

TRADE DESCRIPTIONS ORDINANCE (Cap. 362)

26 May 2017





Major Amendments

- Expanded the definition of the trade descriptions in respect of goods
- Included the trade descriptions of services provided by traders
- Added five new provisions against unfair trade practices





Unfair Trade Practices

**Aggressive
Commercial
Practices**

**Bait
Advertising**

**Wrongly Accepting
Payments**

**Misleading
Omissions**

**Bait and
Switch**





Major Amendments

- Introduced civil "compliance-based" mechanism
 - ◆ Undertakings
 - ◆ Injunctions



What is Trade Description?

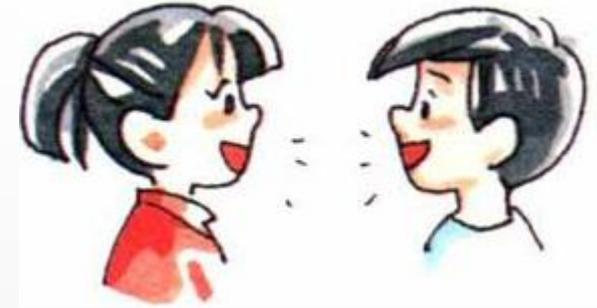
- As defined in S.2 -
 - means an **indication, direct or indirect**, and by **whatever means given**, with respect to the **goods / service** or any part of the **goods / service**
- trade description in relation to both goods and services could be by **whatever means** and in **whatever forms**



What is Trade Description?

- **Forms:**

e.g. statements, advertisements or display notices



- **Means:**

e.g. any media, paper, visual, verbal, electronic and even by conduct





Provisions under Cap. 362

- S.7 & S.7A Offences in respect of trade description of goods & services
- S.13E Misleading omissions
- S.13F Aggressive commercial practices
- S.13G Bait advertising
- S.13H Bait and switch
- S.13I Wrongly accepting payment



Provision S.7

Offences in respect of trade descriptions of goods

- Any person, in the course of trade or business—
 - (a) applies a false trade description to any goods supplied or offered to be supplied to a consumer; or
 - (b) supplies or offers to supply to a consumer any goods to which a false trade description is applied,commits an offence





Provision S.7

Offences in respect of trade descriptions of goods (continued)

- Any person, in his possession for sale—
any goods to which a false trade description is
applied, commits an offence



False Trade Description

- a trade description which is false to a **material degree**
- a trade description which, though not false, is **misleading**, that is to say, likely to be taken for a trade description of a kind that would be false to a material degree





Example – Material Degree

- In an advertisement a trader claims that a smartphone has a **5.55** inch display whereas in fact the display measures only **5.54** inch. The difference of **0.01** inch would **unlikely** be taken as **false to a material degree**

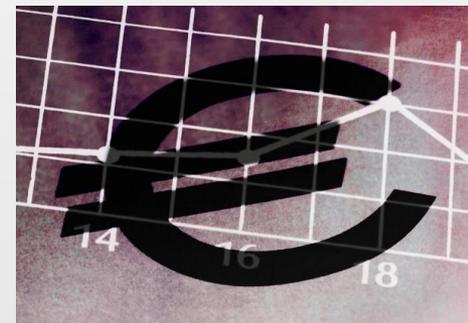




Example – False Trade Description



- The exchange rate confirmed by the trader before the transaction was
RMB\$100 : HK\$127
- After transaction, it was revealed that the actual exchange rate became
RMB\$100 : HK\$112.7



Offences in respect of trade descriptions of goods

- Goods applied false trade descriptions

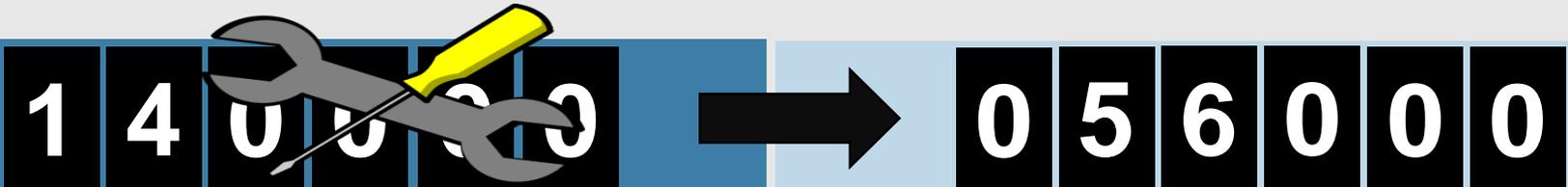




Convicted Case S.7

False Trade Description of Goods

- The C&ED received information alleging that a second-hand car trading company had made a **false claim** to a consumer.
- Investigation revealed that the company had supplied a car bearing odometer reading of **56,000 km** but it was confirmed that the actual mileage of the car had exceeded **140,000 km**. The company was subsequently prosecuted.
- The company was **convicted** and **fined \$40,000**.





Provision S.7A



Offences in respect of trade description of **services**

- A trader who—
 - (a) **applies** a false trade description to a service supplied or offered to be supplied to a consumer;
 - or
 - (b) **supplies or offers to supply** to a consumer a service to which a false trade description is applied,
- commits an offence





Provision S.13E

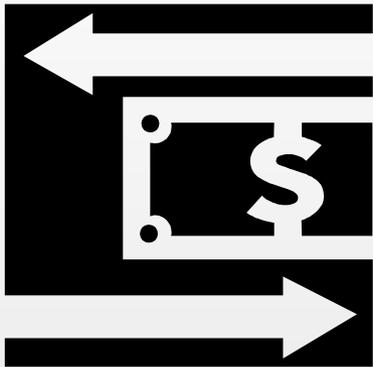
Misleading omissions

- A commercial practice is a misleading omission if it:
 - omits / hides / provides unclear, unintelligible, ambiguous or untimely material information
 - fails to identify its commercial intent
 - causes the average consumer to make transactional decision that he would not have made otherwise.





Example – Misleading Omissions



*List of Exchange rates does **not** specify the rate which is only applied to transaction of **over HK\$10,000***



Convicted Case S.13E Misleading Omissions

- A beauty parlour solicited consumers to purchase prepaid service plans **without telling** them that all its existing **clients** and **equipment** would soon be **taken over by another operator**.
- Such **material information** was **essential** for an **average consumer** to make **informed transactional decisions**.
- A **director** of the beauty parlour was convicted for engaging in a commercial practice that was a **misleading omission** by **hiding material information** from customers and **fined \$4,000**.





Provision S.13F

Aggressive commercial practices

- A **commercial practice** is aggressive if:
 - it significantly impairs the average consumer's freedom of choice or conduct through the use of harassment, **coercion** or **undue influence**; and
 - causes the consumer to make a transactional decision that he would not have made otherwise.





Convicted Case S.13F

Aggressive Commercial Practices

- Three beauticians told a consumer, on the pretext of examining her chest, that there were **lumps** which could **mutate into cancer** and suggested that she purchase a **body treatment package valued at \$140,000**.
- Despite the fact that the consumer had expressed her reluctance toward purchasing any treatment package, the three beauticians continued such sales practice for **over one and a half hours**, trying to convince her repeatedly.





Convicted Case S.13F

Aggressive Commercial Practices

- (continued) The consumer found their continuous persuasion **annoying** but was **scared** and **worried** that she might have cancer, and finally **unwillingly** purchased the body treatment package.
- All three beauticians were convicted for **engaging in a commercial practice that was aggressive**. One of the beauticians was given an order of 200 hours of community service. The other two were each sentenced to **three months' imprisonment**.





Provision S.13G

Bait advertising

- Having regard to the nature of the market in which the trader carries on business and the nature of the advertisement, it is considered a bait advertising if :
 - ◆ there are no reasonable grounds for believing that the trader will be able to offer for supply those products at a specified price that has been advertised, or
 - ◆ the trader fails to offer for supply at that price, for a period that is, and in quantities that are, reasonable





Provision S.13G

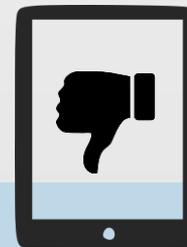
- Bait advertising (continued)
 - It is **NOT** bait advertising if -
 - ◆ the advertisement states clearly the period/quantities that are offered for supply at that price; and
 - ◆ the trader offers for supply at that price for that period or in those quantities.





Convicted Case S.13G Bait Advertising

- A chain electronic products supplier published an **advertisement** in a newspaper to **offer to supply** a tablet model at an **attractive price**. Upon enquiry, a salesperson said that the price and functions of the tablet were **wrongly printed in the advertisement** and hence could not be supplied at the attractive price.
- The trader was **fined \$10,000** after being convicted of bait advertising.





Provision S.13H

Bait and switch

- **Trader makes an invitation to purchase a product at a specified price with the intention of promoting a different product if he:**
 - **refuses to show or demonstrate the product to consumers;**
 - **refuses to take orders for the product or deliver it within a reasonable time; or**
 - **shows or demonstrates a defective sample of the product**





Provision S.13I

Wrongly accepting payment

- A trader wrongly accepts payment if he, at the time of acceptance:
 - **intends** not to supply the product;
 - **intends** to supply a product that is materially different
 - there are **no reasonable grounds for believing** that the trader will be able to supply the product -
 - ◆ within the period specified by the trader at or before the time at which the payment or other consideration is accepted; or
 - ◆ if no period is specified at or before that time, within a reasonable period.



Wrongly accepting payment

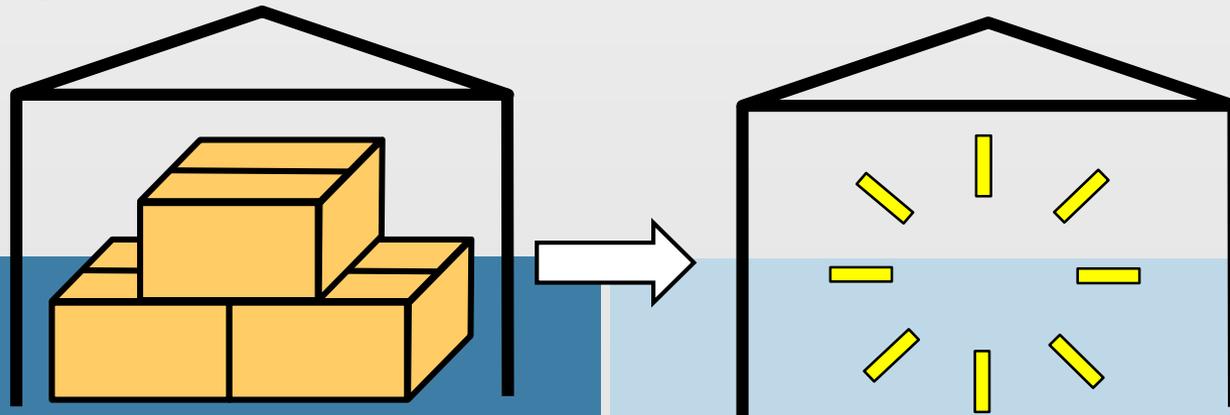




Convicted Case S.131

Wrongly accepting payment

- A storage service provider accepted payment from customers for storage service, while owing rental payment to the landlord . Later the storage was taken over by liquidators and customers' goods were removed.
- The operator was convicted for wrongly accepting payment. He was sentenced to six months' imprisonment and required to compensate \$10,000 to the customer.





Unfair Trade Practices

In conclusion, an unfair trade practice is using improper method which causes the average consumer to make a transactional decision that he would not have made otherwise.





S.26 Defences: mistake, accident, etc.

The person charged is entitled to be acquitted if

Sufficient evidence is adduced to raise an issue that the commission of the offence was due to

- a mistake
- reliance on information supplied by another person
- the act or default of another person
- an accident; or
- some other cause beyond the control of the person charged; and

The person charged took **all reasonable precautions** and exercised **all due diligence** to avoid the commission of the offence





S.26 Defences: mistake, accident, etc.

The person charged is entitled to be acquitted if

The person charged took **all reasonable precautions** and exercised **all due diligence** to avoid the **commission of the offence by**

- the person charged; or
- any person under the control of the person charged

The contrary is not proved by the prosecution beyond reasonable doubt.





Maximum Penalties

Fine of \$500,000 and

Imprisonment for 5 years





Compliance-based Mechanism



Civil compliance-based mechanism

An alternative to initiating prosecution:-

○ Undertaking [S.30L]

- to encourage compliance by a trader and to resolve the matter more expeditiously
- **Commitment** by trader **not to continue** or **repeat** the conduct or commercial practice of concern

○ Injunctions [S.30P]

- to **order** a trader **not to continue** or **repeat** or engage in the contravening conduct





Undertakings

- Instead of criminal proceedings, C&ED may resolve cases in respect of conduct that constitutes an offence under specified sections by accepting a written undertaking from alleged trader
- Trader undertakes not to continue/repeat/ engage in conduct or commercial practice of the kind or of a substantially similar kind of concern
- Acceptance / withdrawal of undertaking is subject to consent in writing by the Secretary for Justice
- If an undertaking is accepted, the enforcement agency may not commence/continue the investigation or bring/continue proceedings in court
- enforcement agency may also publish the accepted undertaking





Injunction

- The Enforcement Agency may apply to the court for an injunction to order a trader not to continue or repeat or engage in the contravening conduct



Exempt Persons



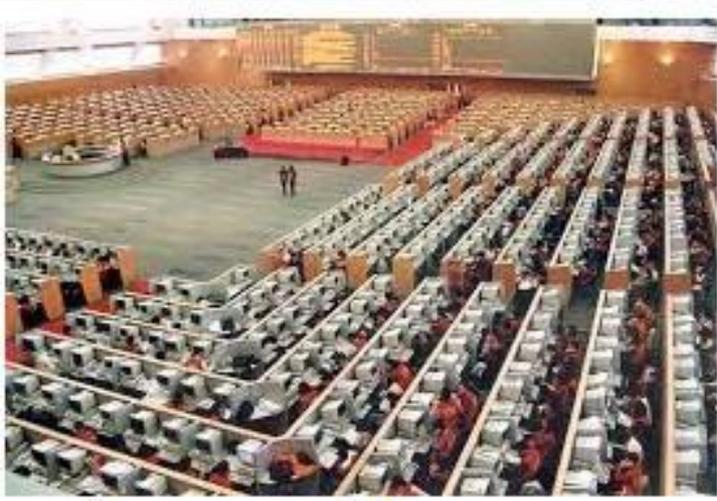


Exempt Persons





Excluded Products







For Enquiry

Hotline : 2815 7711

For Complaints

Hotline : 2545 6182

Fax : 2543 4942

Email : customsenquiry@customs.gov.hk

Thank You!

