

An expensive omission?

July 2017

On 25 July 2017, a travel agency in Hong Kong and its deputy operations manager were convicted of the offence of "misleading omissions" under the Trade Descriptions Ordinance ("TDO"). They were found to have omitted telling several customers of their tour package the reduction in the airline's fuel surcharge. According to Hong Kong Customs (the authority responsible for enforcing the TDO), this is the first criminal conviction of a travel agency under the TDO since it was amended in July 2013 to introduce the unfair trading practice offences.

The defendants were each fined HK\$9,000 and were ordered to compensate HK\$14,000 to all affected customers. While the amounts involved are relatively modest, this conviction highlights a number of risk areas which businesses must be aware of. We have set out our **recommendations** at the end of this article on ways to address these risks.

Background of the case

According to news reports (no written judgment is available yet), the customers involved signed up for a packaged tour operated by the travel agency. At the time of the purchase, the travel agency did not tell the customers that the fuel surcharge for their flight was reduced by the airline by about HK\$1,800 per person. Instead, the travel agency offered a HK\$800 discount to its all-inclusive package. The invoices however highlighted the fuel surcharge (at the original amount, not the reduced amount) as a separate payable item.

At the trial, the travel agency argued that since it was selling at an all-inclusive price, once the customers had agreed with that price, the fuel surcharge should not be regarded as "material information" which would impact the customers' decisions.

However, the Magistrate rejected this argument. The Magistrate found that the travel agency did not clearly explain what the all-inclusive price covered, whereas the invoices highlighted the outdated fuel surcharge as a separate payable item. Furthermore, the Magistrate found that the reduction of the fuel surcharge would lead to a reduction of the "all-inclusive package" price, and if the customers were informed of the actual reduction, they would not have had to pay for the extra amount. Hence, the Magistrate considered that this piece of information amounted to

"material information" which should have been revealed to the customers.

The deputy operations manager in charge of the sales of the packaged tour was also held personally liable on the ground that he consented or connived to the offence committed by the travel agency.

It is reported that the travel agency would appeal the decision.

"Misleading Omissions" under the TDO

By way of reference, under Section 13E of the TDO, a trader commits the offence of misleading omissions if the trader omits or hides material information (or provides such information in an unclear or untimely manner) which causes or is likely to cause the average consumer to make a transactional decision that he or she would not have made otherwise.

This offence imposes strict liability, i.e. the trader can be liable even though it did not deliberately omit the information.

In addition, directors and management personnel of a trader may be personally liable if the offence has been committed with their consent or connivance, or is attributable to their negligence.

Recommendations

The offence of misleading omissions has a wide and uncertain scope. By definition, any information not disclosed to a consumer could fall within the ambit of omitted information. Whether such omitted information is "material" or not to an "average consumer" is something that can be very difficult to interpret with certainty.

This case reminds us of a few lessons:

- Price information (including details on surcharges, discounts, rebates, etc.) is a key focus of enforcement under the TDO. It is critical to put in place measures that the whole business from top down (e.g. by adopting suitable contract terms/invoice templates; providing regular training to front-line staff) uses accurate price descriptions (written and verbal) and not omits important price information.
- Risks under the TDO are applicable to both small traders and big, well-established businesses (as in this case where the travel agency is part of a listed group in Hong Kong).
- Management personnel can be personally liable for an offence under the TDO. A top-down approach is critical.

- TDO complaints and proceedings very often make newspaper headlines. The potential reputation impact cannot be ignored.
- Based on our experience, handling TDO complaints and proceedings often involve significant costs and resources. Prevention is better than cure.

Article by **Eugene Low**, a partner, and Grace Zhu, a trainee from Hong Kong office.

Contacts



Eugene Low

Partner

[> Read the full article online](#)