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

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HONG KONG SPECIAL ADMINISTRATIVE REGION

ORDINANCE NO. 25 OF 2012

L.S.

C. Y. LEUNG
Chief Executive
26 July 2012

An Ordinance 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 by notice published in the Gazette.
- (3) In subsection (2)—

Secretary (局長) has the meaning given by section 2(1) of the Trade Descriptions Ordinance (Cap. 362).

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

Part 1

Ord. No. 25 of 2012

Section 2

A2981

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*—

Repeal paragraph (e).

- (7) Section 2(1), definition of *trade description*, before paragraph (f)—

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;”.

- (8) 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;”.

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

Repeal

“country.”

Substitute

“country;”.

- (10) 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 unrelated to 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).

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) method and procedure by which, manner in which, and location at which, the service is supplied or to be supplied;
- (d) availability;
- (e) testing by any person and the results of the testing;
- (f) approval by any person or conformity with a type approved by any person;
- (g) a person by whom it has been acquired, or who has agreed to acquire it;
- (h) the person by whom the service is supplied or to be supplied;
- (i) after-sale service assistance concerning the service;
- (j) price, how price is calculated or the existence of any price advantage or discount;

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.”.

(11) 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.
- (6) A note located in the text of this Ordinance is provided for information only and has no legislative effect.”.

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

(1) 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.

(2) In this section—

service (服務) does not include any service covered by Schedule 4.”.

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

(1) Section 8(1), after “goods”—

Add

“or services”.

(2) Section 8—

Repeal subsection (2)

Substitute

“(2) The trade description is to 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(1)(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(1)(b).”.

(3) 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; or
 - (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 cause the average member of that group only to make a transactional decision that the member would not have made otherwise.
- (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.

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 of goods;
 - (iii) arrangements for supply of service;
 - (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, company 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—

company secretary (公司秘書) includes any person occupying the position of company secretary, by whatever name called;

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

- (a) a person employed or engaged 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 or engaged 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(1)(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—
 - (A) if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the products; or
 - (B) if that offer was not accepted by the consumer, the trader would have been able to so supply, or procure a third person to so supply, the products had the offer been accepted at the time it was made; 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—

- (A) if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the equivalent products; or
 - (B) if that offer was not accepted by the consumer, the trader would have been able to so supply, or procure a third person to so supply, the equivalent products had the offer been accepted at the time it was made; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

26B. Additional defence (wrongly accepting payment)

- (1) 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—
 - (A) if that offer was accepted by the consumer, the trader procured a third person to supply the products; or
 - (B) if that offer was not accepted by the consumer, the trader would have been able to procure a third person to supply the products had the offer been accepted at the time it was made; 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—
 - (C) if that offer was accepted by the consumer, the trader so supplied, or procured a third person to so supply, the equivalent products; or
 - (D) if that offer was not accepted by the consumer, the trader would have been able to so supply, or procure a third person to so supply, the equivalent products had the offer been accepted at the time it was made; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.
- (2) Without limiting section 26, in any proceedings for an offence under section 13I(2)(c), the person charged is entitled to be acquitted if—
- (a) sufficient evidence is adduced to raise an issue that a refund in full of the payment or other consideration for the product was made within a reasonable period after the expiry of the period referred to in section 13I(2)(c)(i) or (ii), as the case may be; 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.

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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, 7A & 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

“*Communications Authority* (通訊事務管理局) means the Communications Authority established by section 3 of the Communications Authority Ordinance (Cap. 616);”.

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 Communications Authority may 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 powers covered by subsection (1) that are not exercisable by the Communications Authority.
- (3) The Communications 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 licensees under the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (Cap. 562) that are directly connected with the provision of a telecommunications service or broadcasting service under the relevant Ordinance.
- (4) Nothing in this section enables the exercise of powers with respect to any conduct covered by section 9 or 12.

- (5) The fact that a power is exercisable in relation to a commercial practice by the Communications Authority or any public officer authorized in writing by that Authority does not, subject to section 16F, prevent that power being exercised in relation to that practice by the Commissioner or an authorized officer.
- (6) To avoid doubt, in exercising a power under this Ordinance the Communications Authority or any public officer authorized in writing by that Authority does not do so as an agent or delegate of the Commissioner.

16F. Transfer of matters between enforcement bodies

- (1) If the Commissioner or the Communications Authority is performing a function under this Ordinance in relation to a matter over which the other has concurrent jurisdiction, the 2 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 or the Communications Authority is performing or has performed a function under this Ordinance in relation to a matter over which the other has concurrent jurisdiction, the other must not perform any function in relation to that matter.

16G. Memorandum of understanding

- (1) The Commissioner and the Communications 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) The Commissioner and the Communications Authority 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 (25 of 2012).

16H. Guidelines—telecommunications/broadcasting sector

- (1) The Communications Authority, or the Communications Authority jointly with the Commissioner, may issue guidelines on matters in relation to which the Communications Authority or any public officer authorized in writing by that Authority may exercise powers under section 16E(3).
- (2) 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—
 - (a) the reference in subsection (2)(a) of that section to authorized officers is to be taken to be a reference to the Communications Authority or any public officer authorized in writing by that Authority to exercise any of the powers that by virtue of section 16E are exercisable by that Authority; and
 - (b) any reference in subsection (3), (5) or (6) of that section to the Commissioner is to be taken to be a reference to the Communications Authority, or the Communications Authority jointly with the Commissioner, as the case requires.
- (3) The Communications Authority or, in the case of jointly issued guidelines, both the Communications Authority and the Commissioner must make copies of all guidelines and amendments of guidelines available to the public for inspection at their 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) Subject to subsection (4), a person who has given an undertaking may, with the consent of an authorized officer, withdraw or vary it, or give a new undertaking in substitution for it, at any time.
- (4) An authorized officer may only consent under subsection (3) to the withdrawal of, or a variation of or substitution for, an undertaking if the officer has obtained the consent in writing of the Secretary for Justice to doing so.
- (5) An authorized officer may cause an undertaking to be published in any form and manner, and to any extent, that the officer thinks appropriate.
- (6) 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 or continue 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. Court of First Instance 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—

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- (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.
 - (3) A term of a contract that purports to exclude or restrict the right of a claimant to bring an action under subsection (1) against any person is of no effect.”.
-

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，則供應該貨品的人須當作已將該商品說明、商標或標記應用於該貨品。”.

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 (25 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.”.