



Booklet on cases under the Trade Descriptions Ordinance (Cap. 362)

Successful Prosecution and
Accepted Undertaking Cases

2nd Edition



Successful Prosecutions and Accepted Undertakings under the Trade Descriptions Ordinance (Cap. 362)

INTRODUCTION

The Trade Descriptions Ordinance (Cap. 362) (TDO), as amended by the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012, prohibits common unfair trade practices deployed against consumers, including –

- false trade descriptions;
- misleading omissions;
- aggressive commercial practices;
- bait advertising;
- bait-and-switch; and
- wrongly accepting payment.

The maximum penalty upon conviction of the above offences is a fine of \$500,000 and imprisonment for five years. The Customs and Excise Department (C&ED) is the principal enforcement agency of the TDO.

As an alternative to initiating prosecution, the TDO provides for a civil compliance-based mechanism under which C&ED may, with the consent of the Secretary for Justice, accept an undertaking from a trader believed to have engaged, be engaging, or be likely to engage in conduct that constitutes any of the above offences. This undertaking is a commitment by the trader not to continue or repeat the conduct concerned, providing a means to encourage compliance and resolve infringements expeditiously.

Upon operation of the amended TDO in July 2013 and as at the end of December 2017, C&ED has secured in total 302 cases of successful prosecutions. Some of the cases of successful prosecutions and undertakings are set out in this booklet for reference by traders and consumers.

Relevant provisions in the Trade Descriptions Ordinance

- *Section 2 –*

“Trade description” in relation to **goods** means an indication, direct or indirect, and by whatever means given, with respect to the goods or any part of the goods including an indication of, among other matters, price, how price is calculated or the existence of any price advantage or discount; and person by whom manufactured, produced, processed or reconditioned.

“Trade description” 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, among other matters, the person by whom the service is supplied or to be supplied.

“Commercial practice” means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion of a product to consumers or the sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.

- *Section 7 –* It is an offence for any person, in the course of his trade or business, to apply a false trade description to any goods; or supply or offer to supply any goods to which a false trade description is applied. It is also an offence for any person to have in his possession for sale any goods to which a false trade description is applied.
- *Section 7A –* It is an offence for a trader to apply a false trade description to a service supplied or offered to be supplied to a consumer; or supply or offer to supply to a consumer a service to which a false trade description is applied.
- *Section 13D –* The material characteristics of an “average consumer” include that the consumer is reasonably well informed, reasonably observant and circumspect.
- *Section 13E –* It is an offence for a trader to engage in relation to a consumer in a commercial practice that is a misleading omission. A commercial practice is a misleading omission if, in its factual context, it omits material information; hides material information; provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or 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. If a commercial practice is an invitation to purchase, the price information, among other matters, is material, if not already apparent from the context.

- *Section 13F* – It is an offence for a trader to engage in relation to a consumer in a commercial practice that is aggressive. A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances, 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 it therefore causes or is likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise.
- *Section 13I* – It is an offence for a trader to engage in a commercial practice that constitutes wrongly accepting payment. A trader wrongly accepts payment for a product if the trader accepts payment and at the time of that acceptance the trader intends not to supply the product or to supply a materially different product, or there are no reasonable grounds for believing that the trader will be able to supply the product within a reasonable period.
- *Section 30L* – In lieu of prosecution, the enforcement agency may, with the consent of the Secretary for Justice, accept an undertaking from a trader whom the enforcement agency believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence of unfair trade practice.

(A) SUCCESSFUL PROSECUTIONS

False Trade Descriptions

Case A1 (Court case number: ESS33855-33860/2015)

Case particulars:

A branch store of a chain supermarket supplied a “Norway Smoked Salmon”, on which the price was indicated as “Standard Price ~~39.9~~, Discounted Price 29.9”, but charged at \$34.9 instead of \$29.9 at the cashier counter. At another branch store, the price of “Spicy Sausages” was indicated as “Standard Price ~~13.9~~, Discounted Price 7.9”, but it was charged at \$13.9 instead of \$7.9 at the cashier counter.

The supermarket was convicted and fined \$180,000 for supplying and having in possession for sale goods with false trade descriptions.

Case A2 (Court case number: KCS4444-4448/2017)

Case particulars:

A Japanese chain restaurant offered for sale coupons under advertising gimmick “2 hour of all-you-can-eat barbecue buffet for two persons” via an online group buying company. The advertisement on the website specified that “carbonated fruit wine, fruit juice, green tea were unlimited supply for drinking” and besides “Japanese sweet potato, squid mantle, squid neck, teppanyaki beef and sea snail with herbs, spicy cool ramen were unlimited supply for eating”. However, the restaurant failed to provide some of the mentioned food and beverages as stipulated on the advertisement.

The restaurant was convicted and fined \$36,000 for supplying a barbecue buffet with a false trade description.

Case A3 (Court case number: WKS5159/2017)

Case particulars:

A restaurant stated on its menu that its Fujian style abalone fried rice. Upon examination by the Government Laboratory on that style of fried rice test-bought by officers of C&ED, it was confirmed that the “abalone” was in fact sea snail but not abalone, which was inconsistent with the trade description on the menu.

The restaurant was convicted and fined \$5,000 for supplying food with a false trade description.

Case A4 (Court case number: KCS38803/2016)

Case particulars:

A car trading company had supplied a second-hand vehicle bearing an odometer reading (travelling mileage) of 56,000 kilometres. However, the subsequent investigation confirmed that at the material time the actual travelling mileage of the vehicle had already exceeded 140,000km.

The company was convicted and fined \$40,000 for supplying a second-hand vehicle with a false trade description.

Case A5 (Court case number: KCS14225/2017)

Case particulars:

A Chinese medicinal herbs shop sold 4.45 taels of Chinese medicinal herbs claimed to be Cordyceps to a customer. Value of the goods was \$16,320. However, examination by the Government Laboratory revealed that the Chinese Medicinal herbs sold contained no Cordyceps sinensis.

A sole proprietor of the shop was convicted for supplying Chinese medicinal herbs with a false trade description. He was sentenced to carry out 160 hours of community service and to offer the victim \$16,320 as compensation.

Case A6 (Court case number: WKS9185-9186/2017)

Case particulars:

A supermarket sold frozen fish fillets marked as “grouper fish meat” and “sole fish fillet” on the packing respectively. However, upon laboratory examination, it was confirmed that both frozen fish fillets were catfish fillets.

A proprietor of the supermarket was convicted and fined \$8,000 for supplying and having in possession for sale frozen fish fillets with false trade descriptions.

Case A7 (Court case number: TWS18379/2015 & TWCC3303/2015)

Case particulars:

A foreign domestic helper agency, in the course of providing intermediary service to a customer, declared that a Burmese maid did not have any working experience in Hong Kong. However, investigation revealed that the maid had worked in Hong Kong for 4 days.

The agency and its manageress were convicted for applying a false trade description to a service supplied. They were fined \$8,000 and \$4,000 respectively and had to pay the victim a total of \$10,969 as compensation.

Case A8 (Court case number: KTCC717/2017)

Case particulars:

A badminton coach claimed himself being a former member of the Hong Kong Team and having joined Asian Games through social network platforms, name cards and promotion posters. Investigation revealed that he merely participated in “Elite Squad Training Programme” more than a decade ago and had never been chosen as a member of Hong Kong Team.

The badminton coach was convicted for applying a false trade description to a service offered to be supplied and sentenced to a community service order of 200 hours.

Misleading Omissions

Case A9 (Court case number: KCCC1279/2014)

Case particulars:

A beauty parlour solicited consumers to purchase prepaid service plans without telling them that all existing clients and equipment would be taken over by another operator. Although the level and quality of service provided might not be affected in any way, such a piece of material information was essential for an average consumer to make informed transactional decisions.

A director of the beauty parlour was convicted for engaging in commercial practice that was a misleading omission and was fined \$4,000.

Case A10 (Court case number: ESCC3747/2014)

Case particulars:

A salesman of a ginseng and dried seafood shop intentionally avoided clarifying the price measuring unit in the sale of fish maws to a visitor. A price tag affixed on the glass bottle where the fish maws stored was printed with number “580” with larger font size while words “measuring unit per tael” were printed in smaller font size on the lower right corner. The visitor was misled into believing that the price was \$580 per catty. After the fish maws were sliced, the salesman demanded \$10,000 and revealed that the goods were priced at \$580 per tael.

The salesman was convicted for engaging in commercial practice that was a misleading omission and sentenced to 10 weeks imprisonment and had to pay the victim a total of

\$10,000 as compensation.

Case A11 (Court case number: KCS22095/2017)

Case particulars:

A Japanese restaurant charged customers 10% surcharge during the dinner session. However, the restaurant did not mark it on the menu or inform customers of this surcharge by whatever means. Customers did not know this surcharge until they saw the bills. After investigation, the restaurant was proved to have engaged in misleading omission.

The restaurant was convicted and fined \$4,000 for engaging in commercial practice that was a misleading omission.

Aggressive Commercial Practices

Case A12 (Court case number: KCCC3903/2014)

Case particulars:

Three staff members of a beauty parlour told a consumer, on the pretext of examining her chest, that there were lumps which could become breast cancer and urged her to purchase a body treatment package costing \$140,000. Although the consumer expressed reluctance to do so, they persisted with continuous persuasion for over one and a half hours, causing considerable anxiety and annoyance to the consumer. The consumer finally yielded to the pressure and entered into the transaction unwillingly.

All three staff members of the beauty parlour were convicted for engaging in a commercial practice that was aggressive, with one receiving a community service order of 200 hours and the other two sentenced to three months' imprisonment each.

Case A13 (Court case number: FLCC4581/2016)

Case particulars:

A client manager of a precious metals investment service company induced a mentally incapacitated person by holding her hand to sign a sales contract and authorization when promoting a \$100,000 worth of precious metals investment service at a fast food shop.

The manager was convicted and sentenced to 1 month's imprisonment for engaging in a commercial practice that was aggressive.

Case A14 (Court case number: KTCC355/2017)

Case particulars:

On the pretext of joining beauty competition, two female staff members of a beauty parlour continuously coerced a consumer to purchase \$100,000 worth of beauty treatment packages. When the consumer appeared reluctant to pay, they used harassment and undue influence that caused her severe pain and embarrassment. The consumer finally yielded to the pressure and entered into the transaction unwillingly.

The two female staff members were convicted for engaging in a commercial practice that was aggressive and each sentenced to a community service order of 200 hours.

Case A15 (Court case number: KTCC1294/2017)

Case particulars:

A fitness consultant of a fitness centre, on the pretext of offering a free trial plan, used a consumer's credit card to procure a 2-year fitness membership valued at \$10,764 without her permission. While the consumer was asking for cancellation of the contract, a sales manager engaged in aggressive commercial practices by hitting a table forcefully, responding to the consumer in a fierce voice and using his hands to block the door to stop her from leaving, with intent to cause her to make a transactional decision.

The fitness consultant and the sales manager were convicted for applying a false trade description to a service supplied and engaging in a commercial practice that was aggressive respectively. The fitness consultant was sentenced to a community service order of 120 hours, while the sales manager was sentenced to 160 hours of community service order.

Wrongly Accepting Payment

Case A16 (Court case number: KTCC5094/2016)

Case particulars:

A proprietor of a storage and removal company still received payments from customers knowing that the company was going to close and after the company had been wound up. Customers visited the alleged company and found that it had already been wound up and could not get back the stuff stored in the company. At the end, the company did not refund to the customers.

The proprietor was convicted for wrongly accepting payment in the course of business and sentenced to 6 months' imprisonment and ordered to pay \$10,000 as compensation to the victim.

Case A17 (Court case number: TMS9252-9263/2017)

Case particulars:

A private education centre offered a range of interest classes and school admission interview courses for primary and secondary school students. After making pre-payment, consumers found the centre had closed down suddenly and failed to provide the courses. The centre failed to return the payments to its centre members.

The company was convicted for wrongly accepting payment in the course of business and fined \$48,000 and ordered to pay \$21,994 as compensation to the victims.

(B) ACCEPTED UNDERTAKINGS

False Trade Descriptions

Case B1

Conduct believed to constitute an offence:

A bakery promoted its bread products as “naturally made” and “no additive added” in its advertising materials, representation and internet promotion without any elaboration or further explanation of what those terms meant. As some of the products contained artificial essences, adopting such descriptions would create a false impression among consumers that no additive had been used. The bakery was believed to have committed the offence of applying false trade descriptions to its products in the course of trade or business.

Undertakings of trader:

The bakery undertook not to engage in conduct of that kind, or any conduct of a substantially similar kind, in the course of any trade or business for two years, and to put in place a compliance programme for its staff, together with measures for implementing the undertaking and complying with the requirements under the TDO.

Case B2

Conduct believed to constitute an offence:

A company sold rice through a group-buying website at “group-buy price at \$168” per pack, indicating a promotional discount of 35% against the original price of \$260. This practice misled consumers into believing that the “group-buy price at \$168” was a genuine discount, while in fact the rice had never been sold at \$260 per pack. The company was believed to have committed the offence of applying a false trade description to its product in the course of trade or business.

Undertakings of trader:

The company undertook not to engage in the conduct of that kind, or any conduct of a substantially similar kind, in the course of any trade or business for two years, and to put in place a compliance programme for its staff, together with measures for implementing the undertaking and complying with the requirements under the TDO.

Case B3

Conduct believed to constitute an offence:

A staff member of a mini-storage company claimed that the area of a storage room was 54 square feet while the actual area was only 44 square feet upon investigation. The mini-storage company was believed to have committed the offence of applying a false trade description to its service in the course of trade or business.

Undertakings of trader:

The company undertook not to engage in conduct of that kind, or any conduct of a

substantially similar kind, in the course of any trade or business for two years, and to put in place a compliance programme for its staff, together with measures for implementing the undertaking and complying with the requirements under the TDO.

Wrongly Accepting Payment

Case B4

Conduct believed to constitute an offence:

An online company did not deliver electrical and sportswear products at an agreed time after accepting payment from consumers. The shop did not make refund to customers because of insufficient cash flow. The shop was believed to have committed the offence of wrongly accepting payment.

Undertakings of trader:

The operator of the company undertook not to engage in conduct of that kind, or any conduct of a substantially similar kind, in the course of any trade or business for two years, and to put in place with measures for implementing the undertaking and complying with the requirements under the TDO.

(C) NON-ACTIONABLE CASES

Case C1 - Service not being supplied directly to consumer

A passenger complained that the silence mode of the video display units installed on a public light bus failed to function as per the description applied thereon. Since the display unit belonged to the bus owner and the transaction between passengers and the bus operator was confined to the transport service concerned, this case fell outside the ambit of the TDO.

Case C2 - Exempt Persons

A patient reported that a Chinese medicine practitioner had provided prescription with false information for patients by habitually omitting some items of medical herbs. A registered Chinese medicine practitioner is an exempt person under Schedule 3 of the TDO. The fair trading sections do not apply to them when they act in the capacity of a person described in the Schedule (except for sections 4 and 5 on the requirements relating to the provision of information on goods, and section 7 on trade descriptions applied on goods in the course of any trade or business). The commercial practices of exempt persons are regulated by the professional bodies established under the respective ordinances.

Case C3 - Dealt with under other legislation

A member of the public reported that a money lending intermediary used deceptive tactics to induce him to apply for loan and charged very high fees in the process. This is a suspected deception case and may also involve the Money Lenders Ordinance (Cap. 163). Therefore, the case was referred to the police for investigation.

Customs and Excise Department
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Important notice

The information in this booklet is for general reference only. It does not constitute legal or other professional advice, and should not be relied on as a statement of the law in any jurisdiction. You should seek professional advice if you have any specific concern.



This case booklet can be found on the website of
Customs and Excise Department

<http://www.customs.gov.hk>