

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

Views of the Hong Kong Bar Association

1. The Commerce and Economic Development Bureau (“the Bureau”) consults the public on proposed legislative amendments to enhance protection for consumers against unfair trade practices. The Hong Kong Bar Association (“HKBA”) submits its views.
2. The policy objective of the proposed legislation is stated to be that of the enhancing protection for consumers against unfair trade practices and at the same time, ensuring a level playing field for business.
3. Chapter one of the Consultation Paper stated that an effective consumer protection regime is one where both businesses and consumers can trade fairly with confidence. Consumers should be equipped so that they can make informed choices according to their own free will. At the same time, regulatory requirements on business should be clear and kept to the minimum so as not to affect operational efficiency or fetter the legitimate use of creativity in marketing activities.
4. Chapter two of the Consultation Paper sets out proposals to amend the Trade Description Ordinance (Cap 362) to prohibit a number of “commonly seen unfair trade practices”, namely false trade description in respect of services made in consumer transactions, misleading omission in consumer transactions, aggressive practices in consumer transactions, “bait advertising”, “bait-and-switch”, and accepting payment or other consideration in consumer transactions with the intention at the time of acceptance not to supply the contracted products or to supply materially different products.
5. Chapter three of the Consultation Paper proposes that the Customs and Excise Department will be tasked to enforce the prohibitions proposed in Chapter two, with concurrent enforcement powers to be conferred on the Telecommunications Authority and the Broadcasting Authority in respect of

the telecommunications and broadcasting sectors. These agencies, it is proposed, will enforce not only the criminal offences but also a compliance-based civil mechanism. There is also proposed an enhanced role of the Consumer Council.

6. Chapter four of the Consultation Paper is concerned with sector-specific regimes. One of the proposals is that professional practices regulated by regulatory bodies which are established by statute listed in Annex G need not be brought under the ambit of the expanded Trade Description Ordinance. Annex G lists, among others, the Legal Practitioners Ordinance (Cap 159).
7. Chapter five of the Consultation Paper proposes a statutory right of redress by aggrieved consumers to recover loss or damage by private action in the courts for contravention of the fair trade provisions of the Trade Description Ordinance.
8. Chapter six of the Consultation Paper is concerned with introduction of cooling-off periods in respect of timeshare rights and long-term holiday products contracts and consumer transactions concluded during unsolicited visits to consumers' homes and places of work.

Chapter Two

9. The Consultation Paper provides outlines of proposed legislative amendments and in this respect is unsatisfactory. References made in Annexes A and B of the Consultation Paper are to legislative schemes in both the United Kingdom (which followed European Union directive) and in Australia, which are unrelated and separately constructed following the policy choices made by the respective governments and are not particularly helpful in understanding the Bureau's considerations and policy options. The public have been left to guess on the definition of important elements of proposed criminal offences and civil contraventions.
10. With respect to the proposal in paragraph 2.3 of the Consultation Paper to extend the coverage of the Trade Description Ordinance to include trade

descriptions in respect of services made in consumer transactions, the HKBA notes that while there is a proposed definition of “services”, that definition is only an incomplete definition; terms such as “consumer transaction”, “consumer contract”, and “contract of employment” have been left undefined. In the opinion of the HKBA, the public should be in a position to gauge the proposed extended coverage of the Ordinance by reference to these defined terms.

11. With respect to the proposal in paragraph 2.8 of the Consultation Paper to create an offence of misleading omission in consumer transaction, the HKBA notes again that “consumer transaction” has not been defined. More importantly, the HKBA finds that while the proposed offence may have to be in general terms, there are aspects in the proposal that either are imprecise or leave much to the discretion of the enforcement agency, so as to fall foul of the constitutional requirement of legal certainty under the Basic Law of the HKSAR. These aspects include the apparent absence of a definition of “the average consumer”, an open-ended process for deciding on whether a practice is a “misleading omission” and the use of administratively formulated guidelines as a tool of enforcement. Such features are also unsatisfactory in view of the common law presumption that mens rea is required before a person can be held guilty of a criminal offence,¹ which would apply in relation to this offence, since the Consultation Paper does not propose this offence to be one of strict liability.

12. With respect to the proposal in paragraph 2.13 of the Consultation Paper to create a strict liability offence under the Trade Description Ordinance to prohibit the use of aggressive practices in consumer transactions, the HKBA has similar concerns, which are aggravated by the proposed creation of a strict

¹ *Gammon (Hong Kong) Ltd v AG of Hong Kong* [1985] 1 AC 1, HL, applied in *Hin Lin Yee v HKSAR* [2010] 3 HKC 403, CFA. Even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability is effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

liability offence with likely prescribed penalties to be the substantial maximum penalties in s 18(1) of the Ordinance (namely on conviction on indictment, to a fine of \$500,000 and imprisonment for 5 years and on summary conviction, to a fine at level 6 and to imprisonment for 2 years) as a limitation to the presumption of innocence guaranteed under the Basic Law of the HKSAR.

13. The Bureau should therefore explain why a strict liability offence with such substantial penalties is being proposed, bearing in mind that the Australian reference offences carry a maximum penalty of 10,000 penalty units and no term of imprisonment. The HKBA finds again that “consumer transaction” has not been defined. The HKBA also finds that only a broad outline of “aggressive practice” is put forward, using expressions not amenable to precise definition such as “significantly impairs the consumer’s freedom of choice”. The HKBA further finds that the intention of the Bureau might be not to ensure precision (if not to promote administrative discretion) in enforcement and prosecution of offences, since it proposes to include in the Ordinance a “*non-exhaustive* list of facts which should be taken into account when determining whether a practice uses harassment, coercion or undue influence”, believing that such an approach “will provide the necessary flexibility in dealing with different aggressive tactics and, at the same time, *give useful guidance to stakeholders on the considerations to be taken into account in the course of enforcement*”.

14. With respect to the proposal in paragraphs 2.16 and 2.17 of the Consultation Paper to create the offences of “bait advertising” and “bait-and-switch”, the HKBA considers firstly, that the Bureau should state its proposed maximum penalties for “bait advertising” and then explain why a strict liability offence is being proposed with those maximum penalties. Secondly, the HKBA finds again that “consumer transaction” has not been defined. Thirdly, the HKBA finds ambiguous expressions in the proposal for the offence of “bait advertising”, including “nature of the market” and “nature of the advertisement”. Fourthly, the HKBA finds the terms of the proposal for the offence of “bait-and-switch” inherently confusing since it states in the first

sentence that the prohibited intention is one of “promoting a *different* product” and then in the second sentence that the enforcement agency is required to prove the existence of an intention of “promoting a *substitute*”. Fifthly, the HKBA is concerned that enforcement of the “bait-and-switch” offence is liable to transform misunderstandings or bad service attitude into government oppression; the list of prohibited tactics should accordingly be exhaustive and precisely defined.

15. With respect to the proposal in paragraph 2.20 of the Consultation Paper to create an offence to prohibit in consumer transactions, the practice of accepting payment or other consideration with the intention, at the time of acceptance, not to supply the contracted products or to supply materially different products, the HKBA finds the justifications put forward in paragraph 2.19 for the creation of a new criminal strict liability offence with substantial penalties rather flimsy. The proposal itself additionally is unclear about the terms of the proposed strict liability offence(s); the HKBA remains baffled as to whether it is proposed that the prosecution should be required to prove intention, at the time of acceptance, not to supply the contracted products or to supply materially different products; or that the prosecution should be required to prove absence of reasonable grounds for believing, at the time of acceptance, that he will be able to supply the contracted products within the period specified in the contract; or both. Again, the HKBA finds that “consumer transaction” has not been defined.

Chapter Three

16. While the HKBA does not have particular comments on the proposal to have the Customs and Excise Department be tasked primarily with enforcement of the amended Trade Description Ordinance, the HKBA has concerns over the proposals to follow of having the Customs and Excise Department to take civil measures under a compliance-based mechanism and to demand inspection of books and documents during spot checks. In relation to having the Customs and Excise Department to take civil measures, including making applications before the courts, the HKBA is concerned about the oversight the Department

of Justice can have over the Customs and Excise Department in the conduct of litigation.

17. The HKBA is concerned that the proffered merits in paragraph 3.6 of the Consultation Paper of the compliance-based mechanism may not hold true. Insufficient details of the compliance-based mechanism to be proposed, including evidential threshold, modality of application (such as whether the application is to be *ex parte* or *inter partes*), timetable and how consumer complaints associated with a contravention may be resolved, have been provided for the public to make informed comments. The Bureau only proposes in paragraph 3.7 that “suitable amendments” will be made to the Trade Description Ordinance. The HKBA is unable to support the proposal to introduce a compliance-based mechanism.
18. Paragraph 3.13 of the Consultation Paper seems to suggest that the Customs and Excise Department should be given the power to demand production of books and documents for inspection during spot checks. This suggested power, without any threshold of suspicion or belief, is intrusive. The HKBA is unable to support this proposal.

Chapter Four

19. The HKBA supports the idea behind the proposal in paragraph 4.10 of the Consultation Paper that “professional practices regulated by regulatory bodies which are established by statute need not be brought under the ambit of the expanded TDO” but would like to point out that the terms of the proposal fail to take account that both the Hong Kong Bar Association and the Law Society of Hong Kong are not bodies established by a statute; they are bodies of a self-regulating profession vested with powers of regulation by a statute. The HKBA considers that professional practices regulated by regulatory bodies which are established, *recognized or backed-up* by statute need not be brought under the ambit of the amended Trade Description Ordinance.
20. The HKBA adds that the Code of Conduct of the Bar of the Hong Kong Special Administrative Region, enforced by the HKBA and the Barristers

Disciplinary Tribunal, covers both the aspects of practice promotion and legal service provision of barristers. Transgressions, whether occurred in the course of or outside practice, that fall below the standards of professionalism expected of barristers are punished as professional misconduct.

Chapter Five

21. The HKBA considers that there is no justification to establish a Consumer Tribunal and if it is felt necessary to introduce a private right of action under the Trade Description Ordinance, the venue of enforcement of the right of action is the ordinary courts, including the Small Claims Tribunal.

Chapter Six

22. The HKBA supports the Bureau's considerations that there are no sufficient grounds for imposing cooling-off periods across the board on the pre-payment mode of transactions and that there are merits in imposing mandatory cooling-off periods for the two types of transactions set out in paragraph 6.7 of the Consultation Paper. The HKBA however cautions that the issues under consultation in paragraph 6.10 do require the enactment of an elaborate legislative scheme.

Dated 8th October 2010.

Hong Kong Bar Association