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# Regulating Deceptive Misleading & Unfair Practices In Consumer Transactions

## **Consumer Needs A Statutory Cause of Action**

"...common law actions for consumers were considered inadequate. The relatively heavy burden of proof and the numerous defences encountered by the litigant in common law fraud and warranty cases led some legislatures to conclude that consumers need a statutory cause of action for marketplace deception and unfairness that would not be so difficult to pursue in the ...judicial system."

*Consumer Protection and the Law* by Dee Pridgen, West Group

**Consumer Council  
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# SECTION 1

## THE ISSUE

- 1.1. Most consumer protection laws in advanced economies prohibit deceptive, misleading and unfair practices in consumer transactions. Whilst such practices are not uncommon in Hong Kong and have tainted Hong Kong's image, our law as it currently stands has not adequately addressed this problem of grave consumer concern. Improvement in this area is obviously needed.
- 1.2. "*Caveat emptor* – let the buyer beware" has ceased to be appropriate as a general rule, particularly in cases where consumers are dealing with businesses that are bent on marketing their goods and services for short-term gains and on an organized basis.
- 1.3. Deceptive and unfair practices harm not only the interests of private consumers but also honest businesses who may be caught in the dilemma of either adopting similar tactics or losing position in the market. Demands from both the consumer and the business sectors for more effective measures to curb trade malpractices are mounting.
- 1.4. In August 1999, the Consumer Council issued a Consultation Paper, entitled *The Ways to Improve the Regulation of Advertising*. It outlined a number of options for strengthening the existing regulatory system for advertisements in the non-broadcast media. Members of the public were invited to forward their views on these specific options.
- 1.5. In the course of this consultation, it transpired that there was a need to examine the adequacy of legal sanction against deceptive, misleading and unfair conduct, of businesses in more details. The prevalence of such conduct perpetrated by some retailers against visitors to Hong Kong clearly reflects the inadequacy of legal protection currently afforded to shoppers and should be of a grave concern.
- 1.6. This report presents the Council's view regarding how deceptive, misleading and unfair practices in consumer transactions can be effectively and efficiently regulated. The issue of misleading advertising will be covered in a separate report.

## SECTION 2

# NATURE OF DECEPTIVE MISLEADING & UNFAIR PRACTICES

### Consumer Complaints

- 2.1. For the purpose of identifying the prevalence of deceptive, misleading and unfair practices exercised by businesses in Hong Kong, we have analyzed all 4,574 complaint cases, totaling 4,574 received by the Consumer Council in the last quarter of year 2000 as against the total of 18,932 cases in the whole year.
- 2.2. A 'desk top' analysis was made of each complaint against the provisions dealing with deceptive, misleading and unfair practices in the trade practices laws in Australia, UK and USA. The analysis was based on documentation evidence provided by consumers who had contacted the Council, and the notes made by Council staff in discussions with the consumer and, where applicable, with the trader under complaint.
- 2.3. From the analysis, we found that a substantial number of the cases had indicated sharp practices that would be *prima facie* actionable under the trade practices laws overseas if such laws were enacted in Hong Kong. The more prevalent sharp trade practices are as follows -
- (1). misleading indication as to price (21%)\*,
  - (2). false or misleading representation (16%)\*,
  - (3). accepting payment without intention to supply (8%)\*,
  - (4). bait & switch<sup>1</sup> (6%)\*, and
  - (5). undue harassment or coercion (1%)\*.

\* % of the total number of complaint cases from October to December 2000

- 2.4. It should be noted that a trader in one complaint case might have deployed a number of tactics listed above. For example, in one case a consumer was induced by "bait & switch" to a shop and the shop subsequently enticed a deposit from the consumer, but "without intention to supply" the goods ordered. The consumer was then forced by "harassment or coercion" to buy other expensive products.

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<sup>1</sup> As distinct from incentive or bonus schemes to promote sales. In Australia, bait-and-switch tactics are defined as "the trader advertises and/or promotes the sales of his goods or services when there is no reasonable ground to believe that he is able to offer goods or services at the advertised/promoted price for a reasonable period and at a reasonable quantity."

- 2.5. The complaints were mainly related to the following categories of products and services:
- (1). Electrical Appliances;
  - (2). Audio & Visual Goods;
  - (3). Medicines including Chinese Herbal Medicine;
  - (4). Beauty Parlour services;
  - (5). Modelling/Talent Hunt; and
  - (6). Time Sharing Holiday Facility.
- 2.6. It is important to note that 70% of the complaints related to supply of services. Those relate to sale of goods constituted 30% only.

### **Misleading Indication as to Price**

- 2.7. The more common instances involving misleading price indication were:
- (1). failing to display clearly and prominently the unit weight referring to the price of a product;
  - (2). failing to make clear in the price indication the full price consumers will have to pay for the product (including the non-optional extras);
  - (3). making price comparison by stating a "reduced price" without quoting the higher price to which it refers;
  - (4). stating "regular price", "usual price" or "normal price" without saying whose regular, usual or normal price it is;
  - (5). comparing prices with other traders without giving the names of the traders referring to;
  - (6). indicating in small prints the conditions attached to offers at special prices;
  - (7). confining the maximum reduction quoted to very small quantities of products;
  - (8). displaying a price for goods or services and then charging a higher price at the point of sale;
  - (9). refusing to cancel a transaction that a consumer has entered into on the basis of a price indication that is misleading.

### **False and Misleading Representation**

- 2.8. The more common instances relating to false or misleading representation made in the course of sale of goods and supply of services were:
- (1). claiming that goods or services are of a particular standard, quality, value or grade without providing substantiation;
  - (2). stating that goods or services have approval, uses, benefits, or performance characteristics they do not have;
  - (3). suggesting that goods are new or reconditioned;
  - (4). referring, in improper terms, to the need for any goods or services;
  - (5). giving misleading impression on the existence, exclusion or effect of any condition, guarantee, right or remedy.

## **Accepting Payment without Intention to Supply**

- 2.9. The more common instances in this category of sharp practice were:
- (1). failing to supply the goods or services at the agreed price after accepting payment;
  - (2). failing to supply the goods or services within the specified time or within a reasonable time;
  - (3). supplying goods or services materially different from the goods or services in respect of which the payment is demanded for or accepted;

## **Bait & Switch**

- 2.10. Typically, the trader advertises or displays a product at an unusually low price in order to attract attention of prospective purchasers. However, when a purchaser whose interest has been aroused eventually visits the trader's premises, he is convinced by the salesman that the goods or model advertised is an unreliable one and likely to give trouble.
- 2.11. The salesman, posing as releasing "confidential" information suggests that the model advertised or displayed has been known to give trouble. The salesman further alludes that he has doubts whether spare parts would be available in future. Being extremely smooth and skilful in deploying such a tactic, the salesman successfully steers the customer towards another more expensive model. The salesman would usually stress that the product is covered by a warranty (In most cases, a warranty is offered by the shop but not an international warranty) and emphasize that the particular brand he has recommended would be a much better investment than what the customer has intended to buy in the first instance.
- 2.12. However, the displayed goods or services (the bait) which have been 'offered' at a 'super-low price' are either not available in the shop or are being offered in very small quantities or for very limited periods of time. Further, the customer may also be subjected to undue pressure or harassment in the course of the switch sale.

## **Undue Harassment or Coercion**

- 2.13. The customer was, in some instances, forced to buy unwanted or more expensive goods, under the trader's use of, or threat to use, "physical force" or "undue harassment". Such sharp practice is often associated with such unfair conducts as "bait & switch" sales tactics or accepting payment without intention to supply by the trader. Tourists and elderly persons are more susceptible to such sharp practice.

2.14. In some other cases, the trader uses high pressure sales tactics to coerce the customer with a view to undermining his rational decision making. The methods include –

- (1). luring the customer into the belief that he or she is merely participating in a marketing survey;
- (2). conducting sham tests to demonstrate the ‘effectiveness’ of the product or service;
- (3). preying on some unpleasant experience in the customer’s past;
- (4). keeping the customer in a closed room for several hours while sales personnel worked in relay teams;
- (5). ostracizing at the room any customer who refused to sign a contract;
- (6). exploiting the customer’s feeling of insecurity, health problem, etc.;
- (7). creating an atmosphere among prospective buyers to the effect that if they did not act quickly, they might be forever foreclosed from participation;
- (8). exploiting the credulity of children or other vulnerable groups;
- (9). false threats of litigation;
- (10). outrageous emotional ploys.

## SECTION 3

# DEFICIENCIES OF THE EXISTING CONSUMER PROTECTION LAW

### Development of Consumer Protection Law in Hong Kong

- 3.1. In the past 26 years since the establishment of the Consumer Council in 1974, we have witnessed significant developments of consumer protection law in the area of consumer product safety as well as in contract law relating to consumer sales.
- 3.2. To protect consumers against unsafe products, substantial statutes and regulations, have been enacted, notably, the *Gas Safety Ordinance* (Cap.51), the *Toys & Children Products Safety Ordinance* (Cap.424), the *Consumer Goods Safety Ordinance* (Cap.456) and the *Electrical Products (Safety) Regulations*.
- 3.3. Regarding consumer sales, there were substantial amendments to the long established *Sale of Goods Ordinance* (Cap. 26). The *Supply of Services (Implied Terms) Ordinance* (Cap.457) was also enacted. In connection with such development, Hong Kong has introduced statutory intervention of unfair consumer contracts through the *Control of Exemption Clauses Ordinance* (Cap.71) and the *Unconscionable Contracts Ordinance* (Cap.458). These laws have significantly enhanced the protection of consumers in the following ways.
- 3.4. First, the laws have redefined the bounds of freedom of contract and endeavoured to bring fairness and justice for consumer transactions that are often distorted by unequal bargaining power between consumers and the sellers. Secondly, the laws have provided the consumer with a firm foundation of legal protection and restricted the application of the doctrine of *caveat emptor* by taking into account the weak bargaining position and vulnerability of the consumer.
- 3.5. Notwithstanding such developments, through the 1970s and 1990s, more needs to be done in the development of laws for the purpose of curbing deceptive conduct and unfair practices which are harming the economic interest of the consumer. The regulatory models adopted remain traditional, centering either on the provision of information to the consumer or on granting of licenses to do business. The banning of pyramid sales under the *Pyramid Selling Prohibition Ordinance* (Cap.355) enacted in 1980 is a rare exception.

- 3.6. Examples of the initiatives evolved from the more traditional regulatory models include -
- (1). the *Marking Orders* for the gold & platinum articles made under the *Trade Descriptions Ordinance* (Cap.362);
  - (2). the disclosure of exchange rates required under the *Money Changers Ordinance* (Cap.34);
  - (3). the labelling of food & drugs required under the *Public Health & Municipal Services Ordinance* (Cap.132); and
  - (4). the licensing of travel agents and estate agents under the *Travel Agents Ordinance* (Cap. 218) and the *Estate Agents Ordinance* (Cap. 511) respectively.
- 3.7. It has been contended that due to deficiencies in the current laws as they stand, there were recurrent deceptive and unfair practices in the marketplace in the past 20 years. Inadequacies of existing laws in providing safeguards against misleading or false advertising, misleading or false trade representation, misleading indication as to price, bait & switch selling, and accepting payment without the intention to supply are deeply rooted in the way such laws are being constructed. The ensuing paragraphs explain.

#### **Misleading Indication as to Price**

- 3.8. There are very few provisions dealing with prices or price indication under current consumer protection laws, except in the *Money Changers Ordinance* (Cap.34) and the *Money Lenders Ordinance* (Cap.163). The former stipulates that it is an offence for a money changer to make a false or misleading statement as to the rate of exchange offered or the terms of an exchange transaction to a customer. The latter requires that a moneylender who publishes an advertisement indicating the terms of interest, has to show conspicuously the interest as a rate percent per annum.
- 3.9. However, the *Trade Descriptions Ordinance* (Cap.362), which has general application, only prohibits false or misleading trade descriptions such as indications regarding quantity, method of manufacture, physical characteristics, place of manufacture of goods, etc. It does not apply to misleading price indication.
- 3.10. Similarly, the *Weights & Measures Ordinance* (Cap.68) is limited in its application. It applies to false or misleading statements made in the course of trade regarding the "quantity", but not the "price", of the goods supplied.
- 3.11. As indicated in Section 2 above, misleading price indication has brought about many consumer complaints. We consider it necessary to introduce statutory provisions with a view to prohibiting misleading price indications. We shall discuss the issue in the following Section by making reference to relevant laws in the United Kingdom.



## **False & Misleading Representation**

- 3.12. The *Trade Descriptions Ordinance* (Cap.362) protects the consumer against the supply of goods with false or misleading “trade descriptions”. A trade description includes an indication of quantity, composition, and fitness for purpose, performance, physical characteristics and place of origin with respect to any goods. However, it seems that the Ordinance cannot readily deal with false or misleading representation made by the trader in the consumer transaction.
- 3.13. The major deficiency of the Ordinance is that it applies to goods but NOT to services, accommodation and facilities. For example, false and misleading trade descriptions in services provided by financial institutions, telecommunication service providers, health clubs, beauty parlours, travel agencies are not covered. As Hong Kong has changed increasingly into a service-based economy, extending the scope of coverage of this Ordinance is necessary.
- 3.14. Further, apart from the *Marking Orders* for gold and platinum articles, the Ordinance does not impose specific duties on traders to provide adequate descriptions of goods or services in the interest of the consumer. Moreover, the Ordinance does not specifically provide for victims of a false description to be compensated by the wrongdoer.
- 3.15. To rely on civil action in a misrepresentation to deal with false or misleading sales information by a trader is also unsatisfactory. At common law, generally plaintiffs suing for misrepresentation must prove, among other things, that they have *actually* relied on traders’ statements which materially affect his intention to enter into the contract. For such a purpose, he may have to prove such reliance was *justifiable* or material. In a bait and switch scenario, for example, a consumer may not find it easy to meet such legal requirements. Evidence of this kind requires investigatory powers that are more properly given to a public authority
- 3.16. Moreover, the time and litigation expenses for a consumer to take private suits to pursue redress are prohibitive as they very often are not commensurate with the monetary loss in the purchase. This poses yet another hurdle to the consumer in initiating legal action.

## **Deceptive and Unfair Conducts**

- 3.17. Criminal sanctions imposed by the statutory provisions of the *Theft Ordinance* (Cap.210) or the common law of conspiracy to defraud may protect consumer interests against deceptive & misleading conducts and unfair practices of businesses. The application of these laws to protect consumers however has limitations.
- 3.18. Under the statutory offences of fraud and obtaining property by deception in the *Theft Ordinance* (Cap.210), dishonest traders who have cheated consumers into purchases may be prosecuted. Yet, such provisions are not entirely adequate for

consumer protection. This is mainly due to the fact that there is a relatively heavy burden of proof of dishonesty or intent to defraud. In most cases, extensive investigation has to be carried in order to gather evidence. Further, the Ordinance is hardly able to catch such conducts as high pressure coercive sales methods and non-disclosure of material information in respect of goods or services that renders the representation false or misleading.

- 3.19. Moreover, an aggrieved consumer may not always be keen to act as a prosecution witness for various reasons, e.g. the small amount of loss suffered does not commensurate with the time litigation expenses involved. It is also difficult to rely on such provisions to catch practices such as “bait & switch” sales techniques as the consumer is required to prove “justifiable reliance” on the deceptive statement made by the trader.
- 3.20. The *Unconscionable Contracts Ordinance* (Cap.458) enacted in 1995 is a more recent attempt to improve consumer protection. Whether any undue influence or pressure has been exerted on a consumer, or whether unfair tactics have been employed by traders, are amongst the non-exhaustive list of matters to be considered by the court in determining if a contract is unconscionable.
- 3.21. The Ordinance is no doubt of benefit to consumers. However, the law requires consumers to gather evidence to prove that the contract terms in dispute are unconscionable. Thus, since the law has come into force, very few cases on the Ordinance have been decided. The time and costs incurred in pursuing such a case by a consumer often inhibit him to rely on this law to seek relief and remedy.

### **Statutory prohibitions of unfair and deceptive trade practices**

- 3.22. For many jurisdictions, the overriding theme of creating statutory prohibitions to protect consumers in the marketplace is that “the restrictive doctrines of common laws fraud and warranty are to be foregone in favour of a more consumer-oriented approach”. These laws have the following characteristics -
  - (1). *not* to require an intent to deceive on the part of the seller;
  - (2). *not* to require the consumer to prove justifiable reliance on the deceptive statement (although actual reliance may still be a prerequisite); and
  - (3). to alleviate the burden of proof on the consumer alleging deception through the omission of material fact. (Deception by omission or by half truth is prohibited).
- 3.23. With difficulties encountered by both the consumer and the law enforcement agencies, we believe that consumers need a statutory cause of action to protect their interests. Therefore there is a genuine need to create statutory prohibitions against the unfair and deceptive trade practices mentioned above. Consideration could be given to strengthening the existing legislation with a view to empowering the enforcement agencies to act more effectively and encouraging private suits to be brought. Details are discussed in the following Section of the Report.

3.24. We also believe that the best approach is to enact a piece of comprehensive *Trade Practices* legislation. We shall discuss this issue in the following Section with reference to the relevant laws in United States, United Kingdom and Australia.

## SECTION 4

# MORE EFFECTIVE REGULATION ON TRADE MALPRACTICE

### Bait & Switch, Failing to Supply, Harassment & Coercion

4.1. The consumer protection laws in Australia, UK and USA have made specific provisions to sanction against such unfair & deceptive conducts as “bait & switch”, “failing to supply after accepting payments” and “harassment & coercion” exercised by traders.

4.2. Section 56 of the *Australian Trade Practices Act 1974* prescribes a statutory prohibition against bait advertising. It is designed to prevent retailers enticing potential customers to their premises by displaying cheap goods or services which are non-existent or which are being offered in very small quantities or for very limited periods of time. It specifies that –

- (1). A corporation shall not ... advertise for supply at a specified price, goods or services if there are reasonable grounds... for believing that the corporation will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are reasonable....
- (2). A corporation that has... advertised goods or services for supply at a specified price shall offer such goods or services for supply at that price for a period that is and in quantities that are, reasonable....

4.3. To strengthen the provisions dealing with “bait advertising”, the Australian Act made two more provisions to sanction against those unfair and deceptive trade practices that are closely related to the conduct of “bait & switch”. Section 58 of the Act prohibits a trader from accepting payment for goods or services if he does not intend or is unable to supply those goods or services as ordered. Further, the use of physical force, undue harassment or coercion by a trader in connection with the supply of goods and services to a consumer is also specifically prohibited under Section 60. Details of the relevant provisions are as follows -

**Accepting payment without intention to supply**

A corporation shall not... accept payment or other consideration for goods or services where, at the time of the acceptance:

- (1). The corporation intends:
  - (a) not to supply the goods or services
  - (b) to supply goods or services materially different from the goods or services in respect of which the payment or other consideration is accepted; or
- (2). There are reasonable grounds ...for believing that the corporation will not be able to supply the goods or services within the period specified by the corporation or... within a reasonable time.

**Harassment and coercion**

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

- 4.4. The trade malpractice of bait & switch” is also prohibited under the US *Federal Trade Commission Act* which declares unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce as unlawful. In most states, the *Uniform Deceptive Trade Practices Acts* provide specifically that –

A person engages in a deceptive trade practice when he -

- (1). advertises goods or services with intent not to sell them as advertised;
- (2). advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (3). disparages the goods, services or business of another by false or misleading representation of fact.

- 4.5. The US Federal Trade Commission (FTC) has issued clear guides to sanction against ‘Bait Advertising’ and ‘Switch after Sale’. The guides point out –

No act or practice should be engaged in by an advertiser to discourage the purchase of the advertised merchandise as part of a bait scheme to sell other merchandise. Among acts or practices which will be considered in determining if an advertisement is a bona fide offer are:

- (1). the disparagement by acts or words of the advertised product or the disparagement of the guarantee, credit terms, availability of service, repairs or parts, or in any other respect, in connection with it;

- (2). the failure to have available at all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonably anticipated demands;
- (3). the refusal to take orders for the advertised merchandise to be delivered within a reasonable period of time;
- (4). the showing or demonstrating of a product which is defective, unusable or impractical for the purpose represented or implied in the advertisement;
- (5). use of a sales plan or method of compensation for salesman or penalizing salesmen, designed to prevent or discourage them from selling the advertised product.

4.6. In UK, the Director General of the Office of Fair Trading will take action to stop traders from persistently engaging in conducts that are unfair to consumers. They include –

- (1). Failing to return to consumers money to which they are legally entitled for goods which have not been supplied;
- (2). Inducing customers to pay money in advance or to enter into contracts for the provision of services by knowingly, recklessly, or negligently making false statements about the nature of the services it was intended to give;
- (3). Inducing customers to enter into contracts for the purchase of goods by making false statements about the description and availability of goods;

4.7. Such trade malpractices have been the subject of many consumer complaints in Hong Kong. The traders concerned have not only seriously harmed the interest of the local consumer but also severely damaged Hong Kong's reputation as a shopping paradise for tourists. There is an urgent need for the Government to take action by introducing new statutory sanctions against delinquent traders from using such sharp practices as bait & switch, accepting payment without intention to supply and the use of undue harassment & coercion of consumers.

4.8. We understand the Police has been taking action diligently against those delinquent retailers whose conducts harm the interests of consumers, particularly tourists. No doubt, the successful prosecutions resulting from undercover operations in some of the complaint cases have produced certain deterrent effects. However, such operations are rather manpower intensive because of the heavy burden of proof in criminal prosecution.

4.9. We believe that it is appropriate to create new statutory offences under the *Summary Offences Ordinance* (Cap.228) to deter bait & switch and the related conducts of the delinquent retailers. Reference can be made to the trade practices laws in other jurisdictions obliging the seller to have reasonable grounds for believing that he will be able to supply the goods or services as advertised. This is because such information is only privy to the trader and it is onerous to ask the consumer to come up with such proof. Moreover, the Government should also consider whether it is desirable to include a

presumption in favour of the consumer under the new offence created to catch bait & switch and related conducts. The creation of such criminal offences will facilitate the consumer's access to justice and enable the police to act more effectively in their operations.

- 4.10. Such trade malpractices as “bait & switch”, “accepting payment without intention to supply” and “harassment & coercion” are by their very nature dishonest acts. They damage not only the private interests of individuals but also deprave the trade ethics and fair competition of the economy. Moreover, overwhelmed social disapproval of these reprehensible behaviours warrants intervention of the public authority with the imposition of punishment. Taking into account the gravity of such malpractices and the need for expediting prosecution in deterring their prevalence, we are convinced that the creation of such a new summary offence against the malpractices is necessary.
- 4.11. In fact, the *Summary Offences Ordinance* (Cap.228) imposes restrictions on some trade practices that are regarded as undesirable. Section 6 prohibits “cries or noises for buying or selling” and Section 6A makes touting, causing annoyance in a public place unlawful. In addition, Section 6B prohibits profiteering on the sale of travel tickets in a public place. The enforcement of such new provisions (if enacted) by the Police would be similar to that of the existing *Money Changers Ordinance* (Cap.34).
- 4.12. The Australian Trade Practices Act 1974 (Section 51AB) also prohibits a corporation from engaging in conduct that is unconscionable in connection with the supply of goods or services to the consumer. In determining whether a corporation has engaged in any unconscionable conduct, the Court may, among other things, have regard to (1) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer, and (2) the amount for which the consumer could have acquired identical or equivalent goods or services from a person other than the corporation. The legislation is enforced by a public authority.
- 4.13. Our *Unconscionable Contracts Ordinance* (Cap.458) has similar provisions to protect consumer interests. However it does not have the effect, as in the Australian Act, of prohibiting the trader from engaging in unconscionable conducts against the consumer. Further, the Ordinance requires the consumer "claiming that a contract or part of a contract is unconscionable to prove that it is".
- 4.14. To enhance protection in consumer transactions, we are of the view that the *Unconscionable Contracts Ordinance* (Cap.458) should be amended to provide remedy for consumers against unconscionable conducts, including bait & switch and the related conducts of the trader. To achieve the purpose, it might be necessary to specify "bait & switch" and the related unfair trade practices in the list of "matters to be considered by the court" in determining whether a contract resulting from unfair trade practices is unconscionable in the circumstances. Further, for the purpose of enhancing the effectiveness of the Ordinance, we consider it necessary for the Government to designate a public agency or agencies to enforce the law.

## False & Misleading Representation

- 4.15. The trade practices legislation in other jurisdictions contains specific provisions prohibiting misleading representations likely to mislead in consumer transactions. A unique characteristic of this type of law is that where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
- 4.16. Section 53 of the Australian Trade Practices Act 1974 specifically prohibits a corporation from making false or misleading representations in connection with the supply or possible supply of goods or services. It also covers the supply of goods or services in connection with the promotion by any means. The instances covered by the Act include –

- (1). falsely represent that goods or services are of a particular standard, quality, value or grade;
- (2). represent that goods or services have approval, performance characteristics, accessories, uses or benefits they do not have;
- (3). make a false or misleading representation with respect to price of goods or services;
- (4). make a false or misleading representation concerning the need for any goods or services; or
- (5). make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

- 4.17. In the United States of America the Federal Trade Commission Act at the federal level together with the Uniform Deceptive Trade Practices Act at state levels sanction against traders making, among other things, representations that “goods or services are of a particular standard, quality or grade or that goods are a particular style or model, if they are of another”. The laws are being enforced by the Federal Trade Commission and District Attorneys respectively.
- 4.18. The Hong Kong *Trade Descriptions Ordinance* (Cap.362) provides that it is a criminal offence to apply a false or misleading trade description to any goods or to supply any goods (but not services) with false or misleading trade description. Under the Section 6(2) of the Ordinance, “an oral statement may amount to the use of a trade description”. The effect of this Section is that a trader can be convicted of the offence of application of a false trade description if he has told a potential customer something false or misleading in respect of any of the specified matters under the Ordinance.
- 4.19. The United Kingdom *Trade Descriptions Act 1968* has similar provisions covering both goods and services. An equivalent of the provision mentioned above was used to convict a seller of used cars who told a potential customer,



later a purchaser, that the engine of a car was a "good little engine" [Fletcher v Sledmore, (1973) RTR 371]. A summary of the case is as follows:

The customer asked the seller about a used car's engine. The seller replied that it was all right, a good little engine and he had driven it himself. Influenced by what the seller said, the customer bought the used car. The engine turned out to be defective. The seller was charged with applying, by means of "an oral statement", the false trade description of "a good little engine" to the used car he sold. The court found that the seller had applied a false trade description but dismissed the case because the court did not find that the application was in the course of business. On appeal by the prosecution, the case was remitted with a direction to convict the seller.

- 4.20. In Hong Kong, there seems to be no reported court case on any prosecution of the offence relating to an application of a false trade description by means of an oral statement. Moreover, it seems that the *Trade Descriptions Ordinance* (Cap.362) is seldom used to pursue false or misleading misrepresentation made in connection with the supply of goods in consumer transaction.
- 4.21. We believe that there is a need for the Government to conduct a review on the effectiveness of the *Trade Descriptions Ordinance* (Cap.362) in curbing false or misleading representations made by traders in the course of consumer transactions. The more urgent need is to extend the *Trade Descriptions Ordinance* (Cap.362) to cover services, accommodation and facilities.

### **Price Indication**

- 4.22. A competitive market depends upon consumers being able to obtain correct information on price and easily compare prices from different outlets. Price indication legislation can do much to assist fair competition. The availability of clear price information is important in facilitating choice and making the market more transparent for consumers.
- 4.23. Thus, most jurisdictions have specific legislation to regulate price indication relating to the supplies of goods and services to consumers. The legislation is usually enforced by a government agency in order to ensure its effectiveness. It is unrealistic to rely on an aggrieved consumer to seek redress through civil action against a trader providing misleading price indication as the legal cost and the time involved will usually discourage the consumer from doing so. Besides, a trader who encounters unfair competition has no cause of action against his competitor using misleading price indication.
- 4.24. The Consumer Protection Act 1987 of the United Kingdom makes it an offence to give consumers a misleading price indication about goods, services, accommodation or facilities. It applies in a TV or press advertisement, in a

catalogue or leaflet, on notices, price tickets or marking in stores, or in oral statements. An offence is also committed if an initially true indication later becomes misleading.

- 4.25. The UK Act gives the Secretary of State, after consulting the Director General of Fair Trading, power to approve codes of practice to give practical guidance to traders on price indication. In a court proceeding, the court can take into account whether or not one has followed the approved codes.
- 4.26. The UK Code of Practice for Traders on Price Indications is addressed to traders and sets out in great details what is good practice to follow in giving price indications in a wide range of different circumstances so as to avoid misleading price indications. The more interesting provisions are set out in the following tables -

#### **Price Comparison**

In any comparison with one's own previous price -

- (1). the previous price should be the last price at which the product was available to consumers in the previous six months;
- (2). the product should have been available to consumers at that price for at least 28 consecutive days in the previous six months; and
- (3). the previous price should have applied (as above) for that period at the same shop where the reduced price is now being offered

#### **Comparisons with Another Trader's Prices**

Only compare one's prices with another trader's price if -

- (1). one gives the name of other traders clearly and prominently with the price comparison; and
- (2). do not make statements like "if you can buy this product elsewhere for less, we will refund the difference" about one's "own brand" products which other traders do not stock.

#### **Indicating Two Different Prices**

It is an offence to indicate a price for goods or services which is lower than the one that actually applies, for example, showing one price in an advertisement, window display, shelf marking or on the item itself, and then charging a higher price at the point of sale or checkout.

#### **Limited Availability of Product**

Where the price one is quoting for products only applies to a limited number of, say, orders, sizes or colours, one should make this clear in one's price indication (e.g. "available in other colours or sizes at additional cost")

### **Price Indications after They Have Been Given**

- (1). Do not give price indications which one knows will only apply for a limited period, without making this fact clear in advertisement or price indication; and
- (2). If the advertisement does not say otherwise, the price indication should apply for a reasonable period (as a general guide, at least seven days or until the next issue of the newspaper or magazine in which the advertisement was published, whichever is longer)

- 4.27. Further, the Secretary of State may make orders, under the Prices Act 1974, to secure that prices are indicated on goods for sale by retail, or charges are indicated for services provided. In February 1998, the European Parliament and Council issued a directive (EU Directive 98/6/EC) to improve consumer information relating to the prices of products offered to consumers.
- 4.28. According to the EU Directive, for all products offered to consumers by traders, the selling price and the unit price shall be indicated in unambiguous, easily identifiable and clearly legible manner. The Price Marking Order 1999 was made under the Prices Act to implement the EU Directive by imposing a general obligation on traders to show a selling price and to indicate unit prices for all goods sold from bulk or pre-packed. The following are some provisions of the Price Marking Order which are considered relevant to Hong Kong situation:

### **Obligation to Indicate Selling Price and Unit Price**

- (1). The Order implements E.U. Directive 98/6/EC and imposes a general obligation on traders to show a selling price, and to indicate unit prices for all goods sold from bulk or prepackaged.
- (2). Where a trader indicates that any product is or may be for sale to a consumer, he shall indicate the selling price of that product in accordance with the provisions of the Order.
- (3). In respect of any product sold from bulk, a trader shall indicate the unit price of that product in accordance with the provisions of the Order. This requirement shall apply in relation to an advertisement for a product where the selling price of a product is indicated in the advertisement.

### **Manner of Indication of Selling Price and Unit Price**

- (1). The indication of selling price, unit price, commission, conversion rate shall be –
  - (a). Unambiguous, easily identifiable and clearly legible;
  - (b). Placed in proximity to the products to which it relates; and
  - (c). So placed as to be available to consumers without the need for them to seek assistance from the trader or someone else on his behalf in order to ascertain it.

- (2). The indication of any charges for postage, package or delivery of a product shall be unambiguous, easily identifiable and clearly legible.
- (3). In case of a pre-packaged solid food product presented in a liquid medium, the unit price shall refer to the net drained weight of the product.

- 4.29. We believe that Hong Kong is badly in need of similar legal provisions to improve the provision information on prices of goods and services to consumers. With specific statutory provisions prohibiting misleading price indications, malpractice of certain seafood and ginseng shops and other retail shops in the tourist districts could be curbed. Falling short of enacting a piece of price or trade practice legislation, we consider it appropriate for the Government to take immediate action to amend the *Trade Descriptions Ordinance* (Cap.362) to achieve the purpose
- 4.30. To achieve the purpose, it is necessary for the Government to extend the definition of “false trade description” under the *Trade Descriptions Ordinance* (Cap.362) to cover misleading indications to prices of goods, services, accommodation and facilities. This would provide a general legal basis to prohibit misleading price indication. To further strengthen the effectiveness of the law, it is also necessary for the Government to introduce provisions similar to that provided under the UK Consumer Protection Act 1987 and Price Marking Order 1999 in the *Trade Descriptions Ordinance* (Cap.362). The purpose is to prohibit misleading price indications in certain sectors of business.
- 4.31. Section 4(1) of the *Trade Descriptions Ordinance* (Cap.362), “the Chief Executive in Council may by order require any goods specified in the order shall be marked with or accompanied by any information...or instruction relating to the goods... and impose requirements for securing that the goods are so marked ...and the requirements may extend to the form and manner in which such information and instructions is to be given”. We therefore consider it convenient for the Government to invoke the power under Section 4(1) of the Ordinance to make Price Marking Orders for trades that require accurate and clear price indications.
- 4.32. The Government may, at a later stage, decide whether it would require any trade to prescribe in its code of practice provisions on price indications to order to promote desirable trade practice suitable for Hong Kong. In any case, we believe the introduction of a general Code of Practice for Traders on Price Indications is beneficial to both the consumer and the business sector.

### **Comprehensive Trade Practices Legislation**

- 4.33. Hong Kong consumers are protected by various statutes enacted to address specific issues of concern that have arisen over time. Such a piecemeal approach in protecting consumers and in particular, in dealing with misleading advertising and deceptive & unfair business conduct is no longer sufficient. Many other

jurisdictions have adopted a more proficient approach of enacting a single piece of comprehensive trade practices legislation

- 4.34. In the USA, part of the Federal Trade Commission Act declares that unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are unlawful. Unfair practices mean those practices that cause or are likely to cause “substantial injury to consumers which (are) not reasonably avoidable by consumers themselves and not out weighed by countervailing benefits to consumers or to competition.” The law also prohibits certain specified ‘unfair’ and ‘deceptive’ practices.
- 4.35. Any person who acts in breach of the relevant provisions is subject to a cease and desist order issued by the Federal Trade Commission. Such person may seek review of the order in court. If the order has become final, any violation of the order shall attract a civil penalty imposed by the court. Besides, the commission may commence a civil action to recover a civil penalty against any person who has knowingly violated any rule under the Act in respect of unfair or deceptive acts or practices.
- 4.36. In Australia, the Trade Practices Act 1974 deals with consumer protection, competition and fair trade. Part of the Act contains, first, general prohibitions against misleading or deceptive conduct in trade or commerce and secondly, a long list of more specific prohibited practices. There are broad powers of enforcement in relation to trade practices under the Act.
- 4.37. Breach of the trade malpractice prohibition may lead to criminal prosecution for fines up to \$200,000, and failure to pay fines is punishable by imprisonment. The intent of the defendant in these cases is not relevant. All that is relevant is whether the conduct was misleading or deceptive or likely to mislead or deceive.
- 4.38. The enforcement agency may accept written undertaking from traders to remedy any contravention. If any term of the undertaking is breached, the enforcement agency can enforce it in court and apply for order of compliance or compensation.
- 4.39. Under the UK Fair Trading Act 1973, the Director General of Fair Trading has the power to intervene if a trader has persisted in conducting business in a way detrimental to consumer interests (whether economic, health, safety or other interests) and unfair to consumers. To be regarded as “unfair to consumers”, the trade practice must consist of a contravention of the criminal law (e.g. the Trade Descriptions Act) or a breach of a duty enforceable by civil proceedings (e.g. the Sale of Goods Act).
- 4.40. In dealing with unfair trade practice, the Director General of Fair Trading will seek written assurance from the delinquent trader that he will refrain from continuing that course of conduct. If the trader refuses to give such assurance as requested or fails to observe the assurance after giving it, the Director General can bring proceedings against the trader for a court order directing the trader to refrain from the practice.

- 4.41. In enacting these statutory laws, the legislatures in most jurisdictions believed that consumer needed a statutory cause of action for marketplace deception and unfairness. They also believed that it was necessary to make necessary provisions in the statutory laws with a view to enabling the enforcement authorities to pursue such cause of action more easily in the judicial system.
- 4.42. The advantages of dealing with all misleading advertising and deceptive and unfair conducts of the delinquent trader under a single piece of comprehensive consumer protection legislation are obvious. Reasons being -
- (1). That it ensures coherency, consistency and ease of access;
  - (2). That the regulatory mechanism on sharp trade practices becomes more transparent as the standards are being spelled out in law;
  - (3). That the regulatory function over sharp trade practices, including misleading advertising, can be more efficient and cost effective as they will be dealt with under one roof;
  - (4). That the provisions of the law serve the purpose of providing comprehensive guidelines for people in the trade;
  - (5). That the enforcement body can make regulations or guidelines to deal with sharp practices in specific trades or under certain market situations. e.g. price tagging, mail order advertising, 'sales' advertisements, 'switch' selling, etc., and
  - (6). That the law provides legal backup for the self-regulatory Codes of Conduct of the business sector.
- 4.43. We believe that the Government should reform the current consumer protection laws with the view to curbing deceptive, misleading and unfair conducts that are prevalent in the Hong Kong marketplace. At the same time, we believe that the Government should, as a long-term goal, consider the feasibility of incorporating all the relevant laws into one single piece of trade practices legislation and adding new provisions where necessary.

## SECTION 5

### ENFORCEMENT AND REMEDIES

#### General

- 5.1. The effectiveness of consumer protection law depends very much on the ways and means of enforcement as well as the availability of remedies. The experience from other jurisdictions can shed some light.
- 5.2. The consumer protection provisions contained in the laws against trade malpractice mentioned in Section 4 above are all being enforced by designated public administrative agencies. In USA, many state unfair or deceptive trade practices acts also provide *private right of action*, allowing the aggrieved consumer to bring individual private suits against the delinquent trader.
- 5.3. The public administrative agencies have the power to investigate a suspected violation of the prohibitions specified in the laws before proceeding with formal legal action. A unique characteristic of these unfair or deceptive laws is that they all provide a variety of enforcement measures and legal remedies, including -
  - (1). criminal penalties;
  - (2). civil penalties;
  - (3). cease and desist order;
  - (4). declaration, Injunctions, etc.;
  - (5). industry-wide rulemaking;
  - (6). corporate undertaking;
  - (7). corporate compliance programme;
  - (8). affirmative disclosure & corrective advertising;
  - (9). public statement to warn the public against the malpractice;
  - (10). consumer redress.

We shall examine some of these measures in details in the following paragraphs.

#### Pecuniary Penalty

- 5.4. Civil pecuniary penalty is commonly accepted as a method of ensuring compliance with injunctions, consent decree or regulations. Pecuniary penalty, unlike restitution, does not go directly to consumers but instead go into the government treasury. However, as generally recognized, one advantage of pecuniary penalty is that the amount can be adjusted to serve the goals of deterrence while depriving the defendant of the profits of the unlawful activity.
- 5.5. Civil and criminal penalties are the big guns of consumer protection enforcement in the United States. The imposition of substantial monetary fines in the form of civil penalty is one of the Federal Trade Commission 's (FTC) more formidable

enforcement tools. Most state statutes specify a maximum civil pecuniary penalty for each violation of either an order or the statute itself. Criminal penalty is generally reserved for the most outrageous frauds or as an effective approach against companies or individuals who repeatedly violate the law but have little or no assets for restitution.

- 5.6. The FTC has been very successful in obtaining civil pecuniary penalties in settlement of cases alleging violations of rules or orders. It frequently settles with order violators, and the total amount of civil penalties is negotiated by the parties. The courts for the most part have been quite supportive of the FTC in its efforts to obtain civil penalties under each of the various provisions.
- 5.7. Similarly, the Australian *Trade Practices Act* provides the imposition of pecuniary penalties for the violation of each and every specified prohibited practice. The Act contains no specific provision providing for imprisonment of offenders other than for non-payment of fines. The term of imprisonment to be imposed is an encouragement to pay the fine imposed and not as a punishment for the primary offence.
- 5.8. In Australia, courts hold a general view that the pecuniary penalty should constitute a real punishment proportionate to the deliberation with which the defendant contravenes the provisions of the Act. They consider that the pecuniary penalty should be sufficiently high to have a deterrent quality, and it should be kept in mind that the Act operates in a commercial environment where those minded to contravene provisions are not likely to be deterred from sharp practices by penalties which are not realistic. Thus the determination of an appropriate penalty involves considering the objective circumstances surrounding the contravention and then having regard to the subjective factors of each defendant.

### **Injunction, Cease & Desist Order**

- 5.9. When criminal convictions are obtained or favourable civil judgements given, some businesses are observed to continue their objectionable behaviour because it is more profitable simply to pay the fine or the damages awarded than to change their modes of behaviour. Moreover, with respect to breaches of the private contracts, it is recognised that consumers fail to institute legal proceedings even when they have a good case.
- 5.10. Some jurisdictions have found it is necessary to obtain orders against businesses in order to prevent them engaging in conduct detrimental to consumers. They may include cease and desist order, declaration, or injunction. The purpose is to restrain breaches of misleading or deceptive conducts.
- 5.11. Cease & desist orders constitute a staple ingredient of the US FTC enforcement. The FTC can issue 'cease & desist' orders itself against businesses engaging in unfair and deceptive trade practices. The affected trader can seek review of the FTC order in courts. Often, a company will agree to a cease & desist order. The order if violated in future will have the same effect as a litigated one.



- 5.12. In either the negotiated or litigated context, a firm will not normally be subject to civil penalties until it has violated the strictures contained in the order issued against it. FTC's cease & desist orders become effective 60 days after being served on the defendant, unless stayed by a court. If the orders are not obeyed, civil penalties can be imposed.
- 5.13. In Australia, upon the application of the Australian Competition and Consumer Commission (ACCC), the Court, if satisfied that a person has engaged in misleading and deceptive conducts, may grant an injunction in such terms as the Court determines to be appropriate. The purpose is to use injunctions to restrain breaches of "misleading or deceptive conduct". The Act also empowers the Court to grant an injunction to restrain conduct that is likely to continue.
- 5.14. The Court may also grant an injunction by consent of all the parties to the proceedings. A substantial number of trade practices cases are resolved at the interlocutory injunction stage. In granting interlocutory injunctions, the Court must be satisfied that there is a serious question to be tried. The Court must also consider the balance of convenience.
- 5.15. Under Part III of the UK Fair Trading Act 1973, the Director of Fair Trading is empowered to obtain court orders to restrain businesses from engaging in a persistent course of conduct detrimental to consumers and in breach of criminal or civil law. An order of the court shall indicate the nature of the course of conduct relating to the findings of the court and shall direct the respondent to -
- (1). refrain from continuing the course of conduct,
  - (2). refrain from carrying on any similar course of conduct in the course of his business, and
  - (3). take particular steps which, in the opinion of the Court, would suffice to prevent a continuance of the course of conduct to which the complaint relates.
- 5.16. Most Part III action stemming from breach of civil law as a breach of criminal law can be dealt with more promptly through ordinary prosecution. Action can be taken against a business if complaints from consumers could establish that it was in breach of contract, even though no civil judgements to this effect have been obtained against it.

### **Voluntary Assurance or Undertaking of Compliance**

- 5.17. In dealing with unfair and deceptive trade practices, the enforcement agencies generally have the option of accepting voluntary assurance or undertaking of compliance from businesses as out of court resolutions. Such measure is favoured by both the enforcement agencies as well as the business sector.
- 5.18. On the one hand, it provides a means of achieving the goal of protecting consumers from unfair and deceptive practices without depleting the public treasury to the extent that would be required by litigating every case to the final order stage. On the other hand, businesses also benefit by being able to settle a

case against them without formally admitting that the law has been violated, and without the adverse publicity, time and expense involved in going to trial.

- 5.19. The value of a voluntary assurance or undertaking of compliance as a means of deterring future violations depends not only on the legal sanctions available to the enforcement authority in case of breach of the assurance or undertaking but also on the vigilance of monitoring compliance. Some courts treat a violation of the assurance or undertaking as a prima facie evidence that the statute has been violated.
- 5.20. In the US, the FTC generally seeks voluntary compliance by businesses pursuant to the laws it administers. In order to encourage businesses to comply, the FTC issues specific guidelines or rules about particular practices. The FTC also issues advisory opinions to businesses in response to their inquiries about the legality of various practices.
- 5.21. The bulk of the work of most state Attorneys General in enforcing the consumer protection law will result in out-of-court settlements obtained by voluntary assurances of compliance.
- 5.22. In Australia, it has become standard practice for the ACCC to insist, as part of any consent orders, that the respondent implements a trade practices compliance programme. The compliance of the programme will be monitored by the ACCC. The ACCC may accept a written undertaking given by a person concerning his future conduct in connection with a matter regarding which the ACCC has a power or function.
- 5.23. The Court has power to accept undertaking that a compliance programme will be instituted. The Court will look at the compliance programme in two respects. First the court will ask whether there is a substantial compliance programme in place. Secondly the court will ask whether the implementation of the compliance programme would succeed.
- 5.24. A properly designed and managed compliance programme will have an impact on penalty. The Federal Court has extensive powers to enforce such undertakings. ACCC keeps a public register of such undertakings.
- 5.25. The United Kingdom Fair Trading Act obliges the Director General of Fair Trading to use his 'best endeavours' to seek written assurances from traders who persist in an unfair course of business conducts that they will observe their legal obligations. Where the Director General is unable to obtain a voluntary assurance from the trader, or where the trader has given an assurance but has failed to observe, the Director General can take the trader to court for an order. Where such an order is breached, the Director can take the trader to court to be committed for contempt.
- 5.26. In practice, what the Director General does is to require the business to justify its conduct under complaint or investigation. In some cases, the Director General of Fair Trading and the local authority trading standards departments are empowered to issue 'cautions' to businesses requiring them to stop an

objectionable course of conduct, to replace the need first to seek assurance. If the 'caution' is ignored, the trader could be taken to court.

- 5.27. To prevent the possibility that sole traders will evade the legislation by engaging in a different sphere of commercial activity, company directors can be required to give life-long assurances, irrespective of their business. Directors, managers, etc, who can be shown to have consented to or connived at the detrimental course of conduct of a company might be required to give a threefold assurance that they will refrain from carrying on any similar conduct in the course of any business.
- 5.28. The Office of Fair Trading relies importantly on the work of trading standards departments to obtain information relevant to the exercise of its power. A central registry of convictions is maintained which has enabled the Office of Fair Trading to identify a number of businesses for possible action.

### **Consumer Redress**

- 5.29. For any consumer protection law, the ability of the enforcement authority to obtain monetary redress for individual consumers who have been victimized by unfair or deceptive trade practices is a very powerful remedy. The possibility of a consumer redress order is a stronger deterrent than the simple cease and desist order or injunction against future violations discussed above, because it results in a direct monetary loss to the defendant, and not simply a warning.
- 5.30. The action for redress taken by the enforcement authority is well justified in that consumers may be unwilling or unable to pursue litigation when they have only a small amount at stake and the legal cost could consume much of the relief awarded. Businesses may also fear that some consumers in private cases will pursue questionable claims in the hope of achieving a favourable settlement that would include enormous legal fees. There is less reason to fear such abuses when the public enforcement agency, which is legally bound to act in the public interest, is representing consumers.
- 5.31. In the US, many state consumer protection statutes expressly provide that the state enforcement authority may seek restitution for consumer victims of unfair or deceptive trade practices. In states where the statute does not expressly provide for an action for restitution by the state attorney general, courts have nonetheless be receptive to requests by state officials that they be able to obtain such relief on behalf of consumers. In some states, the statutes expressly authorize the state Attorney General to collect damages on behalf of consumers.
- 5.32. The FTC has sometimes incorporated in its cease and desist orders restitution to compensate those injured by an offender. The administrative aspect of a redress order, such as determining the amount and type of restitution, are issues generally left to the court's discretion.
- 5.33. In Australia, the ACCC is empowered to make an application for a court order on behalf of one or more persons identified in the application who have suffered, or are likely to suffer loss or damages by the unfair and deceptive conducts

engaged by traders. The application may be made notwithstanding that a proceeding has not been instituted under the Trade Practices Act 1974.

5.34. The Court may make such orders as it thinks appropriate against traders engaging in unfair and deceptive conducts. The orders that may be made include an order –

- (1). declaring a contract void;
- (2). varying a contract;
- (3). directing the delinquent trader to refund money, to return property and or to pay damages;
- (4). directing the delinquent trader, at his own expense, to repair, or provide parts for, the goods that had been supplied; and
- (5). directing the delinquent trader to supply, at his own expense, specified services to the consumer.

# SECTION 6

## RECOMMENDATIONS

### Immediate Measures

6.1. We recommend that the Government should take immediate action to strengthen the provisions contained in:

- (1). *the Trade Descriptions Ordinance (Cap.362)*,
- (2). *the Summary Offences Ordinance (Cap.228)*, and
- (3). *the Unconscionable Contracts Ordinance (Cap.458)*

for the purpose of introducing sanctions against deceptive, misleading and unfair trade practices. Details are as follows:

#### **Extending the scope of the *Trade Descriptions Ordinance (Cap. 362)***

- 6.1.1. We recommend that the scope of the Ordinance should be extended to cover false or misleading trade descriptions of services, accommodation and facilities (such as those related to resort houses on rental and not the usual transactions of property in the market).
- 6.1.2. We recommend that the definition of "false trade description" under the Ordinance should be extended to cover misleading indications as to the price of goods, services, accommodation and facilities.
- 6.1.3. We also recommend that the amended Ordinance should enable the enforcement authority to prescribe codes of practice on price indication in order to give guidance on the compliance of the statutory provisions.
- 6.1.4. We recommend that the Government should conduct a review on the effectiveness of the Ordinance in curbing false and misleading representations made in the course of a consumer transaction. Particular attention should be given to the enforcement of the offence of application of false trade descriptions by means of oral statement and possible legislative improvement for better consumer protection in such cases.

#### **Creating Summary Offences Against Specific Trade Malpractice**

- 6.1.5. We recommend the introduction of new criminal sanctions, under *the Summary Offences Ordinance (Cap.228)*, against traders for –
  - (1) enticing customers by bait & switch tactics,
  - (2) accepting payment for goods or services which they do not intend to or are not able to supply, and
  - (3) using "physical force" or "undue harassment or coercion" against a consumer relating to the supply of or payment for goods or services.

- 6.1.6. We also recommend that the law should oblige the seller to have reasonable grounds for believing that he will be able to supply the goods or services in such manner as advertised. In this connection, we also recommend the Government to consider the desirability of introducing a presumption in favour of consumers.
- 6.1.7. We recommend that the Court, in addition to imposing criminal penalties under the above mentioned provisions in the *Summary Offences Ordinance* (Cap.228), would be specifically empowered to make orders e.g. compensation order, restitution order, repair order etc. to provide for consumer redress.

#### **Specifying unconscionable trade practices**

- 6.1.8. We recommend that the *Unconscionable Contracts Ordinance* (Cap.458) should include -
- (1). "bait & switch"<sup>2</sup> sales technique, and
  - (2). misleading representation or representation likely to mislead in respect to the price of goods or services
- in the list of matters that the court may take into consideration in determining whether a contract is unconscionable in the circumstances.
- 6.1.9. We also recommend that, in addition to the private right of action of the injured consumer, designated public agencies should be empowered to commence civil action on behalf of the injured consumer against the trader under the Ordinance.

#### **Long Term Measure**

- 6.2. We recommend that the Government should consolidate the various consumer protection laws with necessary amendments and new provisions into a piece of comprehensive trade practice legislation. The new legislation should contain the following characteristics:
- (1). prohibition against traders from engaging in, *inter alia*, deceptive, misleading, unfair and oppressive conducts in the course of consumer transaction should be provided.
  - (2). breaches of the prohibited trade practices should incur strict liability and lead to both criminal and civil penalties. The penalties may include pecuniary fines in order to deprive the delinquent trader of the profits of the unlawful activity. The penalties should also include imprisonment for persistent offenders.
  - (3). the law should provide a fair and adequate consumer redress mechanism for the injured consumers, and this may, for example,

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<sup>2</sup> See page 3

take the form of monetary compensation, repair order or restitution order.

- (4). the proposed legislation should be enforced by a public agency.
  - (5). The enforcement agency should be empowered, *inter alia*, to institute court proceedings against offenders by seeking court orders for declarations, injunctions, specific performance, damages, etc.
  - (6). The enforcement agency should be empowered to accept voluntary assurance or undertaking of compliance from traders who have engaged in unfair and deceptive practices and to enforce the undertaking if breached.
  - (7). It should also be empowered to order publication of correction notices or institution of corporate compliance programmes.
  - (8). The enforcement agency should be empowered to prescribe codes of practices for the conduct of business in specific business sectors.
- 6.3. Advantages of enacting a single piece of trade practices legislation are elaborated in para. 4.42 of the report.

CONSUMER COUNCIL

REGULATING DECEPTIVE  
MISLEADING & UNFAIR PRACTICES  
IN CONSUMER TRANSACTIONS

**MAY 2001**



## **The Issue**

1. In consumer transactions, deceptive, misleading and unfair practices of some traders have tainted Hong Kong's image. Such malpractices are against consumer interests and may coerce competitors adopting similar tactics in order to remain in business, thus giving rise to demands for more effective measures to curb such malpractices.
2. In August 1999, the Consumer Council issued a Consultation Paper, namely *the Ways to Improve the Regulation of Advertising*. In the course of the consultation, it transpired that the Council needed to examine the adequacy of legal sanction against deceptive, misleading and unfair practices in consumer transaction in greater details.
3. This report examines the ways and means to regulate deceptive, misleading and unfair practices in consumer transactions. The issue of misleading advertising will be covered in a separate report.

## **Nature of Deceptive, Misleading & Unfair Practices**

4. For the purpose of identifying the prevalence of deceptive, misleading and unfair practices by businesses in Hong Kong, we have analysed 4,547 complaints cases received by the Consumer Council in the last quarter of 2000 as against the total of 18,932 cases in the year. From the analysis, we found that a substantial number of the complaints had indicated sharp practices that would be *prima facie* actionable under the trade practices laws in Australia, U.K. and the USA, if they were enacted in Hong Kong. The major sharp practices are of the following nature:
  - Misleading indication as to price (21%)\*
  - False or misleading representation (16%)\*;
  - Accepting payment without intention to supply (8%)\*;
  - Bait & switch<sup>1</sup> (6%)\*; and
  - Undue harassment or coercion (1%)\*.

\* % of complaints cases of the last quarter of 2000
5. The complaints were mainly related to the following categories of products and services:
  - Electrical Appliances
  - Audio & Visual Goods
  - Medicines including Chinese Herbal Medicines
  - Beauty Parlour services
  - Modelling/Talent Hunt

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<sup>1</sup> As distinct from incentive or bonus schemes to promote sales. In Australia, bait-and-switch tactics are defined as "the trader advertises and/or promotes the sales of his goods or services when there is no reasonable ground to believe that he is able to offer goods or services at the advertised/promoted price for a reasonable period and at a reasonable

- Time Sharing holiday facilities
6. It is important to note that 70% of the complaints relate to supply of services. Those relate to sale of goods constitute 30% only.

### **Deficiencies of the Existing Consumer Protection Law**

7. In the past 26 years, since the establishment of the Consumer Council in 1974, there were significant developments in consumer protection law in the area of sales of goods and product safety. Development in the law curbing deceptive and unfair practices is still lagging behind.
8. The prevalence of deceptive and unfair sale practices has raised much public concern. Inadequacies of existing laws in providing safeguards against misleading price indication, sales misrepresentation, deceptive sale techniques are deeply rooted in the way such laws are being constructed.
9. First, most consumers injured by the unfair or deceptive trade practices of a seller will find it onerous having to plead and prove a common law action for fraud. Further, most criminal laws dealing with dishonest conducts, including sales abuses, require that the seller be shown to have an evil intent and that the consumer to prove justifiable or material reliance on the deceptive representation.

### **Deceptive and Unfair Conducts**

10. Deceptive and unfair trade practices have been the subject of many consumer complaints in Hong Kong. The sellers concerned have not only seriously harmed the interest of the local consumer but also severely damaged Hong Kong's reputation as a shopping paradise for tourists.
11. Consumers in Hong Kong generally have to rely on the statutory provisions of the *Theft Ordinance* (Cap.210) or that concern with conspiracy to defraud in the common law to protect their interests against deceptive & misleading conducts and unfair practices of businesses. Yet, these provisions cannot give adequate protection to consumers.
12. This is mainly due to the fact that there is a relatively heavy burden of proof of dishonesty or intent to defraud. In most cases, extensive investigations have to be carried out in order to gather evidence. Further, the Ordinance is hardly able to catch such conducts as high pressure coercive sales methods and failure to disclose material information in respect of goods or services.
13. Consumer protection laws in Australia, UK and USA have made specific provisions to prohibit and sanction against such unfair & deceptive conducts as "bait & switch", "failing to supply after accepting payments" and "harassment & coercion" exercised by traders. The more important element of these laws is that a seller is obliged to have reasonable grounds to believe that he will be able to supply the goods or services as advertised.

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quantity."

14. We understand the Hong Kong Police force has been taking action diligently against those delinquent retailers whose conducts harm the interests of consumers, particularly tourists. However, such operations are rather manpower intensive and will demand substantial resources if conducted on a frequent basis.
15. We believe that it is appropriate to create new statutory criminal offences under the *Summary Offences Ordinance* (Cap.228) to deter "bait & switch" tactics and the related conducts of the delinquent retailers. Reference can be made to the trade practices laws of other jurisdictions obliging the seller to have reasonable grounds for believing that he will be able to supply the goods or services as advertised. This is because such information is only privy to the trader and it is impossible to expect the consumer to come up with such proof. The creation of such criminal offences will facilitate the consumer's access to justice and enable the police to act more effectively in their operations.
16. The *Unconscionable Contracts Ordinance* (Cap.458) has provisions to protect consumer interests. The purpose of the Ordinance is "to empower courts to give relief in certain *contracts* found to be unconscionable". However, it does not have the effect, as in the Australian Act, of prohibiting the trader from engaging in unconscionable *conducts* against the consumer. Further, the Ordinance requires the consumer "claiming that a contract or part of a contract is unconscionable to prove that it is". The time and costs incurred in pursuing such a case by the consumer often inhibit him to rely on this law to seek relief and remedy.
17. To enhance protection in consumer transactions, we are of the view that the *Unconscionable Contracts Ordinance* (Cap.458) should be amended to provide sanctions against unconscionable conducts, including bait & switch and the related conducts of a seller. Further, for the purpose of enhancing the effectiveness of the Ordinance, we consider it necessary for the Government to designate a public agency or agencies to take action.

**False & Misleading Representation**

18. To rely on civil action in misrepresentation to deal with false or misleading sales information of the trader is unsatisfactory. Such action requires proof of, among other things, a justifiable or material reliance by the aggrieved consumer on the misrepresentation to enter into the purchase. In many instances, it may not be easily held that the consumer has materially relied on the representation of the seller.
19. The *Trade Descriptions Ordinance* (Cap. 362) protects the consumer against the supply of goods with false or misleading "trade descriptions". The major deficiency of the Ordinance is that it applies to goods but NOT to services, accommodation and facilities. As Hong Kong is moving towards a service economy, expanding the scope of coverage of this Ordinance is necessary.

20. Under the Section 6(2) of the Ordinance, “an oral statement may amount to the use of a trade description”. The effect of this Section is that a trader can be convicted of the offence of application of a false trade description if he has told a potential customer something false or misleading in respect of any of the specified matters under the Ordinance. However, it seems that the *Trade Descriptions Ordinance* (Cap.362) is seldom used to pursue false or misleading misrepresentation made in connection with the supply of goods in consumer transaction.
21. The trade practices legislation in other jurisdictions contains specific provisions prohibiting misleading representations and representations likely to mislead in trade in connection with the supply of goods or services. A unique characteristic of this type of law is that where a seller makes a representation with respect to any future matter and the seller does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
22. We believe that there is a need for the Government to conduct a review on the effectiveness of the *Trade Descriptions Ordinance* (Cap.362) in curbing false or misleading representations made by traders in the course of consumer transactions. The more urgent need is to extend the *Trade Descriptions Ordinance* (Cap.362) to cover services, accommodation and facilities.

#### **Misleading Indication as to Price**

23. A competitive market depends upon consumers being able to obtain accurate information on price and easily compare prices from different outlets. Price indication legislation can do much to assist fair competition. The availability of clear price information is important in facilitating choice and making the market more transparent for consumers.
24. Thus, most jurisdictions have specific legislation to regulate price indication relating to the supplies of goods and services to consumers. The legislation is usually enforced by a public authority in order to ensure its effectiveness, as it is unrealistic to rely on an aggrieved consumer to seek redress through civil action against a trader who has provided misleading price indication on the goods and services offered.
25. The best example is found in the *Consumer Protection Act 1987* of the United Kingdom. The Act makes it an offence to give consumers a misleading price indication about goods, services, accommodation or facilities. The Act gives the authority power to approve codes of practice to give practical guidance to traders on price indication. In a court proceeding, the court can take into account whether or not one has followed the approved codes.
26. The UK *Code of Practice for Traders on Price Indications* is addressed to traders and sets out in great details what is good practice to follow in giving price indications in a wide range of different circumstances so as to avoid misleading price indications.

27. In Hong Kong, we can only find very little provisions dealing with prices or price indication under the existing law. The *Trade Descriptions Ordinance* (Cap.362) prohibits false or misleading trade descriptions such as indications regarding quantity, method of manufacture, physical characteristics, place of manufacture, etc. It does not apply to misleading price indication.
28. We believe that Hong Kong is badly in need of statutory laws to improve the provision information on prices of goods and services to consumers. With specific statutory provisions prohibiting misleading price indications, malpractice of certain seafood and ginseng shops and other retail shops in the tourist districts could be curbed effectively.
29. To achieve the purpose, it is necessary for the Government to extend the definition of "false trade description" under the *Trade Descriptions Ordinance* (Cap.362). to cover misleading indications to the price of goods, services, accommodation and facilities. Further, it may be necessary for the Government to invoke the power under this Ordinance to make Price Marking Orders for designated trades which should carry accurate price indications.

### **Comprehensive Trade Practices Legislation**

30. Consumers in Hong Kong are protected by various statutes which address specific issues of concern that have arisen over time. Such a piecemeal approach in protecting consumers and in particular, in dealing with misleading advertising and deceptive & unfair business conduct is no longer sufficient for to-day's market. Many other jurisdictions have adopted a more proficient approach of enacting a single piece of comprehensive trade practices legislation .
31. In the USA, the *Federal Trade Commission Act 1970* declares that unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are unlawful. The law also prohibits certain specified 'unfair' and 'deceptive' practices.
32. In Australia, the *Trade Practices Act 1974* contains, first, general prohibitions against misleading or deceptive conduct in trade or commerce and secondly, a long list of more specific prohibited practice. Under the UK *Fair Trading Act 1973*, the Director General of Fair Trading has the power to intervene if a trader has *persisted* in conducting business in a way detrimental to consumer interests (whether economic, health, safety or other interests) and unfair to consumers.
33. In enacting these statutory laws, the legislatures in all these jurisdictions believed that consumers need a statutory cause of action for marketplace deception and unfairness. They also believed that it was necessary to make relevant provisions in the statutory laws with a view to enabling the enforcement authorities to pursue such cause of action more easily in the judicial system.

34. There are obvious advantages of dealing with all misleading advertising and deceptive and unfair conducts of the delinquent trader under a single piece of comprehensive trade practices legislation. The regulatory function over sharp trade practices, including misleading advertising, can be more efficient and cost effective as they will be dealt with under one roof. Further, the provisions of the law serve the purpose of providing comprehensive guidelines for people in the trade.
35. We believe that the Government should reform the current consumer protection laws with the view of curbing deceptive, misleading and unfair conducts that are prevalent in the Hong Kong marketplace. At the same time, we believe that the government should, as a long term goal, consider the feasibility of incorporating all relevant laws into one single piece of trade practices legislation and adding new provisions where necessary.

### **Enforcement and Remedies**

36. The consumer protection provisions contained in the laws against trade malpractice in other jurisdictions are all enforced by designated public administrative agencies. Those agencies have the power to investigate a suspected violation of the prohibitions specified in the laws before proceeding with formal legal action.
37. A unique characteristic of these unfair or deceptive laws is that they all provide a variety of enforcement measures and legal remedies, including criminal & civil penalties, cease and desist order, declaration, injunctions; corporate undertaking & compliance programme; advertising and public statement to warn the public against the malpractice.
38. Most statutes have specified a maximum civil pecuniary penalty for each violation of either an order or the statute itself. Criminal penalty is generally reserved for the most outrageous frauds or as an effective approach against companies or individuals who repeatedly violate the law but have little or no assets for restitution.
39. Some jurisdictions found it necessary for court orders to be obtained to prevent businesses from engaging in conduct detrimental to consumers. These may include cease & desist order, declaration or injunction. The purpose is to restrain breaches of "misleading or deceptive conduct".
40. In dealing with unfair and deceptive trade practices, the enforcement agencies generally have the option of accepting voluntary assurance or undertaking of compliance from businesses as out of court resolutions. Such measure is favoured by both the enforcement agencies as well as the business sector.
41. The Court has power to accept undertaking that a compliance programme will be instituted. Where such undertaking has been breached, the enforcement authority can take the trader to court to be committed for contempt.

## **Consumer Redress**

42. For any consumer protection law, the ability of the enforcement authority to obtain monetary redress for individual consumers who have been victimized by unfair or deceptive trade practices is a very powerful remedy. The possibility of a consumer redress order is a stronger deterrent than the simple cease and desist order or injunction against future violations, because it results in direct monetary loss to the defendant rather than simply a warning.
43. In the US, many state consumer protection statutes expressly provide that the state enforcement authority may seek restitution for consumer victims of unfair or deceptive trade practices. The authority can sometimes incorporate into its cease and desist orders, restitution to compensate those injured by an offender.
44. In Australia, ACCC is empowered to make an application court order on behalf of one or more persons identified in the application who have suffered, or are likely to suffer loss or damages by the unfair and deceptive conducts engaged by traders. The Court may make such orders as it think appropriate against traders engaging in unfair and deceptive conducts.

## **Recommendations**

### **Immediate Measures**

45. We recommend that the Government should take immediate action to strengthen the provisions contained in:
  - (1). *the Trade Descriptions Ordinance* (Cap.362),
  - (2). *the Summary Offences Ordinance* (Cap.228), and
  - (3). *the Unconscionable Contracts Ordinance* (Cap.458)

for the purpose of imposing sanctions against deceptive, misleading and unfair trade practices. Details are as follows:

46. EXTENDING THE SCOPE OF THE *TRADE DESCRIPTIONS ORDINANCE* (CAP. 362)
  - (1). We recommend that the scope of the Ordinance should be extended to cover false or misleading trade descriptions of services, accommodation and facilities (such as those related to resort houses on rental and not the usual transactions of property in the market).
  - (2). We recommend that the definition of "false trade description" under the Ordinance should be extended to cover misleading indications as to the price of goods, services, accommodation and facilities.
  - (3). We also recommend that the amended Ordinance should enable the enforcement authority to prescribe codes of practice on price indication in order to give guidance on the compliance of the statutory provisions.
  - (4). We recommend that the Government should conduct a review on the effectiveness of the Ordinance in curbing false and misleading representations made in the course of a consumer transaction. Particular

attention should be given to examine the enforcement of the offence of application of false trade descriptions by means of oral statement and possible legislative improvement for better consumer protection in such cases.

47. CREATING SUMMARY OFFENCES AGAINST SPECIFIC TRADE MALPRACTICE

- (1). We recommend the introduction of new criminal sanctions, under *the Summary Offences Ordinance* (Cap.228), against traders for –
  - (a) enticing customers by bait & switch tactics,
  - (b) accepting payment for goods or services which they do not intend to or are not able to supply, and
  - (c) using "physical force" or "undue harassment or coercion" against a consumer relating to the supply of or payment for goods or services.
- (2). We also recommend that the law should oblige the seller to have reasonable grounds for believing that he will be able to supply the goods or services in the manner as advertised. In this connection, we also recommend the Government to consider the desirability of introducing a presumption in favour of consumers.
- (3). We also recommend that the Court, in addition to imposing criminal penalties under the above mentioned provisions in the *Summary Offences Ordinance* (Cap.228), would be specifically empowered to make orders e.g. compensation order, restitution order, repair order etc. to provide for consumer redress.

48. SPECIFYING UNCONSCIONABLE TRADE PRACTICES

- (1). We recommend that the *Unconscionable Contracts Ordinance* (Cap.458) should include -
  - (a) "Bait & switch"<sup>2</sup> sales technique, and
  - (b) misleading representation or representation likely to mislead in respect to the price of goods or servicesin the list of matters that the court may take into consideration in determining whether a contract is unconscionable in the circumstances.
- (2). We also recommend that, in addition to the private right of action of the injured consumer, designated public agencies should be empowered to commence civil action on behalf of the injured consumer against the unethical trader under the Ordinance.

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<sup>2</sup> See page 3.



### **Long Term Measure**

49. We recommend that the Government should enact a piece of comprehensive trade practice legislation incorporating relevant laws into it and adding new provisions where necessary:
- (1). Prohibition against traders from engaging in, *inter alia*, deceptive, misleading, unfair and oppressive conducts in the course of consumer transaction should be provided.
  - (2). Breaches of the prohibited trade practices should incur strict liability and lead to both criminal and civil penalties. The penalties may include pecuniary fines in order to deprive the delinquent trader of the profits of the unlawful activity. The penalties should also include of imprisonment for persistent offenders.
  - (3). The law should provide a fair and adequate consumer redress mechanism for the injured consumers, and this may, for example, take the form of monetary compensation, repair order or restitution order.
  - (4). The proposed legislation should be enforced by a public agency.
  - (5). The enforcement agency should be empowered, *inter alia*, to institute court proceedings against offenders by seeking court orders for declarations, injunctions, specific performance, damages, etc.
  - (6). The enforcement agency should be empowered to pursue voluntary assurance or undertaking of compliance from traders who have engaged in unfair and deceptive practices and to enforce the undertaking if breached.
  - (7). It should also be empowered to order publication of correction notices or institution of corporate compliance programmes.
  - (8). The enforcement agency should be empowered to prescribe codes of practices for the conduct of business in specific business sectors.
50. Advantages of enacting a single piece of trade practices legislation are elaborated in para. 34 of the report.

### **Consumer Council**

May 2001

# 消費者委員會研究報告

如何遏止消費交易上出現的  
欺騙、誤導及不公平手法？

## 問題所在

1. 某些經營者的欺騙性、誤導性及不公平的經營手法為香港帶來負面的影響，這些行為不但損害消費者的權益，經營者亦感到壓力，使他們要考慮是否也採用不當的經營手法。要改變這情況，需要推行一個有效措施，遏止該等不良手法。
2. 一九九九年八月，消費者委員會發表「如何改善對廣告之監管」的諮詢文件。在諮詢的過程本會發現有需要詳細研究消費交易上所出現的欺騙、誤導及不公平手法及制裁這類行為的方法。
3. 此報告書集中研究應付消費者的交易出現的欺騙、誤導及不公平手法及管制途徑。有關監察「誤導成分廣告」的報告，將另文交待。

## 消費投訴的種類

4. 為進一步了解欺騙、誤導及不公平手法在本港普遍程度，本會從二〇〇〇年全年 18,932 宗個案中，深入分析了第四季的 4,547 宗投訴個案，發現不少個案均顯示 各種不良手法，若能參照澳洲、香港及美國等地的營商手法法規，這些手法均明顯地違規。這些不良手法大致分為以下幾類：

- 價格誤導(21%)\* ；
- 失實或誤導陳述(16%)\* ；
- 收取顧客款項但沒有打算提供產品或服務(8%)\* ；
- 餌誘式手法<sup>1</sup> (6%)\* ；及
- 不適當地滋擾或威迫(1%)\*

\* 佔 2000 年全年投訴個案的百分比。

5. 投訴以涉及以下貨品及服務類別為最多：

- 電器產品
- 影音器材
- 藥物及中草藥
- 美容院
- 模特兒及星探
- 海外渡假屋

6. 值得注意的是 7 成的投訴涉及服務，其餘 3 成是產品。

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<sup>1</sup> 餌誘手法有別於市場推廣的優惠和獎賞計劃。在澳洲，餌誘手法的定義為經營者宣傳或推廣其貨品或服務時，並沒有合理理由相信他是有能力在合理時間內，以宣傳 / 推廣的價格提供該等達到合理質素的貨品或服務

## **現行保障消費者法例不足之處**

7. 消委會在一九七四年成立，廿六年來，保障消費者的法例在貨品銷售及產品安全方面，有明顯的進展。但對遏止誤導及不公平手法的法例仍有待改進。
8. 濫用誤導及不公平的銷售手法的問題，已引起了極大的公眾關注，但現行法例卻未能足夠地保障被誤導的消費者。
9. 首先，由於在普通法的原則下，消費者因經營者的不公平或欺騙手法而蒙受損失，要求賠償的話，他便需要提出足夠的理由及強有力的證據，這對一般消費者來說是一個沉重的負擔。其次，大部份處理不正當交易手法等欺詐行為的刑事條例，控方都需要在毫無疑點地證明賣方是立意欺騙；而消費者亦要證明他作出購買的決定，是基於賣方失實的陳述而作出的。

## **誤導及不公平行為**

10. 誤導及不公平營商手法一直是香港眾多消費者所投訴的問題，這類不良商人，不單止嚴重損害消費者的利益，更破壞了香港「購物天堂」的美譽。
11. 在保障香港消費者免受商戶的欺騙、誤導及不公平手法時，一般需引用盜竊罪條例 (第 210 章)或普通法上有關合謀欺詐條文，可是這些條文對消費者保障不足。
12. 主要原因是在引用這些條文時要有充份的理據，以證明對方不誠實或有欺詐企圖，而搜集這些理據往往需廣泛的偵查。再者，此條例難以對付高壓滋擾的銷售手法，或經營者沒有提供產品及服務的資料等行為。
13. 澳洲、英國及美國的消費者保障法例均有具體條文去阻止及懲治不公平及誤導性行為，例如收取顧客金錢但卻無意提供貨品或服務、餌誘及不適當地滋擾或強迫顧客。
14. 警方為保障消費者(尤其是遊客)的利益，對不良商戶採取行動，一向不遺餘力，但這些行動需大量人手及資源。
15. 我們認為應在「簡單程序治罪條例」(第 228 章)中加入新的條款，以阻嚇餌誘或其他不良銷售手法。其他國家的營商手法法例，當中有條文要求商戶在廣告及推廣時，必須有合理證明能夠提供所宣傳的貨品或服務。這是因為有某些資料只有經營者知道，難以由消費者提供證明。上述新條款，可令消費者更易依法索償，警方的執法工作亦會更有成效。
16. 不合情理合約條例 (第 458 章) 的保障消費者利益的條文，賦予法庭權力去解除不合情理合約的約束。然而，它有異於澳洲法例，不能阻止商戶對消費者做出一些不合情理的行為。此外，在面對不合情理合約訴訟時，香

港的條例要求消費者提出舉證，當中所需的時間與金錢往往令消費者卻步，最終放棄依靠這法例來索取賠償或尋求解決辦法。

17. 為加強消費者保障，本會認為政府應修改不合情理合約條例（第 458 章），對不合情理行為如餌誘等手法加以懲治。為加強條例的效力，政府應賦權力予某些公共機構為受影響人士循民事途徑向不法商人提出訴訟。

## **虛假及誤導陳述**

18. 倚靠民事訴訟對付不良商戶發放虛假及誤導銷售資料的做法效用不大，其原因是受害消費者需要向法院提供合理而實質理據，證明在購買過程中確切地曾被誤導而受到損失。可是，在實際環境中誤導消費者的手法層出不窮，消費者往往沒有能力可提供具體理據。
19. 商品說明條例（第 362 章）保障消費者免受虛假及誤導性產品說明所誤導。此條例的主要不足處在於只能應用於產品，不能應用於服務、樓房及設施。當香港經已轉型成為以服務為主的經濟體系時，實在有必要擴大此條例的覆蓋範圍。
20. 條例的第 6（2）條指出口頭陳述亦可當作商品說明一種，若商戶對消費者作出虛假或誤導的口頭陳述便屬違法。但我們發現很少消費者可以引用這條例來解決日常購物或接受服務時所遇到的問題。
21. 其他國家的營商手法法例均有特定條文禁止發放產品及服務的誤導性陳述，這些法例都有一個共同特點，若商戶沒有合理依據下作出某些陳述便屬誤導。
22. 我們相信政府需要檢討現有的商品說明條例，確保能遏止商店在消費交易上提供的虛假及誤導陳述。最重要的還是把其覆蓋範圍擴大至服務行業。房屋及設施。此外還需要檢討有何方法去有效地制裁口頭的誤導及虛假陳述。

## **誤導價格說明**

23. 消費者得到準確價格及易於比較格價，即可促進市場競爭。價格標示有助於公平競爭，清晰價格資料的提供有利於消費者的選擇及提高市場透明度。
24. 故此，很多國家有特定條例管制商人標示價格的方法及形式，並由公營機構執法，以收收效，依賴消費者循民事訴訟方式索償是相當艱辛和不切實際的。

25. 英國的「1987 消費保障法案」是一好例子，法案訂明向消費者提供產品、服務、樓房或設施的誤導價格乃屬違法，法案亦賦予權力給執行機構去審訂手則，為商戶價格標示指供實質的指引。
26. 手則可對商戶提供良好指引，使他們在不同情況下依從特定的價格標示方式，以防誤導。
27. 本港現行的法例中少有條文顧及價格標示，即使是商品說明條例都只禁止虛假及誤導「產品說明」，但對遏止誤導「價格標示」卻無能為力。
28. 我們相信本港極需訂定法例來改善商戶提供產品及服務價格的資料，這等法規能有效地減少商戶的不當經營手法。
29. 要達致這目的，政府需擴闊商品說明條例（第 362 章）內「虛假商品說明」的定義，以涵蓋產品、服務、樓房及設施（如渡假屋安排及設施，非指一般樓宇賣買）的誤導說明。再者，政府可以引此條例賦予的權力，規定一些行業標示價格的方式，以確保其準確性。

## 全面的營商手法法例

30. 隨著不同年代的需要，香港已訂定不同的法例，保障本地消費者，但這些獨立式法例，要應付誤導廣告及不公平營商手法，已不適切現今市場環境。因應這時代的需要，很多國家已採取單一而全面的營商手法法例。
31. 美國的聯邦貿易局法例 (Federal Trade Commission Act 1970) 聲明一切影響商界的不公平的競爭手法，及不公平或欺詐的營商手段均屬違法。
32. 澳洲的營商手法條例，(Trade Practices Act 1974)禁止所有商業誤導及欺詐的行為，同時亦具體地列明禁止採用的營商手法。英國的公平交易條例 (Fair Trading Act 1975) 更賦權公平貿易署長去干預一些對消費者不公平或有損害的商業行為，(包括對損害消費者經濟利益、健康、安全或其他方面)。
33. 在執行這些法例時，這些國家的立法機關均認同要遏止市場上的欺詐與不公平的行為，必須執法機構有法可依，及令法例可以有效率地把違法者繩諸於法。
34. 透過全面的法例，遏止不良商戶的誤導廣告及欺詐與不公平行為，有明顯好處，一方面能提高執行上的效率及成本效益，另一方面可作為商界人仕的全面指引。
35. 我們相信政府須改善現時消費者保障法例，以遏止香港市場上的不良經營手法；長遠來說，亦應考慮把各條獨立的法例，歸納成一套全面的營商手

法法例，必要時還須加入新的條款。

## **執法及賠償**

36. 在其他地方，遏止不良營商手法的法例，均由指定公共機構執行，法例並賦予這些機構廣泛的調查權。
37. 這些國家的法例，其獨特的地方是它們提供多類型的執行措施和賦予法庭各種權力去遏止不良營商手法及對受害消費者作出賠償。
38. 多數法例均列明對違例的最高金錢罰款及賠償，只有對屢犯不改者，才以刑事懲罰。
39. 有部份地方認為有需要讓法庭發出指令，如禁制令，歸還令等以有效制止不良的經營手法。
40. 在對付不良經營手法的過程中，執法機構可接受營商者自願作出的糾正保證，這種法庭外和解的方法，為營商者及執法者歡迎。
41. 法庭可接受經營者提供的履行承諾的方案。當承諾不能付諸實現時，該經營者可被控藐視法庭。

## **消費者申訴索償**

42. 任何保障消費者權益的法例，如可令執法機構替受害消費者取得金錢賠償，對保障消費者權益十分有效。頒佈涉及金錢賠償的法庭指令，會比警告或發出其他指令或禁制令更為有效。
43. 在美國各州的保障消費者權益的法例中，均有條款賦予執法機構，有權為受害消費者申請復還令。
44. 在澳洲，其消費事務及公平競爭委員會更有權代表一個或多個受害或可能受害消費者，申請法庭頒令，禁制商人從事不公平及欺騙行為。

## **建議**

### **即時措施**

45. 我們建議政府，加強以下條例的內容，遏止欺騙、誤導及不公平的營商手法：
  - (一) 商品說明條例(第 362 章)
  - (二) 簡易程序治罪條例(第 228 章)，及
  - (三) 不合情理合約條例(第 458 章)

詳情見下列各段。

#### 46. 擴闊「商品說明條例」(第 362 章)的範圍

- (一) 本會建議條例的範圍應擴闊至包括服務、樓房及設施的虛假或誤導說明(如渡假屋安排及設施,非指一般樓宇買賣)。
- (二) 本會建議條例中「虛假商品說明」的定義應包括有關貨品、服務、樓房及設施在價格上的誤導說明。
- (三) 本會亦建議,有關條例在修訂後,應賦予執法機構適當權力,就標示貨品價格的方式上制定守則,為如何遵行法定條 提供指引。
- (四) 我們建議政府檢討現行「商品說明條例」,在遏止消費交易中使用虛假或誤導說明方面的效用。特別是研究如何可以使條例更容易執行,以制裁商戶使用口頭的虛假說明,令消費者受損,有需要時應作出需要的法律修改,以便加強保障消費者。

#### 47. 在「簡易程序」法例中引入罰則

- (一) 我們建議根據「簡易程序治罪」條例(第 228 章),引入新的罰則,對付經營者在提供產品/服務或向顧客索取 項的過程中使用以下手法:
  - (i) 以餌誘式手法誘騙顧客,
  - (ii) 在未有意圖或未能提供服務或產品的情況下收取款項,及
  - (iii) 「用武力」或使用「不適當的滋擾或強迫」手法使消費者就範。
- (二) 我們建議法例規定商戶在宣傳出售貨品或提供服務時,必須擁有合理依據,有能力可照其聲稱的方式出售或提供貨品或服務。
- (三) 本會亦建議法庭除可根據上述「簡易程序治罪」條例(第 222 章)的條款,裁定刑事罰則之外,並應特



別賦予頒佈指令權力，如賠償令、歸還令、維修令等，以補償消費者損失。

#### 48. 明確地列舉不合情理商營手法

(一) 本會建議「不合情理合約」條例(第 458 章)應包括：

- (i) \* 餌誘式的銷售手法，及
- (ii) 誤導的產品或服務的價格說明，

使法庭在審查個案是否涉及不合情理合約時，可一併考慮。

(二) 本會並建議除消費者本身有權採取行動之外，應賦予一些特定的公共機構權力，代表受害人向不法商人，根據有關係例進行民事起訴。

#### 長遠方案

49. 本會建議政府應把多項消費保障法例連同相關的修訂與新條款，歸納成一套全面性的營商手法法例。

新法例應包括以下特色：

- (一) 禁止商戶在與消費者進行交易時從事欺騙、誤導、不公平、欺壓性及其他行為。
- (二) 採用法例令使用被禁止的營商手法者負上刑事及民事責任。懲罰可包括罰款，令違規者失去因不合法活動帶來的利益。對屢犯不改者，更可判以監禁。
- (三) 法例應為受害消費者提供一套公平及完善的機制，補償消費者的損失，例如金錢賠償，補救令或復還令。
- (四) 以上建議的法例應由一公共機構執行。
- (五) 執法機構亦應有權採取法律行動，可向法庭就違規行為申請聲明書、禁制令、強制履行令、及要求損害賠償。

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<sup>2</sup> 見第二頁。

- (六) 執法機構應有權向從事(或有可能從事)不公平或欺騙性手法的營商者要求提供自願性保證或履行承諾書，並在違反該保證時，採取行動，使保證實現。
- (七) 此機構亦應有權要求商戶刊登更正告示或提供企業執行承諾的計劃。
- (八) 執法機構應有權按不同行業應有的操守而制訂不同的行業手則。

50. 引入一條單一的營商手法法例的好處詳列於報告第 34 段中。

二〇〇一年五月十一日