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

Readers should refer to the TDO for the relevant statutory provisions and seek their own legal advice if necessary.

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Prohibitions under the TDAO

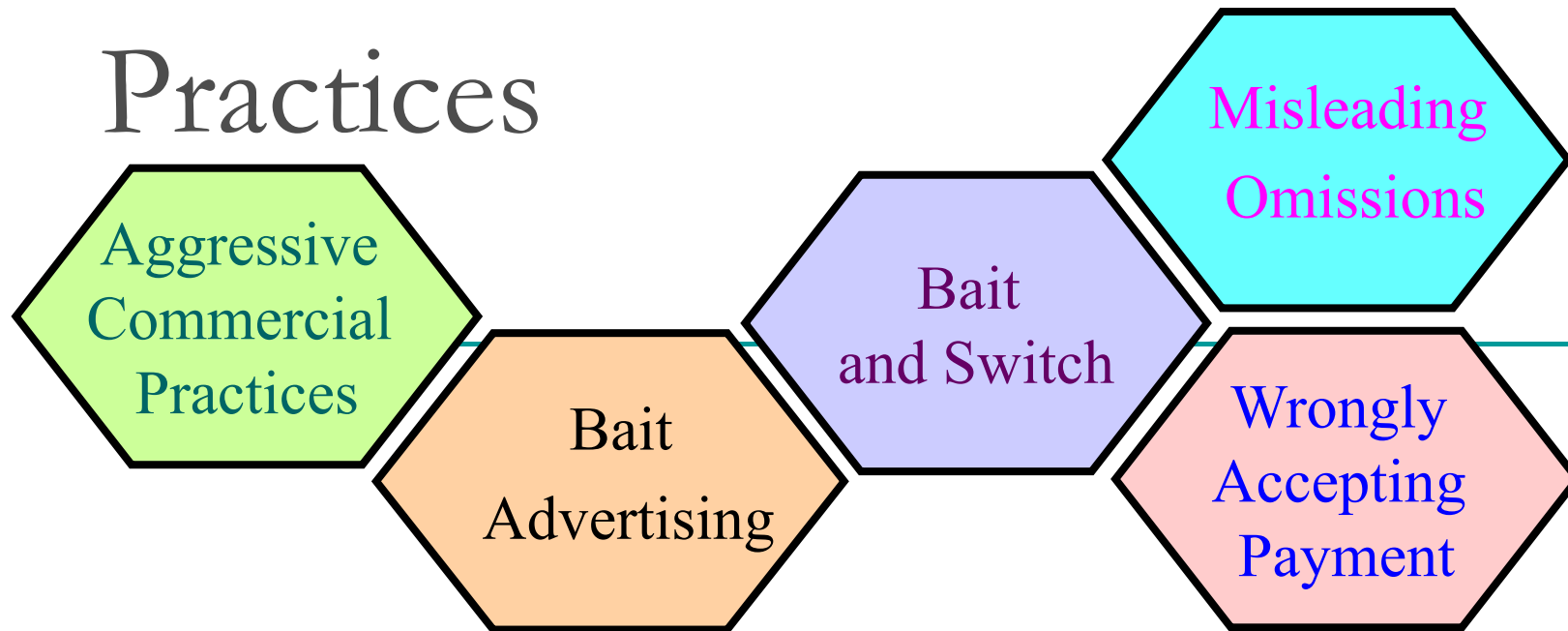
Prohibition of False Trade Description in relation to goods

- Any person who in the course of any trade or business-
 - applies a false trade description to any goods; or
 - supplies or offers to supply any goods to which a false trade description is applied; or
 - has in his possession for sale or for any purpose of trade or manufacture any goods to which a false trade description is applied,
- commits an offence.

Prohibition of False Trade Description in relation to services

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

Prohibition of Unfair Trade Practices



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.

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.

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

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.

Bait Advertising – Additional Defence

- If sufficient evidence is adduced to raise an issue that the trader:
 - offers to supply/procure a 3rd person to supply products as advertised/ equivalent products at advertised price
 - within reasonable time and quantity
 - whether the consumer accept or not
 - if that offer was not accepted by the consumer, the trader would have been able to so supply
- And the contrary is not proved by the prosecution beyond reasonable doubt

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

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 – Additional Defence

- If sufficient evidence is adduced to raise an issue that the trader:
 - offers to procure a 3rd person to supply the products/ equivalent products
 - within reasonable time
 - whether the consumer accept or not
 - refund in full or other consideration was made within reasonable period
- the contrary is not proved by the prosecution beyond reasonable doubt

General Defence

- If sufficient evidence is adduced by the defendant to raise an issue that
 - the offence was:
 - caused by mistake
 - reliance on information supplied to him
 - by act/default of another person
 - accident
 - other cause beyond control
 - and he **took all reasonable precautions** and **exercised all due diligence** to avoid commission by himself or person under his control
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General Defence (continued)

- Innocent publication of advertisement

Defence :

- ❑ the advertisement for publication was received in ordinary course of business ; and
- ❑ the publisher did not know and had no reason to suspect the publication amounted to an offence.

Compliance-based Mechanism

Civil Enforcement – Undertaking

- 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
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Considerations for accepting an Undertaking

- Nature of the conduct and regulatory impact of the undertaking compared with criminal prosecution
- Extent of cooperation that the trader has given in the investigation, including
 - provision of complete information about the conduct of concern
 - any timely and appropriate remedial efforts taken
- Whether the trader acknowledges that the conduct of concern has occurred

Considerations for accepting an Undertaking (Cont')

- Whether the trader is likely to comply with the undertaking
 - history of complaints against the trader
 - history of contraventions by the trader
 - general compliance record of the trader
 - any relevant previous court proceedings in respect of the trader
- Whether the trader will commit to putting in place a compliance programme
- Whether and what enforcement measures have been taken against other parties with similar degree of culpability in the same incident

Acceptance of Undertaking

- Enforcement Agency will not mandate a trader to give an undertaking and trader cannot compel the enforcement agency to accept an undertaking.
- When a trader proposes to give an undertaking, the department will assess its merits
- To enable a trader to determine whether proposing an undertaking is the most appropriate path for him to take, C&ED may, in appropriate circumstances, provide relevant information to the trader:
 - the situation where enforcement agency may withdraw an undertaking and
 - the legal position of the 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

Enforcement Guidelines

Aim of Enforcement Guidelines

- The Guidelines cannot and do not aim to mandate traders to conduct their business in a particular way.
- They serve as a guide as to when a conduct may constitute a contravention of the fair trading sections.
- Examples quoted in the Guidelines seek to illustrate the coverage and possible effect of the fair trading sections and how the sections / prohibitions may be enforced in practice.
- The Guidelines are not a substitute for, or a definitive interpretation of, the fair trading sections

Aim of Enforcement Guidelines (Cont')

- The Guidelines are neither legally binding nor subsidiary legislation
- A person does not incur any civil or criminal liability only because he/she contravenes any part of the Guidelines
- If court is satisfied that the Guidelines are relevant to determining a matter that is an issue or a conduct in any legal proceedings, the Guidelines are admissible in evidence and proof that the person contravened or did not contravene the Guidelines may be relied on by any party to the proceedings as tending to establish or negate the matter