject to contempt of court proceedings.

2.40 However, in those cases where the agency forms the opinion that the seriousness or urgency of the matter does not warrant attempts at reconciliation, the agency should be empowered to make immediate application to court for an injunction and to seek other orders.

2.41 To assist the agency in monitoring the performance of or compliance with undertakings, cease and compliances notices, and injunctions issued by the court, the Statute should require the trader to provide relevant information to the agency in that regard.

Fair Representation

2.42 To ensure that the above administrative mechanism by the agency is fair to traders, they should be given the opportunity to make representations at various

stages. For instance, during the investigation stage, the agency should be required to give reasonable opportunities to traders to make oral or written submissions on their cases. Further, they should also have the right to appeal against a cease and comply order, or any part of it, on reasonable grounds such as that a breach has not occurred, or if it has occurred that the terms of the cease and comply notice are harsh and unreasonable. It follows that in cases where a court injunction, declaration, or other order has been given, a trader should have a right of appeal to the higher court.

Local Experience

2.43 A similar measured approach to that outlined above is currently being adopted by some local enforcement agencies, such as the Equal Opportunities Commission in implementing the Sex Discrimination Ordinance (Cap. 480) and Disability Discrimination Ordinance (Cap. 487) and by the Privacy Commissioner for Personal Data in implementing the Personal Data (Privacy) Ordinance (Cap. 486). The measures of reconciliation, enforcement notice, application for injunctions and other reliefs are also found in their enforcement mechanisms.

Overseas Experience

2.44 In Australia, the Trade Practices Act is enforced by the Australian Competition and Consumer Commission ("**ACCC**"). Upon receiving complaints, the ACCC, as a matter of internal policy, first approaches the trader concerned to seek further information and give it an opportunity to respond to the allegation. Once it is satisfied that a prima facie case has been made out, there are wide ranging enforcement options, depending on factors such as the severity of the alleged conduct, the availability and extent of evidence and the level of cooperation from the trader concerned. The ACCC may accept court enforceable undertakings which include terms such as ceasing the unfair practices or providing redress to affected consumers. If a trader breaches the undertaking, the ACCC may then seek an order from the court to enforce the undertaking or any other order it considers appropriate. There are also other court orders that the ACCC may seek, such as corrective advertising, injunction and cease trading orders²⁰.

2.45 Similar court enforceable undertakings are also found in Part 8 of the Enterprise Act of the UK. First, the enforcer, the Office of Fair Trading ("**OFT**")

²⁰ Para. 82-84, '*Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*' by the Directorate for Science, Technology and Industry Committee on Consumer Policy of the Organization for Economic Co-operation and Development dated 20 December 2006.

would approach the alleged infringer for an undertaking and give at least 14 days to respond. Where the trader has refused to give the undertaking or breached the undertaking given to the OFT, the OFT may apply to the court for an enforcement order (injunction). Normally, an enforcement order can be granted only where an attempt to achieve a resolution through an undertaking has failed. The OFT also has the power to publicize the undertakings and enforcement order. However, it is noted that this enforcement mechanism only applies to breaches that harm collective consumer interests.

Enforcement of Criminal Provisions

2.46 As noted above, in addition to the administrative measures, the Statute may provide for criminal sanctions against those practices that are sufficiently serious to warrant intervention by the criminal law. The enforcement of criminal provisions will inevitably involve powers such as entry into premises, seizure of goods and arrest. It will be more appropriate for disciplined forces than an independent public body to exercise such powers. Therefore, if the Statute contains criminal provisions and the agency is an independent public body, the cases involving contravention of these criminal provisions should be referred to the relevant disciplined forces. It seems that in such cases, no reconciliation would be required before a case referral.

Recommendation 3 – Enforcement Mechanism

2.47 In summary, the Council recommends that:-

- (a) The enforcement agency should adopt a measured and compliance-oriented enforcement approach, heavily relying on administrative measures, with backing of court sanction. The measured steps should be:-
 - (i) reconciliation on a voluntary basis;
 - (ii) written court enforceable undertakings from traders;
 - (iii) court enforceable cease and comply notice issued by the enforcement agency ;
 - (iv) application to the court for financial penalty, declaration and injunction in case of breach of a cease and comply notice or an undertaking.

- (b) The agency should be empowered to obtain information for the purpose of investigation, and for monitoring compliance of undertakings and cease and comply notices issued by the agency, and of injunctions granted by the court.
- (c) The trader concerned should be given reasonable opportunities to make representations at various stages (including investigation) and appeal against cease and comply notices or any part of a notice.
- (d) The enforcement measures should escalate from persuasion to sanction by court for more serious cases, in accordance with the seriousness of the breach, the level of non-compliance and non-cooperation, and other relevant factors. The enforcement agency may, as the urgency or situation of the matter requires, seek immediate court injunction without going through the processes of reconciliation and cease and comply notice.
- (e) The Statute should mainly provide for civil liabilities except for unfair practices that are so morally reprehensible or have caused so great a social harm, that criminal sanction is justified.
- (f) If the Statute contains criminal provisions and the agency is an independent public body, the cases involving contravention of such criminal provisions should be referred to the relevant disciplined forces.

Improvement of Private Right of Action and Access to Redress

Improvement of Private Right of Act

2.48 The Council considers that private rights of action²¹ by consumers should be a vital part of the enforcement regime of the proposed Statute. This form of action may supplement enforcement by the enforcement agency and also induce compliance by traders.

2.49 In fact, consumers currently have private rights of action under common law rules of contract and tort, and trade practices related statutes for misleading or

²¹ The forum may either be an existing court or the Tribunal discussed in the latter part of this Report.

deceptive conduct and unfair sales tactics such as the Unconscionable Contracts Ordinance (Cap. 458). The provisions of the proposed Statute will have similar provisions and there is, therefore, no reason why those consumers should be deprived of the right of taking private action under that Statute. In addition, there are examples in the existing legal frameworks that provide for a private right of action, in addition to enforcement by a public agency. For example, by virtue of s.39A of the Telecommunications Ordinance (Cap. 106), a person sustaining loss or damage as a result of an operator's misleading or deceptive conduct in breach of s.7M, or a breach of a licence condition, determination or direction relating to that section, may bring an action for damages and other remedies against the operator. In addition, s.57 of the Unsolicited Electronic Messages Ordinance (Cap. 593) also provides that a person who suffers loss or damage by reason of a contravention of any provision of the Ordinance shall be entitled to bring proceedings against the person who committed the contravention.

2.50 Accordingly, the Council can see no reason why similar rights of private action should not apply to the regulation of unfair trade practices in a general context in the economy.

Recommendation 4 – Right to Sue under the Proposed Statute

2.51 The Council is of the view that consumers should be given a private right to sue²² for a contravention of the proposed Statute, and to seek damages.

Improvement of Access to Redress

2.52 As noted above, consumers currently have access to the courts in some circumstances to take private action. However, only those consumers whose claims are below HK\$50,000 are benefited from a swift, informal and inexpensive procedure provided by the Small Claims Tribunal. A consumer whose claim exceeds the limit would have to pursue a matter in the higher courts which involve costly, lengthy and complicated proceedings. It could be a daunting task for most consumers. One possible solution is to set up a separate and specialised Consumer Tribunal to facilitate a cost-saving, informal and swift resolution of consumer disputes.

²² Ibid.

Consumer Tribunal

2.53 It is proposed that the Tribunal should deal with claims for monetary compensation only in relation to goods, services, rights and obligations of types ordinarily acquired for private use, consumption or benefit²³.

2.54 As a forum for quick and cost efficient consumer dispute resolution, the Council proposes that no legal representation should be allowed at the hearings of the Consumer Tribunal. The Council also considers that there should not be any monetary limit for the claims filed with the Tribunal. However, where the claim is large, the case is complicated or legal representation is appropriate, the Tribunal may at any stage of the proceedings, either at its own initiative or upon the application of any party, transfer the proceedings to the courts.

Other Alternatives

Small Claims Tribunal

2.55 Another alternative to address the problem is to expand the monetary jurisdiction of the Small Claims Tribunal. However, this may greatly increase the caseload of the Tribunal which deals with not only consumer claims but also claims between businesses.

Legal Assistance

2.56 On the other hand, expensive legal costs are particularly a factor inhibiting the initiation of litigation by persons falling into the 'sandwich class' who are not eligible for legal aid and whose cases are not appropriate for the grant of assistance by the Consumer Legal Action Fund. Therefore, consumer's access to redress may be improved by relaxing the means test under the Supplementary Legal Aid Scheme or by enhancing the availability of the Consumer Legal Action Fund through resources augmentation.

Recommendation 5 – Right to Redress

2.57 The Council recommends that to improve consumer access to redress, serious consideration should be given to the following approaches:-

²³ The Tribunal deals not only with monetary claims in relation to trade practices matters, but also other consumer disputes such as contractual claims. However, under the enforcement mechanism of the proposed Statute, the enforcement agency will have to seek relief (such as injunctions, declaration and financial penalty) through more formal and stringent proceedings in the courts, instead of the Tribunal.

- (a) to establish a Consumer Tribunal;
- (b) to expand the scope of the Supplementary Legal Aid Scheme;
- (c) to enhance the availability of the Consumer Legal Action Fund.

What Attributes should the Enforcement Agency have?

2.58 It is envisaged that the enforcement agency should be a government department or statutory public body specifically dedicated to consumer protection, by regulating and monitoring unfair trade practices in the marketplace. Moreover, it should also have a vital role in enhancing consumer empowerment by public education programmes; assisting traders in constructing their own compliance programmes; developing business guidelines; and assisting industry bodies to construct codes of practice.

2.59 An issue that has to be considered is whether the proposed agency should be set up within either of the two existing major consumer protection agencies in Hong Kong; i.e., the Customs and Excise Department (“**C&ED**”) and the Consumer Council.

The Customs and Excise Department

2.60 The Consumer Protection & Prosecution Bureau under the Trade Controls Branch of the C&ED undertakes control of the following matters:

- (a) Short weights and measures;
- (b) Overstating fineness of gold and platinum;
- (c) Unsafe toys and children’s products;
- (d) Unsafe consumer goods.

2.61 Apart from pro-active monitoring and investigation, the Consumer Protection Division of the Bureau also receives consumer complaints regarding the said matters.

2.62 It seems that C&ED is logically a good option to undertake the task of enforcing the proposed Statute. The reason is that the C&ED already has a consumer protection team that has gained experience in enforcing consumer protection law, in some aspects, and that the team is already in place, so it can

readily transform into a competent authority for the enforcement of the proposed Statute. Moreover, there is an advantage of consolidating resources and reducing administrative costs through sharing of resources.

2.63 On the other hand, it is arguable that the inclusion of the enforcement agency as a part of the administrative machinery of the C&ED, which is multi-tasked²⁴, may result in the enforcement agency's role being diminished and thereby losing its core statutory mandate to raise the profile of consumer protection.

2.64 The Government, in some circumstances, is also a supplier of goods or services to consumers and therefore may be subject to the proposed Statute²⁵. Under such circumstances, an independent enforcement agency would give consumers more confidence and would be better perceived as scrupulously impartial.

The Consumer Council

2.65 The Council is a statutory body set up pursuant to the Consumer Council Ordinance (Cap.216). It discharges its statutory duties through publishing reports on research into matters effecting consumers and product testing, mediating consumer disputes, advising the Government on policy with implications on consumer interests and conducting consumer education. It is also a major advocate in protecting and promoting consumer rights.

Established Infrastructure, Image and Experience

2.66 There may be views that the Council itself should take on the role of the enforcement agency under the proposed Statute. At first glance, this appears to be a practical option. The Council already has an established infrastructure for the various tasks involved in consumer protection. It has gained abundant experience in mediation (with many of its cases related to unfair trade practices); conducting consumer education; and giving policy advice regarding trade practices issues. Therefore, its vast experience and resources would make it conveniently placed to take on the role of expanding the breadth of consumer policies and strategies envisaged under the proposed Statute. It would also benefit from its well-established image of being at the vanguard of consumer protection in Hong

²⁴ The missions of the Department are anti-smuggling, protecting and collecting revenue on dutiable goods, detecting and deterring narcotics trafficking and abuse of narcotic drugs, protecting intellectual property rights, protecting consumer interests, protecting and facilitating legitimate trade and industry and upholding trading integrity and fulfilling international obligations. http://www.customs.gov.hk/eng/about_vision_e.html.

²⁵ For example, confiscated/unclaimed goods and condemned stores are from time to time sold by the Government Logistic Department, and philatelic products sold to the general public by the Hongkong Post.

Kong over many years, thereby enjoying a high-level of credibility if it undertakes the role of enforcing the Statute.

Possible Effect on Its Existing Functions

Mediation

2.67 As noted above, the enforcement agency has a duty under the Statute to facilitate reconciliation on a voluntary basis between consumers and traders, in the first instance, except in very urgent cases. However, should the Council be the enforcer, there may be arguments that the confidence of traders in the Council's role as a mediation body may be weakened due to the possibility that information obtained in reconciliation might be used in proceedings for enforcing the proposed Statute. This concern can be resolved by the proposed provision under the Statute that the information obtained during the reconciliation should be kept confidential and should not be admissible as evidence in any proceedings under the Statute, except with the consent of the party from whom the information was obtained.

Consumer Advocacy

2.68 There may be other views that it is inappropriate for a body that is primarily tasked as an advocate for consumers, such as the Council, to take on a law enforcement role because a law enforcement agency must be, and must be seen to be impartial. However, the law that is being enforced is by its very nature advocating for consumer protection. The relevant agency will have an inherent objective to protect consumers through administering the law, and in the course of pursuing that objective, advocating for any policy changes that it considers necessary for improving the consumer protection objective of the law. Therefore, the Council's role of being a consumer advocate would not be in conflict with that of an agency also tasked with enforcing a law.

Research and Testing

2.69 It might also be opined that the current Council function of product research and testing is by its very nature inappropriate for a consumer law enforcement agency.

2.70 The research and testing reports on products published in the Council's Choice magazine may have some commercial effect in the marketplace, as consumers would adduce from the results which of the products is of better quality or price etc. The Council's research and testing work, as is the case with other product

testing and research entities, could therefore have an economic influence on consumer demand and the viability of competitors in the marketplace. Moreover, the Council's Choice magazine is sold for the purposes of generating revenue for the Council. It could therefore be argued that it is inappropriate for an enforcement agency to enter into these forms of market influence, and revenue raising in a commercial environment.

Singaporean Experience

2.71 In considering the possible role of the Council in the proposed enforcement mechanism, we may refer to the experience of the Council's counterpart in Singapore, the Consumer Association of Singapore ("**CASE**"). It is a non-profit and non-government public body composed of volunteer members who elect a Central Committee that oversees the work of its staff and various advisory councils, committees and taskforces. It retains a mediation service for consumer disputes and conducts research and testing on consumer products. In the meantime, it is also the enforcer of a comprehensive trade practices statute, namely the Consumer Protection (Fair Trading) Act ("**CPFTA**"). Under the Act, it may apply to the court for declaration and injunction against a trader that engages in, or is about to engage in unfair trade practices.

2.72 While the mediation service of the Council is provided by its employees, similar services provided by CASE are performed by trained volunteer mediators (about 200 in number). Moreover, mediation in Singapore is in effect a necessary step that an aggrieved consumer has to take before pursuing claims in the court. Under s.6(9) of CPFTA, when the court makes an order against a trader, after having found that an unfair practice has occurred, it shall consider whether or not the consumer made a reasonable effort to resolve the dispute with the trader before the action.

2.73 CASE resolves the concern about the use of information obtained in mediation by making it a practice that the parties participating in the mediation are required to sign a confidentiality agreement not to disclose information on the matter to the public except when required and ordered by the court.

2.74 Currently, the Council conducts surveys and testing with a view to discharging its statutory duties of disseminating information to and educating consumers. On the other hand, the survey and testing activities of CASE are part of its work to monitor and to ensure compliance with the CPFTA. Therefore, the Council will also be required to perform a similar function if it is to enforce the proposed Statute.

New Enforcer

2.75 The possibility exists that the proposed Statute could be enforced by a new agency. This option gives a relatively free and flexible hand to the Government for it to devise a new structure for the agency accommodating its statutory functions, without the problems arising from fitting those functions within an existing entity. However, the newly created agency may need time to establish its image and credibility before the public. Comparatively speaking, the establishment of the new agency may involve higher costs than building into an administrative division in an existing agency that has already been in place, and has a basic framework for the role of enforcement.

The Council's Position

2.76 As the author of this Report, the Council believes that in order to avoid criticisms of conflict of interests, and perceptions of bias, one way or the other, that may arise from any recommendations regarding the role of the Council under the proposed Statute, the matter is best left open for further public deliberation.

How should the Statute fit within the Existing Legislative or Regulatory Framework?

2.77 Given the comprehensiveness of the proposed Statute, an issue arises as to how the proposed Statute will fit within the existing legislative or regulatory framework; in particular, where an existing provision replicates a provision of the proposed Statute. Ideally, for the purposes of clarity, the original provision should be repealed or amended so as to avoid replication both in legislation and enforcement. The Unconscionable Contracts Ordinance is considered as an example that needs to be reviewed.

2.78 However, while some existing provisions replicate the proposed Statute, it may not be appropriate for the new enforcement agency to enforce them. One typical example is the case where such provisions regulate specific sectors, and the enforcement of which requires a significant degree of professional and specialized knowledge that the new enforcement agency may not have²⁶. Therefore, if the

²⁶ For instance, s.95 of the Banking Ordinance (Cap. 155) empowers the Monetary Authority to serve a written notice requiring a bank to withdraw, remove or cease issuing any advertisements containing false, misleading or deceptive statements or representations. The enforcement of this provision may require specialized knowledge on the banking industry. Other examples are s.7M of the Telecommunications Ordinance and the provisions of the Broadcasting Ordinance that will be discussed in Chapter 3.

statutory frameworks constituted by such provisions have already provided a similar level of protection parallel to and compatible with the proposed Statute, there is no need to transpose the provisions to the proposed Statute and to have them enforced by the new enforcement agency.

2.79 It follows that the sectors covered by these existing pieces of legislation that meet the above criteria should be excluded from the proposed Statute. If necessary, amendments should be introduced to these existing statutes to ensure that they will cover the range of unfair trade practices that the proposed comprehensive Statute will regulate. Further, additional powers should be given to the existing agencies, if necessary, for the purposes of giving them similar enforcement measures to those proposed for the agency that will administer the proposed Statute.

2.80 For the purpose of ensuring that the enforcement agencies in specific sectors will maintain a similar level of protection to consumers in their enforcement, it may be considered whether it is necessary for them to submit a report, when reasonably required by the Government, on their relevant regulatory work for public scrutiny.

2.81 In this connection, the Council has also considered whether it is appropriate to exempt the professional bodies from the proposed Statute. The practices of members of professional bodies are also one of the subjects of consumer complaints. It is not uncommon that such practices are of the kind that will be defined by the proposed Statute as unfair. Currently, the complaints are dealt with by the professional bodies' own rules and procedures. Aggrieved consumers may also seek redress by civil action. Enforcement by a public agency would not arise unless the practice complained of amounts to a criminal offence.

2.82 As regulation of professional practices requires specific expertise or knowledge in particular areas that the new enforcement agency may not have, it is more appropriate for the trade practices of members of these bodies to remain to be regulated by their respective rules and procedures. "Professional bodies", for the purpose of the proposed Statute should mean a well-recognised and established organization (not being a general trade association) that:-

- (a) comprises substantial numbers of practitioners in a defined field of profession, the practice of which requires distinctive skills and knowledge;
- (b) is constituted by formal procedures for the purpose of representing such a profession and safeguarding the public interest;
- (c) facilitates an effective self-regulatory mechanism closely monitoring the trade

practices of its members and providing easy access to consumers' complaints against professional misconduct where complaints are considered by a disciplinary tribunal with potent sanctions, such as suspension from practising and striking off from registration of membership; and

- (d) regulates the practices of their members by codes or rules of ethical standards that are similar to the uniformed trading standards set out in the proposed Statute.

2.83 To make the proposed Statute clear in this aspect, the Government may consider whether, in drafting the Statute, a list of professional bodies meeting the above criteria should be attached to the proposed Statute²⁷. Further, an effective referral system should be established between the new enforcement agency and the professional bodies so that complaints filed with the new enforcement agency against professionals will be duly and speedily referred to the bodies concerned.

Recommendation 6 – Fitting within the Existing Legislative or Regulatory Framework

2.84 To summarize, the Council is of the view that trade practices provisions in existing statutes regulating specific sectors should remain unaffected by the enactment of the proposed Statute if they meet the following criteria:-

- (a) A significant degree of professional and specialized knowledge is required for enforcement of such provisions or statutes; and
- (b) A similar level of protection has already been provided by such statutory frameworks parallel to and compatible with the proposed Statute.

2.85 The sectors regulated by the statutes meeting the criteria should be excluded from the proposed Statute, while amendments to these statutes should be introduced, if necessary, to make them in line with the proposed Statute in consumer protection.

2.86 As regards the professional bodies as defined by the proposed Statute, it is more appropriate for the trade practices of members of these bodies to remain to be regulated by their respective rules and procedures. An effective referral system

²⁷ It appears that in accordance with the criteria, the bodies currently monitoring the practices of doctors and dentists, for example, will be considered as professional bodies under the proposed Statute.

should be set up through which complaints filed with the new enforcement agency against professionals will be duly and speedily referred to the bodies concerned. Moreover, in drafting the Statute, the Government may consider supplementing the relevant provisions of the proposed Statute by a list of professional bodies.

2.87 The above suggested approach, in dealing with the interface with agencies enforcing different legislations, has the benefit of making the administrative processes involved in applying the proposed Statute to the economy, less costly. This is because the Government will only need to focus on providing resources to cover the current unregulated areas. Moreover, as previously noted, enforcement of certain specialized and technical provisions would seem to be more effective by existing teams that have acquired abundant knowledge and experience in enforcement.

2.88 However, it has to be noted that the enforcement agency under the proposed Statute and other separate sector-specific agencies may have different enforcement policies in addressing unfair trade practices, which may bring about different legal consequences. It is important therefore, for traders and consumers to know which agency is going to take action in relation to matters arising in separate economic sectors.

Other Parallel Regimes

2.89 Apart from the above-mentioned regimes of specific sectors and professional bodies, there are also existing provisions in some general legislations regulating unfair trade practice covered by the proposed Statute. A typical example is the provisions of the TDO prohibiting the application of false and misleading trade descriptions on goods. As noted in Paragraphs 2.19 to 2.21 and illustrated by Annexures 4 and 5, the scope of the proposed Statute is comprehensive covering all misleading or deceptive acts or omissions, aggressive or high pressure practices and other improper or unfair trade practices performed by trader acting in trade or commerce, before during or after a transaction. As such, it not only covers the application of false or misleading trade descriptions to goods prohibited by the TDO, but also the same application to services, private residential property and rights and obligations beyond the TDO's ambit. The proposed Statute is consumer-oriented focusing on unfair trade practice occurring in business to consumer transactions. On the other hand, the TDO concerns only with inaccuracy of information regarding goods supplied in the course of trade rather than the trade practice of which the information forms part.

2.90 However, the trade descriptions provisions of the TDO is not purely a safeguard for consumers but also one for traders as they regulate the prohibited act taking place in both business to consumer and business to business transactions. Moreover, the provisions are enforced by criminal prosecution as distinguished from the administrative measures generally adopted in enforcing the proposed Statute.

2.91 Given that the TDO and the proposed Statute are different in terms of scope, objective and enforcement as mentioned, the Council is of the view that the trade descriptions provisions and their enforcement under the TDO should remain unaffected by the enactment of the proposed Statute, subject to the specific recommendations for improvement to the TDO set out in Chapter 3.

2.92 In the circumstances, the trade descriptions provisions of the TDO and the proposed Statute will complement each other in furthering consumer protection against unfair trade practices.

Subsidiary Legislation and Guidelines on Specific Trade Practices Issues

2.93 The proposed Statute will offer more comprehensive protection to consumers and set uniform trading standards for the economy. However, apart from the general protection afforded by the Statute, there are some specific trade practices issues that are of grave social concern and which the Council considers need either further and more detailed regulation through subsidiary legislation, and/or guidance to clarify how certain matters will be dealt with by the agency enforcing the Statute. The Council is of the view that in principle, the regulation of these specific issues should be first addressed by guidelines that promote compliance. If compliance with the guidelines is subsequently considered to be unsatisfactory, formal control may need to be imposed by setting out specific rules with legal force in the form of subsidiary legislation.

Guidelines

2.94 The Council considers that guidelines on the following two specific areas would be of assistance in areas where there has been significant public demand for improvement:-

- (a) Misleading or deceptive advertisements; and
- (b) Discount sales price indications.

2.95 The guidelines are not intended to be a substitute for, or a definitive interpretation of the proposed Statute. They should only be viewed as illustrating how the provisions against deceptive and misleading conduct in the proposed Statute may apply in specific areas. To make the guidelines a user friendly tool for traders' reference, the Council is the view that the Government should invite the involvement of industry in the drafting of them.

Guidelines for Misleading or Deceptive Advertisements

2.96 As noted, the Council contemplates that the proposed Statute will cover all pre-contractual practices that are misleading and deceptive. This will of course include misleading or deceptive advertising claims that usually consist of dubious or exaggerative representations²⁸.

2.97 Consumers who rely on inaccurate information in these advertisements may end up suffering financial losses as the products do not achieve the claimed results, and in some cases, usage of these products may result in damage to their health or put their safety at risk.

2.98 To assist traders in compliance with the provisions, a set of detailed guidelines should be issued to illustrate the manner in which relevant traders should make their claims and representations in advertisements so as to be consistent with the requirement for 'truthfulness in advertising' inherent in the Statute.

2.99 When formulating the guidelines, the enforcement agency could refer to the manner in which sector-specific guidelines on misleading and deceptive conduct have been drafted by other agencies.

2.100 The Guidelines issued by the Telecommunications Authority (the "**TA**") on "Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets" ("**s.7M Guidelines**"), which set out in detail the approach that the TA will take when forming his opinion on any alleged misleading or deceptive practices under s.7M of the Telecommunications Ordinance, are a case in point. The s.7M Guidelines give

²⁸ For instance, misleading or deceptive claims found in advertisements regarding health, beauty and body contouring products.

clear guidance on the TA's views on the general duty of traders to ensure that the descriptions about their products are clear and accurate, and the factors that will be considered by the TA in determining whether conduct will fall within the prohibition of s.7M. For example, that a duty to substantiate any advertising claims should be observed; that the use of certain words such as "free", "unlimited" or "no more to pay" in promotional activities are appropriately qualified; and that certain matters are noted in advertising, such as comparing 'like with like' in comparative advertising.

2.101 The "Generic Code of Practice on Television Advertising Standards" and "Radio Code of Practice on Advertising Standards" (collectively known as the "**Codes**"), which are both issued by the Broadcasting Authority, also set out detailed requirements and guidelines as to the advertising standards for TV service providers and licensed sound broadcasting service providers. The general principle of the Codes is that all advertising should be honest and truthful and not misleading or deceptive. The Codes provide, inter alia, that:-

- (a) No advertisements may contain any descriptions or claims which, expressly or by implication, depart from truth or mislead about the product advertised, or about its suitability for the purpose recommended. (TV Code and similar provision in Radio Code)
- (b) All factual claims should be capable of substantiation. (TV Code and similar provision in Radio Code)
- (c) No advertisement may misleadingly make a claim or imply that a product advertised, or any ingredient of it, has some special features or compositions which are incapable of being established. (TV Code)
- (d) Unless it can be substantiated that professional advice or recommendation has actually been obtained from an acceptable organization of the relevant profession, advertisements giving the impression of professional advice or recommendations by persons who appear in advertisements and who are presented, either directly or by implication, as being qualified to give such advice or recommendation, is not acceptable. (TV Code and Radio Code)
- (e) No advertisement may make exaggerated claims. (TV Code and Radio Code)

Recommendation 7 – Guidelines for Misleading or Deceptive Advertisements

2.102 The Council recommends that guidelines specifically directed at misleading or deceptive advertisements should be issued by the enforcement agency under the proposed Statute. The guidelines could be drafted with reference to the general standards required under the TA's s.7M Guidelines, and the requirements under the Codes issued by the Broadcasting Authority. The guidelines should illustrate to traders that to comply with the Statute, they should ensure that:-

- (a) all advertising claims shall be honest and truthful;
- (b) no misleading, deceptive or exaggerated advertising claims shall be made;
- (c) all factual claims, and claims regarding the effects of the products, shall be substantiated with sound and reasonable evidence; and
- (d) all claims in advertisements giving the impression of professional advice or recommendations should be substantiated.

2.103 The guidelines may also provide detailed guidance regarding:-

- (a) the requirement for the use of specific terms in certain advertisements;
- (b) matters that should be noted in comparative advertising; and
- (c) matters that the enforcement agency will take into account in enforcing the proposed Statute.

2.104 Advertising is not only a consumer issue. In some cases, misleading or deceptive advertising claims may induce consumers into improper self-medication and thereby delay proper treatment. This is clearly a public health issue. Improvement of the Undesirable Medical Advertisements Ordinance (Cap. 231) is therefore called for. Since improvement of the Ordinance is a public health issue and not directly related to trade practices, it is outside the ambit of this study. The Council will propose amendments in separate submission to the Government.

Guidelines on Discount Sales Price Indications

2.105 Price is an important, if not critical, representation that is used by traders to invite consumers to make offer. It is the Council's experience that disputes regarding prices are not uncommon, particularly with regard to claimed discount sales price indications where allegations by consumers that price indications have been either misleading or false, and have led to what they consider has been a fraud perpetrated on them.

2.106 Price comparisons between the purported original price and the discounted price are a common practice and when falsely made, or misrepresented in some way, cause consumer anguish, leaving them financially worse off because they have purchased the product at what was assumed to be a bargain price, but has later been found to be more expensive than represented. In other circumstances where a price indication has been falsely represented in advertising, consumers have suffered detriment by expending time and resources to visit the store only to find that the indicated price is not as it first appeared, and they have no option but to abandon their purchase and count their losses. With regard to this practice, the perception is that the store is counting on at least some consumers making the purchase anyway, notwithstanding that the price indication was not as initially stated. This has an anticompetitive consequence for legitimate businesses that honestly represent their prices, because they are put at a disadvantage and lose customers to the less scrupulous.

2.107 False and misleading price indications are a matter that will be actionable under the proposed Statute, and traders that engage in unscrupulous price indications will find themselves at risk. In order for the business community to understand what their obligations are under the proposed Statute, the Council considers that a set of guidelines on pricing matters is an important step that should be taken at the outset. Having regard to the more prevalent misleading pricing matters of which the Council is currently aware, it considers that Guidelines on what is good practice to follow in giving price indications by way of price comparisons and so called discounts (so as to avoid misleading practices in contravention of the proposed Statute) should be a priority. Further pricing guidelines could follow at the enforcement agency's discretion, having regard to common pricing problems emerging in the marketplace.

Recommendation 8 - Guidelines on Price Comparisons

2.108 A set of guidelines on price indications, covering such matters as appropriate methods of making price comparisons, should be issued under the proposed Statute, setting out the appropriate manner in making price comparisons, such as:-

- (a) Traders should make price comparisons only if they are able to show that representations they make are accurate and valid.
- (b) Original prices as stated in comparisons with discount prices should have been applied for reasonable periods of time before the price comparisons are made.
- (c) Price comparisons should always state clearly the higher original prices as well as the discounted prices. For example, traders should not make statements such as "Sale Price \$9.9" or "Reduced to \$99" without quoting the original price that the terms 'Sale' and 'Reduced' refer to. A more informative and correct price comparison would be "Reduced from \$100 to \$80";
- (d) Traders should make clear to consumers what sort of price the higher price is. For example, in some circumstances, it should be made clear whether the higher price is a regular price or a seasonal price (which is normally higher) so that consumers can assess the benefit they will actually obtain in purchasing at the discounted price.
- (e) Words used in price indications should have their normal everyday meaning. For example, the word "Sale" would be commonly understood by a reasonable consumer to mean that the goods offered are being discounted from their previous selling price; and not that they are merely "for sale".

CHAPTER 3: PROPOSED IMPROVEMENTS TO CURRENT LEGISLATIVE AND REGULATORY FRAMEWORKS

Introduction

3.1 To achieve a high level of consumer protection, the Council is of the view that improvement should be made on existing provisions outside the scope of the proposed Statute. In this connection, rectification should be made to the deficiencies of the existing provisions under the Trade Descriptions Ordinance, and the sector-specific regulation in the Telecommunications Ordinance and Broadcasting Ordinance.

3.2 In addition, standard consumer contracts are common practice, and in many cases, they are devised in such a manner that they are unfair to consumers and are often used by unscrupulous traders to the detriment of consumers. Redress for consumers against these unfair practices, is currently not without problems, and could also therefore be met by a proactive legislative response.

3.3 This Chapter therefore examines the following issues:-

- (a) Measures rectifying the deficiencies of the Trade Descriptions Ordinance;
- (b) Measures regulating unfair terms in standard consumer contracts; and
- (c) Improvement on the regulation of unfair practices in telecommunications and broadcasting industries.

Measures Rectifying the Deficiencies of the Trade Descriptions Ordinance (the “TDO”)

3.4 At the time of writing this Report, the Government has taken steps to rectify some inherent deficiencies of the TDO. In April 2007, a series of complaints by Mainland tourists aroused serious social concern over the impact they had on the image of Hong Kong, and the possible future loss in revenue by the tourist industry.

3.5 Subsequently, more stringent and responsive administrative measures were taken by various enforcement agencies and public bodies to curb the unfair practices under complaint, such as the mutual referral system established by the Police, the Council and Customs and Excise Department (“**C&ED**”) and the Quality Tourism

Services Scheme introduced by the Hong Kong Tourism Board. In addition, the Government proposed a number of amendments to the TDO and its subsidiary legislation as a result of a public consultation based on the observations of the Government Working Group²⁹; in which the Council was actively involved.

3.6 On 21 December 2007, the Government introduced the Trade Descriptions (Amendment) Bill 2007 (the “**TDO Amendment Bill**”) that sets out details of the proposed amendments to the TDO. It is understood that the Government will soon put forward the formal documentation for amending the subsidiary legislation of the TDO (the “**Proposed Subsidiary Amendments**”).

3.7 This legislative exercise is intended to improve consumers’ rights to accurate and essential information. The amendments include:-

(a) Misleading Representation as to Price³⁰

- (i) Making it an offence for a person to display in the course of trade or business any price indication in relation to goods in a manner prescribed by the TDO Amendment Bill that may mislead consumers.
- (ii) Making it an offence for a person who fails to notify the consumer before payment is made that the price of any of the 5 types of regulated electronic products does not include any basic accessories that are reasonably expected to be included in the price.

(b) Misrepresentation of After-sale Repair or Maintenance Service³¹

- (i) Expanding the definition of “trade description” to cover “warranty and availability of after-sale repair and maintenance services” and making it an offence for a person to make a false representation on matters relating to this description.
- (ii) Imposing obligations on traders of regulated electronic products to state in the invoices or receipts any representation made by the trader regarding matters relating to the availability of after-sale repair and maintenance services.

(c) Misrepresentation of Seller’s Connection with Another Person³²

²⁹ The Working Group was led by the Commerce and Economic Development Bureau (formerly the Economic Development and Labour Bureau) and composed of representatives from the Council, the TIC, Hong Kong Tourism Board, the Police and the C&ED.

³⁰ S. 7 of the TDO Amendment Bill.

³¹ S. 4 of the TDO Amendment Bill.

³² S. 7 of the TDO Amendment Bill.

Adding a provision prohibiting false or misleading representation in the course of trade, business or profession, for the sale of goods, as regards seller's connection with another person.

(d) Definition and Information on Natural Fei Cui (天然翡翠)³³

- (i) Introducing a definition regulation on natural Fei Cui (天然翡翠)³⁴ to set out clearly the conditions for the use of this term.
- (ii) Introducing an order on natural Fei Cui requiring traders to state clearly the information and details required in the invoices or receipts (e.g. description, price and date) and to put up the prescribed notice at the point of supply.

(e) Definition and Information on Diamond³⁵

- (i) Introducing a definition regulation on diamond to spell out the conditions for the use of this term.
- (ii) Introducing an order on diamond requiring traders to state clearly the specific information and details required in the invoices or receipts (e.g. description, price, date and weight) and to put up the prescribed notice at the point of supply.

(f) Chinese Translation of Platinum³⁶

- (i) Amending the Chinese translation of "white gold 白金" under paragraph 5(3) of the Trade Descriptions (Marking) (Gold and Gold Alloy) Order to "白色黃金".
- (ii) Amending the Chinese translation of platinum under the Trade Descriptions (Definition of Platinum) Regulations to "白金" or "鉑金".

(g) Information provided in invoices for gold/gold alloy³⁷

Amending paragraph 6(1) of the Trade Descriptions (Marking) (Gold and Gold Alloy) Order to set out more detailed information requirements for invoices or receipts e.g. type of gold, fineness and weight.

³³ Paragraph 11 of the Consultation Paper.

³⁴ It is proposed that the term "natural Fei Cui" will mean "natural jadeite jade" (天然硬玉質翡翠).

³⁵ Paragraph 13 of the Consultation Paper.

³⁶ Paragraph 15 of the Consultation Paper.

³⁷ Paragraph 18 of the Consultation Paper.

- (h) Information provided in invoices for platinum³⁸

Amending paragraph 6(1) of the Trade Descriptions (Marking) (Platinum) Order to require traders to provide more detailed information for invoices or receipts e.g. fineness and weight.

- (i) Information on Electronic Products³⁹

Introducing an order on 5 types of regulated electronic products to require traders to include certain essential information of the products in the invoices or receipts, including description, model number and core features).

Consumer Council's Position

3.8 As noted above, the Council has been an active participant in the Government Working Group. It is therefore supportive of the amendments proposed under the TDO Amendment Bill and the Proposed Subsidiary Amendments. Hopefully, these (comparatively) simple and straightforward amendments will soon be approved and implemented as an expeditious and practical tool to address some of the deficiencies and the trade practice issues arising from them.

Trade Descriptions in Sales Receipts - Time of Application

3.9 As noted, it has been proposed by the Government that certain information prescribed by existing marking orders and other proposed new information provision orders should be contained in the invoices or receipts for the sale of gold/gold alloy, platinum, diamond, natural Fei Cui and certain electronic products. The Council is supportive of the proposal as it will discourage misleading or deceptive practices and strengthen consumers' rights to information.

3.10 However, there is still a technical question regarding enforcement that needs to be considered. For example, the respective Paragraphs 6 of the two existing marking orders, namely, the Trade Descriptions (Marking) (Gold and Gold Alloy) Order and the Trade Descriptions (Marking) (Platinum) Order require the trader, at the

³⁸ Paragraph 20 of the Consultation Paper.

³⁹ Paragraph 22 of the Consultation Paper.

time of supply of the article, to deliver to the buyer an invoice or receipt containing the information prescribed thereunder.

3.11 The information so prescribed and contained in the receipt falls within the definition of a trade description. Putting this information in the receipt would amount to applying a trade description on goods under s.6 of the TDO. Whether the application of that information takes place in the course of trade or business is important. This is because s.7 (1)(a) of the TDO provides that any person, who in the course of any trade or business *applies* a false trade description to any goods; or *supplies* or offers to supply any goods to which a false trade description is applied, commits an offence.

3.12 However, it is often the case that consumers only receive the receipts after they have physically taken possession of the goods. This would mean that the receipts are delivered after the supply has been made. If the trade description is found to be false, there arises an issue as to whether putting the information in the receipt after delivery of goods would constitute applying a false description to the goods or supplying the goods to which a false description is applied in the course of trade or business.

3.13 There is an English authority holding that no offence is committed under s.1 of the Trade Descriptions Act (the “**TDA**”) (the counterpart of s.7 of the TDO of Hong Kong) where the trade description is applied to the goods after they have been supplied. In *Hall v Wickens Motors (Gloucester) Ltd.* [1972] 1 WLR 1418, the defendant car dealers sold a car, and some 40 days later received a complaint from the purchaser about the steering. The defendants replied “There is nothing wrong with the car”. Examination of the car revealed that it was in fact defective. The defendants were charged with applying a false trade description to the car, namely, an oral statement that “there was nothing wrong with the car”. They were convicted but appealed. It was subsequently held that that no offence had been committed under s.1(1)(a) of the TDA (equivalent to s.7(1)(a) of the TDO) on the grounds that on the true construction of s.1(1) of the TDA, to constitute an offence it was essential that the application of the false trade description be associated with the sale or supply of goods; and the trade description applied (in the oral statement) after the transaction was not associated with the sale or supply of goods. For the purpose of establishing an offence under s.1(1)(a) of the TDA, it would appear therefore that in view of the Wickens’ case, the description must precede or be contemporaneous with the supply of goods⁴⁰.

⁴⁰ Consumer Law and Practice, 7th Edition, Geoffrey Woodroffe and Robert Lowe, para.13.17.

3.14 Accordingly, there may be legal arguments that receipts issued after a consumer has taken possession of the goods, and has made the payment, are unconnected with the sale or supply of goods; and thus the falsity of information contained in the receipts may not lead to an offence under s.7(1)(a) of the TDO.

Recommendation 9 – Trade Descriptions in Sales Receipts

3.15 To clear the uncertainty with the timing of the trade descriptions in sales receipts, the Council recommends that appropriate amendment(s) should be made to the relevant provisions of the TDO to make it clear that trade descriptions contained in sale receipts are covered by s.7 of the TDO. The improvement as proposed will remove any uncertainty in the legal application of the provisions, for enforcement by the relevant public authority.

Measures Regulating Unfair Terms in Standard Consumer Contracts

3.16 Unscrupulous traders have been known to exploit the weakness of consumers so as to procure contracts to their advantage (known as ‘procedural unconscionability’)⁴¹ or to impose contract terms that are excessively harsh or unfair to consumers, while unreasonably favorable to traders (known as ‘substantive unconscionability’)⁴².

3.17 In an earlier part of this Report, the Council considered in detail some procedural unconscionability found in the marketplace. However, the problem of substantive unconscionability should also be addressed. One typical example is that of unilateral variation clauses⁴³ which give traders unfettered and unconditional rights to unilaterally vary certain terms without agreement by consumers and as such are alleged to be unfair and one-sided. These clauses are commonly found in the standard consumer contracts of some industries. It is particularly unfair where consumers are locked into fixed term contracts and will bear high transactional costs

⁴¹ “Procedural unconscionability” refers to all kinds of misleading, deceptive, aggressive and high pressure, and unfair sales tactics used by unscrupulous traders in inducing or compelling consumers to make the purchases.

⁴² “Substantive unconscionability” refers to all kinds of unfair terms adopted by traders in their contracts (often in the form of standard contracts) with consumers. These terms are usually oppressive, harsh and one-sided in the sense that they shift all the risks and burden under the contracts to consumers.

⁴³ The total number of complaints received by the Council concerning unilateral variation of contractual terms was 187 in 2005, 134 in 2006 and 182 in 2007.

in terminating their contracts before they expire⁴⁴. The proliferation in the use of standard form contracts has resulted in a prevalence of unfair terms throughout a number of sectors in Hong Kong, giving rise to much concern from the public.

3.18 Given the rapid growth of the service economy and proliferation in the use of standard form consumer contracts, for permanent subscription of services, or for a long period of time, more and more consumers find that their rights and interests have been seriously jeopardized by the inclusion of unfair terms in the contracts. As such, more stringent regulation of traders' activities in this area is considered necessary in order to secure fair and basic protection for consumers. Such protection is particularly important if the unfair terms are widely adopted by all major traders in a sector and as a result, consumers (who invariably lack bargaining power) find they have no choice but to accept the terms in order to obtain the services needed.

Review of Unconscionable Contracts Ordinance

3.19 Currently, the main piece of legislation dealing with unconscionability in consumer contracts is the Unconscionable Contracts Ordinance ("**UCO**"), which empowers the court to grant relief where it finds that a consumer contract or a part thereof is unconscionable. However, as noted above, following the enactment of the proposed Trade Practices Statute, which will confer a more comprehensive protection for consumers against unfair trade practices, including unconscionable conduct, the UCO will most likely be substantively amended or repealed on the grounds of replication.

3.20 Nevertheless, contractual terms though excessive harsh or unfair to consumers will not be regulated by the proposed Statute unless they are connected to an unfair practice. The Council is of the view that to provide comprehensive protection for consumers in their purchasing actions and to secure a fair market place, a separate statute should be created to regulate the use of unfair terms in standard consumer contracts.

⁴⁴ The usual complaints are:

- i) Unilateral variation of the length of termination notice (e.g. from 1 month to 2 months) by service providers without giving consumers the corresponding right to terminate the contracts before the end of the fixed terms.
- ii) Unilateral increase of monthly membership fee payable during the fixed term. Similarly, consumers could not terminate the contract before the term expires or have to pay penalties for early termination.
- iii) Automatic/unilateral renewal of contracts by service providers after the end of the fixed terms at a higher monthly fee until termination by consumers by a specific period of written notice.

Australian Experience

3.21 The issue of unfair terms in standard form contracts is addressed in Australia. In some cases, the Australian courts have taken the view that s.51AB of the Australian Trade Practices Act, which regulates unconscionable conduct in trade or commerce, covers only procedural unconscionability and are reluctant to provide relief under this section where the complaint is only about substantive unconscionability. There have been proposals in Australia for new legislation against unfair terms in consumer contracts modeling upon the UK Unfair Terms in Consumer Contracts Regulations 1999⁴⁵ (“**UK Unfair Terms Regulations**”)⁴⁶. In fact, the Australian State of Victoria has already introduced legislation (i.e. Part 2B of the Victorian Fair Trading Act 1999), largely based on the UK Unfair Terms Regulations, specifically regulating unfair terms in consumer contracts.

United Kingdom Experience

3.22 The UK Unfair Terms Regulations, which implemented the EC Council’s Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, introduced a mechanism regulating unfair terms in standard consumer contracts. The UK Unfair Terms Regulations provide that “*a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer*” (Regulation 5(1)).

3.23 Under the Regulations, it is for the trader who claims that a term was individually negotiated to show that it was (Regulation 5(4)). Regulation 6(1) further provides that in assessing the unfairness of a contractual term, the court may refer to:-

- (a) the nature of the goods or services for which the contract was concluded;
- (b) at the time of conclusion of the contract, (i) all the circumstances attending the conclusion of the contract and (ii) all the other terms of the contract or of another contract on which it is dependent.

3.24 Any contract term found to be unfair under the Regulations is not binding on consumer (Regulation 8).

⁴⁵ <http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&PageNumber=1&BrowseLetter=U&NavFrom=1&parentActiveTextDocId=2730925&ActiveTextDocId=2730925&filesize=34920>.

⁴⁶ James Davidson (2006) DRAFT Unfair contract terms and the consumer: regulating substantive unfairness (CCCL Research Paper, forthcoming) and Submission on “Inquiry into unfair terms in consumer contracts” Oct 2006 by The Centre for Credit and Consumer Law, Griffith University.

3.25 Further, the Regulations are supplemented by an indicative and non-exhaustive list of terms, which may be regarded as unfair⁴⁷ (the “**UK Unfair Terms List**”) (see “**Annexure 6**”)⁴⁸. The List covers unilateral variation clauses as well as other potentially unfair clauses, such as:-

- (a) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
- (b) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract;
- (c) obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his obligations; and
- (d) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract.

3.26 Some exceptions are provided for suppliers of financial services. For example, they may reserve the right to alter the rate of interest payable by consumers.

3.27 So far, the List has been proven to be a very important tool against unfair terms in consumer contracts and has provided a very effective outcome for consumers⁴⁹.

3.28 Apart from giving the aggrieved consumer the right to treat the unfair term as not binding, the UK Unfair Terms Regulations also empower the Office of Fair Trading (“**OFT**”) to consider complaints that any contract term for general use in consumer contracts is unfair. The OFT may enter into discussions with and accept undertakings from traders and apply to the Court for an injunction against any trader appearing to be using, or recommending the use of, such unfair term. Information regarding the undertakings given by traders, applications made to court and orders granted may be

⁴⁷ Schedule 2 of the Regulations. A very similar list can also be found in the EC Council’s Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

⁴⁸ There are criticisms against the UK Unfair Terms List that the clauses therein are vaguely worded and a single clause might relate to a large number of different contractual terms. Nonetheless, the List plays a very important role in the assessment of unfairness of a term.

⁴⁹ On average, about 1,500 terms a year are abandoned following discussions between suppliers and the OFT. (see OFT Annual Report 2001-2004)

published by the OFT.

Proposed Regulation for Hong Kong

3.29 The Council believes that it is advisable to bring in new measures for regulating unfair terms in consumer contracts through the introduction of a new piece of legislation, modeled on the UK Unfair Terms Regulations, with appropriate modifications in view of the differences in the culture and marketplace of Hong Kong and the UK.

3.30 It is acknowledged that the Council's proposal may encounter the following arguments:

- (a) the proposed Trade Practices Statute will provide comprehensive protection to consumers against unfair practices and there is no need for separate legislation;
- (b) parties' freedom to contract on their own terms should not be interfered with by courts; and
- (c) there will be additional costs to industry in complying with the new mechanism and the costs might be passed on to consumers.

3.31 However, as noted, given the prevalence of unfair terms in consumer contracts, more stringent and detailed regulation for this issue is needed. No issue of freedom of contract arises as the standard contract does not really reflect the will of a consumer, since the contract is often dictated by traders and offered on a take it or leave it basis. Likewise, no substantial costs would be incurred to traders because the new measures only regulate standard forms of contracts that are commonly used in transactions with consumers.

3.32 Moreover, the regulation on unfair terms in standard consumer contracts will bring about considerable benefits⁵⁰ to society, which include:-

- (a) A more balanced sharing of risks between traders and consumers.
- (b) A fairer market, with increased confidence in the market by consumers.
- (c) Reduced opportunities for traders' exploitation of consumers.

⁵⁰ Submission on "Inquiry into unfair terms in consumer contracts" Oct 2006 by The Centre for Credit and Consumer Law, Griffith University.

- (d) A clear and detailed mechanism for ensuring that issues of substantive unconscionability can be effectively addressed.
- (e) Clear and detailed guidelines for traders as to the terms that will be considered as unfair under the measures.
- (f) The enforcement agency under the proposed Trade Practices Statute can also be empowered to administer, monitor compliance of, and enforce these measures.
- (g) More competitive marketplaces (because traders will not be able to offset their so called 'competitive discount prices' by increasing hidden costs through unfair terms in the contract.
- (h) The regulations are limited to standard consumer contracts only and would not affect those contract terms negotiated by the parties.

3.33 The Council has also considered the option of self-regulation through industry codes. However, this option might not be appropriate / effective in this area since the problem is not limited to a particular industry. Further, not every industry in Hong Kong has a well-established self-regulatory mechanism and there are also great differences in the regulatory powers that apply to the mechanisms (e.g. mandatory or voluntary codes) and the enforcement mechanisms available to the different regulatory bodies.

Recommendation 10 – Measures Regulating Unfair Terms in Standard Consumer Contracts

3.34 The Council recommends that legislation should be introduced to regulate unfair terms in standard consumer contracts (i.e. those contracts not individually negotiated). The legislation may be modeled upon the UK Unfair Terms Regulations, with an indicative and non-exhaustive list of potential unfair terms, with reference to the UK Unfair Terms List, taking into account the differences in culture and marketplace between Hong Kong and the UK.

3.35 The enforcement agency under the proposed Trade Practices Statute should also be responsible for administering, monitoring compliance of and enforcing this legislation.

Improvement on the Regulation of Unfair Practices in Telecommunications and Broadcasting Industries

3.36 The use of telecommunications and broadcasting services and associated goods has become an indispensable part of life. Subscribers of mobile phone services number about 9.3 million with a penetration rate of 135%; while the respective size of subscribers of the broadband and pay TV sectors is about 1.8 million. About 90% of domestic households use a fixed line telephone service⁵¹. Given the high penetration rate of these services in the community, unfair trade practices in the sectors have raised serious social concerns.

The Unfair Trade Practices

3.37 Hong Kong has experienced a surge of complaints about telecommunications and broadcasting services in recent years. For 2007, the number of complaints filed with the Council regarding alleged unfair trade practices in the supply of services in the telecommunications sector was 1197 and in the pay TV sector was 1002. For statistics of complaints for the two sectors from 2005 - 2007, please see **Annexure 1**.

3.38 Recently, the Legislative Council has been exerting pressure on the Government to address the problems of unfair trade practices (including aggressive, harassing or deceptive/misleading conduct) in these sectors⁵². On 4 July 2007, the Legislative Council passed a motion on “*Strengthening the regulation of unscrupulous business practices in pay TV, telecommunications and Internet services*”.

3.39 It might be argued that these types of trade practices problems can be adequately addressed by the proposed Trade Practices Statute. However, because the sector-specific legislation that currently exists for these industries may fall under the

⁵¹ The figures were mentioned in the speech on the Motion Debate on “Strengthening the regulation of unscrupulous business practices in pay TV, telecommunications and Internet services” dated 4 July 2007 by Ms Carrie Lam, Secretary for Development.

⁵² Generally, the alleged unscrupulous trade practices include:

- (a) Gaining access to consumers’ premises by making false or misleading representations (e.g. “Having done the maintenance for the common antenna, we need to go inside to check your television”).
- (b) Making false or misleading representations on the need to subscribe to pay TV services in order to allow consumers to enjoy high-definition TV.
- (c) Making false or misleading representations on the terms of a contract (e.g. the “preferential” rate to be offered).
- (d) Renewing a contract without the consent or confirmation of consumers.
- (e) Interfering with consumers’ rights to terminate a contract by unduly delaying or making it extremely inconvenient in getting access to the termination procedures.
- (f) Applying unacceptable pressure to consumers, especially the elderly and disabled, in procuring a contract.
- (g) Imposing in a contract a unilateral variation right clause to the detriment of consumers.

criteria of exclusion set out in Chapter 2 subject to the following suggested improvements in line with the proposed Statute, we propose that enforcement of unfair trade practice issues in both the telecommunications and broadcasting sectors should be excluded from the ambit of the proposed Statute.

Factors for Exclusion from Enforcement of the Proposed Trade Practices Statute

Sector-Specific Expertise in Enforcement

3.40 Due to rapid technological advancement, convergence of technologies, and keen market competition, the boundary between the telecommunications and the broadcasting industries is blurring. As an example, the major industry players are moving into what is termed a 'triple-play business model' of providing fixed telephone, television and Internet access services, or a 'quadruple-play model' (triple-play plus mobile services). The goods and services sold in the relevant markets for these two business models are highly complicated with wide-ranging technical, price and quality variables. As such, it would seem to be more appropriate for the current industry regulators to enforce the trade practices provisions. Both the regulators possess the necessary technical expertise for correctly identifying the misleading or deceptive nature of some representations or tactics, and also have an array of administrative and legislative means to address problems in the convergent markets.

Existing Co-regulatory Framework

3.41 There have already been in place established co-regulatory frameworks for the telecommunications and broadcasting industries. The legislative frameworks of both sectors are supplemented by a self-regulatory framework constituted mainly by codes of practice, directions and guidelines issued by the regulators, and controls over licensing. The existing co-regulatory frameworks retain the flexibility and capacity that make them amenable to improvement in consumer protection against unfair trade practices.

Telecommunications – s.7, s.7A and s.7M

3.42 Unfair trade practices engaged in by a licensee in the telecommunications industry are regulated by both s.7M of the Telecommunications Ordinance (Cap. 106) (the "TO") and enforced through license conditions.

3.43 S.7M of the TO provides that "*A licensee shall not engage in conduct which, in the opinion of the Authority, is misleading or deceptive in providing or acquiring*

telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service". This statutory provision is supplemented by a set of detailed guidelines and best practice indicators.

3.44 In addition, the Telecommunications Authority (the "**TA**") may impose general and special licence conditions pursuant to s. 7 and s.7A respectively of the TO. By virtue of s.7(7), a licence condition may relate to inter alia, the manner of service provision, the prohibition of unfair market practices, and compliance with directions, guidelines, codes of practice, regulations and the TO.

3.45 A breach of s.7M or a licence condition may result in administrative fine or financial penalty imposed by the court, and other administrative sanctions namely, disclosure to the public of information relating to the breach⁵³; corrective advertising⁵⁴; in the case of a breach of s.7M, a public warning⁵⁵; and cancellation, withdrawal or suspension of the licence.

3.46 Both the licensing control mechanism and s.7M provide for a cost effective and expeditious enforcement measure that does not involve lengthy court proceedings.

3.47 After the TA has formed an opinion that a licensee has engaged in misleading or deceptive conduct and breached s.7M, a consumer suffering loss or damage from the breach may bring an action for damages, an injunction or other appropriate remedy, order or relief against that licensee⁵⁶.

3.48 The co-regulatory mechanism is therefore an established basis upon which a comprehensive framework for consumer protection against unfair trade practices in the telecommunications sector can be built into the future.

Broadcasting

3.49 As far as the broadcasting industry is concerned, the Broadcasting Authority (the "**BA**") is not specifically empowered by the Broadcasting Ordinance (Cap. 562) (the "**BO**") and the Broadcasting Authority Ordinance (Cap.391) ("**BAO**") to deal with trade practices issues. Nevertheless, formal control over unfair trade practices for broadcast services can be facilitated by statutory and/or licence condition amendments within the established co-regulatory framework. Any problems in the existing framework can be addressed through introducing certain changes to the law

⁵³ S.36C(3A) of the TO.

⁵⁴ Ibid.

⁵⁵ TA Guidelines on "Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets", 12 May 2003, para. 4.9.

⁵⁶ s.39A of the TO.

and to administrative procedure, thereby providing an expedient solution. These will be discussed further in this Chapter.

Prospective Establishment of a Unified Regulatory Body

3.50 As a response to the technological and market convergence noted above, the Government has proposed to establish a unified regulatory body, namely the Communications Authority, by merging the TA and the BA. At the time of writing this Report, the Government was preparing for the introduction of the relevant bill into the Legislative Council to set up the Communications Authority⁵⁷. The Council wholeheartedly supports the Government's policy in this regard, and further suggests that the restructuring of the co-regulatory frameworks provides a good opportunity to reinforce consumer protection against unfair trade practices in the communications sector.

Improvement of the Co-regulatory Frameworks

3.51 As noted above, the Council recognizes that it would be more appropriate to address unfair trade practices issues in the telecommunications and broadcasting sectors by the existing regulatory authorities, and ultimately through the unified regulatory body, the proposed Communications Authority. However, there are currently some areas in the regulatory frameworks administered by the existing bodies that the Council suggests could be improved. Before setting out the Council's proposals for improvement, this report identifies below what the Council believes are deficiencies of the protection afforded by the current frameworks.

Deficiencies

Inadequacy in Legal Protection

3.52 Although s.7M of the TO can be described as a robust provision for the telecommunications sector, it is not considered wide enough to cover all unfair trade practices that have arisen in that sector. S.7M is directed towards 'misleading or deceptive' conduct, and in the experience of the TA and the Council there are unfair practices, other than those that come within the legal definition of misleading or deceptive conduct under s.7M, that need to be addressed in the interests of consumer protection. These are largely concerned with sales tactics involving

⁵⁷ 2008 Digital 21 Strategy, Continuing to Build on Our Strengths through Technology across the Community, December 2007, Para. 5.13.6.

harassment and intimidation that have come to notice due to various complaints regarding doorstep salespersons promoting or selling fixed-line telephone services or Internet access services. So far, the TA is not relying heavily on s.7 and s. 7A of the TO in imposing licence conditions to regulate the manner of service provision or prohibit unfair market practices or require compliance of any mandatory code of practice in regard to these types of sales tactics.

3.53 In respect of the broadcasting sector, a major issue is that the BA does not have any specific power under the BO or the BAO to regulate the marketing and promotion activities of the licensees.

3.54 It follows that any unfair trade practices that are outside the enforcement ambits of the two enforcement agencies are left to be sanctioned either through civil action by aggrieved consumers; or where deception or violence is involved, through criminal law by law enforcement authorities.⁵⁸

3.55 As far as private action by aggrieved consumers is concerned, most of the claims are below \$50,000 and within the jurisdiction of the Small Claims Tribunal. The legal costs incurred from pursuing claims in the Tribunal are modest (as the parties are not allowed to conduct their cases through legal representatives). However, some consumers are scared off by the thought of taking on a large corporation, the lengthy legal proceedings that could be involved, and the possibility of appeal by their opponents, thereby incurring substantial legal costs because legal representation will then be allowed.

3.56 With regard to applying criminal law to these types of sales tactics, the criminal justice process is justifiably intricate and costly, given the severe penalties that can arise for those found guilty. The imposition of a higher standard of proof for the prosecution to prove “beyond reasonable doubt” and other safeguards to avoid wrongful conviction means that the criminal process may not always be the most viable or cost-effective way to provide redress for unfair trade practices and deter unscrupulous sales people from engaging in the conduct.

Reliance on Self-regulatory Framework

3.57 Even though the TA and the BA are unable to impose direct sanctions against those unfair practices that are outside the ambit of their statutory powers, as noted

⁵⁸ For example, on the civil side, the common law doctrine of misrepresentation, the Unconscionable Contracts Ordinance, the Supply of Services (Implied Terms) Ordinance and the tort on trespass of land, while on the criminal side, the deception provisions of the Theft Ordinance and provisions regarding offences against the person under the Crimes Ordinance and the Offences Against the Person Ordinance.

above, they have nevertheless made efforts to address the issues by self-regulation; mainly through codes of practice/ guidelines and licensing control. These efforts are discussed below.

Telecommunications

Voluntary Codes of Practice

3.58 In 2004, the TA attempted to address the non-s.7M unfair trade practices regarding annoyance caused by doorstep salespersons of the operators. A consultation paper was issued on a proposed *Code of Practice on Unsolicited Doorstep Sales and Marketing of Telecommunications Services at Residential Premises*.⁵⁹ However, the attempt fell through due to the lack of support from operators and the absence of any linkage of the Code with the functions and powers of the TA under s.7M of the TO.⁶⁰

3.59 In 2001, the TA issued the *Code of Practice for the Service Contracts for the Provision of Public Mobile Radiotelephone Services*, and in 2004, the TA further extended the Code to other public telecommunications services by issuing the *Code of Practice for the Service Contracts for the Provision of Public Telecommunications Services* (the “**Code for PPTS**”). Due to their voluntary nature, these codes of practice⁶¹ regarding fairness in service contracts are limited in their ability to make a strong impact on the industry.

Licence Conditions – Compliance with Codes of Practice

3.60 In view of the fact that the use of voluntary measures has not been satisfactory, the TA has incorporated a special condition in certain licences⁶² issued in 2005 and 2006. The condition specifically requires the licensees to comply with any code of practice or guideline issued by the TA from time to time for the purpose of providing practical guidance to the licensee regarding:-

- (a) the provision of satisfactory service;
- (b) the protection of customer information; and
- (c) the protection and promotion of the interests of consumers of

⁵⁹ Statement of the TA, 12 November 2004, para.26.

⁶⁰ Ibid.

⁶¹ The Code for PPT sets out the guiding principles for the service contracts, including that contractual terms should be balanced, fair and reasonable, and written in plain and legible language, the Chinese or English version of the contract should not prevail over the other, and a 30-day notice to customers on unilateral variation of contractual terms.

⁶² For example, mobile carrier licences, class licences for offer of telecommunications services, and services-based operator.

telecommunications goods and services

3.61 Moreover, a recent Government consultation paper issued on 21 December 2007, entitled the Creation of a Unified Carrier Licence under the Telecommunications Ordinance and Licensing Framework for Unified Carrier Licence⁶³ has amongst other things proposed two Special Conditions in the sample of a Unified Carrier Licence. A proposed Special Condition 1 has provisions similar to those currently used by the TA, as noted above. In addition, a proposed Special Condition 36, in the sample Licence, more specifically states that a licensee shall comply with all codes of practice issued by the TA from time to time regarding contracts for supply of telecommunications services to end users. The contracting requirements may include the following:-

- (a) the style, format and structure of service contract documentation;
- (b) the manner of entering into and terminating service contracts;
- (c) the information to be included in or in connection with service contracts and the performance of the services;
- (d) the submission of disputes between end users and the providers of telecommunications services to independent dispute resolution, pursuant to a scheme approved by the TA; and
- (e) other terms and conditions or provisions for protection of the interests of end users⁶⁴.

3.62 As it is envisaged that all existing licensing frameworks will be replaced by the proposed unified licensing framework⁶⁵, Special Conditions 1 and 36 may therefore apply in the future to all licensees of telecommunications services.

3.63 The potential scope of regulation offered by these Special Conditions is comprehensive, covering various aspects of the relationship between consumer and licensees. As both of the Special Conditions provide that a licensee shall comply with any or all codes of practice issued by the TA from time to time, it seems to the Council that compliance with the codes will be mandatory.

⁶³ The paper invites public views on the proposed introduction of a Unified Carrier Licence, a new licensing regime to pave the way for fixed-mobile convergence in the telecommunications sector, and a unified licensing framework.

⁶⁴ Consultation Paper Licensing Framework for Unified Carrier Licence, 21 December 2007, p.78- 79.

⁶⁵ Consultation Paper on the Creation of A Unified Carrier Licence under the Telecommunications Ordinance, para.11.

3.64 If this understanding is correct, the Codes, coupled with the Special Conditions, could provide a useful tool for applying sanctions, and modifying market behaviour for the benefit of consumers. Non-compliance with the codes issued under these Special Conditions would amount to a breach of a licence condition and therefore may result in sanctions by the TA, as noted above, which are quite powerful.

Objections to the Special Conditions – Ultra Vires

3.65 An operator has raised an *ultra vires* objection to the proposed Special Condition 1 on the grounds that the provision expands the TA's powers and jurisdiction beyond the TO into unspecified consumer issues. In response to any *ultra vires* objection, the TA may reasonably argue that these Special Conditions are introduced by virtue of s.7 or s.7A of the TO, instead of s.7M. As noted above, s.7(7) provides that the licence conditions may relate to the manner of service provision, the prohibition of unfair market practice and the compliance with directions, guidelines, codes of practice, regulations and the TO. The Council considers there are merits in the argument on the TA's part. Nevertheless, any disputes in this regard will be unresolved until such time as the matter is tested by the courts. Before that occurs, it can be said that there are still doubts or concerns on the validity of the Special Conditions that might be applied in the future.

3.66 If the Special Conditions, as suggested in the proposed Unified Carrier Licence, are ultimately found to be ineffective due to *ultra vires*, the licensing control mechanism may fall short of the TA's expectations for addressing a wide range of unfair trade practices. Under such circumstances, the TA would be obliged to continue with the self-regulatory framework and rely on the voluntary initiatives of the operators in pledging compliance with relevant codes.

Broadcasting - Pay TV

Lack of Trade Practices Provision

3.67 As noted above, the BA is not specifically empowered under the BO or the BAO to regulate unfair trade practices in the broadcasting (pay television) industry. Therefore, the said statutes do not provide for any trade practice provisions similar to s.7M of the TO.

3.68 However, under the licences issued to pay TV operators, licensees are required, after consultation with the BA and the TA, to prepare and keep updated at all times a code of best practice on customer services⁶⁶. However, the code focuses

⁶⁶ For example, the Renewed Domestic Pay Television programme Service Licence, Hong Kong Cable Television Limited, Clause 17.1.

mainly on contractual obligations rather than the pre-contractual unfair trade practices that have resulted in a large number of consumer complaints. For example, the codes formulated by the 3 major operators⁶⁷ for customer services are only a performance pledge for post contractual issues, without any provision for addressing unfair sales practices that arise before a contract is signed.

Proposed Improvements

3.69 In view of the possible convergence of the legislative frameworks of the two industries into a single unified legislative framework, regulating all communications sectors, an overall revamp of the current telecommunications and broadcasting legislation would be impractical because the revamped telecommunications and broadcasting legislation would be made redundant by the subsequent unified legislative framework. However, as there has not yet been any indication when the legal process for the proposed Communications Ordinance will commence, and given the amount of distress some of the unfair trade practices are causing in the community, it seems unwise to leave the issues unattended. The Council therefore recommends the following short term, and easy to implement, measures for improving the existing regulatory framework on unfair trade practices.

Short Term Telecommunications Measures

Recommendation 11 - Expansion of s.7M of the TO

3.70 It appears to the Council that the solution for the deficiencies in licensing and self-regulatory control in the telecommunications sector, with regard to unfair sales tactics that are currently outside the ambit of legislative reach lies in the expansion of s.7M of the TO to include *any unconscionable or improper conduct* in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service.

3.71 Further, in view of the proposed exclusion of the telecommunications sector from the ambit of the proposed Trade Practices Statute, it is important to ensure that the protection conferred by the TO on consumers against unfair trade practices will not be less than that of the proposed Trade Practices Statute. As such, the Council

⁶⁷ Cable TV, PCCW Media Ltd. and Galaxy Satellite Broadcasting Ltd.

also recommends that s.7M should be further amended to the effect that it expressly covers all unfair trade practices, before, during and after transaction, and the conduct of the licensee and its agents or servants⁶⁸.

3.72 The Council considers that the amendments will bring about the following advantages:-

- (a) The amendments will remove any doubt as to ultra vires and empower the TA to introduce the Special Conditions in the proposed Unified Carrier Licence and make codes, such as those issued under the said Special Conditions, mandatory. As such, the Special Conditions and codes of practice regarding unfair trade practices, other than deceptive and misleading conduct under the current s.7M, will be provided with a more solid legal basis upon which the TA will be able to take action. This would in turn improve the effectiveness of the TA's enforcement role in using the licensing control mechanism to enforce the codes.
- (b) There will be a more comprehensive protection framework for consumers, through subjecting unfair trade practices to wide-ranging administrative sanctions under s.36C of the TO. Protection against unfair trade practices will also be enhanced because the defaulting operator will not only encounter private claims from aggrieved consumers (e.g. under the Unconscionable Contracts Ordinance or tort) but also through enforcement by the TA.

Short Term Broadcasting (i.e. Pay TV) Measures

3.73 S.10(4) of the BO may, as it currently stands, provide an expedient framework for resolving unfair trade practice issues in the industry that are currently not being addressed. The provision states that the Chief Executive in Council, or the BA, as the case may require, may, where he or it considers it is **in the public interest** to do so, vary a licence at any time during its period of validity after the licensee has been given a reasonable opportunity to make representations.

3.74 The Government also has a reserve power to amend an existing Licence by

⁶⁸ Currently, the general conditions for a carrier licence, as specified in Schedule 1 of the Telecommunications (Carrier Licences) Regulation (Cap.106V), contain an express condition that "*If the licensee employs any person under contract for the purpose of the service, or for the installation, maintenance or operation of the network (a "contractor"), the licensee shall continue to be responsible for compliance with the conditions of this licence, and the performance thereof, by any contractor*".

virtue of specific clauses found in those existing Licences⁶⁹.

Recommendation 12 – Adding a New Licence Condition for Prohibition of Unfair Trade Practices or Introduction of a New Code of Sales Practices to the same effect

3.75 It is recommended that the Government considers exercising its power in the public interest under s.10(4) of the BO (or Clause 4.1 of the Licence) or with a licensee's consent under Clause 4.2 of the Licence, to add a new licence condition:-

- (a) to prohibit unfair trade practices, before, during and after transactions, by the licensee or its agents or servants; or
- (b) to require the licensee, after consultation with the BA, to prepare a code of best sales practices prohibiting unfair trade practices, before, during and after transactions, by the licensee or its agents or servants.

3.76 Compliance is assured by s.28 of the BO as it empowers the BA to impose an administrative fine for breach of a code provision. Where the BA finds an administrative fine inadequate for the breach, it may apply to the court for a heavier penalty of up to 10% of the turnover of the licensee in the relevant television programme service market in the period of the breach, or \$2,000,000, whichever is higher.

3.77 The Council is of the view that an approach securing co-operation on a voluntary basis (pursuant to Clause 4.2) to add a new licence condition would enhance compliance; and may reduce the possibility of resistance from the operators; for instance through judicial review. Failing that, the Government is recommended to take action to vary the appropriate licences on the grounds of public interest pursuant to Clause 4.1 or s.10(4) of the BO. In view of the widespread problems in unfair sales tactics in the broadcasting sector, there seems little difficulty for the Government to establish that it would be in the public interest to have the variation.

⁶⁹ For example, Clause 4.1 of the “**Domestic Pay Television Programme Service Licence**” (Renewed) of Hong Kong Cable Television Ltd. (“**DPTPSL**”) provides that the Chief Executive in Council may, if he considers it is **in the public interest** to do so, vary the Licence in accordance with the BO. This contractual variation power is similar to the statutory power under s.10(4) of the BO. Alternatively, clause 4.2 provides that without prejudice to Clause 4.1, the Chief Executive in Council may vary the Licence with the prior **consent** in writing of the Licensee at any time and from time to time during the period of validity. There is no public interest requirement for the variation of the Licence under this Clause. Similar provisions are also found in the Licences granted to the other pay TV operators.

Ultra vires

3.78 There is still a possibility that the exercise of the power by the Chief Executive in Council or the BA under s.10(4) of the BO to vary the licence in the public interest by adding the proposed provision (either on prohibition of unfair trade practice or stipulation of a Code on Sales Practice) will be challenged as ultra vires. It may be argued that the variation itself is made outside the ambit of the BO which does not provide for any regulation of the trade practices of the licensees with regard to providing, marketing, promoting and advertising goods or services in broadcasting.

3.79 It may therefore be more appropriate to add a provision similar to the proposed expanded s.7M of the TO within the BO, so as to provide a legal basis for the BA to address the whole range of unfair sales tactics that are causing consumer problems. This would, of course, involve a lengthy legislative process and might be better left to be incorporated into the time-frame for enacting the proposed unified Communications Ordinance.

Conclusion

3.80 The Council does not consider that the prospective establishment of the Communications Authority should inhibit the proposed improvements to the TO and BO, as noted above. For example, an improved s.7M as proposed may be easily transposed into the new Communications Ordinance, covering the conduct of both telecommunications and broadcasting licensees. Constructing a revised provision to cover the complete range of unfair sales tactics and misleading or deceptive conduct, at this stage, would not be redundant but merely early drafting of a provision that would need to be included in the powers of the Communications Authority.

3.81 As far as the existing pay TV licences are concerned, the introduction of a unified Communications Ordinance may leave a substantial transitional period in which the licences will continue until they expire. The proposed improvement in the pay TV licence conditions should therefore continue to exist despite the establishment of the new regulatory framework. In any event, the Council hopes that the convergence of the regulatory frameworks of the telecommunications and the broadcasting industries will not wind back any of the progress made so far. On the contrary, the regulatory convergence should be viewed as presenting opportunities for further enhancing consumer protection, particularly in the area of unfair sales practices noted in this Report; and that the proposed improvements noted above will be duly accommodated in the new unified regulatory framework.

CHAPTER 4: CONCLUSION AND SUMMARY OF RECOMMENDATIONS

4.1 Hong Kong has a well established legal system, and a regulatory framework that provides various safeguards upholding the rights of its citizens. However, the Council's examination in this Report, of the various laws and administrative procedures that currently serve the interests of Hong Kong consumers, indicates that there are deficiencies that place Hong Kong's consumer protection framework below the standards found in comparable advanced economies.

4.2 In this Report the Council has examined a range of marketplace problems facing consumers that continue to be issues of public concern. Various recommendations are made that stress the need for prompt action on certain matters to deliver urgent protection for consumers. In addition, the Council has made recommendations that outline a general framework for consumer protection that will serve the interests of Hong Kong consumers and ultimately business, well into the future.

4.3 The Council's approach has been to identify consumer protection laws that currently exist in Hong Kong and to recommend a new framework that is largely integrated with those various safeguards. In doing so, the Council recognises the benefits that those laws have brought to Hong Kong in the past, and will bring to the future. It also recognises the good work that has been undertaken by the various enforcement agencies and proposes a framework that will ensure that the expertise those agencies have developed will continue into the future, hand in hand within the new framework.

4.4 The primary recommendation is to create a comprehensive consumer protection law (the Trade Practices Statute) administered by a public enforcement agency. This basic framework will provide general consumer safeguards against misleading or deceptive marketplace conduct in the form of a basic 'safety net' that can adapt to the many situations that arise in a vibrant and creative economy.

4.5 It is envisaged that this new basic framework will co-exist with current consumer safeguards such as the Trade Descriptions Ordinance, certain provisions of the Telecommunications Ordinance. Industry self-regulation and common law rights available to consumers would also continue to exist within the recommended framework.

4.6 In total, the combination of various existing and future safeguards will produce a synergy where the actions of separate agencies and laws working with the

proposed Trade Practices Statute and its public enforcement agency, will together have greater total effect on consumer protection than would otherwise be available.

4.7 Summaries of the various recommendations found in the separate Chapters of this Report are as follows.

COUNCIL RECOMMENDATIONS

CHAPTER 2: A COMPREHENSIVE TRADE PRACTICES STATUTE

Recommendation 1 - Scope of the Statute

4.8 The Council recommends that the scope of the proposed Statute should be extended to:-

- (a) misleading or deceptive acts or omissions;
- (b) aggressive or high pressure practices that significantly impair or are likely to significantly impair a consumer's freedom of choice or conduct; and
- (c) other improper or unfair trade practices by a trader that falls short of the general principle of good faith and honest market practice

AND

the practices are performed by traders (or their employees or agents) acting in trade or commerce, before during or after a transaction, directly connected with:-

- (i) the promotion, sale or supply of a product to a consumer or a consumer's exercise of contractual rights in relation to a product;
- (ii) the buying back of goods from consumers, such as goldwares and second hand cars, in the "second hand" market.

AND

such practices cause or are likely to cause a consumer to make a decision relating to a purchase the consumer would not have otherwise taken.

4.9 Where the infringer is a corporation, its officer (e.g. director) may also be liable under the Statute if the contravention is committed with the officer's consent or connivance or is attributable to the officer's negligence.

4.10 Further, "product" should include services; goods; private residential property; and rights and obligations.

Recommendation 2 – Basic Approach to Formulating Statutory Prohibitions

4.11 The Council recommends that an approach combining a general prohibition against unfair trade practices in trade or commerce, with specific unfair conduct prohibitions, should be adopted in the formulation of the proposed Statute. It is noted that there is still a possible element of uncertainty for both consumers and business as to whether acts not expressly prohibited under specific provisions, or not in a list of unfair practices, would be considered as falling under the general catch-all provision, by the relevant enforcement agency, and therefore at risk of enforcement action. However, the Council believes that this uncertainty can be removed by proper guidelines issued by the relevant enforcement agency.

Recommendation 3 – Enforcement Mechanism

4.12 With regard to what is an appropriate enforcement mechanism, the Council recommends that:-

- (a) The enforcement agency should adopt a measured and compliance-oriented enforcement approach, relying heavily on administrative measures, with backing of court sanction. The measured steps should be:-
 - (i) reconciliation on a voluntary basis;
 - (ii) written court enforceable undertakings from traders;
 - (iii) court enforceable cease and comply notice issued by the enforcement agency;
 - (iv) application to the court for civil penalty, declaration and injunction in case of breach of a cease and comply notice or an undertaking.
- (b) The agency should be empowered to obtain information for the purpose of investigation, and for monitoring compliance of undertakings and cease and comply notices issued by the agency, and of injunctions granted by the court.

- (c) The trader concerned should be given reasonable opportunities to make representations at various stages (including investigation) and appeal against cease and comply notices or any part of a notice.
- (d) The enforcement measures should escalate from persuasion to sanction by court for more serious cases, in accordance with the seriousness of the breach, the level of non-compliance and non-cooperation, and other relevant factors. The enforcement agency may, as the urgency or situation of the matter requires, seek immediate court injunction without going through the processes of reconciliation and cease and comply notice.
- (e) The Statute should mainly provide for civil liabilities except for unfair practices that are so morally reprehensible or have caused so great a social harm, that criminal sanction is justified.
- (f) If the Statute contains criminal provisions and the agency is an independent public body, the cases involving contravention of such criminal provisions should be referred to the relevant disciplinary forces.

Recommendation 4 – Right to Sue under the Proposed Statute

4.13 The Council is of the view that consumers should be given a private right to sue for a contravention of the proposed Statute, and to seek damages.

Recommendation 5 – Consumer Right to Redress

4.14 The Council recommends that to improve consumer access to redress, serious consideration should be given to the following approaches:-

- (a) to establish a Consumer Tribunal;
- (b) to expand the scope of the Supplementary Legal Aid Scheme;
- (c) to enhance the availability of the Consumer Legal Action Fund.

Recommendation 6 – Fitting within the Existing Legislative or Regulatory Framework

4.15 The Council is of the view that trade practices provisions in existing statutes regulating specific sectors should remain unaffected by the enactment of the proposed Statute if they meet the following criteria:-

- (a) A significant degree of professional and specialized knowledge is required for enforcement of such provisions or statutes; and
- (b) A similar level of protection has already been provided by such statutory frameworks parallel to and compatible with the proposed Statute.

4.16 The sectors regulated by the statutes meeting the criteria should be excluded from the proposed Statute, while amendments to these statutes should be introduced, if necessary, to make them in line with the proposed Statute in consumer protection.

4.17 As regards the professional bodies as defined by the proposed Statute, it is more appropriate for the trade practices of members of these bodies to remain to be regulated by their respective rules and procedures. An effective referral system should be set up through which complaints filed with the new enforcement agency against professionals will be duly and speedily referred to the bodies concerned. Moreover, in drafting the Statute, the Government may consider supplementing the relevant provisions of the proposed Statute by a list of professional bodies.

Recommendation 7 – Guidelines for Misleading or Deceptive Advertisements

4.18 The Council recommends that guidelines specifically directed at misleading or deceptive advertisements should be issued by the enforcement agency under the proposed Statute. The guidelines could be drafted with reference to the general standards required under the TA's s.7M Guidelines, and the requirements under the Codes issued by the Broadcasting Authority. The guidelines should illustrate to traders that to comply with the Statute, they should ensure that:-

- (a) all advertising claims shall be honest and truthful;
- (b) no misleading, deceptive or exaggerated advertising claims shall be made;

- (c) all factual claims, and claims regarding the effects of the products, shall be substantiated with sound and reasonable evidence; and
- (d) all claims in advertisements giving the impression of professional advice or recommendations should be substantiated.

4.19 The guidelines may also provide detailed guidance regarding:-

- (a) the requirement for the use of specific terms in certain advertisements;
- (b) matters that should be noted in comparative advertising; and
- (c) matters that the enforcement agency will take into account in enforcing the proposed Statute.

Recommendation 8 - Guidelines on Price Comparisons

4.20 A set of guidelines on price indications, covering such matters as appropriate methods of making price comparisons should be issued under the proposed Statute, setting out the appropriate manner in making price comparisons, such as:-

- (a) Traders should make price comparisons only if they are able to show that representations they make are accurate and valid.
- (b) Original prices as stated in comparisons with discount prices should have been applied for reasonable periods of time before the price comparisons are made.
- (c) Price comparisons should always state clearly the higher original prices as well as the discounted prices. For example, traders should not make statements such as “Sale Price \$9.9” or “Reduced to \$99” without quoting the original price that the terms ‘Sale’ and ‘Reduced’ refer to. A more informative and correct price comparison would be “Reduced from \$100 to \$80”.
- (d) Traders should make clear to consumers what sort of price the higher price is. For example, in some circumstances, it should be made clear whether the higher price is a regular price or a seasonal price (which is normally higher) so that consumers can assess the benefit they will actually obtain in purchasing at the discounted price.

- (e) Words used in price indications should have their normal everyday meaning. For example, the word “Sale” would be commonly understood by a reasonable consumer to mean that the goods offered are being discounted from their previous selling price; and not that they are merely “for sale”.
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CHAPTER 3: PROPOSED IMPROVEMENTS TO CURRENT LEGISLATIVE AND REGULATORY FRAMEWORKS

Recommendation 9 – Trade Descriptions in Sales Receipts

4.21 To clear the uncertainty with regard to the timing of trade descriptions in sales receipts, the Council recommends that appropriate amendment(s) should be made to the relevant provisions of the TDO to make it clear that trade descriptions contained in sale receipts are covered by s.7 of the TDO. The improvement as proposed will remove any uncertainty in the legal application of the provisions, for enforcement by the relevant public authority.

Recommendation 10 – Measures Regulating Unfair Terms in Standard Consumer Contracts

4.22 The Council recommends that legislation should be introduced to regulate unfair terms in standard consumer contracts (i.e. those contracts not individually negotiated). The legislation may be modeled upon the UK Unfair Terms Regulations, with an indicative and non-exhaustive list of potential unfair terms, with reference to the UK Unfair Terms List, taking into account the differences in culture and marketplace between Hong Kong and the UK.

4.23 The enforcement agency under the proposed Trade Practices Statute should also be responsible for administering, monitoring compliance of and enforcing this legislation.

Recommendation 11 - Expansion of s.7M of the Telecommunications Ordinance

4.24 It appears to the Council that the solution for the deficiencies in licensing and self-regulatory control in the telecommunications sector, with regard to unfair sales tactics that are currently outside the ambit of legislative reach lies in the expansion of s.7M of the TO to include *any unconscionable or improper conduct* in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service.

4.25 Further, in view of the proposed exclusion of enforcement of the telecommunications sector from the ambit of the proposed Trade Practices Statute, it is important to ensure that the protection conferred by the TO on consumers against unfair trade practices will not be less than that of the proposed Trade Practices Statute. As such, the Council also recommends that s.7M should be further amended to the effect that it expressly covers all unfair trade practices, before, during and after transaction, and the conduct of the licensee and its agents or servants.

4.26 The Council considers that the amendments will bring about the following advantages:

- (a) The amendments will remove any doubt as to ultra vires and empower the TA to introduce the Special Conditions in the proposed Unified Carrier Licence and make codes, such as those issued under the said Special Conditions, mandatory. As such, the Special Conditions and codes of practice regarding unfair trade practices, other than deceptive and misleading conduct under the current s.7M, will be provided with a more solid legal basis upon which the TA will be able to take action. This would in turn improve the effectiveness of the TA's enforcement role in using the licensing control mechanism to enforce the codes.
- (b) There will be a more comprehensive protection framework for consumers, through subjecting unfair trade practices to wide-ranging administrative sanctions under s.36C of the TO. Protection against unfair trade practices will also be enhanced because the defaulting operator will not only encounter private claims from aggrieved consumers (e.g. under the Unconscionable Contracts Ordinance or tort) but also through enforcement by the TA.

Recommendation 12 – Adding a New Licence Condition for Prohibition of Unfair Trade Practices or Introduction of a New Code of Sales Practices to the same effect, for the Broadcasting Sector

4.27 It is recommended that the Government considers exercising its power in the public interest under s.10(4) of the BO (or Clause 4.1 of the Licence) or with a licensee's consent under Clause 4.2 of the Licence, to add a new licence condition:-

- (a) to prohibit unfair trade practices, before, during and after transactions, by the licensee or its agents or servants; or
- (b) to require the licensee, after consultation with the BA, to prepare a code of best sales practices prohibiting unfair trade practices, before, during and after transactions, by the licensee or its agents or servants.

4.28 Compliance is assured by s.28 of the BO as it empowers the BA to impose an administrative fine for breach of a code provision. Where the BA finds an administrative fine inadequate for the breach, it may apply to the court for a heavier penalty of up to 10% of the turnover of the licensee in the relevant television programme service market in the period of the breach, or \$2,000,000, whichever is higher.

4.29 The Council is of the view that an approach securing co-operation on a voluntary basis (pursuant to Clause 4.2) to add a new licence condition would enhance compliance; and may reduce the possibility of resistance from the operators; for instance through judicial review. Failing that, the Government is recommended to take action to vary the appropriate licences on the grounds of public interest pursuant to Clause 4.1 or s.10(4) of the BO. In view of the widespread problems in unfair sales tactics in the broadcasting sector, there seems little difficulty for the Government to establish that it would be in the public interest to have the variation.

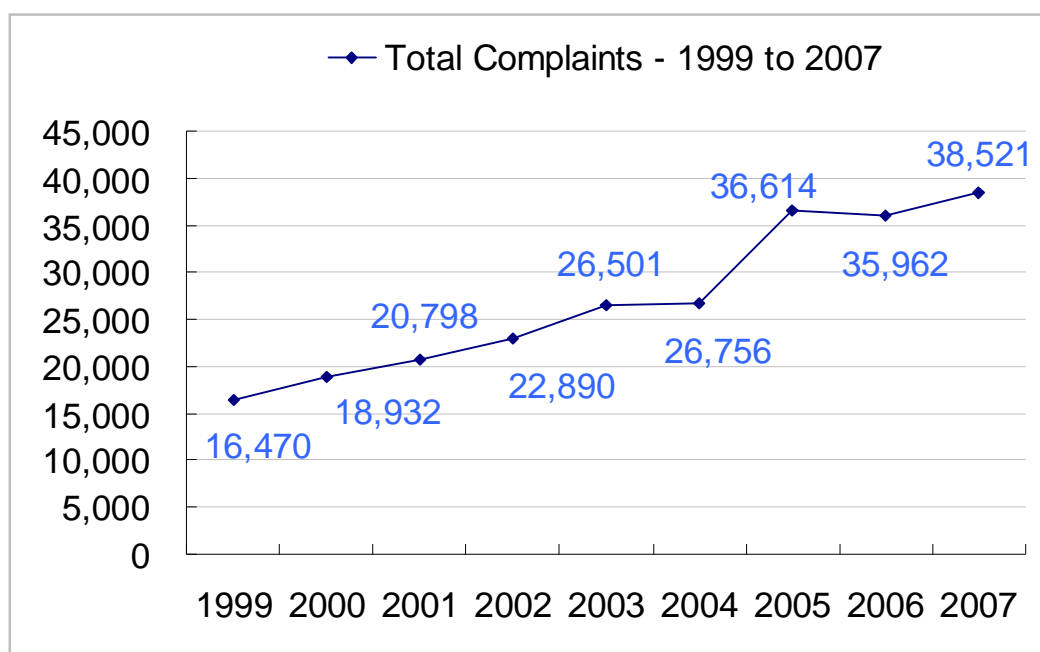
Ultra vires

4.30 There is still a possibility that the exercise of the power by the Chief Executive in Council or the BA under s.10(4) of the BO to vary the licence in the public interest by adding the proposed provision (either on prohibition of unfair trade practice or stipulation of a Code on Sales Practice) will be challenged as ultra vires. It may be argued that the variation itself is made outside the ambit of the BO which does not provide for any regulation of the trade practices of the licensees with regard to providing, marketing, promoting and advertising goods or services in broadcasting.

4.31 It may therefore be more appropriate to add a provision similar to the proposed expanded s.7M of the TO within the BO, so as to provide a legal basis for the BA to address the whole range of unfair sales tactics that are causing consumer problems. This would, of course, involve a lengthy legislative process and might be better left to be incorporated into the time-frame for enacting the proposed unified Communications Ordinance.

Complaints Statistics on Alleged Deceptive, Misleading and Unfair Practices in Consumer Transactions for the Year 2005 To 2007

<u>Services / Goods Under Complaint</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
Telecommunications Services	1,756	2,345	1,197
Pay TV	1,306	1,261	1,002
Photographic Equipment	611	456	437
Electrical Appliances	236	232	193
Telecommunications Equipment	209	199	171
Time Sharing	207	107	98
Medicine & Chinese Herbal Medicine	149	138	127
Properties	71	89	223
Other Services / goods	2,932	2,946	2,613
Sub-total (% of total)	7,477 (20.4%)	7,773 (21.6%)	6,061(15.7%)
TOTAL	36,614	35,962	38,521



Examples of Major Trade Practices Related Provisions¹

Trade Practices Related Statutes

1. Misrepresentation Ordinance (Cap. 284) (providing for, inter alia, remedies for misrepresentation).
2. Mock Auctions Ordinance (Cap. 255) (regulating sale of goods by competitive bidding).
3. Public Health & Municipal Services Ordinance (Cap. 132) (s.61: false statements as to quantity of goods supplied).
4. Summary Offences Ordinance (Cap. 228) (s.6A: prohibiting touting in public places).
5. Trade Descriptions Ordinance (Cap. 362) (prohibiting, inter alia, application of false trade descriptions to goods).
6. Unconscionable Contracts Ordinance (Cap. 458) (imposing restrictions on enforceability of unconscionable contracts).
7. Undesirable Medical Advertisements Ordinance (Cap. 231) (regulating medical advertisements with undesirable claims).
8. Weights and Measures Ordinance (Cap. 68) (s.18: prohibition of false statements as to quantity of goods supplied).

Trade Practices Related Provisions for Specific Industries²

1. Banking Ordinance (Cap. 155) (s.93: Fraudulent inducement to make a deposit; S94: Liability in tort for inducing persons to make a deposit in certain cases; s.95: False, etc. advertisements by authorized institution; S97A: False statements as to authorized status).

¹ Some of these statutes provide civil remedies and some are concerned only with criminal sanctions with no civil redress.

² The list below only sets out examples of some trade practice related provisions in the main legislation and does not include other provisions in regulations or orders.

2. Estate Agents Ordinance (Cap. 511) (s.43: Estate agents' liability for certain moneys received).
3. Money Changers Ordinance (Cap. 34) (s.10: False or misleading representations regarding exchange rate).
4. Money Lenders Ordinance (Cap. 163) (s.30(1)(b): Fraudulently inducing borrower to borrow).
5. Insurance Companies Ordinance (Cap. 41) (s.56: Misleading statements etc. and false information).
6. Pyramid Selling Prohibition Ordinance (Cap. 355) (prohibiting promotion of a pyramid selling scheme).
7. Telecommunications Ordinance (Cap. 106) (s.7M: Misleading or deceptive conduct).
8. Securities and Futures Ordinance (Cap. 571) (s.107: Offence to fraudulently or recklessly induce others to invest money; s.108: Civil liability for inducing others to invest money in certain cases).

Examples of the Comprehensive Trade Practices Statutes in Other Countries

China	Law of the People's Republic of China on Protection of Consumer Rights and Interests ¹
The United States	Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive acts or practices in or affecting commerce ² . Many states have adopted legislation prohibiting unfair or deceptive trade practices based on the Uniform Deceptive Trade Practices Act or Uniform Consumer Sales Practices Act.
The European Union	An Unfair Commercial Practices Directive is to be implemented by Members States. For instance, the United Kingdom has implemented the Directive by enacting the Consumer Protection from Unfair Trading Regulations 2007 which will come into force in April 2008.
Australia	The Trade Practices Act of 1974
New Zealand	The Fair Trading Act of 1986
India	Consumer Protection Act of 1986
Malaysia	Consumer Protection Act of 1999
Singapore	Consumer Protection (Fair Trading) Act ³

¹ This law was adopted by the 4th Session of the Standing Committee of the 8th National People's Congress on October 31, 1993.

² Originally, section 5 of the Federal Trade Commission Act prohibited "unfair methods of competition". In 1938, it was amended with the effect of prohibiting unfair or deceptive acts or practices.

³ This law was enacted in 2004.

Schedule 2 to Consumer Protection (Fair Trading) Act 2003 of Singapore

Specific Unfair Practices

1. Representing that goods or services have sponsorship, approval, performance characteristics, accessories, ingredients, components, qualities, uses or benefits that they do not have.
2. Representing that goods or services are of a particular standard, quality, grade, style, model, origin or method of manufacture if they are not.
3. Representing that goods are new or unused if they are not or if they have deteriorated or been altered, reconditioned or reclaimed.
4. Representing that goods have been used to an extent different from the fact or that they have a particular history or use if the supplier knows it is not so.
5. Representing that goods or services are available or are available for a particular reason, for a particular price, in particular quantities or at a particular time if the supplier knows or can reasonably be expected to know it is not so, unless the representation clearly states any limitation.
6. Representing that a service, part, repair or replacement is needed or desirable if that is not so, or that a service has been provided, a part has been installed, a repair has been made or a replacement has been provided, if that is not so.
7. Representing that a price benefit or advantage exists respecting goods or services where the price benefit or advantage does not exist.
8. Charging a price for goods or services that is substantially higher than an estimate provided to the consumer, except where the consumer has expressly agreed to the higher price in advance.
9. Representing that a transaction involving goods and services involves or does not involve rights, remedies or obligations where that representation is deceptive or misleading.
10. Representing that a person has or does not have the authority to negotiate the final terms of an agreement involving goods or services if the representation is different from the fact.

11. Taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable.
12. Taking advantage of a consumer by exerting undue pressure or undue influence on the consumer to enter into a transaction involving goods or services.
13. Representing in relation to a voucher that another supplier will provide goods or services at a discounted or reduced price if the supplier making the representation knows or ought to know that the other supplier will not do so.
14. Making a representation that appears in an objective form such as an editorial, documentary or scientific report when the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or a promotion.
15. Representing that a particular person has offered or agreed to acquire goods and services whether or not at a stated price if he has not.
16. Representing the availability of facilities for repair of goods or of spare parts for goods if that is not the case.
17. Offering gifts, prizes or other free items in connection with the supply of goods or services if the supplier knows or ought to know that the items will not be provided or provided as offered.
18. Representing that goods or services are available at a discounted price for a stated period of time if the supplier knows or ought to know that the goods and services will continue to be so available for a substantially longer period.
19. Representing that goods or services are available at a discounted price for a particular reason that is different from the fact.
20. Using small print to conceal a material fact from the consumer or to mislead a consumer as to a material fact, in connection with the supply of goods or services.

**Schedule 1 to Draft Consumer Protection
from Unfair Trading Regulations 2007 of the UK**

Commercial practices which are in all circumstances considered unfair

1. Claiming to be a signatory to a code of conduct when the trader is not.
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.
4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practices or the product have not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
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).
7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.

8. Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the EEA State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.
10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer.
11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).
12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.
13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.
14. Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
15. Claiming that the trader is about to cease trading or move premises when he is not.
16. Claiming that products are able to facilitate winning in games of chance.
17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
18. Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.

19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
20. Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.
21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.
23. Creating the false impression that after-sales service in relation to a product is available in an EEA State other than the one in which the product is sold.
24. Creating the impression that the consumer cannot leave the premises until a contract is formed.
25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return, except in circumstances and to the extent justified to enforce a contractual obligation.
26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.
27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.
28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.
29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer, except where the product is a substitute supplied in accordance with regulation 19(7) of the

Consumer Protection (Distance Selling) Regulations 2000 (inertia selling).

30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.
31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either
 - (a) there is no prize or other equivalent benefit; or
 - (b) taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

Schedule 2 to UK Unfair Terms in Consumer Contracts Regulations 1999

**Indicative and Non-Exhaustive List of Terms
Which may be Regarded as Unfair**

1. Terms which have the object or effect of
 - (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
 - (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
 - (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
 - (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
 - (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
 - (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
 - (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
 - (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;

- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of paragraphs 1(g), (j) and (l)

- (a) Paragraph 1(g) is without hindrance to terms by which a supplier of financial

services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

- (b) Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

- (c) Paragraphs 1(g), (j) and (l) do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

- (d) Paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

目錄

報告撮要	1
第一章：引言	9
本港常見的不公平營商手法	9
現行有關消費者保障的法律架構	11
現行有關營商手法的法律架構的不足	12
檢討的需要刻不容緩	16
本報告的目的	17
改善消費者保障法例工作小組	17
第二章：全面的營商手法法例	18
引言：理據	18
要討論的課題	19
法例應涵蓋甚麼範疇？	19
不公平手法的性質	19
須規管的交易	20
法例適用之情況	20
不公平手法對消費者作出購買決定的影響	21
建議一 - 法例涵蓋的範疇	21
在擬定法例的禁制時應採用甚麼基本方式？	22
建議二 - 擬定法例的禁制時的基本方式	23
怎樣才是合適的執法機制？	23
執法策略	23
執法機制	25
建議三 - 執法機制	27
改善私人訴訟權及獲得補償的權利	28
建議四 - 法例中加入提出訴訟的權利	28
建議五 - 獲得到補償的權利	29
執行機構須具備甚麼特質？	29
海關	30
消費者委員會	30
營商手法法例如何與現行法律架構融合？	32
建議六 - 與現行法律或規管架構融合	33
其他並行的架構	34

附屬法例和針對特定營商手法問題的指引	35
指引	35
關於誤導或欺騙性廣告的指引	35
建議七 - 關於具誤導或欺騙性廣告的指引	36
有關標價的誤導性陳述	37
建議八 - 價格比較的指引	37
第三章：改善現行法律及規管架構的建議	39
簡介	39
修正《商品說明條例》不足之處的措施	39
消費者委員會的立場	41
銷售單據上的商品說明 - 記載時間	41
建議九 - 在銷售單據上的商品說明	42
規管標準消費者合約中不公平條款的使用	43
檢討《不合情理合約條例》	43
澳洲經驗	44
英國例子	44
建議本港立例	45
建議十 - 規管標準消費者合約中不公平條款的使用	46
改善電訊及廣播行業有關不公平手法的規管	47
不公平營商手法	47
豁免於建議的營商手法法例中之原因	48
改善共同規管架構	49
不足之處	49
建議改善內容	53
有關電訊的短期措施	53
建議十一 - 擴大《電訊條例》第7M條的範疇	53
有關廣播業（收費電視）的短期措施	54
建議十二 - 增設全新牌照條件；或增設全新的促銷 手法守則，以杜絕不公平營商手法	54
結語	55
第四章：總結建議	56

報告撮要

導言

1. 本報告審視現時香港保障消費者權益的相關法例和行政措施，並提出消費者委員會（消委會）認為對保障消費者權益至為關鍵的建議。根據消委會的研究，以及多年與消費者及商界在投訴處理和其他服務中所得的經驗顯示，現時保障消費者的架構存在不足之處。

2. 引起關注的範疇包括：

- (a) *虛假或誤導的商品及服務說明* – 以虛假或誤導的說明，誘使消費者購買價值不符或非他們想要的貨品或服務。雖然《商品說明條例》禁止在貿易或商業上作虛假商品說明、虛假標記及錯誤陳述，但只適用於商品而不適用於服務。
- (b) *資訊的不足* – 《商品說明條例》只要求黃金和白金貨品標示規定的資料，但對售賣鑽石、天然翡翠及電子產品這些引起不少投訴的產品，法例卻未有規定須提供的資料。
- (c) *誤導的廣告* – 廣告中含糊及誇大的聲稱引致消費者錯誤地選購，經常引起投訴。
- (d) *威脅性或高壓手法* – 推銷員以騷擾性的手法來推銷並非罕見。但針對騷擾的《簡易治罪條例》第 6A 條，卻不適用於私人地方如在消費者家裏或門前，或在私人會所內進行的推銷活動。
- (e) *餌誘式銷售* – 營商者在廣告中聲稱貨品以特惠價出售，其實並無足以應付預期需求的合理供應數量。這種手法實際是以所宣傳的特惠價為誘餌以作招徠，旨在轉而推銷其他價錢較為高昂的產品，這已成為行騙技倆。
- (f) *接受付款時並未有能力或意圖提供貨品或服務* – 預繳式代用／現金券或服務計劃引起的投訴，主要是收款後，營商者沒有提供，或未能在合理時間內提供有關貨品或服務。此舉令人懷疑營商者在接受預繳款項時根本沒有打算在可見的將來提供已承諾的貨品或服務，又或沒有恰當地顧及本身提供貨品或服務的能力，便已接受預繳。
- (g) *標準合約的不公平的條款* – 典型的例子是那些容許營商者在任何情況下單方面更改合約、終止合約的通知期、月費或合約所提供的貨品或服務等的合約條款。

3. 消委會認為現時針對上述不公平營商手法的法律保障不足，令香港對消費者的保障低於其他相類的先進經濟體系的標準，因而必須正視。

4. 令人關注的地方是：即使經過政府多年的努力，現存的架構，不單未能杜絕長期存在的種種不公平營商手法，亦未能應付市場的急劇變化。結果，消費者仍繼續受不公平營商手法的損害。更甚的是，受損的不單是香港消費者，有關內地遊客在消費時受騙的消息，更引起了公眾強烈的不滿。消委會認為必須立刻採取果斷的行動，以防止問題惡化，危害到香港在遊客心中的地位。

5. 消委會主要的建議，是制定一條全面的消費者保障法例（即營商手法法例）及由一專責公共機構來執行這條新法例，以解決問題。在這充滿動力和不斷創新的經濟環境中，新的保障機制將為消費者提供一個可適應由這環境衍生出來的多種情況的基本「安全網」，針對不公平的市場行為，為消費者提供全面的保障。在這建議的機制內，現存的行業自我規管架構及在普通法下消費者現有的權利，將仍繼續保存。

全面的營商手法法例

6. 現行讓消費者抗衡不公平營商手法的法律架構只針對個別範疇，可說是零散和互不協調的，因而存在不少的漏洞，讓不良的行徑易於得逞。更重要的是，這種種互不協調的法律規定，使消費者難於理解自己應有的法律權益，也令營商者難於掌握他們對消費者應有的責任。

7. 再者，現行的條例主要是透過公共機構以刑事制裁來執行。由於刑事制裁在執行上困難，因而並非經常運用。若希望有效促進市場行為的整體改變，刑事制裁實非合適的機制。對於受損的消費者來說，除了尋求消委會協助調解外，他們追討補償的唯一途徑，就是自行提出民事訴訟了。

全面概括的法例和專責的執法機構

8. 由此可見，現行機制缺乏了多樣化的執法工具和尋求補償途徑，在法例的執行上，不管是在公共和私人的層面，均欠缺彈性。當面對市場的急劇變化和愈趨複雜的銷售策略及營商模式的挑戰時，就必須成立一個較靈活和涵蓋面更廣的機制，以遏止不公平的營商手法，保持公平的市場環境。消委會相信，要建立這樣的一個機制，必須制定一套全面的營商手法法例，以及一個專責的執法機構，這遠比繼續以零散方式去對付市場上各種各樣的消費者問題，更有規管效率。

9. 至於新的架構應如何運作，需要深入思考幾個問題。

甚麼營商手法需要規管？

10. 消委會認為，需要規管的必須是損害了消費者基本權益的不公平手法，包括消費者的安全受保障、獲得資訊和自主選擇的權利。基本上，這涉及對消費者作出明智抉擇所需的資訊，作出誤導/欺詐行為或不作為（包括隱瞞或遺漏）；妨礙消費者選擇或行為方面的自由的威脅性或高壓推銷手法；及其他有違誠信及誠實經營手法的一般原則的不當或不公平的營商手法等。

應涵蓋那些交易？

11. 法例旨為消費者提供全面的保障及建立適用於所有行業的統一營商道德標準。所以，法例的範圍應涵蓋所有消費者購買的貨品和服務，由簡單、價廉的物品以至貴重如汽車、私人住宅物業，以及合約權益和責任等「產品」。

法例適用於甚麼情況？

12. 法例適用於企業(營商者)與消費者作出的不公平手法，不涵蓋消費者之間的私人交易。因此，法例應涵蓋供應者(包括政府)所提供予消費者的產品，而不會應用於營商者之間的商業交易，或是消費者之間的私人交易。也就是說，有關不公平手法須由進行業務及從事貿易或商業的人士於該交易進行之前、期間或之後作出。

應如何擬定法例的禁制？

13. 參照其他國家制定全面性消費者保障法的經驗，消委會認為擬定新法例中受禁制行為的最佳方法，是結合一個全面性禁制貿易或商業中不公平營商手法的條文，以及某些特定行為的禁制條文。消委會相信，若消費者和營商者不清楚某種沒有受特定條文明文禁止的行為，是否受全面性條文的禁制，有關疑慮可以透過執法機構發出適當的指引來消除。

怎樣才是合適的執法機制？

14. 消委會認為合適的執法機制應達致最佳的成本效益，能因應消費者需要迅速解決他們的問題，同時為那些發現自己可能涉及違法行為的營商者提供一個簡單的解決途徑，因此建議執法的策略應以行政措施為主導，加上法庭制裁的支持，從而改善市場環境。消委會認為下列是一個漸進的策略：

- (a) 第一步應嘗試協助雙方調解；
- (b) 若執法機構認為營商者有違法行為，可接受營商者提供的「可由法庭強制執行」的承諾書，訂明不會再作類似的違法行為，需要的話，並可訂明其他補償；

- (c) 若營商者未有作出令人滿意的承諾，即展開正式調查，並發出「可由法庭強制執行」的「終止與遵從」通知書；
- (d) 若執法機構認為某營商者違反條例、並向他發出「終止及遵從」通知書或已接納其承諾書，有關機構有權公布營商者名稱；
- (e) 最後，若營商者違反了承諾或「終止及遵從」通知書，又或是執法機構認為以上措施未能或不會達到滿意成效，可向法院申請聲明、禁制令、法令及 /或罰款；
- (f) 如個案的情況緊急或有需要，執法機構可向法院即時申請禁制令，不需經過調解程序或「終止及遵從」通知書的程序。

15. 營商者在不同階段應獲合理的申述機會（包括調查階段）。除一般向高一級的法院提出上訴外，他們亦可就「終止及遵從」通知書的有關內容或部份內容提出上訴。

16. 「法例」以民事責任為主，除非所涉及的不公平手法極不道德，或嚴重損害社會利益，方會訴諸刑事制裁。然而，建議中的「法例」將會是一條在對付不良營商手法方面史無前例的法例架構，日後在執行法例時，可按需要作出調節，若發現「法例」對某些不公平營商手法的管制效果未如理想，可把有關不公平手法納入刑事的規管。另外，消費者有權就違反建議中的「法例」的行為提出私人訴訟，要求賠償。為改善消費者追討賠償的途徑，消委會建議應同時考慮以下的方法，例如：成立消費者審裁處去處理按照現行及建議中的法例提出，有關消費者與營商者的交易糾紛的民事訴訟；擴闊法律援助輔助計劃的範圍；或擴大消費者訴訟基金給予援助的能力，使更多消費者受惠。

有關執法機構應具備甚麼特質？

17. 消委會與海關現時均有把資源投放於處理保障消費者事宜，並擁有相關經驗。海關在執行《商品說明條例》中的刑事條文方面，更有廣泛的經驗，而現有的相關資源亦可轉移至新建議「法例」中的調查工作上。

18. 至於消委會是否應擔當建議中的「營商手法法例」的執法者，視乎它是否一個適合的機構，須考慮消委會作為代表消費者的主要聲音的角色，以及在產品研究和測試方面及將有關資料出售方面的功能。從另一角度來看，消委會亦擁有作為有關執法機構的資源和專業知識。

19. 作為本報告的作者，消委會相信為免有利益衝突及偏頗之嫌，實不宜對消委會在新法例中的角色，作出任何建議，而有關問題應留待公眾討論。

建議中的「法例」怎樣與現行法律架構融合？

20. 大部份現行涵蓋消費者保護的法例，如《銀行業條例》及《電訊條例》內的相關條款，均有針對有關範疇內消費者保障的主要問題，而相關的機構亦有專業知識和資源來執行有關法例。

21. 因此，消委會認為現時法例中對某些特定範疇的營商手法的規管條文，如在執行上需要高度的專業及專門知識，而有關法定架構又已提供與建議中的「法例」相若及可並立的保障，這些條文便不應受新「法例」的訂立而受影響。若有需要，可對有關現行法例作出修訂，以確保這些法例會涵蓋新「法例」所規管的各種不公平營商手法。此外，亦可考慮是否有需要，在政府合理要求下，有關執法機構就其相關的規管工作提交報告，讓公眾省覽。

22. 就現時專業團體現有的自我規管制度而言，消委會認為繼續讓該等團體相應的專業規則及程序來規管其成員的營商手法，會較為適合，因為建議「法例」下的全新執法機構可能不具備在執行有關規則及程序時所需的專業知識。而建議「法例」中的「專業團體」一詞乃指獲得公認已確立的機構（但非一般商貿協會），其執業者須具備獨特的技術及知識，而該團體亦擁有一個有效的自我規管機制，密切監管其成員的營商手法，並提供方便的途徑讓消費者作出投訴，以及能對違反規則者作出有力的制裁。消委會建議應將符合上述條件的專業團體名單附於建議「法例」中，並須於全新的執法機構及專業團體之間設立轉介制度，讓執法機構可將涉及有關專業團體的投訴，恰當地及迅速地轉介予相關團體。

23. 雖然受《商品說明條例》管制之應用虛假或誤導性商品說明的行為將包括在建議中條例的範圍內，但鑑於兩條條例，如上述所言，在範圍內、目的和執法三方面均不同，因此消委會認為《商品說明條例》中的與商品說明有關的條文及其執行應不受建議中的條例之制定影響，仍然保留。

制定指引的需要

24. 對於某些備受社會關注的營商手法，消委會認為需要透過附屬法例或指引作進一步或較詳細的補充，去說明相關執法機構，在新法例下如何執行有關的禁制條文。特別引起關注的範疇有：誤導及欺騙性廣告和有關標價的誤導性陳述。消委會認為，原則上新法例對這些問題的規管，應首先以制訂指引的方式來協助業界對遵守有關誤導及欺騙的禁制條文。消委會建議擬定指引時，可參考電訊管理局及廣播事務管理局的指引。若指引未見成效，則可訂立附屬法例進行正式的規管。

25. 消委會亦關注到在某些誤導的廣告，可能令到消費者作不適當的自行藥療，而延誤醫治。好明顯這涉及公眾健康，須從《不良醫藥廣告條例》(第 231 章)方面著手處理。由於改善此條例基本上是一項公眾健康

議題，超出本建議書的範圍，故本會將以獨立的意見書，向政府提供條例建議。

改善現行法例和規管架構的建議

26. 除制定建議中的新法例之外，消委會認為將會跟建議中的「法例」並行的保障消費者的法例，及以牌照經營的行業中的某些地方，也有改善的需要。因此，本會研究了相關範疇的問題，作出下列的建議。

修正《商品說明條例》不足之處的必要措施

27. 政府成立了工作小組，檢討《商品說明條例》，消委會一直積極參與。小組經已提出了一系列修訂，包括：

- (a) 禁止有關標價的失實陳述；
- (b) 擴大「商品說明」的定義，以涵括「售後維修保養服務的保證及提供情況」；
- (c) 如商戶聲稱受規管的電子產品可享有售後維修保養服務，須於發票或收據列明提供售後服務的地方及詳情；
- (d) 加入新的條文，禁止在經營任何行業、業務或專業中，為了銷售貨品而作出關於營商者與其他人士有關連的失實陳述；及
- (e) 制定與天然翡翠、鑽石、黃金合金、白金定義有關的規例，清楚訂明使用該些詞彙的條件及指定電子產品須列明的資料準則。

28. 消委會支持《2007 年商品說明（修訂）條例草案》及其附屬法例的修訂建議。本會期望這些較簡單而直接的修訂能盡快獲得通過及實施，成為切實可行的工具，以解決目前還未涵蓋的不公平營商手法的問題。此外，有關銷售單據上商品說明的記載時間可能引伸一個需要澄清的法律問題，即是說商品資料記載在銷售單據上是否符合《商品說明條例》中，應用商品說明的含義。因此，消委會建議作出相應的修訂，以訂明該條例涵括單據上的商品說明，以澄清法理不清晰之處。

有關標準消費合約中的不公平條款的建議

29. 鑑於服務業的急速發展及標準消費合約日益普及，消委會發現這類合約中的不公平條款，嚴重損害消費者的權益。縱使建議中的「法例」規管不合情理的行為，為使消費者得到公平及基本的保障，對這類營商行為必需有更嚴謹的規管。在大多數主要營運商均使用這類不平等條款行業中，保障尤其重要。因為議價能力有限的消費者想要獲取服務，除了接受這些條款便別無選擇。

30. 消委會建議立法規管標準消費合約（即並非個別商議的合約）內的不公平條款。有關法例的制定，可參考英國《消費者合約不公平條款規例》，該規則附有一份具指示性但可增補的列表，列出可能被視為不公平的條款，當參照此列表時，須顧及香港與英國在文化及市場環境方面的差異。建議中的營商手法下執法機構，應具有管理、監察及執行這法例的職能。

改善電訊和廣播行業有關不公平手法的規管

31. 消委會與電訊管理局及廣播事務管理局等監管機構，對行業的推銷員運用涉及威脅性、騷擾及欺騙消費者的不良銷售手法極為關注。兩個行業的現行法例架構不足以應付所有由此產生的問題，故此確有需要增加兩個監管機構的權力以處理消費者已存在的不滿。

32. 電訊業與廣播業之間的界線正在急速消失，這可見於政府建議通過新法，去成立通訊事務管理局，為這兩個界別，建立統一的監管架構。消委會支持政府這個建議，並認為這新架構，結合建議中的營商手法條例，可彌補現時本港在消費者保障方面許多不足之處。然而，新例立法需時，因而極需即時的行動以解決現存的問題。為此，本會建議一系列的短期措施以解燃眉之急。

33. 就電訊業而言，本會建議可透過擴大《電訊條例》第 7M 條的範疇，以涵蓋任何在提供或獲取電訊網絡、系統、裝置、客戶裝備或服務，包括（但不限於）推廣、行銷或宣傳其網絡、系統、裝置、客戶裝備或服務的任何不合情理或不當行為。

34. 同時，由於將電訊業豁免於建議中的營商手法法例之外，所以須確保在抗衡不公平營商手法方面，《電訊條例》為消費者所提供的保障，不會低於建議的營商手法法例。因此，本會建議修訂第 7M 條使之跟建議的營商手法法例一樣，以明確地涵蓋一切在交易進行之前、期間及之後的不公平營商手法，以及涵蓋持牌人、其代理或僱員的行為。

35. 就廣播業而言，《廣播條例》及《廣播管理局條例》並未有特定地授權廣管局處理有關營商手法的問題。然而，要正式規管對廣播業涉及的不良營商手法，可透過於現行規管架構，修訂現行的法定及 / 或發牌條件來達成。而目前架構內的任何問題，亦因而可透過修改條例和行政措施來得到適當而迅速的處理。因此消委會建議，為切合解決上述常見的不當銷售手法的急切需要，政府應考慮為公眾利益而行使權力，或在個別持牌人的同意下，對現行牌照作以下修改：

- (a) 禁止其持牌人、代理或僱員在交易進行之前、期間及之後，進行不公平營商手法；或
- (b) 要求持牌人，在諮詢廣管局後，編撰一套可由廣管局監察的良好銷售手法守則，以禁止其持牌人、代理或僱員在交易進行之前、期間

及之後，行使不公平營商手法。

36. 消委會並不認為將會成立的通訊事務管理局及將訂立的統合法例，會妨礙上述《電訊條例》及《廣播條例》的改善建議。舉例來說，修訂後的第 7M 條可輕易地轉移至新的統合法例，涵蓋電訊及廣播持牌人的行為。現階段，修訂條文以涵蓋所有不公平銷售手法及誤導或欺詐行為，只是預先制定須納入通訊事務管理局權力範圍的條文，故此這項工作是不會白費的。

總結

37. 消委會相信報告書中就現行和未來保障所作的各項建議，結合新的營商手法法例和執法機構，及個別法例及機構的行動，所發揮的力量能為消費者提供更大的協同保障能力。

38. 為香港經濟及整體社會利益為設想，這方案將為消費者和營商者雙方均帶來益處。

公平營商 買賣共贏

第一章：引言

1.1 過去數十年，香港在經濟及科技方面經歷重大的發展，衍生了許多層出不窮的營商模式及銷售手法，例如：預繳及會員制度，把不同類型的貨品及服務以綑綁式的手法促銷，以及一些在店舖以外的地方進行的推銷或銷售手法。在瞬息萬變的市場環境下，消費者往往發現自己正面對各種不公平的營商手法，消費者委員會接獲的相關投訴，只是冰山一角。**附件一**列出消委會於 2005 至 2007 年收到涉及欺騙性、誤導性及不公平營商手法的投訴統計。

本港常見的不公平營商手法

1.2 不公平營商手法大致可分三類：誤導或欺騙性的手法、威脅性或高壓手法，及其他不當和不公平的手法（「不公平營商手法」）¹。以下是一些在市場上常見的例子：

誤導或欺騙性手法

- (a) 虛假地聲稱貨品或服務符合某個水平、質素、評級、或訛稱其類型、型號、來源地、製造方法等（例如：訛稱一隻名貴手錶為瑞士製造的，但事實並非如此；或實際提供的貨品或服務質素遠低於宣傳資料上所列的質素）。
- (b) 虛假地聲稱貨品或服務得到某些團體的贊助或認可，或訛稱貨品或服務擁有某些功能、特徵、配件、成分、質素、效能等（例如：訛稱一種健康食品有特別治病的功能，或訛稱一種「高科技」的健康設備獲得美國食品及藥物管理局的認可）；
- (c) 訛稱所展示的價格已給予消費者折扣優惠（例如：聲稱貨品由\$12 減至\$10，暗示貨品的原價為\$12，但實際上原價只是\$10）；

¹ 為方便討論，本建議書將這些行為手法稱為「不公平營商手法」。在本建議書中，具威脅性或高壓的營商手法包括一些涉及不當行為的營銷策略，例如：意圖以騷擾、強逼及不當影響等方法去左右消費者選擇或行為方面的自由。

- (d) 以刻意誤導的手法推廣一些類似名廠製造的貨品，使消費者誤以為貨品是該名廠製造的；
- (e) 訛稱某件貨品是贈品，藉以利誘消費者購買其他貨品，但其後卻把「贈品」的價錢計算入賬單內；
- (f) 作出虛假陳述，聲稱除購買貨品的地區外，在其他地區或國家亦有提供貨品的售後服務；
- (g) 誤導消費者令他們以為只須購買一些職前培訓或其他與聘用相關的服務（此類手法可見於某些涉及聲名狼藉的模特兒公司的個案），便可以獲得相當吸引的受聘機會；
- (h) 訛稱產品只會在短期內供應，或只會在短期內提供優惠（如：減價），促使消費者作出即時的決定（例如訛稱減價只限一天藉以迫消費者馬上作出決定）。

威脅性或高壓的手法

- (i) 對消費者施加不當的壓力或影響，促使他們進行貨品或服務的交易，從而佔取便宜。（例如：主動替消費者保管一些重要的個人物品，設法把他們長時間留在單位內；並作出冗長不斷的推銷，迫切要求他們即時作出購買決定）；
- (j) 故意對消費者說出侮辱或冒犯性的說話，使他們感到羞辱，無奈地進行購買。
- (k) 在夜深時分造訪消費者，在其家中反覆不斷地推銷貨品或服務，造成滋擾。

其他不當或不公平的手法

- (l) 假意就某貨品或服務提供非常優惠的價錢吸引消費者，但目的只是為了促銷其他貨品或服務；
- (m) 接納消費者的付款時，並沒有意圖按訂單或在合理的時間內向消費者提供貨品及服務，或沒有充份地考慮到自己是否有能力履行有關承諾（例如：在接納消費者就預繳計劃所作的付款時，沒有充份地考慮到履行計劃中的責任所需的資源，以致無法達到消費者的合理要求）；

- (n) 妨礙消費者行使終止合約的權利（例如：使消費者難以取得終止合約的表格；或在接獲消費者非正式的終止合約通知時，沒有澄清該通知是無效的，亦沒有提醒消費者終止合約的正確程序）。

其他有關營商手法的問題

- (o) 在標準合約中加入不利消費者的不公平條款（例如：合約條款賦予營商者獨有的權力去詮釋合約中任何條款）。

1.3 在消委會接獲的投訴中，有些個案涉及超過一種的不公平營商手法，變化多端，更有力地影響消費者的判斷。在某些情況下，這些不公平的營商手法不但令消費者蒙受損失，更對社會帶來廣大的傷害；例如有關暢銷食品的錯誤陳述，便會影響眾多的消費者。這些不公平的營商手法，無論以任何方式進行，均有違社會誠實公平的價值觀不為社會接受。為維持社會公義，消委會認為需採取進一步行動使消費者能更有效地參與經濟活動，以及使他們免受不公平營商手法及騙局的損害。若此類不公平的營商手法大行其道，必會損害消費者的信心，從而損害經濟繁榮。

現行有關消費者保障的法律架構

1.4 即使政府過去曾付出不少努力，可是現有法律對消費者的保障亦有不足之處。現時，受不良營商手法損害的消費者，可透過不同的普通法原則追討補償特別是侵權法及合約法，例如：有關失實陳述，不當影響，威迫，錯誤，違約，非法禁錮，襲擊及毆打等普通法原則。

1.5 除普通法的保障外，還有一些由公共執法機構執行透過消費者自行執行訴訟的法例，其中有些條文就不公平營商手法方面為消費者及奉公守法的營商者提供直接或間接的保障（見附件二）。某些行業，例如：電訊業、銀行業、地產代理業、旅遊代理業及保險業等，均設立了自我規管架構，並制定一些有關營商手法的業務守則或指引供業內人士遵守。有關人士若被發現違規，可能會影響到其牌照或營業許可。

1.6 可是，現行有關營商手法的法律及規則零散又互不協調，涵蓋的行為亦有所局限，有些法例或規則只適用於某些特定的範疇，因而存在不少漏洞，未能有效地打擊現有的不公平營商手法，使不法的商人有機可乘。

1.7 而政府關注到消費者保障法例上的不足處。在 2007/08 的財政預算案中，財政司司長邀請消費者委員會：—

“檢討保障消費者權益的現行措施，包括如何改善有關法例，以更有效地打擊誤導或不良的銷售手法。”

現行有關營商手法的法律架構的不足

互不協調且零散的法律條文及規則

1.8 跟其他國家(包括一些先進的經濟體系)不同，香港沒有一條全面的法例，去規管不公平的營商手法。有關其他國家的全面營商手法法例的例子，請見**附件三**)。受不良營商手法損害的消費者，只可透過不同的普通法原則或一些互不連繫及互不協調的法例尋求補償(如有)，唯現行的法例大多欠缺全面性，只適用於個別範疇。就消費者自我保護而言，對於沒有接受過法律培訓的普通消費者，要明白現有法律授予他們的法律權利及利用有關保障，並不容易。與此同時，現時互不連繫及互不協調的法律體制亦會使很多營商者對他們的法律責任一無所知，結果縱使他們希望奉公守法，亦可能在不知不覺間負上了違法的風險。

現行法例的漏洞

1.9 再者，由於現時某些保障消費者的法例條文涵蓋範圍局限，以及各執法機制均有其法定限制，致令現時的法律架構在規管不公平營商手法方面存在漏洞，以下是一些例子²：

誤導或欺騙性的手法

虛假或誤導的貨品說明³

(a) 正如上文所提及，對貨品或服務的口頭或書面的虛假說明，是市場上最常見的誤導或欺騙手法之一。消費者時常會誤信一些虛假或誤導的貨品說明，因而買入與所付價值不符，或不是他們想要的貨品或服務。現時《商品說明條例》是本港禁止貿易或商業上虛假商品說明的主要法例，但該條例的涵蓋範圍有限：—

- (i) 該法例禁止貨品方面的虛假商品說明的應用，但並不包括服務、住宅物業及其他權利及權益的保障。「商品說明」的定義亦比較局限，不包括價格、售後維修及保養服務、以及贊助或聯繫機構的陳述⁴。此等事宜的虛假的說明並非公共執法機構的執法範圍內，只可透過受損消費者經由民事訴訟的途徑處理

² 以下列出的行業只是部份例子，不應視作盡列。類似的狡滑手法亦可能出現於其他行業。

³ 縱使《商品說明條例》的涵蓋範圍狹窄，但香港海關在2006年及2007年的首9個月分別錄得720及782宗有關這條例的案件。

⁴ 在2007年12月21日刊憲的《2007商品說明(修訂)條例草案》已對上述部分不足處作出補救。有關修訂的概要請參閱本建議書的第三章。

（如虛假陳述或違約等），因此，欠缺了由一個資源充足及有效率的公共執法機構負責執法所衍生的阻嚇作用。

- (ii) 現行的《商品說明條例》的條文是否足以涵蓋所有在合約訂立後應用的商品說明，仍有不清晰的地方，例如條例是否適用於在付款及交貨後發出的銷售單據上所紀錄的資料。

資料不足

- (b) 《商品說明條例》只規定黃金與白金製品需註有或在單據上列明⁵有關標記令中指定的資料，如製品的成色等。儘管如此，最近有投訴指出業界對「白色黃金」及「白金」兩個名詞的運用引起消費者混淆。再者，該條例並無就營商者在售賣鑽石、翡翠及電子產品時，須列明的資料作出法定規定。現時有些營商者沒有就此等貨品提供足夠的資料，清楚地描述消費者的選購的貨品，這在一定程度上亦導致有關此等貨品的投訴頗為常見。
- (c) 即使《商品說明條例》要求營商者在單據上列明指定的資料，但由於單據是於合約訂立後才發出，單據上的資料對消費者因涉及失實陳述而採取法律行動尋求民事補償時，是否有用亦存疑問。消費者仍須證明單據上所記載的虛假陳述在購買前已作出，並導致他們訂立合約。

誤導性的廣告

- (d) 廣告中含糊而又誇大的聲稱，往往引致消費者錯誤地選購貨品引起投訴。然而，除了《不良醫藥廣告條例》可規管一些有關醫藥的廣告以及某些只適用於個別範疇中有關廣告的特定法定條文外，現時並沒有全面的法例去監管誤導性廣告。通過廣播媒體發放的廣告，主要受廣播事務管理局執行的規管方案所監管，透過其他的媒體如印刷品及電子媒體（如互聯網及電郵）發放的廣告，則沒有類此的監管方案，只受自願性參與的自我規管架構約束。

有關招聘機會的誤導行為

- (e) 社會上不時有涉及營商者利用誤導行為，誘使消費者購買一些與職前培訓或與其他聘用事宜相關的服務，務求獲得營商者所聲稱具吸引力的工作機會。除非當中牽涉刑事欺詐成分，否則現時法例條文並沒有賦予公共機構權力，去規管此類不公平的營商手法。因此，受損的消費者只可透過個人的法律行動追討賠償（例如根據《不合情理合約條例》下管制的「不合情理」情況），可是舉證工作甚為艱鉅，成功機會亦未可知。

⁵ 《商品說明(標記)(黃金及黃金合金)令》及《商品說明(標記)(白金)令》。

威脅性或高壓的手法

騷擾性及高壓的銷售手法

- (f) 騷擾性的銷售手法在香港並非不普遍。根據《簡易程序治罪條例》第 6A 條，任何人在公眾地方進行招徠活動而對他人造成煩擾，須負上刑事責任。但在私人地方如在消費者家裏或門前推銷⁶或在私人會所內進行的推銷活動卻不受此條文限制。因此，在這些情況下，消費者只能透過個人法律行動索償。
- (g) 消費者的投訴個案不時涉及營商者主動為消費者保管一些重要的個人物件（如：身份證及手提電話），其後設法把他們長時間留在單位內，並作出冗長不斷的推銷，不讓消費者有機會離去。這些手法明顯地削弱消費者在考慮購買所需或所想要的貨品的判斷能力。若手法涉及襲擊，毆打或非法禁錮⁷，則可能構成侵權行為及引起刑事檢控；但若然所用的手法非常狡滑，當中沒有限制人身自由或使用武力，這些高壓銷售手法，雖有損消費者利益，卻不會受侵權法或刑事法制裁，除非發生於公眾地方，並構成受《簡易程序治罪條例》第 6A 條所約束的招徠行為。因此，循個人法律行動解決，成為消費者的唯一選擇。

其他不當或不公平手法

餌誘式銷售

- (h) 有些營商者在廣告中聲稱貨品或服務以特惠價出售，其實並無足以應付預期需求的合理數量。這種手法實際是以所宣傳的特惠價為誘餌的招徠，然後以缺貨或特價貨品已售罄等藉口作推搪，旨在推銷其他價格較高的產品，這實為行騙伎倆。除非證明有明顯的欺詐企圖，否則由於難以搜集足夠的證據，較難運用具刑事制裁的欺騙法或《盜竊條例》來檢控。

接受付款時並未有能力或意圖提供貨品或服務

- (i) 本港流行預繳式的營商模式（如預繳式代用／現金券或服務計劃等），而有關此類收款後營商者沒有提供或未能在合理時間內提供有關貨品或服務的投訴也不少。此舉令人懷疑營商者在接受預繳款項時，根本沒有打算在可見的將來提供已承諾的貨品或服務的能力，便已接受預繳。然而，現時除非經過冗長而複雜的法律行動後，証明營商者有欺騙的企圖，公共機構才可按根據《盜竊條例》（第 210 章）第 16A 條要求法院定罪。反之，若不能證實有詐騙的意圖，受損消費者只可循民事方面提出違約的指控及索償。

⁶ 例如：推銷員以檢查住宅的設施或裝置為理由進入消費者的住所，但其後卻向有關消費者不斷推銷其他貨品及服務的新計劃。

⁷ 襲擊是指一些令消費者意會到他將受即時及非法的暴力所影響。毆打是指對消費者施予非法的暴力。非法禁錮是指利用非法的手法限制消費者離開特定範圍的活動自由。

妨礙消費者行使終止合約的權利

- (j) 妨礙消費者行使終止合約的權利亦是不公平的營商手法之一，這亦損害消費者的利益。可是根據現行的法律架構，消費者往往發現個人的法律行動乃尋求補償的唯一途徑。

其他有關營商手法的問題

標準合約內不公平的條款

- (k) 在標準合約中加入不利消費者的不公平條款，在某些行業中是相當盛行的做法，典型的例子是那些容許營商者在任何情況下單方面更改合約中有關通知期、月費或合約所提供的貨品或服務的合約條款⁸。縱使不少投訴認為這些有關單方面更改權力的條款是不公平和不合理，但在《不合情理合約條例》下，單單加入這些條款而又沒有牽涉其他不合情理的手法，是否已會被視不合情理合約，卻未有清楚闡釋。

現行執法機制的不足

依賴消費者採取的法律行動

- (l) 現時受損的消費者可循民事法律行動尋求索償，此外亦可通過調解方式解決糾紛。消委會亦是一個廣為大眾所知的途徑，協助消費者及營商者進行和解。但是由於缺乏執法及制裁的權力，能否成功調解完全依賴營商者在接獲投訴後是否合作。故此，受損的消費者往往須訴諸個人的法律行動，去對付該等不公平的營商手法及尋求補償。但顧慮到舉證困難，他們大都不會積極採取法律行動去爭取他們的權利。譬如在虛假陳述案件中，消費者不單要證明陳述是虛假的，還要證明該等陳述就是導致他們訂立合約的主因；加上敗訴的風險及一旦敗訴後要負擔的可觀訴訟費用，很多消費者都會感到法律訴訟乃一項沉重的工作，特別當申索的款額不多時，他們更覺得不值得採取法律行動，因而卻步。

公共機構在執法上的限制

- (m) 有鑑於現行有關營商手法條例在涵蓋範圍方面的限制，現時仍有一些範疇是不在公共主管機構的執法權力範圍內。當中包括有關服務、住宅物業及其他權利及權益的虛假陳述。就現時受規管的範疇而言，如涉及貨品的虛假說明，其制裁主要是刑事的。但由於要有足夠證據，證明無合理疑點，刑事罪行一般較難證實，制裁方面亦未必達致成本

⁸ 本會在 2005 年、2006 年及 2007 年接獲有關單方面更改合約內容的投訴分別有 187、134 及 182 宗。

效益。整體而言，我們仍未建立一套由公共執法的機制，去作出民事制裁或行政制裁，杜絕不公平營商手法。由於制裁方式的限制，公共主管當局在執法上，往往欠缺了因應問題的嚴重性及性質而採取適當及快速行動的彈性；從而影響公共執法的有效性，未能達到消費者對其利益保障的期望。

檢討的需要刻不容緩

1.10 因此，消委會認為需要改善現行的法律架構以：

- (a) 面對日新月異的不良營商手法所帶來的挑戰；及
- (b) 維持消費者信心及保障奉公守法的營商者的利益，使該些營商者毋須面對該等手法引起的不公平競爭，從而確保市場的公平運作。

1.11 消委會認為這些改善有助推動本港經濟的兩大支柱，即零售及旅遊業⁹的持續發展，更可保持本港購物天堂的國際形象及聲譽。

1.12 消委會認為若要達到在 1.10 段提及的目的，必需擴大消費者保障法例的範疇，以涵蓋該些現仍未受規管的不公平營商手法。同時，亦要建立一致協調的機制並賦予靈活的執法工具，以及訂立清晰的政策，以杜絕不同行業中的不公平營商手法。

1.13 原則上，有關法例改革，可以有兩種做法：

- (a) 零散方式：零散地修改現存各條與營商手法有關的法例；
- (b) 全面方式：制定一條全面性的法例及成立一個專責機構來執法，以及規管不公平營商手法。

1.14 以零散方式進行會法律改革涉及冗長而繁複的立法程序，且要計劃得周詳有序，才能達致連貫一致的消費者保障政策目標。儘管處處小心，仍難保法例之間不會出現遺漏。此外，如上文所述，現時的公共機構在執法上以刑事制裁為主，如要增加現在法例架構中的彈性，不單要重大修改有關機構在制裁方面的選擇，以及現時執法程序，同時亦要顧及各方面的一致性，當中涉及的變動，或會吃力不討好。

⁹ 2007 年的訪港旅客總人數超過 2 千 8 百萬。2007 年的總零售額達 2,477 億港元。

本報告的目的

1.15 因此，消委會在本建議書的第二章中，建議制定一條全面的營商手法法例，亦會就相關的法例架構及執法架構提出建議，為消費者提供全面的保障。

1.16 此外，消委會認為某些現行法例及自我規管架構可能會被豁免於全面營商手法條例之外或與該條例並存，故在第三章中消委會亦提出該等法例及規管架構的改善建議。

改善消費者保障法例工作小組

1.17 本研究在改善消費者保障法例工作小組的指導和監督下，由消委會法律事務部負責進行。

1.18 工作小組成員包括：

張炳良教授，銅紫荊星章，太平紳士（主席，由 13.7.07）

陳家強教授，銀紫荊星章，太平紳士（主席，至 30.6.07）

何沛謙資深大律師

郭琳廣律師，太平紳士（至 6.10.07）

陳文敏教授，名譽資深大律師

陳志光先生

黎榮浩先生（由 1.11.07）

馬錦星先生

馬詠璋大律師

黃以謙醫生（至 31.12.07）

王沛詩大律師，太平紳士

容韻儀律師

1.19 消費者委員會對所有曾為本建議書提供資料和寶貴意見的個人和團體，表示深深的謝意。

第二章：全面的營商手法法例

引言：理據

2.1 如第一章所述，杜絕不公平營商手法，以保障消費者所遇到的問題如下：

- (a) 現行的法例及相關的普通法原則，零散而互不協調，令消費者在理解及行使其權利，以及營商者在理解其責任及遵守法例時，面對一定的困難；
- (b) 若干現行與營商手法相關的法例條文過於局限，某些備受關注的問題超越執法者的規管範疇。舉例來說，《商品說明條例》只涵蓋商品供應，若商戶就所提供的服務作出虛假或誤導陳述，海關並不能採取任何行動，而消費者只能循個人的法律行動去制裁此等不良的營商手法。
- (c) 公共主管當局的執法範疇及靈活性，都受到限制，影響其執法效力，亦未能符合消費者的期望；
- (d) 消費者要保障其權益，須自行採取法律行動去抗衡不公平營商手法。然而，透過法律行動尋求補償，消費者往往因昂貴的法律費用、敗訴後需承擔的風險及艱巨的舉證而卻步。

2.2 本會認為透過制定全面的營商手法法例，可有效解決上述問題，建議的營商手法法例須：

- (a) 規管所有不公平營商手法及受關注的範疇；及
- (b) 建立一個全新、靈活而具效率的機制，並由專責的機構執法。

2.3 法例將提供一致而協調的法律架構，方便消費者全面理解其應有的法律權利。另一方面，法例亦詳列有關營商手法的一般規則，釐清營商者對消費者權益應負的責任，並提供基本的市場規則，加強營商者對此的理解，讓他們遵從。

2.4 此外，法例的範疇須全面確保堵塞現行法例及普通法原則所存在的漏洞。例如包括現時《商品說明條例》未有涵蓋的有關服務的虛假與誤導陳述。

2.5 建議中的全面法例亦會提供一個靈活及具效率的執法機制，有效解決上述問題。在此機制下，須設立一專責機構，並賦予它權力，推行各項確保市場公平運作的措施，和採取具成本效益及靈活的執法政策，對處理的爭議，就其性質及嚴重性作出適當的行動。對於緊急及嚴重個案，有關機

構須獲賦權向法院申請命令，作出及時的補救措施。

2.6 此執法機制可在昂貴的法律行動以外，提供既省時又省錢的另類選擇，讓受損消費者可透過和解來解決與營商者之間的糾紛。被認為不當的營商者，若未能達成和解，而執法機構認為需要時，便對他採取嚴厲的執法程序，這個以執法行動作為後盾的做法，相信會帶來更有效的結果。

2.7 本會相信上述建議的法例及專責的執法機構將提供一個有效的機制，以解決第 2.1 段所提及的問題。總的來說，建立全面的營商手法法例，並由專責機構執行有關法例，可為消費者提供全面的保障，應付市場上瞬息萬變的挑戰。此外，法例亦可為各行業制定統一營商標準及基線，建立一致且協調的法律架構，有助實施及遵行保障消費者的政策，進一步促進整體經濟利益。

2.8 建議中的法例既符合社會上與日俱增的消費意識，與及公平交易的訴求，亦有助保持香港「購物天堂」的美譽，突顯重視保障消費者權益的形象。

要討論的課題

2.9 在這全面營商手法法例的建議書中，消委會就下列問題進行討論：

- (a) 法例應涵蓋甚麼範疇？
- (b) 在擬定法例的禁制時應採用甚麼基本方式？
- (c) 怎樣才是合適的執法機制？
- (d) 執法機構須具備甚麼特質？
- (e) 法例如何與現行的法律和規管架構融合？

法例應涵蓋甚麼範疇？

2.10 在確定法例應涵蓋的範疇時，須考慮四個層面，包括不公平手法的性質、須規管的交易模式、法例適用之情況，以及不公平手法對消費者作出購買決定時的影響。

不公平手法的性質

2.11 受規管的手法須屬不公平的手法，即損害了消費者基本權益，包括消

費者的安全受保障、獲得資訊和自主選擇的權利¹⁰；大致可分三類：

- (a) 對消費者作出決定所需的重要資料¹¹，作出誤導、欺騙行為或不作為（隱瞞或遺漏）；
- (b) 威脅性或高壓的推銷手法，妨礙消費者選擇或行為方面的自由；及
- (c) 營商者的其他不符合殷實可靠的經營原則之不當或不公平營商手法，例如侵犯消費者的選擇權。

2.12 本會相信上述所列的範疇足以涵蓋現時在市場上出現的不公平營商手法，包括誤導性廣告、騷擾性的推銷行為、餌誘式銷售，以及接受付款時並未有能力或無意圖提供貨品／服務。

須規管的交易

2.13 法例的應用範圍包括宣傳、銷售或提供任何「產品」予消費者。法例旨在為消費者提供全面的保障，建立適用於所有行業的統一營商標準，而「產品」一詞的定義應廣泛至足以涵蓋消費者購買的所有形式之貨品和服務，由廉價的產品如鉛筆，以至貴重如汽車、私人住宅物業例如樓宇單位、以及合約權益及責任¹²等。

法例適用之情況

2.14 法例將適用於企業(營商者)與消費者作出的不公平手法，不涵蓋消費者之間的私人交易。因此，法例應涵蓋供應者(包括政府)所提供予消費者的產品(包括貨品、服務、私人住宅物業，及合約權益和責任)，而不會應用於營商者之間的商業交易，或是消費者之間的私人交易。法例亦涵蓋交易進行之前、期間或之後，由營商者作出的手法，且與下列事項有直接關連：

- (a) 宣傳、銷售或提供產品予消費者，或消費者行使與產品相關的合約權利；
- (b) 向消費者回購貨品，例如金器和二手車。

2.15 營商者及消費者之間的合約關係，不應在買賣完成後便告終，而是包括某些售後的權利及義務，如退款、更換，或終止合約等。鑑於某些營商者經常透過不公平營商手法，剝奪或限制消費者行使此等權利，故法例涵

¹⁰ 此三項權利，連同受理的權利，構成消費者權利基本概念，由美國前總統甘迺迪提出；其後，國際消費者組織「國際消費者聯會」加入滿足基本需要的權利、獲得公正賠償的權利、接受消費者教育的權利，以及享有健康環境的權利。載有上述八項消費者權利的《聯合國消費者保護指南》，已於1985年4月9日在聯合國大會中通過。

¹¹ 例如廣告上的誤導聲稱。

¹² 例如健身會籍所含的權利及責任。

蓋的範疇須延伸至交易後所出現的不公平手法。

2.16 就立約前的不公平手法而言，最常見的例子是商戶「面對面」或在廣告上作出誤導聲稱，嚴重損害消費者作出知情的決定，這些情況跟交易時出現的不公平手法同樣損害消費者利益。

2.17 法例須涵蓋個人或機構，包括從事商品或貿易之公司董事、僱員或代理所作出的不公平營商手法。若違例者為機構，而在其管理人員（如董事）的同意、縱容或疏忽下違例，該管理人員亦可能要負上法律責任。

不公平手法對消費者作出購買決定的影響

2.18 根據有關法例，除了在企業與消費者的交易下作出不公平手法須負上法律責任外，若該等手法令消費者作出在其他情況下不會作出的購買決定¹³，同樣須負上相關責任。「購買決定」指消費者究竟根據甚麼條件而作出決定，去購買某一產品，或行使與產品有關的合約權（如終止合約、退款或更換的權利）¹⁴。

建議一 - 法例涵蓋的範疇

2.19 建議法例的範疇須延伸至：

- (a) 具誤導或欺騙性的作為或不作為(包括隱瞞或遺漏)；
- (b) 威脅性或高壓的推銷手法，對消費者的選擇或行為方面的自由構成重大損害，或可能構成重大損害；及
- (c) 營商者的其他不當或不公平營商手法，不符合殷實可靠的經營原則；

以及

在交易進行之前、期間，或之後營商者（或其僱員或代理）使用的不公平營商手法，並與下列事項有直接關連：

(i) 宣傳、銷售或提供產品予消費者，或消費者行使與產品相關的合約權；

(ii) 在二手市場中，向消費者回購貨品，例如金器和二手車。

以及

有關手法或會令消費者作出一個在其他情況下並不會作出的購買決定。

2.20 若違例者為機構，而在其管理人員（如董事）的同意、縱容或疏忽下

¹³ 例如，某消費者乃基於虛假資料，而被「錯誤引導」作出在其他情況下並不會作出的購買決定。

¹⁴ 歐盟的《不公平商業行為指令》。

違例，該管理人員亦可能要負上法律責任。

2.21 此外，「產品」應包括服務、貨品、私人住宅物業，以及合約權利及義務。

在擬定法例的禁制時應採用甚麼基本方式？

2.22 針對不公平營商手法所擬的法例條文，通常採用三種形式：

- (a) 一般及概括一切的禁制；
- (b) 特定行為的禁制；
- (c) 結合(a)及(b) 的禁制。

2.23 第一種形式為一般性條文，列明所有在貿易或商業的不公平手法均屬違法。這形式的範圍較廣泛，與針對個別行為的特定禁制條文相比，其法定內容更具靈活性，更易對付變化多端的不良手法；因為要決定怎樣才構成不公平營商手法十分困難，但若使用一般原則來判斷某些手法是否不公平，則較容易。然而，亦由於一般條文本身不夠具體，在某些情況下，個別手法是否受法例規管成為疑問。要待法院清楚詮釋，營商者及消費者方才明白其權利及義務。

2.24 第二種形式羅列一系列明確及具體清晰的不公平手法定義，例如誤導消費者某地區有提供產品的售後服務，或虛假聲稱某產品可治療某種疾病。此方式能清楚明確地闡釋有關的權利及義務，易於執法及遵從。然而，此方式卻同時限制了對不公平營商手法的規管範圍，未必能涵蓋所有須受規管的行為，因而出現漏洞。

2.25 第三種形式乃結合上述兩種情況，在一般禁制的基礎上再增補特定針對行為之禁制條文。此方式具開放性及解說性。另一方面，亦容許法院禁制在不同情況下出現的不公平營商手法。此外，特定行為禁制條文有助進一步闡釋一般條文，並可作為營商者須遵從的清晰指引。

2.26 此結合方式可採用訂定一些明確的條文，或透過載有特定的不公平手法的可增補的附表的形式。前者為澳洲商業行為法所採用。在該法例中，針對「商業或貿易中具誤導性或欺騙性行為」的一般禁制條文，輔以一些特定條文，禁止商業或貿易中某些特定的不公平手法，例如陳述有關產品或服務的價格的虛假或誤導性，以及聲稱免費提供禮品或獎品，但實際上並無此意圖等。

2.27 而新加坡的《消費者保護(公平交易)法 2003》及英國的《保障消費者

免於不公平交易規例 2007 草稿》¹⁵ 均採用了可增補的附表方式，來補充一般禁制條文。新加坡的法令，利用一般禁制條文去針對不公平手法，包括任何虛假聲明、合理地可能欺騙或誤導消費者，或不公平地損害消費者利益的作為或不作為。除了此一般禁制條文外，營商者須就附表¹⁶（請參閱附件四）列明之特定行為負上法律責任。另一方面，英國的規例包含與不公平營商手法有關的一般禁制條文，包括具誤導或威脅性手法；該法令亦禁止 31 種特定營商手法，詳情列於附表（請參閱附件五）。

建議二 – 擬定法例的禁制時的基本方式

2.28 綜合上文所言，本會建議在制定法例杜絕商業及貿易中的不公平營商手法時，採用一般禁制條文結合特定不公平行為禁制條文的方式。雖然消費者或營商者可能不肯定某些沒有在特定條文或不公平行為附表中明確禁制的行為是否被執法機構視為包括在全面性的總括條文之內。不過本會相信，相關執法機構可制定出適當的指引，便可消除此等疑慮。

怎樣才是合適的執法機制？

2.29 立法規管不公平營商手法，只是建立全面法律架構的其中一部分；同樣重要的，是制定合適的執法機制，對違法者作出制裁，包括刑事及民事的制裁，以及設立一套有效的行政程序，以實現執法策略的目標。

執法策略

2.30 本會認為，合適的執法機制應建基於一套能為執法機構、消費者及營商者帶來最佳成本效益的策略上；此策略須回應消費者需求，迅速提供解決方法，而當營商者察覺其可能觸犯法例之時，亦可簡單直接地解決問題。通過法庭訴訟來執行的刑事制裁，難以達到上述的目的。因為刑事制裁講求阻嚇性，定罪帶來的嚴厲懲罰，包括犯案記錄和監禁，故此必須減低錯誤判決的機會。舉証方面的各項要求，比起其他法律程序較為嚴謹，故此不論案情是否嚴重，刑事訴訟程序都是冗長和昂貴的，不能迅速處理問題，由此觀之，刑事制裁在某些情況下並非保障消費者最佳手段。

2.31 本會建議執行建議中的條例，應以行政措施為主導以確保市場行為得以改善，此策略亦有助促成執法機構與可能觸犯法例的營商者之間的互惠合作。有關策略應循下列各步驟進行：

(a) 首先嘗試調解營商者與消費者之間的糾紛。

¹⁵ 草擬的保護消費者免於不公平交易規例 2007(07 年 5 月)諮詢文件附件 A

¹⁶ 法令亦授權首相根據憲報所刊登的法令修訂附表。

- (b) 若執法機構認為營商者有違反行為，可接納由營商者作出，「可由法院強制執行」的承諾書，在這承諾中營商者答應不再作出類似的違規行為，必要時亦可得營商者答應作出其他補救行動。
- (c) 如營商者未能作出令人滿意的承諾，執法機構即展開正式調查，並發出「可由法院執行」的「終止及遵從」通知書。
- (d) 若執法機構認為某營商者違反法例、並向他發出「終止及遵從」通知書或已接納其承諾書，有關機構有權公布營商者的名稱。
- (e) 如上述措施仍未能或不會達預期成效，或營商者違反承諾或「終止及遵從」通知書的要求，執法機構可向法院申請聲明、禁制令、法令及／或罰款¹⁷。

2.32 執法措施會由游說（例如調解糾紛及接受書面承諾）逐步提升至處理較嚴重個案的法院制裁（例如禁制令或罰款）。舉例來說，假若營商者經告誡後仍重複行使不公平的營商手法，及或拒絕與執法機構合作，以行政方式去解決問題，執法機構便會向法院申請予以制裁。根據個別情況及其緊急性，執法機構亦可要求法院即時頒布禁制令，但這應視為例外情況，並非常規。運用此策略，消費者的爭議可適時地在行政層面上得以解決，而執法機構亦可在耗用訟費，採取法律行動之前確保營商者遵守法律。此策略在處理不太嚴重的違規行為最具成本效益，尤其是當該等違規的營商者願正面地和快速地作出回應，例如向受損的消費者作出賠償。

2.33 消委會相信此漸進的方式，比較單靠阻嚇之方式，更能解決市場上的營商手法問題。現時某些營商手法法例，只能作出刑事制裁（例如罰款及入獄），實在有欠靈活。假如營商者態度合作，願意採取補救措施，例如賠償予受損消費者，清晰的程序可協助代表公眾執法的機構，以及尋求權宜解決方法的營商者解決問題。這避免高昂而費時的法律程序，而該等程序之使用可限於性質較嚴重和情節較惡劣的違例行為。

2.34 配合這種漸進的策略，消委會建議法例的規管應以民事¹⁸責任為主，除非所涉手法極不道德或嚴重危害社會，方會訴諸刑事制裁¹⁹。例如有些個案的營商者把消費者的重要財物收起，設法留住他們於單位內（長達六小時），期間不停催迫他們作出即時的購買決定。此外，亦可考慮把情節嚴重的欺騙作為或不作為列作刑事罪行。由於建議中的法例將會是本港處理不良營商手法全新法制框架，推行過程中仍需作出調整，若發覺該法例未能滿意地規管某些不公平手法，必要時可對此訂立刑事罪行條文。

¹⁷ 《性別歧視條例》(第 480 章)第 82 條，《殘疾歧視條例》(第 487 章)第 78 條，及《家庭崗位歧視條例》(第 527 章)第 60 條

¹⁸ 民事法律責任可引起私人的索償申訴行動，及由公共機關透過法院以禁制令、聲明或罰款形式執行。《性別歧視條例》(第 480 章)第 82 條，《殘疾歧視條例》(第 487 章)第 78 條，及《家庭崗位歧視條例》(第 527 章)第 60 條

¹⁹ 刑事法律責任可引致更為嚴重的後果，除了罰款，也可監禁，並可能留下犯案記錄，影響其個人前途，例如不能擔任董事或專業執業等。

執法機制

和解

2.35 合作及遵從是這個漸進政策的基本目的，故此執法機構的初步措施是協助雙方調解，除非遇到十分緊急的個案，協助消費者及營商者在自願的情況下和解，是執法機構的法定責任。為鼓勵及促使雙方平息糾紛，在調解過程中涉及的資料，除非獲當事人同意，否則便應予以保密，亦不能引用作為訴訟程序中的證據。

正式進行調查

2.36 若雙方未能成功和解，而執法機構認為營商者的行為已抵觸「法例」，就會展開正式調查。為了進行調查，執法機構應獲賦權去搜集資料、文件，和其他相關的證據，以及有權傳召受調查者以作訊問。為確保調查能有效地進行，任何人若拒絕或阻礙執法機構搜集資料或審查，執法機構可向法庭申請命令，要求有關人士合作，違反此命令應是一項刑事罪行。此外，任何人蓄意修改、隱瞞、隱藏或毀壞執法機構或法院要求提交的文件，又或是明知或罔顧實情地提供錯誤的資料或誤導的陳述，亦同樣干犯刑事罪行。本會認為干犯上述罪行的人士應判處罰款，而情節較為嚴重的可被判處入獄。

自願性的承諾

2.37 在調查期間，當執法機構決定需要作出和解以外的進一步行動，法例應訂明執法機構可接受營商者提出的「可由法院強制執行」的承諾書，表明其願意終止或改變現行的不良手法；及在某些情況中，對受損消費者作出補償。這種自願遵從及補償的做法，一方面可讓營商者遵守法例，令受損消費者得到補償，更可節省為執行行政措施及法律程序所需之費用，符合成本效益，另一方面，營商者亦能利用便捷的方法，盡早解決問題，不必花時間及金錢到法院作出抗辯或就進一步的行政措施作出回應。

「終止及遵從」通知書

2.38 經調查後，若執法機構發現營商者觸犯「法例」，而他們又未有提供任何承諾書，執法機構可獲賦權向營商者發出「可由法院強制執行」的「終止及遵從」通知書。在通知書中，執法機構可視乎情況對營商者作出不同程度的要求，包括終止以及不可再次行使該等不公平手法，或是公布或刊登更正聲明。

2.39 若營商者違犯之前作出的承諾書，或不遵從通知書，執法機構可向法院申請罰款、聲明或禁制令，禁止營商者繼續行使不公平的手法。法院會審查個案是否已違犯營商手法法例，亦會查證營商者有否履行承諾書或之前發出的「終止及遵從」通知書。法院在聆訊後，若判定確已觸犯「法例」，

便會發出禁制令，着令營商者終止所有干犯的行爲，並需遵從合適的法令，如被發現違反禁制令，營商者可能被控藐視法庭。

2.40 若執法機構察覺事態嚴重或緊急，不能以和解方式解決問題，應獲賦權立即向法院申請禁制令或其他命令。

2.41 爲了協助執法機構監督營商者是否履行承諾書、「終止及遵從」通知書，以及法院頒布的禁制令，「法例」應明確規定營商者必須向執法機構提供相關資料。

申述及上訴

2.42 爲確保營商者在相關的行政機制中得到公平的對待，他們在不同階段應獲申述的機會。例如在調查階段，執法機構應給予營商者合理機會，就事件作出口頭或書面解釋；再者，在合理情況下，例如營商者未有作出違反行爲，又或「終止及遵從」通知書的條款過於苛刻和不合理，他們可提出上訴；假如營商者已接獲法院禁制令、聲明或其他命令，亦有權向較高一級的法院提出上訴。

本地經驗

2.43 本地某些執法機構亦採用了與上述相類似的手法，例如由平等機會委員會執行的《性別歧視條例》(第 480 章)和《殘疾歧視條例》(第 487 章)，以及由私隱專員公署執行的《個人資料(私隱)條例》(第 486 章)，都是採用先和解，發出執行通知書，及申請禁制令和其他命令，這種漸進的執法模式。

海外經驗

2.44 在澳洲，《交易慣例條例》由澳洲競爭與消費者公署負責執行。公署接獲投訴後，會根據內部政策，首先接觸被投訴的商戶，要求提供更多資料，並給予機會就指控作出回應；若公署認爲指控表証成立，可根據違規行爲的嚴重性、證據的多寡、涉案營商者是否合作等多項因素，採取不同的執法行動。公署亦可以接受商戶提出「可由法院強制執行」的承諾書，包括終止行使不公平手法，或賠償予受損消費者等；若營商者違反承諾，公署可向法院申請法令，着令營商者履行承諾書或其他合適的命令；公署亦可申請其他法令，例如更正啓示、禁制令及停止交易命令等²⁰。

2.45 類似的「可由法院強制執行」的承諾書，亦可見於英國的《企業法》第 8 部分。負責執法的公平貿易局會先要求被指違法的營商者作出承諾書，並給予最少 14 天限期回應。如營商者拒絕作出承諾，或違反向公平貿易局作出的承諾，公平貿易局可向法院申請執行令(禁制令)；一般而言，只有營商者未能履行承諾解決糾紛，才會收到執行令。公平貿易局亦有權

²⁰ 《經濟合作與發展組織》科學科技及工業理事會 2006 年 12 月就消費者政策發表的「對消費者最佳的手法：執法制度的成效報告」第 82 至 84 段

公布相關的承諾及執行令，然而此執法機制只適用於對整體消費者利益構成損害的違法行為上。

刑事條文的執行

2.46 如上文所述，除行政措施以外，「法例」亦可對嚴重的不良手法作出刑事制裁，而執行時無可避免地牽涉到進入物業、沒收財物及逮捕等權力；行使此等權力，紀律部隊會較獨立公共機構合適。因此，若「法例」載有刑事條文，而又由獨立的公共機構負責執法，所涉及違反刑事條文的個案應轉交有關紀律部隊處理，而該些個案在轉介前亦不必作出任何和解。

建議三 - 執法機制

2.47 總括而言，本會建議：

- (a) 執法機構應採用漸進及以遵從為本的執法方式，以由法院制裁支持的行政措施為主導，採取以下的步驟：
 - (i) 協助雙方自願和解
 - (ii) 要求營商者作出「可由法院強制執行」的承諾書
 - (iii) 由執法機構發出「可由法院強制執行」的「終止及遵從」通知書；
 - (iv) 若違反承諾書或「終止及遵從」通知書，可向法院申請罰款、聲明及禁制令。
- (b) 執法機構在調查時，應獲賦權收集資料，監察有關涉案人士有否遵從機構發出的承諾書、「終止及遵從」通知書，及法院頒布的禁制令。
- (c) 有關的營商者在不同階段（包括調查期間），都應有合理機會作出申述，或就「終止及遵從」通知書或其中的任何部分提出上訴。
- (d) 執法措施應逐步提升，先是游說，然後再根據違法的嚴重程度、不遵從和不合作程度，及其他相關因素，決定是否由法院作出制裁。執行機構可視乎個案的緊急程度或其他情況，即時向法院申請禁制令而毋須經過和解，發出通知等步驟。
- (e) 違法者主要須承擔民事責任，除非有關的不公平手法極不道德，或對社會構成重大傷害，便會作出刑事制裁。
- (f) 假若法例載有刑事條文，而執法機構乃獨立的公共機構，涉及違反刑事條文的個案應轉交相關紀律部隊處理。

改善私人訴訟權及獲得補償的權利

改善私人訴訟權

2.48 本會認為消費者的私人訴訟權²¹應為建議法例中執行架構重要的一部分。私人訴訟權既可補足執法機關的執法行動，亦可促使營商者遵從法則。

2.49 事實上，根據現時就有關合約和侵權的普通法規則，或有關誤導、欺騙性行為及不公平銷售手法的法例條文，如《不合情理合約條例》(第 458 章)消費者擁有私人訴訟權。而建議中的條例亦有同樣條文，故此消費者同樣享有私人訴訟的權利。此外，現存法律架構中亦有例子，可在公共機構執法以外，容許進行私人訴訟。例如，根據《電訊條例》(第 106 章)第 39A 條，因經營者違反第 7M 條，或第 7M 條有關的牌照條件決定或指引，而蒙受損失或損害的人士，均可對有關的營運商提出訴訟、索取賠償或其他補償。此外，《非應邀電子訊息條例》(第 593 章)第 57 條亦指明任何人如因他人違反該條例條文而受到損害，亦有權針對該人士提出法律訴訟。

2.50 建議中的法例規管在普遍經濟活動中發生的不公平營商手法，本會實在看不到有任何理由不賦予消費者同樣的私人訴訟權利的理由。

建議四 – 法例中加入提出訴訟的權利

2.51 本會認為，如遇上違反建議法例的情況，消費者應有權提出訴訟²²，尋求賠償或其他補償。

改善追討賠償的途徑

2.52 如上文所述，消費者現時可透過法院提出私人訴訟。然而只是申索額不超過 5 萬元的消費者能使用小額錢債審裁處提供的迅速、非正式的和廉宜的申索程序。但若申索款額超過此限額，消費者便須透過法院進行追討，當中的法律程序冗長而繁複，令一般消費者卻步。改善這個情況，其中一個可行的方案，便是成立一個獨立、專責處理消費者糾紛的消費者審裁處，以迅速和高效率的程序處理消費者糾紛。

消費者審裁處

2.53 消委會建議消費者審裁處，所處理的申索應限於與以下方面有關的金錢補償：以私人享用、耗用或利益為目的而獲取的貨品、服務、合約權益

²¹ 可透過現有的法庭或本報告較後部分所討論的消費者審裁處。

²² 同上。

或責任²³。

2.54 消費者審裁處提供一個快捷而具成本效益的途徑，處理消費者索償個案，故不應容許律師代表出席聆訊，消委會亦認為不應訂下索償限額。假若申索額太大，或個案太複雜而較適合由律師代表出席，或聆訊由法律代表進行是較合適的，審裁處可在任何聆訊階段，自行提出，或應由訴訟任何一方申請，把個案轉交至法院處理。

其他建議

小額錢債審裁處

2.55 另一個解決的方案是擴大小額錢債審裁處的司法管轄權金額上限，但這會大大增加小額錢債審裁處的工作量，因為它不但須處理消費者個案，亦須審理商業糾紛。

法律援助

2.56 除此之外，高昂的法律費用對一些希望進行訴訟的「夾心階層」人士造成障礙，他們既不符合申請法律援助的資格，而其個案性質亦不適合申請消費者訴訟基金。故此，擴闊現時法律援助輔助計劃的範圍或擴大消費者訴訟基金給予援助的能力，亦有助改善消費者追討賠償的途徑。

建議五 – 獲得到補償的權利

2.57 本會建議應慎重考慮下列方案以改善消費者得到補償方法：

- (a) 成立消費者審裁處；
- (b) 擴闊法律援助輔助計劃的範圍；
- (c) 擴大消費者訴訟基金給予援助的能力。

執行機構須具備甚麼特質？

2.58 本會預計負責執法的機構應是政府部門或法定公共機構。這個執法機構應專責消費者保護的工作、規管和監察市場上不公平的營商手法。同時，它亦當利用各項公眾教育計劃，加強消費者自我保護能力；此外，更協助營商者和行業商會制定營商守則和行業指引。

2.59 這裡要討論的課題是，建議中的執法機構應否在現時兩個專責消費者保護工作的機構中成立，它們是香港海關（海關）和消費者委員會（消委會）。

²³ 除營商手法方面有關金錢補償外，審裁處也可處理其他消費者糾紛如合約糾紛等，但在建議的法例的執行機制下，執法機構將須通過正式和嚴謹的法院司法程序尋求補償（例如禁制令、聲明和罰款）。

海關

2.60 海關貿易管制處轄下的檢控及消費者保障科負責監管以下問題：

- 重量和度量不足；
- 誇大黃金和白金的含量純度；
- 不符合安全標準的玩具及兒童產品；和
- 不符合安全規定的消費品。

2.61 除了主動監管和調查外，部門的消費者保障部亦接受消費者就上述問題作出的投訴。

2.62 理論上，海關是負責執行新法例的好選擇。因為海關的消費者保護團隊在執行消費者保護法例方面富有經驗，而且團隊已經成型，可以容易地轉化成執行新法例的機構，此外，亦有集中資源，減省行政費用的好處。

2.63 然而，若在海關多功能²⁴的行政架構下成立新的執法機構使之成為海關一部份，這可能會使新執法機構的角色模糊，亦淡化新機構以保障消費者權益為首要的使命。

2.64 在某些情況下，政府亦有提供產品和服務予消費者；因此，亦應受到新法例²⁵的監管。故此，一個獨立的機構去執行這法例，會被視為較容易公正持平，給予消費者更大的信心。

消費者委員會

2.65 消委會是根據《消費者委員會條例》（第 216 章）成立的法定組織；透過以下工作執行它的法定職能：進行和發布研究和測試報告、調解消費者糾紛、就影響消費者權益的政策向政府提供意見、以及進行消費者教育。它亦是保護和推廣消費者權益最主要的倡導者。

已建立的機制、形象和經驗

2.66 有建議指消委會應肩負起新法例執法者的工作。乍看起來，這未嘗不是一個可行的方案。消委會已建立一個涵蓋不同消費者保護工作的機制，既擁有豐富調解糾紛的經驗（當中不少個案與不公平營商手法有關）；亦致力消費者的教育工作和就營商手法問題提供意見。豐富的經驗和資源有利消委會肩負起新法例下，擴大消費者政策和策略層面的職能。而它在香港成功建立多年來捍衛消費者權益的形象，有助在執行新法例時獲取消費者的信任。

²⁴ 海關的使命包括：防止走私、保障和徵收應課稅品稅款、偵緝和防止販毒及濫用毒品、保障知識產權、保障消費者權益、保障和便利正當工商業及維護本港貿易的信譽、履行國際義務。
http://www.customs.gov.hk/chi/about_vision_c.html.

²⁵ 例如政府物流服務署不時出售一些充公 / 無人認領貨物及廢棄物料；郵政署亦向公眾發售集郵品。

對現時職能的可能影響

調解

2.67 如上述所言，除非在十分緊急的情況，否則，執法機構有責任先協助消費者和營商者在自願的情況下進行和解。然而，有意見認為一旦消委會成為執法者，營商者或會對消委會作為調解人的角色失去信心，因為營商者可能擔心消委會在調解過程中得到的資料，將來會用於執法的訴訟中。建議新法例中有規定，除非得到當事人的允許，否則在調解過程中得到的資料必須保密，亦不能作為訴訟的証據，這可釋上述疑慮。

倡導消費者權益

2.68 亦有意見認為執法機構應保持中立；因此，作為倡導消費者權益的機構如消委會，並不適合負起執法的職能。然而，法例本身亦在本質上是提倡消費者保護，有關執法機構的固有目標應是透過執行法例保護消費者，在實現此目標的過程中，會倡議必要的政策修改，改善法律對消費者的保護。因此，消委會倡導消費者權益的職能與執行消費者保護法例的工作並沒有抵觸。

研究和測試

2.69 有意見指消委會現時所進行的產品研究和測試工作，對一個執法機構來說並不合適。

2.70 消委會將產品研究和測試報告刊登於「選擇」月刊內，可能會帶來商業效果，因為消費者可從報告結果中了解哪些產品質素較佳或較相宜。即如其他產品測試和研究機構，消委會研究和測試工作可能會對消費者的需求和市場競爭帶來經濟上的影響。此外，出售「選擇」月刊的收入歸於消委會，有意見認為執法機關並不適宜在商業環境中，進行這些具市場影響或涉及金錢收入的活動。

新加坡經驗

2.71 當考慮消委會能否在新法例下肩負執法的職能時，我們參考了新加坡消費者協會的經驗。新加坡消費者協會是一個非牟利和非政府組織，由義務成員組成並推舉出一個中央委員會負責統籌和指導其屬下職員、各諮詢委員會和小組的工作。它提供調解消費者糾紛服務，亦進行消費品研究和測試。同時，它亦是新加坡《消費者保障(公平交易)法》的執法機構，根據法例，它可以向法院申請聲明和指令，以打擊干犯或可能干犯不公平營商手法的營商者。

2.72 香港消委會的調解服務由機構本身的職員提供，而同類的服務在新加坡則由經過訓練的義務調解員（約 200 人）負責。此外，在訴諸法院前，實際上，新加坡的消費者必須先經調解這個步驟。根據《消費者保障(公平交易)法》第 6 條（9），當法院裁定營商者作出不公平營商手法後，在作出有關命令時，須考慮消費者曾否作出努力，解決與營商者之間的糾紛。

2.73 關於調解過程中所得資料的保密問題，新加坡消費者協會的處理手法是要求所有參與調解的人士簽署保密協議，除非法院要求和頒令，決不可向公眾透露個案的任何資料。

2.74 現時，香港消委會根據其法定職能，會透過調查和產品測試蒐集資料來教育消費者。另一方面，新加坡消費者協會則透過調查和產品測試，監察和確保其法例有效地執行；因此，若消委會須負起執法職能，可能跟新加坡消費者協會一樣，須履行同樣職能。

新執法者

2.75 新法例亦可由一新的機構負責執行。此項選擇可讓政府較自由和有彈性地設立新機構的架構及相關的法定職能，而避免在現存機構中，因加入新職能而帶來的問題。然而，新的執法機構需要時間建立形象和信譽，此外，現存機構已就執法職能建立一定的基礎，相對來說，建立新的執法機構比在現存機構加入新職能需要更多成本。

消委會的立場

2.76 作為本報告的作者，為免產生利益衝突和保持中立，本會認為上述問題應留待公眾討論。

營商手法法例如何與現行法律架構融合？

2.77 由於建議中的法例之涵蓋範圍廣泛，將出現與現行法律架構融合的問題，尤其是當現行法例與新法例的條文有重複的地方。為使法律條文清晰，最理想固然是撤銷或修訂某些現有條文，以避免出現雙重條文和執法的問題，其中可考慮修訂的是《不合情理合約條例》。

2.78 可是，某些現行法例條文或與建議法例有重複的地方，亦未必適合由新的執法機構執行，特別是條文涉及某些特定範疇的規管條文，在執行上需要高度的專業和專門知識²⁶。因此，若有關的法定架構能夠在處理不公平營商手法問題時，與建議中的法例提供相若及可共存並行的保障，這些條文便毋須移置到建議中的法例，由新的執法機構執行。

2.79 因此，由現存法例規管的行業，若符合上述條件，將可豁免於建議法例。當有需要時，亦可修訂這些現行法例以確保它們會涵蓋建議新法例所規管的各種不公平營商手法。與此同時，亦可考慮加強現行執法機構的權力，使它們能執行與建議法例下執法機構所採用的執行措施。

2.80 為確保負責規管特定行業的執法機構，在處理其管轄範圍內的不公平

²⁶ 舉例說，《銀行業條例》（第 155 章）第 95 條授權金融管理局，可藉向銀行送達的書面通知，規定該銀行撤回、除去或停止發出任何虛假、誤導或有欺騙性的陳述或任何申述的廣告。其他例子包括電訊條例第 7M 及廣播條例，將在第三章討論。

營商手法問題時，能維持相若的保障水平，可考慮是否有需要，在政府合理要求下，有關執法機構就其相關的規管工作提交報告，讓公眾省覽。

2.81 此外，專業團體應否豁免於建議法例的規管，是另一需考慮的問題。部分專業團體成員的手法，亦曾惹來投訴，根據建議中法例的詮釋，該等受到投訴的行為不少屬不公平的手法。現時，投訴大多由專業團體根據本身的專業規則及程序來自我規管。除非涉及刑事罰行，否則公共機構未必介入其中。

2.82 由於建議法例下的全新執法機關，未必具備執行有關規則及程序時所需的專業知識，故此由專業團體現有的自律性規管，及以該等團體的規則及程序來規管其成員的營商手法，較為適合。「專業團體」乃指獲得公認及已確立的機構（但非一般商貿協會）：

- (a) 在已界定的專業領域當中，由相當數目的執業者所組成，而執業者須具備獨特的技術及知識；
- (b) 透過正式程序成立，為代表其專業及保障公眾利益而成立；
- (c) 擁有一個有效的自我規管機制，密切監管其成員的營商手法，並提供方便的途徑讓消費者就專業上的行為失當作出投訴，而其紀律審裁小組會對違反規則者作出有力的制裁，如暫停其執業及剔除其註冊會員資格；以及
- (d) 透過合乎道德標準的守則，規管團體成員的執業手法，而該守則或規則與建議法例所包含的統一營商標準相類似。

2.83 為使建議法例更清晰明確，政府在草擬法例時，可考慮將符合上述條件的專業團體名單附於法例²⁷。此外，在全新的執法機構及專業團體之間設立轉介制度，讓執法機構可將涉及有關專業團體的投訴，恰當地及迅速地轉介予相關團體。

建議六 — 與現行法律或規管架構融合

2.84 本會認為，若現行法例中與營商手法有關的條文符合下述條件，將不會受建議制定的新法例所影響：—

- (a) 法例或條文的執行需要高度的專業及專門知識；及
- (b) 現行法定架構已提供了與建議法例相若及可共存並行的保障。

2.85 若現行法例已能對特定範疇行業作出規管，亦能達致與建議法例相若

²⁷ 按照所述條件，在建議的法例下，現時監管執業醫生及牙醫的團體，可被視為專業團體的例子。

的保障水平，便可豁免於建議法例。如有需要，可修訂該等現行法例，以確保它們能為消費者提供同樣水平的保障。

2.86 在建議法例中界定的專業團體，可透過其自我規管制度，以其制定的專業規則和程序來規管其成員；並須設立轉介制度讓新的執法機構能恰當地及迅速地把有關專業團體投訴的個案，轉介相關團體。此外，政府在制定建議法例時，可考慮將符合條件的專業團體名單附於法例。

2.87 按上述建議去處理現時執行不同法例的各機構之間的關係，可確保實施建議法例涉及的行政程序不會過於高昂。因為政府只須集中資源在未有規管的地方。而且，如先前提及，在執行某些涉及專業和專門知識的相關條文時，由擁有豐富知識和經驗的現行機構繼續執法，工作更為有效。

2.88 不過，根據建議法例成立的執法機構和其他個別行業的執法機構，在處理不公平營商手法事宜上，也許會採取不同的執行政策，因而出現不同的法律後果。因此，最重要是讓營商者和消費者能夠清楚知道，不同的經濟範疇會由哪個執法機構負責執法。

其他並行的架構

2.89 除上文提及有關特定行業及專業團體的情況外，建議法例亦涵蓋一些現存對某些不公平營商手法作出的規管的一般性條例。其中典型的例子就是規管虛假及誤導商品說明的《商品說明條例》。如上文第 2.19 至 2.21 段及附件四和五所述，建議中的法例全面涵蓋在交易前、期間或交易後，所有有關的誤導及欺騙性的作為或不作為、威脅性及高壓手法，以及其他不當或不公平的營商手法。因此，除了涵括《商品說明條例》所規管的應用虛假或誤導商品說明於貨品外，該法例還涵括與服務、私人住宅物業、合約權益和責任有關的虛假或誤導說明，這些在現行的《商品說明條例》並沒有涵蓋。此外，建議中法例乃針對營商者與消費者之間的交易所發生的不公平手法，以消費者為中心。另一方面，《商品說明條例》則只針對交易時所提供有關貨品的不確資料，而非營商手法。

2.90 然而，《商品說明條例》中有關商品說明的條文，不純粹保障消費者，亦保護營商者規管企業與消費者，企業與企業之間的營商行為。此外，該些條文是以刑事制裁執行，而非建議中的法例所一般採用的行政制裁。

2.91 由於《商品說明條例》在範圍、目的和執法三方面均與建議法例不同，本會認為《商品說明條例》的商品說明條文及執法應該繼續保留，不應受建議法例的制定所影響，唯須考慮作出相應的改善，有關建議在報告第三章詳述。

2.92 整體來說，《商品說明條例》的商品說明條文將與建議法例並行，在雙管齊下的情況下，相信會提高抗衡不公平營商手法方面的消費者保障。

附屬法例和針對特定營商手法問題的指引

2.93 建議法例將為消費者提供更加全面的保障，及為社會訂定統一的營商標準。然而，除提供一般性的保障外，本會認為有需要就一些社會備受關注的個別營商手法，制訂進一步和更詳細的附屬法例，及/或由執行建議法例的執法機構發出指引，列明如何處理此等事宜。本會原則上認為，應先發出指引規管這些問題，促使行業自律遵從。假若情況不理想，便可正式制定附屬法例，加強規管。

指引

2.94 本會認為，可就下列兩個公眾關注的特定範疇訂立指引：

- (a) 關於誤導或欺騙性的廣告；及
- (b) 有關標價的誤導性陳述。

2.95 制訂指引的目的是為了解釋建議法例的條文如何在特定的範疇中應用禁制條文，而非取代新法例或對此作出判定性的闡釋。為了確保指引成為便利營商者的參考工具，消委會認為政府應邀請業界參與其擬定工作。

關於誤導或欺騙性廣告的指引

2.96 如上文所述，本會提出的建議的法例應涵蓋在合約簽署前，有關誤導和欺騙性的手法，包括誤導、欺騙、含糊或誇大的廣告²⁸在內。

2.97 消費者若依賴這些失實的廣告內容作出購買決定，最終可能得不到產品所聲稱的效果而遭受金錢損失，在某些情況下，使用該些廣告中的產品，甚至令消費者的健康受損。

2.98 為協助營商者遵從有關法例，應發出一套詳細的指引，規定營商者在其廣告內作出的聲稱和陳述，必須與建議法例中所指出“廣告的真確性”的要求一致。

2.99 當制訂指引時，執法機構可參考其他機構，就有關誤導和欺騙性行為草擬具體指引的方法。

2.100 其中一個可供參考的例子，是由電訊管理局(電訊局)發出的《香港電訊市場中具誤導性或欺騙性的行為》(第 7M 條指引)。當中詳述電訊局長就第 7M 條就任何行為是否屬於誤導或欺騙性作出判斷及結論。第 7M 條指引說明營商者有責任確保產品的描述必須清楚而準確，而電訊局長會以此作為考慮因素，決定該等行為有否違反第 7M 條。例如，營商者有責任

²⁸ 例如有關健康、美容及纖體產品的誤導或欺騙性的廣告聲稱。

就產品聲稱的表現提供實證；就使用「免費」、「無限量」或「無需支付其他費用」等詞語作推銷時，須清楚列明相關條件。此外，就某些比較式廣告，任何比較須在「類似」產品或服務間進行。

2.101 由廣播事務管理局發出的《電視通用業務守則－廣告標準》和《電台業務守則－廣告標準》(合稱「守則」)，就領牌的電視節目及聲音廣播服務提供者的廣告標準提供詳細的規定和指引。指引的一般原則規定所有廣告必須誠實、真確及不具誤導或欺騙性。詳述如下：－

- (a) 廣告不得以任何公然或隱含的方式作出與事實不符的描述、聲稱或說明；或對有關產品，或其是否適用於所建議的用途，作出誤導的描述、聲稱或說明。(電視守則和電台守則中類似的條文)
- (b) 所有的聲稱均須有事實根據及憑據。(電視守則和電台守則中類似的條文)
- (c) 任何廣告都不得以誤導手法聲稱或暗示所宣傳的產品或服務，或其中任何成分，具有某些無法證明的特性或成分。(電視守則)
- (d) 除非能證明已得到有關專業認可機構提供專業意見或推薦使用，否則，在廣告內不能載有此類內容顯示。此外，除非廣告中出現的乃是合資格的人士，否則其陳述不可令人誤以為是專業意見或推介，廣告亦不可直接表示或暗示其有資格給予該意見或推介。(電視守則和電台守則)
- (e) 所有廣告均不得作誇大的聲明。(電視守則和電台守則)

建議七－關於具誤導或欺騙性廣告的指引

2.102 本會建議，執法機構根據建議的營商手法法例，發出有關誤導或欺騙性廣告的具體指引。指引的制訂可參考電訊局第 7M 條指引的一般標準和廣播事務管理局的守則要求。指引為這些個別行業的營商者提供適當的指導，並確保：－

- (a) 所有廣告聲稱必須誠實及真確；
- (b) 廣告不得作誤導、欺騙或誇大的聲明；
- (c) 所有具事實根據的聲稱和產品及服務具效用的聲稱，必須有確實及合理證據支持；及
- (d) 所有令人相信是專業意見及推薦使用的廣告聲稱，必須能提供證明。

2.103 指引亦可就下列方面提供詳細指導：－

- (a) 為某些廣告所採用的特別字句，訂立規定要求；
- (b) 比較式廣告須注意事項；及
- (c) 執法機構在執行建議法例時須考慮的事項。

2.104 誤導或欺騙性的廣告聲稱，不單是一項消費問題，甚至是一個與公眾健康有關的課題。在某些情況下，消費者受到此等廣告的影響，誤信該些產品有治療效用而延誤求診，因此對《不良醫藥廣告條例》（第 231 章）須作出修訂。由於改善該條例基本上是一項公眾健康的議題，故此不在此報告詳述。本會將以獨立的意見書，向政府提供修例建議。

有關標價的誤導性陳述

2.105 價格表述是營商者向消費者作出重要的購買邀約。根據本會的經驗，涉及價格爭議的消費投訴屢見不鮮，很多時候都涉及優惠/折扣價格的標示，消費者懷疑營商者所標示的價格有誤導或虛假成分，令他們受騙。

2.106 將優惠價和原價比較是營商者常用的做法，但當出現錯誤或虛假陳述時，消費者便蒙受金錢損失。他們以為購入的產品是以優惠價購入，但其後發現店舖所標示之優惠價較原價更為昂貴。此外，廣告刊登虛假的價格，同樣令消費者蒙受損失。消費者往往花費時間和精神到店舖時，才發現貨品所標示價格與原先在廣告中見到的有出入，令他們只好放棄購買決定。營商者利用這種手法，似乎是想吸引一些即使發現價格標示不同，仍會光顧的消費者。這種銷售手法帶來反競爭後果，令正確標示價格的殷實營商者，反而失去顧客及處於市場劣勢。

2.107 在建議中的法例下，對作出虛假和誤導性價格標示的營商者，將會對法律行動。為讓營商者明白他們在建議法例下應有的責任，本會認為制訂一套有關標價的指引是非常重要的。由於現時有關標價的誤導手法日益嚴重，本會建議應制訂良好營商手法指引，就價格比較及優惠提供(以避免具誤導性的手法違反建議中的法例為目的)訂出指引。執法機構可視乎市場標價問題之情況，進一步考慮制訂有關標價的指引。

建議八－價格比較的指引

2.108 根據建議法例制訂有關價格標示的指引，列明比較價格的合適方式及途徑，例如：－

- (a) 營商者提供價格比較的聲稱必須準確和真實。

- (b) 以原價與折扣價作價格比較之前，該原價應已維持了一段合理的時間；
- (c) 價格比較必須清楚地列明原價及折扣價。例如，營商者作出「優惠價\$9.9」或「減至\$99」的聲稱時，應同時列出原價作為「優惠」或「減至」等字眼的參考。當然，更清晰及和正確的價格比較應為「由\$100減至\$80」；
- (d) 營商者必須讓消費者清楚知道較高價格是甚麼意思，例如在某些情況，應清楚表明究竟較高價格是指一般價格還是旺季價格(一般較高)，好讓消費者衡量以該折扣價購買時，實際上可獲得多少益處；
- (e) 用於價格標示的字眼須與其一般日常意思相同。例如，合理的消費者一般對「減價」(sale) 字眼的理解是貨品從原先的售價減價；而非指貨品是「供銷售」(for sale)。

第三章 改善現行法律和規管架構的建議

簡介

3.1 除制定建議中的新法例外，本會認為要改善跟建議中的法例並行的保障消費者的法例條文，以維持對消費者的高度保障。因此，要進一步修正現行《商品說明條例》不足之處，以及《電訊條例》及《廣播條例》內某些部份。

3.2 再者，標準消費者合約的使用相當普遍，但在很多情況下，不良營商者將合約設計至損害消費者利益，造成不公。現行消費者抗衡這種不公平商營手法的保障並不完善，因此需要為此立法。

3.3 本章將闡述下列各項：

- (a) 修正《商品說明條例》不足之處的措施；
- (b) 有關標準消費者合約中不公平條款的建議；及
- (c) 改善對電訊及廣播行業有關不公平手法的規管。

修正《商品說明條例》不足之處的措施

3.4 當本會撰寫本報告，政府已逐步修訂現行《商品說明條例》不足之處。在 2007 年 4 月，一連串有關國內旅客的投訴，引起社會高度關注，事件嚴重影響香港的形象，以及令旅遊業帶來潛在的損失。

3.5 多個執法機構及公共機構已採取更嚴謹及相應的行政措施，以遏止該等被投訴的不公平營商手法，例如警方、消委會與海關設立相互通報機制，以及香港旅遊發展局推出「優質旅遊服務」計劃。此外，政府根據政府工作小組的觀察所得²⁹，廣泛作出公眾諮詢，對《商品說明條例》及其附屬法例提出了多項修訂建議，本會亦曾積極參與上述小組的工作。

3.6 政府在 2007 年 12 月 11 日提交《2007 年商品說明（修訂）條例草案》，當中詳細提出多項修訂。我們相信政府很快會就《商品說明條例》附屬法例的修訂正式立法。

3.7 此修訂旨在提升消費者的知情權，確保他們獲得準確及重要的資料。有關的主要建議修訂內容，概述如下：

- (a) 有關標價的誤導陳述³⁰

²⁹ 工作小組在商務及經濟發展局（前經濟發展及勞工局）的領導下組成，代表成員來自消費者委員會、香港旅遊業議會、香港旅遊發展局、警方及海關。

³⁰ 《2007 年商品說明（修訂）條例草案》第 7 條。

- (i) 任何人在交易或營商過程中，誤導性地展示商品的標價，即屬違法；
 - (ii) 在消費者付款前，任何人如沒有告知消費者五種受規管的電子產品（即數碼音響播放器、數碼攝錄機、數碼相機、流動電話及手提多媒體播放機）之價格並不包括其基本配件，而該等基本配件在消費者的合理期望下是應該包括在售價內的。
- (b) 對售後維修保養服務的失實陳述³¹
- (i) 擴大「商品說明」定義，加入「售後維修保養服務的保證及提供情況」；任何人如訛稱在某國家或地區可獲提供售後維修保養服務，即屬違法；
 - (ii) 如商戶聲稱受規管的電子產品（即數碼音響播放器、數碼攝錄機、數碼相機、流動電話及手提多媒體播放機）可享有售後維修保養服務，須於發票或收據列明提供售後服務的地方及詳情。
- (c) 營商者就與其他人士有關連的失實陳述³²
- 加入新的條文，任何人如在交易、營商或提供專業的過程中，對營商者與其他人士的關連作出的虛假或誤導陳述，即屬違法。
- (d) 天然翡翠的定義及資料³³
- (i) 制訂與天然翡翠³⁴定義有關的規則，清楚訂明使用該詞的條件；
 - (ii) 制訂與天然翡翠定義有關的命令，清楚訂明在發票或收據須列明的資料及詳情（例如製品說明、價格及出售日期）。
- (e) 鑽石的定義和資料³⁵
- (i) 制訂與鑽石定義有關的規則，清楚訂明使用該詞的條件；
 - (ii) 制訂與鑽石定義有關的命令，清楚訂明在發票或收據須列明的資料及詳情（例如製品說明、價格、出售日期及重量）。
- (f) 更改白金的中文譯名³⁶
- (i) 將《商品說明（標記）（黃金及黃金合金）令》第 5(3)條「white gold」的中文譯名改為「白色黃金」；
 - (ii) 將《商品說明（標記）（白金）》「platinum」的中文譯名改為「白金」或「鉑金」。

³¹ 諮詢文件第 7 段及《2007 年商品說明（修訂）條例草案》第 4 條。

³² 諮詢文件第 9 段及《2007 年商品說明（修訂）條例草案》第 7 條。

³³ 諮詢文件第 11 段。

³⁴ 建議把「天然翡翠」一詞界定為「天然硬玉質翡翠」。

³⁵ 諮詢文件第 13 段。

³⁶ 諮詢文件第 15 段。

(g) 黃金 / 黃金合金發票上的資料³⁷

修訂《商品說明（標記）（黃金及黃金合金）令》第 6(1)條，訂明發票或收據須列明更多詳盡資料，包括黃金種類、純度及重量。

(h) 白金發票上的資料³⁸

修訂《商品說明（標記）（白金）令》第 6(1)條，訂明發票或收據須列明更多詳盡資料，包括純度及重量。

(i) 電子產品的產品資料³⁹

針對五種受規管的電子產品（即數碼音響播放器、數碼攝錄機、數碼相機、流動電話及手提多媒體播放機）制訂新的標記令，要求店舖在發票或收據須列明產品的重要資料，包括受規管產品的描述、型號及主要特點。

消費者委員會的立場

3.8 如前文所述，消委會一直積極參與政府工作小組的工作，支持《2007年商品說明（修訂）條例草案》及其附屬法例的修訂建議。本會期望這些較簡單而直接的修訂能盡快獲通過及實施，成為切實可行的工具，以解決目前還未涵蓋的不公平營商手法的問題。

銷售單據上的商品說明 — 記載時間

3.9 如前文所述，現行的標記令已要求營商者在售賣黃金 / 黃金合金，白金，鑽石，天然翡翠及某些電子產品時，應在發票或單據上列出產品資料。政府亦建議在發票或單據上列出一些新的資料。本會對此項建議表示支持，認為有助打擊誤導或欺騙的營商手法，增強消費者獲取資訊的權利。

3.10 可是，在執法方面仍有一些技術性的問題需要考慮。例如：在《商品說明（標記）（黃金及黃金合金）令》及《商品說明（標記）（白金）令》的第 6 條均要求營商者在提供商品時，給予顧客一張附有有關商品資料的發票或銷售單據。

³⁷ 諮詢文件第 18 段。

³⁸ 諮詢文件第 20 段。

³⁹ 諮詢文件第 22 段。

3.11 在單據上列出的資料是商品說明的一種。因此，在單據上列明這些資料等同於《商品說明條例》第 6 條中在貨品上提供商品說明。商品說明是否在交易或營商過程當中提供是十分重要的。因為在《商品說明條例》第 7(1)(a) 條訂明在營商過程或經營業務過程中，任何人如將虛假商品說明應用於貨品，或供應或要約供應已應用虛假商品說明，即屬犯罪。

3.12 可是，消費者通常在取得貨品後才會收到單據。這表示單據是在貨品提供後才發出。換句話說，若商品說明是在貨品交收後記載於單據上，若這些說明是虛假的，這樣便出現一個疑問：此行為是否構成在營商或業務過程中，將虛假商品說明應用於貨品的罪行。

3.13 在英國有一案例判定在提供商品後所作出的商品陳述，並沒有觸犯商品說明條例第 1 條（本港《商品說明條例》第 7 條的對應條文）。在 **Hall v Wickens Motors (Gloucester) Ltd** [1972] 1 WLR 1418 中，被告從事汽車銷售，在賣了一輛車子後的四十天，回應關於車子操舵功能的投訴，被告答「車子沒有任何問題」。後來證實車子的確有問題。被告給控以應用虛假商品說明。被告定罪後作出上訴。最終，法庭裁定被告並未有違犯商品說明條例第 1(1)(a)條（本港《商品說明條例》第 7(1)(a)條的對應條例），原因是商品說明條例第 1(1)(a)條只適用於在銷售或服務時提供的失實陳述，跟交易完成後方作出的陳述（口頭陳述）的貨品的銷售或供應沒有關連。因此，按照 **Wickens** 案的判決，要構成商品說明條例第 1(1)(a)條的指控，該陳述必須要在提供商品前或在提供商品時發生⁴⁰。

3.14 因此，對於在消費者取得商品及付款後所發出的單據，是否銷售或服務提供的一環仍存有法律爭議。故此，在單據上提供虛假的資料未必能構成在《商品說明條例》第 7(1)(a) 條的控罪指控。

建議九 — 在銷售單據上的商品說明

3.15 為了釐清銷售單據上的商品說明的爭議，本會建議對《商品說明條例》作出修訂，訂明《商品說明條例》第 7 條亦適用於銷售單據上的商品說明，以消除此法例條文是否包括銷售單據上的商品說明的疑團，亦令有關的執法機構更有效地執法。

⁴⁰ Consumer Law and Practice, 7th Edition, Geoffery Woodroffe and Robert Lowe, para.13.17.

規管標準消費者合約中不公平條款的使用

3.16 不當商人經常利用消費者的弱點去誘使消費者訂立對該商人較為有利的合約（稱為“過程中的不公平”）⁴¹或在合約上加入一些極為苛刻或對消費者不公但有利於營商者的條款（“條款上的不公平”）⁴²。

3.17 在本報告的先前部份，本會分析了一些在市場上出現的「過程」中的不公平，而「條款上的不公平」帶來的問題亦不容忽視。其中一個典型的例子就是在某些行業中的標準消費者合約，容許營商者單方面更改合約條款⁴³。這些條款給予營商者在毋需知會顧客的情況下，擁有不受束縛及無條件單方面更改合約條款的權利，而這些條款是不公平的。尤其是消費者受合約的固定期限合約約束，要在合約期滿前終止合約，消費者需要付上高昂的代價⁴⁴。標準消費者合約的廣泛應用，亦令多個行業出現很多不公平條款，引起公眾的關注。

3.18 鑑於服務業發展迅速及使用標準消費者合約的普及，消費者在無限期購用服務合約或長期合約，往往發現自己的權利及利益被該些合約的不平等條文嚴重剝削。為了向消費者提供公平及應有的保障，對此等營商行為實施更嚴謹的監管是勢在必行的；尤其當行業中主要營商者均採用此類不公平合約條款時，嚴謹的監管更是必要的，因為議價能力有限的消費者往往發現他們若想獲取這些服務，除了默然接受外，便別無選擇。

檢討《不合情理合約條例》

3.19 現時規管合約中出現的不合情理情況主要是透過《不合情理合約條例》。但如上文所述，隨著建議中營商手法法例的制定，法例將會賦予消費者更全面的保障，杜絕不公平商營手法，當中包括不合情理的行為，因此《不合情理合約條例》或須作大幅的修訂或廢除。

3.20 然而，建議中的法例只規管營商手法，不會規管合約條款，儘管條款對消費者嚴苛或不公平。本會認為，為了使消費者得到更全面的保障，

⁴¹ “過程上的不公平”是指商人運用誤導，欺騙，欺壓及不公平的銷售手法去誘使或強迫消費者購買商品。

⁴² “條款上的不公平”是指商人在合約（通常是標準消費者合約）中加入不公平的條款。這些條款大多是苛刻及一面倒的把所由風險轉嫁及消費者。

⁴³ 消費者委員會在 2005 年，2006 年及 2007 年接獲有關營商者單方面更改合約內容的投訴分別有 187，134 及 182 宗。

⁴⁴ 普遍的投訴包括：

- i) 服務提供者能單方面更改終止合約的通知期（例如：由一個月延長至 2 個月），但顧客卻沒有在固定條款到期前終止合約的權利。
- ii) 在固定條款期單方面增加會員月費。同樣地，顧客並沒有在合約到期前終止合約的權利，或需要為提前解約而繳付罰款。
- iii) 服務提供者能自動/單方面在合約到期後更新合約內容並調高月費，直至消費者提出終止合約的書面通知。

以及締造公平的市場環境，政府應另行制定法例，規管標準消費者合約內不公平條款的使用。

澳洲經驗

3.21 澳洲曾有處理標準合約內不公平條款問題的經驗。在部份個案中，澳洲法院認為到澳洲《交易慣例條例》第 51AB 條，雖然該條文是規管貿易與商業中不合情理的行為，但只涵蓋過程中的不公平。因此，當控訴只是針對條款上的不公平，法院並不願意向原告人提供補償。澳洲曾有訂立新例的建議，以防止消費者合約內的不公平條文。該建議⁴⁵學效英國《1999 年消費者合約不公平條款規例》⁴⁶。實際上，澳洲維多利亞省早已為規管消費合約內不公平的條款《1999 年維多利亞公平貿易法》2B 部份），該法例大致採納英國的規則。

英國例子

3.22 英國的《消費者合約不公平條款規例》包含歐盟委員會於 1993 年 4 月 5 日發出的 93/13/EEC 就有關消費者合約中不公平條款的指引，並提供機制規管在標準消費者合約中的不公平條款。英國《消費者合約不公平條款規例》的第 5(1)規例中訂明“未經個別商議的合約條款，若有違真誠，並對立約雙方的合約權利及責任造成嚴重失衡，令消費者損失，該等條款將被視為不公平條款。

3.23 在上述的規例中，規例 5(4)指定若營商者聲稱合約條文是經過個別談判而訂立的，就由他去証明，而規則 6(1)則訂明在評估某條文的不合理性，法院可考慮：

- (a) 合約所涉貨品或服務的性質；
- (b) 在合約訂立的一刻，(i) 所有導致合約訂立的情況及 (ii) 所有該合約的其他條文或其他該合約相關的其他合約。

3.24 任何規例下視為不公平的合約條款，對消費者均無法律約束力（規例 8）。

⁴⁵ 占士·大衛遜(2006)草擬的「不公平合約條款與消費者」：規管不公平手法（「信貸和消費者保護法中心」即將發表的研究論文）以及格里菲斯大學「信貸和消費者保護法中心」2006 年 10 月提交的「消費者合約內的不公平條款調查」。

⁴⁶ 參考網址：
<http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&PageNumber=1&BrowseLetter=U&NavFrom=1&parentActiveTextDocId=2730925&ActiveTextDocId=2730925&filesize=34920>

3.25 再者，該規例附帶一份具指示性，並可增補的列表，列出可視為不公平的條款⁴⁷。（參考附件六 - 英國《消費者合約不公平條款規則》列表）⁴⁸列表包括容許單方面更改及其他可能被視為不公平的條款。

- (a) 合約條款訂明提供的服務只基於銷售商或供應商的意願；
- (b) 排除或阻止消費者採取法律行動或行使任何補償方法的權利，特別是要求消費者將爭議交由法例不涵蓋的仲裁方法解決、隱瞞證據、或將在法例下應由雙方共同承擔的舉證責任，推卸給消費者獨自承擔；
- (c) 在銷售商或供應商未有履行其責任的情況下，要求消費者履行其責任；及
- (d) 給予銷售商或供應商決定供應的貨品或服務是否與合約訂明的一致，或給予其詮釋任何合約條款的獨有權利。

3.26 然而，該規例給予金融服務供應商一些豁免，例如他們有權修改由消費者繳付的利息的利率。

3.27 至目前為止，列表的方式證實是一項非常重要的工具，有效地禁止消費者合約中的不公平條款，令消費者得到保障⁴⁹。

3.28 英國規例除了賦予消費者權力，毋需受不公平條款約束之外，亦授權公平貿易署審理合約中不公平條款的投訴。公平貿易署可與商戶進行商討、接受其作出的承諾、以及向法院申請禁制令，禁止商戶使用或建議使用不公平合約條款。公平貿易署可將營商者的承諾、其向法院提出的申請及法院頒發的命令的相關資料，予以公佈。

建議本港立例

3.29 透過制定新法例，消委會相信能規管消費者合約內的不公平條款。在制定新法例時，可參考英國的《消費者合約不公平條款規例》，並因應兩者在文化及市場上的差異，作出適當的調整。

3.30 消委會的建議或會引起下述爭論：

- (a) 建議中的營商手法法例，將會針對不公平營商手法，為消費者帶來全面的保障，故並毋須另行立法；

⁴⁷ 英國《消費者合約不公平條款規則》附表 2。關於消費者合約中的不公平條款亦可見於 1993 年 4 月 5 日發布的「歐盟 93/13 號指令」。

⁴⁸ 英國《消費者合約不公平條款規則》的列表曾被批評條款用語含糊不清，單一條款可被引用在多條合約條款上；然而，在評估條款是否不公平時，列表仍有著其重要性。

⁴⁹ 經過公平貿易署與供應商磋商後，每年平均有 1,500 條條款被廢除（詳見公平貿易署 2001-2004 年度報告）。

(b) 法院不應妨礙自由立約的權利；及

(c) 新措施會為營商者帶來額外的支出，最終轉嫁給消費者。

3.31 可是，在不公平合約條款普遍出現的情況下，實有需要作更嚴厲的規管。況且，不公平合約條款問題與立約的自由權無關，因為很多標準消費者合約的訂立都是由營商者支配，合約未能反映消費者的意願，他們只能在接受與拒絕兩者中，選擇其一。同樣地，由於新措施只規管常用的標準消費者合約，因此不會大量增加營商者的營運成本。

3.32 此外，為標準消費者合約內的不公平條款訂立規例，會為社會帶來很多好處⁵⁰，包括：

(a) 商戶與消費者更公平地分擔風險。

(b) 在公平的貿易平台上，消費者對市場會更有信心。

(c) 減少營商者對消費者的侵害利益的機會。

(d) 一個清晰及詳盡的機制得以建立，確保有效地處理不合情理的個案。

(e) 為營商者制定清晰及詳細的指引，列明何者為不公平的條款。

(f) 在建議中法例下的執法機構，可以獲賦予管理、監督及執行這些措施的職能。

(g) 市場更具競爭性（因為營商者不能通過合約內不公平的條款，增加隱藏代價，以抵銷他們向消費者提供的所謂「具競爭力的優惠價格」。）

(h) 有關規例只應用於標準消費者合約，不會影響營商者與個別消費者商議下訂定合約條款。

3.33 本會亦有考慮由行業訂立業務守則作自我監管。但由於問題並非出現在某一行業，因此這種做法未為合適和有效。況且，本港並不是所有行業都有完善的自我規管機制，而現有在不同行業的自我規管機制（如強制或自願執行的業務守則），在規管及執行上亦有頗大的差異。

建議十 - 規管標準消費者合約中不公平條款的使用

3.34 本會建議立法規管標準消費者合約內的不公平條款。法例可參考英國《消費者合約不公平條款規例》及其不公平條款列表，並兼顧兩地在

⁵⁰ 格里菲斯大學「信貸和消費者保護法中心」2006年10月提交的「消費者合約內的不公平條款調查」。

文化及市場上的差異。訂立一份具指示性及可增補的列表，列出可能被視為不公平的條款。

3.35 建議中營商手法下的執法機構，應具有管理、監察及執行此法例的職能。

改善電訊及廣播行業有關不公平手法的規管

3.36 電訊及廣播服務和其相關產品，在日常生活不可或缺。使用流動電話的用戶人數達 930 萬，滲透率 135%；而寬頻及收費電視的用戶則有 180 萬；全港約有 90% 家庭用戶使用固定電話線服務⁵¹。鑑於電訊及廣播服務擁有極高的滲透率，社會對該界別的不公平營商手法，甚表關注。

不公平營商手法

3.37 在香港，有關電訊及廣播服務及其相關產品的投訴數字近年來急劇上升。在 2007 年，本會接獲 1197 宗與電訊業不公平營商手法相關的投訴，有關收費電視的則有 1002 宗。上述兩個界別於 2005 至 2007 年的投訴數字，可參考附件一。

3.38 近年，立法會要求政府正視上述兩個界別的不公平營商手法⁵²。2007 年 7 月 4 日，立法會通過「加強監管收費電視、電訊及互聯網服務的不良營商手法」動議。

3.39 然而，若監管兩個界別的現行法例，按以下建議改善，使之與新例一致，符合第二章列出的豁免準則，我們建議在電訊及廣播行業的不公平營商手法，可豁免於建議的營商手法法例。

⁵¹ 這些數字在 2007 年 7 月 4 日，由發展局局長林鄭月娥女士就「加強監管收費電視、電訊及互聯網服務的不當營商行為」的動議辯論時提及。

⁵² 一般而言，被指稱的不良營商手法包括：

- (a) 藉虛假或誤導陳述，進入消費者的物業（例如：「公共天線已完成維修，我們需要入內檢查你的電視」）。
- (b) 作出虛假或誤導陳述，令消費者誤信需申請收費電視，方可收看高清電視。
- (c) 就合約條款作出虛假或誤導陳述（例如：提供的是「優惠」價格）。
- (d) 未經消費者同意或確認的情況下，將合約續期。
- (e) 不當地延遲或令取消合約手續極之不便，以干擾消費者取消合約的權利。
- (f) 向消費者尤其是長者及殘疾人士，施予難以接受的壓力，促成合約。
- (g) 單方面更改合約，加入損害消費者利益的條款。

豁免於建議的營商手法法例中之原因

專業的執行

3.40 科技急速發展、聚合，加上市場競爭激烈，電訊及廣播業的界線漸趨模糊。舉例來說，主要的業界成員正轉營為「三合一營商模式」，提供固網電話、電視及上網服務，或「四合一營商模式」（三合一連同流動電話服務）。這兩個營商模式在市場出售的產品及服務甚為複雜及廣泛，無論在技術、價格及質量方面，種類繁多，因此，交由業界規管者執行營商手法條文較為恰當。兩個業界的規管者都擁有所需的專業技術，能正確識別具誤導或欺騙性的陳述或手法，並提供一系列行政及法律措施，解決市場聚合所衍生的問題。

現存共同規管架構

3.41 電訊及廣播行業早已存在一個共同規管架構，有關法例的架構，由自律性監管架構增補。自律性監管架構主要由業務守則、規管者發出的指示及指引，以及發牌管制所組成。現存共同規管架構具有彈性和空間，讓消費者在不公平營商手法方面的保障可以得到改善。

電訊 – 第 7 條、第 7A 條及第 7M 條

3.42 有關電訊業持牌人的不公平營商手法均受《電訊條例》（第 106 章）第 7M 條及其牌照條件所規管。

3.43 第 7M 條訂明「持牌人在提供或獲取電訊網絡、電訊系統、電訊裝置、顧客設備或服務時（包括（但不限於）促銷、推廣或宣傳該等網絡、系統、裝置、顧客設備或服務），不得作出局長認為屬具誤導或欺騙性的行為。」此法定條文由一套詳盡的指引及指示所增補。

3.44 此外，電訊管理局局長發出的電訊牌照，分別以《電訊條例》第 7 條及第 7A 條為依歸，電訊管理局局長可為電訊牌照分別訂立的一般及特定牌照條件。根據第 7(7)條，牌照條件可涵蓋提供服務的方式、禁止不公平的市場操作，及須遵從有關指示、指引、業務守則、規例及《電訊條例》。

3.45 違反第 7M 條及牌照條件的罰則包括行政罰款或由法院判處罰款，及其他行政制裁，包括向公眾披露有關違規事宜⁵³；刊登更正啓示⁵⁴；在違反第 7M 條的情況下，作公開警告⁵⁵，以及取消、撤回或暫時吊銷其牌照。

⁵³ 《電訊條例》第 36(c)(3A)條。

⁵⁴ 同上。

⁵⁵ 電訊管理局局長指引，《香港電訊市場中具誤導性或欺騙性的行為》第 4.9 段，2003 年 5 月 12 日。

3.46 發牌機制及第 7M 條能提供具成本效益及迅速的執法措施，毋須經過冗長的法院程序及嚴苛的舉證。

3.47 在電訊管理局局長得出持牌人確實作出誤導或欺騙性行為的結論後，受損的消費者，可向該違反行為的持牌人提出訴訟，尋求賠償、禁制令或其他適當的補救、命令或其他補償⁵⁶。

3.48 因此，現時的共同規管架構為電訊業提供了一個基礎，好讓全面保障消費者抗衡不公平營商手法的法律框架在未來得以建立。

廣播

3.49 至於廣播業《廣播條例》（第 562 章）及《廣播事務管理局條例》（第 391 章）未有特定授權廣管局處理營商手法事宜。然而透過修訂在現已確立的共同規管架構內的法例及/或牌照條件，便可正式規管有關廣播服務的不公平營商手法。故此，較便捷的解決方法，是在現行架構中，對法例及行政程序作出一些改變，下文將為此進一步作出論述。

成立統一的監管機構

3.50 就上文提及關於科技及市場聚合的情況，政府建議成立一個統一的監管機構，將電訊管理局及廣播事務管理局合併為通訊事務管理局。在本報告撰寫之時，政府正準備向立法會提交成立通訊事務管理局的相關條例草案⁵⁷。本會全力支持政府是項政策，並相信建議中的重組乃是一個良好契機，讓消費者在通訊業的不公平營商手法中，獲得進一步的保障。

改善共同規管架構

3.51 如上述所言，本會認為要處理電訊及廣播行業的不公平營商手法，最適宜由現行的兩所監管機構，及最終由統一監管機構，即建議中的通訊事務管理局所負責。然而，現行的規管架構，仍有待改善的地方。本會希望在此提出現行架構保障不足之處，並提出改善建議。

不足之處

法律保障不足

3.52 雖然《電訊條例》第 7M 條可視為電訊業的關鍵條文，但仍未能涵蓋該行業涉及的所有不公平營商手法。第 7M 條乃針對「誤導或欺騙性」行為，根據電訊管理局局長及本會的經驗，於該法律定義涵蓋範圍之外，行業尚有其他不公平手法存在，有必要加強規管，保障消費者的權益。該等手法主要為了促銷，包括騷擾及恐嚇，由於涉及上門推銷員的推廣

⁵⁶ 《電訊條例》第 39A 條。

⁵⁷ 《2008 年數碼 21 資訊科技策略—配合科技發展，共創數碼社會》第 5.13.6 段，2007 年 12 月。

手法或推銷固網電話服務或上網服務的投訴眾多，備受公眾關注。一直以來，廣管局並未太倚重《廣播條例》第 7 條及第 7A 條來訂立牌照條件，用作監管服務供應方式及禁止不公平營商手法，甚或要求遵從任何強制性業務守則。

3.53 廣播業的問題癥結，是《廣播條例》或《廣播事務管理局條例》並沒有授權廣管局，規管持牌人的行銷及宣傳活動。

3.54 在兩個監管機構規管範疇以外的任何不公平營商手法，只可透過受損消費者採取民事訴訟，或當涉及欺詐或暴力，則由執法機構透過刑事法檢控⁵⁸。

3.55 關注到受損的消費者採取個人的訴訟行動，當中所牽涉的申索大多低於 5 萬元，屬小額錢債審裁處的司法管轄權範圍。雖然，在審裁處追索賠償所需的法律費用亦不多（雙方均不可透過法律代表處理其案件），可是向大機構提訴訟的心理壓力，冗長的法律程序、對方若上訴時，可能委聘法律代表所涉及的巨額法律費用，都令部份消費者卻步。

3.56 至於對電訊及廣播行業之不良促銷手法採取的刑事制裁，由於定罪後的刑罰較嚴重，為免錯誤判罪，既須在檢控時提出充份的證據，證實「毫無合理疑點」，亦要有其他保護措施防止誤判，故此審訊過程難免複雜及昂貴，因此透過刑事制裁來杜絕不公平營商手法及阻嚇不良推銷員進行相關行為，未必是最可行或最具成本效益的方法。

依賴自律性的規管架構

3.57 對於超出其法定權力所能規管的不公平手法，縱然電訊局及廣管局不能直接施加制裁，但如上述所言，電訊局及廣管局曾作出努力，透過業務守則 / 指引及發牌管制等自律性的規管來處理相關事項。以下將就此作進一步論述。

電訊

自願性的業務守則

3.58 電訊管理局局長在 2004 就涉及上門推銷員推廣手法、推銷固網電話服務或上網服務，發出一份諮詢文件，建議「**上門推銷及推廣電訊服務活動的守則**」⁵⁹。可是，由於欠缺營運商的支持，且根據《電訊條例》第 7M 條，電訊管理局局長的功能及權力與守則並沒有關連⁶⁰，令守則未能成功推行。

⁵⁸ 例如：在普通法方面，有關失實陳述的法則、《不合情理合約條例》、《服務提供（隱含條款）條例》及非法侵入土地侵權法，而在刑事法方面，《盜竊罪條例》下的欺騙條文，以及《刑事罪行條例》與《侵害人身罪條例》下有關侵犯他人的條文。

⁵⁹ 電訊管理局局長聲明第 26 段，2004 年 11 月 12 日。

⁶⁰ 同上。

3.59 在 2001 年，電訊管理局局長發出《有關公共流動無線電話服務合約的實務守則》；在 2004 年，電訊管理局局長把守則擴展至公共電訊服務，並發出《有關公共電訊服務合約的實務守則》。但由於守則⁶¹ 乃自願性遵從，故未能在業界產生重大的影響。

牌照條件 – 遵從業務守則

3.60 上文所言，自願性的措施一向成效有限，在 2005 及 2006 年，電訊管理局局長於發出移動傳送者牌照、提供電訊服務類別牌照及服務營辦商牌照時，加入特別條件⁶²，要求牌照持有人須不時遵守任何由電訊管理局局長發出的業務守則或指引，並就下列項目為牌照持有人提供實務性的指引：

- (a) 提供滿意服務，
- (b) 保護客戶資料，及
- (c) 保障及促進使用電訊產品及服務的消費者之權益。

3.61 此外，政府在 2007 年 12 月 21 日發表的諮詢文件「根據《電訊條例》設立『綜合傳送者牌照』」及「綜合傳送者牌照發牌架構」⁶³，建議在「綜合傳送者牌照」的範例中，加入兩項「特別條件」。建議的「特別條件一」，與上文提及電訊管理局局長現正行使的條文相類似。此外，在牌照範例中，建議的「特別條件三十六」更特別訂明，有關提供電訊服務予用戶的合約，持牌人須不時遵守電訊管理局局長發出的一切業務守則，並規定訂立合約須包括：

- (a) 服務合約文件的名稱、格式及結構；
- (b) 訂立及終止服務合約的方式；
- (c) 服務合約及服務表現所須包含或有聯繫的資訊；
- (d) 根據電訊管理局局長所批准的機制，將用戶及電訊服務供應商的爭議提交予獨立機構作出裁決；及
- (e) 其他條款與細則或用戶權益保障條文⁶⁴。

⁶¹ 《有關公共電訊服務合約的實務守則》就服務合約的內容制定了指引，如合約條款應平衡、公平及合理，要以淺白清晰的語言書寫，合約的中文或英文版本享有同等地位；如要單方面更改合約條款，應在 30 天前預先知會消費者。

⁶² 例如：移動傳送者牌照、提供電訊服務類別牌照以及服務營辦商牌照。

⁶³ 諮詢文件建議公眾就建議設立的綜合傳送者牌照提出意見，綜合傳送者牌照是一個為電訊業的固網及流動網絡匯流鋪路的全新發牌制度，亦是一個綜合發牌架構。

⁶⁴ 「綜合傳送者牌照發牌架構」諮詢文件第 78-79 頁，2007 年 12 月 21 日。

3.62 由於預期所有現行發牌架構將由建議的綜合傳送者發牌架構⁶⁵所取代，「特別條件一」及「特別條件三十六」在日後可適用於所有電訊服務持牌人。

3.63 這些「特別條件」的規管範圍全面，涵蓋消費者與持牌人的各個關係層面。由於兩項「特別條件」都要求持牌人須不時遵守由電訊管理局局長發出的一切業務守則，本會認為有關遵從是強制性的。

3.64 若此理解正確，守則結合「特別條件」乃一有效的工具，用以制裁及糾正市場不公平行為，從而保障消費者權益。不遵從「特別條件」下的發出守則，將觸犯牌照條件，因而可能須要面對電訊管理局局長所實施的有力制裁。

基於超越權限的理由反對「特別條件」

3.65 某營運商曾以超越權限的理由，反對建議的「特別條件一」，認為條文將電訊管理局局長的權力及管轄範圍擴大至非特定的消費者事項，超出《電訊條例》的範疇。電訊管理局局長可解釋此等「特別條件」乃根據《電訊條例》第7條及第7A條設立，而非第7M條。如上述所言，第7(7)條訂明牌照條件可關乎服務的提供方式、禁止不公平的市場操作，以及對有關指示、指引、業務守則、規例及《電訊條例》的遵從。本會認為電訊管理局局長的理據明顯地有很多可取之處。然而任何未解決的相關爭議，須待法院作出審理。在此爭論有任何定案之前，「特別條件」在日後施行的有效性，仍然存疑。

3.66 若建議的綜合傳送者牌照中提出的「特別條件」，最後因超越權限而失效，電訊管理局局長便難以利用發牌監管制度來解決市場的不公平營商手法。在這情況下，電訊管理局局長唯有繼續依賴自律性的規管架構，以及營運商自願性去遵從相關守則。

廣播-收費電視

缺乏規管營商手法的條文

3.67 如上文所言，《廣播條例》或《廣播事務管理局條例》並沒有授權廣管局規管廣播業（收費電視）的不良營商手法。因此，上述兩項法例未有任何與《電訊條例》第7M條相類似而對營商手法作出規管的條文。

3.68 根據收費電視營運商牌照規定，在諮詢廣管局及電訊局後，持牌人須作出準備，經常更新有關客戶服務的最佳實務守則⁶⁶。然而，守則主要集中於履行合約責任，而非合約簽訂前的不公平營商手法，而該等手法卻一直引起眾多的投訴。例如，由三家主要營運商⁶⁷制訂的客戶服務守則，只限於簽訂合約後的服務承諾，而並無條文去約束簽訂合約前的不公平促銷手法。

⁶⁵ 「根據《電訊條例》設立『綜合傳送者牌照』」諮詢文件第11段。

⁶⁶ 例如：「香港有線電視有限公司--收費電視節目服務牌照續期」第17.1條。

⁶⁷ 香港有線電視有限公司、電訊盈科媒體有限公司及銀河衛星廣播有限公司。

建議改善內容

3.69 鑑於電訊及廣播行業的法律架構，可能匯合為一個統一的監管架構，以規管所有傳播業，故全面整理現行電訊及廣播法例的做法似乎不太實際。不過，現時仍未知道建議的《通訊條例》會於何時展開立法程序，由於不公平營商手法在社會上正製造不少困擾，若不關注事件，實非明智之舉。因此，本會建議以下一些短暫並易於實行的措施，以改善現行規管架構，杜絕不公平營商手法。

有關電訊的短期措施

建議十一 – 擴大《電訊條例》第 7M 條的範疇

3.70 本會認為，為解決電訊業發牌及自律性規管的不足，可透過擴大《電訊條例》第 7M 條的範疇，以涵蓋任何在提供或獲取電訊網絡、系統、裝置、客戶裝備或服務，包括（但不限於）推廣、行銷或宣傳網絡、系統、裝置、客戶裝備或服務的任何不合情理或不當行為。

3.71 同時，由於將電訊業豁免於建議中的營商手法法例之外，所以須確保在抗衡不公平營商手法方面，《電訊條例》為消費者所提供的保障，不會低於建議的營商手法法例。因此，消委會建議進一步修訂第 7M 條，使之跟建議的營商手法法例一樣，明確地涵蓋一切在交易進行之前、交易期間及交易之後的不公平營商手法，以及涵蓋持牌人、其代理或僱員的行為⁶⁸。

3.72 本會相信修訂該條文有下列好處：

- (a) 可消除任何關於超越權限的疑慮，並授權電訊管理局局長在建議的綜合傳送者牌照中加入特別條件，以及制訂強制性守則，例如上述「特別條件」下發出的守則。修訂條文為針對不公平營商手法(包括第 7M 條欺騙及誤導性的行為以外的其他不公平手法)的「特別條件」和業務守則提供法律基礎，能使電訊管理局局長能對此等行為採取行動。此外，電訊管理局局長在行使牌照管制機制以執行守則時，其在執法方面的效能應可改善。
- (b) 透過《電訊條例》第 36C 條的廣泛行政制裁措施來規管所有不公平營商手法，能為消費者提供更全面的保障架構。由於違規營運商不僅面對受損消費者的個人索償（例如，根據《不合情理合約條

⁶⁸ 《電訊(傳送者牌照)規例》第 106V 章附表 1 傳送者牌照的一般條件列明「如持牌人為提供有關的服務，或為裝置、維持或操作有關的網絡，而以合約形式僱用任何人(“承辦人”)，持牌人須繼續對承辦人有否遵從及履行本牌照的各項條件，負上責任。」。

例》或侵權法），亦令受到電訊管理局局長的制裁，故此不公平的營商手法可望遏止。

有關廣播業（收費電視）的短期措施

3.73 《廣播條例》第 10(4)條提供一個合適的框架，解決廣播業未被處理的不公平營商手法事宜。條文訂明行政長官會同行政會議或廣管局（視乎情況所需而定）能以公眾利益的大前提下，在持牌人獲得合理機會作出申述後，於牌照有效期內隨時更改該牌照。

3.74 在現行發牌之特定條款修中，政府亦保留修訂現行牌照的權利⁶⁹。

建議十二 - 增設全新牌照條件；或

增設全新的促銷手法守則，以杜絕不公平營商手法

3.75 我們建議政府可根據《廣播條例》第 10(4)條(或牌照第 4.1 條)為公眾利益而行使權力；又或在個別持牌人的同意下的牌照第 4.2 條，加入全新的發牌條件：

- (a) 禁止其持牌人、代理或僱員在交易進行之前、交易期間及交易之後，行使不公平營商手法，以保障公眾利益。
- (b) 要求持牌人在諮詢廣管局後，編撰良好促銷手法守則，以禁止在交易進行之前、交易期間及交易之後，其持牌人、代理或僱員行使不公平營商手法。

3.76 《廣播條例》第 28 條授權廣管局對違反守則作出行政罰款。若廣管局認為罰款並不足夠，可向法庭申請更高的罰款，罰款可高達違反期內持牌人在相關電視節目服務市場營運額的 10%，或港幣\$2,000,000，以較高者為準。

3.77 本會認為以根據牌照第 4.2 條的自願合作為本的方案，加入新的發牌條件，可加強業界的遵從性，及減低其抗拒修改，例如提出司法覆核等的可能性。若然證實此方案並非可行，我們建議政府應以第 4.1 條或

⁶⁹ 例如根據香港有線電視有限公司「本地收費電視節目服務牌照」（續牌）第 4.1 條，行政長官會同行政會議可在其認為公眾利益有需要的情況下，按照《廣播條例》更改牌照。此項合約更改權利與《廣播條例》第 10(4)條之法定權力相類似。另外，第 4.2 條提出，在不損害第 4.1 條的原則下，在獲得持牌人事先書面同意的情況下，行政長官會同行政會議可於任何時間及在有效期內不時修改牌照。此條文並沒有要求修改牌照須合乎公眾利益。其他收費電視經營者的牌照亦有類似的條文。

《廣播條例》第 10(4)條的公眾利益為依據，就牌照事宜採取適當的行動。由於廣播業的不公平促銷手法問題嚴重，相信政府以公眾利益為理據去作出修訂，不會遇到太大困難。

超越權限

3.78 行政長官會同行政會議或廣管局根據《廣播條例》第 10(4)條，以公眾利益為由，透過新增建議條文（禁止不公平營商手法或規定促銷實務守則）去修改牌照，可能會受到以超越權限為理據的反對。反對者可能認為《廣播條例》並沒有為持牌人就提供、行銷、推廣及宣傳廣播產品或服務的營商手法作出任何規管，故此有關修改超越條例的範圍。

3.79 因此較恰當的做法似乎是在《廣播條例》加入類似擴大《電訊條例》第 7M 條的建議，此舉能為廣管局奠定法律基礎，處理一切引起消費者關注的不公平促銷手法。然而，當中可能牽涉冗長的立法程序，故最好能與建議中的統合通訊行業的《通訊條例》一併制訂。

結語

3.80 本會並不認為將會成立的通訊事務管理局，會妨礙上述《電訊條例》及《廣播條例》的改善建議。舉例來說，修訂後的第 7M 條可輕易地轉移至新的《通訊條例》，涵蓋電訊及廣播持牌人的行為。現階段，修訂條文以涵蓋所有不公平促銷手法及誤導或欺騙性行為，只是預先制訂須納入通訊事務管理局權力範圍的條文，故此這項工作是不會白費的。

3.81 就現行的收費電視牌照而言，推出統一的《通訊條例》可能需要有一段相當長的過度期，當中牌照會繼續有效直至到期日為止，故即使成立新的規管架構，有關收費電視牌照條件的改善仍可繼續有效。無論如何，消委會希望電訊及廣播業規管架構的匯合不會對現在經已獲得的進展產生倒退作用。反之，這規管加構的結果，應提供進一步保障消費者權益的機會，尤其是本報告書所述的不公平營商手法方面，此外有關建議亦應納入新的統一規管架構當中。

第四章 總結建議

4.1 香港擁有健全的法律制度及規管架構，保障市民大眾的利益不受到損害；然而消委會是在是次報告發現，現時部分保障香港消費者的法律及行政措施仍有不足之處，致令香港保障消費者的水平低於其他相對已發展的經濟體系。

4.2 在報告中，消委會審視了一連串深受市民關注，困擾著市場的問題，本會亦作出多項建議，要求採取迅速行動去保障消費者。此外，為保障消費者，以至商界今後的利益，本會亦就保障消費者的整體架構提出一些建議。

4.3 消委會建議設立全新的架構，並與現時保障消費者的相關法例整合。這樣，消委會一方面肯定了這些法例過去以及日後為香港帶來的利益；另一方面，亦對各相關執法機構的工作表示認同，相信各執法機構亦能繼往開來，在建議的新架構下緊密合作。

4.4 首要的建議是制定一條由全面的消費者保障法例（營商手法法例），並由一個專責的執法機構負責執行有關法例。法例能設立一個「安全網」，令消費者在瞬息萬變的市場中，免受誤導及欺騙性行為損害。

4.5 建議的新機制將與現行的消費者保障條例並存，包括《商品說明條例》、《不良醫藥廣告條例》及《電訊條例》部分條文。而業界的自律性規管，以及普通法中消費者相關的保障，將維持不變。

4.6 總體來說，綜合現行及建議中法例的保障應能發揮協同效應。個別執法機構與建議中的《營商手法法例》的執法機構共同合作，相信能高度保障消費者權益。

4.7 現綜合報告中各章節所提出的建議。

消費者委員會的建議

第二章：全面的營商手法法例

建議一 法例涵蓋的範疇

4.8 建議法例的範疇須延伸至：

(a) 具誤導或欺騙性的作為或不作為(包括隱瞞或遺漏)；

- (b) 威脅性或高壓的推銷手法，對消費者的選擇或行為方面的自由構成重大損害，或可能構成重大損害；及
- (c) 營商者的其他不當或不公平營商手法，不符合殷實可靠的經營原則；
以及
在交易進行之前、期間，或之後營商者（或其僱員或代理）使用的不公平營商手法，並與下列事項有直接關連：
 - (i) 宣傳、銷售或提供產品予消費者，或消費者行使與產品相關的合約權；
 - (ii) 在二手市場中，向消費者回購貨品，例如金器和二手車。以及
有關手法或會令消費者作出一個在其他情況下並不會作出的購買決定。

4.9 若違例者為機構，而在其管理人員（如董事）的同意、縱容或疏忽下違例，該管理人員亦可能要負上法律責任。

4.10 此外，「產品」應包括服務、貨品、私人住宅物業，以及合約權利及義務。

建議二 擬定法例的禁制時的基本方式

4.11 本會建議在制定法例杜絕商業及貿易中的不公平營商手法時，採用一般禁制條文結合特定不公平行為禁制條文的方式。雖然消費者或營商者可能不肯定某些沒有在特定條文或不公平行為附表中明確禁制的行為，是否被執法機構視為包括在全面性的總括條文之內。不過本會相信，相關執法機構可制定出適當的指引，便可消除此等疑慮。

建議三 執法機制

4.12 就怎樣才是合適的執法機制，本會建議：

- (a) 執法機構應採用漸進及以遵從為本的執法方式，以由法院制裁支持的行政措施為主導，採取以下的步驟：
 - (i) 協助雙方自願和解
 - (ii) 要求營商者作出「可由法院強制執行」的承諾書
 - (iii) 由執法機構發出「可由法院強制執行」的「終止及遵從」通知書；
 - (iv) 若違反承諾書或「終止及遵從」通知書，可向法院申請罰款、聲明及禁制令。

- (b) 執法機構在調查時，應獲賦權收集資料，監察有關涉案人士有否遵從機構發出的承諾書、「終止及遵從」通知書，及法院頒布的禁制令。
- (c) 有關的營商者在不同階段（包括調查期間），都應有合理機會作出申述，或就「終止及遵從」通知書或其中的任何部份提出上訴。
- (d) 執法措施應逐步提升，先是游說，然後再根據違法的嚴重程度、不遵從和不合作程度，及其他相關因素，決定是否由法院作出制裁。執行機構可視乎個案的緊急程度或其他情況，即時向法院申請禁制令而毋需經過和解，發出通知書等步驟。
- (e) 違法者主要須承擔民事責任，除非有關的不公平手法極不道德，或對社會構成重大傷害，便會作出刑事制裁。
- (f) 假若法例載有刑事條文，而執法機構乃獨立的公共機構，涉及違反刑事條文的個案應轉交相關紀律部隊處理。

建議四 法例中加入提出訴訟的權利

4.13 本會認為，如遇上違反建議法例的情況，消費者應有權提出訴訟，尋求賠償或其他補償。

建議五 獲得到補償的權利

4.14 本會建議應慎重考慮下列方案以改善消費者得到補償方法：

- (a) 成立消費者審裁處；
- (b) 擴闊法律援助輔助計劃的範圍；
- (c) 擴大消費者訴訟基金給予援助的能力。

建議六 與現行法律或規管架構融合

4.15 本會認為，若現行法例中與營商手法有關的條文符合下述條件，將不會受建議制定的新法例所影響：—

- (a) 法例或條文的執行需具要高度的專業及專門知識；及
- (b) 現行法定架構已提供了與建議法例相若及可共存並行的保障。

4.16 若現行法例已能對特定範疇行業作出規管，亦能達致與建議法

例相若的保障水平，便可豁免於建議法例。如有需要時，可修訂該等現行法例，以確保它們能為消費者提供同樣水平的保障。

4.17 在建議法例中界定的專業團體，可透過其自我規管制度，以其制定的專業規則及程序來規管其成員；並須設立轉介制度讓新的執法機構能恰當地及迅速地把有關專業團體投訴的個案，轉介相關團體。此外，政府在制定建議法例時，可考慮將符合條件的專業團體名單附於法例。

建議七 關於具誤導或欺騙性廣告的指引

4.18 消委會建議，執法機構根據建議的營商手法法例，發出有關誤導或欺騙性廣告的具體指引。指引的制訂可參考電訊局第 7M 條指引的一般標準和廣播事務管理局的守則要求。指引為這些個別行業的營商者提供適當的指導，並確保：—

- (a) 所有廣告聲稱必須誠實及真確；
- (b) 廣告不得作誤導、欺騙或誇大的聲明；
- (c) 所有具事實根據的聲稱和產品及服務具效用的聲稱，必須有確實及合理證據支持；及
- (d) 所有令人相信是專業意見及推薦的廣告聲稱，必須能提供證明。

4.19 指引亦可就下列方面提供詳細指導：—

- (a) 為某些廣告所採用的特別字句，訂立規定要求；
- (b) 比較式廣告須注意事項；及
- (c) 執法機構在執行建議法例時須考慮的事項。

建議八 價格比較的指引

4.20 根據建議法例制訂有關價格標示的指引，列明比較價格的合適方式及途徑，例如：—

- (a) 營商者提供價格比較的聲稱必須準確和真實。
- (b) 以原價與折扣價作價格比較之前，該原價應已維持了一段合理的時間。

- (c) 價格比較必須清楚地列明原價及折扣價。例如，營商者作出「優惠價\$9.9」或「減至\$99」的聲稱時，應同時列出原價作為「優惠」或「減至」等字眼的參考。當然，更清晰及和正確的價格比較應為「由\$100減至\$80」；
- (d) 營商者必須讓消費者清楚知道較高價格是甚麼意思，例如在某些情況，應清楚表明究竟較高價格是指一般價格還是旺季價格（一般較高），好讓消費者可衡量以該折扣價購買時，實際上可獲得多少益處；
- (e) 用於價格標示的字眼須與其一般日常意思相同。例如，合理的消費者一般對「減價」(sale)字眼的理解是貨品從原先的售價減價；而非指貨品是「供銷售」(for sale)。

第三章：改善現行法律及規管架構的建議

建議九 在銷售收據上的商品說明

4.21 為了釐清銷售收據上的商品說明的爭議，本會建議對《商品說明條例》作出修訂，訂明《商品說明條例》第7條亦適用於銷售單據上的商品說明，以消除此法例條文是否包括在銷售單據上的商品說明的疑團，亦令有關的執法機構能更有效地執法。

建議十 規管標準消費者合約中不公平條款的使用

4.22 本會建議立法規管標準消費者合約內的不公平條款。法例可參考英國《消費者合約不公平條款規例》，及其不公平條款列表，並兼顧兩地在文化及市場上的差異。訂立一份具指示性及可增補的列表，列出可能被視為不公平的條款。

4.23 建議中營商手法法例下的執法機構，應具有管理、監察及執行此法例的職能。

建議十一 擴大《電訊條例》第7M條的範疇

4.24 本會認為，為解決電訊業發牌及自律性規管不足，可透過擴大《電訊條例》第7M條的範疇，以涵蓋任何在提供或獲取電訊網絡、系統、裝置、客戶裝備或服務，包括（但不限於）推廣、行銷或宣傳網絡、系統、裝置、客戶裝備或服務的任何不合情理或不當行為。

4.25 同時，由於將電訊業豁免於建議中的營商手法法例之外，所以須確保在抗衡不公平營商手法方面，《電訊條例》為消費者所提供的保障，不會低於建議的營商手法法例。因此，消委會建議進一步修訂第 7M 條，使之跟建議的營商手法法例一樣，明確地涵蓋一切在交易進行之前、交易期間及交易之後的不公平營商手法，以及涵蓋持牌人、其代理或僱員的行為。

4.26 本會相信修訂該條文有下列好處：

- (a) 可消除任何關於超越權限的疑慮，並授權電訊管理局局長在建議的綜合傳送者牌照中加入特別條件，以及制訂強制性守則，例如上述「特別條件」下發出的守則。修訂條文為針對不公平營商手法(包括第 7M 條欺騙及誤導性的行為以外的其他不公平手法)的「特別條件」和業務守則提供法律基礎，能使電訊管理局局長能對此等行為採取行動。此外，當電訊管理局局長在行使牌照管制機制以執行守則時，其在執法方面的效能應可改善。
- (b) 透過《電訊條例》第 36C 條的廣泛行政制裁措施來規管所有不公平營商手法，能為消費者提供更全面的保障架構。由於違規營運商不僅面對受損消費者的個人索償（例如，根據《不合情理合約條例》或侵權法下），亦令受到電訊管理局局長的制裁，故此不公平的營商手法可望遏止。

建議十二 為廣播業增設全新牌照條件；或增設全新的促銷手法守則，以杜絕不公平營商手法

4.27 我們建議政府可根據《廣播條例》第 10(4)條（或牌照第 4.1 條）為公眾利益而行使權力；又或在個別持牌人的同意下的牌照第 4.2 條，加入全新的發牌條件：—

- (a) 禁止其持牌人、代理或僱員在交易進行之前、交易期間及交易之後，行使不公平營商手法，以保障公眾利益。
- (b) 要求持牌人在諮詢廣管局後，編撰良好促銷手法守則，以禁止在交易進行之前、交易期間及交易之後，其持牌人、代理或僱員行使不公平營商手法。

4.28 《廣播條例》第 28 條授權廣管局對違反守則作出行政罰款。若廣管局認為罰款並不足夠，可向法院申請更高的罰款，罰款可高達違反期內持牌人在相關電視節目服務市場營運額的 10%，或港幣 \$2,000,000，以較高者為準。

4.29 本會認為以根據第 4.2 條的自願合作為本方案，加入新的發牌

條件，可加強業界的遵從性，及減低其抗拒修改，例如提出司法覆核的可能性。若然證實此方案並非可行，我們建議政府應以第 4.1 條或《廣播條例》第 10(4)條的公眾利益為依據，就牌照事宜採取適當的行動。由於廣播業的不公平促銷手法問題嚴重，相信政府以公眾利益為理據去作出修訂，不會遇到太大困難。

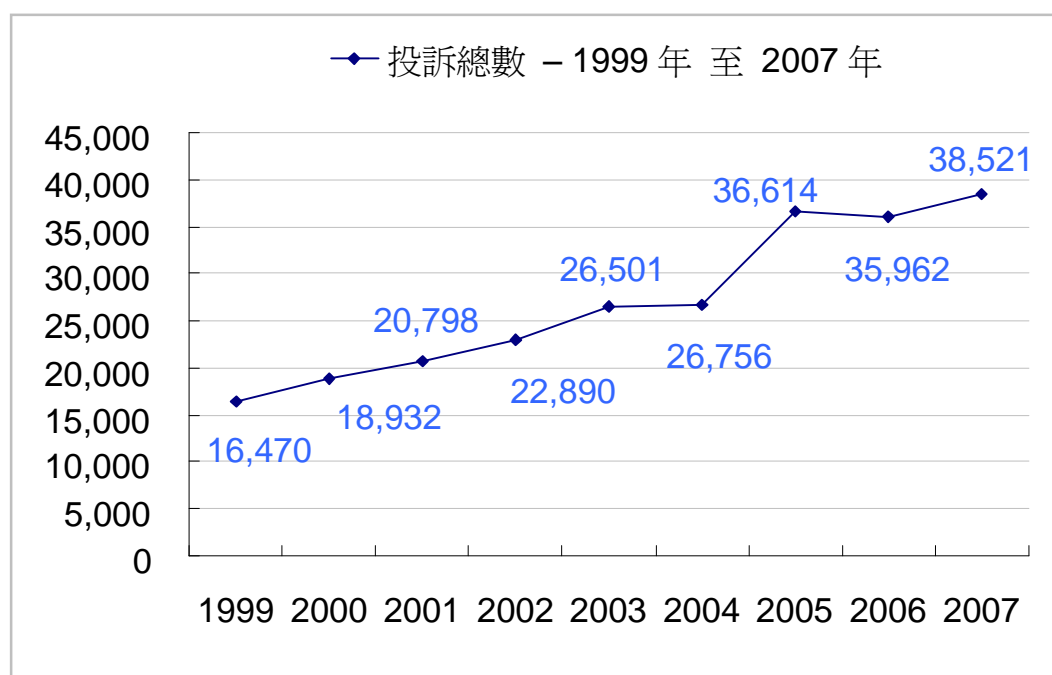
超越權限

4.30 行政長官會同行政會議或廣管局根據《廣播條例》第 10(4)條，以公眾利益為由，透過新增建議條文（禁止不公平營商手法或規定促銷實務守則）去修改牌照，可能會受到以超越權限為理據的反對。反對者可能認為《廣播條例》並沒有為持牌人就提供、行銷、推廣及宣傳廣播產品或服務的營商手法作出任何規管，故此有關修改超越條例的範圍。

4.31 因此較恰當的做法似乎是在《廣播條例》加入類似擴大《電訊條例》第 7M 條的建議，此舉能為廣管局奠下法律基礎，處理一切引起消費者關注的不公平促銷手法。然而，當中可能牽涉冗長的立法程序，故最好能與建議中的統合通訊行業的《通訊條例》一併制訂。

涉及欺騙性、誤導性及不公平營商手法的投訴統計 (2005 年 至 2007 年)

有關投訴貨品／服務	2005	2006	2007
電訊服務	1,756	2,345	1,197
收費電視	1,306	1,261	1,002
攝影器材	611	456	437
電器用品	236	232	193
通訊用品	209	199	171
分時享用海外渡假	207	107	98
藥物及中藥	149	138	127
物業買賣	71	89	223
其他貨品及服務	2,932	2,946	2,613
總數 (全年總數比例)	7,477 (20.4%)	7,773 (21.6%)	6,061(15.7%)
全年總數	36,614	35,962	38,521



與營商手法相關之主要條文的例子¹

與營商手法有關之條例

1. 失實陳述條例（第 284 章）(包括失實陳述的損害補償)
2. 假拍賣條例（第 255 章）(規管以出價競投方式售賣貨品之行爲)
3. 公眾衛生及市政條例（第 132 章）(第 61 條:對所供應貨品品質的虛假陳述)
4. 簡易程序治罪條例（第 228 章）（第 6A 條:禁止在公眾地方招徠)
5. 商品說明條例（第 362 章）(包括禁止將虛假商品說明應用於貨品)
6. 不合情理合約條例（第 458 章）（就不合情理合約的執行施加限制)
7. 不良醫藥廣告條例（第 231 章）(規管包括不良聲稱的醫藥廣告)
8. 度量衡條例（第 68 章 ）(第 18 條：禁止就所供應貨品的數量作出虛假陳述)

與某些特定行業營商手法有關之條文²

1. 銀行業條例（第 155 章）（第 93 條：欺詐誘使他人作出存款；第 94 條：在某些情況下誘使他人作出存款的侵權法律責任；第 95 條：認可機構發出虛假等的廣告；第 97A 條：關於認可身分的虛假陳述)
2. 地產代理條例（第 511 章）（第 43 條：地產代理在收取某些款項方面的法律責任)
3. 貨幣兌換商條例（第 34 章）(第 10 條： 有關兌換率的虛假或誤導性陳述)
4. 放債人條例（第 163 章）(第 30(1)(b)條: 欺詐誘使借款人作出借貸)

¹部份法例提供民事補償，部份只有刑事制裁沒有民事補償機制。

²以下只列出一些主要法例中與營商手法有關的條文的句子，並未列出相關的規例或法令中的條文。

5. 保險公司條例（第 41 章）(第 56 條: 誤導的陳述等及虛假的資料)
6. 禁止層壓式推銷法條例（第 355 章）(禁止推廣層壓式推銷計劃)
7. 電訊條例（第 106 章）(第 7M 條:具誤導性或欺騙性的行為)
8. 證券及期貨條例（第 571 章）(第 107 條: 欺詐地或罔顧實情地誘使他人投資金錢的罪行; 第 108 條: 在某些情況下誘使他人投資金錢的民事法律責任)

其他國家全面商營手法法例的例子

中國	中華人民共和國消費者權益保護法 ¹
美國	《聯邦貿易委員會法案》第五節禁止在商業活動中進行不公平或欺騙的行為或手法，或以不公平或欺騙的行為或手法，影響商業活動 ² 。美國多個洲已以此法為基礎，制定各洲的法例。
歐盟	將於各成員國實施的《不公平商業行為指令》。例如，英國就此頒布《保障消費者免於不公平交易規例 2007》，並將於 08 年 4 月實施。
澳洲	《交易慣例條例 1974》
紐西蘭	《公平交易法 1986》
印度	《消費者保障法 1986》
馬來西亞	《消費者保障法 1999》
新加坡	《消費者保障（公平交易）法》 ³

¹ 此法於 1993 年 10 月 31 日第八屆人民代表大會常委會第四節通過。

² 原《聯邦交易委員會法案》第五節禁止的「不公平競爭方法」，於 1938 年修訂為禁止不公平或欺詐行為。

³ 此法於 2004 年頒布。

新加坡《消費者保障（公平交易）法 2003》附表二
特定不公平營商手法

1. 對貨品或服務的贊助、認可、效能、特性、配件、材料、零件、品質、用途或好處作虛假陳述。
2. 對貨品或服務的特定標準、品質、級別、風格、型號、來源地或生產方法作虛假陳述。
3. 指稱貨品為全新或從未使用，但事實並非如此，又或該貨品的質量已下降或已被更改、修理或回收再造。
4. 指稱貨品曾被使用的程度與事實不符，或假稱貨品有特殊來歷或使用記錄。
5. 供應者指稱能提供貨品或服務，或能在特定原因、價錢、數量或時間下提供貨品或服務，但他們明知或有理由知道這與事實不符(除非有關限制早已清楚說明)。
6. 假稱需要額外的服務、配件、維修、替換品；或假稱已提供服務、裝置配件、作出維修或替換。
7. 指稱貨品或服務存有價格優惠或利益，而事實上該項價格優惠或利益並不存在。
8. 所收取貨品或服務的價錢大大高於原先提供予消費者的估計價格，除非該消費者已事先明確地表示同意付出較高之費用。
9. 作出欺騙性或誤導性的陳述，指稱貨品與服務的交易牽涉或不牽涉某些權利、補償或責任。
10. 假稱有關人士擁有或不擁有洽商貨品或服務協議之最終條款的權限。
11. 在合約中加入苛刻、欺壓性或過度地偏袒一方的條款或條件，從中取利，對消費者造成不公。

12. 對消費者行使不當的壓力或影響，迫使他們進行涉及貨品或服務的交易，從而取利。
13. 供應商就著單據聲稱另一商店將會以優惠價錢提供貨品或服務，但他知道或應當知道該商店不會這樣做。
14. 以看來客觀的方式，例如報導、記錄性資料或科學報告作出有關貨品或服務的陳述，旨在達到銷售目的，除非該陳述已聲明為廣告或宣傳資料。
15. 不論有否聲明價格，假稱某特定人士已經提出或同意購買貨品及服務。
16. 假稱能提供維修貨品的設備或備用的貨品配件。
17. 供應商明知道或應當知道未能提供與貨品或服務相連的禮物、獎品或其他免費品，仍提出供應這些禮物、獎品或免費品。
18. 供應商明知道或責任上應當知道有關貨品及服務的價格折扣會維持一段相當長的時段，但卻表示該折扣只於指定時段內有效。
19. 指稱貨品或服務因特定原因而有價格折扣，卻與事實不符。
20. 以細小字體隱藏與貨品或服務相關的關鍵性事實，以隱瞞或誤導消費者。

英國《保障消費者免於不公平交易規例 2007 草稿》

附表一

以下的營商手法在任何情況下均屬不公平：

1. 假稱該營商者為某守則的簽署人。
2. 未經批准而展示信託標誌、品質標誌或其他同類標籤。
3. 假稱某業務守則已受公共或其他機構批註。
4. 未經公共或私營機構認可批註、授權或未有遵守有關條件，營商者聲稱自己（包括其業務方法）或其售賣的產品已獲認可、批註或授權。
5. 營商者以特定價錢招徠，但卻沒有透露他可能有合理理由，當考慮到有關產品，宣傳該產品廣告的規模和該產品的價格，相信他並未能在合理時間內，以及合理數量，以該價錢供應（或促使其他商人供應）所聲稱的產品或相同產品（餌誘宣傳）。
6. 以特定價錢招徠顧客後，
 - (a) 拒絕向消費者展示宣傳產品，
 - (b) 拒絕接受訂購或於合理時段內送遞，或
 - (c) 展示有缺憾的產品樣本，意圖借機宣傳另一種產品（餌誘式銷售）。
7. 假稱產品供應時間有限，或只在限定時間內及特殊條件下供應，促使消費者在未有足夠時間審慎考慮的情況下，作出即時購買的決定。
8. 向消費者承諾，用該營商者所在歐盟國家的非法定語言提供售後服務，其後卻用另一種語言提供服務，而在消費者進行交易前，沒有向消費者透露有關事實。

9. 聲稱或給予別人印象不合法的產品能合法銷售。
10. 介紹產品時將消費者法律權益列為產品特色。
11. 利用媒介上的報導篇幅去宣傳產品，但沒有在其內容中說明或以消費者容易辨認的內容，圖片或聲音清晰表示此乃是廣告。(新聞式廣告)
12. 聲稱不購買產品會對消費者或其家人造成人身安全風險，而所稱的風險性質和程度是不真確的。
13. 推銷的產品與另一種由某製造商生產的產品相似，但卻特意促使消費者誤以為該推銷產品來自同一個製造商。
14. 設立、運作或推銷層壓式推銷計劃，促使消費者透過引入更多消費者而賺取酬金，但所繳付的金額並非用於購買產品。
15. 假稱該商戶即將結業或搬遷。
16. 聲稱產品有助提高賭博勝算機會。
17. 假稱產品能醫治疾病、官能障礙或畸形。
18. 提供其關鍵性不準確的市場或產品重要資料，意圖促使消費者以遜於普通市場的條件購買產品。
19. 聲稱舉行比賽或頒發獎品，但沒有頒予所稱的獎品或同等的代替品。
20. 聲稱產品是免費贈送或相類似的字眼，但實際上消費者卻須繳付費用才可回應此商業行為及領取或交付有關產品。
21. 在宣傳資料中加入帳單或類似文件，促使消費者誤以為已購買該宣傳產品。
22. 假稱或予人印象該營商者進行貿易、業務、行業或專業，或訛稱自己是消費者。
23. 當產品在某歐盟國家銷售，卻予人錯誤印象以為產品售後服務可於另一歐盟國家提供。

24. 予人印象，以為訂立合約後才可離開。
25. 拒絕理會消費者的反對，堅持親身造訪，但不包括在有正當理由及合理程度上執行合約條文的情況。
26. 持續地透過電話、傳真、電郵或其他媒體聯絡不願意接收訊息的消費者，但不包括在有正當理由及合理程度上執行合約條文的情況。
27. 對於保險索償的消費者，要求其提供與索償無合理關連的文件，或沒有系統地回應其與索償相關的函件，藉此令消費者放棄行使合約權利。
28. 在廣告中直接規勸兒童購買宣傳產品，或游說家長或其他成年人給他們購買宣傳產品。
29. 在消費者沒有要求的情況下，着令其為就產品即時或延後付款，或要求消費者退還貨品或交給商戶保管，但不包括 2007 年保護消費者（遙距銷售）規例第 19(7)條的代替產品。（慣性銷售）
30. 向消費者表示如果拒絕購買產品或服務，該營商者可能面臨失業或生計遭遇困難。
31. 予人印象，以為自己已經贏得、將會贏得、或只要完成某些作為便會贏得獎品或同等利益，但實質上 -
 - (a) 根本沒有獎品或同等利益可提供，或
 - (b) 消費者須付款或相關支出才可索取該獎品或同等利益。

英國《消費者合約不公平條款規則 1999》附表二
可能被界定為不公平的條款
(具指示性及可增補的列表)

1. 有下列目的或效果的條款:
 - (a) 免除或局限賣家或供應商因行為或疏忽引致消費者死亡或受傷的法律責任；
 - (b) 不恰當地免除或局限賣家或供應商完全或局部地不履行，或不履行全部合約責任時消費者的法律權利，包括以消費者對賣家或供應商所負的債項作抵銷合約規定；
 - (c) 以協議約束消費者，但提供服務與否卻取決於賣家或供應商單方面的實踐；
 - (d) 在消費者決定不完成或不履行合約時，准許賣家或供應商保留消費者已付的金錢，但消費者則不能因賣家或供應商取消合約而收取同等金額作賠償；
 - (e) 要求不能履行責任的消費者繳付不合理的高額賠償；
 - (f) 容許賣家或供應商在未能提供服務時可以解除合約，而消費者則沒有同樣權利；或容許賣家或供應商解約後，保留消費者已支付用作購買其未有提供的服務的金錢；
 - (g) 使賣家或供應商毋須在合理時間內發出通知，也可終止不固定期限合約，但是有重大理由引致相關的行動的情況則例外；
 - (h) 在消費者沒有作出表示的情況下，自動延長有固定期限合約，而把消費者表示續約與否的通知期限，設定至不合理地過早的時間；
 - (i) 在合約加入不能撤回的條款以約束消費者，而消費者並沒有真正機會在認清條款前簽訂合約；
 - (j) 使賣家或供應商無需根據合約指定的合理原因，便可單方面修改合約；

- (k) 使賣家或供應商無需有合理原因，便可單方面更改所提供的產品或服務之特性；
- (l) 在產品送遞時才訂價，或容許賣家或供應商調高價格，但消費者卻不能因最後價格與原本的合約價格相差太大而取消合約；
- (m) 給賣家或供應商有權決定產品或服務是否合乎合約規定，或使賣家或供應商獨有解釋合約條款的權利；
- (n) 限制賣家或供應商為代理人須承諾的責任，或使只在若干指定手續完成後賣家或供應商才須對自己的承諾負責任；
- (o) 規定消費者必須履行所有責任，而賣家或供應商卻無需如此；
- (p) 容許賣家或供應商可有機會轉移合約中的權利和責任，以致在毋須獲得消費者的同意下減低對消費者的保證；
- (q) 排除或妨礙消費者採取法律行動或追討其他法律補償的權利，尤其是要求消費者只可以不受法律規管的仲裁解決紛爭，不當地限制消費者可援引的證據，或使消費者承受根據法律應屬另一方的舉證責任；

2. 1(g), (j) 及 (l)段落所包涵的範圍

- (a) 1(g)段容許財務服務供應商，在毋須事先通知的情況下，保留單方面終止有關不固定限期合約的權利，而當中具有合理理據的原因，但大前提是供應商需要立即知會簽訂合約的另一方或相關當事人之有關安排
- (b) 1(j)段容許財務供應商，在毋須事先通知的情況下，保留更改支付消費者之利率或其他財務服務收費的權利，而當中須具合理原因，但大前提是供應商需盡早知會簽訂合約另一方或相關當事人，讓其能有自由立即除合約。

1(j)段同時適用於賣方或供應人，保留單方面更改不固定限期合約條件的權利，但大前提是需要合理的情況下知會消費者，令消費者可以自由解除該合約。

(c) 1(g), (j) 及 (l)段落不適用於:

- 可轉讓之證券、財務工具及其他產品或服務之交易，該價格與股票交易報價或期指（指數）或財務市場利率之波動相聯繫，而賣方或供應人未能加以控制；
- 購買或售賣海外貨幣、旅遊支票或以外幣命名之國際匯票之有關合約；

(d) 1(l)段容許於合法之按物價指數調整之利率條款，但前提是價格變更的方法已明確地說明。