

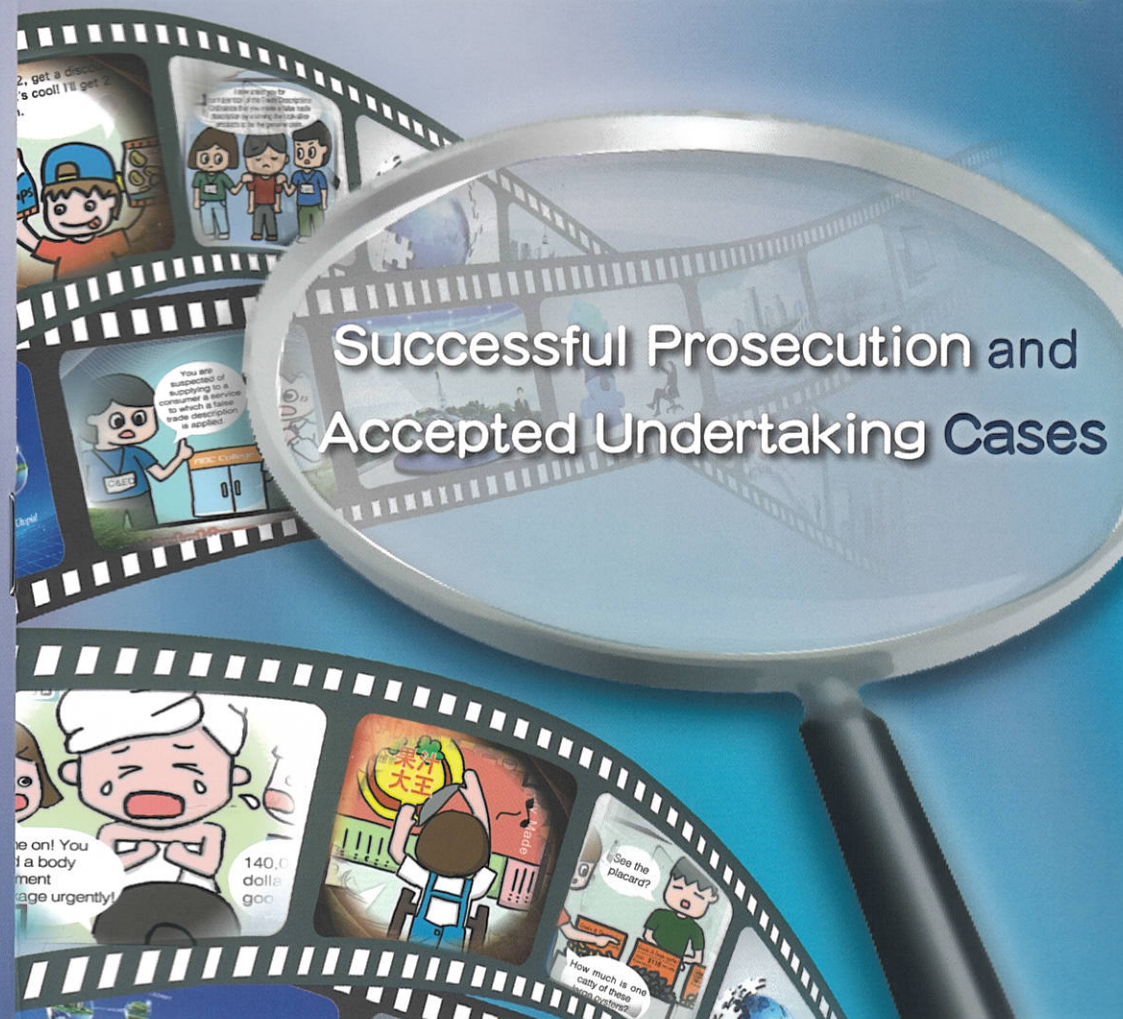


This case booklet can be found on the
website of Customs and Excise Department:

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



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



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

INTRODUCTION

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

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

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

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

Upon operation of the amended TDO in July 2013, C&ED has secured a number of successful prosecutions and undertakings, some of which are set out in this booklet for reference by traders and consumers.

Relevant provisions in the Trade Descriptions Ordinance

– Section 2 –

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

“Trade description” in relation to **a service**, means an indication, direct or indirect, and by whatever means given, with respect to the service or any part of the service including an indication of, among other matters, the person by whom the service is supplied or to be supplied.

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

– Section 7 –

It is an offence for any person, in the course of his trade or business, to apply a false trade description to any goods; or supply or offer to supply any goods to which a false trade description is applied. It is also an offence for any person to have in his possession for sale any goods to which a false trade description is applied.

– Section 7A –

It is an offence for a trader to apply a false trade description to a service supplied or offered to be supplied to a consumer; or supply or offer to supply to a consumer a service to which a false trade description is applied.

– Section 13D –

The material characteristics of an “average consumer” include that the consumer is reasonably well informed, reasonably observant and circumspect.

– Section 13E –

It is an offence for a trader to engage in relation to a consumer in a commercial practice that is a misleading omission. A commercial practice is a misleading omission if, in its factual context, it omits material information; hides material information; provides material information in a manner that is unclear, unintelligible, ambiguous or untimely; or fails to identify its commercial intent, unless this is already apparent from the context, and as a result it causes, or is likely to cause, the average consumer to make a transactional decision that the consumer would not have made otherwise. If a commercial practice is an invitation to purchase, the price information, among other matters, is material, if not already apparent from the context.

– Section 13F –

It is an offence for a trader to engage in relation to a consumer in a commercial practice that is aggressive. A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances, it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and it therefore causes or is likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise.

– Section 13I –

It is an offence for a trader to engage in a commercial practice that constitutes wrongly accepting payment. A trader wrongly accepts payment for a product if the trader accepts payment and at the time of that acceptance the trader intends not to supply the product or to supply a materially different product, or there are no reasonable grounds for believing that the trader will be able to supply the product within a reasonable period.

– Section 30L –

In lieu of prosecution, the enforcement agency may, with the consent of the Secretary for Justice, accept an undertaking from a trader whom the enforcement agency believes has engaged, is engaging or is likely to engage, in conduct that constitutes an offence of unfair trade practice.

(A) SUCCESSFUL PROSECUTIONS

False Trade Descriptions

Case A1 (Court case number: KTS63/2014)

Case particulars

A supermarket displayed for sale a brand of potato chips with price tags showing "Standard Price \$5.5, Discounted Price \$11.5/2 pieces". The total amount charged for two pieces of the same product separately was \$11 and actually lower than the claimed discounted price of \$11.5. The indication "Discounted Price \$11.5 / 2 pieces" therefore misled consumers into believing that a price advantage was on offer.



The supermarket was convicted and fined \$10,000 for possessing for sale potato chips to which a false trade description was applied.

Case A2 (Court case number: KTCC6664/2013)

Case particulars

A private detective agency offered to supply service by falsely stating on its website that it had over 30 years of experience in the business, and that investigations would be planned and led by ex-police officers.



A partner of the company was convicted for offering service to which a false trade description was applied and fined \$30,000.

Case A3 (Court case number: KTCC2732/2014)

Case particulars

The salesman of a dispensary supplied three boxes of "Nanjing Tong Ren Tang On Kung Niu Huang Wan" as "Beijing Tong Ren Tang Angong Niu Huang Wan" to customers in two separate transactions, asserting fraudulently that the goods originated from the same manufacturer.



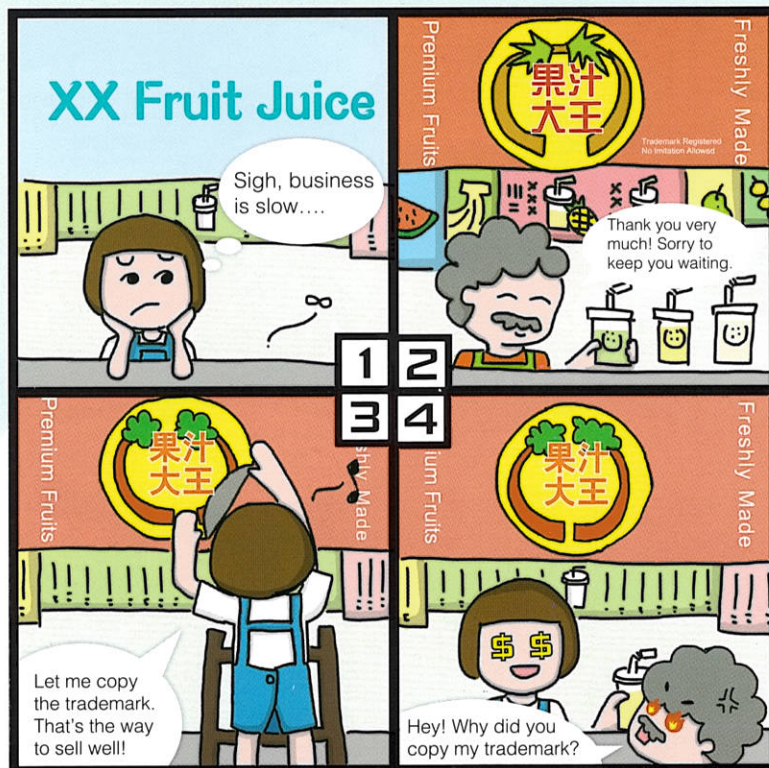
The salesman was convicted for applying false trade description to a proprietary medicine. He was fined \$5,000 and sentenced to two months' imprisonment, suspended for 24 months, with the medicine confiscated.

Misleading Omissions

Case A4 (Court case number: KCS39071/2014)

Case particulars

A take-away beverage store displayed a logo on its signboard which was highly similar in shape, colour, wording and font to a registered trade mark of another beverage supplier. Although the beverages sold at the store were served in plastic cups or bottles without such a logo, the signboard constituted a trade description of the products and misled customers into believing that the products were supplied or manufactured by the beverage supplier with the registered trade mark.

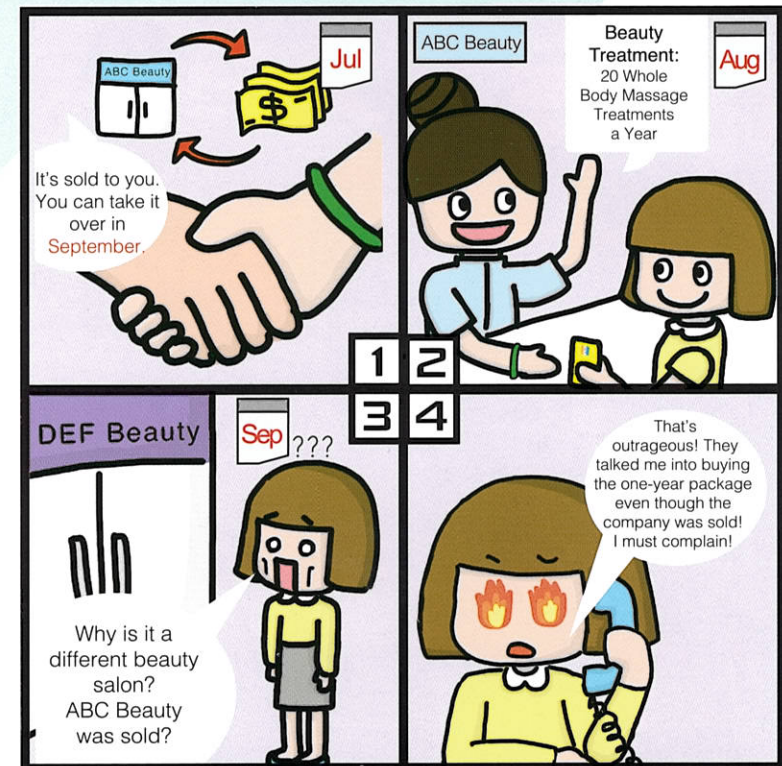


As a consumer could only rely on the signboard to identify the beverage supplier, the store operator was convicted for offering beverages to which a false trade description was applied and fined \$7,500. The beverages and signboard were confiscated.

Case A5 (Court case number: KCCC1279/2014)

Case particulars

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



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

Aggressive Commercial Practices

Case A6 (Court case number: KCS26519-26522/2014)

Case particulars

A dried seafood retailer displayed three placards peddling dried seafood products (oysters, scallops and shrimps), with two different price units (catty and 500 grams) shown against each of the products. The print of "500G" was so small that the price unit could easily be interpreted as being meant for "catty". Furthermore, test purchase revealed that the shop intentionally avoided clarifying the price units or any relationship between "catty" and "500 grams", while purporting that 476 grams of the goods it supplied were equivalent to one catty which in fact translates to about 604 grams.



The shop was convicted for engaging in commercial practice that was a misleading omission by providing material information in a manner that was unclear, unintelligible, ambiguous or untimely, thereby likely to cause an average consumer to make a transactional decision that he/she would not have made otherwise. It was fined \$20,000, with the concerned dried seafood products confiscated.

Case A7 (Court case number: KCCC3903/2014)

Case particulars

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



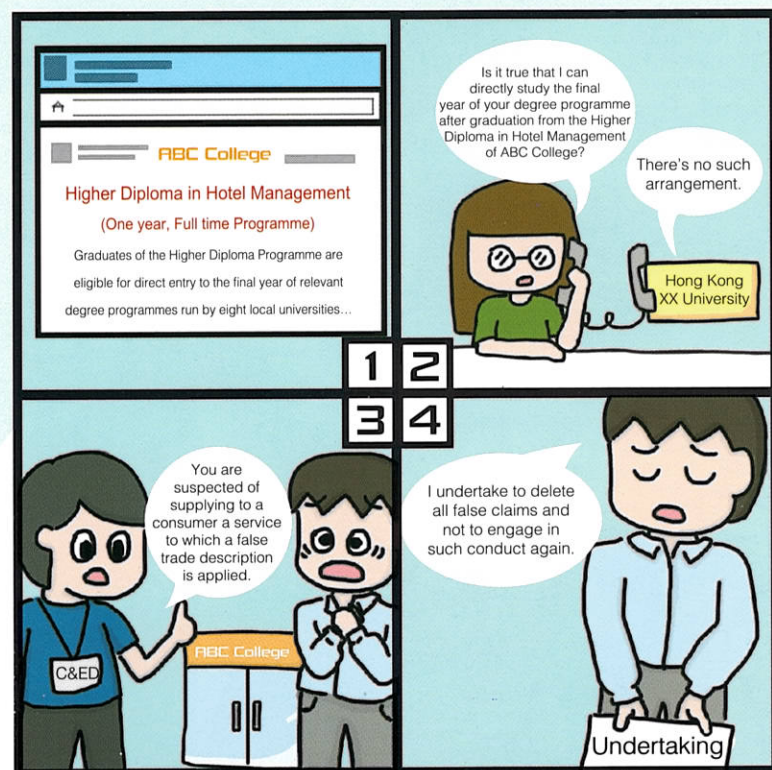
All three staff members of the beauty parlour were convicted for engaging in a commercial practice that was aggressive, with one receiving a community service order of 200 hours and the other two sentenced to three months' imprisonment each.

False Trade Descriptions

Case B1

Conduct believed to constitute an offence

An education institution falsely claimed that the graduates of a diploma course that it offered was eligible for direct entry to the final year of relevant degree programmes run by eight local universities. The institution was believed to have committed the offence of applying a false trade description to its product in the course of trade or business.



Undertakings of trader

The education institution undertook not to engage in conduct of that kind, or any conduct of a substantially similar kind, in the course of any trade or business for two years, and to ensure that its staff are provided with adequate training to better understand and comply with the fair trading provisions under the TDO.

Case B2

Conduct believed to constitute an offence

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



Undertakings of trader

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

Case B3

Conduct believed to constitute an offence

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



Undertakings of trader

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

Case B4

Conduct believed to constitute an offence

A trader described on its website and social media webpage that the ham it sold was "Hand Sliced Iberico Ham". The trader also posted a photograph of a famous Spanish ham-slicing master and the specific awards received by him, and stated that the trader's "Hand Sliced Iberico Ham" was cut by award-winning master who had won the awards. This depiction misled consumers into believing that the said master had processed or sliced the ham on offer. The trader was believed to have committed the offence of applying a false trade description to its products in the course of trade or business.



Undertakings of trader

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

Case B5

Conduct believed to constitute an offence

A vendor supplied lip balm weighing 7g per unit through a group-buying website with an advertisement depicting a false net weight of 10.75g and a false price discount of 94% off. Both the vendor and group-buying website were believed to have committed the offence of supplying goods to which a false trade description was applied.



Undertakings of trader

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

Wrongly Accepting Payment

Case B6

Conduct believed to constitute an offence

An online shop selling baby products accepted payments for powdered formula, but was unable to fulfil the orders at the agreed time or provide full refund to consumers. The shop was believed to have committed the offence of wrongly accepting payment.



Undertakings of trader

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

(C) NON-ACTIONABLE CASES

Case C1 - Service not being supplied directly to consumer

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

Case C2 - Excluded product

A member of the public alleged that the exchange rate displayed by a bank at its money exchange device was inaccurate. Bank services were subject to regulation by other relevant statutory authorities and excluded from the ambit of the TDO by virtue of Schedule 4 to the TDO.

Case C3- Transactions between traders

A travel agent alleged that a competitor failed to fulfil the promise of providing the service of hotel rooms requested by its customers. The transaction was not made between a trader and consumers, thus falling outside the ambit of the TDO.

Case C4 - Dealt with under other legislation

A consumer accused a beauty parlour of applying her electronic signature onto several invoices without her knowledge or consent. Since forgery of documents might be involved, this case was referred to the Police for investigation.

Important notice

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

Customs and Excise Department

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