

**Marked-up Version of
Trade Descriptions (Unfair Trade Practices)
(Amendment) Bill 2012
showing Committee Stage Amendments
Proposed by Administration**

(as at 28 May 2012)

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

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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.
- (3) In subsection (2)—

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

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”.

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

Repeal paragraph (e).

- (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~~ 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).

~~**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.

(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.”.

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”—

Repeal the subsection

Add/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(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).

“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~~ 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 materially distort the economic behaviour only of that group 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.

~~(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)—
- it omits material information;
 - it hides material information;
 - it provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or
 - 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—
- all the features and circumstances of the commercial practice;
 - 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—
- 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;
 - the identity (such as trading name) of the trader and of any other trader on whose behalf the trader is acting;
 - 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;
 - either—
 - the price, including any taxes; or
 - 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;
 - where appropriate, either—
 - all additional freight, delivery or postal charges; or
 - if those charges cannot reasonably be calculated in advance, the fact that they may be payable;
 - the following matters if they depart from the requirements of professional diligence—
 - arrangements for payment;

- (ii) arrangements for delivery of goods;
- (iii) arrangements for performance 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(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);~~

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

~~“**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 Communications 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 the~~ the Communications Authority.
- (3) The ~~Telecommunications Communications~~ 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) ~~persons specified in subsection (4) that are directly connected with the provision of a telecommunications service or broadcasting service under the Telecommunications Ordinance (Cap. 106)~~ relevant Ordinance.

- ~~(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 Communications Authority, ~~the Broadcasting Authority~~ or any public officer authorized in writing by ~~either of those Authorities~~ 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.

- (9) To avoid doubt, in exercising a power under this Ordinance the ~~Telecommunications~~ Communications Authority, ~~the Broadcasting Authority~~ or any public officer authorized in writing by ~~either of those Authorities~~ 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, ~~the Telecommunications Authority~~ or the ~~Broadcasting~~ Communications Authority is performing a function under this Ordinance in relation to a matter over which ~~another one of them~~ the other 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~~ Communications Authority is performing or has performed a function under this Ordinance in relation to a matter over which ~~another one of them~~ 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 ~~Telecommunications~~ Communications 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)~~ 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 (of 2012).

16H. Guidelines—telecommunications/broadcasting sector

- (1) ~~The Telecommunications—Communications Authority, or the Telecommunications—Communications Authority jointly with the Commissioner, may issue guidelines on matters in relation to which the Telecommunications Communications 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—
 - (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 Telecommunications Communications Authority or the Broadcasting Authority or such that Authority jointly with the Commissioner, as the case requires.~~

- (4) ~~A person by whom guidelines are issued under this section~~The Communications Authority or, in the case of jointly issued guidelines, both the Communications Authority and the Commissioner (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~~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 (3A), 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.~~

(3A) 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.

- (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 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. 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.
- (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

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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.

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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.

**Proposed CSAs to
Trade Descriptions (Unfair Trade Practices) (Amendment) Bill
2012**

Item	Clause	Proposed Amendment	Justifications	Remarks
Part 1				
1.1	1	To replace “Secretary for Commerce and Economic Development” in clause 1(2) with “Secretary”, and to add a new clause 1(3) to provide that “Secretary” has the meaning given by the Trade Descriptions Ordinance	Technical amendment to cater for any possible change in the title after the enactment of the Bill and before its commencement	The Administration’s suggestion
Part 2				
2.1	3	To add a new clause 3(5A) to repeal paragraph (e) under the definition of “trade description” in respect of goods; to remove paragraph (c) under the proposed definition of “trade description” in respect of services in clause 3(9)	To make policy intention clearer and avoid misunderstanding in view of the non-exhaustive nature of the definitions	Discussed at meeting on 12 April.
2.2	3(9)	To remove the proposed definition of “Secretary” in section 2(1)	The same definition has already been added by the Trade Descriptions (Amendment) Ordinance 2012	The Administration’s suggestion as discussed at the meeting on 12 April.
2.3	3(9)	To replace “outside” with “unrelated to” in the proposed definition of “consumer”	For consistency between the proposed definitions of “trader” and “consumer”	Discussed at meeting on 12 April.
2.4	3(10)	To add a new section 2(6) on the effect of notes in the Ordinance	To make policy intention clearer	Discussed at meeting on 15 May.

Item	Clause	Proposed Amendment	Justifications	Remarks
2.5	8	To add a new subsection to proposed new section 7A to make it clear that false trade descriptions of financial services are outside the ambit of the amended Ordinance, and to remove the note to the proposed section	To make policy intention (as to the applicability of the section) clearer and to avoid any possible understanding of the effect of the note	The point about the note was discussed at the meeting on 15 May.
2.6	9	In the Chinese text, to delete the original clause 9(2) to (5) and rewrite section 8(2) through a new clause 9(2) and to make consequential amendments clause 9(2) to (5) of the English text	For consistency of expression in the Chinese text with other provisions of the Bill and the Ordinance	The revision on the Chinese text was suggested by Assistant Legal Advisor (ALA) in the letter dated 15 March. Agreed in the Administration's paper of 9 May.
2.7	13 (new section 13D(3)(a))	To replace "and" in proposed new section 13D(3)(a) with "or"	To make it clear that paragraphs (a) and (b) are not to be read cumulatively	Discussed at meeting on 15 May.
2.8	13 (new section 13D(3)(b)(ii) and (5))	To amend proposed new section 13D(3)(b)(ii) to read "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" and repeal proposed new section 13D(5)	To simplify the provision	In response to a suggestion made by ALA in the letter dated 15 March. Raised in the Administration's paper of 9 May.
2.9	13 (new section 13E(2)(b))	To replace "隱瞞" by "隱藏" in the Chinese text	To avoid any possible misunderstanding	Discussed at meeting on 26 April and 15 May.
2.10	13 (new section 13E(4)(f))	To amend section 13E(4)(f)(ii) to read "arrangements for delivery of goods" ("送貨安排") and	To make policy intention clearer	Suggested by ALA in the letter dated 15 March. Agreed

Item	Clause	Proposed Amendment	Justifications	Remarks
		section 13E(4)(f)(iii) to read “arrangements for supply of service” (“提供服務的安排”)		in the Administration's paper of 9 May.
2.11	15 (revised section 20)	To replace “secretary” with “company secretary” in revised section 20(2)(a) and add a definition under revised section 20(3)	To make policy intention clearer	Suggested by ALA in the letter dated 15 March. Discussed at the meeting on 15 May.
2.12	15 (revised section 20(3), definition of “principal officer”)	To add “or engaged” after “employed” in paragraphs (a) and (b)	To make policy intention clearer	Suggested by ALA in the letter dated 15 March. Discussed at the meeting on 15 May.
2.13	23 (new Schedule 4)	To replace “及” with “或” in the Chinese text of item 1 of Schedule 4	To rectify a typographical error in the Chinese text	Suggested by ALA in the letter dated 15 March. Agreed in the Administration's paper of 9 May.
Part 3				
3.1	24 and 27	To repeal the definitions of “Broadcasting Authority” and “Telecommunications Authority” introduced by clause 24, and add a new definition “Communications Authority” (meaning the Communications Authority established by section 3 of the Communications Authority Ordinance (Cap. 616)) to section 2(1), and to make consequential amendments to proposed new sections 16E, 16F, 16G and 16H introduced by clause 27	To take account of the establishment of the Communications Authority under the Communications Authority Ordinance (Cap. 616) and the dissolution of the Broadcasting Authority	The Administration's suggestion set out in the paper issued on 9 May.

Item	Clause	Proposed Amendment	Justifications	Remarks
3.2	27 (new section 16H)	To add a new paragraph under proposed new section 16H(3) on the construction of the reference to "authorized officers" in proposed new section 16BA(2)	To avoid any possible misunderstanding	The Administration's suggestion
3.3	29 (new sections 30L and 30N)	To add ", or give a new undertaking in substitution for it," after "withdraw or vary it" in proposed new section 30L(3), and add a new section 30L(3A) to make it clear that the consent of the Secretary for Justice in writing is also required for the withdrawal of, or a variation of or substitution for, an undertaking; a consequential textual amendment is also made to the Chinese text of proposed new section 30N(2)	To allow the acceptance of new/revised undertakings proposed by traders	The Administration's suggestion
3.4	29 (new section 30N(3)(b))	To add "or continue" after "or bring" in proposed new section 30N(3)(b)	To bring the provision in line with section 30M(1)(b) and make policy intention clearer	Suggested by ALA in the letter dated 15 March and discussed at the meeting on 21 May.
Part 4				
4.1	31 (new section 36)	To add a new paragraph to pre-empt attempts to exclude or restrict claimants' right of action by terms in contracts	To prevent circumvention	Suggested by ALA in the letter dated 15 March.

**Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
May 2012**