

LEGISLATIVE COUNCIL BRIEF

Trade Descriptions Ordinance
(Chapter 362)

TRADE DESCRIPTIONS (UNFAIR TRADE PRACTICES) (AMENDMENT) BILL 2012

INTRODUCTION

At the meeting of the Executive Council on 14 February 2012, the Council ADVISED and the Chief Executive ORDERED that the Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012 (“the Bill”), at **Annex A**, should be introduced into the Legislative Council.

JUSTIFICATIONS

2. Our current legislation only provides limited protection for consumers against unfair trade practices. We need to enhance the scope of consumer protection.

3. The Trade Descriptions Ordinance (Chapter 362) (“the Ordinance”) presently prohibits only false trade descriptions of goods. There have been strong public demands for extending the application of the Ordinance to prohibit other types of unfair trade practices against consumers. In response to these concerns, we published a paper in July 2010 to consult the public on a package of proposed legislative amendments to the Ordinance which, *inter alia*, sought to expand the scope of prohibited unfair trade practices and to enhance the enforcement regime. There were wide public support for these legislative proposals. We reaffirmed them in the consultation report we published in January 2011.

I. Practices to be Prohibited

False Trade Descriptions of Services

4. False descriptions or misrepresentation undermine consumers’ ability to

make informed choices and are therefore unacceptable. At present, the Ordinance prohibits anyone from applying a false or a materially misleading indication of any of the specified aspects to any goods in the course of trade or business. Offenders are liable to a maximum fine of \$500,000 and imprisonment for five years. However, the Ordinance does not apply to services. There is a need to plug this loophole given Hong Kong's status as a service economy. We propose to extend the application of the Ordinance to prohibit traders from applying false trade descriptions to services for supply to consumers. The presumption of *mens rea* is displaced by the terms of the proposed offence, as in the present case of false trade descriptions to goods.

5. Besides, the current definition of “trade description” in respect of goods is too restrictive, in the sense that pertinent descriptions (such as price indications) presently not listed in the Ordinance are not subject to its regulation. We propose to expand the definition of “trade description” in relation to goods to the effect that false indications of **any** matters with respect to goods will be prohibited. We also propose to define trade descriptions in relation to services in the same manner.

Misleading Omissions

6. The interests of consumers may be hampered if they cannot get hold of critical pieces of information, either because of outright omissions by businesses or unclear presentation which has the effect of misleading consumers. Businesses should have the primary responsibility of presenting accurate, truthful and pertinent information in respect of their products to consumers. We propose to amend the Ordinance to prohibit “misleading omissions” by creating an offence in respect of which the presumption of *mens rea* is displaced, defined, as in the case of the United Kingdom, along the following lines:

- (a) a commercial practice¹ is considered as a “misleading omission” if, in its factual context, it omits or hides “material information”, provides material information in an unclear or ambiguous manner, or it fails to identify its commercial intent² (unless this is apparent) **and** as a result, it causes or is likely to cause the average consumer to take a

¹ “Commercial practice” 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.

² Such as advertorials and the posting of comments using pseudonyms by traders or their agents on online discussion fora in the bid to promote sales or degrade competitors.

transactional decision³ that he would not have made otherwise; and

- (b) when deciding on whether a practice is a misleading omission, all the features and circumstances of the commercial practice should be taken into account⁴.

Aggressive Commercial Practices

7. Consumers' freedom of choice is likely to be undermined when they are under undue influence or high-pressure practices and as a result, their consumption behaviour may be affected. We propose to add new provisions to the Ordinance to prohibit the use of aggressive practices in consumer transactions by creating an offence in respect of which the *mens rea* requirement is displaced. Specifically, we propose that, as in the case of the United Kingdom, a commercial practice should be considered as aggressive if, in its factual context, taking into account all relevant circumstances, it significantly impairs (or is likely to significantly impair) the consumer's freedom of choice through the use of harassment, coercion or undue influence and it thereby causes him to take a transactional decision that he would not have taken otherwise. We also propose to include a non-exhaustive list of the factors which must be taken into account when determining whether a practice uses harassment, coercion or undue influence⁵.

Bait Advertising and Bait-and-Switch

8. We propose to create two offences in the Ordinance to tackle this practice. The first is bait advertising. Modeling on provisions in Australia, this offence prohibits a trader from advertising for the supply of products at a specified price if there are no reasonable grounds for believing that he will be

³ "Transactional decision" means any decision made by a consumer, concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or whether, how or on what terms to exercise a contractual right in relation to a product.

⁴ Such features and circumstances may include the limitations of the medium used to communicate the commercial practice, and 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.

⁵ The factors include the timing, location, nature and persistence of the practice, the use of threatening or abusive language or behaviour, 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 (e.g. sales pitches in relation to funeral services which take advantage of the consumer's misfortune as a result of the death of his kin), and any onerous or disproportionate non-contractual barrier fettering the consumer's exercise of rights under the contract (e.g. tactics of withholding cancellation forms or designating an inconvenient means of communications which fetter the exercise of the right of cancelling a service contract).

able to offer for supply those products at that price for a reasonable period and in reasonable quantities, having regard to the nature of the market and the nature of the advertisement. Considering that traders should have the primary responsibility of ensuring an adequate supply before advertising, a trader may be held liable to this offence if he holds an unreasonable belief (even honestly) that he could have met the demand. To ensure that businesses acting in good faith would not be inadvertently caught, we propose that additional defences be provided: in the absence of proof to the contrary by the prosecution, a defendant will be entitled to be acquitted if he can adduce sufficient evidence to raise an issue that he had taken immediate remedial action (such as replenishing the stock, causing another supplier to supply the same goods or service on the same terms or offering equivalent goods or service on the same terms) if the demand was greater than he originally foresaw.

9. The second proposed offence is “bait-and-switch”. It refers to the practice of traders advertising or promoting products at bargain prices or on very favourable terms but the promoted item is in fact used as a bait to attract consumers into shop premises, so that the trader has the opportunity to switch them to more expensive products in various guises. This offence prohibits a trader from making an offer to sell a product at a specified price with the intention of promoting a different product through any of the defined tactics (such as refusing to show the product to a consumer and showing a defective sample).

Wrongly Accepting Payment

10. Pre-payment for goods or services is becoming an increasingly popular form of consumption. Consumers and businesses stand to benefit from this mode of consumption, as consumers normally enjoy discounts and the cash flow of businesses can be improved. Many problems may arise, however, when traders with no intention or ability to supply the contracted products trick consumers into pre-payment. Due to an information asymmetry, consumers may not be in a position to ascertain the bona fides and capability of businesses in delivering the pledged goods or services. Complaints about traders receiving pre-payments when there is already a risk of closure and consistent over-subscription of services have given rise to widespread public concern.

11. We propose to create an offence in the Ordinance to tackle such a practice head-on. Specifically, modeling on provisions in Australia, we propose that a trader will commit the proposed offence “wrongly accepting payment” if, **at the time of accepting payment for a product**, he intends not to supply the

product or to supply a materially different product. A trader will also commit an offence if there are no reasonable grounds for believing that he will be able to supply the product within the period specified or within a reasonable period (if no period is specified). Similar to the case of “bait advertising” above, a trader may be held liable if he holds an unreasonable belief that he could have supplied the product within the specified period or within a reasonable period.

12. We propose to make available additional defences for defendants in proceedings for this proposed offence. If the defendant can adduce sufficient evidence to raise an issue that he had successfully procured a third party to supply the same or equivalent products, he will be entitled to be acquitted unless the contrary is proved by the prosecution.

Proposed Penalty

13. For consistent treatment of different types of unfair trade practices, we propose that the current maximum penalty under the Ordinance, i.e. a fine of \$500,000 and imprisonment for five years, should apply to the proposed new offences.

II. Enforcement

Enforcement Agency

14. To capitalize on their respective enforcement experience and expertise, we propose that the Customs and Excise Department be tasked to enforce the proposed offences, with concurrent enforcement powers to be conferred on the Telecommunications Authority and the Broadcasting Authority⁶ in respect of the telecommunications and broadcasting services respectively.

Compliance-based Mechanism

15. While the specified unfair trade practices (including false trade descriptions to goods at present and the other proposed offences) should attract criminal sanctions, we consider that there are merits in establishing a compliance-based enforcement mechanism with the main objectives of encouraging compliance and facilitating quicker settlement. Under the proposed mechanism, the enforcement agency is empowered to seek undertakings from traders suspected of deploying any unfair trade practices to

⁶ They are to be merged pursuant to the Communications Authority Ordinance (Ordinance No. 17 of 2011).

stop and not to repeat an offending act and, where necessary, seek injunctions from the court for the purpose. This mechanism is expected to be able to deliver quicker and better outcomes for consumers.

Power to Inspect Books and Documents at Business Premises

16. Currently, the Ordinance empowers the enforcement agency to inspect any goods and enter any non-domestic premises for the purpose of ascertaining whether any offence under the Ordinance has been or is being committed. This power does not extend to inspecting books or documents. The enforcement agency may do so only if it has reasonable cause to suspect that an offence **has been** committed. There are provisions in the Ordinance which require traders engaged in the sale of specified goods to keep invoices⁷ and to provide specified information thereon related to the transactions. To help the enforcement agency ascertain if the provisions are being complied with, we propose to amend the Ordinance to empower the enforcement agency to inspect books and documents that are required to be kept under the Ordinance without being subject to the reasonable suspicion threshold.

III. Sector-Specific Regimes

17. In view of the presence of sector-specific regimes, we propose that certain sectors should not be brought under the ambit of the expanded Ordinance. Specifically, they are the financial services sector, because there are well-established regulatory regimes under the auspices of the Securities and Futures Commission, the Hong Kong Monetary Authority and other financial regulatory bodies; the property sector, in view of the separate regime now being proposed by the Transport and Housing Bureau on the sale of first-hand residential properties; and professional practices regulated by regulatory bodies established or sanctioned by statute.

IV. Consumer Redress

18. To facilitate aggrieved consumers to seek restorative justice, we propose that an express right be created under the Ordinance to allow any person who suffers loss or damage because of conduct which constitutes the current offence of false trade descriptions of goods or any of the proposed offences and that is directed to him to institute private actions for damages. We also propose that when convicting a person of any of the offences, the court may order the

⁷ Such as the requirement for retailers in gold or gold alloy to retain copies of invoices or receipts issued to consumers for a period of not less than three years under section 6(2) of the Trade Descriptions (Marking) (Gold and Gold Alloy) Order (Cap. 362 sub. leg. A).

convicted person to compensate any person for financial loss resulting from the offence.

THE BILL

19. The main provisions are -

- (a) **clause 3(5)** expands the current definition of “trade description” in relation to goods to the extent that **any** indication with respect to any aspect of goods or part of the goods may amount to a trade description. The new definition of “trade description” in relation to services, introduced by **clause 3(9)**, is also couched in the same fashion;
- (b) **clause 4** seeks to empower the Chief Executive in Council to make orders requiring that specified pieces of information must accompany the supply of any services that he may specify. The same power is currently available in respect of goods only;
- (c) **clause 8** introduces a new section creating an offence of applying false trade descriptions to services that are supplied or to be supplied to consumers;
- (d) **clause 12** repeals the current Part IIA of the Ordinance. The Part currently comprises detailed provisions regulating the display of price indications in the sale of goods, the disclosure of defined pieces of information in the sale of five types of electronic products and representations as to third-party endorsements. These provisions are overly-prescriptive and would be essentially covered by the proposed offences of misleading omissions and false trade descriptions. We therefore propose to repeal the Part;
- (e) **clause 13** introduces a new Part into the Ordinance, which seeks to prohibit (by creating criminal offences) misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and the practice of “wrongly accepting payment” when they are deployed by traders against consumers. Under the amendments introduced by **clause 14**, offenders will be liable to the same penalty as is presently prescribed for the offence of applying false trade descriptions to goods;
- (f) **clause 17** provides that a trader may commit an offence even if the consumer at which the unfair trade practice is directed is outside Hong Kong. Taking account of the fact that many consumer transactions are cross-national (e.g. those conducted on the web), this is an important anti-avoidance/enforcement mechanism;

- (g) **clause 19** provides for additional specific defences for defendants in proceedings for the offences of bait advertising and the practice of wrongly accepting payment;
- (h) **clause 23** inserts a new Schedule 3 which sets out those professionals who are exempted in the course of their practices from the fair trading offences under the Ordinance. It also inserts a new Schedule 4 which excludes financial services products from the ambit of the new offences;
- (i) **clause 25** seeks to empower the enforcement agency, for the purpose of ascertaining whether any offence under the Ordinance has been or is being committed, to inspect books or documents that are required to be kept under the Ordinance;
- (j) **clause 27** adds a few new sections, seeking to give concurrent jurisdiction to the Telecommunications Authority and the Broadcasting Authority in respect of trade practices of their respective licensees. The new sections provide for the transfer of matters between enforcement bodies, enables them to enter into a memorandum of understanding with a view to coordinating the performance of their enforcement functions and confers on the two Authorities the power to issue guidelines;
- (k) **clause 29** inserts a new part to the Ordinance which establishes the compliance-based enforcement mechanism. Subject to the written consent of the Secretary for Justice, the enforcement agency may accept an undertaking from a trader if it is satisfied that the trader has engaged, is engaging or is likely to engage in an unfair trade practice (new section 30L). It may also seek an injunction from the District Court (new section 30P);
- (l) **clause 30** inserts a new section empowering the court to order a person convicted of any fair trading offence to compensate any person who suffers financial loss resulting from the offence; and
- (m) **clause 31** inserts a new section creating a private right of action for any person who suffers loss or damage because of conduct of another person which amounts to any one of the fair trading offences and that is directed to him.

B A marked-up copy of the Ordinance showing the proposed amendments is at **Annex B**.

LEGISLATIVE TIMETABLE

20. The legislative timetable is—

Publication in the Gazette	24 February 2012
First Reading and commencement of Second Reading debate	29 February 2012
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

21. The proposals are in conformity with the Basic Law including the provisions concerning human rights. They have no environmental or sustainability implications. By tackling unfair trade practices, we hope to maintain a level playing field to encourage healthy competition among businesses. This will also help build consumer confidence and enhance the image of Hong Kong as a leading commerce and business centre in the region. The binding effect of the Ordinance will not be affected by the proposals. We expect that the Bill, if enacted, will be brought into operation only after implementation details are further worked out, possibly in 2013. As a number of operational details, such as the modus operandi of the proposed compliance-based enforcement mechanism, the circumstances under which different types of enforcement actions should be taken and the mechanism for the transfer of cases among the Consumer Council, the Customs and Excise Department and the executive arms supporting the Telecommunications Authority and the Broadcasting Authority, are yet to be confirmed, we are unable to provide an estimate of the resources required at this stage. The relevant parties (including the Customs and Excise Department, the executive arms supporting the Telecommunications Authority and the Broadcasting Authority, the Department of Justice, the Government Laboratory and the Consumer Council) will endeavour to absorb the additional workload arising from the implementation of the Bill within their existing resources. In the event that additional resources are required, they will be justified and sought in accordance with the established mechanism.

PUBLIC CONSULTATION

22. We consulted the public between 15 July and 31 October 2010 on the legislative proposals. We also attended meetings organized by various stakeholders, including the Panel on Economic Development and a number of District Councils. The public expressed general support.

PUBLICITY

23. This Legislative Council Brief and a press release are issued on 22 February 2012. A spokesman will be available to handle media and public enquiries.

ENQUIRY

24. Any enquiry on this brief may be addressed to Mr K C Yau, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry) Special Duties on 2810 2969.

Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
22 February 2012

TRADE DESCRIPTIONS (UNFAIR TRADE PRACTICES) (AMENDMENT) BILL 2012

Annexes

Annex A - Trade Descriptions (Unfair Trade Practices)
(Amendment) Bill 2012

Annex B - Marked-up copy of the existing Trade Descriptions
Ordinance (Cap. 362) showing the proposed
amendments

Annex C - List of Abbreviations

Trade Descriptions (Unfair Trade Practices) (Amendment) Bill 2012

Contents

Clause	Page
Part 1	
Preliminary	
1. Short title and commencement	1
2. Enactments amended	1
Part 2	
Unfair Trade Practices	
3. Section 2 amended (interpretation)	2
4. Section 4 amended (marking and provision of information, etc. orders)	6
5. Section 5 amended (information to be given in advertisements)	7
6. Section 6A added	7
6A. Applying a trade description to services	7
7. Section 7 heading amended (offences in respect of trade descriptions)	8
8. Section 7A added	8
7A. Offences in respect of trade description of services	8

Clause	Page
9. Section 8 amended (trade descriptions used in advertisements)	9
10. Section 12 amended (prohibited import and export of certain goods)	9
11. Section 13 repealed (power to exempt goods sold for export)	10
12. Part IIA repealed (false, misleading or incomplete information)	10
13. Part IIB added	10
Part IIB	
Unfair Trade Practices	
13D. Average consumer	10
13E. Misleading omissions	11
13F. Aggressive commercial practices	14
13G. Bait advertising	15
13H. Bait and switch	16
13I. Wrongly accepting payment	16
14. Section 18 amended (penalties)	17
15. Section 20 substituted	17
20. Liability of directors, partners, etc.	17
16. Section 21 amended (offences due to fault of other person)	18
17. Section 21A added	19

Clause		Page
	21A. Extra-territoriality.....	19
18.	Section 26 amended (defence mistake, accident, etc.)	19
19.	Sections 26A and 26B added.....	19
	26A. Additional defence (bait advertising)	20
	26B. Additional defence (wrongly accepting payment).....	20
20.	Section 33 amended (definition orders).....	21
21.	Section 34 amended (saving for civil rights).....	22
22.	Section 37 added	22
	37. Amendment of Schedules 3 and 4.....	22
23.	Schedules 3 and 4 added	22
	Schedule 3 Exempt Persons	23
	Schedule 4 Excluded Products	26

Part 3

Enforcement-related Matters

24.	Section 2 amended (definitions relevant to enforcement)	27
25.	Section 15 amended (power to enter premises and inspect and seize goods and documents)	27
26.	Section 16BA added.....	28
	16BA. Guidelines—general.....	28
27.	Sections 16E to 16I added	29
	16E. Enforcement relating to telecommunications and	

Clause		Page
	broadcasting	29
16F.	Transfer of matters between enforcement bodies.....	31
16G.	Memorandum of understanding	31
16H.	Guidelines—telecommunications/broadcasting sector	32
16I.	Transitional provision.....	33
28.	Section 19 amended (time limit for prosecutions).....	33
29.	Part IIIB added	34

Part IIIB

Enforcement (Undertakings and Injunctions)

30L.	Undertakings	34
30M.	Effect of acceptance of undertaking.....	35
30N.	Withdrawal of acceptance of undertaking	35
30O.	Effect of withdrawal on time limit for prosecutions.....	36
30P.	Injunctions.....	37
30Q.	Interim injunctions	38
30R.	Variation and discharge of injunctions.....	38
30S.	CFI may exercise powers of District Court in certain cases.....	38

Part 4

Clause	Page
Consumer Redress	
30. Section 18A added.....	39
18A. Power to award compensation.....	39
31. Section 36 added	39
36. Actions for damages.....	39
Part 5	
Consequential, Related and Minor Textual Amendments	
Division 1—Trade Descriptions Ordinance	
32. Long title amended.....	41
33. Section 4 amended (marking and provision of information, etc. orders).....	41
34. Section 6 amended (applying a trade description, trade mark or mark to goods)	41
35. Section 11 repealed (false representations as to supply of goods).....	42
36. Schedule 2 repealed (goods specified for purposes of section 13B).....	42
Division 2—Telecommunications Ordinance	
37. Section 7M repealed (misleading or deceptive conduct).....	42
38. Part VC heading amended (appeals relating to sections 7K, 7L, 7M, 7N and 7P).....	42

Clause	Page
39. Section 32L amended (interpretation)	42
40. Section 32N amended (appeals to Appeal Board)	43
41. Section 39A amended (remedies).....	43
42. Section 43 added	43
43. Transitional provisions—Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012	43

A BILL To

Amend the Trade Descriptions Ordinance to extend its coverage to services; to prohibit certain unfair trade practices; to provide for enhanced enforcement mechanisms; to repeal section 7M of the Telecommunications Ordinance; and to make consequential, related and minor textual amendments.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Commerce and Economic Development by notice published in the Gazette.

2. Enactments amended

- (1) The Trade Descriptions Ordinance (Cap. 362) is amended as set out in Parts 2, 3 and 4 and Division 1 of Part 5.
- (2) The Telecommunications Ordinance (Cap. 106) is amended as set out in Division 2 of Part 5.

Part 2

Unfair Trade Practices

3. Section 2 amended (interpretation)

- (1) Section 2(1), definition of *false trade description*, paragraph (a)—

Repeal

“degree;”

Substitute

“degree; or”.

- (2) Section 2(1), definition of *false trade description*, paragraph (b)—

Repeal

“such an indication of any of the matters specified in the definition of “trade description” as”

Substitute

“a trade description of a kind that”.

- (3) Section 2(1), definition of *false trade description*—

Repeal paragraphs (c), (d) and (e).

- (4) Section 2(1), definition of *trade description*, before “means an indication”—

Add

“, in relation to goods,”.

- (5) Section 2(1), definition of *trade description*—

Repeal

“of any of the following matters with respect to any goods or parts of goods, that is to say”

Substitute

“with respect to the goods or any part of the goods including an indication of any of the following matters”.

- (6) Section 2(1), definition of *trade description*, after paragraph (e)—

Add

- “(ea) availability;
- (eb) compliance with a standard specified or recognized by any person;
- (ec) price, how price is calculated or the existence of any price advantage or discount;
- (ed) liability to pay duty on them under the laws of Hong Kong, generally or in specified circumstances;”.

- (7) Section 2(1), definition of *trade description*, after paragraph (g)—

Add

- “(ga) a person by whom they have been acquired, or who has agreed to acquire them;
- (gb) their being of the same kind as goods supplied to a person;”.

- (8) Section 2(1), English text, definition of *trade mark*, paragraph (d)(iii)—

Repeal

“country.”

Substitute

“country;”.

- (9) Section 2(1)—

Add in alphabetical order

“*average consumer* (一般消費者)—see section 13D;

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;

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 outside the person’s trade or business;

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;

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;

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

Note—

See subsection (4).

Secretary (局長) means the Secretary for Commerce and Economic Development;

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);

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) any other characteristic or attribute of the service not covered by paragraph (a) or (b);
- (d) method and procedure by which, manner in which, and location at which, the service is supplied or to be supplied;
- (e) availability;
- (f) testing by any person and the results of the testing;
- (g) approval by any person or conformity with a type approved by any person;
- (h) a person by whom it has been acquired, or who has agreed to acquire it;
- (i) the person by whom the service is supplied or to be supplied;
- (j) after-sale service assistance concerning the service;
- (k) price, how price is calculated or the existence of any price advantage or discount;

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).

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.”.

(10) After section 2(3)—

Add

“(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.

(5) In this Ordinance a reference to a trader includes any person acting in the name of, or on behalf of, a trader.”.

4. Section 4 amended (marking and provision of information, etc. orders)

(1) Section 4(1)—

Repeal

“shall be marked with or accompanied by any information”

Substitute

“must be marked with or accompanied by any information, or that any services specified in the order must be accompanied by any information.”.

(2) Section 4(1), after “the goods” (wherever appearing)—

Add

“or services”.

(3) Section 4(1), after “of goods”—

Add

“or services”.

(4) Section 4(2), after “to goods”—

Add

“or services”.

- (5) Section 4(2), after “the order”—

Add

“, or any trader who supplies or offers to supply services of that description to a consumer in contravention of the order.”.

- (6) Section 4(5), after “goods”—

Add

“or the same kind of service”.

5. Section 5 amended (information to be given in advertisements)

- (1) Section 5(1), after “goods” (wherever appearing)—

Add

“or services”.

- (2) Section 5(3), after “business”—

Add

“, or of any services to be supplied by a trader to a consumer.”.

6. Section 6A added

After section 6—

Add

“6A. Applying a trade description to services

- (1) A person is to be regarded as applying a trade description to a service if the person gives (by whatever means and whether direct or indirect) an indication of any kind with respect to the service or any part of the service including—

- (a) where the indication is given in such a manner that it is likely to be taken as referring to the service; and

- (b) where the person makes in any affidavit, declaration or writing a statement to the effect that the indication is applicable to the service.

- (2) An oral statement may amount to the use of a trade description.

- (3) If a service is supplied in response to a request in which a trade description is used and the circumstances are such as to make it reasonable to infer that the service is supplied as a service corresponding to that trade description, the person supplying the service is to be regarded as having applied that trade description to the service.”.

7. Section 7 heading amended (offences in respect of trade descriptions)

Section 7, heading, after “descriptions”—

Add

“of goods”.

8. Section 7A added

After section 7—

Add

“7A. Offences in respect of trade description of services

A trader who—

- (a) applies a false trade description to a service supplied or offered to be supplied to a consumer; or
(b) supplies or offers to supply to a consumer a service to which a false trade description is applied,

commits an offence.

Note—

Section 21A gives this section an extra-territorial application.”.

9. Section 8 amended (trade descriptions used in advertisements)

(1) Section 8(1), after “goods”—

Add

“or services”.

(2) Section 8(2), after “all goods”—

Add

“or services”.

(3) Section 8(2)(a), after “section 7(1)(a)(i)—

Add

“or 7A(a)”.

(4) Section 8(2)(b), after “goods”—

Add

“or services”.

(5) Section 8(2)(b), after “section 7(1)(a)(ii)—

Add

“or 7A(b)”.

(6) Section 8(3), after “goods” (wherever appearing)—

Add

“or services”.

10. Section 12 amended (prohibited import and export of certain goods)

Section 12(1)—

Repeal

“Subject to section 13, no person shall”

Substitute

“A person must not”.

11. Section 13 repealed (power to exempt goods sold for export)

Section 13—

Repeal the section.**12. Part IIA repealed (false, misleading or incomplete information)**

Part IIA—

Repeal the Part.**13. Part IIB added**

Before Part III—

Add**“Part IIB****Unfair Trade Practices****13D. Average consumer**

(1) In determining the effect on the average consumer of a commercial practice that reaches or is directed to a consumer or consumers, 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.

(2) In determining the effect on the average consumer of a commercial practice in the circumstances specified in subsection (3), a reference to the average consumer is a reference to the average member of the particular group of consumers.

(3) For the purpose of subsection (2) the circumstances are—

(a) where the commercial practice is directed to a particular group of consumers; and

(b) where—

- (i) a clearly identifiable group of consumers is particularly vulnerable to the commercial practice or the underlying product because of mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee; and
 - (ii) the practice is likely to materially distort the economic behaviour only of that group.
- (4) Subsection (3)(b) does not prejudice the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.
- (5) In subsection (3)(b)(ii)—
- materially distort the economic behaviour*** (在一定程度上扭曲消費表現), in relation to an average consumer, means appreciably to impair the average consumer's ability to make an informed decision and therefore causing the consumer to make a transactional decision that the consumer would not have made otherwise.

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;
 - (c) the address (not including a postal box address) of the trader's usual place of business and of any other trader on whose behalf the trader is acting;
 - (d) either—
 - (i) the price, including any taxes; or
 - (ii) if the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;

- (e) where appropriate, either—
 - (i) all additional freight, delivery or postal charges; or
 - (ii) if those charges cannot reasonably be calculated in advance, the fact that they may be payable;
 - (f) the following matters if they depart from the requirements of professional diligence—
 - (i) arrangements for payment;
 - (ii) arrangements for delivery;
 - (iii) arrangements for performance;
 - (g) for products in relation to which there is a right of withdrawal or cancellation, the existence of that right.
- (5) In this section—
- material information** (重要資料) means—
- (a) in relation to a commercial practice that is an invitation to purchase, any information that is material as a result of subsection (4); and
 - (b) in every case—
 - (i) the information that the average consumer needs, according to the context, to make an informed transactional decision; or
 - (ii) any other information required in relation to a commercial communication under any other enactment;
- professional diligence** (專業勤勉) means the standard of skill and care that a trader may reasonably be expected to exercise towards consumers which is commensurate with either—
- (a) honest market practice in the trader's field of activity; or

- (b) the general principle of good faith in that field.

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.

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.

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.

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.”.

14. Section 18 amended (penalties)

- (1) Section 18(1), after “7,”—

Add

“7A,”.

- (2) Section 18(1)—

Repeal

“11,”.

- (3) Section 18(1)—

Repeal

“13A, 13B or 13C”

Substitute

“13E, 13F, 13G, 13H or 13I”.

15. Section 20 substituted

Section 20—

Repeal the section

Substitute

“20. Liability of directors, partners, etc.

- (1) If an offence under this Ordinance is committed by a body corporate or by a person as a member of an unincorporated body, and it is proved that the offence has been committed with the consent or connivance or is attributable to the neglect of a person specified in subsection (2), that person also commits the offence and is liable to be proceeded against and punished accordingly.

- (2) The person referred to in subsection (1) is a person who, at the time of the offence, was—

- (a) (in the case of a body corporate) a director, shadow director, secretary, principal officer or manager of the body corporate;
- (b) (in the case of a member of an unincorporated body) a partner or office holder in or a member or manager of the unincorporated body; or
- (c) (in either case mentioned in paragraph (a) or (b)) purporting to act in the capacity of a person referred to in that paragraph.

- (3) In this section—

principal officer (主要人員), in relation to a body corporate, means—

- (a) a person employed by the body corporate who, either alone or jointly with one or more other persons, is responsible under the immediate authority of the directors of the body corporate for the conduct of the business of the body corporate; or
- (b) a person employed by the body corporate who, under the immediate authority of a director of the body corporate or a person to whom paragraph (a) applies, exercises managerial functions in respect of the body corporate;

shadow director (幕後董事), in relation to a body corporate, means a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act.”.

16. Section 21 amended (offences due to fault of other person)

- (1) Section 21—

Renumber the section as section 21(1).

- (2) After section 21(1)—

Add

- “(2) In subsection (1) the reference to some other person does not include an exempt person in the case of an offence under section 7A, 13E, 13F, 13G, 13H or 13I.”.

17. Section 21A added

After section 21—

Add**“21A. Extra-territoriality**

A trader may commit an offence under this Ordinance with respect to a commercial practice even if the practice is directed to consumers who are outside Hong Kong if, at the time of engaging in the practice, the trader is in Hong Kong or Hong Kong is the trader’s usual place of business.”.

18. Section 26 amended (defence mistake, accident, etc.)

- (1) Section 26(3), after “(b)”—

Add

“or section 7A(b)”.

- (2) Section 26(3), after “goods” (wherever appearing)—

Add

“or service”.

19. Sections 26A and 26B added

After section 26—

Add**“26A. Additional defence (bait advertising)**

Without limiting section 26, in any proceedings for an offence under section 13G the person charged is entitled to be acquitted if—

- (a) sufficient evidence is adduced to raise an issue that—
 - (i) the trader offered to supply, or to procure a third person to supply, products of the kind advertised to the consumer within a reasonable time, in a reasonable quantity and at the advertised price and, if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the products; or
 - (ii) the trader offered to supply immediately, or to procure a third person to supply within a reasonable time, equivalent products to the consumer in a reasonable quantity and at the price at which the advertised products were advertised and, if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the equivalent products; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

26B. Additional defence (wrongly accepting payment)

Without limiting section 26, in any proceedings for an offence under section 13I the person charged is entitled to be acquitted if—

- (a) sufficient evidence is adduced to raise an issue that—
 - (i) the trader offered to procure a third person to supply the products and, if that offer was

- accepted by the consumer, the trader procured a third person to supply the products; or
- (ii) the trader offered to supply, or to procure a third person to supply, equivalent products—
- (A) within the period specified by the trader at or before the time at which the payment or other consideration was accepted; or
- (B) if no period was specified at or before that time, within a reasonable period, and, if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the equivalent products; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.”.

20. Section 33 amended (definition orders)

- (1) Section 33(a), after “goods”——
Add
“or services”.
- (2) Section 33(b), after “exported”——
Add
“, or of traders by whom any services are supplied to consumers who are outside Hong Kong.”.
- (3) Section 33(b), after “such goods”——
Add
“or services”.
- (4) Section 33, after “in relation to the goods”——
Add
“or services”.

- (5) Section 33(i), after “used”——
Add
“in connection with the supply of goods”.
- (6) Section 33(i), after “business”——
Add
“or the supply of services by a trader to a consumer”.
- (7) Section 33(i), after “goods”——
Add
“or services”.

21. Section 34 amended (saving for civil rights)

Section 34, after “goods”——

Add
“or service”.

22. Section 37 added

Before Schedule 1——

Add

“37. Amendment of Schedules 3 and 4

The Secretary may, by notice published in the Gazette, amend Schedule 3 or 4.”.

23. Schedules 3 and 4 added

At the end of the Ordinance——

Add

“Schedule 3

[ss. 2 & 37]

Exempt Persons

1. A certified public accountant or a corporate practice, as defined by section 2(1) of the Professional Accountants Ordinance (Cap. 50).
2. A certified public accountant (practising), as defined by section 2(1) of the Professional Accountants Ordinance (Cap. 50), practising on their own account under a firm name.
3. A person whose name is entered in the register of pharmacists under section 5 of the Pharmacy and Poisons Ordinance (Cap. 138).
4. A registered dentist as defined by section 2(1) of the Dentists Registration Ordinance (Cap. 156) or a person deemed by section 30 of that Ordinance to be a registered dentist for the purpose of section 3 of that Ordinance.
5. A person whose name is recorded in the roll maintained under regulation 4(2) of the Ancillary Dental Workers (Dental Hygienists) Regulations (Cap. 156 sub. leg. B).
6. A barrister, solicitor, foreign lawyer, foreign firm, Hong Kong firm or notary public, as defined by section 2(1) of the Legal Practitioners Ordinance (Cap. 159).
7. A pupil serving pupillage in accordance with the Barristers (Qualification) Rules (Cap. 159 sub. leg. E).
8. A trainee solicitor as defined by rule 2 of the Trainee Solicitors Rules (Cap. 159 sub. leg. J).

9. A registered medical practitioner as defined by section 2(1) of the Medical Registration Ordinance (Cap. 161) or a person who is provisionally registered in accordance with the provisions of section 12 of that Ordinance.
10. A registered midwife as defined by section 2(1) of the Midwives Registration Ordinance (Cap. 162) or a person deemed by section 25 of that Ordinance to be a registered midwife.
11. A registered nurse or an enrolled nurse, as defined by section 2(1) of the Nurses Registration Ordinance (Cap. 164), or a person deemed by section 26 of that Ordinance to be a registered nurse or an enrolled nurse.
12. A person whose name is entered in the register kept under section 10 of the Supplementary Medical Professions Ordinance (Cap. 359) for the profession of medical laboratory technologist, radiographer, physiotherapist, occupational therapist or optometrist or a person who is deemed by section 30(2) of that Ordinance to be so registered or is provisionally so registered in accordance with the provisions of section 15 of that Ordinance.
13. A person whose name is currently entered in the register of registered architects established and maintained under section 8 of the Architects Registration Ordinance (Cap. 408).
14. A registered professional engineer as defined by section 2(1) of the Engineers Registration Ordinance (Cap. 409).
15. A registered professional surveyor as defined by section 2(1) of the Surveyors Registration Ordinance (Cap. 417).
16. A registered professional planner as defined by section 2(1) of the Planners Registration Ordinance (Cap. 418).

17. A registered chiropractor as defined by section 2 of the Chiropractors Registration Ordinance (Cap. 428).
 18. An authorized land surveyor as defined by section 2 of the Land Survey Ordinance (Cap. 473).
 19. A registered social worker as defined by section 2(1) of the Social Workers Registration Ordinance (Cap. 505).
 20. A licensed estate agent or a licensed salesperson, as defined by section 2(1) of the Estate Agents Ordinance (Cap. 511).
 21. A person whose name is currently entered in the register of registered landscape architects established and maintained under section 7 of the Landscape Architects Registration Ordinance (Cap. 516).
 22. A registered veterinary surgeon as defined by section 2 of the Veterinary Surgeons Registration Ordinance (Cap. 529).
 23. A listed Chinese medicine practitioner or a registered Chinese medicine practitioner, as defined by section 2(1) of the Chinese Medicine Ordinance (Cap. 549).
 24. A registered professional housing manager as defined by section 2(1) of the Housing Managers Registration Ordinance (Cap. 550).
-

Schedule 4

[ss. 2 & 37]

Excluded Products

1. Goods or services sold or supplied by a person regulated, licensed, registered, recognized or authorized under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485) or the Securities and Futures Ordinance (Cap. 571), being goods or services the sale or supply of which by that person is itself regulated under an Ordinance that is referred to in this item and under which the person is regulated, licensed, registered, recognized or authorized.”
-

Part 3**Enforcement-related Matters****24. Section 2 amended (definitions relevant to enforcement)**

Section 2(1)—

Add in alphabetical order

“Broadcasting Authority (廣管局) means the Broadcasting Authority established by section 3 of the Broadcasting Authority Ordinance (Cap. 391);

Telecommunications Authority (電管局局長) means the Telecommunications Authority appointed under section 5 of the Telecommunications Ordinance (Cap. 106);”.

25. Section 15 amended (power to enter premises and inspect and seize goods and documents)

(1) After section 15(1)(c)—

Add

“(ca) for the purpose of ascertaining whether any offence under this Ordinance has been or is being committed, require any person carrying on a trade or business or employed in connection with a trade or business to produce any books or documents required to be kept under this Ordinance and may take copies of, or of any entry in, any such book or document;”.

(2) At the end of section 15(1)—

Add**“Note—**

By virtue of section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) a reference to an Ordinance includes subsidiary legislation made under it, unless the contrary intention appears.”.

26. Section 16BA added

After section 16B—

Add**“16BA. Guidelines—general**

- (1) The Commissioner may issue guidelines on matters in relation to which an authorized officer may exercise powers under this Ordinance.
- (2) Without limiting subsection (1), the guidelines may—
 - (a) indicate the manner in which powers will be exercised by authorized officers with respect to the matters to which the guidelines relate; or
 - (b) provide guidance on the operation of any provision of this Ordinance relating to those matters.
- (3) Guidelines may be published in any manner that the Commissioner considers appropriate.
- (4) Guidelines are not subsidiary legislation.
- (5) The Commissioner may amend or revoke any guidelines. Subsections (3) and (4) apply to an amendment or revocation of guidelines in the same way as they apply to the guidelines.
- (6) Before issuing any guidelines or amendments of guidelines, the Commissioner must consult any persons that the Commissioner considers appropriate.
- (7) The Commissioner must make copies of all guidelines and amendments of guidelines available to the public for inspection at the Commissioner’s office during ordinary business hours.
- (8) A person does not incur any civil or criminal liability only because the person has contravened any of the guidelines. If, in any legal proceedings, a court is satisfied that a guideline is relevant to determining a matter that is in issue—

- (a) the guideline is admissible in evidence in the proceedings; and
- (b) proof that the person contravened or did not contravene the guideline may be relied on by any party to the proceedings as tending to establish or negate the matter.”.

27. Sections 16E to 16I added

After section 16D—

Add

“16E. Enforcement relating to telecommunications and broadcasting

- (1) Subject to subsection (2), the Telecommunications Authority and the Broadcasting Authority may each exercise any of the powers conferred on an authorized officer under this Ordinance (other than Part IIIA).
- (2) The Chief Executive in Council may, by notice published in the Gazette, specify in relation to the Telecommunications Authority or the Broadcasting Authority powers covered by subsection (1) that are not exercisable by that Authority.
- (3) The Telecommunications Authority, or any public officer authorized in writing in that behalf by that Authority, may exercise any of the powers that by virtue of this section are exercisable by that Authority but may only do so in relation to any commercial practices of persons specified in subsection (4) that are directly connected with the provision of a telecommunications service under the Telecommunications Ordinance (Cap. 106).
- (4) For the purpose of subsection (3) the persons are persons that are licensees under the Telecommunications

Ordinance (Cap. 106), other than licensees under Part IIIA of that Ordinance.

- (5) The Broadcasting Authority, or any public officer authorized in writing in that behalf by that Authority, may exercise any of the powers that by virtue of this section are exercisable by that Authority but may only do so in relation to any commercial practices of persons specified in subsection (6) that are directly connected with the provision of a broadcasting service under the Broadcasting Ordinance (Cap. 562) or Part IIIA of the Telecommunications Ordinance (Cap. 106).
- (6) For the purpose of subsection (5) the persons are persons that are—
 - (a) licensees under the Broadcasting Ordinance (Cap. 562); or
 - (b) licensees under Part IIIA of the Telecommunications Ordinance (Cap. 106).
- (7) Nothing in this section enables the exercise of powers with respect to any conduct covered by section 9 or 12.
- (8) The fact that a power is exercisable in relation to a commercial practice by the Telecommunications Authority, the Broadcasting Authority or any public officer authorized in writing by either of those Authorities does not, subject to section 16F, prevent that power being exercised in relation to that practice by the Commissioner or an authorized officer.
- (9) To avoid doubt, in exercising a power under this Ordinance the Telecommunications Authority, the Broadcasting Authority or any public officer authorized in writing by either of those Authorities does not do so as an agent or delegate of the Commissioner.

16F. Transfer of matters between enforcement bodies

- (1) If the Commissioner, the Telecommunications Authority or the Broadcasting Authority is performing a function under this Ordinance in relation to a matter over which another one of them has concurrent jurisdiction, the 2 relevant bodies may agree that the matter be transferred to and be dealt with by one of them.
- (2) Unless there is an agreement as mentioned in subsection (1), if the Commissioner, the Telecommunications Authority or the Broadcasting Authority is performing or has performed a function under this Ordinance in relation to a matter over which another one of them has concurrent jurisdiction, the other must not perform any function in relation to that matter.

16G. Memorandum of understanding

- (1) The Commissioner and the Telecommunications Authority, and the Commissioner and the Broadcasting Authority, must prepare and sign a memorandum of understanding for the purpose of co-ordinating the performance of their functions under this Ordinance.
- (2) Without limiting subsection (1), a memorandum of understanding may provide for any or all of the following—
 - (a) the manner in which the parties will perform the functions that they have jurisdiction to perform concurrently under this Ordinance;
 - (b) the manner in which the parties will resolve any dispute between themselves;
 - (c) the provision of assistance by one party to the other;
 - (d) the allocation between the parties of responsibility for particular matters or classes of matters;

- (e) arrangements for the supply by one party to the other of information relating to a matter over which they have concurrent jurisdiction;
- (f) arrangements for keeping the other party informed about progress when one party is performing functions that may be performed concurrently under this Ordinance;
- (g) the joint authorship of educational material or guidelines on matters over which the parties have concurrent jurisdiction.
- (3) The parties to a memorandum of understanding may amend or replace any memorandum of understanding prepared and signed under this section.
- (4) The parties to a memorandum of understanding must, within 6 weeks after the memorandum or any amendment of the memorandum is signed by both parties, publish it in any manner the parties consider appropriate.
- (5) Each set of parties referred to in subsection (1) must prepare and sign their first memorandum of understanding under this section as soon as is reasonably practicable after the coming into operation of section 27 of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (of 2012).

16H. Guidelines—telecommunications/broadcasting sector

- (1) The Telecommunications Authority, or the Telecommunications Authority jointly with the Commissioner, may issue guidelines on matters in relation to which the Telecommunications Authority or any public officer authorized in writing by that Authority may exercise powers under section 16E(3).
- (2) The Broadcasting Authority, or the Broadcasting Authority jointly with the Commissioner, may issue

guidelines on matters in relation to which the Broadcasting Authority or any public officer authorized in writing by that Authority may exercise powers under section 16E(5).

- (3) Subsections (2) to (6) and (8) of section 16BA apply to guidelines issued under this section in the same way as they apply to guidelines issued under that section. For this purpose any reference in subsection (3), (5) or (6) of that section to the Commissioner is to be taken to be a reference to the Telecommunications Authority or the Broadcasting Authority or such Authority jointly with the Commissioner, as the case requires.
- (4) A person by whom guidelines are issued under this section (including jointly with another person) must make copies of all guidelines and amendments of guidelines available to the public for inspection at the person's office during ordinary business hours.

16I. Transitional provision

Subject to section 43 of the Telecommunications Ordinance (Cap. 106), anything that was done under that Ordinance as in force immediately before the commencement date as defined by subsection (1) of that section and that was in effect immediately before that date continues, in so far as it may be done under this Ordinance, to have effect as if it had been done under this Ordinance.”.

28. Section 19 amended (time limit for prosecutions)

At the end of section 19—

Add

“Note—

See section 30O.”.

29. Part IIIB added

After Part IIIA—

Add

“Part IIIB

Enforcement (Undertakings and Injunctions)

30L. Undertakings

- (1) An authorized officer may, with the consent in writing of the Secretary for Justice, accept a written undertaking given by a person whom the officer believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I.
- (2) An undertaking referred to in subsection (1) is an undertaking—
 - (a) not to continue or repeat the conduct covered by that subsection;
 - (b) not to engage in conduct of that kind, or any conduct of a substantially similar kind, in the course of any trade or business; or
 - (c) as a person referred to in section 20(1), not to continue, repeat or engage in any conduct referred to in paragraph (a) or (b) of this subsection that could constitute an offence by virtue of that section.
- (3) A person who has given an undertaking may, with the consent of an authorized officer, withdraw or vary it at any time.
- (4) An authorized officer may cause an undertaking to be published in any form and manner, and to any extent, that the officer thinks appropriate.

- (5) If an authorized officer considers that the person who gave an undertaking has breached any of its terms, the officer may apply to a court for an injunction under section 30P.

30M. Effect of acceptance of undertaking

- (1) If an authorized officer accepts an undertaking under section 30L, neither the Commissioner nor an authorized officer may—
- (a) commence or continue an investigation relating to the matter to which the undertaking relates; or
 - (b) bring or continue proceedings in a court relating to that matter.
- (2) To avoid doubt, the Commissioner or an authorized officer may still commence or continue an investigation, or bring or continue proceedings in a court, after the acceptance of an undertaking—
- (a) in relation to matters to which the undertaking does not relate; or
 - (b) in relation to persons who have not given the undertaking.

30N. Withdrawal of acceptance of undertaking

- (1) Subject to subsection (2), an authorized officer may, by notice in writing given to the person who gave the undertaking, withdraw the acceptance of an undertaking, with effect from the date specified in the notice, if the officer—
- (a) has reasonable grounds for believing that there has been a material change of circumstances since the undertaking was accepted;
 - (b) has reasonable grounds for suspecting that the person who gave the undertaking has breached any of its terms;

- (c) has reasonable grounds for suspecting that the information on which the decision to accept the undertaking was based was incomplete, false or misleading in a material particular; or
 - (d) has reasonable grounds for suspecting that the acceptance of the undertaking was procured by improper or unlawful conduct.
- (2) An authorized officer may only give a notice under this section if the officer has obtained the consent in writing of the Secretary for Justice to doing so.
- (3) If the acceptance of an undertaking is withdrawn under this section—
- (a) the undertaking is no longer binding on the person who gave it;
 - (b) an authorized officer may commence or resume an investigation, or bring proceedings in a court, relating to the matter to which the undertaking related; and
 - (c) a statement of any fact contained in the undertaking may be admitted in evidence in any proceedings referred to in paragraph (b) and, on its admission, is conclusive evidence in those proceedings of the fact stated in the undertaking.

30O. Effect of withdrawal on time limit for prosecutions

Despite section 19, if the acceptance of an undertaking is withdrawn, a prosecution for an offence under this Ordinance relating to the matter to which the undertaking related may be brought at any time before the expiration of 1 year after the effective date specified in the notice given under section 30N(1).

30P. Injunctions

- (1) The District Court may, on application by an authorized officer, grant an injunction, in any terms that the Court considers appropriate, if it is satisfied that a person—
 - (a) has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I; or
 - (b) has breached any of the terms of an undertaking given by the person under section 30L.
- (2) On an application under subsection (1) the District Court may, if satisfied that there are grounds for granting an injunction, instead of doing so accept an undertaking given by the defendant not to continue or repeat the conduct or to take steps that the Court believes will ensure that the defendant does not continue or repeat the conduct.
- (3) The District Court may require a person from whom it has accepted an undertaking to cause its terms (accompanied by any statement that may be specified by the Court) to be published in any form and manner, and to any extent, that the Court thinks appropriate.
- (4) The power of the District Court to grant an injunction against a person under subsection (1) or accept an undertaking from a person under subsection (2) may be exercised—
 - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of a kind referred to in subsection (1)(a);
 - (b) whether or not the person has previously engaged in conduct of that kind; or
 - (c) whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.

30Q. Interim injunctions

If an application is made under section 30P, the District Court may, if it considers it desirable to do so, grant an interim injunction pending the determination of the application.

30R. Variation and discharge of injunctions

The District Court may vary or discharge an injunction that it has granted under section 30P or 30Q.

30S. CFI may exercise powers of District Court in certain cases

The Court of First Instance may exercise the powers conferred on the District Court under section 30P, 30Q or 30R—

- (a) in a case of urgency; or
 - (b) if the Court of First Instance is satisfied that special circumstances exist which make it appropriate for the Court of First Instance rather than the District Court to exercise those powers.”.
-

Part 4

Consumer Redress

30. Section 18A added

After section 18—

Add

“18A. Power to award compensation

- (1) If a person is convicted of an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I, the court may, in addition to passing any sentence that may otherwise be passed by law, order the person to pay an amount of compensation that it thinks reasonable to any person who has suffered financial loss resulting from that offence.
- (2) An amount of compensation ordered to be paid to a person under subsection (1) is recoverable as a civil debt.”.

31. Section 36 added

After section 35—

Add

“36. Actions for damages

- (1) If—
 - (a) a person (*the claimant*) suffers loss or damage because of conduct of another person (not being an exempt person) that is directed to the claimant; and
 - (b) the conduct constitutes an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I,

the claimant may recover the amount of the loss or damage by action against that other person, or against any person (not being an exempt person) involved in the contravention.

- (2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.”.

Part 5

Consequential, Related and Minor Textual Amendments

Division 1—Trade Descriptions Ordinance

32. Long title amended

The long title, after “trade marks;”—

Add

“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;”.

33. Section 4 amended (marking and provision of information, etc. orders)

Section 4(3), English text—

Repeal

“required the”

Substitute

“require the”.

34. Section 6 amended (applying a trade description, trade mark or mark to goods)

Section 6(3), Chinese text—

Repeal

everything after “要求而供應的，”

Substitute

“而推斷該等貨品是作為符合該商品說明、商標或標記的貨品而供應的，在有關個案的整體情況下屬合理推斷，則供應該等貨品的人須當作已將該商品說明、商標或標記應用於該等貨品。”.

35. Section 11 repealed (false representations as to supply of goods)

Section 11—

Repeal the section.

36. Schedule 2 repealed (goods specified for purposes of section 13B)

Schedule 2—

Repeal the Schedule.

Division 2—Telecommunications Ordinance

37. Section 7M repealed (misleading or deceptive conduct)

Section 7M—

Repeal the section.

38. Part VC heading amended (appeals relating to sections 7K, 7L, 7M, 7N and 7P)

Part VC, heading—

Repeal

“7M,”.

39. Section 32L amended (interpretation)

Section 32L, definition of *appeal subject matter*, paragraph (a)(i)—

Repeal

“, 7M”.

40. Section 32N amended (appeals to Appeal Board)

Section 32N(1)(a)(i)—

Repeal

“, 7M”.

41. Section 39A amended (remedies)

Section 39A(1)—

Repeal

“, 7M”.

42. Section 43 added

Before Schedule 1—

Add

“43. Transitional provisions—Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012

(1) In this section—

amending Ordinance (《修訂條例》) means the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (of 2012);

Appeal Board (上訴委員會) has the meaning given by section 32L of the pre-amended Ordinance;

appeal subject matter (標的事項) has the meaning given by section 32L of the pre-amended Ordinance;

commencement date (生效日期) means the date on which Division 2 of Part 5 of the amending Ordinance comes into operation;

pre-amended Ordinance (《原有條例》) means this Ordinance as in force immediately before the commencement date.

(2) Any conduct of a licensee that—

- (a) was engaged in, or was in part engaged in, before the commencement date; and
- (b) but for the enactment of the amending Ordinance would be covered by section 7M of the pre-amended Ordinance,

may be investigated under this Ordinance on or after the commencement date, and the provisions of this Ordinance apply in relation to that investigation as if the amending Ordinance had not been enacted.

- (3) Any investigation of any conduct referred to in subsection (2) initiated before the commencement date under the pre-amended Ordinance may be continued under this Ordinance on or after the commencement date, and the provisions of this Ordinance apply in relation to that investigation as if the amending Ordinance had not been enacted.

(4) If—

- (a) but for the enactment of the amending Ordinance a person may make an appeal to the Appeal Board under section 32N(1) of the pre-amended Ordinance; and
- (b) the appeal subject matter relates to section 7M of that Ordinance,

the appeal may be made to and disposed of by the Appeal Board under this Ordinance on or after the commencement date, and the provisions of this Ordinance apply in relation to that appeal as if the amending Ordinance had not been enacted.

(5) If—

- (a) an appeal made to the Appeal Board under section 32N(1) of the pre-amended Ordinance has not been finally determined before the commencement date; and

(b) the appeal subject matter relates to section 7M of that Ordinance,

the appeal may be continued and disposed of by the Appeal Board under this Ordinance on or after the commencement date, and the provisions of this Ordinance apply in relation to that appeal as if the amending Ordinance had not been enacted.

(6) If—

(a) but for the enactment of the amending Ordinance a person may bring an action under section 39A(1) of the pre-amended Ordinance; and

(b) the action relates to—

(i) a breach of section 7M of the pre-amended Ordinance; or

(ii) a breach of a licence condition, determination or direction relating to section 7M of the pre-amended Ordinance,

the action may be brought under this Ordinance on or after the commencement date as if the amending Ordinance had not been enacted.

(7) If—

(a) an action brought under section 39A(1) of the pre-amended Ordinance has not been finally determined before the commencement date; and

(b) the action relates to—

(i) a breach of section 7M of that Ordinance; or

(ii) a breach of a licence condition, determination or direction relating to section 7M of that Ordinance,

the action may be continued under this Ordinance on or after the commencement date as if the amending Ordinance had not been enacted.”.

Explanatory Memorandum

The main object of this Bill is to amend the Trade Descriptions Ordinance (Cap. 362) (*the TDO*) to prohibit certain unfair trade practices, namely misleading omissions, aggressive commercial practices, bait advertising, bait and switch and wrongly accepting payment. The Bill also enables undertakings to be accepted and injunctions to be granted under the TDO as compliance mechanisms. As a further enforcement-related change the Bill makes the Telecommunications Authority and the Broadcasting Authority enforcement bodies under the TDO for their sector. Finally it empowers the making of compensation orders and enables anyone who has suffered loss or damage as a result of conduct that constitutes certain offences under the TDO to bring a civil action to recover that loss or damage.

Part 1—Preliminary

2. Clause 1 sets out the short title and provides for commencement.
3. Clause 2 introduces the enactments that are amended by the Bill.

Part 2—Unfair Trade Practices

4. Clause 3 amends section 2 of the TDO (interpretation) to amend the definitions of *false trade description* and *trade description* and insert a number of new definitions and interpretative provisions.
5. Clauses 4 and 5 respectively amend sections 4 and 5 of the TDO (which relate to the mandatory provision of information or instruction relating to goods) to extend their application to services.
6. Clause 6 inserts a new section 6A in the TDO specifying the circumstances in which a person is to be regarded as applying a trade description to a service.
7. Clause 7 amends the heading of section 7 of the TDO to make it clear that the section only applies to goods.

8. Clause 8 inserts a new section 7A in the TDO to make it an offence for a trader to apply a false trade description to a service or supply, or offer to supply, a service to which a false trade description is applied.
9. Clause 9 amends section 8 of the TDO consequentially on the inclusion in Part II of the TDO of provisions relating to trade descriptions applied to services.
10. Clause 10 amends section 12(1) of the TDO consequentially on the repeal of section 13 of the TDO being effected by clause 11.
11. Clause 11 repeals section 13 of the TDO which narrowed the coverage of trade description for goods sold for export.
12. Clause 12 repeals Part IIA of the TDO having regard to the expanded definition of *trade description* in relation to goods and the proposed new offence of misleading omissions.
13. Clause 13 inserts a new Part IIB in the TDO creating new offences relating to misleading omissions (new section 13E), aggressive commercial practices (new section 13F), bait advertising (new section 13G), bait and switch (new section 13H) and wrongly accepting payment (new section 13I). The new offences all relate to commercial practices in which a trader engages in relation to a consumer. As several of the new prohibitions involve a consideration of the effect of a commercial practice on the average consumer, new section 13D sets out the characteristics of the average consumer of which account must be taken in applying those prohibitions.
14. Clause 14 amends section 18(1) of the TDO to specify the penalties for the new offences created by the Bill and delete the reference to section 11 of the TDO consequentially on the repeal of that section by clause 34.
15. Clause 15 substitutes a new section 20 in the TDO dealing with the liability of others for an offence committed by a body corporate or by a person as a member of an unincorporated body if it is proved by the prosecution that the offence was committed with the consent

- or connivance of the other person or was attributable to their neglect.
16. Clause 16 amends section 21 of the TDO to exclude any person who is an exempt person from the class of persons to whom liability is extended by the section to the extent that the section relates to the offences created by the new section 7A (offences in respect of trade description of services) and new Part IIB (unfair trade practices).
17. Clause 17 inserts a new section 21A in the TDO to give an extra-territorial application to offences under the TDO that relate to commercial practices engaged in by traders who are in Hong Kong or whose usual place of business is Hong Kong and directed to consumers outside Hong Kong.
18. Clause 18 amends section 26(3) of the TDO consequentially on the creation by clause 8 of the new offence in respect of trade description of services.
19. Clause 19 inserts new sections 26A and 26B in the TDO to provide additional specific defences for the offences of bait advertising and wrongly accepting payment. In each case an evidential burden is imposed on a trader charged with the offence to raise a specific issue about what they offered to do and the burden then shifts to the prosecution to prove the contrary beyond reasonable doubt.
20. Clause 20 amends section 33 of the TDO to extend the regulation-making power conferred by that section to services supplied by a trader to a consumer.
21. Clause 21 amends section 34 of the TDO to save a contract for the supply of a service from being rendered void or unenforceable because of a contravention of the TDO.
22. Clause 22 inserts a new section 37 in the TDO enabling the Secretary for Commerce and Economic Development to amend by Gazette notice the new Schedules 3 and 4 being inserted by clause 23.

23. Clause 23 inserts new Schedules 3 and 4 in the TDO. New Schedule 3 sets out categories of professionals who are exempted in the course of their practices from the new prohibitions being imposed on traders. New Schedule 4 sets out classes of goods or services that are excluded from the definition of *product*.

Part 3—Enforcement-related Matters

24. Clause 24 inserts in section 2(1) of the TDO a definition of *Broadcasting Authority* and *Telecommunications Authority*.
25. Clause 25 amends section 15(1) of the TDO to include a new power for authorized officers to require persons carrying on, or employed in connection with, a trade or business to produce books or documents for the purpose of ascertaining whether an offence under the TDO has been or is being committed.
26. Clause 26 inserts a new section 16BA in the TDO empowering the Commissioner of Customs and Excise to issue guidelines on matters related to enforcement of the TDO by authorized officers. Guidelines are not subsidiary legislation and a person does not incur any civil or criminal liability through contravening them.
27. Clause 27 inserts new sections 16E to 16I in the TDO. These sections confer on the Telecommunications Authority and the Broadcasting Authority jurisdiction to enforce the TDO (except Part IIIA relating to the importation of infringing goods) for their respective sectors. New section 16F provides for the transfer of matters between enforcement bodies and new section 16G enables the enforcement bodies to enter into a memorandum of understanding with a view to co-ordinating the performance of their enforcement functions. New section 16H confers on the Telecommunications Authority and the Broadcasting Authority the same power as the Commissioner of Customs and Excise has under new section 16BA to issue guidelines. Guidelines issued by these Authorities are limited to their respective sectors and may be issued jointly with the Commissioner of Customs and Excise. New section 16I is a transitional provision covering things done under the

Telecommunications Ordinance (Cap. 106) before its amendment by Division 2 of Part 5 of this Bill.

28. Clause 28 inserts a Note in the text of section 19 of the TDO (time limit for prosecutions) to direct readers to new section 30O which extends that time limit in certain specified circumstances.
29. Clause 29 inserts a new Part IIIB in the TDO—
 - (a) New Part IIIB enables authorized officers, with the consent in writing of the Secretary for Justice, to accept written undertakings from persons whom they believe to have engaged, to be engaging or to be likely to engage, in conduct constituting certain offences under the TDO (new section 30L). If an undertaking is accepted no investigation relating to the matter to which the undertaking relates may be commenced or continued nor may any court proceedings be brought in relation to it (new section 30M).
 - (b) New section 30N allows an authorized officer, with the consent in writing of the Secretary for Justice, to withdraw the acceptance of an undertaking in certain specified circumstances thus removing the bar on commencing or resuming an investigation or bringing court proceedings relating to the matter to which the undertaking related. If the acceptance of an undertaking is withdrawn, a statement of fact contained in the undertaking is admissible in evidence in such court proceedings and is conclusive evidence in those proceedings of that fact. Further, on the withdrawal of the acceptance of an undertaking, the time limit for commencing a prosecution relating to the matter to which the undertaking related is extended up until 1 year after the withdrawal (new section 30O).
 - (c) New sections 30P and 30Q enable the District Court to grant an injunction or interim injunction on the application of an authorized officer if satisfied that a person has engaged, is engaging or is likely to engage, in

conduct constituting certain specified offences under the TDO or has breached an undertaking. The District Court may accept an undertaking instead of granting an injunction. New section 30R enables the District Court to vary or discharge an injunction and new section 30S enables the Court of First Instance to exercise the District Court's powers under these new provisions in certain specified circumstances.

Part 4—Consumer Redress

30. Clause 30 inserts a new section 18A in the TDO enabling a court on convicting a person of certain specified offences under the TDO to order the payment of reasonable compensation to any person who suffered financial loss from the offence.
31. Clause 31 inserts a new section 36 in the TDO enabling a person who has suffered loss or damage because of conduct of another person that amounts to any one of certain specified offences under the TDO and that is directed to the person to recover that loss or damage in an action against that person or anyone else involved in the contravention. Exempt persons are excluded from being claimed against under this new section.

Part 5—Consequential, Related and Minor Textual Amendments

Division 1—Trade Descriptions Ordinance

32. Clause 32 amends the long title of the TDO to accommodate the new provisions being inserted in the TDO by the Bill.
33. Clause 33 corrects a typographical error in the English text of section 4 of the TDO.
34. Clause 34 makes a minor textual amendment to the Chinese text of section 6 of the TDO.
35. Clause 35 repeals section 11 of the TDO consequentially on the expanded definition of *trade description*, in relation to goods, brought about by clause 3.

36. Clause 36 repeals Schedule 2 to the TDO consequentially on the repeal of section 13B of the TDO by clause 12.

Division 2—Telecommunications Ordinance

37. Clause 37 repeals section 7M of the Telecommunications Ordinance (Cap. 106) consequentially on the extension of the TDO to conduct previously covered by that section.
38. Clauses 38 to 41 make amendments to the Telecommunications Ordinance (Cap. 106) consequentially on the repeal of section 7M of that Ordinance.
39. Clause 42 inserts a new section 43 in the Telecommunications Ordinance (Cap. 106) containing transitional provisions relating to the amendments made to that Ordinance by this Division.

Chapter: 362 TRADE DESCRIPTIONS ORDINANCE

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.**

Part: I PRELIMINARY

Section: 1 Short title

This Ordinance may be cited as the Trade Descriptions Ordinance.

Section: 2 Interpretation

(1) In this Ordinance, unless the context otherwise requires-

"advertisement" (宣傳品) includes a catalogue, a circular and a price list;

"average consumer" (一般消費者)—see section 13D;

"authorized officer" (獲授權人員) means a public officer appointed under section 14;

"Broadcasting Authority" (廣管局) means the Broadcasting Authority established by section 3 of the Broadcasting Authority Ordinance (Cap. 391);

"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;

"Commissioner" (關長) means the Commissioner of Customs and Excise and any Deputy or Assistant Commissioner of Customs and Excise;

"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 outside the person's trade or business;

"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);

"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;

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

- (a) a trade description which is false to a material ~~degree; degree; or~~
- (b) a trade description which, though not false, is misleading, that is to say, likely to be taken for ~~such an indication of any of the matters specified in the definition of "trade description"~~ as a trade description of a kind that would be false to a material degree;
- ~~(c) anything which, though not a trade description, is likely to be taken for an indication of any of the matters specified in the definition of "trade description" and, as such an indication, would be false to a material degree;~~
- ~~(d) a false indication, or anything likely to be taken as an indication which would be false, that any goods comply with a standard specified or recognized by any person or implied by the approval of any person if there is no such person or no standard so specified, recognized or implied; or~~
- ~~(e) a false indication, or anything likely to be taken as an indication which would be false, that any goods of any class or type—~~
 - ~~(i) being goods in respect of which duty is payable under the laws of Hong Kong, are supplied free of the duty so payable in respect of that class or type of goods; or~~
 - ~~(ii) not being goods in respect of which duty is payable under the laws of Hong Kong, are supplied free of the duty so payable;~~

"forged trade mark" (偽造商標) has the meaning assigned to it by section 9(3);

"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;

"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;

"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;

"mark" (標記), when used as a noun, includes a sign capable of distinguishing the goods of one undertaking from those of other undertakings;

"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).

"Secretary" (局長) means the Secretary for Commerce and Economic Development;

"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);

"Telecommunications Authority" (電管局局長) means the Telecommunications Authority appointed under section 5 of the Telecommunications Ordinance (Cap. 106);

"trade description" (商品說明), in relation to goods, means an indication, direct or indirect, and by whatever means given, ~~of any of the following matters with respect to any goods or parts of goods, that is to say~~ with respect to the goods or any part of the goods including an indication of any of the following matters—

- (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) any physical characteristics not included in the preceding paragraphs;
- (ea) availability;
- (eb) compliance with a standard specified or recognized by any person;
- (ec) price, how price is calculated or the existence of any price advantage or discount;
- (ed) liability to pay duty on them under the laws of Hong Kong, generally or in specified circumstances;
- (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;

(gb) their being of the same kind as goods supplied to a person;

(h) place or date of manufacture, production, processing or reconditioning;

(i) person by whom manufactured, produced, processed or reconditioned;

(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;

(l) warranty given in respect of the service or spare parts referred to in paragraph (k);

(m) the person by whom the service or spare parts referred to in paragraph (k) are provided;

(n) the scope of the service referred to in paragraph (k)(i);

(o) the period for which the service or spare parts referred to in paragraph (k) are available;

(p) the charge or cost at which the service or spare parts referred to in paragraph (k) are available;

"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) any other characteristic or attribute of the service not covered by paragraph (a) or (b);
- (d) method and procedure by which, manner in which, and location at which, the service is supplied or to be supplied;
- (e) availability;
- (f) testing by any person and the results of the testing;
- (g) approval by any person or conformity with a type approved by any person;
- (h) a person by whom it has been acquired, or who has agreed to acquire it;
- (i) the person by whom the service is supplied or to be supplied;
- (j) after-sale service assistance concerning the service;
- (k) price, how price is calculated or the existence of any price advantage or discount;

"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-;

"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).

"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.
- (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-
- (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.

- (c) This subsection shall not apply to goods which are the subject of a notice published under subsection (2A).

(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.

(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.

(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.

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

Section: 3 Special provisions applicable to goldware

(1) Notwithstanding the definition of "false trade description" in section 2, a trade description which indicates the fineness (whether in parts per thousand or in carats) of gold shall be a false trade description if that indication is false to any extent or degree, except by understating the fineness.

(2) For the purpose of construing descriptions relating to the fineness of gold-

- (a) a description indicating that an article, or the metal in an article, is so many carats shall be presumed to be an indication that the article or metal is of gold, and that its fineness is that specified in the table in Schedule 1 for that number of carats;
- (b) paragraph (a) shall not apply if (as in a case where the article is a precious stone) the word "carat" is used as a measure of weight for precious stones, and not as a measure of fineness.

(3) Notwithstanding the definition of "false trade description" in section 2-

- (a) a trade description which indicates that any article (other than an article of pure gold) is of gold shall be a false trade description unless the article consists solely of gold alloy and-
 - (i) contains not less than 8 carats of gold; or
 - (ii) bears a mark clearly indicating in carats, by number or by number and the letters "k", "c" or "ct", the fineness of the gold content; or

- (iii) bears a mark clearly indicating in parts per thousand the fineness of the gold content; and
- (b) a mark calculated to be taken as an indication of the fineness of gold of an article-
 - (i) which is plated with or enclosed in gold alloy or gilded; or
 - (ii) to which gold alloy is soldered or otherwise affixed,
 shall be a false trade description unless it is manifest from the appearance of the article that the mark refers solely to the part of the article which consists of gold alloy.

(4) Any number of 1 or 2 digits on an article which indicates or purports to indicate, or is likely to be taken as an indication of, the fineness in carats of its gold content shall be a false trade description unless the article contains at least the same proportion of pure gold as the number bears to 24.

(5) Any number of 3 digits on an article which indicates or purports to indicate, or is likely to be taken as an indication of, the fineness in number of parts per thousand of its gold content shall be a false trade description unless the article contains gold of such a standard of fineness.

(6) For the purposes of this section "fineness" (純度) means the proportion of pure gold in accordance with subsection (4) or the number of parts by weight of gold in accordance with subsection (5) as the case may require.

Section: 4 Marking and provision of information, etc. orders

(1) The Chief Executive in Council may by order require that any goods specified in the order ~~shall be marked with or accompanied by any information must be marked with or accompanied by any information, or that any services specified in the order must be accompanied by any information,~~ (whether or not amounting to or including a trade description) or instruction relating to the goods **or services** and, subject to the provisions of this Ordinance, impose requirements for securing that the goods **or services** are so marked or accompanied, and regulate or prohibit the supply of goods **or services** with respect to which the requirements are not complied with; and the requirements may extend to the form and manner in which the information or instruction is to be given.

(2) Where an order under this section is in force with respect to goods **or services** of any description, any person who, in the course of any trade or business, supplies or offers to supply goods of that description in contravention of the order, **or any trader who supplies or offers to supply services of that description to a consumer in contravention of the order,** commits an offence.

(3) An order under this section may make different provision for different

circumstances and may, in the case of goods supplied in circumstances where the information or instruction required by the order would not be conveyed until after delivery, ~~required the require the~~ whole or part thereof to be also displayed near the goods.

(4) Without prejudice to subsection (2), an order under this section may provide that a contravention of any provision of the order is an offence punishable with a fine at level 6 and a term of imprisonment for 3 months.

(5) For the avoidance of doubt, information required by 2 or more orders made under subsection (1) to be contained in an invoice or receipt may, where the information is provided in respect of the same item of goods **or the same kind of service,** be contained in one single invoice or receipt.

Section: 5 Information to be given in advertisements

(1) The Chief Executive in Council may by order require that any description of advertisements of any goods **or services** specified in the order shall contain or refer to information (whether or not amounting to or including a trade description) relating to such goods **or services** and subject to the provisions of this Ordinance impose requirements as to the inclusion of that information or of an indication of the means by which it may be obtained.

(2) An order under this section may specify the form and manner in which any such information or indication is to be included in advertisements of any description and may make different provision for different circumstances.

(3) Where an advertisement of any goods to be supplied in the course of any trade or business, **or of any services to be supplied by a trader to a consumer,** fails to comply with any requirement imposed under this section, any person who publishes the advertisement commits an offence.

Part: II FALSE TRADE DESCRIPTIONS OR REPRESENTATIONS AND FORGED TRADE MARKS

Section: 6 Applying a trade description, trade mark or mark to goods

- (1) A person applies a trade description or trade mark or mark to goods if he-
 - (a) affixes or annexes it to or in any manner marks it on or incorporates it with-
 - (i) the goods themselves; or
 - (ii) anything in, on or with which the goods are supplied;

- (b) places the goods in, on or with anything which the trade description or trade mark or mark has been affixed or annexed to, marked on or incorporated with, or places any such thing with the goods;
- (c) uses the trade description or trade mark or mark in any manner likely to be taken as referring to the goods; or
- (d) makes in any affidavit, declaration or writing any statement to the effect that a trade description or trade mark or mark is applicable to the goods.

(2) An oral statement may amount to the use of a trade description or trade mark or mark.

(3) Where goods are supplied in pursuance of a request in which a trade description or trade mark or mark is used and the circumstances are such as to make it reasonable to infer that the goods are supplied as goods corresponding to that trade description or trade mark or mark, the person supplying the goods shall be deemed to have applied that trade description or trade mark or mark to the goods.

Section: 6A Applying a trade description to services

(1) A person is to be regarded as applying a trade description to a service if the person gives (by whatever means and whether direct or indirect) an indication of any kind with respect to the service or any part of the service including—

- (a) where the indication is given in such a manner that it is likely to be taken as referring to the service; and
- (b) where the person makes in any affidavit, declaration or writing a statement to the effect that the indication is applicable to the service.

(2) An oral statement may amount to the use of a trade description.

(3) If a service is supplied in response to a request in which a trade description is used and the circumstances are such as to make it reasonable to infer that the service is supplied as a service corresponding to that trade description, the person supplying the service is to be regarded as having applied that trade description to the service.

Section: 7 Offences in respect of trade descriptions of goods

(1) Subject to the provisions of this Ordinance, any person who—

- (a) in the course of any trade or business-
 - (i) applies a false trade description to any goods; or
 - (ii) supplies or offers to supply any goods to which a false trade description is applied; or
- (b) has in his possession for sale or for any purpose of trade or manufacture any goods to which a false trade description is applied,

commits an offence.

(2) A person exposing goods for supply or having goods in his possession for supply shall be deemed to offer to supply them.

(3) Subject to the provisions of this Ordinance any person who disposes of or has in his possession any die, block, machine, or other instrument for the purpose of making, or applying to goods a false trade description commits an offence unless he proves that he acted without intent to defraud.

Section: 7A Offences in respect of trade description of services

A trader who—

- (a) applies a false trade description to a service supplied or offered to be supplied to a consumer; or
- (b) supplies or offers to supply to a consumer a service to which a false trade description is applied,

commits an offence.

Note—

Section 21A gives this section an extra-territorial application.

Section: 8 Trade descriptions used in advertisements

(1) The following provisions of this section shall have effect where in an advertisement a trade description is used in relation to any class of goods or services.

(2) The trade description shall be taken as referring to all goods or services of the class, whether or not in existence at the time the advertisement is published—

- (a) for the purpose of determining whether an offence has been committed under section 7(1)(a)(i) or 7A(a); and
- (b) where goods or services of the class are supplied or offered to be supplied by a person publishing or displaying the advertisement, also for the purpose of determining whether an offence has been committed under section 7(1)(a)(ii) or 7A(b).

(3) In determining for the purposes of this section whether any goods or services are of a class to which a trade description used in an advertisement relates, regard shall be had not only to the form and content of the advertisement but also to the time, place, manner and frequency of its publication and all other matters making it likely or unlikely that a person to whom the goods or services are supplied would think of the goods or services as belonging to the class in relation to which the trade description is used in the advertisement.

Section: 9 Offences in respect of trade marks

- (1) Subject to the provisions of this Ordinance, any person who-
- (a) forges any trade mark;
 - (b) falsely applies to any goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive;
 - (c) makes any die, block, machine or other instrument for the purpose of forging, or of being used for forging, a trade mark;
 - (d) disposes of or has in his possession any die, block, machine or other instrument for the purpose of forging a trade mark; or
 - (e) causes to be done anything referred to in paragraph (a), (b), (c) or (d),
- commits an offence unless he proves that he acted without intent to defraud.
- (2) Subject to the provisions of this Ordinance, any person who sells or exposes or has in his possession for sale or for any purpose of trade or manufacture, any goods to which any forged trade mark is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, commits an offence.
- (3) For the purposes of this section but subject to subsection (3A), a person shall be deemed-
- (a) to forge a trade mark who either-
 - (i) without the consent of the owner of the trade mark, makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or
 - (ii) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise;
 - (b) falsely to apply to goods a trade mark who without the consent of the owner of that trade mark applies that trade mark to goods,
- and "forged trade mark" (偽造商標) shall be construed accordingly.
- (3A) A person shall not be deemed under subsection (3) to forge a trade mark, or falsely to apply to goods a trade mark, if the person proves-
- (a) that he acted without infringing any right of the owner of the trade mark conferred by the Trade Marks Ordinance (Cap 559);
 - (b) that the trade mark or mark was not used by him in the course of any trade or business as a trade mark in relation to goods;
 - (c) that the use made by him of the trade mark or mark is not a use in relation to goods for which the trade mark is registered and is not a use in relation to goods similar to those for which it is registered; or
 - (d) that the use made by him of the trade mark or mark is a use to which the rights of the owner of the trade mark do not extend by reason of a

disclaimer, limitation or condition to which the trade mark is subject.

(4) In any prosecution for an offence under subsection (1)(a) or (b) the burden of proving the consent of the owner shall lie on the defendant.

Section: 10 (Repealed)

~~Section: 11 False representations as to supply of goods~~

~~—Subject to the provisions of this Ordinance, any person who, in the course of any trade or business, gives, by whatever means, any false indication, direct or indirect, that any goods supplied by him are of a kind supplied to any person, commits an offence.~~

Section: 12 Prohibited import and export of certain goods

- (1) ~~Subject to section 13, no person shall~~ A person must not import or export any goods to which a false trade description or forged trade mark is applied.
- (2) Any person who imports or exports any goods contrary to subsection (1) commits an offence unless he proves that-
- (a) he did not know, had no reason to suspect and could not with reasonable diligence have found out that the goods are goods to which a false trade description or forged trade mark is applied; or
 - (b) the goods are not intended for trade or business.
- (3) This section shall not apply to any goods in transit.

~~Section: 13 Power to exempt goods sold for export~~

~~—In relation to goods which are intended for despatch to a destination outside Hong Kong, section 7 shall apply as if there were omitted from the matters included in the definition of "trade description" in section 2 those specified in paragraph (a) thereof, and, if the Chief Executive by order specifies any other of those matters for the purposes of this section with respect to any description of goods, section 7 shall apply, in relation to goods of that description which are intended for despatch to a destination outside Hong Kong, as if the matters so specified were also omitted from those included in the definition of "trade description" in section 2.~~

~~Part: 11A FALSE, MISLEADING OR INCOMPLETE INFORMATION~~

~~Section: 13A Price per unit of quantity on signs must be readily comprehensible~~

~~—(1) Any person who, without reasonable excuse, displays in the course of any trade or business a sign which—~~

- ~~(a) indicates a price set by reference to any unit of quantity for any goods that are exposed for sale; but~~
- ~~(b) fails, within the meaning given by subsection (2)(c), to indicate the price per unit of quantity in a readily comprehensible manner,—~~

~~commits an offence.~~

~~—(2) For the purposes of subsection (1)—~~

- ~~(a) “quantity” (數量) includes length, width, height, area, volume, capacity, weight and number;~~
- ~~(b) “sign” (標誌) includes notice, placard, label and any other article that serves a similar purpose;~~
- ~~(c) a sign which indicates the price set by reference to any unit of quantity for any goods fails to indicate the price per unit of quantity in a readily comprehensible manner if—~~
 - ~~(i) any letter, word, numeral or character on the sign that indicates the price or the unit of quantity is partially or completely obscured while some other such letters, words, numerals or characters are visible;~~
 - ~~(ii) because of any discrepancy between the manner of presentation of any letter, word, numeral or character on the sign that indicates the price or the unit of quantity and that of any other letter, word, numeral or character on the sign that indicates the price or the unit of quantity in terms of—~~
 - ~~(A) the size and distinctiveness of the letters, words, numerals or characters; or~~
 - ~~(B) the colour of the letters, words, numerals or characters as contrasted with the colour of the background on which they are marked,—~~~~it is reasonably likely that a person not having a close look at the sign will be unable to get a clear idea of the accurate price per that unit of quantity; or~~
 - ~~(iii) the letters, words or characters on the sign that indicate the unit of quantity are unreasonably far apart from the letters, words, numerals or characters on the sign that indicate the price.~~

~~—(3) If a person—~~

- ~~(a) displays in the course of any trade or business a sign which—~~
 - ~~(i) indicates the price of any goods set by reference to a unit of quantity; but~~
 - ~~(ii) does not indicate that unit of quantity; and~~
- ~~(b) displays another sign which indicates that unit of quantity by reference to which the actual price of such goods is to be calculated,—~~

~~subsections (1) and (2) shall have effect in relation to the person as if such signs were a single sign.~~

~~Section: 13B If price does not include basic accessories, purchaser to be informed before payment~~

~~—(1) Any person who—~~

- ~~(a) exposes any goods specified in Part 1 of Schedule 2 for sale in the course of any trade or business at a price which does not include any basic accessories of the goods that are reasonably expected to be included in the price; and~~
- ~~(b) fails to communicate, in the specified manner, to a person who offers to purchase the goods, the information that the price does not include the accessories before the person pays for the purchase,—~~

~~commits an offence.~~

~~—(2) In subsection (1)—~~

- ~~(a) “basic accessories” (基本配件), in relation to any goods specified in Part 1 of Schedule 2, means accessories that, though not being an integral part of the goods in structural terms, are nevertheless essential for the effective performance of the principal function (as determined in accordance with section 2 of Part 2 of Schedule 2) of the goods;~~
- ~~(b) “specified manner” (指明方式) means the manner in which the price of the goods is communicated to the person who offers to purchase the goods.~~

~~—(3) For the purposes of subsection (1), in determining whether any basic accessories of any goods are reasonably expected to be included in the price of the goods as communicated to a person who offers to purchase the goods, regard shall be had to—~~

- ~~(a) the prevailing trade practice;~~
- ~~(b) the representation, if any, made to the person by the person who exposes the goods for sale (“seller”);~~
- ~~(c) whether the instructions for users provided by the manufacturer or~~

- distributor of the goods show that the goods and the accessories are treated as a single item for the purpose of sale;
- (d) whether the packaging of the goods and the accessories is such that they are treated as a single item for the purpose of sale;
 - (e) whether the price of the goods at which they were supplied to the seller included the accessories; and
 - (f) any other relevant considerations.

—(4) The Secretary for Commerce and Economic Development may by notice published in the Gazette amend Schedule 2.

Section: 13C False or misleading representation as regards seller's connection with another person

—(1) Any person who, in the course of any trade, business or profession, makes a false representation to any other person that a particular seller (whether or not the seller is the person who makes the representation) who sells any goods in the course of any trade or business is connected with or endorsed by any individual or body commits an offence.

—(2) Any person who—

- (a) in connection with—
 - (i) the supply or possible supply of any goods in the course of any trade or business; or
 - (ii) the promotion of the supply of any goods in the course of any trade or business,—

makes a representation to any other person (“information recipient”) that the seller who supplies the goods is connected with or endorsed by any individual or body (“subject individual or body”);

- (b) ought reasonably to expect that the information recipient is likely to mistake the subject individual or body for another individual or body who or which is widely known to be of good standing and reputation (“reputable individual or body”) because the name of the subject individual or body is identical with, or very similar to, that of the reputable individual or body; and
- (c) fails, where the seller is not connected with or endorsed by the reputable individual or body, to take reasonable steps to prevent the information recipient from believing that the seller is connected with or endorsed by the reputable individual or body,—

commits an offence.

—(3) For the purposes of subsections (1) and (2)—

- (a) a representation that a seller is connected with an individual or body is

made if it is suggested that—

- (i) the individual or body has a proprietary interest (whether as the proprietor, a shareholder, a partner or otherwise) in the seller;
- (ii) the individual or body is in any form of close business association with the seller; or
- (iii) the seller is the agent or principal of the individual or body;
- (b) a representation that a seller is connected with a body is made if it is suggested that the seller and the body are owned by, or under the control of, the same person;
- (c) a representation that a seller is endorsed by an individual or body is made if it is suggested that—
 - (i) the individual or body makes a positive evaluation specifically of the seller; or
 - (ii) the seller has the permission, authorization or consent of the individual or body without which the seller would not be able to sell the goods concerned lawfully.

—(4) It is a defence for a person charged under subsection (1) to prove that he did not know and had no reason to believe that the representation was false.

—(5) It is a defence for a person charged under subsection (2) to prove that he believed, on reasonable grounds, that the information recipient did not mistake the subject individual or body for the reputable individual or body.

Part: IIB UNFAIR TRADE PRACTICES

Section: 13D Average consumer

(1) In determining the effect on the average consumer of a commercial practice that reaches or is directed to a consumer or consumers, 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.

(2) In determining the effect on the average consumer of a commercial practice in the circumstances specified in subsection (3), a reference to the average consumer is a reference to the average member of the particular group of consumers.

(3) For the purpose of subsection (2) the circumstances are—

- (a) where the commercial practice is directed to a particular group of consumers; and
- (b) where—
 - (i) a clearly identifiable group of consumers is particularly vulnerable to the commercial practice or the underlying product because of

- mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee; and
- (ii) the practice is likely to materially distort the economic behaviour only of that group.

(4) Subsection (3)(b) does not prejudice the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.

(5) In subsection (3)(b)(ii)—

"materially distort the economic behaviour" (在一定程度上扭曲消費表現), in relation to an average consumer, means appreciably to impair the average consumer's ability to make an informed decision and therefore causing the consumer to make a transactional decision that the consumer would not have made otherwise.

Section: 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;
- (c) the address (not including a postal box address) of the trader's usual place of business and of any other trader on whose behalf the trader is acting;
- (d) either—
 - (i) the price, including any taxes; or
 - (ii) if the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
- (e) where appropriate, either—
 - (i) all additional freight, delivery or postal charges; or
 - (ii) if those charges cannot reasonably be calculated in advance, the fact that they may be payable;
- (f) the following matters if they depart from the requirements of professional diligence—
 - (i) arrangements for payment;
 - (ii) arrangements for delivery;
 - (iii) arrangements for performance;
- (g) for products in relation to which there is a right of withdrawal or cancellation, the existence of that right.

(5) In this section—

"material information" (重要資料) means —

- (a) in relation to a commercial practice that is an invitation to purchase, any information that is material as a result of subsection (4); and
- (b) in every case -
 - (i) the information that the average consumer needs, according to the context, to make an informed transactional decision; or
 - (ii) any other information required in relation to a commercial communication under any other enactment;

"professional diligence" (專業勤勉) means the standard of skill and care that a trader may reasonably be expected to exercise towards consumers which is commensurate with either—

- (a) honest market practice in the trader's field of activity; or
- (b) the general principle of good faith in that field.

Section: 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.

Section: 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.

Section: 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.

Section: 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.

Part: III ENFORCEMENT

Section: 14 Appointment of authorized officers

(1) The Commissioner may appoint any public officer to be an authorized officer for the purposes of this Ordinance.

(2) The Commissioner may exercise any of the powers conferred on an authorized officer under this Ordinance.

Section: 15 Power to enter premises and inspect and seize goods and documents

(1) An authorized officer may, on production, if required, of evidence of his appointment-

- (a) make such purchases of goods as may appear expedient for the purpose of determining whether or not the provisions of this Ordinance are being complied with;
- (b) for the purpose of ascertaining whether any offence under this Ordinance has been or is being committed, inspect any goods and enter any premises other than domestic premises;
- (c) if he has reasonable cause to suspect that an offence under this Ordinance has been committed, seize or detain any goods for the purpose of ascertaining, by testing or otherwise, whether the offence has been committed;
- (ca) for the purpose of ascertaining whether any offence under this Ordinance has been or is being committed, require any person carrying on a trade or business or employed in connection with a trade or business to produce any books or documents required to be kept under this Ordinance and may take copies of, or of any entry in, any such book or document;
- (d) if he has reasonable cause to suspect that an offence under this Ordinance has been committed and for the purpose of ascertaining whether it has been committed, require any person carrying on a trade or business or employed in connection with a trade or business to produce any books or documents relating to the trade or business and may take copies of, or of any entry in, any such book or document;
- (e) in the case of any premises, vehicle, vessel (other than a ship of war) or aircraft (other than a military aircraft) in which he has reasonable cause to suspect that there are goods in respect of which an offence under this Ordinance has been or is being committed-
 - (i) subject to section 16, enter and search such premises;

- (ii) stop and search such vehicle; or
- (iii) stop, board and search such vessel or aircraft;
- (f) seize, remove or detain-
 - (i) any goods in respect of which he has reasonable cause to suspect an offence under this Ordinance has been or is being committed; and
 - (ii) anything which he has reason to believe may be required as evidence in proceedings for an offence under this Ordinance.

Note—

By virtue of section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) a reference to an Ordinance includes subsidiary legislation made under it, unless the contrary intention appears.

(2) An authorized officer may-

- (a) break open any container or open any vending machine for the purpose of exercising his powers under subsection (1)(f) to seize goods;
- (b) break open any outer or inner door of any place which he is empowered or authorized by or under this Ordinance to enter and search;
- (c) forcibly board any vessel or aircraft which he is empowered by this Ordinance to stop, board or search;
- (d) remove by force any person or thing obstructing him in the exercise of any power conferred on him by this Ordinance;
- (e) detain any person found in any premises which he is empowered or authorized by or under this Ordinance to search until such place has been so searched;
- (f) detain any vessel or aircraft which he is empowered by this Ordinance to stop, board and search, and prevent any person from approaching or boarding such vessel or aircraft until it has been so searched;
- (g) detain any vehicle which he is empowered by or under this Ordinance to stop and search until it has been so searched.

Section: 16 Restrictions on the entry and search of domestic premises

(1) No domestic premises shall be entered and searched by an authorized officer unless-

- (a) a magistrate has issued a warrant under subsection (2); or
- (b) the Commissioner has given an authorization under subsection (3).

(2) A magistrate may, if he is satisfied by information on oath that there is reasonable ground for suspecting that there is in any domestic premises any goods or thing which may be seized, removed or detained under section 15(1)(f), issue a warrant authorizing an authorized officer to enter and search the premises.

(3) The Commissioner may, if he is satisfied that there is reasonable ground for

suspecting-

- (a) that there is in any domestic premises any goods or thing which may be seized, removed or detained under section 15(1)(f); and
 - (b) that unless the premises are entered and searched immediately such goods or thing are likely to be removed from the premises,
- authorize in writing an authorized officer to enter and search the premises.
- (4) An authorized officer authorized under subsection (2) or (3) to enter and search any domestic premises may take with him such other persons and such equipment as may appear to him to be necessary.

Section: 16A Power to detain goods by locking or sealing premises or container

- (1) An authorized officer may, for the purpose of detaining, under section 15-
- (a) any goods in respect of which he has reasonable cause to suspect that an offence under this Ordinance has been or is being committed; and
 - (b) anything which he has reason to believe may be required as evidence in proceedings for an offence under this Ordinance,
- place a lock or seal on any premises or container in which the goods or things are.
- (2) If a lock or seal is placed on any premises or container under subsection (1), the period for which the lock or seal is placed shall not exceed 7 days without the consent in writing of the owner of the premises or container, or his authorized agent.
- (3) If an authorized officer has placed a lock or seal on any premises or container under subsection (1), any person who breaks or interferes with such lock or seal commits an offence unless he does so-
- (a) in the bona fide belief that it is necessary immediately to break or interfere with the lock or seal in order to prevent-
 - (i) injury being suffered by any person; or
 - (ii) damage being incurred to any such premises or container, as the case may be; or
 - (b) in the exercise of his duties as a public officer.

Section: 16B Powers of arrest of authorized officers

- (1) An authorized officer may, subject to subsection (2), arrest or detain for further enquiries without warrant any person whom he reasonably suspects of having committed any offence under this Ordinance.
- (2) An authorized officer who arrests any person under subsection (1) shall forthwith take the person to a police station or, if further enquiries are necessary, first to an office of the Customs and Excise Department and then to a police station, there

to be dealt with in accordance with the provisions of the Police Force Ordinance (Cap 232):

Provided that in no case shall any person be detained for more than 48 hours without being charged and brought before a magistrate.

(3) If any person forcibly resists or attempts to evade arrest under this section, the authorized officer may use such force as is reasonably necessary to effect the arrest.

Section: 16BA Guidelines-general

- (1) The Commissioner may issue guidelines on matters in relation to which an authorized officer may exercise powers under this Ordinance.
- (2) Without limiting subsection (1), the guidelines may—
- (a) indicate the manner in which powers will be exercised by authorized officers with respect to the matters to which the guidelines relate; or
 - (b) provide guidance on the operation of any provision of this Ordinance relating to those matters.
- (3) Guidelines may be published in any manner that the Commissioner considers appropriate.
- (4) Guidelines are not subsidiary legislation.
- (5) The Commissioner may amend or revoke any guidelines. Subsections (3) and (4) apply to an amendment or revocation of guidelines in the same way as they apply to the guidelines.
- (6) Before issuing any guidelines or amendments of guidelines, the Commissioner must consult any persons that the Commissioner considers appropriate.
- (7) The Commissioner must make copies of all guidelines and amendments of guidelines available to the public for inspection at the Commissioner's office during ordinary business hours.
- (8) A person does not incur any civil or criminal liability only because the person has contravened any of the guidelines. If, in any legal proceedings, a court is satisfied that a guideline is relevant to determining a matter that is in issue—
- (a) the guideline is admissible in evidence in the proceedings; and
 - (b) proof that the person contravened or did not contravene the guideline may be relied on by any party to the proceedings as tending to establish or negate the matter.

Section: 16C Disclosure of information, etc.

- (1) Where goods seized or detained under section 15 are, or are reasonably suspected by the Commissioner to be, goods to which a forged trade mark is applied,

or to which a trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, the Commissioner shall, wherever reasonably practicable, notify the owner of the trade mark or his authorized agent of the seizure or detention, as the case may be.

(2) In the circumstances specified in subsection (1), the Commissioner may disclose to the owner of the trade mark or to his authorized agent-

- (a) the time, and the address of the place, of seizure or detention of the goods;
- (b) the name and address of the person from whom the goods have been seized or detained;
- (c) the nature and quantity of the goods seized or detained;
- (d) any statement made to the Commissioner by any person in connection with the seizure or detention, either with the prior consent in writing of that person or without such consent where that person is dead or cannot after reasonable enquiries by the Commissioner as to his whereabouts be found by the Commissioner;
- (e) any other information or document relating to the goods seized or detained which the Commissioner thinks fit to disclose.

(3) The owner of a trade mark or his authorized agent-

- (a) where he seeks disclosure of any information or document that is not referred to in subsection (2); or
- (b) where information or a document that is referred to in subsection (2) is not disclosed by the Commissioner,

may apply to the Court of First Instance for an order requiring the Commissioner to disclose such information or document and the Court of First Instance may on such an application make such order for disclosure as it deems fit.

(4) An application under subsection (3) may be begun by motion with previous notice to the Commissioner.

Section: 16D International co-operation

The Commissioner may, for the purpose of promoting international co-operation in the protection of intellectual property rights, disclose information obtained in pursuance of this Ordinance to the customs authorities of any Convention country.

Section: 16E Enforcement relating to telecommunications and broadcasting

(1) Subject to subsection (2), the Telecommunications Authority and the Broadcasting Authority may each exercise any of the powers conferred on an authorized officer under this Ordinance (other than Part IIIA).

(2) The Chief Executive in Council may, by notice published in the Gazette, specify in relation to the Telecommunications Authority or the Broadcasting Authority powers covered by subsection (1) that are not exercisable by that Authority.

(3) The Telecommunications Authority, or any public officer authorized in writing in that behalf by that Authority, may exercise any of the powers that by virtue of this section are exercisable by that Authority but may only do so in relation to any commercial practices of persons specified in subsection (4) that are directly connected with the provision of a telecommunications service under the Telecommunications Ordinance (Cap. 106).

(4) For the purpose of subsection (3) the persons are persons that are licensees under the Telecommunications Ordinance (Cap. 106), other than licensees under Part IIIA of that Ordinance.

(5) The Broadcasting Authority, or any public officer authorized in writing in that behalf by that Authority, may exercise any of the powers that by virtue of this section are exercisable by that Authority but may only do so in relation to any commercial practices of persons specified in subsection (6) that are directly connected with the provision of a broadcasting service under the Broadcasting Ordinance (Cap. 562) or Part IIIA of the Telecommunications Ordinance (Cap. 106).

(6) For the purpose of subsection (5) the persons are persons that are—

- (a) licensees under the Broadcasting Ordinance (Cap. 562); or
- (b) licensees under Part IIIA of the Telecommunications Ordinance (Cap. 106).

(7) Nothing in this section enables the exercise of powers with respect to any conduct covered by section 9 or 12.

(8) The fact that a power is exercisable in relation to a commercial practice by the Telecommunications Authority, the Broadcasting Authority or any public officer authorized in writing by either of those Authorities does not, subject to section 16F, prevent that power being exercised in relation to that practice by the Commissioner or an authorized officer.

(9) To avoid doubt, in exercising a power under this Ordinance the Telecommunications Authority, the Broadcasting Authority or any public officer authorized in writing by either of those Authorities does not do so as an agent or delegate of the Commissioner.

Section: 16F Transfer of matters between enforcement bodies

(1) If the Commissioner, the Telecommunications Authority or the Broadcasting Authority is performing a function under this Ordinance in relation to a matter over which another one of them has concurrent jurisdiction, the 2 relevant bodies may agree that the matter be transferred to and be dealt with by one of them.

(2) Unless there is an agreement as mentioned in subsection (1), if the Commissioner, the Telecommunications Authority or the Broadcasting Authority is performing or has performed a function under this Ordinance in relation to a matter over which another one of them has concurrent jurisdiction, the other must not perform any function in relation to that matter.

Section: 16G Memorandum of understanding

(1) The Commissioner and the Telecommunications Authority, and the Commissioner and the Broadcasting Authority, must prepare and sign a memorandum of understanding for the purpose of co-ordinating the performance of their functions under this Ordinance.

(2) Without limiting subsection (1), a memorandum of understanding may provide for any or all of the following—

- (a) the manner in which the parties will perform the functions that they have jurisdiction to perform concurrently under this Ordinance;
- (b) the manner in which the parties will resolve any dispute between themselves;
- (c) the provision of assistance by one party to the other;
- (d) the allocation between the parties of responsibility for particular matters or classes of matters;
- (e) arrangements for the supply by one party to the other of information relating to a matter over which they have concurrent jurisdiction;
- (f) arrangements for keeping the other party informed about progress when one party is performing functions that may be performed concurrently under this Ordinance;
- (g) the joint authorship of educational material or guidelines on matters over which the parties have concurrent jurisdiction.

(3) The parties to a memorandum of understanding may amend or replace any memorandum of understanding prepared and signed under this section.

(4) The parties to a memorandum of understanding must, within 6 weeks after the memorandum or any amendment of the memorandum is signed by both parties, publish it in any manner the parties consider appropriate.

(5) Each set of parties referred to in subsection (1) must prepare and sign their first memorandum of understanding under this section as soon as is reasonably practicable after the coming into operation of section 27 of the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (of 2012).

Section: 16H Guidelines-telecommunications/broadcasting sector

(1) The Telecommunications Authority, or the Telecommunications Authority jointly with the Commissioner, may issue guidelines on matters in relation to which the Telecommunications Authority or any public officer authorized in writing by that Authority may exercise powers under section 16E(3).

(2) The Broadcasting Authority, or the Broadcasting Authority jointly with the Commissioner, may issue guidelines on matters in relation to which the Broadcasting Authority or any public officer authorized in writing by the Broadcasting Authority may exercise powers under section 16E(5).

(3) Subsections (2) to (6) and (8) of section 16BA apply to guidelines issued under this section in the same way as they apply to guidelines issued under that section. For this purpose any reference in subsection (3), (5) or (6) of that section to the Commissioner is to be taken to be a reference to the Telecommunications Authority or the Broadcasting Authority or such Authority jointly with the Commissioner, as the case requires.

(4) A person by whom guidelines are issued under this section (including jointly with another person) must make copies of all guidelines and amendments of guidelines available to the public for inspection at the person's office during ordinary business hours.

Section: 16I Transitional provision

Subject to section 43 of the Telecommunications Ordinance (Cap. 106), anything that was done under that Ordinance as in force immediately before the commencement date as defined by subsection (1) of that section and that was in effect immediately before that date continues, in so far as it may be done under this Ordinance, to have effect as if it had been done under this Ordinance.

Section: 17 Offences of obstruction and disclosure of information

(1) Without prejudice to any other Ordinance, any person who-

- (a) wilfully obstructs an authorized officer in the exercise of his powers or the performance of his duties under this Ordinance;

(b) wilfully fails to comply with any requirement properly made to him by any such authorized officer; or
(c) without reasonable excuse fails to give such authorized officer any other assistance or information which the authorized officer may reasonably require of him for the purpose of the performance of the officer's functions under this Ordinance,
commits an offence.

(2) Subject to subsection (2A), any person who discloses to any other person-
(a) any information with respect to any manufacturing process or trade secret obtained by him in premises which he has entered by virtue of this Ordinance; or
(b) any information obtained by him in pursuance of this Ordinance,
commits an offence unless the disclosure was made-
(i) in or for the purpose of the performance by him or any other person of functions under this Ordinance; or
(ii) in the case of paragraph (b) under the direction or order of a court.
(2A) A person does not commit an offence under subsection (2) by-
(a) disclosing information under section 16C(1) or (2) or under an order of the Court of First Instance made under section 16C(3);
(b) disclosing information under section 16D; or
(c) disclosing information under section 30F(1) or under an order of the Court of First Instance made under section 30F(2).
(3) Any person who, in giving any such information as is referred to in subsection (1)(c), makes any statement which he knows to be false commits an offence.

(4) Subject to subsection (5), nothing in this section shall be taken to-
(a) require a person to answer any question or give any information if to do so might incriminate that person or the wife or husband of that person; or
(b) compel the production by a solicitor of a document containing a privileged communication made by or to him in that capacity or authorize the seizure of any such document in his possession.

(5) A person shall not be excused, by reason that to do so may incriminate that person or the wife or husband of that person of an offence under this Ordinance-
(a) from answering any question put to that person in any civil proceedings;
(b) from complying with any order made in any such proceedings,
but no statement or admission made by a person in answering a question put or complying with an order made shall, in proceedings for an offence under this Ordinance, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the wife or husband of that person.

Section: 18 Penalties

(1) Any person who commits an offence under section 4, 5, 7, 7A, 9, ~~11~~, 12, ~~13A~~, ~~13B~~ or ~~13C~~ 13E, 13F, 13G, 13H or 13I shall be liable-
(a) on conviction on indictment, to a fine of \$500000 and to imprisonment for 5 years; and
(b) on summary conviction, to a fine at level 6 and to imprisonment for 2 years.

(1A) Any person who commits an offence under section 16A(3) shall be liable to a fine at level 2 and to imprisonment for 3 months.

(2) Any person who commits an offence under section 17 shall be liable to a fine at level 3 and to imprisonment for 1 year.

Section 18A Power to award compensation

(1) If a person is convicted of an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I, the court may, in addition to passing any sentence that may otherwise be passed by law, order the person to pay an amount of compensation that it thinks reasonable to any person who has suffered financial loss resulting from that offence.
(2) An amount of compensation ordered to be paid to a person under subsection (1) is recoverable as a civil debt.

Section: 19 Time limit for prosecutions

No prosecution for an offence under this Ordinance shall be brought after-
(a) the expiration of 3 years from the date of commission of the offence; or
(b) the expiration of 1 year from the date of discovery of the offence by the prosecutor,
whichever is the earlier.
Note –
See section 300.

Section: 20 Offences by corporations –

~~—Where a body corporate is convicted of an offence under this Ordinance, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of the body corporate, or any person who was~~

~~purporting to act in any such capacity, shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the commission of the offence.~~

Section: 20 Liability of directors, partners, etc.

(1) If an offence under this Ordinance is committed by a body corporate or by a person as a member of an unincorporated body, and it is proved that the offence has been committed with the consent or connivance or is attributable to the neglect of a person specified in subsection (2), that person also commits the offence and is liable to be proceeded against and punished accordingly.

(2) The person referred to in subsection (1) is a person who, at the time of the offence, was—

- (a) (in the case of a body corporate) a director, shadow director, secretary, principal officer or manager of the body corporate;
- (b) (in the case of a member of an unincorporated body) a partner or office holder in or a member or manager of the unincorporated body; or
- (c) (in either case mentioned in paragraph (a) or (b)) purporting to act in the capacity of a person referred to in that paragraph.

(3) In this section—

"principal officer" (主要人員), in relation to a body corporate, means—

- (a) a person employed by the body corporate who, either alone or jointly with one or more other persons, is responsible under the immediate authority of the directors of the body corporate for the conduct of the business of the body corporate; or
- (b) a person employed by the body corporate who, under the immediate authority of a director of the body corporate or a person to whom paragraph (a) applies, exercises managerial functions in respect of the body corporate;

"shadow director" (幕後董事), in relation to a body corporate, means a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act.

Section: 21 Offences due to fault of other person

(1) Where the commission by any person of an offence under this Ordinance is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of

this section whether or not proceedings are taken against the first-mentioned person.

(2) In subsection (1) the reference to some other person does not include an exempt person in the case of an offence under section 7A, 13E, 13F, 13G, 13H or 13I.

Section: 21A Extra-territoriality

A trader may commit an offence under this Ordinance with respect to a commercial practice even if the practice is directed at consumers who are outside Hong Kong if, at the time of engaging in the practice, the trader is in Hong Kong or Hong Kong is the trader's usual place of business.

Section: 22 Accessory to offences committed outside Hong Kong

Subject to the provisions of this Ordinance, any person who, in Hong Kong, procures, counsels, aids, abets or is accessory to the commission outside Hong Kong of an act which, if committed in Hong Kong, would be an offence under this Ordinance, commits that offence as a principal and shall be liable to be prosecuted in Hong Kong as if the offence had been committed within Hong Kong.

Section: 23 Samples

(1) Where any act or omission constitutes both an offence under this Ordinance and an offence under the Public Health and Municipal Services Ordinance (Cap 132), evidence on behalf of the prosecution concerning any sample procured for analysis shall be admissible in proceedings in respect of the offence under this Ordinance if, but only if, the provisions of section 63 of the Public Health and Municipal Services Ordinance (Cap 132) have been complied with.

(2) The Chief Executive in Council may by regulations provide that in any proceedings for an offence under this Ordinance in relation to such goods as may be specified in the regulations (other than proceedings for an offence referred to in subsection (1)) evidence on behalf of the prosecution concerning any sample procured for analysis shall not be admissible unless the sample has been dealt with in such manner as may be specified in the regulations.

Section: 24 Evidence by certificate

(1) The Chief Executive in Council may by regulations provide that certificates issued by such persons as may be specified by the regulations in relation to such matters as may be so specified shall, subject to this section, be received in evidence of those matters in any proceedings under this Ordinance.

(2) Such a certificate shall not be received in evidence—

- (a) unless the party against whom it is to be given in evidence has been served with a copy thereof not less than 7 days before the hearing; or
- (b) if that party has, not less than 3 days before the hearing served on the other party a notice requiring the attendance of the person issuing the certificate.

(3) For the purposes of this section any document purporting to be such a certificate as is referred to in this section shall be deemed to be such a certificate unless the contrary is shown.

Section: 24A Rule of evidence regarding imported goods

(1) In any prosecution for an offence under this Ordinance in respect of the import of goods to which a false trade description of the place of manufacture, production, processing or reconditioning is applied, evidence that the goods were imported from a place shall be prima facie evidence that the goods were manufactured, produced, processed or reconditioned, as the case may be, in such place.

(2) Notwithstanding subsection (1), in any prosecution for an offence referred to in that subsection, a trade description which indicates that the goods were manufactured, produced, processed or reconditioned in a place shall not be regarded as false only because of the evidence that the goods were imported from another place, if—

- (a) that other place is located within the first-mentioned place; or
- (b) the first-mentioned place is located within that other place.

Section: 25 Description of trade mark in pleading

In any information, indictment, pleading, proceeding or document in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.

Section: 26 Defence mistake, accident, etc.

(1) In any proceedings for an offence under this Ordinance it shall, subject to subsection (2), be a defence for the person charged to prove—

- (a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and
- (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

(2) If in any case the defence provided by subsection (1) involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, within a period ending 7 clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.

(3) In any proceedings for an offence under section 7(1)(a)(ii) or (b) **or section 7A (b)** it shall be a defence for the person charged to prove that he did not know, had no reason to suspect and could not with reasonable diligence have ascertained, that the goods **or service** did not conform to the description or that the description had been applied to the goods **or service**.

(4) In any proceedings for an offence under section 9(2) it shall be a defence for the person charged to prove that he did not know, had no reason to suspect and could not with reasonable diligence have ascertained, that a forged trade mark had been applied to the goods or that a trade mark or mark so nearly resembling a trade mark as to be calculated to deceive had falsely been applied to the goods.

Section: 26A Additional defence (bait advertising)

Without limiting section 26, in any proceedings for an offence under section 13G the person charged is entitled to be acquitted if—

- (a) sufficient evidence is adduced to raise an issue that—**
 - (i) the trader offered to supply, or to procure a third person to supply, products of the kind advertised to the consumer within a reasonable time, in a reasonable quantity and at the advertised price and, if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the products; or**
 - (ii) the trader offered to supply immediately, or to procure a third person to supply within a reasonable time, equivalent products to**

the consumer in a reasonable quantity and at the price at which the advertised products were advertised and, if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the equivalent products; and

(b) the contrary is not proved by the prosecution beyond reasonable doubt.

Section: 26B Additional defence (wrongly accepting payment)

Without limiting section 26, in any proceedings for an offence under section 13I the person charged is entitled to be acquitted if—

(a) sufficient evidence is adduced to raise an issue that—

(i) the trader offered to procure a third person to supply the products and, if that offer was accepted by the consumer, the trader so procured a third person to supply the products; or

(ii) the trader offered to supply, or to procure a third person to supply, equivalent products—

(A) within the period specified by the trader at or before the time at which the payment or other consideration was accepted; or

(B) if no period was specified at or before that time, within a reasonable period,

and, if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the equivalent products; and

(b) the contrary is not proved by the prosecution beyond reasonable doubt.

Section: 27 Innocent publication of advertisements

In proceedings for an offence under this Ordinance committed by the publication of an advertisement, it shall be a defence for the person charged to prove that he is a person whose business it is to publish or arrange for the publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence under this Ordinance.

Section: 28 Costs in proceedings

In any proceedings under this Ordinance, the magistrate or court hearing the proceedings may, notwithstanding any provision of any other Ordinance, make such

order as to costs as he or it may think fit.

Section: 29 Power to make orders with respect to property in possession of the Government

Where any property has come into the possession of the Government or any authorized officer acting under this Ordinance, section 102 of the Criminal Procedure Ordinance (Cap 221) shall, subject to this Ordinance, apply to such property in all respects as though such property had come into the possession of the police in connection with a criminal offence and such section shall be construed as though references to the Government or such authorized officer, as the case may be, were substituted therein for references to the police.

Section: 30 Forfeiture and disposal of certain goods

(1) Any goods in respect of which an offence under this Ordinance has been committed shall be liable to forfeiture, whether or not any person has been convicted of any such offence.

(2) Where goods are seized or detained by an authorized officer under section 15, the Commissioner may at any time release such goods to the person who appears to him to be the owner thereof or his authorized agent subject to any such condition as the Commissioner may specify in writing.

(3) Where goods have not been released under subsection (2), the Commissioner may, whether in the same proceedings where an offence is prosecuted or in other proceedings under this Ordinance, apply to a court or magistrate for the forfeiture of the goods.

(4) If, on the hearing of an application under subsection (3), the court or magistrate is satisfied that the goods are liable to forfeiture, the court or magistrate may order that—

(a) the goods be forfeited to the Government;

(b) the goods be destroyed;

(c) any false trade description applied to the goods be obliterated and thereafter the goods be—

(i) disposed of in such manner and subject to any such condition as the court or magistrate may specify in the order; or

(ii) released to the owner thereof or his authorized agent subject to any condition which the court or magistrate may specify in the order; or

(d) in exceptional cases, any forged trade mark applied to the goods be obliterated and thereafter the goods be—

(i) disposed of in such manner and subject to any such condition as the

- court or magistrate may specify in the order; or
- (ii) released to the owner thereof or his authorized agent subject to any condition which the court or magistrate may specify in the order.

(5) Where under subsection (3) an application is made to a court or magistrate for the forfeiture of goods otherwise than in proceedings where an offence is prosecuted, the Commissioner shall forthwith notify in writing the owner of the goods or his authorized agent, unless the owner or his authorized agent has indicated in writing to the Commissioner that such notification is not required:

Provided that, if there is more than one owner of the goods, it shall be sufficient for the purposes of this subsection to give notice to one such owner or his authorized agent, unless one such owner or his authorized agent has indicated that such notification is not required.

Section: 31 (Repealed)

Part: IIIA PROCEEDINGS RELATING TO IMPORTATION OF INFRINGING GOODS*

Section: 30A Interpretation

In this Part, "detention order" (扣留令) means an order made under section 30C(1).

Section: 30B Application for detention order

(1) The owner of a trade mark may apply to the Court of First Instance for an order under section 30C(1) where he has reasonable ground for suspecting that the importation of goods that constitute infringing goods may take place.

(2) An application under subsection (1) may be made ex parte but with previous notice to the Commissioner.

(3) An application under subsection (1) shall be in such form as is prescribed by rules of court and shall be supported by an affidavit of the owner which-

- (a) states that the deponent is the owner of the trade mark in question;
- (b) states that a copy of the trade mark exhibited to the affidavit is a true copy of the trade mark;
- (c) states the grounds for the application, including the facts relied upon by the deponent as showing that the goods in question are prima facie infringing goods;
- (d) sets out a sufficiently detailed description of the goods in question to make them readily recognizable by the Commissioner;
- (e) sets out particulars regarding the expected mode of transportation and the expected date of importation and, if available, particulars identifying the importer; and
- (f) sets out such other information and exhibits such other documents as may be prescribed by rules of court.

(4) Where the trade mark in question is registered, the affidavit of the owner shall exhibit a certified copy of each entry in the register that relates to the trade mark or, where it is not practicable for the deponent to obtain such a certified copy, shall state the reasons why it is not practicable to do so.

(5) No application may be made under subsection (1) with respect to goods in transit.

(6) No application may be made under subsection (1) with respect to the importation by a person of goods for his private and domestic use.

Section: 30C Issuance of detention order

(1) Where, on the hearing of an application made under section 30B, the owner presents adequate evidence to satisfy the Court of First Instance that the goods in question are prima facie infringing goods, the Court of First Instance may make an order directing the Commissioner or an authorized officer to take reasonable measures to seize or detain the goods on or after their importation.

(2) The Court of First Instance may require the owner of the trade mark to provide security or an equivalent assurance in an amount sufficient to protect the importer and any other person having an interest in the goods to be detained, including the consignor and consignee, from any loss or damage that may be incurred in the event that the detention is wrongful or the goods are released to the importer under section 30D(6).

(3) A detention order may contain such terms and conditions as the Court of First Instance considers appropriate.

(4) The Court of First Instance shall not make a detention order with respect to any goods that have been seized or detained by, and that are in the custody of, the Commissioner or an authorized officer pursuant to any law.

(5) Where the Commissioner or an authorized officer seizes or detains any goods pursuant to any law, other than this Part, any detention order made with respect to those goods shall cease to have effect.

(6) Where the Court of First Instance makes a detention order, the owner of the trade mark shall forthwith serve a copy of the order on the Commissioner.

(7) A detention order has effect from the date on which it is made or such later date as may be specified by the Court of First Instance and shall cease to have effect 60 days from that date unless the Commissioner or an authorized officer has, pursuant to the order and within that period, seized or detained any goods to which the order applies.

Section: 30D Enforcement of detention order

(1) Where a detention order is served on the Commissioner, the Commissioner or an authorized officer may, subject to the terms and conditions of the order, seize or detain any goods to which the order applies.

(2) The owner of the trade mark shall-

- (a) supply to the Commissioner or an authorized officer sufficient information on the goods and the particular importation to render the goods recognizable and the shipment or particular importation

identifiable and any other information the Commissioner or an authorized officer may reasonably require for the purpose of carrying out the detention order;

- (b) deposit with the Commissioner an amount that is, in the opinion of the Commissioner, sufficient to reimburse the Government for the costs likely to be incurred in connection with the carrying out of the detention order; and

- (c) upon notification in writing by the Commissioner or an authorized officer of the seizure or detention of the goods, provide such storage space and other facilities as he may require.

(3) The Commissioner or an authorized officer may refuse to carry out the detention order if the owner of the trade mark fails to comply with subsection (2).

(4) The Commissioner may, after giving written notice to the owner of the trade mark, apply to the Court of First Instance for directions in carrying out the detention order, and the Court of First Instance may, after giving the owner an opportunity to be heard, give such directions as it deems fit.

(5) The Commissioner or an authorized officer shall forthwith after goods are seized or detained pursuant to a detention order, give written notice of the seizure or detention to-

- (a) the owner of the trade mark;
- (b) the importer; and
- (c) any other person to whom notice is required to be given by the terms of the order.

(6) Subject to subsection (7) and to any law authorizing the Commissioner or an authorized officer to seize or detain goods, the Commissioner or an authorized officer shall release any goods that have been seized or detained pursuant to a detention order to the importer if the owner of the trade mark has not, within a period of 10 days after notice of the seizure or detention is given to the owner, notified the Commissioner in writing that an action for infringement in respect of the goods has been brought under the Trade Marks Ordinance (Cap 559).

(7) The Court of First Instance may, on application by the owner of the trade mark, after giving the Commissioner and each person to whom notice is required to be given under subsection (5) an opportunity to be heard, extend the period referred to in subsection (6) by a period not exceeding an additional 10 days if it is satisfied that the request for the extension is reasonable.

(8) In proceedings under subsection (7), the Court of First Instance may require the owner of the trade mark to provide security or an equivalent assurance in addition to that provided in accordance with section 30C(2).

(9) Where the owner of the trade mark has, within the period referred to in subsection (6), as may be extended under subsection (7), notified the Commissioner in writing that an action for infringement in respect of the goods has been brought

under the Trade Marks Ordinance (Cap 559), the Commissioner or an authorized officer shall retain custody of the goods subject to the direction of the Court of First Instance in the infringement proceedings.

(10) No public holiday, gale warning day or black rainstorm warning day shall be reckoned in the computation of the period referred to in subsection (6), as may be extended under subsection (7).

(11) In this section-

"black rainstorm warning day" (黑色暴雨警告日) means any day throughout or for part of which a black rainstorm warning is in force, and "black rainstorm warning" (黑色暴雨警告) means a warning issued by the Director of the Hong Kong Observatory of a heavy rainstorm in, or in the vicinity of, Hong Kong by the use of the heavy rainstorm signal commonly referred to as Black;

"gale warning day" (烈風警告日) means any day throughout or for part of which a gale warning is in force, and "gale warning" (烈風警告) has the meaning assigned to it by section 2 of the Judicial Proceedings (Adjournment During Gale Warnings) Ordinance (Cap 62).

Section: 30E Variation or setting aside of detention order

(1) The Commissioner or the owner of the trade mark may at any time apply to the Court of First Instance to vary the detention order.

(2) The importer or any other person affected by the detention order may at any time apply to the Court of First Instance to vary or set aside the order.

(3) A person who makes an application under subsection (1) or (2) shall give to the other parties such notice of the day fixed for the hearing of the application as a judge of the Court of First Instance may order.

(4) On the hearing of an application under subsection (1) or (2) to vary a detention order, the Court of First Instance may vary the order in such manner as it thinks just.

(5) On the hearing of an application under subsection (2) to set aside a detention order, the Court of First Instance may set aside the order on such terms and conditions as it thinks just.

(6) For the purposes of subsection (3)-

(a) the parties to an application under subsection (1) are the Commissioner, the owner of the trade mark and, if the goods in question have been seized or detained pursuant to the detention order, the importer and any other person to whom notice is required to be given under section 30D(5); and

(b) the parties to an application under subsection (2) are the Commissioner, the owner of the trade mark, the applicant and the importer, if the importer is not the applicant.

Section: 30F Disclosure of information

(1) Where goods are seized or detained pursuant to a detention order, the Commissioner may disclose to the owner of the trade mark-

- (a) the names and addresses of the importer, the consignor and the consignee;
- (b) the nature and quantity of goods seized or detained pursuant to the order;
- (c) any statement made to the Commissioner or an authorized officer by any person in connection with the seizure or detention, either with the prior consent in writing of that person or without such consent where the person is dead or cannot after reasonable enquiries by the Commissioner as to his whereabouts be found by the Commissioner; and
- (d) any other information or document relating to any goods seized or detained pursuant to the order which the Commissioner thinks fit to disclose.

(2) Where the owner of the trade mark seeks disclosure of-

- (a) any information or document that is not referred to in subsection (1); or
- (b) any information or document that is referred to in subsection (1) but which the Commissioner has not disclosed,

he may apply to the Court of First Instance for an order requiring the Commissioner to disclose such information or document and the Court of First Instance may on such an application make such order for disclosure as it deems fit.

(3) An application under subsection (2) may be begun by motion with previous notice to the Commissioner.

Section: 30G Inspection of goods, release of samples, etc.

(1) Where goods are seized or detained pursuant to a detention order, the Commissioner or an authorized officer shall-

- (a) give the owner of the trade mark sufficient opportunity to inspect the goods for the purpose of substantiating his claim; and
- (b) give the importer an equivalent opportunity to inspect the goods for the purpose of refuting the owner's claim.

(2) The Commissioner or an authorized officer may permit the owner of the trade mark or the importer to remove samples of the seized or detained goods if the owner or the importer, as the case may be, gives the Commissioner or authorized officer the requisite undertakings.

(3) For the purposes of subsection (2), the requisite undertakings are undertakings

in writing that the person giving the undertaking will-

(a) return the samples to the Commissioner or authorized officer at a specified time that is satisfactory to the Commissioner or authorized officer; and

(b) take reasonable care to prevent damage to the samples.

(4) If the Commissioner or an authorized officer permits the inspection of the seized or detained goods, or the removal of a sample, by the owner of a trade mark in accordance with this section, the Government is not liable to the importer for any loss or damage suffered by the importer arising out of-

(a) damage to any of the goods incurred during the inspection; or

(b) anything done by the owner or any other person to, or in relation to, a sample removed by the owner or any use made by the owner of such sample.

Section: 30H Costs payable

(1) The Commissioner may assess the costs incurred by the Government in connection with the carrying out of a detention order and may deduct those costs from the amount paid as a deposit by the owner of the trade mark under section 30D(2).

(2) Any costs assessed under subsection (1) shall be payable by the owner of the trade mark to the Government and recoverable as a civil debt.

Section: 30I Protection of Commissioner and authorized officers

(1) The Commissioner and authorized officers are not liable for any loss or damage suffered by any person as a result of any action taken or omitted to be taken in good faith in connection with the carrying out of a detention order.

(2) The protection conferred by subsection (1) on the Commissioner and authorized officers in respect of any action taken or omitted to be taken in good faith in connection with the carrying out of a detention order shall not affect in any manner any liability of the Government for that action taken or omitted to be taken.

Section: 30J Compensation payable to importer, etc.

(1) Where goods are seized or detained pursuant to a detention order and the goods are released pursuant to section 30D(6), the importer, the consignee or the owner of the goods may, within 6 months after the date on which the order is made,

apply to the Court of First Instance for compensation for any loss or damage suffered by him by reason of the seizure or detention.

(2) Where-

(a) goods are seized or detained pursuant to a detention order;

(b) an action for infringement is brought under the Trade Marks Ordinance (Cap 559) in respect of the goods within the period referred to in section 30D(6), as may be extended under section 30D(7); and

(c) the action is discontinued, the claim of infringement is withdrawn or the Court of First Instance in the infringement proceedings determines that the infringement is not proved,

the importer, the consignee or the owner of the goods may, within 6 months after the date on which the action is discontinued, the claim is withdrawn or the Court of First Instance renders its determination, as the case may be, apply to the Court of First Instance for compensation for any loss or damage suffered by him by reason of the seizure or detention.

(3) On an application under subsection (1) or (2), the Court of First Instance may make such order for compensation as it deems fit.

Section: 30K Rules

The Chief Justice may make rules of court regulating and prescribing the procedure and the practice to be followed in the Court of First Instance under this Part, and any matters incidental to or relating to that procedure or practice, including rules prescribing any matter or thing that under this Part is to be or may be prescribed by rules of court.

Part IIIB Enforcement (Undertakings and Injunctions)

Section: 30L Undertakings

(1) An authorized officer may, with the consent in writing of the Secretary for Justice, accept a written undertaking given by a person whom the officer believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I.

(2) An undertaking referred to in subsection (1) is an undertaking—

(a) not to continue or repeat the conduct covered by that subsection;

(b) not to engage in conduct of that kind, or any conduct of a substantially similar kind, in the course of any trade or business; or

- (c) as a person referred to in section 20(1), not to continue, repeat or engage in any conduct referred to in paragraph (a) or (b) of this subsection that could constitute an offence by virtue of that section.

(3) A person who has given an undertaking may, with the consent of an authorized officer, withdraw or vary it at any time.

(4) An authorized officer may cause an undertaking to be published in any form and manner, and to any extent, that the officer thinks appropriate.

(5) If an authorized officer considers that the person who gave an undertaking has breached any of its terms, the officer may apply to a court for an injunction under section 30P.

Section: 30M Effect of acceptance of undertaking

(1) If an authorized officer accepts an undertaking under section 30L, neither the Commissioner nor an authorized officer may—

- (a) commence or continue an investigation relating to the matter to which the undertaking relates; or
- (b) bring or continue proceedings in a court relating to that matter.

(2) To avoid doubt, the Commissioner or an authorized officer may still commence or continue an investigation, or bring or continue proceedings in a court, after the acceptance of an undertaking—

- (a) in relation to matters to which the undertaking does not relate; or
- (b) in relation to persons who have not given the undertaking.

Section: 30N Withdrawal of acceptance of undertaking

(1) Subject to subsection (2), an authorized officer may, by notice in writing given to the person who gave the undertaking, withdraw the acceptance of an undertaking, with effect from the date specified in the notice, if the officer—

- (a) has reasonable grounds for believing that there has been a material change of circumstances since the undertaking was accepted;
- (b) has reasonable grounds for suspecting that the person who gave the undertaking has breached any of its terms;
- (c) has reasonable grounds for suspecting that the information on which the decision to accept the undertaking was based was incomplete, false or misleading in a material particular; or
- (d) has reasonable grounds for suspecting that the acceptance of the undertaking was procured by improper or unlawful conduct.

- (2) An authorized officer may only give a notice under this section if the officer has obtained the consent in writing of the Secretary for Justice to doing so.

(3) If the acceptance of an undertaking is withdrawn under this section—

- (a) the undertaking is no longer binding on the person who gave it;
- (b) an authorized officer may commence or resume an investigation, or bring proceedings in a court, relating to the matter to which the undertaking related; and
- (c) a statement of any fact contained in the undertaking may be admitted in evidence in any proceedings referred to in paragraph (b) and, on its admission, is conclusive evidence in those proceedings of the fact stated in the undertaking.

Section: 30O Effect of withdrawal on time limit for prosecutions

Despite section 19, if the acceptance of an undertaking is withdrawn, a prosecution for an offence under this Ordinance relating to the matter to which the undertaking related may be brought at any time before the expiration of 1 year after the effective date specified in the notice given under section 30N(1).

Section: 30P Injunctions

(1) The District Court may, on application by an authorized officer, grant an injunction, in any terms that the Court considers appropriate, if it is satisfied that a person—

- (a) has engaged, is engaging or is likely to engage, in conduct that constitutes an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I; or
- (b) has breached any of the terms of an undertaking given by the person under section 30L.

(2) On an application under subsection (1) the District Court may, if satisfied that there are grounds for granting an injunction, instead of doing so accept an undertaking given by the defendant not to continue or repeat the conduct or to take steps that the Court believes will ensure that the defendant does not continue or repeat the conduct.

(3) The District Court may require a person from whom it has accepted an undertaking to cause its terms (accompanied by any statement that may be specified by the Court) to be published in any form and manner, and to any extent, that the Court thinks appropriate.

(4) The power of the District Court to grant an injunction against a person under subsection (1) or accept an undertaking from a person under subsection (2) may be exercised—

- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of a kind referred to in subsection (1)(a);
- (b) whether or not the person has previously engaged in conduct of that kind; or
- (c) whether or not there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.

Section: 30Q Interim injunctions

If an application is made under section 30P, the District Court may, if it considers it desirable to do so, grant an interim injunction pending the determination of the application.

Section: 30R Variation and discharge of injunctions

The District Court may vary or discharge an injunction that it has granted under section 30P or 30Q.

Section: 30S CFI may exercise powers of District Court in certain cases

The Court of First Instance may exercise the powers conferred on the District Court under section 30P, 30Q or 30R—

- (a) in a case of urgency; or
- (b) if the Court of First Instance is satisfied that special circumstances exist which make it appropriate for the Court of First Instance rather than the District Court to exercise those powers.

Part: IV MISCELLANEOUS

Section: 32 Trade marks containing trade descriptions

The fact that a trade description is a trade mark, or part of a trade mark, does not prevent it from being a false trade description when applied to any goods, except where the following conditions are satisfied, that is to say-

- (a) that it could have been lawfully applied to the goods if this Ordinance had not been enacted;
- (b) that the trade mark as applied is used to indicate such a connection between the goods and the owner of the trade mark or a person licensed to use the trade mark; and
- (c) that the person who is the proprietor or owner of the trade mark is the same person as, or a successor in title of, the proprietor or owner on the commencement of this Ordinance.

Section: 33 Definition Orders

Where it appears to the Chief Executive in Council-

- (a) that it would be in the interest of persons to whom any goods or services are supplied; or
- (b) that it would be in the interest of persons by whom any goods are exported, or of traders by whom any services are supplied to consumers who are outside Hong Kong, and would not be contrary to the interest of persons to whom such goods or services are supplied in Hong Kong,

that any expressions used in relation to the goods or services should be understood as having definite meanings, the Chief Executive in Council may by regulations assign such meanings either-

- (i) to those expressions when used in connection with the supply of goods in the course of a trade or business or the supply of services by a trader to a consumer as, or as part of, a trade description applied to the goods or services; or
- (ii) to those expressions when so used in such circumstances as may be specified in the regulations,

and where such a meaning is so assigned to an expression, it shall be deemed for the purposes of this Ordinance to have that meaning when used as referred to in paragraph (i) or, as the case may be, paragraph (ii) of this section.

Section: 34 Saving for civil rights

A contract for the supply of any goods or service shall not be void or unenforceable by reason only of a contravention of any provision of this Ordinance.

Section: 35 Compensation for loss of goods seized under section 15(1)(f)

(1) Where any goods are seized or detained by an authorized officer under section 15 the Government shall, subject to this section, be liable to compensate the owner of the goods for any loss suffered by him by reason of the seizure or detention thereof or by reason that the goods, during the detention, are lost or damaged or deteriorate; but the owner shall not be entitled to compensation for any such loss if-

- (a) the goods are forfeited;
- (b) he is convicted of an offence under this Ordinance committed in relation to the goods; or
- (c) an order has been made in respect of the goods under section 30(4).

(2) In any proceedings against the Government in respect of a claim for compensation on any of the grounds referred to in subsection (1), the amount of the compensation recoverable shall be such amount as is just and equitable in all the circumstances of the case, including the conduct and comparative blameworthiness of-

- (a) the owner of the goods;
- (b) the person in charge or control of the goods at the time they were seized;
- (c) the agents of the person specified in paragraphs (a) and (b); and
- (d) authorized officers, public officers and other persons concerned.

(3) No proceedings shall be maintainable in respect of any claim for compensation on any of the grounds referred to in subsection (1) unless the proceedings are commenced-

- (a) in the case of a claim for compensation in respect of goods released to their owner by order of a court or magistrate or by any person having authority to release the goods to him, not later than 6 months after the release thereof;
- (b) in the case of a claim for compensation on the ground that any goods were lost during the detention thereof, not later than 6 months after-
 - (i) the discovery by the owner of the existence of such ground; or
 - (ii) the date on which the owner could, by the exercise of reasonable diligence, have discovered the existence of such ground,

whichever is the earlier.

Section: 36 Actions for damages

(1) If—

- (a) a person (*the claimant*) suffers loss or damage because of conduct of another person (not being an exempt person) that is directed to the claimant; and
 - (b) the conduct constituted an offence under section 4, 5, 7, 7A, 13E, 13F, 13G, 13H or 13I,
- the claimant may recover the amount of the loss or damage by action against that other person, or against any person (not being an exempt person) involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

Section: 37 Amendment of Schedules 3 and 4

The Secretary may, by notice published in the Gazette, amend Schedule 3 or 4.

Schedule: 1 TABLE

SCHEDULE 1*		[section 3]
Number of carats		Indicates gold of fineness of
8	_____	333 parts per thousand
9	_____	375 parts per thousand
12	_____	500 parts per thousand
14	_____	585 parts per thousand
15	_____	625 parts per thousand
18	_____	750 parts per thousand
22	_____	916.6 parts per thousand
and so in proportion for any other number of carats.		

~~Schedule: 2 GOODS SPECIFIED FOR PURPOSES OF SECTION 13B~~

- ~~PART 1 _____ [section 13B]~~
- ~~1. Digital audio player~~
 - ~~2. Digital camcorder~~
 - ~~3. Digital camera~~
 - ~~4. Mobile phone~~
 - ~~5. Portable multimedia player~~

~~PART 2~~

1. Definitions of products

~~—In this Schedule—~~

~~“digital audio player” (數碼音響播放器) —~~

~~(a) means any portable device the principal function of which is to play digital audio files in one or more audio encoding formats from any storage medium;~~

~~(b) includes the product commonly known as MP3 player; and~~

~~(c) does not include portable optical disc player;~~

~~“digital camcorder” (數碼攝錄機) means any portable device the principal function — of which is to make a recording in digital format on any medium from which a — moving image may by any means be reproduced;~~

~~“digital camera” (數碼相機) means any portable device the principal function of — which is to record and store an image in digital format on any medium from which~~

~~— a still image may by any means be reproduced;~~

~~“mobile phone” (手提電話) means any portable device the principal function of — which is for mobile communication through a cellular radio network with —~~

~~(a) standard voice function of a telephone; and~~

~~(b) interconnection to the public switched telephone network (PSTN);~~

~~“portable multimedia player” (便攜式多媒體播放器) —~~

~~(a) means any portable device the principal function of which is to play digital multimedia files in one or more media recording formats from any storage medium;~~

~~(b) includes the product commonly known as MP4 player; and~~

~~(c) does not include portable optical disc player.~~

~~2. Determination of principal function~~

~~—In determining the principal function of a product for the purposes of this Schedule, regard shall be had to—~~

~~(a) the description applied to the product on its package;~~

~~(b) the description applied to the product in any document relating to the supply of the product;~~

~~(c) the description applied to the product in any promotional material and advertisement concerning the product; and~~

~~(d) any other relevant information.~~

Schedule 3 Exempt Persons

[ss. 2 & 37]

1. A certified public accountant or a corporate practice, as defined by section 2(1) of the Professional Accountants Ordinance (Cap. 50).
2. A certified public accountant (practising), as defined by section 2(1) of the Professional Accountants Ordinance (Cap. 50), practising on their own account under a firm name.
3. A person whose name is entered in the register of pharmacists under section 5 of the Pharmacy and Poisons Ordinance (Cap. 138).
4. A registered dentist as defined by section 2(1) of the Dentists Registration Ordinance (Cap. 156) or a person deemed by section 30 of that Ordinance to be a registered dentist for the purpose of section 3 of that Ordinance.

5. A person whose name is recorded in the roll maintained under regulation 4(2) of the Ancillary Dental Workers (Dental Hygienists) Regulations (Cap. 156 sub. leg. B).

6. A barrister, solicitor, foreign lawyer, foreign firm, Hong Kong firm or notary public, as defined by section 2(1) of the Legal Practitioners Ordinance (Cap. 159).

7. A pupil serving pupillage in accordance with the Barristers (Qualification) Rules (Cap. 159 sub. leg. E).

8. A trainee solicitor as defined by rule 2 of the Trainee Solicitors Rules (Cap. 159 sub. leg. J).

9. A registered medical practitioner as defined by section 2(1) of the Medical Registration Ordinance (Cap. 161) or a person who is provisionally registered in accordance with the provisions of section 12 of that Ordinance.

10. A registered midwife as defined by section 2(1) of the Midwives Registration Ordinance (Cap. 162) or a person deemed by section 25 of that Ordinance to be a registered midwife.

11. A registered nurse or an enrolled nurse, as defined by section 2(1) of the Nurses Registration Ordinance (Cap. 164), or a person deemed by section 26 of that Ordinance to be a registered nurse or an enrolled nurse.

12. A person whose name is entered in the register kept under section 10 of the Supplementary Medical Professions Ordinance (Cap. 359) for the profession of medical laboratory technologist, radiographer, physiotherapist, occupational therapist or optometrist or a person who is deemed by section 30(2) of that Ordinance to be so registered or is provisionally so registered in accordance with the provisions of section 15 of that Ordinance.

13. A person whose name is currently entered in the register of registered architects established and maintained under section 8 of the Architects Registration Ordinance (Cap. 408).

14. A registered professional engineer as defined by section 2(1) of the Engineers Registration Ordinance (Cap. 409).

15. A registered professional surveyor as defined by section 2(1) of the Surveyors Registration Ordinance (Cap. 417).

16. A registered professional planner as defined by section 2(1) of the Planners Registration Ordinance (Cap. 418).

17. A registered chiropractor as defined by section 2 of the Chiropractors Registration Ordinance (Cap. 428).

18. An authorized land surveyor as defined by section 2 of the Land Survey Ordinance (Cap. 473).

19. A registered social worker as defined by section 2(1) of the Social Workers Registration Ordinance (Cap. 505).

20. A licensed estate agent or a licensed salesperson, as defined by section 2(1) of the Estate Agents Ordinance (Cap. 511).

21. A person whose name is currently entered in the register of registered landscape architects established and maintained under section 7 of the Landscape Architects Registration Ordinance (Cap. 516).

22. A registered veterinary surgeon as defined by section 2 of the Veterinary Surgeons Registration Ordinance (Cap. 529).

23. A listed Chinese medicine practitioner or a registered Chinese medicine practitioner, as defined by section 2(1) of the Chinese Medicine Ordinance (Cap. 549).

24. A registered professional housing manager as defined by section 2(1) of the Housing Managers Registration Ordinance (Cap. 550).

Schedule 4 Excluded Products

[ss. 2 & 37]

1. Goods or services sold or supplied by a person regulated, licensed, registered, recognized or authorized under the Insurance Companies Ordinance (Cap. 41), the Banking Ordinance (Cap. 155), the Mandatory Provident Fund Schemes Ordinance (Cap. 485) or the Securities and Futures Ordinance (Cap. 571), being goods or services the sale or supply of which by that person is itself regulated under an Ordinance that is referred to in this item and under which the person is regulated, licensed, registered, recognized or authorized.

LIST OF ABBREVIATIONS

The Bill - The Trade Descriptions (Unfair Trade Practices)
(Amendment) Bill 2012

The Ordinance - The Trade Descriptions Ordinance (Cap. 362)