

have contravened its requirements and establishing additional enforcement mechanisms.

The Trade Descriptions Ordinance was primarily a criminal-focused Ordinance, which was enforced by the Hong Kong Customs and Excise Department. Breach of the various provisions of the Ordinance exposed the wrongdoer to both fines and imprisonment. In relation to false trade descriptions which included a third party's registered trade mark, the Ordinance represented the criminal counterpart of breach of the Hong Kong Trade Marks Ordinance (Cap.559) and gave the Customs department significant powers to investigate and punish improper use of trade marks. The exercise of these powers have significantly reduced the incidence of goods bearing infringing trade marks being imported into and sold in the Territory.

Statutory Interpretation and the Trade Descriptions Ordinance

The Ordinance should be interpreted in a *sui generis* manner as this was what was held at common law; see *HKSAR v Sunan Industries Ltd* (unrep., HCMA 939/2007). In this sense, the provisions of the Ordinance must be given a fair and liberal interpretation, promoting its objectives, which include providing a safeguard to members of the public who are consumers and purchasers of goods. It has also been held that the primary objective of the provision is not simply to provide carve outs to corporations but also to preserve Hong Kong's international reputation as an international trading and shopping centre (*HKSAR v Sunan Industries Ltd* (unrep., HCMA 939/2007)) and a service economy (Legislative Council Brief: Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012).

Amendment History

Since its original enactment, there had been various piecemeal amendments added to the Ordinance and its regulations. Such amendments were generally a response to a specific perceived threat or were targeted at a particular industry. Thus, additions relating to matters such as gold, platinum and diamonds were made, and there have been a great many Orders and regulations promulgated dealing with a dispirit range of matters such as the marking of platinum, the place of manufacture of piece-knitted garments, place of origin of watches, etc.

In recent years the protection of consumers from unfair and unscrupulous traders has become an issue of increasing general public interest. Press stories dealing with cheated tour groups (particularly those from Mainland China) who were subject to misleading, deceptive or aggressive sales tactics from dishonest traders, had gained widespread attention. In 2008 a report entitled "Fairness in the Marketplace for Consumers and Business" commissioned by

the Consumer Council put forward a number of suggestions for overhauling consumer protection in Hong Kong. This report proposed an across-the-board trade practices statute, applicable to both goods and services and to all industries.

2008 Reform Package

In 2008, the Trade Descriptions (Amendment) Ordinance 2008 was introduced on the back of significant public sentiment, which raised multiple concerns over unlawful and unethical trade practices. Some of these concerns included malpractices, where dishonest retailers would induce consumers to enter into transactions by methods such as false advertising and misleading representations including verbal misrepresentations. A number of pieces of legislation were introduced to enhance protection of consumers:

- (a) Trade Descriptions (Definition of *Fei Cui* and Natural *Fei Cui*) Regulation;
- (b) Trade Descriptions (Definition of Diamond) Regulation;
- (c) Trade Descriptions (Provision of Information on Natural *Fei Cui*) Order;
- (d) Trade Descriptions (Provision of Information on Diamond) Order;
- (e) Trade Descriptions (Provision of Information on Regulated Electronic Products) Order;
- (f) Trade Descriptions (Marking) (Gold and Alloy) Order;
- (g) Trade Descriptions (Marking) (Platinum) Order; and
- (h) Trade Descriptions (Definition of Platinum) Regulations.

These subsidiary pieces of legislation were introduced in order to overhaul the current *status quo* and award significant protections to consumers when purchasing articles in a retail setting. In the contexts of natural *fei cui* (jade), diamond, and five types of regulated electronic products, retailers are now required to furnish consumers with invoices or receipts containing specified information on the sale of the items, and to retain a copy of the invoice or receipt for not less than three years after the date of issue (this is to ensure records can be audited by government departments when any complaint is raised).

Display and advertising requirements for certain products have also become more prescriptive under the subsidiary instruments, which formed part of the 2008 reform package. For instance, merchants selling natural *fei cui* (jade), diamond, gold, gold alloy, platinum and platinum alloy are now required to prominently display a notice to customers informing them of the definitions of these products of natural *fei cui* (jade), diamond, gold and platinum, as well as the supplier's obligation to issue a detailed invoice or receipt.

A number of other miscellaneous practices have also been stipulated as being outright prohibited under the 2008 Reform Package. Despite containing a list of positive inclusions, the Ordinance also introduces a “negative list” of unfair trade practices to be proscribed, including misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongful acceptance of payment. Remedies available to consumers were also significantly improved, with the most significant immediate remedy being a “cease and desist” order issued by an authorized officer with the consent of the Secretary for Justice, and aimed at eliminating contravening conduct through undertakings provided by a person or entity engaged in prohibited Trade Descriptions Ordinance conduct.

Under the 2008 Reform Package, the courts were also awarded greater ability to have jurisdiction over and make criminal and civil (compensatory damage) orders in circumstances where consumer rights have been violated under the Trade Descriptions Ordinance. Courts now have power to not only order a convicted person to pay reasonable compensation to another person who has suffered financial loss as a result of an offence under the Ordinance, but to also make orders relating to sentencing for criminal strict liability offences.

Finally, civil sanctions are also a component of the 2008 Reform Package. Apart from criminal sanctions, a consumer aggrieved by unfair trade practices will also be able to commence civil action to recover loss or damage suffered. However, unfortunately the amendments did not include any cooling-off arrangements. This is significant as the likelihood of conduct surfacing in the days immediately following a transaction are not necessarily covered unless they fall within the negative list under the Ordinance, or could constitute misleading or deceptive conduct more generally.

A number of carve outs apply in the Ordinance and are based upon profession or typology of activity involved. Schedule 3 of the Ordinance makes an exhaustive list of professions and registered persons who are subject to separate codes of conduct and legislation and do not fall under the Trade Descriptions Ordinance regime. Exclusions also extend to products. In particular, financial services products listed in Schedule 4, are specifically carved out due to the existence of regulatory regimes established under the Securities and Futures Commission, the Hong Kong Monetary Authority and other financial regulatory bodies.

2012 Amendments to the Ordinance

The 2012 package of amendments caused a further shift in favour of consumers. Whereas the pre-2012 package was narrower in imposing only certain limited criminal sanctions for false trade description offences dealing with physical goods only, the *current* Trade Descriptions Ordinance (post 2013

enactment date) has now been replaced with an ordinance which *now resembles a fully fledged consumer protection ordinance. This can be seen in the emphasis placed on placing the rights of the consumer at the forefront of trade and commerce in Hong Kong.*

The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 was passed by the Legislative Council on 17 July 2012 and came into effect on 19 July 2013.

Rather, a more targeted series of amendments have been introduced, dealing with the following major areas:

- (a) Expansion of offences to cover false trade descriptions in relation to “services”;
- (b) Prohibition of unfair trade practices, specifically:
 - (i) Misleading omissions;
 - (ii) Aggressive commercial practices;
 - (iii) Bait advertising;
 - (iv) Bait and switch;
 - (v) Wrongly accepting payment;
- (c) Expansion of enforcement powers available to the Customs and Excise Department;
- (d) Introduction of a “compliance based mechanism” through the offering and acceptance of undertakings from traders suspected of breaching the Ordinance; and
- (e) Addition of consumer redress provisions to either award compensation to victims of unfair trade practices or to allow consumers to commence civil proceedings against defendants who have breached the Ordinance.

(i) Prohibited Activities Extended

The 2012 amendments also extend coverage of the Ordinance so as to prohibit specified unfair trade practices deployed by traders against consumers, including false trade descriptions of services, misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongful acceptance of payments. It also introduces a civil compliance-based mechanism to encourage compliance by traders and to stop identified non-compliant practices, under which the law enforcement agencies may, as an alternative to criminal prosecution, accept an undertaking from a trader whom the enforcement agencies believe has engaged in a prohibited unfair trade practice to stop that practice.

The *addition* of false trade description offences in relation to services is a welcome and long overdue remedy, filling a significant gap in the previous legislation. However, it has been opined that the new unfair trade practices

sections, which proscribe certain unfair trading acts and “sharp practices”, may have the most long lasting and significant effect on business practices and consumer protection in Hong Kong. To date, the Consumer Council has continuously received numerous complaints as well as hundreds of enquiries since the current Ordinance took effect in 2013 and is still in operation today. The majority of these enquiries concerned false representation of products and aggressive sales tactics. The industries that received the most complaints included those in the medical, food, entertainment services and education sectors.

(ii) Extension of enforcement powers

Pursuant to those new ss.16BA and 16H added as a result of the amendments to the Ordinance, the Commissioner of Customs and Excise (CCE) and the Communications Authority (CA), being the Enforcement Agencies, jointly drafted a set of Enforcement Guidelines which states the manner in which they will exercise their enforcement powers and provide guidance on the operation of the new legislative provisions. Enforcement Agencies launched a public consultation on the draft Enforcement Guidelines from 7 December 2012 to 17 March 2013 to invite views from the public.

In response to the public consultation, a total of 27 submissions from various parties were received. In light of the views and comments gathered from the consultation, the Enforcement Agencies have revised the draft Enforcement Guidelines, and published the finalized Enforcement Guidelines and Public Consultation Report on 15 July 2013.

(iii) Delineation of Responsibilities between Enforcement Agencies

The Customs and Excise Department is the principal agency to enforce the Ordinance. The Communications Authority also has concurrent jurisdiction in relation to the commercial practices of licensees under the Telecommunications Ordinance (Cap.106) and the Broadcasting Ordinance (Cap.562), which are directly connected with the provision of a broadcasting service or telecommunications service. To enforce the Ordinance effectively and ensure that every case is taken up by the appropriate Enforcement Agency, the CCE and CA have entered into a Memorandum of Understanding for the purpose of coordinating the performance of their functions.

The Ordinance in its former iterations was primarily an Ordinance which empowered government enforcement agencies to prosecute traders in the criminal courts for breach of its provisions. The 2013 amendments included in the Ordinance now provide specific avenues for consumer redress and the ability of consumers to directly take action in the civil courts.

However, there has been criticism that these amendments did not go far enough. The new amendments (which came into force on 19 July 2013) did not meet the ambitious recommendations contained in the Consumer Council report. In particular, key industries and sectors were specifically omitted from the operation and oversight of the Ordinance and suggestions for inclusion of mandatory “cooling off” periods in relation to certain consumer contracts were also not adopted.

The 2012 amendments to the Ordinance have expanded its coverage from goods to services, in particular banning misleading sales practices such as false discounts and concealing extra charges. Under the current Ordinance, it is now also an offense for retailers and traders to omit important product specifications or to display prices in a misleading way. Retailers must now distinguish the price of their goods and services, using price related terms as “sale”, “original price” and “reduced price” accurately and judiciously to avoid misleading consumers, in accordance to the guidelines from the Customs and Excise Department.

One of the most common complaints the Customs and Excise Department, who are tasked with enforcing the law, were “bait and switch” tactics used mostly by shops selling electronic products and goods as the shops promoted bargain items which were not offered or available in the store. Customers were instead told that the items being advertised were an “older” model and were then “persuaded” to purchase other like products. Accordingly, s.13G of the Ordinance was added to address this particular tactic by unscrupulous stores and shops.

Also note that that the current Ordinance was amended to now include services. The advent of this inclusion was spurred by the high-pressure tactics used by some fitness centres to entice consumers to either purchase new fitness plans or even extend their plan even though there was still significant time remaining on his/her existing membership. One complainant informed the Customs and Excise Department that staff at one fitness centre did not fully explain the terms of its membership plan and even used coercive sales tactics to press for payment. Section 13F of the Ordinance deals with such unwarranted aggressive commercial practices.

These amended unfair trade practice provisions drew heavily on legislation enacted in both the EU and Australia. In relation to the unfair trade practices of Misleading Omissions and Aggressive Commercial Practices (ss.13E and 13F of the Ordinance), these sections were modeled almost word for word on the EU Unfair Commercial Practices Directive (Council Directive 2005/29) (“UCPD”) which has been adopted in the UK under the title of the Consumer Protection from Unfair Trading Regulations 2008. The Bait Advertising, Bait

and Switch and Wrongly Accepting Payment provisions (ss.13G, 13H, and 13I of the Ordinance, respectively) were modeled on the Australian Consumer Law which itself is largely an updated version of the previous Australian Trade Practices Act (1974) Cth.

Exempt Persons & Products

Note that these 2012 amendments to the Ordinance do not apply to all industries and sectors of the economy. Schedule 3 of the Ordinance lists a large number of *Exempt Persons* while Schedule 4 of the Ordinance lists a smaller number of *Exempt Products*.

The persons and products listed in these schedules are *exempt* from the provisions of the Ordinance. The list of exempt persons consists mainly of those professions which have their own form of stringent regulation and oversight. *For example*, this list includes: solicitors, barristers, doctors, veterinary surgeons, etc. All of these professions have their own regulatory codes and supervisory bodies, which regulate their members' conduct and the way they interact with the public. Of more concern however, Schedule 3 also includes licensed estate agents or licensed salesperson as defined in the Estate Agent's Ordinance (Cap.511).

The Administration's justification for inclusion of these persons as "*exempt*" apparently stems from fact that the Transport and Housing Bureau is developing a separate regime to oversee these persons in relation to the sale of first hand properties. Whilst this may be true, given the importance of residential properties in Hong Kong (and the high prices paid for them) it would have been thought that regulation of the trade practices of estate agents would have been a major concern of the Administration – as it is with the public at large. In relation to Schedule 4 of the Ordinance, the excluded products can be generally described as financial services products. These products are also exempt from the Ordinance due to regulatory regime that already oversees the financial services.

Conclusion

The Ordinance as it now stands represents a significant departure from previous versions prior to the 2008 and 2012 reform packages. The Ordinance is no longer a weak instrument and now had considerable power behind it. Its previous narrow scope of criminal deterrence and enforcement of trade description breaches in relation to physical goods has now been significantly amended.

The current regime favours a consumer-centred approach to trade, with a greater onus on merchants to ensure their practices are in line with negative and positive behaviours. Despite this progress, the Ordinance is still not

completely aligned to other comparable jurisdictions and has not adopted a vast majority of requirements proposed by the Consumer Council. A general prohibition against "misleading and deceptive conduct" in trade and commerce is still notably absent from the revised Ordinance as too are the mandatory "cooling off" provisions that were suggested to be applied to all commercial contracts. It may be that these provisions, being significant and complicated provisions, will only be included in future versions of the Ordinance and after further consideration and consultation.

Long title

To prohibit false trade descriptions, false, misleading or incomplete information, false marks and misstatements in respect of goods provided in the course of trade or suppliers of such goods; to confer power to require information or instruction relating to goods to be marked on or to accompany the goods or to be included in advertisements; to restate the law relating to forgery of trade marks; to prohibit certain unfair trade practices; to prohibit false trade descriptions in respect of services supplied by traders; to confer power to require any services to be accompanied by information or instruction relating to the services or an advertisement of any services to contain or refer to information relating to the services; and for purposes connected therewith.

(Amended 65 of 2000 s. 3; 19 of 2008 s. 3; 25 of 2012 s. 32)

[1 April 1981] *L.N. 64 of 1981*

(Originally 69 of 1980)

(*Format changes—E.R. 2 of 2012)

Note: *The format of the Ordinance has been updated to the current legislative styles.

COMMENTARY

Overview

The Trade Description Ordinance (Cap.362) ("TDO" or the "Ordinance"), while described as a consumer protection ordinance, is in fact focused primarily with false trade descriptions applied to physical goods only and the regulation of various miscellaneous matters such as trade descriptions in relation to gold, diamonds, precious metals, etc.

The 2012 amendments to the TDO brought significant changes to both the focus and practical operation of the Ordinance. What was previously seen as a narrow ordinance, imposing criminal sanctions for false trade description

[LT.01]

offences dealing with physical goods only, has now been replaced with an ordinance which now resembles a piece of more general consumer protection legislation. The addition of false trade description offences in relation to services is a welcome and long overdue remedy, filling a significant gap in the previous legislation.

As such, the TDO is now primarily used as a criminal-focused Ordinance as the principle piece of legislation enforced and utilized by the Hong Kong Customs and Excise Department. Breach of the various provisions of the Ordinance exposes the wrongdoer to both fines and imprisonment. In relation to false trade descriptions which included a third party's registered trade mark, the TDO represents the criminal counterpart of breach of the Trade Marks Ordinance and gives the Customs department significant powers to investigate and punish improper use of trade marks. The exercise of these powers have significantly reduced the incidence of goods bearing infringing trade marks being imported into and sold in Hong Kong.

Similar legislation in other jurisdictions

[LT.02] Comparable legislation to the Ordinance can be found in the UK's Consumer Protection from Unfair Trading Regulations 2008.

Part 1

PRELIMINARY

Section 1	Short title
Section 2	Interpretation
Section 2A	Special provisions for place of manufacture or production under certain trade agreements or arrangements
Section 3	Special provisions applicable to goldware
Section 4	Marking and provision of information, etc. orders
Section 5	Information to be given in advertisements

1. Short title

This Ordinance may be cited as the Trade Descriptions Ordinance.

COMMENTARY

Overview

Section 1 sets out the name and official reference to this Ordinance.

[1.01]

The Ordinance was originally enacted in 1980 and came into effect in April 1981. It was modeled in part on the old Hong Kong Merchandise Marks Ordinance (Cap.41) and to some extent on the UK Trade Descriptions Act of 1968. While originally described as a consumer protection ordinance, it was in fact a rather narrow piece of legislation which focused on false trade descriptions applied to physical goods only and the regulation of various miscellaneous matters such as trade descriptions in relation to gold, diamonds, etc.

But the 2012 amendments to the Ordinance (Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012) expanded its coverage so that not only *goods* but also now *services* are now covered under this Ordinance, in particular banning misleading sales practices such as false discounts and concealing extra charges. Under the Ordinance, it is now also an offense for retailers and traders to omit important product specifications or to display prices in a misleading way. Retailers must now distinguish the price of their goods and services, using price related terms as "sale", "original price" and

“reduced price” accurately and judiciously to avoid misleading consumers, in accordance to the guidelines from the Customs and Excise Department.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires-
advertisement (宣傳品) includes a catalogue, a circular and a price list;
authorized officer (獲授權人員) means a public officer appointed under section 14;

average consumer (一般消費者)—see section 13D; (Added 25 of 2012 s. 3)

commercial practice (營業行為) means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion of a product to consumers or the sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product; (Added 25 of 2012 s. 3)

Commissioner (關長) means the Commissioner of Customs and Excise and any Deputy or Assistant Commissioner of Customs and Excise; (Added L.N. 294 of 1982. Amended 65 of 2000 s. 3)

Communications Authority (通訊事務管理局) means the Communications Authority established by section 3 of the Communications Authority Ordinance (Cap 616); (Added 25 of 2012 s. 24)

consumer (消費者) means an individual who, in relation to a commercial practice, is acting, or purporting to act, primarily for purposes that are unrelated to the person's trade or business; (Added 25 of 2012 s. 3)

Convention country (公約國家) means a Paris Convention country or WTO member as defined in section 2(1) of the Trade Marks Ordinance (Cap 559); (Replaced 35 of 2000 s. 98)

exempt person (獲豁免人士) means a person who is acting in the capacity of a person described in an item of Schedule 3; (Added 25 of 2012 s. 3)

false trade description (虛假商品說明) means-

- (a) a trade description which is false to a material degree; or (Amended 25 of 2012 s. 3)
- (b) a trade description which, though not false, is misleading, that is to say, likely to be taken for a trade description of a kind that would be false to a material degree; (Amended 25 of 2012 s. 3)

(c)-(e) (Repealed 25 of 2012 s. 3)

forged trade mark (偽造商標) has the meaning assigned to it by section 9(3); (Added 35 of 2000 s. 98)

goods (貨品) includes vessel and aircraft, things attached to land and growing crops;

goods in transit (過境貨品) means goods which-

- (a) are brought into Hong Kong on a vessel or aircraft for the sole purpose of taking them out of Hong Kong; and
- (b) remain at all times while they are in Hong Kong on the vessel or aircraft; (Replaced 19 of 2008 s. 4)

import (進口) means to bring, or cause to be brought, into Hong Kong;

infringing goods (侵犯權利貨品) means goods to which-

- (a) a forged trade mark is applied; or
- (b) a trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied; (Added 35 of 2000 s. 98)

invitation to purchase (購買邀請) means a commercial communication that indicates characteristics of the product and its price in a way appropriate to the medium used for that communication and therefore enables the consumer to make a purchase; (Added 25 of 2012 s. 3)

mark (標記), when used as a noun, includes a sign capable of distinguishing the goods of one undertaking from those of other undertakings; (Added 35 of 2000 s. 98)

premises (處所) includes any place and any stall, vehicle, vessel or aircraft;

product (產品) means any goods or service but does not include any goods or service covered by Schedule 4;

Note— See subsection (4). (Added 25 of 2012 s. 3)

Secretary (局長) means the Secretary for Commerce and Economic Development; (Added 5 of 2012 s. 3)

service (服務) includes any right, benefit, privilege or facility that is, or is to be, provided, granted, conferred or offered under a contractual right other than one arising under a contract of employment as defined by section 2(1) of the Employment Ordinance (Cap 57); (Added 25 of 2012 s. 3)

trade description (商品說明), in relation to goods, means an indication, direct or indirect, and by whatever means given, with respect to the goods or any part of the goods including an indication of any of the following matters- (Amended 25 of 2012 s. 3)

- (a) quantity (which includes length, width, height, area, volume, capacity, weight and number), size or gauge;
- (b) method of manufacture, production, processing or reconditioning;
- (c) composition;

- (d) fitness for purpose, strength, performance, behaviour or accuracy;
- (e) (Repealed 25 of 2012 s. 3)
- (ea) availability; (Added 25 of 2012 s. 3)
- (eb) compliance with a standard specified or recognized by any person; (Added 25 of 2012 s. 3)
- (ec) price, how price is calculated or the existence of any price advantage or discount; (Added 25 of 2012 s. 3) (ed) liability to pay duty on them under the laws of Hong Kong, generally or in specified circumstances; (Added 25 of 2012 s. 3)
- (f) testing by any person and results thereof,
- (g) approval by any person or conformity with a type approved by any person;
- (ga) a person by whom they have been acquired, or who has agreed to acquire them; (Added 25 of 2012 s. 3) (gb) their being of the same kind as goods supplied to a person; (Added 25 of 2012 s. 3)
- (h) place or date of manufacture, production, processing or re-conditioning;
- (i) person by whom manufactured, produced, processed or re-conditioned;
- (j) other history, including previous ownership or use;
- (k) availability in a particular place of-
 - (i) a service for the inspection, repair or maintenance of the goods; or
 - (ii) spare parts for the goods; (Added 19 of 2008 s. 4)
- (l) warranty given in respect of the service or spare parts referred to in paragraph (k); (Added 19 of 2008 s. 4)
- (m) the person by whom the service or spare parts referred to in paragraph (k) are provided; (Added 19 of 2008 s. 4)
- (n) the scope of the service referred to in paragraph (k)(i); (Added 19 of 2008 s. 4)
- (o) the period for which the service or spare parts referred to in paragraph (k) are available; (Added 19 of 2008 s. 4)
- (p) the charge or cost at which the service or spare parts referred to in paragraph (k) are available; (Added 19 of 2008 s. 4)

[cf. 1968 c. 29 s. 2(1) U.K.]

trade description (商品說明), in relation to a service, means an indication, direct or indirect, and by whatever means given, with respect to the service or any part of the service including an indication of any of the following matters—

- (a) nature, scope, quantity (including the number of occasions on which, and the length of time for which, the service is supplied or to be supplied), standard, quality, value or grade;
- (b) fitness for purpose, strength, performance, effectiveness, benefits or risks;
- (c) method and procedure by which, manner in which, and location at which, the service is supplied or to be supplied;
- (d) availability;
- (e) testing by any person and the results of the testing;
- (f) approval by any person or conformity with a type approved by any person;
- (g) a person by whom it has been acquired, or who has agreed to acquire it;
- (h) the person by whom the service is supplied or to be supplied;
- (i) after-sale service assistance concerning the service;
- (j) price, how price is calculated or the existence of any price advantage or discount; (Added 25 of 2012 s. 3)

trade mark (商標) means-

- (a) a trade mark relating to goods registered or deemed to be registered in Hong Kong under the Trade Marks Ordinance (Cap 559);
- (b) a certification mark or collective mark relating to goods registered or deemed to be registered in Hong Kong under the Trade Marks Ordinance (Cap 559);
- (c) a trade mark-
 - (i) registered in a Convention country; and
 - (ii) capable of registration in Hong Kong under the Trade Marks Ordinance (Cap 559) as a trade mark relating to goods;
- (d) a trade mark-
 - (i) in respect of which an application for registration has been made in a Convention country; and
 - (ii) capable of registration in Hong Kong under the Trade Marks Ordinance (Cap 559) as a trade mark relating to goods; and
 - (iii) in respect of which a period of 6 months has not expired since the date of the application for the registration thereof in a Convention country; (Replaced 35 of 2000 s. 98. Amended 25 of 2012 s. 3)

trader (商戶) means any person (other than an exempt person) who, in relation to a commercial practice, is acting, or purporting to act, for purposes relating to the person's trade or business;

Note— See subsection (5). (Added 25 of 2012 s. 3)

transactional decision (交易決定) means any decision made by a consumer, whether it is to act or to refrain from acting, concerning—

- (a) whether, how or on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or
- (b) whether, how or on what terms to exercise a contractual right in relation to a product. (Added 25 of 2012 s. 3)

(2) (a) For the purposes of this Ordinance, goods shall be deemed to have been—

- (i) manufactured in the place in which they last underwent a treatment or process which changed permanently and substantially the shape, nature, form or utility of the basic materials used in their manufacture; or
- (ii) produced in the place in which they were wholly grown or mined.

(b) The Commissioner may by order specify— (Amended L.N. 294 of 1982)

- (i) in relation to any description of goods, what treatment or process is to be regarded for the purposes of this Ordinance as resulting or not resulting in a permanent and substantial change in shape, nature, form or utility of the basic materials used in their manufacture;
- (ii) in relation to any description of goods different parts of which were manufactured or produced in different places, or of goods assembled in a place different from that in which their parts were manufactured or produced, in which of those places the goods are to be regarded for the purposes of this Ordinance as having been manufactured or produced. [cf. 1968 c. 29 s. 36 U.K.]

(c) This subsection shall not apply to goods which are the subject of a notice published under subsection (2A). (Added 96 of 1991 s. 2. Amended 9 of 2005 s. 2)

(2A) The Director-General of Trade and Industry may by notice in the Gazette specify in relation to any description of goods (being goods that are subject to a scheme of import or export control specified in the notice) the place in which the goods are to be regarded for the purposes of this Ordinance as having been manufactured or produced, and any such goods shall, for the purposes of this Ordinance, be deemed to have been manufactured or produced in such place. (Added 96 of 1991 s. 2. Amended L.N. 173 of 2000)

(2B) Subsections (2) and (2A) do not apply to specified goods, as defined in section 2A(1), that are covered by section 2A(3). (Added 5 of 2012 s. 3)

(3) For the purposes of this Ordinance, a trade description or statement published in any newspaper, book or periodical or in any film or sound or television broadcast shall not be deemed to be a trade description applied or statement made in the course of a trade or business unless it is or forms part of an advertisement. [cf. 1968 c. 29 s. 39(2) U.K.]

(4) To avoid doubt, immovable property is itself not a product (because it is not goods) while a service supplied in relation to immovable property may be a product. (Added 25 of 2012 s. 3)

(5) In this Ordinance a reference to a trader includes any person acting in the name of, or on behalf of, a trader. (Added 25 of 2012 s. 3)

(6) A note located in the text of this Ordinance is provided for information only and has no legislative effect. (Added 25 of 2012 s. 3)

COMMENTARY

Definitions

This section defines all the terms used throughout this Ordinance. These definitions include references to definitions in other ordinances, as set out and stated throughout the provisions of this law. [2.01]

Definition of “trade description” in relation to “physical goods” or “services”

The Ordinance now uses two separate definitions of a “trade description:” (i) as it applies to physical “goods;” or (ii) as it applies to “services”. [2.02]

But do note that the definition of “trade description” is not an exhaustive definition in that it does not seek to comprehensively define all the matters in relation to goods or services which may be regarded as a trade description. While ten separate matters are described in the definition, these items are not intended to describe the only matters which would be regarded as a trade description in relation to goods or services. Rather, the use of the word “including” in the definition indicates that it is an inclusive definition and there may well be other matters relating to services which would also be regarded as a “trade description” for the purposes of the Ordinance.

Interpretation of “including” in the definition of “trade description”

[2.03] This interpretation of the word “including” in the definition also accords with the Legislative Counsel’s intent. In a response to questions raised by the Legal Services Division, the Legislative Counsel stated that:

“...the two definitions [i.e. of a trade description relating to goods and a trade description relating to services] are framed in an all-inclusive fashion, that is to say, an indication, direct or indirect, and by whatever means given, with respect to the goods and service or any part of it, will fall within the definitions. The matters mentioned in the paragraphs under the definition are in our view the most relevant examples. They may be framed differently because of the differences in nature between goods and services. This would not affect the all-inclusive nature of the definitions.”

Wider application of “trade description”

[2.04] The definition is also very wide in its application due to the wording “*an indication, direct or indirect, and by whatever means given*”. Further, note that s.6A of the Ordinance confirms that a trade description can be made orally as well as in writing.

False trade descriptions in relation to goods

[2.05] The definition of a “trade description” in relation to goods has also been significantly expanded. This definition is also an all inclusive definition which has specifically added the following new matters:

- (a) Availability;
- (b) Compliance with a standard specified or recognised by any person;
- (c) Price, how price is calculated or the existence of any price advantage or discount;
- (d) Liable to pay duty on them under the laws of Hong Kong, generally or in specified circumstances;
- (e) A person whom they have been acquired, or who has agreed to acquire them; and
- (f) Their being of the same kind as goods supplied to a person.

The new matters noted above have been added either to support the other 2012 amendments to the Ordinance, in particular the new Unfair Trade Practices provisions, or are merely updating the Ordinance to include matters which previously appeared in miscellaneous repealed versions of the Ordinance or in subsidiary regulations and rules. For example, there was previously a section in the Ordinance dealing with a prohibition on providing false indications that similar items are supplied to members of the Royal Family.

While this provision was repealed in 1997 after the resumption of Chinese sovereignty, the amended definition now provides that references or indications that the goods in question are “...of the same kind as goods supplied to a person” is a reformulation of the repealed provision minus references to the Royal Family.

False trade descriptions when it equates to an offense

For an offence to be committed under s.7A of the Ordinance, the trade description in question must be a “false” trade description as so defined in this provision. The definition of “false trade description” relevantly states that a false trade description means:

[2.06]

- (a) a trade description which is false to a *material degree*; or
- (b) a trade description which, though not false, is *misleading*, that is to say, likely to be taken for a trade description of a kind that would be false to a *material degree*.

This definition was heavily revised and simplified as a result of the 2012 Amendments to remove much of the previous language which formerly explained different specific situations in which a trade description would be regarded as “a false trade description”. This language is now redundant due to the all-inclusive nature of the new definitions of trade descriptions.

“Material degree” as worded in the definition of false trade description

Part (a) of the definition above states that a false trade description means: “(a) *a trade description which is false to a material degree.*” A “material degree” is not defined but appears to be merely the threshold question to remove trivial matters from the oversight of the Ordinance. Referring to the equivalent UK provision, “material degree” has been described as follows:

[2.07]

“The words “to a material degree” qualify “false” so as to take out of the criminal sphere over-enthusiastic, but not essentially inaccurate, descriptions of goods and other *de minimus* situations where otherwise the description might strictly be false.”

The Customs and Excise Department in Part B, para 2.6 of its *Enforcement Guidelines* Part B provides the following example of what constitutes a “material degree:”

“For example, in an advertisement a trader claims that a smart phone has a 5.55 inch display whereas in fact the display measures only 5.54 inches. The difference of 0.01 inch would unlikely to be taken as false to a material degree.”

See also the cases of: *R v Tam Sbo-Lam* [1988] 2 HKLR 586; *Donnelly v Rowlands* [1970] 1 WLR 1600; and *Divisional Trading Officer v Kingsley Clothing Ltd* [1989] RPC 695.

“Misleading” as worded in the definition of false trade description

[2.08]

Assuming the threshold of “material degree” in part (a) of the definition has been met, part (b) of the definition states: “(b) *A trade description will also be regarded as a false trade description if it is misleading.*”

“Misleading” in this context includes situations where the trade description is not necessarily false but is misleading to the extent that consumers would regard it as a false trade description.

This definition was considered in the case of *R v Wong Yan-Chuen* (unrep., CACC 523/1987 (CA)) where the Court held that a description of “mineral water” when applied to bottles of ordinary tap water was “misleading”. The Court stated that:

“...the judge concluded that as tap water contains minerals...the prosecution had failed to establish that the description “mineral water” was in scientific terms a false description of those contents”. The Court then went on to say “as an obvious matter of common sense, a member of the public entering a shop and seeing a bottle marked “mineral water” would expect it to contain something more than mere tap water, and that a prospective purchaser would understand that the product so labeled was, in terms of composition, richer than tap water in mineral content. Accordingly, the trade description “mineral water” when applied to bottled tap water is misleading in that it is likely to be taken as an indication, false to a material degree, of the composition of the contents of the bottle.”

Trade, trader

[2.09]

“Trader” is defined above as any person (other than an exempt person) who, in relation to a commercial practice, is acting, or purporting to act, for purposes relating to the person’s trade or business.

But note that “trade” is not defined in the Ordinance. In a financial concept, trade is a basic economic concept involving the buying and selling of goods and services, with compensation paid by a buyer to a seller, or the exchange of goods or services between parties.

2A. Special provisions for place of manufacture or production under certain trade agreements or arrangements

(1) In this section—

date of entry into force (生效日期), in relation to a trading partner place under a scheduled trade arrangement, means the date specified in column 4 of Schedule 1 corresponding to the place and the arrangement; **scheduled trade arrangement** (表列貿易安排) means a regional or international trade agreement or arrangement specified in column 2 of Schedule 1;

specified goods (指明貨品), in relation to a trading partner place under a scheduled trade arrangement, means any goods that are—

- (a) qualified for preferential tariff treatment, as between the place and Hong Kong, under the arrangement; and
- (b) subject to rules, specified in the arrangement, for determining the place of manufacture or production of the goods;

trading partner place (貿易夥伴地), in relation to a scheduled trade arrangement, means a place to which the arrangement is applicable, other than Hong Kong, specified in column 3 of Schedule 1 corresponding to the arrangement.

(2) The rules referred to in paragraph (b) of the definition of **specified goods** in subsection (1) (**rules of origin**) may be—

- (a) rules based principally on—
 - (i) the place in which the goods last underwent a treatment or process which changed permanently and substantially the shape, nature, form or utility of the basic materials used in their manufacture; or
 - (ii) the place in which the goods were wholly grown or mined;
- (b) rules based principally on—
 - (i) a maximum percentage of the value of the goods attributable to places other than Hong Kong or a trading partner place under the relevant scheduled trade arrangement; or
 - (ii) a minimum percentage of the value of the goods attributable to Hong Kong or a trading partner place under the relevant scheduled trade arrangement;
- (c) rules of a kind described in paragraph (a)(i) or (ii) or (b)(i) or (ii) or any combination, with or without modifications; or
- (d) any other rules.

(3) In relation to a trading partner place under a scheduled trade arrangement for the time being in force as between the place and Hong

Kong, if, on or after the relevant date of entry into force, any specified goods are—

- (a) exported or intended to be exported to the place in accordance with the arrangement; or
- (b) imported from the place in accordance with the arrangement, then the rules of origin for the goods, specified in the arrangement for the time being in force as between the place and Hong Kong, apply for the purpose of determining the place of manufacture or production of the goods under this Ordinance.

(4) The Secretary may by notice published in the Gazette amend Schedule 1.

(5) The Director-General of Trade and Industry is to make available at his or her office all scheduled trade arrangements for inspection, free of charge, by the public during normal office hours.

(Added 5 of 2012 s. 4)

COMMENTARY

Enactment history

[2A.01] Section 4 of the Trade Descriptions (Amendment) Ordinance 2012 (5 of 2012) added this new s.2A to the Trade Descriptions Ordinance.

Section 3 of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (25 of 2012) provided new definitions for the terms “average consumer”, “commercial practice”, “consumer”, “exempt person”, “invitation to purchase”, “product”, “service”, “trader” and “transactional decision”.

Section 24 of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (25 of 2012) added the definition of “Communications Authority”.

Section 3 of the Trade Descriptions (Amendment) Ordinance 2012 (5 of 2012) added the definition of “Secretary”.

Section 3 of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (25 of 2012) added the definition of “trade description” which was amended in order to make a distinction between trade descriptions which relate to goods and those which relate to services.

Section 3 of the Adaptation of Laws (No 14) Ordinance 2000 (65 of 2000), which commenced on 1 July 1999, amended the definition of “Commissioner” and which was amended pursuant to Schedule 2 to the Interpretation

and General Clauses Order 1982 (LN 294 of 1982), which commenced back on 30 July 1982. The Chinese translation “(總監)” was replaced with “(關長)”.

Section 98 of the Trade Marks Ordinance (35 of 2000) amended the definition of “Convention country”.

Section 98 of the Trade Marks Ordinance (35 of 2000) inserted the new definitions for “forged trade mark”, “infringing goods” and “mark”.

Section 2 of the Trade Descriptions (Amendment) Ordinance 1996 (43 of 1996), which commenced on 5 July 1996, amended the definitions for “goods in transit”.

Section 98 of the Trade Marks Ordinance (35 of 2000) amended the definition of “trade mark”.

Section 2 of the Trade Descriptions (Amendment) Ordinance 1991 (96 of 1991), which commenced on 19 July 1991, amended the Ordinance by replacing “Director-General of Trade and Industry” with “Director-General of Trade”, pursuant to s.3 and Schedule 3 of the Declaration of Change of Titles (Trade and Industry Bureau, Secretary for Trade and Industry, Trade Department, Director-General of Trade, Deputy Director-General of Trade and Assistant Director-General of Trade) Notice 2000 (LN 173 of 2000), which was commenced on 1 July 2000.

Overview

This provision was added and incorporated as a result of the 2012 amendments to the Ordinance. This s.2A defines all the terms when referring to those goods and services in relation to the place of manufacturing or production of goods under certain trade agreements or arrangements.

[2A.02]

Advertisement

The definition of *advertisement* in s.2 above is broad and takes a non-exhaustive approach to the requirements under the Ordinance. Items like a catalogue, a circular and a price list, constitute a non-exhaustive list of what an advertisement should include. Despite this, the intention of the drafters is clearly to take a substantive approach to what would constitute an advertisement (not a literal approach). For instance, normally where a published piece would not satisfy all the requirements in the definition, it would not be characterized as a s.2 definition of an advertisement. However, the section clarifies this by stating that it is the effect of the communication, which is to be the main underlying feature evidencing whether in fact it constitutes a s.2 definition of advertisement and for the purposes of enlivening application of the Ordinance.

[2A.03]

COMMENTARY

Average consumer

[13D.01] In each of the unfair trade practices listed in Part 2B, there is a reference to the effect that the unfair trade practice will have on the “average consumer”. A “consumer” is defined under previous s.2 as:

“...an individual who, in relation to a commercial practice, is acting or purporting to act, primarily for purposes that are unrelated to the person’s trade or business”.

In other words, a “consumer” must be a natural person or individual and will only be regarded as a consumer for the purposes of the Ordinance if they are engaged in activities unrelated to their ordinary trade or business.

Section 13D of the Ordinance expands the definition of “consumer” as defined in previous s.2 and provides an extensive definition and explanation as to what constitutes an “average consumer” for the purposes of this Part 2B. The “average consumer” for the purposes of Part 2B is not a reference to any particular identifiable or actual consumer but rather is a reference to a notional consumer of the particular goods or services in question.

Subsection 13D(1) begins by noting that when determining who the *average consumer* is:

“...an account must be taken of the material characteristics of such an average consumer including that the consumer is *reasonably well informed, reasonably observant and circumspect*”.

This definition of an average consumer appears similar to the way in which the average consumer is construed for the purposes of assessing likelihood of confusion in relation to trade mark infringement cases. See, for example, *Sable BV v Puma AG* [1998] RPC 199 at para 22; see also *Guccio Gucci SpA v Gucci* [2009] 5 HKLRD 28, at p 79). It is a notional and objective reference point and does not refer to any particular real person.

The term “average” does not mean a statistically average consumer; and the average consumer is *not* ill-informed, ignorant or reckless.

However, the average consumer must also be construed against the backdrop of the particular commercial practice in question. Thus determining who the notional average consumer is will depend on the circumstances and the commercial practice in question (sub-s.13D(2)).

Identifiable group

Subsection 13D(3) goes further and provides that where a commercial practice is targeted or directed towards a particular group of consumers (sub-s.13D(3)(a)) or:

“...where a clearly identifiable group of consumers is particularly vulnerable to the commercial practice or underlying product because of mental or physical infirmity, age, or credulity...”

then these will be factors to take into account when assessing sub-s.13D(2) of the Ordinance and who the average consumer is.

The Customs and Excise Department’s Enforcement Guide provides helpful examples. Accordingly:

“For a Japanese life-style magazine, the main characteristic of an average consumer of the target group may likely be someone who can read Japanese. On the other hand, the target group for a Japanese magazine for children, and hence the characteristics of an average consumer of that group, can be very different.”

Vulnerable groups

Where a clearly identifiable vulnerable group is the target of the relevant practice, then the identification of the notional average consumer should take this vulnerable group into account. Subsection 13D(3)(b)(i) lists the following matters which may indicate a “vulnerable group”:

- (a) Mental or physical infirmity;
- (b) Age;
- (c) Credulity in a way in which the trader could reasonably be expected to foresee.

Where the target group contains members of these vulnerable groups and “the practice is likely to cause the average member of that group only to make a transactional decision that the member would not have made otherwise” then the reference to average consumer should be taken to be a reference to a average consumer of that vulnerable group.

For example, advertisements for toys shown on afternoon television would likely be regarded as targeting children. Whilst others may also watch television at these times and may also be induced to purchase the toys, children are both an identifiable group and a vulnerable group and thus would likely be regarded as the group from which the average consumer would be found for the purposes of the Part 2B Unfair Trade Practices.

[13D.02]

[13D.03]

Impact on the average customer

[13D.04] When assessing the impact of a particular commercial practice, reference must be had to the notional “average customer.” However, where the trade practice is directed towards a particular group of consumers, the average consumer will be taken as a member of that target group of consumers and not merely consumers in general. Furthermore, where the target group contains vulnerable consumers, then the notional average consumer will be regarded as a member of that vulnerable group and not merely as an average member of consumers in general.

In identifying whom the notional average consumer is for the purpose of unfair trade practices, survey evidence will rarely be of practical benefit. In the case of *Office of Fair Trading v Purely Creative* [2011] EWHC 106, the court examined who the average consumer may be for the purpose of the Ordinance and where the limitations of statistical and expert evidence regarding typical consumer behaviour are also discussed.

Transactional Decision

[13D.05] Another key term found in each of the unfair trade practices is the notion of a “*transactional decision*.” In general terms, if the unfair trade practice does not or is unlikely to induce/cause the average consumer to make a “*transactional decision*” then the various unfair trade provisions would not be enlivened. Thus it is important to identify the relevant transactional decision.

A “*transactional decision*” is a new definition added during the recent amendments and is defined in s.2 of the Ordinance as follows:

“Transactional decision means: any decision made by a consumer, whether it is to act or refrain from acting, concerning:

- (a) whether, how or on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or
- (b) whether, how or on what terms to exercise a contractual right in relation to a product...”

Transaction decision and an economic consequence

[13D.06] This definition of “*transactional decision*” in the Hong Kong legislation is identical to the relevant EU provisions under the Unfair Commercial Practices Directive. The first case which dealt with interpretation of this term in the UK was *Office of Fair Trading v Purely Creative* [2011] EWHC 106 (Ch).

In that decision, Mr Justice Briggs held that a decision “*with an economic consequence*” was likely to be regarded as a “*transactional decision*”. His Lordship went on to state that:

“Although it may be debatable whether ... this includes a decision to step into a shop after viewing an advertisement ... it was common ground that any decision with an economic consequence was a transactional decision, even if it was only a decision between doing nothing or responding to a promotion by posting a letter, making a premium rate telephone call or sending a text message” (at para 68).

On-line transaction

Following the above reasoning, it is suggested that on-line transactions and purchases, etc. would likewise be regarded as transactional decisions for the purposes of the Ordinance.

[13D.07]

13E. Misleading omissions

- (1) A trader who engages in relation to a consumer in a commercial practice that is a misleading omission commits an offence.
- (2) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in subsection (3)—
 - (a) it omits material information;
 - (b) it hides material information;
 - (c) it provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
 - (d) it fails to identify its commercial intent, unless this is already apparent from the context, and as a result it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise.
- (3) The matters referred to in subsection (2) are—
 - (a) all the features and circumstances of the commercial practice;
 - (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
 - (c) if the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.
- (4) If a commercial practice is an invitation to purchase, the following information is material, if not already apparent from the context—
 - (a) the main characteristics of the product, to the extent appropriate to the product and to the medium by which the invitation to purchase is communicated;
 - (b) the identity (such as trading name) of the trader and of any other trader on whose behalf the trader is acting;

and as a result it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise.

Factual context

[13E.05] Subsection 13E(2) also provides that when assessing a commercial practice, full regard must be had to its factual context. Accordingly, an alleged misleading omission must not be construed in isolation but rather against the factual backdrop of the transaction. Further, the following matters enumerated under later sub-s.13E(3) must also specifically be taken into account:

- (a) All the features and circumstances of the commercial practice;
- (b) The limitations of the medium used to communicate the commercial practice (including limitations of space and time); and
- (c) If the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

In practice, if it is impracticable for traders to provide all the necessary information to consumers due to limitations of the communication medium available, other means of communication medium should be used by the traders to make the information available to consumers to enable them to make informed transactional decisions. For example, where traders are promoting their products by short message service (SMS) and find it difficult to include in the message all the necessary information due to the constraints on the message length, traders are less likely to commit a misleading omission if they make it clear where omitted information can be found. For instance, traders may provide their website address or a hotline telephone number in the SMS and invite consumers to browse it for more detailed information on the products they are promoting.

Invitation to Purchase

[13E.06] Subsection 13E(4) also delineates a number of specific types of information that must be provided if the commercial practice is “an invitation to purchase” and the information is not readily apparent from the context. The information is regarded as *material* and must be made available unless such information is apparent from the context. The information required includes such things as price, characteristics of the goods, the identity and address of the trader, etc.

Under previous s.2(1), an invitation to purchase is defined as a *commercial communication* that indicates the *characteristics of the product and its price* in a way appropriate to the medium used for that communication and *therefore enables* the consumer to make a purchase.

The term “*therefore enables*” primarily refers to enabling of a purchase through the provision of information. The amount of information that enables the consumer to make a purchase varies depending on the circumstances. Sophisticated products may require the provision of more information than simple ones before a purchase is enabled.

Examples of invitations to purchase include: (i) a price label on a product displayed in a shop; (ii) an automobile advertisement in a newspaper that advertises the products’ image and price; (iii) a menu in a restaurant in which the price and choice of dishes are listed; and (iv) an interactive TV advertisement showing images of the products and their prices.

Note that an invitation to purchase *does not necessarily have to contain* all the above information if the information is already apparent from the context. On the other hand, it should be noted that while sub-s.13E(4) lists out the minimum information required that is not apparent from the context, there may be other information that is material in an invitation to purchase, taking into account the nature and circumstances of the commercial practice concerned. Furthermore, whether a piece of information is material in commercial practices other than in the context of an invitation to purchase hinges on what the average consumer needs to make an informed transactional decision.

Material Information

The term “material information” as used in this provision is specifically defined at sub-s.13E(5). It should be noted however, that “material information” in this provision is not equivalent to “all possible information” that a consumer might find desirable to have. Such a standard would be impossibly high for traders to satisfy. Rather, “material information” refers to that information which the consumer needs to make an informed transactional decision in that particular situation.

[13E.07]

What information is considered *material* depends on the circumstances and the nature of the products involved, including, for instance the products’: (i) characteristics; (ii) where and how they are offered for sale; and (iii) who the target consumers are. Information may be material in one commercial practice but may not be so in others and should be judged on a case-by-case basis.

As a general rule, for simple products, it should be sufficient for the trader to provide information on the basic characteristics of the product, if it is not already apparent from the context. More information will be needed for sophisticated products (such as electronic products and vehicles) for the average consumer to make an informed transactional decision. In this regard, traders should exercise all due diligence and common sense. As a good

practice, traders should provide opportunities for consumers to raise questions, and depending on the product types supply sufficient information through suitable means, e.g. by reference to product specifications and official websites.

Accordingly, what will constitute “material information” will depend on the context of the situation and the actual needs of the consumer. In *Office of Fair Trading v Purely Creative* [2011] EWHC 106 (Ch), Justice Briggs said:

“In my judgment the key to understanding this paragraph is the concept of “need”. The question is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision”.

Material information required by other laws

[13E.08] Material information also includes information that should be mandatorily provided in a commercial communication in accordance with the requirements of other provisions of Hong Kong Laws. It should be remembered that other laws may mandate that certain information must be supplied to a consumer before they make a transactional decision. In such situations, the information required under the other laws will constitute “material information” for the purposes of this s.13E and failure to supply that information will constitute a clear breach of the section.

For example, the Accreditation of Academic and Vocational Qualifications Ordinance (Cap.592) requires that advertisements promoting learning programs recognized under the qualifications framework have to contain, among other things, information on the relevant level of the qualifications framework under which the qualification obtainable is recognized and the relevant registration number.

Another example is that The Travel Agents Ordinance (Cap.218) provides that no person shall publish any advertisement referring to the provision of a travel service by any person required to be licensed under the Ordinance unless that advertisement relates to the provision of a travel service by a licensed travel agent and the licence number of that licensed travel agent is stated clearly in the advertisement. Such information is material for the purpose of determining whether the offence of misleading omissions is committed.

Failure to supply the information as required in accordance with the above Ordinances will be regarded as an omission of material information and likely constitute a breach of this provision.

Omission or hiding of material information

Omitting or hiding material information is also a misleading omission in contravention of this s.13E if as a result, it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise. [13E.09]

Professional diligence

The concept of “professional diligence” is also defined under sub-s.13E(5). [13E.10]

Professional diligence is an objective standard which may vary according to the context. However, poor current practice that is widespread in an industry or sector cannot be taken as an acceptable objective standard because this is not what a reasonable person would expect from a trader who is acting in accordance with honest market practice or good faith. Professional diligence requires traders to approach transactions professionally and fairly as judged by a reasonable person. A simple way of undertaking professional diligence would be to ask:

“...is the trader acting to a standard that a reasonable person would expect?”

For example, where a furniture store offers free delivery service, a reasonable person would expect that it covers most of the urban residential areas in Hong Kong. However, if the free delivery service is provided only where an address has lifts or the delivery schedule is fixed by the store, these arrangements depart from the requirements of professional diligence and should be disclosed to consumers in a clear and timely manner (such as clearly displaying a conspicuous notice near the cashier specifying the delivery policy and relevant charges, and drawing it to the attention of consumers before payment is made) to enable them to make informed transactional decisions.

Note that the requirements of professional diligence are to be applied only to the matters specified under sub-s.13E(4)(f) (i.e. arrangements for payment, delivery of goods and supply of service) when considering whether there are misleading omissions in a commercial practice that is an invitation to purchase.

Transactional decision test

For a commercial practice described as described above to amount to misleading omissions in contravention of this provision, the practice must cause, or is likely to cause, the average consumer (as defined in previous s.13D) to make a transactional decision that the consumer would not have made otherwise. In other words, the *effect or the likely effect* on the average consumer’s transactional decision is critical. [13E.11]

Section 2(1) of the Ordinance defines transactional decision as:

“...any decision made by a consumer, whether it is to act or to refrain from acting, concerning (a) whether, how or on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or (b) whether, how or on what terms to exercise a contractual right in relation to a product.”

For instance, a decision to purchase a product, a decision not to purchase a product, as well as a decision not to purchase a product and switch to purchase another product, is all transactional decisions. A decision to terminate a service in accordance with the relevant provisions in the service contract is also a transactional decision.

In essence, the transactional decision test would mean the following question:

“Would the average consumer make the same transactional decision if not because of the commercial practice of the trader?”

It is not necessary to prove that an individual consumer has actually made a different transactional decision as a result of a commercial practice and therefore suffers. It is sufficient if the commercial practice causes, or is likely to cause, the average consumer to make a transactional decision that he would not have made but for the commercial practice.

Causes or is likely to cause

[13E.12] The term “causes or is likely to cause” is a further key phrase in both this s.13E on misleading omissions and later s.13F on aggressive commercial practices and is the causation test by which those unfair trade practice will be assessed. The test is a “but for” type test, familiar to most practitioners.

In *Office of Fair Trading v Purely Creative* [2011] EWHC 106 (Ch) the court discussed this term as follows:

“...causes or is likely to cause” is equivalent to the English standard of the balance of probabilities. The phrase “to take a transactional decision he would not have taken otherwise” suggests a sine qua non test, namely, whether but for the relevant misleading action or omission of the trader, the average consumer would have made a different transactional decision from that which he did make. This may not mean that the misleading act or omission was the sole cause of the average consumer’s decision, but it appears to mean that those Regulations will not have been infringed if the court concludes that, but for the misleading act or omission, the average consumer would nonetheless have decided as he did...”

... I consider that the combined effect of all relevant misleading acts and omissions must first be ascertained, and then subjected to the test whether, taken in the aggregate, it would probably cause the average consumer to take a transactional decision which he would not otherwise have taken. Otherwise a communication which contained misleading acts and omissions, none of which would separately satisfy the causation test, may escape from classification as an infringement, even though (as may have been intended by the trader) their combined effect would satisfy the causation test”. (para 71 & 72)

13F. Aggressive commercial practices

(1) A trader who engages in relation to a consumer in a commercial practice that is aggressive commits an offence.

(2) A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances—

- (a) it significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and
- (b) it therefore causes or is likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise.

(3) In determining whether a commercial practice uses harassment, coercion or undue influence, account must be taken of—

- (a) its timing, location, nature or persistence;
- (b) the use of threatening or abusive language or behaviour;
- (c) the exploitation by the trader of any specific misfortune or circumstance, of which the trader is aware and which is of such gravity as to impair the consumer’s judgement, to influence the consumer’s decision with regard to the product;
- (d) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate the contract or to switch to another product or another trader; and
- (e) any threat to take any action which cannot legally be taken.

(4) In this section—
coercion (威迫) includes the use of physical force;
undue influence (不當影響) means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or

threatening to use physical force, in a way which significantly impairs the consumer's ability to make an informed decision.

COMMENTARY

Aggressive Commercial Practices

[13F.01] Section 13F deals with and prohibits those overly aggressive commercial practices employed by some traders to harass, coerce or force a consumer to make a purchase or enter into a commercial transaction which they otherwise would not have made. *For example*, a tour bus operator taking a group of tourists to a gem shop in a remote location and refusing to resume the tour until tourists purchase gems from the shop would likely constitute an aggressive commercial practice. This unfair conduct is aimed squarely at removing the tourists' freedom of choice in whether to purchase the gems or not and thus would fall foul of the aggressive commercial practices provisions. This provision is very similar to regulation 7 of the Unfair Commercial Practices Directive (UPCD).

Elements of an Aggressive Commercial Practice

[13F.02] Subsection 13F(2) sets out the elements which will constitute an aggressive commercial practice as follows:

- (2) "A commercial practice is aggressive if, in its factual context, taking into account all of its features and circumstances -
- (a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of *harassment, coercion or undue influence (emphasis added)*.

Key terms

[13F.03] The key terms highlighted above are the core concepts for understanding what constitutes an aggressive commercial practice with the "*removal of freedom of choice*" being pivotal. In short, if the consumer's freedom of choice in whether to make a transactional decision is impaired in some way by the trader's aggressive actions, then it is likely that the practice will be regarded as an unlawful aggressive commercial practice. Whilst harassment is not defined under the Ordinance (and would therefore, presumably have its ordinary dictionary meaning), both "coercion" and "undue influence" are specifically defined in later sub-s.13F(4).

Harassment

Generally speaking, harassment includes an infliction of physical and/or non-physical (including psychological) pressure. In the context of this section, it may cover a range of conduct in connection with the supply of goods or services, which includes, but is not limited to, applying repeated pressure to a consumer who is under no obligation to acquire the goods or services, repeated unwelcome approaches to a potential customer of goods or services, etc.

[13F.04]

Coercion

A commercial practice may involve coercion if the consumer is subjected to pressure and threat. Coercion is not limited to deliberate intimidation. Coercion is defined as: "*includes the use of physical force*". This leads to the interpretation that it *may or may not* involve the use of physical force.

[13F.05]

This is an unhelpful definition. However, the Customs and Excise Guidelines outline Customs approach to "*coercion*" as follows:

"...if the consumer is subjected to pressure and threat. Coercion is not limited to deliberate intimidation. It may or may not involve the use of physical force. An example is the use of personally abusive or obscene language that has the effect of humiliating a consumer or subjecting a consumer to fears over his own safety... and prejudicing his freedom of choice."

Accordingly, it appears that "coercion" will encompass a wide range of behaviours and that physical force is only one kind of coercive behavior. An example is the use of personally abusive or obscene language that has the effect of humiliating a consumer or subjecting a consumer to fears over his own safety or the safety of his next of kin and prejudicing his freedom of choice.

Undue Influence

Undue Influence is so defined at sub-s.13F(4) as:

[13F.06]

"...exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force in a way which significantly impairs the consumer's ability to make an informed decision".

An example of undue influence would be taking tourists to a remote shopping location as described above.

Note that offering some incentive to consumers, such as a free shuttle transfer to and from shopping centres, or the provision of some light refreshments

free in shopping centres might influence consumers but it might *not be* likely to constitute undue influence as the consumers' ability to make an informed transactional decision would not be impaired. But where a tour bus operator takes a group of tourists to a gem shop in a *remote location* and *refusing to resume the tour* until tourists purchase gems from the shop would likely constitute an aggressive commercial practice. This would certainly equate to undue influence.

In another instance, where a trader takes consumers to a resort for a health plan presentation which is situated at a distant location with no public transport available and after the presentation, the trader says he would arrange return transport only if consumers sign a contract to subscribe to a health plan, this could certainly amount to either coercion and/or undue influence

Another example is where a mechanic has a consumer's car at his garage and has done more work on the car than agreed. The mechanic refuses to return the car to the consumer until he is paid in full for the work. The mechanic did not check with the consumer before he went ahead with the extra work. As the mechanic has the car, he has power over the consumer's decision to pay for the unauthorized work. He has exploited his position of power, by demanding payment for doing work. As such, the mechanic could be liable for exercising undue influence on and/or coercion of the consumer.

Freedom of choice or conduct

- [13F.07] The concept of freedom of choice or conduct is not limited solely to decisions about whether to purchase a product or not. It applies to a wide range of transactional decisions. For example, coercion might cause consumers to purchase the product at a much higher price or on disadvantageous terms, or from one trader instead of another.

Factors which Indicate an "aggressive commercial practice"

- [13F.08] Subsection 13F(3) sets out a non-exhaustive list of factors which may indicate whether a trader is engaged in an aggressive commercial practice or not. The factors are as follows:
- (a) its timing, location, nature or persistence;
 - (b) the use of threatening or abusive language or behaviour;
 - (c) the exploitation by the trader of any specific misfortune or circumstance, of which the trader is aware and which is of such gravity as to impair the consumer's judgment, to influence the consumer's decision with regard to the product;
 - (d) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the

- contract, including rights to terminate the contract or to switch to another product or another trader; and
- (e) any threat to take any action which cannot legally be taken.

It is not necessary for all of these above factors to be present for a commercial practice to be aggressive. The court may consider any other relevant factors as it sees fit. In addition to the above factors, regard must always be taken to the factual context surrounding the transaction and all of its relevant features and circumstances. Once again, when assessing whether the trader's conduct constitutes an unfair commercial practice, the Court will look to all of the surrounding circumstances and not just those factors enumerated in sub-s.13F(3).

For examples of aggressive commercial practices under the corresponding UK regulations, see the cases of *R v Connors (Patricke)* [2012] EWCA Crim 2106 and *Price v Cheshire East Borough Council* [2012] EWHC 2927 (Admin). Both cases involved carrying out unnecessary building works and pressuring elderly complainants to undertake the work and then forcing them to immediately withdraw money from their bank accounts to pay for it.

As a good practice, traders are advised to stop promoting their goods or services when consumers have explicitly rejected the offer.

The most *common example of such aggressive behavior* involves the situation where a beautician has persuaded a consumer B to pay slimming treatment fees by several credit cards, claiming that payment by different credit cards would entitle her to more "fabulous offers". B gave the beautician three credit cards which were then held in custody by the cashier. Twenty minutes later, when the slimming treatment was still in progress, the manageress of the beauty salon came into the treatment room and asked B if she was delighted with the treatment. B was embarrassed by the manageress' abrupt move as her upper body was barely covered with body cream and ointment. The manageress and the beautician then kept promoting other slimming and beauty packages to B for more than 30 times during the two hour treatment until B finally agreed to purchase one. B later changed her mind and asked for the cancellation of the transactions and return of her credit cards, but was denied unless she signed the agreements. Both the manageress and the beautician may be liable for using harassment and undue influence.

13G. Bait advertising

- (1) A trader who engages in relation to a consumer in a commercial practice that constitutes bait advertising commits an offence.

(2) Subject to subsection (3), advertising by a trader of products for supply at a specified price is bait advertising if there are no reasonable grounds for believing that the trader will be able to offer for supply those products at that price, or the trader fails to offer those products for supply at that price, for a period that is, and in quantities that are, reasonable, having regard to—

- (a) the nature of the market in which the trader carries on business; and
- (b) the nature of the advertisement.

(3) Advertising by a trader of products for supply at a specified price is not bait advertising if—

- (a) the advertisement states clearly the period for which, or the quantities in which, the products are offered for supply at that price; and
- (b) the trader offers those products for supply at that price for that period or in those quantities.

COMMENTARY

Bait advertising

[13G.01] Section 13G deals with the practice of “*bait advertising*.”

In summary, the provision aims to prevent traders from offering goods or services to consumers at unrealistically cheap prices when the trader has no reasonable grounds for believing that it will be able to supply the goods/services at the advertised price. Likewise, a commercial practice will be regarded as *bait advertising* where there are some goods available at the unrealistic price but only an unreasonably small amount of the advertised goods are available. The provision is intended to address a relatively common practice in Hong Kong (and elsewhere) where perhaps only one or two items are available at the extremely cheap price but these goods have been offered to “lure” the consumer into the shop, hopefully to purchase other, presumably more expensive, items.

The prohibition seeks to forbid traders from enticing consumers by advertising goods or services at an exceedingly attractive price but making them available for sale only for an unreasonably short period and/or in unreasonably small quantities. In short, the advertised product is the bait to attract consumers to come forward, but when arriving at the traders’ premises or visiting the traders’ websites intending to buy the advertised product (the bait), consumers only find out that the advertised product is no longer available (or perhaps has never been available). They may end up buying something that

they might not have purchased if not for having been attracted by the bait in the first place.

A trader may commit an offence if he does not supply the advertised goods or services in reasonable quantities for a reasonable period. Whether the period and the quantities are reasonable is determined in the light of the nature of the market in which the trader carries on business and also the nature of the advertisement.

Based on Australian Provision

This s.13G is extensively modeled on s.35 of the Australian Consumer Law. Note however, that there are important differences between the Australian and Hong Kong provisions, particularly in sub-s.3G(2) as it relates to the “grounds of belief” held by the trader in question. [13G.02]

In the Australian provision, the trader must not advertise goods or services if:

- “(a) there are reasonable grounds for believing that the person will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable ...”

In contrast, the Hong Kong provision states that the trader will have committed bait advertising if:

- “...there are no reasonable grounds for believing that the trader will be able to offer for supply those products at that price”.

Explaining the intent behind the apparent difference, the Administration has stated that:

- “...it is not our intention to enable the prosecution of a trader on the basis of only one reasonable ground for believing that he will not be able to supply... as the Australian formulation appears to suggest” (See para 15.2 Administrations response).

The slight differences in formulation of s.13G and the model Australian provision suggest that some care must be taken when relying upon Australian cases in this area.

Definition

Bait advertising is not defined in s.2 but rather under sub-s.13G(2) which describes what would be regarded as “bait advertising” and later sub-s.13G(3) describes what falls outside the ambit of bait advertising. Subsections 13G(2) and 13G(3) provides: [13G.03]

- “(2) Subject to subsection (3), advertising by a trader of products for supply at a specified price is bait advertising if there are no reasonable grounds for believing that the trader will be able to offer for supply those

products at that price, or the trader fails to offer those products for supply at that price, for a period that is, and in quantities that are, reasonable, having regard to—

- (a) the nature of the market in which the trader carries on business; and
 - (b) the nature of the advertisement.
- (3) Advertising by a trader of products for supply at a specified price is not bait advertising if—
- (a) the advertisement states clearly the period for which, or the quantities in which, the products are offered for supply at that price; and
 - (b) the trader offers those products for supply at that price for that period or in those quantities.”

In order to avoid contravening this provision, the trader must have “reasonable grounds” for believing that it has sufficient stocks of the advertised product and the advertised price. The reasonableness of that belief must also be assessed against both the nature of the market and the nature of the advertisement. There have yet to be any reported cases on bait advertising in Hong Kong, but the Customs and Excise Department suggests that in assessing the nature of the market, both demand and supply side of the market must be considered. See the Customs and Excise Guidelines, Part B at para 5.4. For example, consideration should not just be made of the stocks of the relevant product held by the trader but also consideration of whether there had been an unexpected surge in consumer demand, due to some reason beyond the control of the trader.

Nature of the market

- [13G.04] In examining the nature of the market, *both the supply and demand sides* in relation to the subject goods or services should be considered. The *demand-side factors* which are generally taken into account include, but are not limited to: (i) the typical size of consumer demand for the same or similar goods or services that have been offered for sale by the same trader and/or traders in the same market; (ii) demand elasticity at different prices; and (iii) the extent of reach of the advertisement. Factors which are not reasonably foreseeable by traders and may have a substantial impact on the size of demand, for example a sudden drop in temperature prompting a great number of consumers rushing for down jackets, are taken into account.

In relation to the *supply side*, it is recognized that certain products are inherently limited in the quantities that could be made available to meet a sudden upsurge in market demand, for example perishables and other fast moving consumer

goods, the production of which is subject to capacity constraints. Further, constraints in replenishing supply that are beyond the traders’ control are also considered.

Before putting up an advertisement or initiating a marketing promotion, traders should review their previous sales trends and promotion records and assess if the size of the stock they have in hand is sufficient to meet a reasonably projected consumer demand. The inclusion of a hotline number or website address which allows consumers to check the most updated information about the availability of the products is encouraged. If the actual demand is greater than that originally projected, traders should, as a good practice, stop or withdraw the relevant advertisement, cease the related promotional activities and notify consumers as soon as possible so that no more surplus demand will be generated.

Note that the traders’ use of the disclaimer “*while stocks last*” or “*subject to product availability*” will *unlikely* to be sufficient to protect traders from committing the offence of bait advertising if they were not: (i) able to supply the products at the specified price for a reasonable time period; and (ii) in quantities that are reasonable, in the first instance.

Nature of the advertisement

Likewise, the advertisement itself must also be assessed. Factors to be assessed include the extent and geographical reach of the advertisement. An advertisement only displayed inside a store will of course have quite a different impact on consumers and their behaviour than one which is prominently displayed on all buses and trams in the territory for a long period of time.

[13G.05]

As previously examined above, the size of the consumer demand for the advertised goods or services is generally subject to the extent of the reach of the advertisement in question. The size of the readership that is reachable by a print advertisement on the front page of a widely circulated daily newspaper is naturally larger than that on an inside page of a local weekly. The reach of a TV commercial is expected to be farther than a bill posted on the front of a local store.

Situation where advertising is not considered as bait advertising

This provision is not intended to be an obstacle to traders in their legitimate promotional activities, including those activities intended to create a “queuing effect”, as long as information on the period and the quantities in which the advertised products are available (even if the period and quantities are grossly unreasonable, for example, 2 handbags sold at 50% discount or handbags sold at 50% discount for the first hour of business) is provided to consumers such

[13G.06]

that they can make an informed decision as to whether they would like to come early and queue up.

As such, sub-s.13G(3) states that if an advertisement states clearly the period or the quantities in which the products are offered for supply at the specific price and the trader offers those products for supply accordingly, the advertisement is not bait advertising. But it must be emphasized that *a mere absence* of an indication in an advertisement of the period and the quantities in which the advertised product is available does not in itself amount to an offence of bait advertising. As long as the price, terms of the sale, and duration is reasonable conveyed to the consumer, the trader may not be liable for any such omission.

Disclaimers

- [13G.07] Customs and Excise suggest that the use of typical disclaimers such as “*while stocks last*” or “*subject to product availability*” will be unlikely to protect traders from prosecution under the Bait Advertising provisions if the trader did not in fact have reasonable grounds for believing that they had sufficient stocks to meet likely demand at the advertised price. See the Customs and Excise Guidelines, Part B at para 5.6.

Not intended to stop all promotional activities

- [13G.08] The Customs and Excise Department provides a useful guideline where it states:

“There is no intention of fettering traders in their legitimate promotional activities, including activities intended to create a “queuing effect”, as long as information on the period and the quantities in which the advertised products are available...is provided to customers so that they can make an informed decision” (at para 5.8).

Thus traders may be able to avoid the strictures of the provision if they provide adequate information in their advertisements in relation to the quantities of products available at what price.

Defences as provided in s.26A of the Ordinance

- [13G.09] As with all of the unfair trading provisions, there are specific defences relating to mistake, etc found in later s.26 of the Ordinance. However, there is an additional specific defence to bait advertising found in s.26A of the Ordinance.

In short, it is a defence to a charge of bait advertising if sufficient evidence can be adduced to show that either the trader himself or a third party had been arranged to supply a sufficient quantity of the goods in question or the trader offered to supply equivalent products. A trader relying on this defence must

show evidence to support this contention and the contrary position “is not proved by the prosecution beyond reasonable doubt”. Of course, what will constitute an “equivalent product” must be assessed on a case by case basis but it is suggested that only true equivalents in terms of both the characteristics of the original goods in question and equivalent in terms of price would be regarded as a true equivalent for the purposes of this defence. Where a purported equivalent lacks one or either of the characteristics/price aspects, then it may be difficult for the Court to hold that the item in question is a true equivalent which would support a defence under that s.26A.

13H. Bait and switch

- (1) A trader who engages in relation to a consumer in a commercial practice that constitutes a bait and switch commits an offence.
- (2) The making by a trader of an invitation to purchase a product at a specified price is a bait and switch if, having made the invitation, the trader then, with the intention of promoting a different product—
 - (a) refuses to show or demonstrate the product to consumers;
 - (b) refuses to take orders for the product or deliver it within a reasonable time; or
 - (c) shows or demonstrates a defective sample of the product.

COMMENTARY

Bait and Switch

The bait and switch provision herein is a straightforward initiative which seeks to prevent a trader from advertising one product with the chief intent of inducing the consumer to purchase a different product. A trader will be guilty of committing a bait and switch if:

[13H.01]

“...having made the invitation, the trader then, with the intention of promoting a different product—

- (a) refuses to show or demonstrate the product to consumers;
- (b) refuses to take orders for the product or deliver it within a reasonable time; or
- (c) shows or demonstrates a defective sample of the product.”

In simple terms, bait and switch is a sales tactic that tricks consumers into buying something other than an advertised item. First, customers are “*baited*” by merchants advertising products or services at a low price, but when customers visit the store, they discover that the advertised goods either are not

available or are not as good as expected, or the customers are pressured by sales people to consider similar, but higher-priced, items (“switching”).

The intention of the bait-and-switch is to encourage purchases of substituted goods, making consumers satisfied with the available stock offered, as an alternative to a disappointment or inconvenience of acquiring no goods (or bait) at all, and reckoning on a seemingly partial recovery of sunk costs expended trying to obtain the bait. It suggests that the seller will not show the original product or service advertised but instead will demonstrate a more expensive product or a similar product with a higher margin.

Note that this provision does not seek to prohibit a trader from promoting products *other than* the product which is the subject of the invitation to purchase. The section prohibits a trader from taking any one of the three courses of conduct referred to in sub-s.13H(2) above when he has the *intention of promoting a different product* after making an invitation to purchase a product at a specified price. In order to establish an offence under this section, it is necessary to prove the deceptive *intention* of the trader.

13I. Wrongly accepting payment

(1) A trader who engages in relation to a consumer in a commercial practice that constitutes wrongly accepting payment for a product commits an offence.

(2) A trader wrongly accepts payment for a product if the trader accepts payment or other consideration for the product and at the time of that acceptance—

- (a) the trader intends not to supply the product;
- (b) the trader intends to supply a product that is materially different from the product in respect of which the payment or other consideration is accepted; or
- (c) there are no reasonable grounds for believing that the trader will be able to supply the product—
 - (i) within the period specified by the trader at or before the time at which the payment or other consideration is accepted; or
 - (ii) if no period is specified at or before that time, within a reasonable period.

COMMENTARY

Wrongly Accepting Payment

The last of the unfair trade practice deals with “wrongly accepting payment” and is found in this section.

[13I.01]

It is a short provision which states that if a trader:

“...who engages in relation to a consumer in a commercial practice that constitutes wrongly accepting payment for a product commits an offence.”

The justification for this provision concerns the fact that it is common for consumers to make pre-payments in the purchase of goods or services to be delivered at a later date. To boost business, some traders offer discounts for pre-payments, especially in bulk purchases. Traders are advised not to accept pre-payments from consumers if they are uncertain whether the pertinent goods or services can be delivered to consumers at the agreed time or, if no time is agreed, within a reasonable time.

Under sub-s.13I(1), a trader who engages in relation to a consumer a commercial practice that constitutes wrongly accepting payment for a product commits an offence. Determination of what constitutes “wrongly accepting payment” is made by reference to sub-s.13I(2) which relevantly provides:

(2) A trader wrongly accepts payment for a product if the trader accepts payment/or other consideration for the product and at the time of that acceptance—

- (a) the trader intends not to supply the product;
- (b) the trader intends to supply a product that is materially different from the product in respect of which the payment or other consideration is accepted; or
- (c) there are no reasonable grounds for believing that the trader will be able to supply the product-
 - (i) within the period specified by the trader at or before the time at which the payment or other consideration is accepted; or
 - (ii) if no period is specified at or before that time, within a reasonable period.

In this regard, pursuant to sub-ss.13I(2)(a) and 13I(2)(b), a trader is prohibited from accepting payment in whole or in part and by whatever means for a product if at the time of accepting payment, the trader intends not to supply or intends to supply a materially different product. This provision is aimed at traders who accept pre-payments for goods or services in circumstances