

**EXPLANATORY NOTE ON
PROPOSED CONSUMER PROTECTION (FAIR TRADING)
(OPT-OUT PRACTICES) REGULATIONS**

1 General

1.1 These Regulations seek to implement the proposals of the CPFTA¹ Review Taskforce relating to unsolicited goods and services and goods and services provided on a free trial basis. These proposals are intended to regulate the practice whereby some suppliers supply consumers with goods or services and charge them for it without their clear consent. Although such practices can sometimes provide a convenience for both consumers and suppliers, they are also open to abuse. This practice, which places a burden on the consumers to opt-out from the arrangement, may result in consumers being charged for goods and services without their knowledge or consent, and consumers may find it difficult to obtain a refund in such circumstances.

1.2 In the case of the supply of **unsolicited goods and services** (or inertia selling), a supplier typically sends goods or provides services to the consumer that have not been requested by him and demands payment from the recipient for the goods or services.

1.3 The Regulations will allow the consumer²:

- (a) to treat unsolicited goods or services as an unconditional gift unless the consumer has expressly acknowledged to the supplier³ in writing his intention to accept and pay for the goods or services; and
- (b) to claim a refund of payment made for such unsolicited goods or services.

1.4 In the case of the supply of goods or services on a **free trial basis**, a supplier supplies goods or services free of charge for a limited period. The supplier begins to charge for the goods or services after the expiry of the free trial period if the recipient does not opt-out from the arrangement before the expiry. The supplier may or may not have obtained the recipient's consent initially to begin the free supply of goods or services.

¹ Consumer Protection (Fair Trading) Act (Cap.52A).

² The term "consumer" is defined in the CPFTA as an individual who, otherwise than exclusively in the course of business —

- (a) receives or has the right to receive goods or services from a supplier; or
- (b) has a legal obligation to pay a supplier for goods or services that have been or are to be supplied to another individual;

³ The term "supplier" is defined in the CPFTA as a person who, in the course of the person's business —

- (a) provides goods or services to consumers;
- (b) manufactures, assembles or produces goods;
- (c) promotes the use or purchase of goods or services; or
- (d) receives or is entitled to receive money or other consideration as a result of the provision of goods or services to consumers,

and includes any employee or agent of the person;

- 1.5 The Regulations will:
- (a) require the supplier to give the consumer a reminder notice within a specified period before the end of the free trial period; and
 - (b) allow the consumer to claim a refund of payments made for such goods or services if the supplier failed to give the consumer a reminder notice and the consumer did not, after the supply of goods or services commenced, expressly acknowledge to the supplier in writing his intention to accept or pay for the goods or services.

2 Unsolicited Goods and Services

2.1 The term “unsolicited goods or services” is defined to mean goods or services that are supplied in relation to a consumer transaction⁴ to a consumer who did not request them, but does not include goods or services supplied to a consumer who knew or ought to have known that they were intended for delivery to another person.⁵ In the case of a dispute, the burden of proof that goods or services were not unsolicited is on the supplier.⁶

2.2 Regulation 3 provides that a consumer may treat the goods as if they were an unconditional gift from the supplier unless and until he expressly acknowledges to the supplier his intention to accept and pay for the unsolicited goods or services. This provision helps to clarify the position of the consumer who receives unsolicited goods.⁷

2.3 The position under the common law is not entirely clear. It would seem that, if a person receives goods without any request or arrangement and does not hold himself out as willing to receive the goods, that person has no liability to the sender for their safe custody or protection,⁸ but he must not use the goods or otherwise convert them to his own use. This may prove rather inconvenient for the consumer as this will usually mean that he has to keep the goods without using or disposing of them, unless he returns it to the supplier or the supplier collects it.⁹ The provision changes the legal position so that the consumer is free to deal with or to dispose of the goods.

⁴ The term “consumer transaction” is defined in the CPFTA as:

- (a) the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift, contest or other arrangement; or
- (b) an agreement between a supplier and a consumer, as a result of a purchase, lease, gift, contest or other arrangement, in which the supplier is to supply goods or services to the consumer or to another consumer specified in the agreement,

but does not include any transaction specified in the First Schedule;

⁵ Regulation 2(1). See further discussion on the exclusion for misdelivered goods or services in paragraph 2.6 below.

⁶ Regulation 3(3).

⁷ Based on regulation 24 of the UK Consumer Protection (Distance Selling) Regulations 2000 (SI 2334) and the British Columbia Business Practices and Consumer Protection Act (SBC 2004, Chapter 2) Part 2, Division 3, sections 11 to 14.

⁸ He would probably be liable for wilful or reckless damage.

⁹ See generally, *Bailment* (2nd Edition), Chapter 12 on “Involuntary Bailment”, N.E. Palmer.

2.4 Regulation 2(2) provides that the intention to accept and pay for goods or services is not to be inferred only from the passage of time, or from the consumer's payment for the goods or services, use of, dealing with or disposal of the goods or services, request to purchase another similar good or service or inaction. In the case of consumers, the acknowledgment must be expressed and made in writing.¹⁰ This avoids the complexity and uncertainty that may arise under contract law in respect of the consumer's position.

2.5 Under contract law, acceptance must usually be communicated. Therefore, silence or inaction on the part of the recipient of unsolicited goods does not usually amount to acceptance. Generally, the supplier cannot by ultimatum (e.g. by instructing the consumer to inform the supplier if he wishes to opt-out) impose on the offeree an obligation to state his non-acceptance. There are however possibly 3 situations in which silence may amount to acceptance:

- (a) where the recipient takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation;
- (b) where the supplier has stated or given the recipient reason to understand that assent may be manifested by silence or inaction, and the recipient remaining silent or inactive intends to accept the offer; or
- (c) where, because of previous dealings or otherwise, it is reasonable that the recipient should notify the supplier if he does not intend to accept.¹¹

Much therefore depends on the facts of each case and it would be difficult for a consumer to judge his legal position with certainty.

2.6 The exclusion of misdelivered goods or services from the definition of "unsolicited goods or services"¹² is intended to apply in the situation where, for example, goods have been ordered or bought by someone but they are misdelivered to another person. The Regulations do not intend to give the recipient the right to keep the goods as his own. Honesty would dictate that he should notify the sender of the mistake. The words in square brackets¹³ have been added in the definition of "unsolicited goods or services" to address the situation where, as often happens, unsolicited goods are sent by mail to an address but bearing the name of a person who does not reside at that address (e.g. the name of a former occupant). Those words allow the recipient to treat the goods as unsolicited goods if it was reasonable to believe that the goods would have been unsolicited goods if they were delivered to the named person. If, however, the recipient ought to have known that the goods had been ordered or bought by the other person but had been misdelivered to him, he will not be able to rely on the Regulations.

¹⁰ This requirement can be satisfied by electronic records if the information contained therein is accessible so as to be usable for subsequent reference e.g. email or SMS: Electronic Transactions Act (Cap.88), section 7.

¹¹ Section 69 of the American Restatement on Contract Law, quoted in *Cheshire, Fifoot and Furmston's Law of Contract* (14th Edition, 2001), pages 52 and 53.

¹² Regulation 2(1).

¹³ "[unless it was reasonable to believe that the goods or services, if delivered to that other person, would have been unsolicited goods or services]"

2.7 Goods or services supplied on a continuing basis¹⁴ under a contract¹⁵ between the consumer and the supplier (e.g. subscription for cable TV services) are an exception to proposed regulation 3 since the obvious intention in the case of such an arrangement is that the supplier will continue to supply the goods or services to the consumer until the arrangement is cancelled. In the case of such supply on a continuing basis, the provisions on unsolicited goods and services will apply only to a material change in the goods or services, or in the supply of the goods or services e.g. a repackaging of the cable channels provided. For commercial convenience, a change in the price of the goods or services or a renewal of the existing supply of goods or services, if the goods or services are not otherwise changed, will not be regarded as a material change.¹⁶ A material change also does not include a change that a reasonable person in the position of the consumer would not view as being material.

3 Supply on free trial basis

3.1 The terms “free trial basis” and “free trial period” are defined in the Regulations.¹⁷ The supply of goods or services on a free trial basis refers to an arrangement whereby goods or services are supplied free of charge for a specified period (the free trial period).

3.2 Goods or services supplied on a free trial basis may or may not be unsolicited goods or services. The supply is unsolicited if, for example, a mobile telecommunications provider (supplier) provides a new SMS-news service to its subscribers free of charge for a limited period without prior consent by the subscribers. After the free trial period, the supplier proceeds to charge for the service. The provisions in regulation 3 (on unsolicited goods or services) will apply in addition to the provisions in regulation 5 (on supply on a free trial basis). On the other hand, the supply would not be unsolicited if the supplier first obtained the subscriber’s consent to commence the supply of the service on a free trial basis. In that case, only the provisions on supply on a free trial basis in regulation 5 will apply.

¹⁴ The definitions in section 17 of the British Columbia Business Practices and Consumer Protection Act have not been adopted:

"continuing services contract" means a future performance contract that provides for the performance of services on a continuing basis and is designated by regulation;

"future performance contract" means a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed, but does not include

- (a) a contract for which the total price payable by the consumer, not including the total cost of credit, is less than a prescribed amount,
- (b) a contract for the supply of goods or services under a credit agreement, as defined in section 57 [definitions], if the goods or services have been supplied, or
- (c) a time share contract;

¹⁵ In order to rely on this exclusion, the supplier will have to prove that there was a contract with the consumer for the continuing supply of the goods or services.

¹⁶ Similar to British Columbia Business Practices and Consumer Protection Act (SBC 2004, Chapter 2), section 13. This does not affect the normal contract law which will apply to determine whether such a change in price or renewal of service is legally valid.

¹⁷ Regulation 2(1).

3.4 Regulation 5 requires suppliers of goods or services on a free trial basis to give consumers a reminder notice before the end of the free trial period. The reminder notice will alert consumers that the free trial period is ending so that they can take action to cancel or confirm the supply of the goods or services before the supplier starts to charge for the goods or services.

3.5 If the supplier fails to give a reminder notice, the consumer can demand a refund of his payments within 12 months after the payment was made. The right to demand a refund does not however apply if the consumer, at any time after the supply of the goods or services on a free trial basis commenced, expressly acknowledged to the supplier in writing¹⁸ his intention to accept and pay for the goods and services. It should be noted that a prior consent to begin the supply on a free trial basis would not bar a consumer from demanding a refund. It should also be noted that the right to demand a refund under regulation 5 does not apply if the supplier has given the consumer a reminder notice. If the goods or services are unsolicited, the right to demand a refund under regulation 6 may however apply even if a reminder notice has been given.

3.6 The provisions in regulation 6(2) to (7) (relating to a demand for a refund in the case of unsolicited goods or services) apply similarly to a demand under regulation 5(9).¹⁹

4 Refund of payments

4.1 A consumer who pays for unsolicited goods or services may demand a refund if he did not expressly acknowledge to the supplier in writing his intention to accept and pay for the goods or services.²⁰ The demand to the supplier must be in writing.²¹ No particular form or wording is required as long as the demand indicates, in any way, the intention of the consumer to demand a refund of a payment made for unsolicited goods or services (or, in the case a demand under regulation 5, goods or services supplied on a free trial basis).

4.2 The supplier must give the refund within 60 days after the receipt of the demand from the consumer. If the supplier fails to do so, the consumer may claim the refund as a breach of statutory duty. There is a \$20,000 cap on such claims. Such claims will be time-barred after 12 months from the time that the demand for the refund was made.

¹⁸ See footnote 10.

¹⁹ See paragraph 4 below.

²⁰ Regulation 6.

²¹ See footnote 10.

4.3 Section 20(2)(h) of the CPFTA will be amended to clarify that the proposed Regulations may make provision for such claims.²²

²² See proposed Consumer Protection (Fair Trading) (Amendment) Bill. Section 20(2)(h) of the CPFTA currently applies only “in the event of failure to comply with any provisions” of the CPFTA or the regulations made thereunder. A claim under regulation 6 arguably does not arise from circumstances of non-compliance.