

K&L GATES



Lost in translation

Trading in Hong Kong? Watch out. Consumers now have greater protection against vendors, whether shopping in stores or online, write K&L Gates' **Winnie W.N. Chan** and **Citrine Ho**.

NEW LEGISLATION WHICH came into effect on July 19 2013, the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (TDA), provides for new offences and remedies, as summarised below.

New offence – Misleading omissions: Say an online shop from Hong Kong offers a new range of beauty products. The business pays blogging agents to anonymously post various favourable reviews on the website and an unsuspecting consumer buys the beauty products on the strength of those posts but doesn't get what they bargained for. Under the TDA, it is an offence to omit or hide material information or provide material information in an unclear, unintelligible, ambiguous or untimely manner. Failure to identify the commercial intent of a commercial practice is also an offence. By not disclosing that these blogging agents are agents of the trader and causing the consumer to buy the beauty products solely based on these reviews, the trader may have committed an offence under the TDA.

New offence – Bait advertising: Promoting products by reference to taglines such as "Purchase now! Designer shoes at 80% off, while stocks lasts" may entice customers, but traders, including those who conduct business over the internet, should be aware that they may be committing an offence under the TDA. If a trader uses bait advertising where there is no reasonable ground to believe that the trader will be able to supply reasonable quantities of the shoes at that price for a reasonable period, the trader can be guilty of an offence. Qualifying the taglines with "while stock lasts" may not be sufficient to protect the trader, but the trader is unlikely to commit an offence if the tagline clearly states the period, the price and the quantity of shoes offered and the trader actually supplies the shoes on those terms.

New offence – Bait and switch: Some disgruntled consumers have been in situations where traders make an invitation to purchase a product at a specified price and then refuse

to sell the product as they have an intention to promote a different product. This may also happen in an online boutique where the website does not allow you to make your purchase but instead redirects you to a different page. The TDA puts a stop to this practice by making it an offence to bait and switch. If a trader offers to sell a luxury watch in a shop window, or at an online boutique, way below the market price with no intention of actually selling the watch but intending to lure customers to buy other goods, that trader may commit an offence of bait and switch.

New offence – Wrongly accepting payment: With the advent of online group discount buying, restaurants often sell dining vouchers at a discounted price with the condition that the voucher should be redeemed within a certain period of time. If at the time of accepting payment for the vouchers there are no reasonable grounds for believing that the restaurants can deliver the specified dining services within the specified time, eg due to overcapacity, the restaurants may have committed the offence of wrongly accepting payment.

New offence – Aggressive commercial practices: Rare, but unpleasant scenarios where tourists have found themselves trapped inside shops for hours by aggressive sales staff intimidating those customers into buying expensive products, could now be dealt with under the TDA. Under the TDA, "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".

Penalty: The TDA also contains provisions relating to exclusions and some defences for traders. Any trader who is found guilty of engaging in any of the above five offences will have committed a criminal offence and may be subject to a maximum penalty of HK\$500,000 and a term of imprisonment of up to 5 years. The offender may also be ordered by the Court to pay compensation to the consumer, if the consumer has suffered financial loss resulting from that offence. The TDA also contains a "softer" alternative which allows the relevant regulatory bodies to accept an undertaking from the trader not to

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continue the offensive conduct. In addition, aggrieved consumers may institute civil proceedings to claim damages.

The TDA is certainly good news for consumers and should also be embraced by traders as it will level the playing field. Traders should be reminded to review their company policies and ensure that their employees and agents are in full compliance with the TDA, as the TDA is couched quite widely and traders may unwittingly be committing an offence without being aware they are doing so. ■

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