Limitations in the Regulation of Unfair Marketing Practices in Hong Kong

Stefan Lo

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/jibl

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/jibl/vol7/iss1/4

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Journal of International Business and Law by an authorized editor of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.
LIMITATIONS IN THE REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

Stefan Lo*

INTRODUCTION

The scope of consumer protection laws in Hong Kong is relatively limited compared with major international economies such as the United States, Australia and European countries. Additionally, the laws that do exist in Hong Kong in this field are fragmented and lack cohesion. This paper will analyze the deficiencies and gaps in the regulatory regime in Hong Kong in the particular area of business-to-consumer marketing practices.

Part I discusses the problems that exist in Hong Kong in relation to the misleading of consumers and other unfair marketing practices. Part II examines the extent to which common law and statutory law provide civil regulation in the areas of contract law, misrepresentation and unconscionable conduct. Part III explores the existing criminal regulations in Hong Kong and their limitations. Part IV analyzes industry specific codes of conduct with a discussion of both the advantages and disadvantages to self regulation. Finally, Part V provides a comparative analysis of Hong Kong laws and the applicable laws of Australia and the United Kingdom. This paper argues that the laws on unfair marketing practices require comprehensive reform in order to provide adequate protection for Hong Kong consumers.

PART I: PROBLEMS OF UNFAIR MARKETING PRACTICES IN HONG KONG

Incidents of unfair marketing practices are frequently reported in the Hong Kong media. In the real estate sector, problems arising from developers’ unscrupulous marketing of newly released flats relating to sales results,1 prices2 and flat sizes,3 have caused a significant amount of controversy. In the health

* Stefan H. C. Lo, BA, LLB, LLM (Sydney); Legal Practitioner of the Supreme Court of NSW; Assistant Professor, School of Law, City University of Hong Kong. Financial support from the City University of Hong Kong is gratefully acknowledged.


3 See Yvonne Tsui & Agnes Lam, Deal on Flats Sparks Call for Public Debate Consumer Council

77
and beauty industry, unsubstantiated or false claims in relation to various weight loss and slimming techniques\(^4\) or products\(^5\) are notoriously common in Hong Kong. Alarmingly, the real estate and health industries represent only a small portion of the areas where problems have been reported.\(^6\)

Complaint statistics compiled by the Hong Kong Consumer Council\(^7\) (hereinafter “the Council”) reveal the extent of the problems false advertisements have created. In 1999, the Council observed that more than half of the advertisements published in newspapers and magazines in Hong Kong “made outrageous claims about products or used misleading statements to lure buyers into bad deals.”\(^8\) In 2001, the Council released a report on misleading and unfair practices in consumer transactions.\(^9\) The Council noted that the major problems reported by consumers were: (1) “misleading indication as to price”

\(^{4}\) See Donald Asprey, Slimming Fads Cut Down to Size Exercise, Good Diet Only Way to Lose Weight: Consumer Body, S. CHINA MORNING POST, Nov. 16, 2005.

\(^{5}\) See Elaine Wu, Electronic Exercise Belts Fail to Fight the Flab: But Manufacturers Are in the Clear Because They don’t Make Medical Claims, S. CHINA MORNING POST, Jan. 16, 2004.

\(^{6}\) Other sectors where problems have also been reported include: (1) the telecommunications sector (see, e.g., Vivienne Chow, Watchdog Warns of Telecoms’ Sales Tricks Consumer Council Wants Code of Practice to Pull Service Providers Into Line, S. CHINA MORNING POST, Jan. 11, 2005); (2) misleading food labelling (see, e.g., Barclay Crawford, Teas No Better Than Soft Drinks, Experts Warn Bottled Brews Can Be High in Sugar and Low in Benefits: Study, S. CHINA MORNING POST, Aug. 16, 2006); (3) misrepresentations in relation to discount dining schemes (see, e.g., Agnes Lam, Dining Club Named Over Misleading Practices Consumer Watchdog Lists Complaints Against Discount Restaurant Scheme, S. CHINA MORNING POST, Dec. 21, 2005); (4) misleading advertising as to rates by travel agents (see, e.g., Duncan Hughes, Protection ‘Adequate’ Against Tour Scams, S. CHINA MORNING POST, Jan. 8, 1998); (5) deceptive conduct by shopkeepers and the selling of counterfeit goods to tourists (see, e.g., Agnes Lam, No Fakes Scheme Violators May Be Named Options Weighed After Sweep of Jewelry Shops Nets Member of Anti-Counterfeit Pledge Campaign, S. CHINA MORNING POST, Sept. 29, 2005); and (6) practices of forced shopping imposed on members of tour groups (see, e.g., Dennis Eng & Zoe Mak, Complaints Against Package Tours Up 20% Consumers More Aware of Rights When Holidays Go Wrong, S. CHINA MORNING POST Aug. 10, 2007).

\(^{7}\) See Consumer Council Ordinance (2000) Cap. 216, § 4(1). (H.K.) (stating that the functions of the Council include protecting and promoting the interests of consumers in Hong Kong). See also Consumer Council Mission, http://www.consumer.org.hk/website/ws_en/profile/mission/mission.html (stating that the Council is not invested with any powers of investigation nor is it vested with powers to commence legal action on behalf of consumers, but has functions of giving advice to and assisting consumers in resolution of their disputes with traders; disseminating information about products and services and empowering consumers to help themselves; and facilitating discussion and promulgation of consumer policies).


\(^{9}\) CONSUMER COUNCIL, REGULATING DECEPTIVE MISLEADING AND UNFAIR PRACTICES IN CONSUMER TRANSACTIONS (2001).
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

and other “false or misleading representation[s]”; (2) traders “accepting payment without intention to supply”; (3) “bait and switch”; and (4) “undue harassment or coercion.” The Council observed that such misrepresentations have not only damaged the interests of consumers and honest competitors, but have also “tainted Hong Kong’s image”. Following the publication of that report, such problems have continued to exist in Hong Kong, with the number of complaints made to the Council increasing by approximately 50% from 2002 to 2007. Problems relating to sales tactics and prices represent some of the highest number of complaints by category. The Council has more recently observed that the complaints it receives from consumers “represent only the tip of the iceberg”.

PART II: EXISTING CIVIL REGULATIONS

Presently there are a number of different civil remedies under the common law, supplemented by statute, which can provide consumers with redress for many of the problems outlined in Part I. The delicate interplay between these remedies and their limitations is clear when analyzing how deceptive advertisements may be treated differently under contract law principles, the misrepresentation doctrine and the doctrine of unconscionable conduct.

---

10 Id.
11 Id.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

A. Contract Law

1. Common Law

Existing legal doctrines on contractual warranties and conditions do, in principle, provide consumers with a potential remedy against businesses in relation to unfair marketing practices. If a statement amounting to a contractual term turns out to be false, then there is a breach of contract. This gives the consumer a right to seek damages and to terminate the contract where the term amounts to a condition of the contract. For example, oral statements made by salespersons, as well as written statements contained in promotional material or on packaging provided at the point of sale, could be construed as terms of a contract with the consumer under ordinary contract law principles. Matters such as the importance of the content of the statement and the relative knowledge and expertise of the maker of the statement would be relevant considerations to the issue of incorporation of said terms.

2. Statutory Law

The above common law principles are supplemented by the Sale of Goods Ordinance. Under this statute, all consumer contracts for the sale of goods possess the following unwaivable conditions: (1) where goods are purchased by description, the goods must correspond with the description; (2) goods must be of merchantable quality; and (3) goods must be fit for the purpose for which they are purchased. On occasion, consumers have successfully relied upon both the common law and statutory principles to seek redress in Hong Kong. For example, a false oral representation about the date of manufacture of a motor vehicle has been held to be a condition of the contract giving the purchaser the right to terminate. In Wong Hiu Ling v. MP Hong Kong Ltd., false representations as to the health benefits of bed sheets and

---

15 Where the term is a warranty, then the consumer can seek damages but would not be able to terminate the contract.
19 Control of Exemption Clauses Ordinance, Cap. 71, §11(2). (H.K.) (stating that such implied terms cannot be excluded or restricted by reference to any contract term as against a person dealing as a consumer).
21 Id. at §16(2).
22 Id. at §16(3).
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

mattresses amounted to a breach of the implied conditions of fitness for purpose and correspondence with description where the representations were contained in promotional leaflets of the seller.  

3. Limitations

In many situations, the common law contract principles and the Sale of Goods Ordinance provide redress for consumers. However, there are still significant limitations in these protections. The first limitation is that the consumer cannot assume that every statement or representation made by a seller is automatically incorporated into a contract. For example, when an advertisement is made through print, television, radio or internet, advertisers are given some latitude in providing mere "puffery" to enhance the effectiveness of their advertisements. The second limitation is temporal. Even in situations where the alleged false advertisements provide specific misleading promises, the consumer may nevertheless be without recourse as the lapse in time between the advertisement and the contractual formation could prevent a finding that the promises are intended to form part of the contract.

B. Misrepresentation

1. Common Law

Representations not amounting to terms of the contract could nonetheless give rise to remedies in the law of misrepresentation. Where false information is given by one party ("representor") inducing another ("representee") to contract, and the representee relies on the information to enter into the contract with the representor, then the representee is prima facie entitled to rescind the contract under the common law. In a variety of different settings, there have been cases in Hong Kong where the representee was allowed to rescind the contract based on pre-contractual misrepresentations under common law principles. A common scenario where this doctrine is invoked is where the representor induced the consumer to purchase land based

26 Cf. Routledge v. McKay (1954) 1 W.L.R. 615 (App. Cas.) (holding that a statement at the first meeting between the parties for the sale of a motor-cycle regarding the age of the motor-cycle was not intended as a warranty in the contract when the contract was formed some time after the first meeting).

81
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

on misrepresentations. In Green Park Properties Ltd. v. Dorku Ltd., the Hong Kong Court of Appeal allowed the purchaser to rescind the contract where the real estate agent, who was acting on behalf of the vendor, gave a false impression that a yard area was part of the property to be sold. After weighing the evidence, the Court agreed with the purchaser’s accusations and found the contract formed as a direct result of the misrepresentation.

A representee may also seek damages in the tort of deceit for fraudulent misrepresentations at common law. Fraud is found where the representor knew the information to be false or was reckless as to the truth of the information. Where the representor was not fraudulent but merely negligent, then he or she may be liable for damages in the tort of negligence where there existed a special relationship between the representor and representee so as to give rise to a duty on the part of the representor to take care that the information provided is accurate.

There are, however, various limitations to the availability of common law remedies for misrepresentation that present difficulties for consumers to be successful in bringing actions. Where the action is in deceit, the consumer is required to prove that the misrepresentation was fraudulent. Proving fraud is always difficult in practice as there must be compelling evidence to convince the court that a person was acting fraudulently. Where the action is for damages in negligence, there are limitations under the common law requiring the consumer to establish a duty of care based on a special relationship between the parties. The precise contours of the concept of a special relationship are perhaps not entirely clear, but the concept includes situations where the representor can be regarded as having assumed responsibility to the representee for the accuracy of the statement. This relationship requirement is satisfied when the representor holds himself out as having some special knowledge or

29 Id.
30 Id., see also Welltech Inv. Ltd. v. Easy Fair Indus. Ltd., [1996] 4 H.K.C. 711 (H.C.) (stating, in relation to the facts of that case, “[t]hat the representations were made with the purpose of inducing the purchaser to enter into the sale and purchase agreement and the purchaser was influenced by the representations are beyond doubt”).
31 See Derry v. Peek, (1889) 14 App. Cas. 337 (H.L.) (appeal taken from Ch.D.) (stating that where an individual “makes a statement to be acted on by others which is false, and which is known to be false, or is made by him recklessly, or without care [to] whether it is true or false, that is without any reasonable ground for believing to be true,” that individual is “liable to an action of deceit”).
33 See Aktieselskabet Dansk Skibsfinansiering v. Bros., [2000] 1 H.K.C. 511 at 536 (holding that the court would not review the evidence for a third time in the absence of special circumstances to find a finding of fraud).
34 Williams v. Natural Life Health Foods Ltd., [1998] 1 WLR 830 (H.L.) (appeal taken from Eng.).
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

skill and makes a statement to that effect with the intention of inducing the representee into contract. However, these elements might not be present in many types of consumer transactions.

2. Statutory Law

Section 3(1) of the Misrepresentation Ordinance (hereinafter “Section 3(1)”) addresses some of the difficulties consumers face in bringing actions under the common law. Section 3(1) imposes liability where: (1) the representee entered into a contract following a misrepresentation; (2) the representee suffered loss as a result; and (3) the representor is unable to prove that he or she “had reasonable grounds to believe[,] and did believe up to the time the contract was made[,] that the facts represented were true” at the time the contract was made. In stark contrast to the common law, the onus is now on the representor to prove that he was not fraudulent. Section 3(1) also takes a contrasting approach to the common law in cases of negligent misrepresentation. Under the statute there is no need to establish any special relationship or duty of care, and the burden is now again on the representor to show that he had reasonable grounds for the belief and was accordingly not negligent. There are examples of cases in Hong Kong where purchasers or lessees of flats have been able to obtain damages under Section 3(1) in relation to misrepresentations on matters ranging from the size of the flat to whether the carpark being sold was covered or uncovered.

3. Limitations

Despite the possibilities for successful remedies under either the common law of misrepresentation or Section 3(1) there are still a number of limitations under the existing law. Firstly, under both the general common law

35 Esso Petroleum Co. Ltd. v. Mardon, [1976] Q.B. 801, 820 (stating that “duty only arises where the representor carries on the business of giving advice, or holds himself out as possessing the necessary skill and competence”). See also Customs and Excise Comm’rs v. Barclay Bank PLC., [2007] 1 A.C. 181 (H.L.) (appeal taken from Eng.) (stating that “the test is objective, the relevant question being whether the defendant, by his words or conduct, should be held to have assumed responsibility for the claimant”).
36 Misrepresentation Ordinance, Cap. 284, § 3(1). (H.K.).
39 Compare Misrepresentation Ordinance, Cap. 284, § 3(2). (H.K.), (allowing an order for damages in lieu of rescission in cases of innocent misrepresentation) and the general law where there is no opportunity for the representee to seek damages purely for innocent misrepresentations.
and Section 3(1), there must be a "misrepresentation" involved. This means that mere silence or non-disclosure, even of material information, would not give rise to any remedy.40 The requirement of misrepresentation also means that mere "puffery" would not be grounds for remedy, as vague promotional language or exaggerated sales talk is not regarded as amounting to any representation of fact as required by the common law.41 Thus, there have been cases where statements made in advertising material have been held to be mere "puffery" rather than statements of fact capable of amounting to an actionable misrepresentation. In one Hong Kong case, the Court of First Instance held that the phrase "regal surroundings for the select few" contained in a brochure advertising a property development was mere "puff" and did not amount to any representation that the property would be constructed to a high standard of luxury.42

A second limitation of the existing law on misrepresentations is the requirement that the plaintiff be a person or member of a class of persons whom the representation was intended by the representer to reach.43 It also appears that the representer must have intended the representee to act on the representation. In other words, the representer must have made the representation with the intent of inducing the representee to enter into the contract.44 In many situations, these requirements would not cause any real difficulties for the plaintiff as the court can readily infer the element of inducement from the nature of the representation and the context in which it was made.45 For example, the inference of inducement can be made where an

40 See Aktieselskabet Dansk Skibsfinansiering 1 H.K.C. at 528; see also Inchcape NRG HK Ltd. v. Hotel Amenities Int’l Ltd., [2000] H.K.E.C. 644 (C.A.). Cf. Aktieselskabet Dansk Skibsfinansiering, 1 H.K.C. at 528, (stating that there would be a misrepresentation as a result of omissions only where statements made are partially true or where statements are "literally true but may give a misleading impression").

41 Dimmock v. Hallett, [1866] L.R. 2 Ch. App. 21 (holding that "the statement that the land is fertile is a mere advertising flourish, which cannot affect the contract").

42 Chan Yeuk Yu v. Church Body of Hong Kong Sheng Kung Hui, [2001] 1 H.K.C. 621 (C.F.I.). See also Chartered Trust PLC v. Davies, [1997] 76 P. & C.R. 396, 396 (A.C.) (holding that “[t]he advertising literature...could not be said to constitute an implicit representation”). Oral sales talk might also be regarded as mere puffery: Mok Lai Kuen v. Will Rise Ltd., [2003] H.K.E.C. 757 (C.F.I.) (holding that a statement that a flat was “a very good flat” made by a real estate agent to a prospective purchaser who was viewing show flats was incapable of amounting to a representation of quality in the circumstances of the case).


44 Smith v. Chadwick, [1884] L.R. 9 App. Cas. 187, 196 (stating that “[i]n an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them”). While there is generally acceptance of this principle, the matter is not entirely beyond doubt. See Michael Bridge, Innocent Misrepresentation in Contract, 57 C.L.P. 277, 285-287 (2004).

REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

oral representation is directed to a customer by a salesperson at the point of sale where the salesperson is encouraging or enticing the customer to contract. However in some cases, the requirements would pose a difficulty. In Peek v. Gurney, the House of Lords held that the purchasers of shares on the secondary market could not seek a remedy for misrepresentations contained in a prospectus issued by promoters of a company because the prospectus was only intended by the promoters to be relied upon by the initial subscribers to the company, and not subsequent purchasers.\(^{46}\) Therefore, if a property developer made false statements in brochures promoting its new residential flats, and subsequently a purchaser on the secondary market relies on the brochure provided by a real estate agent, the purchaser might well be deprived of any remedies against the developer under the principles in Peek.\(^{47}\)

A third area of difficulty for consumers under the existing law is the operation of exclusion clauses in the contract. The courts do provide some protection to plaintiffs under the common law\(^{48}\) by: (1) ensuring that exclusion clauses are properly incorporated into the contract before they can take effect; (2) interpreting such clauses strictly against the proferens; and (3) declining to allow exclusion clauses to exempt liability from fraud.\(^{49}\) Further protection is provided under legislation in Section 4 of the Misrepresentation Ordinance. Under this section, advertisers can exclude or restrict liabilities or remedies in relation to a misrepresentation only if the clause itself is reasonable in light of the circumstances.\(^{50}\) However despite the above protections, exclusion clauses can sometimes deny a plaintiff a remedy even though the defendant made a misrepresentation that would otherwise be actionable.\(^{51}\) For example, in Cheng Kwok-Fai v. Mok Yiu-Wah Peter, where it was alleged that a real estate agent made misrepresentations concerning the size of the flat for sale, the court held that an exclusion clause in the contract was reasonable and therefore effective.\(^{52}\) The court found reasonability based on the fact that the vendor had done nothing to mislead the purchaser and the purchaser should have arranged for the flat to be measured himself.\(^{53}\)

\(^{46}\) Peek, L.R. 6 H.L. 377.
\(^{47}\) Id.
\(^{53}\) Id.; see also Green Park Properties Ltd. v. Dorku Ltd., [2002] 1 H.K.C. 121, 128-129 (C.F.A.)
A further difficulty for consumers under the present law of misrepresentation is that the right to rescind is not an absolute contractual right. The common restrictions apply when *restitutio in integrum* is not possible, or where a third party has acquired rights in the subject matter of the voidable contract. If rescission is not permitted, then there is still the possibility for the plaintiff to seek redress by way of damages for fraudulent or negligent misrepresentations. However damages might not be available for innocent misrepresentations under Misrepresentation Ordinance section 3(2) where the right to rescind has been lost. The balance of authority supports the view that the power of the court to award damages under Section 3(2) is dependent upon there being in existence the right to rescind. Although the misrepresentation may have been made innocently and without fault, it might be thought that leaving the loss entirely on the representee who acted on the misrepresentation may not be desirable as the representor has, in a sense, benefited from the misrepresentation at the expense of the representee.

C. Unconscionable Conduct

1. Common Law

Common law remedies allow a party to seek rescission of a contract where the other party to the contract acted unconscionably or has notice of a third party who engaged in unconscionable conduct. Hong Kong courts have not established any unifying principle or comprehensive requirements for the
REgulation of Unfair Marketing Practices in Hong Kong

operation of the unconscionable dealings doctrine. However, it has been accepted that the doctrine can apply where a weaker party was under a special disadvantage known to, and exploited by, the stronger party in a morally culpable manner, with the resulting transaction being not merely hard or improvident, but overreaching and oppressive.59 A person can be regarded as being subject to a special disadvantage by reason of “age, poverty, ignorance, lack of assistance or independent advice or inability to judge what is in his best interest.”60 Thus, the taking advantage of vulnerable consumers could potentially allow a court to refuse to enforce oppressive contracts on the basis of unconscionability.61 However, the court’s intervention is exceptional,62 as the elements of unconscionability under the common law are not easy to establish.

2. Statutory Law

Following recommendations of the Law Reform Commission in 1990, the legislature in Hong Kong enacted the Unconscionable Contracts Ordinance (hereinafter “UCO”), modelled on what is now section 51AB of the Trade Practices Act 1974 in Australia.63 Under UCO Section 5, where a contract or any part of a contract for the sale of goods or supply of services is unconscionable in the circumstances at the time of entry into the contract, the court may refuse to enforce the contract or any part of the contract, or modify the terms of the contract to avoid the unconscionable result.64 Factors which the court may consider in deciding whether or not a contract is unconscionable

59 See Wong Yung v. Hui Kwok Nam, [2003] H.K.C. 337 (explaining that “an unconscionable bargain in this context would be a bargain of an improvident character made by poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction.”). See also Semana Bachicha v. Poon Shiu Man, [2000] 2 H.K.L.R.D. 833, 841 (C.A.) (holding unconscionability to be present because “[n]either party was legally represented when the agreement was signed. The plaintiff was a person with an economic and social disadvantage, and with a marked inequality of bargaining power, when compared with her employer.”); Hart v. O’Connor, (1985) A.C. 1000 (P.C.) (holding that the court would look to the bargaining positions of the parties including age, physical health and experience to determine the viability of a contract); Commercial Bank of Australia Ltd. v. Amadio, (1983) 151 C.L.R. 447 (holding that “a transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed.”).


61 See, e.g., id.

62 See Ming Shiu Chung v. Ming Shiu Sum, [2006] 2 H.K.L.R.D. 831, 859 (C.F.A.) (stating “[i]t remains the case that there is no general jurisdiction to set aside transactions either because of inequality of bargaining power between the parties or because the transaction was improvident”).


64 Unconscionable Contracts Ordinance, Cap. 458, § 6. (H.K.).
include:

(a) the relative strengths of the bargaining positions of the consumer and the other party;
(b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;
(c) whether the consumer was able to understand any documents relating to the supply of the goods or services;
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and
(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.\textsuperscript{65}

The statutory provision is not limited by the common law doctrine of unconscionability,\textsuperscript{66} and thus the UCO potentially provides greater protection to consumers.

Where the contractual terms are particularly harsh and not reasonably necessary for the protection of the interests of the trader, and where the consumer has a lack of bargaining power and deals with the trader on the basis of a standard form contract, then the conduct of the trader in persuading the consumer to contract without highlighting the existence of harsh terms in the contract, or without affording the consumer a realistic opportunity to peruse the contractual terms, could well lead the court to find the contractual provisions unconscionable.\textsuperscript{67} In relation to whether the consumer understood the terms of the contract, the courts have taken a realistic approach, and the mere fact that the consumer could have read the terms or that the standard form contract contains an acknowledgement that the consumer has read the terms would not be sufficient to show that the consumer was aware of all the contractual terms in

\textsuperscript{65} Unconscionable Contracts Ordinance, § 6(1).
\textsuperscript{66} Hang Seng Credit Card Ltd. v. Tsang Nga Lee, [2000] 3 H.K.L.R.D. 33, 41 (C.F.I.) (holding that “[i]n applying the UCO, the court is not shackled by the traditional or classic theories in contract law”).
\textsuperscript{67} Cheung Kam Sing v. Int’l Resort Dev. Ltd., [2003] 2 H.K.L.R.D. 113 (holding a holiday timeshare agreement to be unconscionable where claimants were enticed to attend the defendants’ premises by claims that they had won holiday prizes and where the claimants were then subjected to 3 hours of persistent persuasion to contract and were not given an opportunity to discuss and consider the matter calmly between themselves).
circumstances where the parties did not really intend for the consumer to read clearly all the terms prior to contracting.68

3. Limitations

While the provisions in the UCO are important in providing remedies for consumers, there are still some limitations in the legislation. Firstly, the UCO deals with unconscionable terms in contracts, and although conduct of the trader is relevant when ascertaining whether the contract is unconscionable, the UCO cannot be relied upon in relation to unconscionable promotional conduct per se.69 Moreover, unconscionability under the UCO is assessed with reference to the circumstances relating to the contract at the time when it was made, and so post-contractual unconscionable conduct is not caught.70 By contrast, the Australian provision in the Trade Practices Act 1974 Section 51AB, applies generally to unconscionable “conduct” and is not restricted in the above ways.

Secondly, the concept of unconscionability might be too narrow in its application such that the UCO would not cover all types of unfair or unjust conduct. In Shum Kit Ching v. Caesar Beauty Centre Ltd., the court explained that the term “unconscionability” denotes a lack of conscience, and accordingly held that under both the UCO and the common law, the doctrine requires that the consumer be under some form of weakness which is known to the other party and which is exploited by the other party.71

The weakness requirement on the part of the consumer was not expressly examined by the court in Hang Seng Credit Card Ltd. v. Tsang Nga Lee. The court simply examined the factors set out in Section 6 of the UCO and was prepared to accept that the relevant terms were unconscionable without specific investigation of any particular circumstances of weakness of the consumers.72 Assuming that there is a blackletter requirement for the consumer to suffer from some sort of weakness, that requirement can be established at least on the basis of the inequality of bargaining power when coupled with the consumer’s lack of understanding or awareness of the terms. The reasoning in

70 Unconscionable Contracts Ordinance, § 5(1). (H.K.) (stating that the court may provide a remedy if “the court finds the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made”). Under section 6(3), the court may take into account the conduct of the parties in relation to the performance of the contract since it was made when considering the exercise of its powers under section 5, however this provision only applies after the court has already made a finding that the contract was unconscionable.
71 Caesar Beauty Ctr. Ltd., 3 H.K.L.R.D. at 432.
72 See generally Hang Seng Credit Card, 3 H.K.L.R.D. at 33-41.
The Journal of International Business & Law

Caesar Beauty Centre Ltd. clearly indicates that the weakness requirement is easier to satisfy in the UCO than it is under the common law. In Caesar Beauty Centre Ltd., the court found the purchaser of a health club membership was in a position of weakness. The court explained that the purchaser was easily persuaded to spend money, that she did not have a clear understanding of all the terms in the contract and had some reservations in deciding to enter into the contract. Nonetheless, while the statutory provision is wider than the common law principles, to some extent, the concept of unconscionability still narrows the scope of the UCO compared with a concept of unfair or unjust conduct.

Thirdly, the application and practical effects of the UCO present yet another limitation for consumers. Once again, Caesar Beauty Centre Ltd. highlights the limitation. The consumer paid HK$48,060 in advance to receive 267 facial treatments. On the day after entering into the contract and making that payment, the consumer sought to withdraw from the contract and to recover the monies paid. Despite the fact that the court found the contractual clause denying refunds to be unconscionable, it did not order the consumer be refunded the money paid. The crux of the court’s position was that the trader did not accept the consumer’s request to terminate the contract. As a result, the contract remained valid and therefore no legal basis existed for the consumer to recover the $48,060. Interestingly, if the contract was terminated, the trader would not have been able to enforce the non-refund clause, and the consumer could have recovered the $48,060 under restitutionary principles or pursuant to a court order under Section 5(1)(c) altering the unconscionable part of the contract. This application of the UCO highlights an obscure result which shows that the Hong Kong laws intended to protect consumers still possess significant gaps.

73 Caesar Beauty Ctr. Ltd., 3 H.K.L.R.D. at 422.
74 Id., at 432-33.
75 Id.
77 Caesar Beauty Centre Ltd., 3 H.K.L.R.D. at 422.
78 Id., at 436.
79 Id., at 437-439.
80 Id. at 437.
81 Id., at 439 (the judge stated that: “Notwithstanding that I have considerable sympathy for the [consumer] who had entered into an unwise bargain beyond her means, my decision is that the appeal must be dismissed”).
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

PART III: EXISTING CRIMINAL REGULATIONS

Apart from civil remedies for consumers under the common law and under particular statutory provisions, there are a number of statutes in Hong Kong creating criminal offences in relation to misleading advertising or marketing. Similar to the analysis of civil law, an analysis of the statutory protections and existing limitations is required.

A. Trade Descriptions Ordinance

The main legislation of general application across different industries is the Trade Descriptions Ordinance (hereinafter “TDO”). Section 7 of the TDO prohibits a person in the course of any trade or business from applying a false trade description to any goods, or supplying or offering to supply any goods, to which a false trade description is applied. The term “trade description” refers to a description of goods as to: (1) quantity; (2) method of manufacture, production, processing or reconditioning; (3) composition; (4) fitness for purpose, strength, performance, behaviour or accuracy; (5) any other physical characteristics not included in the above; (6) testing by any person and results thereof; (7) approval by any person or conformity with a type approved by any person; (8) place or date of manufacture, production, processing or reconditioning; (9) person by whom manufactured, produced, processed or reconditioned; and (10) other history, including previous ownership or use.

Section 7 of the TDO provides a broad scope of protection for consumers against false or misleading marketing. The statute catches general advertising of goods which contain false trade descriptions, as well as both oral and written trade descriptions given at the point of sale. Moreover, the following are guiding principles that have developed through case law: the fact that no one was in fact deceived does not mean that there cannot be a contravention; intention to deceive is not a requisite element of the offence.

83 Trade Descriptions Ordinance, § 2(1). (H.K.) (“False trade description” is also defined in section 2, and includes trade descriptions which are misleading or “false to a material degree”).
84 See id. at, Cap.362, 1, § 8(1-2).
85 Id. at § 6(2).
87 Keening Indus. Ltd., 1 H.K.C. at 285-86.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

"omissions can render a description misleading",^88 and opinions can be caught as well.^89 In Hong Kong, prosecutions have been brought under the TDO in relation to counterfeit goods^90 and false descriptions as to the place of manufacture of goods.^91

B. Industry Specific Legislation

Beyond the TDO, other legislation in Hong Kong creates criminal offences in relation to misleading advertising or marketing in specific industries. The Weights and Measures Ordinance prohibits persons who supply goods in the course of trade from knowingly making any false or misleading statement regarding the quantity of goods supplied.^92 In the food and drug industry, the Public Health and Municipal Services Ordinance creates offences for providing false or misleading labels on food^93 or drugs.^94 In the financial services sector, the Securities and Futures Ordinance contains a number of criminal provisions dealing with deceptive information which is likely to induce persons to: acquire or sell securities or interests in collective investment schemes, or to deal in futures contracts, or leveraged foreign exchange contracts.^95 Section 40A of the Companies Ordinance also imposes criminal liability for untrue or misleading statements in prospectuses on persons who authorized the issue of the prospectus.^96

^92 Weights and Measures Ordinance, Cap. 68, §18. (H.K.). See also Weights and Measures Ordinance, §32(2) (making the maximum penalty a fine of HK$20,000). Cf. Weights and Measures Act, 1985, c. 72, § 30 (U.K.).
^93 Public Health and Municipal Services Ordinance, (Cap. 132) § 2 (stating that food includes drinks).
^94 Id. at § 61(1). See also id. at §150 and Sch. 9 (making the maximum penalty a level 5 fine of HK$50,000 and 6 months imprisonment).
^95 Securities and Futures Ordinance, Cap. 571, §§ 107, 298, 300, 301 and 303. (H.K.) (outlining the criminal provisions. For example, the maximum penalties range from HK$1,000,000 and 7 years imprisonment (§ 107(2)) to HK$10,000,000 and 10 years imprisonment: § 303(1)). See id. at §§ 108, 252, 277, 281 (for civil liability provisions).
^96 See also Companies Ordinance, Cap. 32, 1, § 40(1). (H.K.) (addressing civil liability).
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

C. Limitations

The above legislative provisions are important within their scope of operation. However, it is clear that there are significant gaps in coverage. While the above Ordinances cover misleading advertising or marketing of goods and certain financial products, there is no statutory regulation dealing with misstatements in a number of problem areas in Hong Kong outlined in Part I, including advertising by property developers, and those in the weight loss, slimming and beauty industries. There is outright prohibition on advertising of medical treatments or products under the Undesirable Medical Advertisements Ordinance, which can address problems of advertisements in relation to unproven medical treatments, including sexual virility.\(^97\) However, the Ordinance does not cover information contained in package inserts in products;\(^98\) and moreover does not extend to all types of health products,\(^99\) nor slimming and beauty treatments. The lack of statutory regulation of misstatements in many service industries in Hong Kong has been described as constituting a "major deficiency"\(^100\) of Hong Kong law.

There are even limitations in the TDO in its application to goods.\(^101\) For instance, there are gaps in the definition of "false trade description" in Section 2, so misleading statements about matters such as the identity and standing of businesses; authorship of books; films and music recordings; and environmental claims are not caught.\(^102\) Misleading information in advertisements as to pricing is also missing from the list in Section 2.\(^103\) In addition, the courts have held that an incorrect statement that goods are available does not amount to a false trade description as to any goods,\(^104\) and there is also a suggestion that misdescriptions contained in after-sale statements are not within the Ordinance where the statements are not associated with the

\(^{97}\) Undesirable Medical Advertisements Ordinance, Cap. 231, Sch. 2. (H.K.).
\(^{99}\) Undesirable Medical Advertisements Ordinance, Schs. 1 and 2 (setting out the treatments which are covered by the legislation).
\(^{100}\) Consumer Council, supra note 9, at § 19; see also The Law Reform Commission of Hong Kong, Sale of Goods and Supply of Services, § 8.3.4 (Feb. 1990) available at www.hkreform.gov.hk/en/docs/services-e.doc (where the Commission expressed similar concerns).
\(^{102}\) Scott & Black, supra note 38, at 295, 301.
\(^{103}\) Cf. Trade Descriptions (Amendment) Ordinance 2008, § 7. (H.K.) (which purports to amend the Trade Descriptions Ordinance to give some protections in relation to misleading price indications).
actual sale or supply of the goods. A further difficulty in Hong Kong appears to be that criminal prosecutions have mainly been brought in relation to counterfeiting problems only and thus there is limited enforcement as to general problems of misstatements and false descriptions even in relation to matters that could come within the Ordinance.

PART IV: INDUSTRY CODES OF CONDUCT

Apart from the civil and criminal laws discussed in Parts II and III, respectively, there is a significant degree of self-regulation in Hong Kong in relation to advertising and marketing practices. Codes of conduct exist in a number of industries, with the status of codes ranging from those which are entirely voluntary to those supported by statutory backing resulting in legal sanctions for non-compliance.

A. Non-Statutory Codes of Conduct

The Real Estate Developers Association of Hong Kong has issued Guidelines for Sale Descriptions of Uncompleted Residential Properties to deal with the types of malpractices outlined earlier in this paper. The Guidelines require that sales brochures and price lists be made available to prospective purchasers at least 24 hours before flats are put for sale; that sales brochures should contain essential information, including matters such as floor areas, prominent fittings and finishes, salient conditions of the government lease and the DMC, anticipated completion date, and management fee details; and that any information provided about sales results should be as accurate as possible.

In June 2006, a voluntary Code of Practice for the beauty industry was issued by the Consumer Council in conjunction with various trade and professional organizations in the industry. The Code contains a number of detailed provisions aimed towards eradicating misleading advertising and promotional conduct including claims regarding the health or medical benefits

---

105 Hall v. Wickens Motors Ltd., [1972] 1 WLR 1418, 1419; and see also SCOTT & BLACK, supra note 38 at 298; but cf. BENJAMIN GUMPERT & JONATHAN KIRK, TRADING STANDARDS: LAW AND PRACTICE 68-69 (Jordan Pub., Ltd. 2001) (stating a more liberal approach that any trade description applied to goods in the course of a trade or business can be caught by the statute).
106 Sale of Goods and Supply of Services, supra note 100 at § 8.3.7; Consumer Council, supra note 9 at § 3.9.
108 Id.
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

of treatments and products, and the pricing and terms of contracts with customers. Apart from misleading conduct, the Code also deals with other aspects of marketing activities, including requirements for beauty salons not to exert undue pressure in selling products to customers, and for salons to ensure that they have the capacity to fulfil service obligations under contracts for pre-paid treatments.

In some other industries, codes exist which bind members of an association contractually as a condition of membership or through articles of association of the body. In the insurance sector, the two main associations of brokers in Hong Kong - the Hong Kong Confederation of Insurance Brokers (hereinafter "CIB") and the Professional Insurance Brokers Association (hereinafter "PIBA") - each have a Code of Conduct for its members which prohibits members from making advertisements or statements which are misleading or extravagant. Brokers are contractually bound to these requirements through the conditions of membership. Breach of the code provisions can lead to disciplinary action by the association, with the possibility of the imposition of sanctions including reprimands, fines, or expulsion. For brokers, expulsion has significant ramifications because a person can only act as an insurance broker if the person is a member of an authorized body of insurance brokers or is otherwise authorized by the Insurance Authority.

For insurance agents, there are obligations under their agency agreements which prohibit them from making inaccurate or misleading statements about the insurer for whom they act and about the policies of the insurer. Persons can only act as agents pursuant to an appointment by an authorized insurer, and the above restrictions on misleading statements are required by the mandatory agency agreement under the Code of Practice for the

10 Id. at Pt 2.
11 Id. at Pt 3.
14 Hong Kong Confederation of Insurance Brokers, Membership Regulations §§ 3.8, 3.9, http://www.hkcib.org/main.htm; Hong Kong Confederation of Insurance Brokers, Articles of Association arts. 28, 28D, 29, http://www.hkcib.org/main.htm; Professional Insurance Brokers Association, Rules and Regulations, Misconduct §§ 3(b), 3(f) and Disciplinary Matters §7(f).
15 Insurance Companies Ordinance, Cap. 41, §2 (defining "authorized insurance broker"), §65 (discussing insurance agents and insurance brokers), §69, (requiring insurance brokers to be authorized) and §70 (concerning approval of bodies of insurance brokers), (H.K.) §4 (making the Insurance Authority the statutory regulator in the insurance industry under the Insurance Companies Ordinance).
16 Id. at § 2 (defining "appointed insurance agent").
Administration of Insurance Agents, with which insurers are bound to comply under the Insurance Companies Ordinance.\textsuperscript{117}

Insurers are also subject to a code known as the Code of Conduct for Insurers. This Code is issued by an industry body known as the Hong Kong Federation of Insurers.\textsuperscript{118} Clause 8 of this Code requires insurers to guarantee that information in sales materials are not misleading.\textsuperscript{119} Breaches of the Code are to be taken into account by the self-regulatory body, the Insurance Claims Complaint Bureau, when resolving disputes between policy holders and insurers.\textsuperscript{120}

Marketing activities of real estate agents are regulated through a combination of non-statutory guidelines and subsidiary legislation. Under Circular 06-05 on \textit{First Sales of Residential Properties} issued by the Estate Agents Authority (EAA),\textsuperscript{121} real estate agents are required to provide developers’ price lists to customers where they have been supplied with such lists, to issue advertisements and to make representations with respect to the property only if authorized by the developer, and to ensure the accuracy of any such advertisements and representations.\textsuperscript{122} Estate agents are effectively required to comply with the circular as they can only carry on business with a license under the Estate Agents Ordinance,\textsuperscript{123} and the EAA has power under the Ordinance to fine agents or to suspend or revoke licenses where the agent does not satisfy the requirements of being fit and proper.\textsuperscript{124} In addition to the circular, the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation prohibits estate agents from: providing false and misleading information when seeking instructions from clients; issuing advertisements which are false or misleading; misrepresenting the value of properties; and exercising undue influence over clients.\textsuperscript{125}

\textsuperscript{117} \textit{Id.} at § 67(4) (stating that "[A]n insurer is required to comply with a code of practice approved under this section in its administration of insurance agents.").

\textsuperscript{118} See The Hong Kong Federation of Insurers website, http://www.hkfi.org.hk.

\textsuperscript{119} The Code of Conduct of Insurers, Pt. 2, cl. 8, available at http://www.hkfi.org.hk/en_tips_customer_conduct.htm#part2 (stating that "[i]nsurers shall endeavour to ensure that all information contained in their sales materials and illustrations is current, correct, expressed in plain language and not misleading to the public.")

\textsuperscript{120} Articles of Association of the Insurance Claims Complaint Bureau, Art. 82 (stating that the Complaints Panel, in making its ruling "shall have regard to ... any codes and guidelines issued from time to time by the Hong Kong Federation of Insurers").

\textsuperscript{121} Estate Agents Ordinance, Cap. 511, §4, Pt. II(1), (H.K.) (establishing the Estate Agents Authority).

\textsuperscript{122} Estate Agents Authority, \textit{First Sales of Residential Properties Circular No. 06-05 (C.R.)}, ¶¶ 1, 3, 4, 5, 6 available at http://www.eaa.org.hk/practice/circulars_06-05.htm.

\textsuperscript{123} Estate Agents Ordinance, §§ 15, 16.

\textsuperscript{124} \textit{Id.} at §§27, 30; see also Circular 06-05 supra note 146.

\textsuperscript{125} Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation, §§ 8,
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

A Code of Conduct applies to travel agents in Hong Kong pursuant to the requirements of the Travel Industry Council. Travel agents who are members of the Council are contractually bound to the Code under the Articles of Association of the Council, and infringements of the Code may lead to the imposition of fines or termination of the agent’s membership. Effectively, all travel agents are covered by the Code as agents must be a member of the Council in order to be licensed to carry on business under the Travel Agents Ordinance. The Code is comprised of a number of specific codes, including a Code of Advertising Practice and a Code of Business Practice on Inbound Travel Service. The Code of Advertising Practice requires advertising of travel agents to be honest and truthful, and descriptive claims and comparisons which relate to matters of ascertainable fact to be capable of substantiation. Specific material information is also required to be set out in package tour brochures published by travel agents. The Code of Business Practice on Inbound Travel Service requires travel agents to ensure that the tourist guides whom they use in Hong Kong comply with another code, the Code of Conduct for Tourist Guides. Various obligations are imposed on tourist guides under this latter Code. For example, guides must not coerce or mislead visitors into purchasing goods, and must not exhibit dissatisfaction or provide sub-standard service because few or no gratuities are received. Tourist guides in Hong Kong are effectively required to comply with this Code as they can only be used by tourist agents if they are accredited under the TIC’s Tourist Guide Accreditation System.

B. Statutory Codes of Conduct

In the television broadcasting sector, the Generic Code of Practice on Television Advertising Standards, issued by the Broadcasting Authority...
pursuant to the Broadcasting Ordinance, imposes restrictions on providers of television broadcasting services in relation to advertising that is broadcasted. For example, there are provisions in the Code which require that advertising must be honest and truthful; that advertising should not unduly play on fear; and that factual claims and best-selling claims in advertising should be capable of substantiation. More specific restrictions are provided in relation to particular categories of advertising, such as advertisements for medical preparations and treatments, credit services, and real estate. Licensees have a statutory obligation to comply with the Code, and breaches can lead to the Authority imposing fines on the licensee or suspension or cancellation of licences.

C. Advantages and Disadvantages of Self Regulation

Much has been written by commentators in relation to the desirability, or otherwise, of the use of industry codes and self-regulatory schemes in consumer protection.

1. Advantages of Self-Regulation

Advantages of self-regulation are said to include the following: (1) non-legal codes are flexible in that they can be amended faster than laws to deal with changes in the market place; (2) codes being drawn up by industry members can cater to the specific needs and circumstances of the particular

---

134 See Broadcasting Ordinance, Cap 562, §3. (H.K.).
135 Id. at § 5 (containing provisions directing who must be licensed under the Ordinance).
137 Id. at §11.
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

industry; (3) self-regulation is less costly both in terms of the use of public resources and in terms of the costs to individuals in seeking redress; and (4) codes can provide for matters which might be inappropriate for legal regulation or can provide guidelines for best practice that go beyond requirements that might be imposed by law.

The first two factors should not be over-emphasized as it is possible for a statutory scheme to provide for flexibility with industry involvement generally catered to in the legislative process, while industry-specific codes can be implemented under a statutory regime as well. The third and fourth of the suggested arguments in favor of the use of codes arguably have more merit. However, cost savings alone cannot be decisive if the self-regulatory scheme does not actually work.

2. Disadvantages of Self-Regulation

Conversely, it has often been pointed out that there are various disadvantages to self-regulatory schemes including: (1) that codes promulgated by industry associations are not applicable for non-members; and (2) there may either be no sanctions for non-compliance or the sanctions that exist may be insufficient or ineffective.

Some of the existing codes in Hong Kong deal with the first problem by effectively requiring compulsory memberships of industry associations through statutory licensing requirements. However, licensing is not appropriate for every industry, and any imposition of a code on all traders in an industry would require statutory provisions of some sort. Regarding the second problem of effective compliance or enforcement in relation to traders subject to codes, there may be a difference depending upon whether the code is entirely voluntary or whether traders are bound by contract or under statute. Problems of non-compliance due to the voluntary nature of a code or due to lax enforcement by the industry body can be dealt with by giving responsibility to a statutory body to enforce the code, such as in the use of the Estate Agents Authority in Hong Kong. However, the question of whether there are problems with

---

142 As government involvement is nil or minimal.
143 As an industry scheme for dispute resolution could be provided free of charge to consumers who would not need to incur legal and/or court expenses.
145 See, e.g., BORRIE, supra note 142, at 75; Clarke, supra note 142; SCOTT & BLACK, supra note 38, at 46-49, 59.
146 For example, because the industry association is insufficiently objective or proactive in protecting the interests of consumers, sanctions such as cancellation of memberships might not necessarily have much impact for the particular trader.
147 For example, travel agents, real estate agents, and insurance agents.
compliance and enforcement can only be answered on the basis of empirical data. A more systematic empirical study may be needed to draw firm conclusions for the various codes in Hong Kong, but the possible limitations, at least with voluntary codes, are illustrated by the fact that some of the problems noted earlier in the real estate sector have arisen despite the existence of REDA’s voluntary guidelines.

Any difficulties with self-regulatory schemes are not necessarily solved by legislative intervention, as even statutory bodies might be too lax in enforcing laws.148 However, the trend in overseas jurisdictions, including England where there has been a long tradition in the use of industry codes, has been to recognize that while such codes can have an important role to play, they cannot operate effectively as a total replacement for legal regulation. Rather, what is needed is either the use of codes against a backdrop of minimum legal standards set out under legislation, or a type of co-regulation where public enforcement mechanisms are harnessed to provide teeth to industry codes.149 As one scholar noted: “[t]he key to [the] effective [use of self-regulation] is in the design of a system of oversight which obviates the less desirable risks of self-regulation but recognises the advantages that can result.”150

PART V: COMPARATIVE ANALYSIS


A. Misleading Conduct – General Prohibitions

Section 52 of the TPA in Australia prohibits misleading or deceptive conduct in trade or commerce.152 In the European Community, the UCP

---


149 See, e.g., SCOTT & BLACK, supra note 38, at 66-69 see also European Consumer Law Group, supra note 145, at 222 (observing that codes have often been unsuccessful in promoting the interests of consumers, as they are usually drawn up in the interests of traders, usually to avoid legislation).

150 CARTWRIGHT, supra note 142, at 60.

151 Implemented in the United Kingdom pursuant to the Consumer Protection from Unfair Trading Regulations (Eng.) 2008.

152 Compare Trade Practices Act (which for constitutional reasons, prohibits “corporations” from engaging in the impugned conduct) with Fair Trading Act, 1987, Pt. 5, (Austl.) (extending the
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

Directive prohibits unfair commercial practices, which is defined to include misleading actions and omissions.\(^{153}\) Examples of conduct which can be caught by the Australian or European Community provisions but not under the laws in Hong Kong,\(^{154}\) are discussed below.

1. **Omissions or Non-Disclosures By the Trader**

Under the Hong Kong common law principles of misrepresentation\(^{155}\) and under the TDO,\(^{156}\) “half-truths,” or statements literally true but which give rise to a false or misleading impression, can amount to a misrepresentation or a false trade description. However, Section 52 of the Australian TPA provides wider coverage in catching omissions, as the concept of “conduct” is wider than the concept of a “representation” or “trade description”.\(^{157}\) Section 52 does not impose a general duty of disclosure of material information, but failure to disclose certain information can be misleading where the circumstances give rise to the reasonable expectation that if some relevant fact exists it would be disclosed.\(^{158}\) Where the trader fails to disclose information to correct the misleading impression arising from his actions then the conduct can be misleading even though no representation is made.

For example, it could be argued that where a beauty salon promotes a facial package comprised of 100 sessions for an upfront payment, with the package expiring in 12 months, the actions in promoting this package can lead a consumer to believe that he or she would not have major difficulties in making appointments so as to use up the facial sessions in the 12 month period. If the beauty salon has “blackout” periods, or the salon already has a high number of customers committed to such packages so as to make appointments difficult, the

---


\(^{154}\) Except in relation to the telecommunications sector, where the Telecommunications Ordinance, Cap. 106, §7M. (H.K.), adopts the TPA type of prohibition of misleading or deceptive conduct in the telecommunications industry.

\(^{155}\) Cf. R v. Kylsant, [1932] 1 KB 442 (stating that a written statement can be regarded as false not only because of what it states, but also because of what it conceals, omits or implies).

\(^{156}\) See SCOTT & BLACK, *supra* note 38, at 299.


\(^{158}\) Demugouge Pty., Ltd. v. Ramensky, (1992) 39 FCR 31 (judge Gummow, J. approving of the statement that “unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist”); Software Integrators Pty., Ltd. v. Roadrunner Couriers Pty., Ltd., (1997) ATPR (Digest) 46-177 (stating that “[c]ontemporary authority approaches the question from the perspective of whether the circumstances are such that they give rise to a reasonable expectation that if a relevant fact exists, it will be disclosed”).
failure to disclose of these difficulties could render the promotional conduct as being misleading.

Under the UCP Directive, there is a specific prohibition on misleading omissions. A commercial practice is regarded as “misleading” if it omits material information that the consumer needs to make an informed transactional decision and thereby causes the consumer to make a transactional decision that he would not have otherwise made.

2. Where No Intention for Consumer to Rely on the Conduct

In Australia, intention is not required for a contravention of TPA Section 52 and under the UK provisions implementing the UCP Directive, intention is also not a necessary element for contravention of the prohibitions on misleading acts or omissions. Although intention is not required for a contravention of the TDQ under existing Hong Kong law, in order to establish misrepresentation under the common law, there may be a need to establish an intention for the representee to rely on the representation. Usually this element of intention will not be difficult to establish under the common law, however as noted earlier, it can give rise to problems in particular circumstances. Take, for example, the situation presented earlier in this paper of a real estate developer making available brochures to real estate agents: if the brochure contains false statements and the agent has passed on the brochure to a purchaser on the secondary market, it may be that the developer can be liable

159 UCP Directive, Art. 5(4) and 7.
160 UCP Directive, Art. 2 (defining a “commercial practice” as “any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from a consumer, whether occurring before, during or after a commercial transaction in relation to a product”). See also id. (defining “consumer”, “trader” and “product”).
161 Id. (defining a “transactional decision” as “any decision taken by a consumer concerning whether to act or to refrain from acting concerning — (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or (b) whether, how and on what terms to exercise a contractual right in relation to a product”). See also GERAIN HOWELLS, HANS-W. MICKLITZ & THOMAS WILHELMSSON, EUROPEAN FAIR TRADING LAW: THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE, 123, 136-138, Ashgate Pub., (2006).
162 Howells et al., supra note 162, at 136-138.
164 See discussion supra Part IIIA.
165 See discussion supra Part IIIB.
166 See discussion supra Part IIIB.
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

for losses suffered by the purchaser under TPA section 52. Under the UCP Directive, the absence of the element of intention to induce would also not be a bar to a finding that the statements in the brochure amount to a misleading act.

3. Post-Contractual Conduct

In both Australia and the European Community, the TPA Section 52 and the UCP Directive, respectively, cover post-contractual conduct that is misleading. On the other hand, the general law of misrepresentations only deals with pre-contractual representations, while there is some uncertainty as to whether the TDO covers post-contractual trade descriptions that are not made in relation to the supply of a product.

4. Puffery

Puffery is not prohibited by TPA Section 52 as hyperbolic claims or statements that consumers would not take seriously are not regarded as misleading conduct. However, the scope for a defense of puffery under a provision such as TPA Section 52 might be narrower than under the common law principles of misrepresentation. Thus, for example, a claim by a real estate agent that a flat is a “very good flat” could well be regarded as being misleading under TPA Section 52 if, in fact, the flat contains serious hidden

---

167 See also Harland, supra note 53, at 131.
168 Query whether in this particular example, the definition of “commercial practice” in UCP Directive Art. 2 might mean that the statements in the brochure would not give rise to a contravention where the brochure has been passed on to secondary purchasers by the agent. The developer is not involved with the promotion or supply of the property any more in the case of a secondary sale, and it might be argued that the developer is thus not “directly connected” with the sale to consumers as is required by Art 2. On the other hand, the reference to “directly connected” might be thought to be intended to distinguish between business to consumer practices from business to business practices, and thus it could be argued that it should not be read in a way that excludes application of the UCP Directive to a situation such as the present. On this latter approach, the developer can be regarded as being directly connected to the sale to the consumer in circumstances where the developer has made available the brochures to the agents without any restriction on the distribution of the brochures to secondary purchasers.
169 See TPA §52.
170 See UCP Directive, Art. 3(1).
171 See discussion supra Part III, The Trade Descriptions (Amendment) Bill seeks to expand the definition of “trade description” so as to catch misstatements in connection with after-sale repair or maintenance services, however the proposed amendments do not cover post-contractual representations generally.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

defects.\textsuperscript{173} The UCP Directive also expressly permits the "common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally."\textsuperscript{174} However, the same consumer protection concerns underlying the Australian legislation in leading to a stricter approach in assessing whether statements are mere puffs might also be said to underlie the EC provisions.

5. Use of Exclusion Clauses and Disclaimers

The possibility of relying on exclusion clauses or disclaimers would be more limited under a statutory prohibition such as TPA Section 52 compared with the existing law in Hong Kong. For example, take the facts in Cheng Kowk-Fai v. Mok Yiu-Wah Peter, discussed in Part IIB. If this case was decided under TPA Section 52, it is likely that the conduct would be misleading or deceptive, because the mere fact that the exclusion clause in the contract might be regarded as being reasonable would not prevent the false statements as to the size of the flat from being characterized as misleading and from preventing a finding that the statements did, in fact, mislead the purchaser into contracting. Under the EC Directive, it is also unlikely that the courts will allow contracting out of statutory prohibitions, particularly where the prohibitions are implemented as criminal provisions, as in the UK.\textsuperscript{175}

6. Conduct of Third Parties

In Hong Kong, the TDO can catch false descriptions made by manufacturers of goods, though the public only deals with the retailers. However, there is no general prohibition on misleading conduct by third parties who are not party to the contract with the consumer. The difficulties in this regard arising from the limitations of the common law principles\textsuperscript{176} of misrepresentation and privity of contract do not arise under TPA Section 52,\textsuperscript{177} nor under the UCP Directive\textsuperscript{178} Thus, for example, under the Australian and EC regulation, false or misleading information contained in promotional literature of a franchisor about services provided by franchisees which is acted upon by a

\textsuperscript{174} UCP Directive, Art 5(3).
\textsuperscript{176} See discussion supra Part II(B)(1) (relating to the common law position).
\textsuperscript{177} Harland, supra note 38, at 130-131.
\textsuperscript{178} See HOWELLS ET AL., supra note 162, at 69-70 (so long as the commercial practice is a "business to consumer" practice rather than a "business to business" practice).
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

customer of a franchisee might well be impugned without any need to deal with
the difficulties facing the customer in pursuing a common law remedy against
the franchisor.

7. Unfair conduct

The Hong Kong provisions under the Unconscionable Contracts
Ordinance are narrower than the counterpart provisions in TPA Section 51AB
in Australia in that the Hong Kong provisions: (1) do not cover unconscionable
conduct per se;¹⁷⁹ and (2) do not extend to post-contractual conduct. Thus for
instance, undue harassment or coercion of a consumer into making a purchase
would not be caught by the legislation unless the resultant purchase was made
under terms which are unconscionable. It was also noted earlier that a general
limitation of the Hong Kong and the Australian TPA provisions is that they are
based on the concept of unconscionability, which is a narrower concept than
unfair or unjust conduct.

By contrast, the UCP Directive prohibits unfair commercial practices
generally. A commercial practice is unfair if it is contrary to the requirements
of professional diligence, and it materially distorts the economic behaviour of
the average consumer or of the average member of the group when a commercial
practice is directed to a particular group of consumers.¹⁸⁰ Professional diligence
means "the standard of special skill and care which a trader may reasonably be
expected to exercise towards consumers, commensurate with honest market
practice and/or the general principle of good faith in the trader's field of
activity."¹⁸¹ Unfair commercial practices include "aggressive practices,"¹⁸² as
defined in Arts 8 and 9: see Art 5(4)(b). A commercial practice is regarded as
aggressive if, in its factual context, taking into account of all its features and
circumstances, by harassment, coercion, including the use of physical force, or
undue influence, it significantly impairs or is likely to impair the average
consumer's freedom of choice or conduct and thereby causes, or is likely to
cause, him to take a transactional decision that he would not have taken
otherwise¹⁸³ Article 9 then sets out factors which are to be taken into account
when assessing whether a commercial practice uses harassment or coercion,
including, the timing, location, nature or persistence of the conduct; the use of
threatening or abusive language or behavior; and the exploitation of any specific

¹⁷⁹ See supra Part IIC (discussing the fact that the Hong Kong provisions only proscribe such
conduct indirectly where the conduct has led to the consumer contracting under unconscionable
terms).
¹⁸⁰ UCP Directive, Art. 5(2).
¹⁸¹ Id. at Art. 2(b).
¹⁸² Id. at Art. 5(4)(b).
¹⁸³ Id. at Art 8.
misfortune or circumstance of the consumer.\textsuperscript{184}

The precise scope\textsuperscript{185} of these provisions and the concept of unfairness will need to be worked out by the courts, however it would seem that the concepts in the UCP Directive would be wider than the concept of unconscionability in Hong Kong and Australia. In relation to the situation in the case of \textit{Caesar Beauty Centre Ltd.}, it was noted in Part IIC of this paper, that the court did not regard the contractual provisions requiring an upfront payment and the committing to 267 facial treatments to be unconscionable.\textsuperscript{186} It is likely that under the provisions of the UCP Directive, a court would be more willing to impugn the trader's conduct in circumstances similar to the above case where the consumer was, as the court had accepted, in a position of weakness because of her vulnerability to persuasion and because of her financial circumstances. Psychological pressure that exploits "a conflict between an individual's short term and long term preferences"\textsuperscript{187} might well be regarded as involving coercion that impairs the consumer's choice so as to amount to an aggressive commercial practice, or alternatively might be contrary to the standards of honest market practice or good faith so as to amount to an unfair commercial practice within the general prohibition in Art 5(2).\textsuperscript{188}

\textbf{B. Specific Prohibitions}

Consumer protection statutes often use a general prohibition on misleading or unfair conduct supplemented by specifically defined types of proscribed conduct.\textsuperscript{189} This is the approach under the TPA\textsuperscript{190} and under the UCP Directive.\textsuperscript{191} Some of these specific prohibitions are discussed below by way of comparison with the position in Hong Kong.

Many of the prohibitions deal with particular categories of misleading conduct. Various false representations specifically prohibited can give rise to a remedy for consumers under the law of misrepresentation in Hong Kong\textsuperscript{192} and might also come within the scope of the Trade Descriptions Ordinance.\textsuperscript{193}

\begin{flushright}
\textsuperscript{184} \textit{Id.} at Art. 9.
\textsuperscript{185} See generally \textsc{Howells et al.}, supra note 162, Chpts. 4, 6.
\textsuperscript{186} \textit{Caesar Beauty Centre}, 3 H.K.L.R.D. at 422.
\textsuperscript{187} See \textsc{Iain Ramsay}, \textsc{Consumer Law and Policy: Text and Materials on Regulating Consumer Markets} 325 (Hart Publications, 2\textsuperscript{nd} ed., 2007).
\textsuperscript{188} \textit{Id.}, at 321-326; Office of Fair Trading, \textsc{Draft Guidance on the UK Implementation of the Unfair Commercial Practices Directive: Consultation Document} 45-52 (2007) (Eng.).
\textsuperscript{189} David Harland, \textsc{The Control of Advertising - A Comparative Overview}, 1 \textsc{Competition & Consumer L.J.} 95, 99 (1993).
\textsuperscript{190} See generally \textsc{Trade Practices Act}, Pt. V & Pt. VC Div 2.
\textsuperscript{191} UCP Directive, Art. 5 and Annex I.
\textsuperscript{192} For example false representation as to the standard of services covered.
\textsuperscript{193} For example, false representations that goods are of a particular quality.
\end{flushright}
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

However, some of the matters covered under the TPA or UCP Directive might not necessarily be prohibited under the law in Hong Kong. For example, bait advertising or bait and switch tactics are specifically prohibited under both the TPA\textsuperscript{194} and the UCP Directive,\textsuperscript{195} but are not regulated generally under Hong Kong law. Where, for example, a consumer has been enticed into the shop by bait advertising, the consumer might acquire other products promoted to him or the consumer might simply leave without purchasing any items. In either situation, there would not have been any misrepresentation inducing a transaction.

Additionally, false representations concerning the exclusion of rights or remedies of the consumer are specifically prohibited in Australia.\textsuperscript{196} However in Hong Kong, use of a "no refund" sign in the premises of the store would not, in general, be prohibited. In this case, there is no remedy in the law of misrepresentation because the sign is not a representation that induces the consumer to contract. Such a sign may, however, mislead consumers into thinking that they would not have any remedies even if the product turns out to be defective, although the seller may, in fact, be subject to liability for breaches of certain implied terms under the Sale of Goods Ordinance.\textsuperscript{197}

As for other forms of unfair marketing practices, again some of the specific prohibitions in Australia and the EC might be addressed under the existing law in Hong Kong. For instance, the promotion of pyramid selling schemes in Hong Kong is prohibited.\textsuperscript{198} Hong Kong also has regulations to cover the unsolicited commercial messages made to mobile phones, to phones via pre-recorded voice messages, or via fax or email.\textsuperscript{199} However other specific categories of conduct may not be covered under Hong Kong law. Take a situation where a trader randomly telephones a person and indicates to the person that he has won some prize but will need to go to the trader’s premises.

\textsuperscript{194} Id. at Part VC §§ 56 and 75AZJ.
\textsuperscript{195} UCP Directive, Annex I, 5 (dealing with bait advertising) and 6 (dealing with bait and switch).
\textsuperscript{196} TPA Part V, Div. 1 § 53(g), and Part VC, Div. 2, § 75AZC(1)(k) (both prohibiting the making of "a false or misleading representation about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy").
\textsuperscript{197} See Control of Exemption Clauses Ordinance, Cap. 71, § 11. (H.K.) (liability of a seller under various implied terms under the Sale of Goods Ordinance cannot be excluded where the seller deals with a consumer).
\textsuperscript{198} Pyramid Selling Prohibition Ordinance, Cap. 355, (H.K.); see also TPA §§ 65AAA-65AAE (prohibition on pyramid selling schemes); UCP Directive, Annex I, cl. 14 (prohibition on pyramid selling schemes).
\textsuperscript{199} See Unsolicited Electronic Messages Ordinance, Cap. 593, (H.K.) (stating that consumers must be given an opportunity to opt out of receiving the messages, and there are prohibitions on sending messages to persons who have requested not to receive the messages); see also UCP Directive, Annex I, cl. 26; and Spam Act of 2003 (Austl.) available at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/E9920A4E670DF0C8CA25702600124DC5.
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

for collection. It may be that no prize in fact would be given or the claiming of the prize might be conditional on the consumer paying money or incurring some cost. While the consumer is at the premises, the trader may engage in coercive tactics in selling some product or service to the consumer and through psychological pressure, preventing the consumer from leaving the premises until a contract is formed. If the individual is particularly vulnerable, then the individual may well succumb to the sales conduct and agree to some purchase just so that he can leave the premises. There might not be any misrepresentation actually made to the consumer inducing the consumer to contract, and there might not be any terms in the contract that are clearly unfair to the consumer. Thus, there might not be any remedy for the consumer under the law in Hong Kong.\(^{200}\) However, such conduct is specifically prohibited under the UCP Directive.\(^{201}\) In Australia, the conduct might come within the provisions of the TPA prohibiting the use of physical force or undue harassment or coercion in the supply of goods or services to a consumer\(^{202}\) and prohibiting the offering of prizes without the intention of supplying them.\(^{203}\)

C. Enforcement and Remedies

The existing regulatory scheme in Hong Kong involves a combination of civil remedies for consumers under the common law (as supplemented in some areas by statutory remedies), criminal sanctions, self-regulation by the industry, and administrative enforcement in particular industries. Limitations in the existing regulations arise not only in relation to gaps in coverage of the existing laws, but also in relation to enforcement mechanisms and the available remedies.

For example, the main piece of legislation of general application in this area, the TDO, relies on criminal enforcement. However, some have commented that the use of the criminal law as an instrument of consumer protection is not always satisfactory. This may be because enforcement agencies

\(^{200}\) See Int'l Resort Dev. Ltd., 2 H.K.L.R.D. at 113 (holding that misrepresentations were made and the contract placed the consumer at a special disadvantage. The consumer succeeded in obtaining remedies on the basis of misrepresentation and under the Unconsciousable Contracts Ordinance (HK), but it would seem that no remedy would have been forthcoming in the absence of the misrepresentations inducing the contract and in the absence of the harsh terms in the contract).

\(^{201}\) UCP Directive, Annex I, cl. 31 ("creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, whin in fact either there is no prize or other equivalent benefit, or taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost") and UCP Directive Annex I, cl. 24 ("creating the impression that the consumer cannot leave the premises until a contract is formed").

\(^{202}\) TPA §§ 60 and 75 AZN.

\(^{203}\) TPA §§ 54 and 75AZG.
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

might be reluctant to bring action except in the most clear cut cases as a result of uncertainties in the application of general standards in consumer protection legislation, and also because of the higher standard of proof in criminal cases.\textsuperscript{204} Such factors may well be significant in Hong Kong where, as noted earlier, prosecutions under the TDO have generally been made in relation to counterfeit cases and not false advertising or false representations made to consumers generally.\textsuperscript{205} Another possible difficulty with relying on the criminal law is that there might be a tendency for courts to regard consumer offences as lesser crimes with the result that the fines imposed might not be sufficiently heavy and might simply be treated by traders as a cost of business.\textsuperscript{206} Despite its shortcomings, a common view is that criminal provisions are still important for consumer protection, at least for more serious conduct, to emphasize the egregious nature of the conduct and to deter traders from engaging in said conduct.\textsuperscript{207} Under the Australian TPA, the general prohibition on misleading conduct under Section 52 does not give rise to criminal liability, however there is criminal liability for the specifically prohibited conduct.\textsuperscript{208} The UCP Directive leaves enforcement mechanisms to be determined by the member states and the approach in the UK is to create criminal offences for contraventions of both the general prohibition on unfair commercial practices as well as the particular categories of proscribed conduct.\textsuperscript{209}

It is recognized both in the UK and Australia, however, that the limitations in relying solely on criminal enforcement do mean that other mechanisms of enforcement are required, including administrative enforcement by a public agency. The ability of a public enforcement authority to seek, for example, injunctions to restrain contraventions is seen as attractive in protecting the public from the continuation of the wrongful conduct while at the same time meeting the objection that businesses should not be punished for conduct not previously labelled clearly as illegal.\textsuperscript{210} In Australia, the TPA allows the government regulator, the Australian Competition and Consumer Commission (hereinafter "ACCC"), standing to seek injunctions against breaches of any of the provisions prohibiting unconscionable or misleading conduct in Pt. IVA and

\textsuperscript{204} SCOTT & BLACK, supra note 38, at 289-290; see also Harland, supra note 190, at 113. Note however that often consumer protection offences are created as strict liability offences without the need to prove mens rea.

\textsuperscript{205} See discussion supra Part IIIC.

\textsuperscript{206} SCOTT & BLACK, supra note 38, at 335.

\textsuperscript{207} See, e.g., Harland, supra note 190, at 113; BORRIE, supra note 142, at 45-50; CARTWRIGHT, supra note 142, at 63-125.

\textsuperscript{208} See TPA, Pt. VC, Div 2.


\textsuperscript{210} Harland, supra note 190, at 113(44).
THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

Pt. V of the Act.\textsuperscript{211} The ACCC may also seek a range of other orders, including orders for corrective advertising or for remedies on behalf of consumers who have suffered loss.\textsuperscript{212} In the UK, the Regulations implementing the UCP Directive can be enforced not only via the criminal provisions but also via civil injunctive action taken by the Office of Fair Trading or by local Trading Standards Officers under Pt. 8 of the Enterprise Act 2002.\textsuperscript{213}

The limitations of the existing civil remedies for consumers have been discussed earlier in Part II. Under the TPA in Australia, persons who have suffered loss as a result of the proscribed conduct may seek compensation or other relief.\textsuperscript{214} The wide range of remedies available to consumers under the Act is recognition of the limitations of the general law in dealing with modern marketing and promotional practices.\textsuperscript{215} The UCP Directive does not deal with private rights of consumers to seek legal address,\textsuperscript{216} and the UK provisions implementing the Directive do not purport to create such rights in consumers. There is much to be said for the view that consumers should be given statutory legal remedies so that they can be compensated for losses arising from the proscribed conduct.\textsuperscript{217} However, individual rights of action might not be effective in practice if transaction costs for consumers in seeking redress are high,\textsuperscript{218} and thus issues in relation to access to justice must also be addressed.\textsuperscript{219}

The advantages and disadvantages of self-regulation have been discussed in Part IVC.\textsuperscript{220} In certain industry sectors in Australia, there are codes which incorporate redress mechanisms for consumers.\textsuperscript{221} The UCP Directive also allows for the possibility of the use of codes of conduct in controlling unfair commercial practices, however there must still be a legal backstop for enforcement.\textsuperscript{222} In the UK, there will be a continued role for industry self-regulation,\textsuperscript{223} though that is to operate in tandem with the criminal and administrative enforcement mechanisms under the Consumer Protection From Unfair Trading Regulations 2008. While industry codes are not necessarily

\textsuperscript{211} TPA, Part VI § 80.
\textsuperscript{212} \textit{Id.} at §§ 86C, 86D, 87.
\textsuperscript{214} TPA, §§82 and 87.
\textsuperscript{215} Harland, \textit{supra} note 190, at 115.
\textsuperscript{216} HOWELLS ET AL., \textit{supra} note 162, at 220.
\textsuperscript{217} SCOTT & BLACK, \textit{supra} note 38, at 336.
\textsuperscript{218} \textit{Id.}, at 105.
\textsuperscript{219} Harland, \textit{supra} note 190, at 115.
\textsuperscript{220} See discussion \textit{supra} Part V.
\textsuperscript{221} See Vijaya Nagaratnam, \textit{Reconceiving Regulation: Finding a Place for the Consumer, 15 COMPETITION & CONSUMER L.J. 93 (2007).}
\textsuperscript{222} See UCP Directive, Arts. 10 & 11; HOWELLS ET AL., \textit{supra} note 162, at 211-212.
\textsuperscript{223} See Office of Fair Trading, \textit{supra} note 189.
REGULATION OF UNFAIR MARKETING PRACTICES IN HONG KONG

effective on their own, codes can be important not only in setting best practice guidelines and standards which might be higher than those under legislative provisions, but also in providing cheaper and quicker dispute resolution processes for aggrieved consumers that could be utilized before seeking redress through the courts.

D. General Regulation or Sector by Sector Regulation

The discussion in the previous section regarding the Australian and EC regulation illustrates the common use in many jurisdictions of general prohibitions on misleading or unfair marketing practices. In Hong Kong, while there is no such general prohibition presently, there are prohibitions on misleading conduct across many industries through either particular legislative provisions or through industry codes. It might be argued that there is no need to enact broad prohibitions under a general consumer protection statute but rather, any limitations in the existing law can be dealt with by plugging the gaps via specific legislative provisions or greater use of industry codes with statutory backing on a sector by sector approach.

There are two aspects to the above objection to a general consumer protection statute. The first is in relation to the use of a broad prohibition of misleading or unfair conduct. This is often criticized on the basis that such a provision creates uncertainty as to the scope of the legislative prohibition. In Australia, the Swanson Committee, which reviewed the operation of the TPA in the initial years after its enactment, took the view that the criticisms of uncertainty arising from the general prohibition in Section 52 were overstated and had recommended the maintaining of the general provision.\(^{224}\) The benefit of a general provision is that it provides flexibility in dealing with new practices that emerge, thereby avoiding the possibility of traders devising strategies to get around specific prohibitions.\(^{225}\) The need for a general prohibition is now largely recognized internationally,\(^{226}\) and even the UK, which originally objected to a general clause in the UCP Directive, has now accepted this approach. Any difficulties arising from uncertainty in the operation of a general provision can be ameliorated to an extent through guidance via codes of conduct or guidance notes published by the regulator, and through education of

---


traders.

The second aspect to the above objection to a general consumer protection statute is the view that misleading or unfair conduct can be dealt with through a sector by sector approach. Examples were given earlier in this paper of prohibitions on misleading advertising or marketing practices set out in codes in particular industries. It might be argued that this type of regulation can be extended to other industry sectors without the need for some overarching piece of legislation. In this author's view however, there is merit in simplifying and systemizing the law and regulatory scheme. The Department of Trade and Industry\(^{227}\) in the UK has rightly pointed out that an important benefit of the new regulations implementing the UCP Directive is that it provides for a simplified and modern legal framework to replace the existing regime, which is complicated and fragmented.\(^{228}\) If the same provision prohibiting misleading advertising is to be contained in different codes applying to different industries, then why not simply have the one provision in the one statute applying to all industry sectors?\(^{229}\) Consumers seeking legal redress would find enough obstacles in navigating through the court system and to have redress mechanisms set out in a range of different codes or Ordinances would unjustifiably create complexity for, and add to the difficulties of, consumers who wish to seek a remedy for their loss.

**PART VI: CONCLUSION**

It has been argued in this paper that problems for consumers resulting from misleading sales tactics and other forms of unfair marketing practices of businesses in Hong Kong continue to exist. While there are various existing civil remedies for consumers, criminal sanctions prohibiting certain types of conduct, and industry codes of conduct proscribing particular practices, it is submitted that the existing regulatory regime does not adequately deal with all of the problems presently faced by consumers in Hong Kong. The scope of protection in Hong Kong is limited compared with the regimes that exist, for example, in Australia and in the UK and European Community. In its report in 2001,\(^{230}\) the Hong Kong Consumer Council had already suggested that amendments to the law of unfair marketing practices in Hong Kong would be desirable to better protect consumers, however no action was taken by the government at the time to implement the recommendations. It does appear that

\(^{227}\) Now the Department for Business Enterprises and Regulatory Reform.

\(^{228}\) See DEP'T OF TRADE & INDUST., supra note 164.

\(^{229}\) Of course, codes can still be useful in setting out specifically the type of conduct arising in the particular industry that might be regarded as misleading conduct in breach of a general statutory provision.

\(^{230}\) CONSUMER COUNCIL, supra note 9.
there is now a greater willingness on the part of the government to examine possible law reforms, with the Financial Secretary in 2007 requesting the Consumer Council to re-examine this area, and with the Council having now proposed recommendations to amend the laws in Hong Kong.231 This paper has argued that reform is needed in light of the continuing problems for consumers in Hong Kong. It is submitted that there is merit in devising a consumer protection statute of general application in prohibiting misleading and other forms of unfair marketing practices, with enforcement through a combination of criminal, administrative, and self-regulatory measures, coupled with the availability of civil remedies for consumers.

231 CONSUMER COUNCIL, supra note 14.