

Submission on the Consultation Paper on Legislation to Enhance Protection for Consumers Against Unfair Trade Practices

Introduction

1. The Consumer Council welcomes the opportunity to provide feedback on the legislative proposals set out in the above Consultation Paper.
2. Unfair trade practices are always a key concern for the Council. The Council welcomes and appreciates the Government's initiative in reviewing consumer protection legislation and policy and consulting the public on safeguarding consumers' rights against unfair trade practices.
3. The Council notes that the recommendations in the Consultation Paper have to a large extent responded to the Council's Report entitled "Fairness in the Marketplace for Consumers and Business" published in 2008 ("the Council's Report"). Nevertheless, it is also noted that the Council's proposal of enacting a comprehensive trade practices statute with both general and specific prohibitions has not been adopted.

Framework and direction of the proposed legal reform

4. The Council understands that it takes time to enact a new statute, and thus, to extend the scope of the Trade Description Ordinance ("TDO") and to give concurrent jurisdiction to Telecommunications Authority ("TA") and Broadcasting Authority ("BA") to enforce the proposed trade practices provisions would be a quick and expedient approach to combat those unfair trade practices that have aroused grave concerns.
5. Given the immediate need to improve the position of vulnerable consumers in the marketplace, such as tourists and the aged, the Council hopes that the proposed amendments to the TDO, as imminent measures against the prevalent unfair trade practices, will be introduced as early as possible to deter unfair trade practices.

Comprehensive statutory regime

6. That said, the Council urges the Government to consider further developing the proposed legal reform with a view to establishing in the long run a comprehensive statutory regime for protection of consumers against

unfair trade practices. The Council believes that such a statutory regime will be more effective in protecting consumers against unfair trade practices which are multifarious and fast-changing in such a vibrant and creative economy as Hong Kong.

First-hand property transactions

7. The Council notes that Government has introduced enhancement measures to regulate first-hand private residential property transactions in June 2010. However, the Council opines that such measures serve to enhance the transparency and clarity of information on those properties and transactions. They were not devised to address the unfair trade practices in the sale of residential properties. While the Council holds the view that consumer transactions of real property should be regulated in the long run by a comprehensive trade practices statute, it urges the Government to consider enacting a new piece of legislation in the interval specifically regulating unfair trade practices occur in those transactions. While preparing this submission, the Council is pleased to note that the Government has taken further initiative, as announced in the Policy Address, in setting up a steering committee to discuss specific issues on regulating the sale of first-hand residential properties by legislation and put forward practicable recommendations within one year, including the use of saleable floor area as the only basis for listing the price per square foot to avoid misleading buyers and eradicate the problem of “shrunken flats”.

Unfair terms

8. Adoption of unfair terms in standard consumer contracts is a prevalent unfair trade practice. While consumers should be fairly treated in the process leading to contract, it is equally vital that the substantive rights and obligations under the contract are fairly distributed. Therefore, the Council calls for legislation regulating unfair terms in standard consumer contracts which may be modeled upon the *UK Unfair Terms in Consumer Contracts Regulations 1999*.

Excluded sectors

9. It is noted that the proposed exclusion of financial sectors and professional bodies which have already had established statutory or regulatory frameworks is in sync with the Council's recommendation made in its Report. It is advisable that a review on the existing statutes and/or codes of practice

regulating the excluded sectors would be conducted to ensure that they are in line with the proposed trade practices provisions; and, if necessary, amendments to them should be made accordingly. Consumers of those sectors should be assured that they will be given the protection equivalent to that afforded by the proposed provisions.

Enforcement and improvement of consumer access to redress

Private right to sue

10. The Council supports the recommendation of the Consultation Paper that consumers should be given a private right to sue for contravention of the proposed trade practices provisions under the TDO. We concur with the Report that the creation of such a right “not only facilitates aggrieved consumers in obtaining restorative justice but also encourage compliance by businesses”.

11. Presently, consumers aggrieved by the practices prohibited by the existing TDO provisions may be inhibited from taking legal action by the lack of an appropriate cause of action. The private right to sue if introduced will create a new cause of action with which aggrieved consumers would be emboldened to seek redress through litigation. It would tend to increase significantly the number of consumer lawsuits seeking public legal assistance, which may be filed either individually or in group. Distinguished from the Legal Aid, the Consumer Legal Action Fund has no means test and is specifically mandated to provide legal assistance to the consumers aggrieved en masse and individual consumers whose claims involved significant consumer interest. Aggrieved consumers who do not satisfy the means test of the Legal Aid may turn to the Fund. The obvious possibility is the rise of number of applications for the Fund and a surge in its caseload. The strain on the Fund both in administrative and financial terms could only be eased off by the support of the Government with adequate resources.

12. Apart from enhancing the availability of the Fund, the enforcement of this private right to sue will become more attainable by the expansion of the scope of the Supplementary Legal Aid Scheme and the establishment of a Consumer Tribunal as proposed in the Council's Report. The Council believes that these recommended measures will provide effective means for consumer protection and deserves serious consideration by the Government.

Enforcement agency

13. The Council agrees to the Consultation Paper's proposal that the Customs & Excise should be the enforcement agency of the proposed trade practices provisions under the TDO and concurrent jurisdiction should be given to the TA and the BA to enforce the said proposed provisions. These authorities with their expertise and experience in respective areas of work will be in a better position to enforce the proposed provisions.

"Compliance-based mechanism"

14. The Council pledges support for the proposed "compliance-based mechanism", which is in line with the "measured approach" proposed in the Council's Report. Such a mechanism would allow flexibility in using the enforcement tools or sanction options so that the matter may be resolved expeditiously and pragmatically in accordance with the nature and gravity of the misconduct. The Council further suggested that this mechanism could be reinforced by adding more appropriate enforcement tools and/or sanction options, such as court enforceable cease and comply notice, financial penalty and court declaration in case of breach of a cease and comply notice or an undertaking.

Council's part in "compliance-based mechanism"

15. It is the Council's pleasure to contribute to the task of tackling unfair trade practice by playing an active role in the mediation as part of the proposed "compliance-based mechanism" and believes that the proposed referral mechanism will ensure a high operational efficiency of that mechanism.

Cooling-off arrangements

16. The Council welcomes the Government's proposal to impose mandatory cooling-off periods for timeshare rights and long-term holiday product contracts and consumer transactions concluded during unsolicited visits to

consumers' homes and places of work.

17. Nevertheless, the Council considers that the narrow scope of application of mandatory cooling-off arrangements limited only to the said two specific areas will fail to meet the expectation of the general public. The Council strongly calls for the extension of this statutory scheme to contracts with prepaid arrangements, such as contracts for beauty care, slimming, fitness and yoga, where

- i) the time between the commencement of negotiation for the contracts and when the contracts are entered into is limited, so consumers have no sufficient time to reflect on the goods or services they purchase; and
- ii) it is not an uncommon complaint that the consumer was induced or pressurized to make short-sighted or emotion-based decision which tied the consumer to a commitment that the consumer does not want or cannot afford. As consumer may cancel the contract for any reason during the cooling-off period, it is likely that cooling-off period will encourage traders to restrain themselves from using unfair trade practice.

18. The Council takes note of the divergent views on the *operational features of cooling-off arrangements* as mentioned in the Consultation Paper. There may not be a straitjacket rule for the design of a cooling-off arrangement, which would depend on the circumstances of the transaction, such as the nature of the goods or services concerned. Nevertheless, the Council would like to draw the attention of the Government to the following *basic principles* when designing the features of cooling-off arrangements for a particular industry:

- i) The timeframe of a cooling-off period would be adequate for a consumer to collect new information or to consider his/her genuine need and financial ability while not imposing unreasonable costs and uncertainty on the business;
- ii) The rights and obligations regarding the cooling-off period should be stated clearly in the contract and brought home to the consumers before they enter into the contract;
- iii) Clear and sufficient information about the product should be given to

consumers so that they can consider their purchase thoroughly during the cooling-off period;

iv) The cancellation process must *not be so onerous* that it discourages consumers from exercising their right to cancel during the cooling-off period;

v) The procedure and requirements for exercising the cancellation right should be clearly stated in the contract and explained to the consumers before they enter into the contract;

vi) The trader is entitled only to compensation *reasonable in all the circumstances* when the goods in the possession of the consumer are damaged or the service or part of it has been used during the cooling-off period;

vii) Any measure that might be abused and defeat the purpose of cooling-off period must be avoided. For instance, if waiver of the cooling-off rights is provided for in the contract, there will be a significant risk that a consumer's waiver may be procured unfairly by the trader with tactics such as undue pressure and deliberate omission to draw the consumer's attention to the waiver.

viii) Consumers should have their payments made for the transaction returned and any credit arrangements made for the payments cancelled *as soon as practicable* after they have exercised their right of cancellation.

Conclusion

19. The Council reiterates that a piece of comprehensive trade practices legislation containing both catch-all and specific provisions would be more effective than remedial statutory amendments. Such an all-embracing statute would be more responsive to the unfair trade practices which are growing both in range and complexity. It is the hope of the Council that the legal reform proposed by the Consultation Paper will signify the first, but not the last, stride towards the establishment of a comprehensive legal framework for consumer protection against unfair trade practices.

October 2010
Consumer Council