

The 2016 Amendments to Singapore's Consumer Protection (Fair Trading) Act — A Missed Opportunity

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Abstract:

Singapore has recently amended its Consumer Protection (Fair Trading) Act in response to calls for tougher action against unscrupulous traders. The revisions were aimed at strengthening the government's ability to deter and punish errant traders, with a focus on deterrence. To this end, the Singapore Government introduced new investigatory powers, enhanced court powers and added one substantive consumer remedy. Despite this, the authors argue that Singapore's consumer protection regime remains inadequate because: unfair practices are yet to attract criminal sanctions; no guidelines were issued to provide transparency and clarity on how the broad investigatory powers and harsher court powers are to be implemented; no measures to encourage reform were introduced; and consumer remedies remain insufficient. In this article, the revisions are discussed with a comparison to the Hong Kong and Australian regimes. Suggestions for further reform are then made for the purpose of achieving a more robust and comprehensive consumer protection regime.

Keywords

Consumer Protection; Unfair Practice; Consumer Remedies; Voluntary Compliance; Deterrence; Consumer Protection (Fair Trading) Act; Hong Kong Trade Descriptions Ordinance; Australian Consumer Law

I INTRODUCTION

Singapore has recently amended the *Consumer Protection (Fair Trading) Act* (cap 52A, 2009 rev ed) ('CP(FT)A') in response to calls for tougher action against unscrupulous traders. For ease of reference, the CP(FT)A prior to the 2016 amendments shall be referred to as the 'previous CP(FT)A' and the amended one as the '2016 CP(FT)A'. News of vulnerable consumers being taken advantage of at a popular electronic gadgets mall partly precipitated the outcry.¹ A notable case involved a

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Vietnamese tourist who sought to purchase an iPhone 6 for SGD950.² Not being fluent in the language, he signed an agreement in English without reading it. He had also agreed to a one-year product warranty having assumed that it was free. The tourist had a rude shock when he was not allowed to leave with the phone without paying an additional SGD1500 in ‘warranty fees’, which the signed agreement obliged him to pay. In a widely circulated video, he knelt before the storeowner to beg for his SGD950 back. His girlfriend rejected the storeowner’s subsequent offer of SGD600 refund and called the police. In front of the police, however, the storeowner raised the signed agreement in defence and reduced their offer to SGD70. The police referred the matter to the Consumer Association of Singapore (‘CASE’) which only obtained a SGD400 refund.³

This, and other similar incidents, have reinforced a common public perception that the then-existing consumer protection laws provided insufficient protection for consumers.⁴ In particular, errant traders who had been blacklisted by authorities or given injunctions to restrain their unfair practices often simply changed their companies’ name or set up new ones ‘to escape the black mark’.⁵ Thus, in 2015, the Ministry of Trade and Industry of Singapore (‘MTI’) embarked on a review of the consumer protection framework. In the process, Hong Kong and Australian practices were studied and relevant stakeholders consulted.⁶ On 13 September 2016,⁷ revisions to the previous CP(FT)A⁸ were passed and came into operation on 9 December 2016.⁹

The revisions were aimed at strengthening the deterrent effect of the CP(FT)A.¹⁰ The ultimate goal was for unfair practices to be deterred altogether, or in situations where deterrence is unsuccessful, be resolved through negotiation, mediation or trader’s voluntary compliance

¹ Foo Jie Ying, ‘Consumer Protection Act to get more Bite?’, *The New Paper* (Singapore), 16 May 2016 <<http://www.tnp.sg/news/singapore-news/consumer-protection-act-get-more-bite>>.

² Chew Hui Min, ‘Vietnamese Tourist Kneels and Begg for Refund of iPhone 6 at Sim Lim Square’, *The Straits Times* (Singapore), 4 November 2014 <<http://www.straitstimes.com/singapore/vietnamese-tourist-kneels-and-begs-for-refund-of-iphone-6-at-sim-lim-square-0>>.

³ Ibid.

⁴ See, eg, above nn 1–2. See also Rachel Au-Yong, ‘Sick of Scams: But what is the Cure?’ *The Straits Times* (Singapore) 15 November 2014 <<http://news.asiaone.com/news/singapore/sick-scams-what-cure>>.

⁵ See Foo, above n 1.

⁶ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 69 (Minister for MTI Dr Koh Poh Koon).

⁷ *Consumer Protection (Fair Trading) (Amendment) Act 2016* (Singapore, Act 25 of 2016).

⁸ *Consumer Protection (Fair Trading Act)* (Singapore, cap 52A, 2009 rev ed).

⁹ *Consumer Protection (Fair Trading) (Amendment) Act 2016 (Commencement) Notification 2016* (Singapore, No S 624/2016).

¹⁰ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 103 (Minister for MTI Dr Koh Poh Koon).

agreements ('VCAs').¹¹ To achieve this, a new administering agency, the Standards, Productivity and Innovation Board ('SPRING') was created and given new investigatory powers¹² so that it could bring timely injunction applications to deal with unfair trade practices and monitor compliance.¹³ The investigatory powers were reinforced with criminal sanctions against persons obstructing investigations,¹⁴ although unfair practices do not attract criminal sanctions. At the same time, court powers were enhanced to allow: (i) injunctive relief against, not just the errant trader's business entity,¹⁵ but also complicit individuals;¹⁶ and (ii) additional orders to compel traders¹⁷ and complicit individuals¹⁸ under injunction to notify potential customers of their status (the former in a targeted way and the latter in a general way), and to prevent evasion of compliance.¹⁹ The substantive remedy that was introduced enables consumers to cancel contracts with errant traders under injunction who fail to notify the consumers of their status.²⁰

Despite the 2016 revisions, the Singapore consumer protection regime remains inadequate. In this article, the shortcomings of the new regime are discussed in comparison with the Australian and Hong Kong regimes, as the Singapore MTI specifically considered these regimes when developing the 2016 revisions.²¹ The discussion is organised as follows: Part II sets out background information on Singapore's consumer protection regime. Part III explores SPRING's new investigatory powers. While SPRING's new investigatory powers provide deterrence, in their current form they are overbroad, lack sufficient balance and clarity, and fail to provide consumers and traders with guidance as to when and how SPRING's investigatory powers will be used. It further argues that levying criminal sanctions for obstruction of investigation into non-criminal practices appears disproportionate. Part IV explains the Courts' enhanced powers. This part first argues that despite the enhancements, deterrence of recalcitrant traders will still be problematic without criminalising unfair practices. This issue is exacerbated by the new orders requiring traders to notify potential customers of their injunction status, which might encourage traders to not comply with sanctions. Second, it is argued that

¹¹ Ibid.

¹² 2016 CP(FT)A Part IIIA.

¹³ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 70 (Minister for MTI Dr Koh Poh Koon).

¹⁴ 2016 CP(FT)A Part IIIB.

¹⁵ Ibid ss 2(1), 9(1).

¹⁶ Ibid ss 2(1), 10(1).

¹⁷ Ibid ss 9(1)(c), 9(4)(a)–(c).

¹⁸ Ibid s 10(6)(a).

¹⁹ Ibid ss 9(4)(d)–(f) (traders), 10(6)(c)(complicit individuals).

²⁰ Ibid ss 9(4)(b), 9(12).

²¹ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 69 (Minister for MTI Dr Koh Poh Koon).

the revisions are neither comprehensive nor transparent because there are no guidelines to assure traders and consumers as to how the enhanced powers will be implemented. Additionally, the measures do not encourage reform of errant traders. Part V argues that consumer remedies remain insufficient since the new remedy benefits a limited group and still requires consumers to initiate action. Part VI then offers recommendations for how to achieve a more robust and comprehensive consumer protection regime for Singapore based on the Australian and Hong Kong approaches.

II BACKGROUND

It is useful to briefly set out the Singaporean framework on contractual fairness and the definition of ‘unfair practice’ in the CP(FT)A. Prior to the enactment of the previous CP(FT)A, there was no legislation targeted at protecting small consumers against unfair trade practices generally. Statutory protection was only available in specific situations coming within, for example, the *Hire-Purchase Act*,²² the *Pawnbrokers Act*²³ or the *Moneylenders Act*.²⁴ Regulation of general contractual fairness, whether for consumers or businesses, rested on the common law of contract, particularly the doctrines of misrepresentation, duress and undue influence, and legislation such as the *Sale of Goods Act*,²⁵ *Unfair Contract Terms Act*²⁶ and s 3 of the *Misrepresentation Act*.²⁷ The CP(FT)A thus filled a lacuna in the law when it was introduced in 2004.²⁸

The 2016 CP(FT)A retains the same basic definition of an unfair practice as in previous versions, although its scope has been widened. The 2016 CP(FT)A, under s 4, defined the following as unfair practices by a trader in relation to a consumer transaction:

- (a) to do or say anything, or omit to do or say anything, if as a result, a consumer might reasonably be deceived or misled;
- (b) to make a false claim;
- (c) to take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer –
 - (i) is not in a position to protect his own interests; or

²² (Singapore, cap 125, 2014 rev ed).

²³ (Singapore, cap 222, 1994 rev ed); repealed and re-enacted in 2015 (Singapore, No 2 of 2015).

²⁴ (Singapore, cap 188, 2010 rev ed).

²⁵ (Singapore, cap 393, 1999 rev ed).

²⁶ (Singapore, cap 396, 1994 rev ed).

²⁷ (Singapore, cap 390, 1994 rev ed). See Wee Ling Loo and Erin Goh-Low Soen Yin, ‘Awards of Damages under the Singapore Consumer Protection (Fair Trading) Act’ (2007) 9:1 *Australian Journal of Asian Law* 66, 67 n 5 therein and accompanying text; Sandra Booyesen, ‘Twenty Years (And More) of Controlling Unfair Contract Terms in Singapore’ [2016] *Singapore Journal of Legal Studies* 219, 219–20.

²⁸ See generally Ravi Chandran, ‘Consumer Protection (Fair Trading) Act’ (July 2004) *Singapore Journal of Legal Studies* 192, for a commentary on the workings and implications of the first CP(FT)A.

(ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related [thereto].

Section 4(d) further refers to a list of 28 specific unfair practices in the Second Schedule, nine of which have been added by a 2016 amendment.²⁹

To deter unfair practices, the previous CP(FT)A provisions targeted the errant traders' desire to avoid bad publicity and the associated loss of reputation and business. Potential public naming and shaming was the main tool of deterrence. The 2016 introduction of investigatory powers and enhancements to court powers essentially aim to strengthen this mode of deterrence.

III INVESTIGATORY POWERS

A *New Powers Under the 2016 CP(FT)A*

Under the previous and current legislation, both CASE and the Singapore Tourism Board ('STB') are the first points of contact for consumer complaints regarding unfair trade practices.³⁰ However, under the previous CP(FT)A, neither CASE nor STB had the power to investigate complaints. They even faced 'operational difficulties in gathering evidence to submit their applications to the Courts to file an injunction.'³¹ Now, under the 2016 regime, SPRING has been granted powers to investigate and gather evidence regarding alleged unfair practices, with a view to filing injunction applications.³² Criminal penalties may be imposed for obstruction of investigation,³³ although unfair practices remain uncriminalised.

CASE and STB may raise cases of errant traders to SPRING for further investigation.³⁴ SPRING may conduct an investigation if there are 'reasonable grounds' for suspecting that an errant trader has, is or is likely to engage in an unfair practice or that a person is or has knowingly aided, permitted or procured an errant trader to engage in an unfair practice.³⁵ SPRING's new powers of investigation are each considered in turn.

²⁹ *Consumer Protection (Fair Trading) (Amendment) Act 2016* (Singapore, Act 25 of 2016) s 10.

³⁰ See Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 69 (Minister for MTI Dr Koh Poh Koon); see also below n 118 and accompanying text regarding the process for initiating consumer complaints.

³¹ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 68 (Minister for MTI Dr Koh Poh Koon).

³² *Ibid* 69. This supersedes the previous practice where CASE or STB would be the bodies applying for injunctions: see previous CP(FT)A, s 9(1) and the discussion in Part IV on the previous approach.

³³ See discussion at Part IIIA3 below.

³⁴ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 69 (Minister for MTI Dr Koh Poh Koon). It was not stated whether SPRING would institute investigations on its own accord, but there is nothing in the legislation to prevent this.

³⁵ 2016 CP(FT)A s 12G(1).

1 *Examination of Persons; Production of Information*

SPRING may orally examine any person who appears to be acquainted with relevant facts or circumstances of a case.³⁶ Further, SPRING also has the power to issue a written notice requiring such person ‘to attend before the investigation officer.’³⁷ SPRING can also require production of relevant documents or information, from an errant trader or any complicit person.³⁸ No person is excused from making a disclosure under the 2016 CP(FT)A on the grounds of potential self-incrimination.³⁹

2 *Entry and Search*

SPRING may investigate suspect premises with or without a warrant.⁴⁰ To search without warrant, SPRING must give two days’ written notice to the occupier of any premises reasonably suspected of being used by a person under investigation.⁴¹ Such notice is not required if the investigation officer has taken all ‘reasonably practicable [steps] to give notice but has not been able to do so’.⁴² During such entry, the officer may, for instance: search the premises; take photographs; seize and detain goods; and require production of relevant documents.⁴³ SPRING can seek a search warrant after a search without a warrant has occurred but failed or was incomplete, or the investigation officer believes a search without a warrant would be unproductive.⁴⁴ With a warrant, the officer may, in addition to the powers under a search without a warrant: search anyone on the premises if there are reasonable grounds for believing that he or she possesses relevant documents or goods; take relevant documents; and remove relevant equipment.⁴⁵

3 *Criminal Penalties for Obstruction of Investigation*

Criminal penalties may be imposed for obstruction of a SPRING investigation. Obstructing a SPRING investigation includes: non-compliance with requirements imposed under the abovementioned

³⁶ Ibid s 12M(1)(a).

³⁷ Ibid s 12M(1)(b).

³⁸ Ibid s 12H(1).

³⁹ Ibid s 12N(1). However, such disclosure is not admissible in evidence against that person in criminal proceedings that are not under the 2016 CP(FT)A, although it remains admissible in civil proceedings (including those under the 2016 CP(FT)A). See 2016 CP(FT)A s 12N(2). Criminal proceedings not under the 2016 CP(FT)A could involve Penal Code (Singapore, cap 224, 2008 rev ed) violations. Civil proceedings under the CP(FT)A could include SPRING’s injunction applications or consumer claims for compensation.

⁴⁰ 2016 CP(FT)A ss 12I, 12J.

⁴¹ Ibid s 12I(1)–(2).

⁴² Ibid s 12I(3).

⁴³ Ibid s 12I(5).

⁴⁴ Ibid s 12J(2).

⁴⁵ Ibid s 12J(3).

sections;⁴⁶ destroying or falsifying documents;⁴⁷ providing false or misleading information;⁴⁸ and obstructing SPRING in the discharge of its duties or exercise of its powers, without reasonable excuse.⁴⁹ Where an offence is committed by a corporation, but an officer or individual in a management position consented to (or knew or should have known of the offence but failed to take reasonable steps to prevent it), the officer or individual will be deemed guilty of the offence and punished.⁵⁰ Penalties for obstruction of an investigation are fines and/or imprisonment.⁵¹ Finally, for errant traders or complicit individuals under injunction, SPRING will monitor compliance and take action for non-compliance.⁵²

B Evaluation

In the context of consumer protection, the effectiveness of these changes depend on their deterrent effect, and whether they provide transparency and clarity to both consumers and traders. While these new measures do provide some deterrent effect, there is some question as to the transparency and balance of these new measures, especially in comparison with the Hong Kong and Australian approaches.

1 Deterrence (*Ease of Investigation*)

There is certainly a deterrent effect in SPRING's new powers, especially when compared to the absence of investigatory powers in the previous regime. SPRING can now conduct searches of premises (with or without warrant), examine people and require documents, merely on 'reasonable grounds' for suspecting that an errant trader has, is or is likely to engage in an unfair practice or that a person is or has knowingly aided, permitted or procured an errant trader to engage in an unfair practice.⁵³ As stated above, criminal penalties can also be imposed for obstructing investigations.⁵⁴ SPRING's investigations can also be carried out by auxiliary police officers as well as officers of SPRING,⁵⁵ giving such investigations the appearance of a criminal or quasi-criminal investigation.

These investigatory powers go some way towards countering previous claims of CASE's 'lack of teeth' in investigating claims against alleged

⁴⁶ Ibid s 12O(1), being failure to comply with ss 12H, 12I, 12J, 12L or 12M. These have each been discussed with the exception of s 12L, which merely states the investigation officer's power to require evidence as to a trader's or complicit person's identity.

⁴⁷ 2016 CP(FT)A s 12P.

⁴⁸ Ibid s 12Q.

⁴⁹ Ibid s 12R.

⁵⁰ Ibid s 12T. Section 12U provides similar clauses for other forms of organisations such as partnerships and unincorporated associations.

⁵¹ Ibid Part IIIB.

⁵² Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 70 (Minister for MTI Dr Koh Poh Koon).

⁵³ 2016 CP(FT)A s 12G(1).

⁵⁴ Ibid Part IIIB.

⁵⁵ Ibid s 12G(2). Such auxiliary police officers are appointed pursuant to Part IX of the Police Force Act (Singapore, cap 235, 2006 rev ed). See 2016 CP(FT)A s 12G(5).

errant traders.⁵⁶ Additionally, SPRING's broad new powers also facilitate ease of investigation by the authorities, which in turn strengthens the deterrent force of the new regime. Indeed, some of the broad investigatory powers afforded to SPRING have, with some justification, been called 'rather draconian'.⁵⁷ For instance, the ability to enter premises and seize evidence without warrant, with merely a requirement of reasonable suspicion of the premises being used by a person under investigation, will result in more efficient evidence gathering in pursuit of injunctions against errant traders.⁵⁸ Moreover, the possibility of SPRING making heavy demands for information and documents during an investigation could potentially impose significant costs on traders, and thereby deter them from engaging in unfair practices. In this regard, MTI has indicated that only egregious cases would be investigated,⁵⁹ where arguably, the egregious traders might try (even more so than the ordinary trader) to hide relevant information, thus justifying a broad-based and efficient entry and search process.

There were some concerns raised in Parliament regarding the use of auxiliary police and SPRING's investigatory officers, rather than actual police, for investigations, especially given that 'some of these errant retailers can be gangsters'.⁶⁰ However, the Minister of State responded that the use of auxiliary police officers to conduct investigations was 'not unique to the CP(FT)A',⁶¹ and provided further assurances that SPRING would put in place 'robust procedures for carrying out investigations' and that SPRING's officers and the appointed auxiliary police would be 'sufficiently trained'.⁶² In summary, SPRING's new investigatory powers will likely have a measure of deterrence, and go some way towards protecting consumers from egregious traders.

2 *Lack of Balance and Clarity*

While SPRING's powers of investigation will have a deterrent effect, it is questionable whether the powers, as written, provide sufficient balance and clarity, such that consumers and traders (whether honest or otherwise) are

⁵⁶ See, eg, 'Consumers Welcome Proposed Changes to Law against Errant Retailers' *Today* (online), 18 May 2016 <<http://www.todayonline.com/singapore/consumers-welcome-proposed-changes-law-against-errant-retailers>>.

⁵⁷ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 75 (Dennis Tan Lip Fong). The phrase was used in relation to SPRING's powers 'to enter take photographs, seize or detain without a court warrant'.

⁵⁸ See Part IV below for further discussion on injunctions.

⁵⁹ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 100, 104 (Minister for MTI Dr Koh Poh Koon).

⁶⁰ *Ibid* 87 (Er Dr Lee Bee Wah).

⁶¹ *Ibid* 103-4 (Minister for MTI Dr Koh Poh Koon). For instance, the *Weights and Measures Act* (Singapore, cap 349, 1987 rev ed) ('WMA') s 30 also authorizes SPRING inspectors, as well as police officers, to conduct investigations under the act.

⁶² Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 103-4 (Minister for MTI Dr Koh Poh Koon).

given assurance and guidance as to when and how SPRING will use its investigatory powers.

(a) Discrepancy — Powers of Entry and Search

There appears to be a discrepancy between SPRING's powers with regard to the entry and search of premises *as written*, and what has been indicated will occur *in practice*. It was suggested in Parliament that entry without warrant would not be the 'default' approach. The Minister of State for MTI stated that while searches without warrant could be used where 'the egregious behaviour require[d] more urgent action', for example, where a large number of tourists might be 'fleeced' or 'multiple feedback [was received] from consumers about ... [a trader's] egregious behaviour', he reiterated that this was not the 'default position'.⁶³

However, the interpretation that a search without warrant will only be conducted under special circumstances does not accord with the language of s 12I, which provides for searches without warrant. Indeed, s 12J specifically contemplates that a search with warrant would take place only after a search without warrant has occurred.⁶⁴ This is evident from the grounds for obtaining a search warrant, namely:

- if there are reasonable grounds for suspecting that documents had not been produced pursuant to a search under s 12I;
- if documents or goods may be damaged or otherwise affected if prior notice under s 12I was provided; or
- an attempt was made to enter the premises without warrant but such attempt was unsuccessful, and there are reasonable grounds for suspecting that there are on the premises documents or goods that could have been obtained under the provisions relating to entry without a warrant.⁶⁵

In any case, the abovementioned scenarios raised in Parliament do not suggest the conclusion provided.⁶⁶ In the scenario concerning tourists, if the trader has indeed been acting that badly, it is more than likely that the trader has committed such acts before, and would already be on government agencies' radars. In such a case, it should not make a significant difference if SPRING were to wait for a court warrant. If the fear is that evidence would be destroyed during the delay, there is in any case a two-day notice requirement under s 12J.⁶⁷ If the concern is that the tourists will leave before an investigation can take place — information and evidence can always be taken from the tourists first, and then SPRING

⁶³ Ibid 104.

⁶⁴ 2016 CP(FT)A s 12J(2).

⁶⁵ Ibid.

⁶⁶ See above n 63 and accompanying text discussing the two scenarios where a trader's egregious behaviour might require more urgent action.

⁶⁷ 2016 CP(FT)A s 12I(1)–(2). There is no notice period if s 12I(3) is invoked. See above n 39 and accompanying text.

and/or STB could follow up with them after they have left Singapore.⁶⁸ In the scenario concerning traders who have had multiple complaints filed against them: if abundant evidence already exists, a wait for a court warrant should not make a significant difference. Finally, if the intention is that entry and search with warrant (rather than without warrant) is the ‘default’ option, then the 2016 CP(FT)A should be amended accordingly to avoid any confusion.⁶⁹ Alternatively, MTI should issue guidelines specifying that entry and searches with warrants will be conducted first. Otherwise, as written, SPRING will be empowered to, and may in practice, carry out warrantless searches as its first option.

(b) Criminal Penalties for Obstruction without Criminal Penalties for Unfair Practices

The imposition of criminal sanctions for obstruction of an investigation into practices that (even if proven) are *not* considered criminal acts seems disproportionate. There is a disconnect between the consequences for obstruction of investigation of the underlying unfair practices, and the consequences for actually committing the underlying unfair practices. Further, the 2016 approach is inconsistent with the approach taken under the other two acts SPRING administers: the *Consumer Protection (Trade Descriptions and Safety Requirements) Act*⁷⁰ (‘CP(TDSR)A’) and the *Weights and Measures Act* (‘WMA’).⁷¹ SPRING similarly has investigatory powers under both acts,⁷² and each act provides criminal penalties for obstruction of investigations.⁷³ However, unlike the 2016 CP(FT)A, the commission of the underlying unlawful actions are in fact considered offences. Under the CP(TDSR)A, the provision of false trade descriptions is an offence,⁷⁴ punishable with fines and/or imprisonment.⁷⁵ Under the WMA, various acts regarding the unlawful use of weights and measures are offences,⁷⁶ also punishable with fines and/or imprisonment.⁷⁷

⁶⁸ See below n 117–18 and accompanying text, explaining how STB, together with CASE, may assist tourists who file complaints.

⁶⁹ See also the Singapore High Court’s position on statutory interpretation: ‘The words of a Minister must not be substituted for the text of the law’ even if ‘through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens ... [t]he function of the Court is to give effect to the will of Parliament as expressed in the law’. *Seow Wei Sin v PP* [2011] 1 SLR 1199, [21] (emphasis in original).

⁷⁰ (Singapore, cap 53, 2013 rev ed).

⁷¹ WMA (Singapore, cap 349, 1987 rev ed).

⁷² CP(TDSR)A s 23; WMA s 30.

⁷³ CP(TDSR)A s 24; WMA ss 32, 35.

⁷⁴ CP(TDSR)A s 4.

⁷⁵ *Ibid* s 15.

⁷⁶ See, eg, WMA ss 6–7, 10–12, 14, 19.

⁷⁷ *Ibid* s 35.

(c) *Lack of Calibration*

SPRING's investigatory powers, while providing deterrence, lack calibration. The breadth of the powers could be a potential source of alarm for traders who might be innocent or merely careless or negligent in their interactions with consumers. These powers also seem to indicate a disregard for the due process rights of traders and individuals under investigation. To ameliorate those concerns, Singapore could consider adopting aspects of regimes that provide some protections for traders and other persons under investigation, without jeopardizing the deterrent effect of SPRING's powers or ability to conduct effective investigations.

(i) *Singapore in Comparison: The Australian and Hong Kong Examples*

Singapore's approach to investigations is similar to Hong Kong's, in that both are fairly draconian in nature. For instance, in both jurisdictions, an investigation officer only needs 'reasonable' grounds for suspecting that an unfair practice has been committed, before conducting an investigation,⁷⁸ including a search of premises, and request for information and/or documents.⁷⁹ Criminal penalties are also imposed for obstruction of investigation.⁸⁰ Indeed, Hong Kong arguably goes further than Singapore, in that the investigation officer may 'arrest or detain for further enquiries without warrant any person whom he reasonably suspects of having committed any offence' under the HK Ordinance.⁸¹ However, Hong Kong makes a concession to the rights of individuals under investigation — a magistrate's warrant or authorisation from the Commissioner of Customs and Excise is required for entry and search of *domestic* premises.⁸²

In comparison, Australia's approach is far less draconian and more calibrated. In particular, Australia provides significantly more rights for individuals under investigation. For instance, while entry into suspect premises without warrant is also allowed if the Australian Competition and Consumer Commission ('ACCC') has 'reasonable grounds' for suspecting that there may be 'evidential material' on the premises, the occupier must first have given consent for such entry and search.⁸³ Consent is also required for removal of evidential material from the premises.⁸⁴ Additionally, the investigation officer must also inform the occupier that

⁷⁸ 2016 CP(FT)A s 12G(1); *Trade Descriptions Ordinance* (Hong Kong) cap 362 ('HK Ordinance') s 15. The Hong Kong Customs and Excise Department has primary responsibility for enforcing the HK Ordinance: Enforcement Guidelines for the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 (July 2013) Part A[1] <http://www.coms-auth.hk/filemanager/en/content_800/enforcement_guidelines_en.pdf> ('HK Guidelines').

⁷⁹ 2016 CP(FT)A ss 12H(1), 12I, 12J(1), 12(M)(1); HK Ordinance s 15.

⁸⁰ 2016 CP(FT)A Part III; HK Ordinance ss 17–18.

⁸¹ HK Ordinance s 16B(1).

⁸² *Ibid* s 16.

⁸³ *Australian Competition and Consumer Act 2010* (Cth) ('ACCA') s 154D.

⁸⁴ *Ibid* s 154E(1)(d).

consent may be refused.⁸⁵ Penalties are only incurred for non-cooperation with searches with warrants.⁸⁶ Even in the case of searches with a warrant, there are protections in place for occupiers.⁸⁷ Before entry for such a search, the officer must announce his or her authority to enter, and give the occupier opportunity to allow entry.⁸⁸ While the investigation officer's powers of search with warrant are similar to that during a search without warrant,⁸⁹ a key difference is that the occupier may observe the search,⁹⁰ a right that is not provided in Singapore or Hong Kong.

Similarly, Australian investigators can also summon individuals or companies to provide relevant documents or evidence concerning a possible breach of the ACCA pursuant to s 155 of the ACCA ('s 155 notice').⁹¹ Unlike Singapore or Hong Kong, the ACCC has published a number of guidelines regarding how examinations pursuant to a s 155 notice will be conducted.⁹² For instance, the examinee will generally be permitted the assistance of a legal adviser as 'a matter of procedural fairness.'⁹³ The ACCC shall also not conduct a 'fishing expedition' for information.⁹⁴ Information gathered will only be used to assist the ACCC in its investigations into a potential breach.⁹⁵ The ACCC is also required to consider the burdens imposed by the issuance of a s 155 notice, including the time and cost implications.⁹⁶

Even with these protective guidelines, Australia's Competition Policy Review ('Harper Review') found that complying with s 155 requests imposed a significant burden, because of 'the increased use of technology leading to more electronic material being retained by businesses that may need to be searched in order to comply with a notice.'⁹⁷ The Harper Review recommended that notices be framed 'in the narrowest form possible' and that the recipient should only be required to undertake 'a reasonable search, taking into account factors such as the number of documents involved and

⁸⁵ Ibid s 154D(3).

⁸⁶ Ibid s154Q, 154R, 154RA; *Crimes Act 1914* (Cth) ('*Crimes Act*') s 4AA.

⁸⁷ ACCA s 154X–Z.

⁸⁸ Ibid s 154M(1).

⁸⁹ Ibid s 154G(1)–(1A).

⁹⁰ Ibid s 154P.

⁹¹ Ibid s 155(1).

⁹² Commonwealth of Australia, *ACCC Guidelines - Use of Section 155 powers* (July 2017) <<https://www.accc.gov.au/publications/accc-guidelines-use-of-s-155-powers>> ('*S155 Guidelines*'); Commonwealth of Australia, *The Australian Competition and Consumer Commission's Accountability Framework for Investigations* (22 May 2013) <<https://www.accc.gov.au/publications/the-acces-accountability-framework-for-investigations>> ('*Accountability Framework*').

⁹³ *S155 Guidelines*, above n 92, 8.

⁹⁴ Ibid 3.

⁹⁵ Ibid 10.

⁹⁶ Ibid 3. See also *Accountability Framework*, above n 92, 28.

⁹⁷ Commonwealth of Australia, *Competition Policy Review Final Report 2015* (March 2015) ('Harper Review') Part 2 [3.15].

the ease and cost of retrieving the documents [requested].⁹⁸ It also recommended including a defence to the charge of refusal or failure to comply with a s 155 notice, that the recipient could demonstrate that such a ‘reasonable search’ was undertaken.⁹⁹ The Australian Government accepted this recommendation and intends to review its guidelines on s 155 notices ‘having regard to the increasing burden imposed by notices in the digital age.’¹⁰⁰ Indeed, it appears that some of these recommendations were incorporated in the recently issued *S155 Guidelines*.¹⁰¹

(ii) *Lessons From Australia*

In the interests of providing transparency and balance, SPRING could similarly provide certain basic protections for individuals under investigation. A key protection in the case of a search without warrant would be procuring the occupier’s consent for the entry and search of premises. A search of one’s premises (whether domestic or business) would presumably be invasive and a significant burden for the occupier. Requiring the occupier’s consent for such search, as Australia does, recognises that burden and is also an acknowledgment of the occupier’s rights in his or her own property. While there is a concern that such consent might be denied and/or evidence destroyed due to the denial of such a request, there is already a two-day notice requirement for a warrantless search, which would have allowed the occupier the opportunity to destroy or hide evidence in any event.¹⁰² Given that MTI has asserted that a search with warrant would be the default option for SPRING’s investigators,¹⁰³ requesting the occupier’s consent for a search without warrant should not unduly affect SPRING’s investigations. Seeking consent may be a polite fiction, since SPRING can always request a warrant for a search, but it nevertheless assures individuals under investigation, or who could potentially come under investigation, that they do have some basic rights under the new regime.

In this vein, SPRING could also consider adopting the Harper Review’s recommendations, that is, to frame requests for information in the narrowest form possible, while allowing for a defence that a reasonable search was undertaken to comply with the notice.¹⁰⁴ With regard to oral

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Commonwealth of Australia, *Government Response to the Competition Policy Review* (24 November 2015), 32 <<https://treasury.gov.au/publication/government-response-to-the-competition-policy-review/>>.

¹⁰¹ *S155 Guidelines*, above n 92, 3–5. The guidelines do not currently address the proposed ‘reasonable search’ defence to a failure or refusal to comply with a s 155 notice, see *S155 Guidelines*, 1.

¹⁰² See above n 39 and accompanying text.

¹⁰³ See discussion under ‘IIIB2(a) Discrepancy — Powers of Entry and Search’ above.

¹⁰⁴ It is already a defence to a charge of failure to provide documents/information pursuant to SPRING’s investigations. However, if the document was not in the person’s possession or control and it ‘was not reasonably practicable’ to produce such document, or the person had ‘a reasonable excuse’ for failing to provide relevant information (2016

examinations, SPRING could follow the Australian guidelines¹⁰⁵ and consider allowing an examinee the assistance of a legal adviser, especially since statements provided during such an examination may be used against the examinee in civil proceedings.¹⁰⁶ SPRING could also provide information as to what will occur during the examination, for example, the likely length of an examination, the typical questions asked, and what will occur post-examination. SPRING could also clarify that the evidence gathered will only be used for that particular investigation.

Indeed, SPRING could consider providing guidelines on its overall approach to investigations. Both Hong Kong and Australia have published guidelines discussing the circumstances under which the relevant authorities will conduct investigations of consumer complaints. The HK Guidelines state that only egregious traders will be investigated, to ‘maximise the effectiveness of enforcement actions’ and ‘protect the interests of consumers and honest traders.’¹⁰⁷ Priority will be accorded to cases involving, for example, conduct that is ‘repeated, intentional ... or constitutes a serious contravention’; ‘suggests a pattern of non-compliance’ or indicates a ‘risk of future misconduct’; and for which enforcement may bring about a ‘worthwhile educative or deterrent effect’.¹⁰⁸ Australia also gives priority to matters that demonstrate (among others) conduct: resulting in significant consumer detriment; affecting disadvantaged or vulnerable consumer groups; that is industry-wide or likely to become widespread if there is no intervention by the ACCC; and action is likely to have a ‘worthwhile educative or deterrent effect’.¹⁰⁹

Similarly, that SPRING could publish guidelines to address when the full brunt of its investigatory powers would be brought to bear. They could include assurances that: a search with warrant will be SPRING’s default approach;¹¹⁰ that due regard will be given to the rights of occupiers in their premises, in particular that the occupier’s consent will be required for searches without warrants; that requests for information and evidence will be made with due regard for the burden imposed by such requests; that protections will be available for individuals going through examinations; and that only egregious cases will be pursued.

Publication of these guidelines would be unlikely to reduce the deterrent effect of SPRING’s powers, as they will not be binding on SPRING. In

CP(FT)A ss 12O(2)–(3)), there is no explanation of the standards for such ‘reasonableness’.

¹⁰⁵ *SI55 Guidelines*, above n 92; *Accountability Framework*, above n 92.

¹⁰⁶ 2016 CP(FT)A s 12N(1).

¹⁰⁷ HK Guidelines, Part A [7].

¹⁰⁸ *Ibid.*

¹⁰⁹ Commonwealth of Australia, *2017 ACCC Compliance and Enforcement Policy* (February 2017) <<https://www.accc.gov.au/publications/compliance-and-enforcement-policy>>, 2.

¹¹⁰ See discussion under ‘IIIB2(a) Discrepancy — Powers of Entry and Search’ above.

fact, the published guidelines could specify, as Hong Kong does, that they are non-binding.¹¹¹ Such guidelines would also provide some assurance to traders that innocent mistakes or minor errors are unlikely to be pursued vigorously. While it could be argued that innocent traders should in any case have little concern about being investigated, there is always the concern that they may have ‘inadvertently flouted the rules or engaged in unfair practice[s].’¹¹² At the same time, the guidelines will indicate to consumers that egregious traders — the ones that pose the most concern to consumers — will be investigated and hopefully penalised.

Australia’s experience indicates that providing protections for persons under investigation, as well as publishing guidelines as to its investigatory procedures, should not significantly affect the authorities’ ability to effectively investigate and pursue consumer complaints. In 2015 and 2016, for instance, the ACCC had a target of 80 in-depth investigations of alleged violations of the Australian Consumer Law,¹¹³ but ended up conducting 126 investigations.¹¹⁴ In any event, even with the publication of the above guidelines, Singapore’s regime still contains significant protections to ensure the effectiveness of its investigations and the cooperation of parties under investigation.¹¹⁵ In conclusion, while SPRING’s new powers of investigation certainly do provide a deterrent effect, they also indicate a lack of balance and clarity, which may cause concern amongst honest traders.

IV COURT POWERS

A Previous Approach

Before any court powers are invoked, a specified body¹¹⁶ — either CASE or STB — upon receiving a complaint about an unfair trade practice from a consumer (or tourist), could negotiate on behalf of the complainant and/or mediate the dispute.¹¹⁷ Since CASE is the dedicated consumer organisation

¹¹¹ HK Guidelines, Part B [V]. The *S155 Guidelines* also state that: ‘This publication provides guidance to the business community, their advisers and the public about the ACCC’s procedures and approach in exercising its s 155 powers’. *S155 Guidelines*, above n 92, 1.

¹¹² See Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 100 (Minister for MTI Dr Koh Poh Koon).

¹¹³ *Australian Competition and Consumer Act 2010* sch 2 *The Australian Consumer Law* (‘ACL’).

¹¹⁴ Australian Competition & Consumer Commission, *Annual Report 2015-16*, 66 <<https://www.accc.gov.au/publications/accc-aer-annual-report/accc-aer-annual-report-2015-16>> (‘Annual Report’). ‘Investigations’ appears to be a general term regarding investigation of harm to consumers and small businesses resulting from non-compliance with the ACL: Annual Report, 64.

¹¹⁵ See discussion at Part IIIA above.

¹¹⁶ Previous CP(FT)A s 2(1).

¹¹⁷ For example, see Consumers Association of Singapore, *Lodge a Complaint* <https://www.case.org.sg/complaint_lodgeacomplaint.aspx>; and Consumers

with the relevant expertise and resources, STB has appointed CASE to ‘co-administer consumer-related complaints by tourists’ from 2011.¹¹⁸ For brevity, references will only be made to CASE as the specified body in this section.

CASE also has powers under the previous CP(FT)A, to invite the errant trader to enter into a VCA where there are reasonable grounds for believing that a trader had engaged, was engaging or was likely to engage in an unfair practice.¹¹⁹ CASE could not compel a trader to enter into the VCA. However, a trader refused at the risk of CASE applying to court to have its act declared an unfair practice and have an injunction issued to restrain it from such acts. Where the Court granted such orders, a trader could also be required to publicise the declaration and injunction to the public.¹²⁰ Notably, CASE could only proceed *after* obtaining the Injunction Proposals Review Panel’s (‘IPRP’) endorsement of its proposed application.¹²¹

If the trader agreed, the VCA must include the trader’s undertaking to cease the unfair practice.¹²² It might also include any or all of the following trader’s undertakings: to reimburse CASE for costs and expense incurred; to compensate the loss or damage of any consumer; and to publicise the VCA in the manner required.¹²³

The undertaking to compensate a consumer would only be included at the aggrieved consumer’s request. Once included, it could not be varied without the consumer’s consent.¹²⁴ The trader’s undertakings could not be varied without the trader’s consent.¹²⁵ If the trader breached the VCA, civil claims could be initiated by: (i) the consumer for payment of the promised compensation;¹²⁶ and (ii) CASE for the promised reimbursement¹²⁷ and/or further expenses incurred in publicising the VCA.¹²⁸ For committing

Association of Singapore, *Mediation*

<https://www.case.org.sg/complaint_mediation.aspx>.

¹¹⁸ See Singapore Tourism Board, ‘Collaboration between CASE & STB to Curb Unfair Trade Practices’ (Media Release, 15 March 2011) <<https://www.stb.gov.sg/news-and-publications/lists/newsroom/dispform.aspx?ID=355>>. CASE may also represent tourists at the Small Claims Tribunal. Despite the arrangement, STB can still enter into VCAs and apply for injunctions.

¹¹⁹ Previous CP(FT)A s 8(1).

¹²⁰ *Ibid* s 9(1)(c).

¹²¹ *Ibid* ss 9(1), 9(4). The IPRP may endorse the proposal if satisfied that it serves the public interest, see Previous CP(FT)A s 10(5)(b).

¹²² Previous CP(FT)A 8(2)(a).

¹²³ *Ibid* s 8(3).

¹²⁴ *Ibid* ss 8(3)(a), 8(5).

¹²⁵ *Ibid* s 8(4).

¹²⁶ *Ibid* s 8(6).

¹²⁷ *Ibid* s 8(7).

¹²⁸ *Ibid* s 8(8).

further unfair practices, CASE could also, after obtaining the IPRP's endorsement, apply to court for an injunction.

The VCA is the least costly method of resolution for all parties involved, including an errant trader,¹²⁹ because the VCA need not incorporate a trader's undertaking to publicise. CASE would likely not insist on such inclusion, to encourage the trader to enter into the VCA. However, it is questionable whether there are sufficient incentives to make entry into the VCA and compliance with its terms the more attractive option to an errant trader compared to the alternatives. Before the 2016 amendments, the strongest incentive was the 'spectre' of an injunction ordered against it — the trader could be fined and/or imprisoned should it breach the court order, and be found in contempt of court.¹³⁰ This was in addition to the naming and shaming that would follow if the Court also ordered the trader to publicise the injunction. Potential civil claims by aggrieved consumers were poor incentives since consumers may be reluctant to expend cost, time and effort in pursuing legal action or refrain because of unfamiliarity with the legal process.¹³¹ Unfortunately, the regime prescribed a circuitous route towards obtaining the court orders, which prevented expeditious action.¹³² For example, in 2014, in relation to a particular trader, CASE estimated that several months would be required to 'seek the necessary approval from our relevant committees as well as the [IPRP] ... and then apply to the Court for the injunction'.¹³³

In any event, the effectiveness of the injunction¹³⁴ (and even the VCA) had been called into question as it (they) had been found to be easily circumvented. During the Parliamentary debates on the 2016 amendment, Mr Lim Biow Chuan, the President of CASE, stated:

¹²⁹ As noted when Singapore's first *Consumer Protection (Fair Trading) Bill (No 24 of 2003)* (Singapore) ('2003 Bill') was debated, '[t]he VCA was meant to be a non-litigious option so that it is less costly for all parties involved': Singapore, *Parliamentary Debates*, 11 November 2003, vol 76 at col 3461 (Raymond Lim Siang Keat).

¹³⁰ *Administration of Justice (Protection) Act 2016* (Singapore, No 19 of 2016) ss 4(1), 10.

¹³¹ This sentiment was mentioned when the 2003 Bill was debated: Singapore, *Parliamentary Debates*, 10 November 2003, vol 76 at col 3357 (Leong Horn Kee); and again when the 2016 amendments were debated: Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 84 (Leon Perera).

¹³² These concerns were raised when the 2003 Bill was debated, see Singapore, *Parliamentary Debates*, 10 November 2003, vol 94 at col 3365 (Yeo Guat Kwang), 3367–8 (Halimah Yacob) and 3379 (Chay Wai Chuen); and noted in Loo and Goh-Low, above n 27, 79–80 in relation to the same provision in the first CP(FT)A.

¹³³ See CASE, Company Alert — Mobile Air Pte Ltd (12 November 2014) <https://www.case.org.sg/consumer_guides_consumeralerts_archive.aspx?month=November&year=2014>.

¹³⁴ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 68 (Minister for MTI Dr Koh Poh Koon).

Out of the six injunctions taken out by CASE [since the CP(FT)A was introduced in 2004],¹³⁵ every one of them had ceased operations after the injunction. Some retailers who have signed VCAs had used the names of their relatives to set up another company to operate a new business, and this defeats the intent of the VCAs and the court injunctions as any restrictions imposed can easily be overcome.¹³⁶

B *New Approach*

Under the new approach, the previous CP(FT)A provisions relating to VCAs are unchanged. As mentioned, CASE and STB ‘remain the first points of contact for locals and tourists’ to provide assistance in consumer disputes through negotiation, mediation and VCAs,¹³⁷ and a new administering body, SPRING, is appointed with powers of investigation and enforcement, to which CASE and STB may now refer cases.¹³⁸ CASE and STB would no longer initiate injunction applications¹³⁹ and the IPRP is abolished.¹⁴⁰ Instead, after completing its investigation,¹⁴¹ SPRING could apply to court for an injunction against not just the errant trader,¹⁴² but also complicit parties, that is, those who have knowingly abetted, aided, permitted or procured the trader to engage in the unfair practice.¹⁴³ SPRING would subsequently ensure compliance with the resulting court orders.¹⁴⁴ Though not explicitly provided in the amendments, SPRING would work together with CASE or STB to publish notices of any or all of the following actions or court orders against the trader and/or complicit individual: commencement of the injunction application; grant of an interim injunction; grant of an injunction and/or declaration.¹⁴⁵ The amendments explicitly empower the Court to require the trader and/or complicit individual to reimburse SPRING for expenses thus incurred.¹⁴⁶

The new regime also allows additional orders to accompany the injunction for more targeted naming and shaming of the errant trader, and general naming and shaming of the complicit individuals. Vis-a-vis the trader, the Court may order it to do one or more of the following: give written notification of the details of the declaration and injunction to a potential

¹³⁵ See CASE Statistics on ‘Injunction/Declaration Proceedings that have been Taken out against Businesses (1 March 2004 – 31 December 2016)’ <https://www.case.org.sg/consumer_guides_statistics.aspx>.

¹³⁶ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 73 (Mr Lim Biow Chuan).

¹³⁷ *Ibid* 69 (Minister for MTI Dr Koh Poh Koon).

¹³⁸ *Ibid*.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* 70.

¹⁴¹ See Part III above.

¹⁴² 2016 CP(FT)A ss 2(1), 9(1).

¹⁴³ *Ibid* ss 2(1), 10(1).

¹⁴⁴ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 69–71 (Minister for MTI Dr Koh Poh Koon).

¹⁴⁵ *Ibid* 71, 100, 107.

¹⁴⁶ 2016 CP(FT)A ss 9(4)(g) (trader) and 10(6)(b) (complicit individuals).

customer and obtain a written acknowledgment from him prior to the entry into a consumer transaction; and/or include in every invoice or receipt issued to a consumer, a statement that the trader is under the declaration and injunction order.¹⁴⁷

For non-compliance with the first-mentioned order, but not the second, the amendments confer upon the customer a right to cancel the contract entered into.¹⁴⁸ Vis-a-vis the complicit party, a court may order them to publish to the public, at their own expense, the details of the injunction in a manner that secures ‘prompt and adequate publicity’.¹⁴⁹ To prevent the trader and/or complicit parties from evading compliance, a court may require them to notify SPRING in writing of certain events that will enable closer monitoring of the parties under injunction, for instance, changes to the trader’s business address or the complicit individual’s employment status.¹⁵⁰ Compliance with the orders to name and shame and to notify SPRING must be observed for a specified period of up to five years, at the Court’s discretion.¹⁵¹

C Evaluation

The 2016 amendments did not incorporate aspects of the Hong Kong and Australian approaches that could have made the CP(FT)A a more effective tool of deterrence, and one that encourages reform of recalcitrant traders, and provides transparency and assurance of the Singapore Government’s balanced approach in implementing regulation. This section will discuss how the 2016 amendments fare based on the said parameters.

1 Deterrence (*Encouraging Voluntary Compliance*)

Taken together, the 2016 enhancements to the available injunctive relief could have the deterrent effect that MTI intends, that is, to dissuade would-be errant traders and persuade the majority of them to enter into VCAs.¹⁵² First, imposing injunctions against all parties involved in the unfair practice, rather than just the trader, could discourage employees from being complicit. It could also discourage friends or relatives from aiding the errant business owner to evade the injunction or VCA by letting them use their names to start a new business.¹⁵³ Further, it closes the previous loophole where the injunction would be issued against the incorporated trader while leaving the individual owner unchecked. The individual owner can now be subjected to an injunction as a party who ‘knowingly permitted

¹⁴⁷ Ibid ss 9(1)(c), 9(4)(b)–(c).

¹⁴⁸ Ibid ss 9(4)(b), 9(12).

¹⁴⁹ Ibid s 10(6)(a).

¹⁵⁰ Ibid ss 9(4)(d), 9(4)(e)–(f), 10(6)(c), Fifth Schedule.

¹⁵¹ Ibid ss 9(7) (trader), 10(8) (complicit individuals). If the orders are breached, SPRING may apply for an extension up to a maximum of 10 years from the time the orders were first made: ss 9(8)–(10) (trader) and 10(9) (complicit individuals).

¹⁵² Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 103 (Minister for MTI Dr Koh Poh Koon).

¹⁵³ Ibid 73 (Lim Biow Chuan).

or procured' the incorporated trader to engage in the unfair practice, and can no longer circumvent the law by deregistering the stigmatised incorporated entity and registering a new one to carry on the same business.

Second, if strictly complied with, the orders to notify in writing the potential customer of the trader's injunction status at his store (and obtain acknowledgment in writing), or in print on receipts or invoices, are effective means to warn the customer of the trader's poor reputation. The trader is likely to appreciate that these orders could result in a shut-down of their business. After all, few consumers would, having received such warning on the brink of a consumer transaction, likely proceed with the transaction. Not least, the notification obligations allow SPRING to monitor parties under injunction for compliance more closely, with the result that traders will likely take court orders more seriously.

But what of the recalcitrant trader? The harshness of the orders to notify potential customers at the store, if imposed, could have the unintended effect of incentivising the recalcitrant trader to devise ways and means to avoid strict compliance. For example, the trader could simply insert a statement on his injunction status (perhaps in fine print) in a contract document which customers are required to sign, without specifically drawing it to the customer's attention. Customers who do not read documents before signing or who do not read the fine print, whether due to unfamiliarity with the language, lack of time or the trader's other dubious acts, would be none the wiser. The same could arguably apply to notifications printed on invoices and receipts.

The prospect of such a scenario is likely what prompted the inclusion of a customer's right of cancellation of contracts entered into with a trader who failed to specifically notify the customer of his injunction status prior to contracting.¹⁵⁴ Curiously, this right is not extended where the trader failed to comply with an order to print his injunction status on receipts and invoices. Whether the right of cancellation, or the prospect of being charged with contempt of court, will reduce the incentive to avoid strict compliance for a recalcitrant trader bent on saving his business is doubtful. What is evident though, is that considerable time and resources would be required to enforce compliance should the scenario materialise,¹⁵⁵ apart from diluting the incentive for recalcitrant traders to enter into VCAs and abide by their terms.

(a) Singapore in Comparison: The Australian and Hong Kong Examples

In contrast, much stronger incentives to encourage genuine traders' voluntary compliance exist under the Hong Kong and Australian regimes. In Hong Kong, certain unfair practices are made criminal offences under

¹⁵⁴ 2016 CP(FT)A ss 9(4)(b), 9(12).

¹⁵⁵ Concerns over ease of enforcement were also voiced in Parliament: Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 75 (Dennis Tan Lip Fong).

the HK Ordinance.¹⁵⁶ However, the Hong Kong enforcement agency has the discretion to advise the errant trader to consider providing an undertaking.¹⁵⁷ If the errant trader accepts, the agency's right to commence or continue with investigations or criminal proceedings against the trader in respect of the unfair practice is suspended.¹⁵⁸ The voluntary undertaking typically requires the trader to admit to having perpetrated particular unfair practices, promise not to continue or repeat them, take specific corrective action and acknowledge that the enforcement agency may publish the undertaking to the public,¹⁵⁹ including publication on the agency's public register.¹⁶⁰ Even if accepted, the trader would still be required to cooperate with the agency's inspections at its business premises to ensure adherence.¹⁶¹ Despite these requirements, providing a voluntary undertaking is still far preferable to the alternative of criminal prosecution.

Moreover, the Hong Kong enforcement agency retains the upper hand in obtaining the trader's voluntary compliance. The wording of the Hong Kong provision, compared with Singapore's, indicates as much. Rather than to 'invite'¹⁶² the trader to provide the undertaking, the Hong Kong enforcement agency 'may accept'¹⁶³ the undertaking proffered, and can only accept it with the consent of the Secretary of Justice.¹⁶⁴ In sum, the onus is on the trader to convince the enforcement agency to accept its undertaking.¹⁶⁵ Factors taken into account include the likelihood of compliance by the trader and the willingness of the trader to commit to implementing a compliance programme for its employees.¹⁶⁶ The Hong Kong agency's acceptance can be withdrawn on certain grounds, for example, if the acceptance was wrongfully obtained.¹⁶⁷ If withdrawn, the suspension on investigations or court proceedings would be lifted.¹⁶⁸ These include civil proceedings for an injunction against the trader (which could be initiated as an alternative to accepting the trader's undertaking or upon

¹⁵⁶ See, eg, HK Ordinance s 13E (Misleading Omissions), s 13F (Aggressive Commercial Practices), s 13G (Bait advertising), s 13H (Bait-and-switch), s 13I (Wrongly accepting payment). Penalties on conviction on indictment are a fine of HKD50 000 and imprisonment of 2 years and on summary conviction, a fine at level 6 and imprisonment for 2 years, see Hong Kong Ordinance ss 18(1).

¹⁵⁷ HK Ordinance ss 30L(1)–(2). See also HK Guidelines Part A [14], [18].

¹⁵⁸ HK Ordinance s 30M.

¹⁵⁹ HK Guidelines Part A [14], [19]–[20], Appendix to Part A.

¹⁶⁰ Customs & Excise Department, The Government of the HK SAR, Undertaking Given under the Trade Descriptions Ordinance, <http://www.customs.gov.hk/en/customs_notices/undertake/index.html>.

¹⁶¹ HK Guidelines Part A [23].

¹⁶² See previous CP(FT)A s 8.

¹⁶³ See HK Ordinance s 30L(1).

¹⁶⁴ HK Ordinance s 30L(1).

¹⁶⁵ HK Guidelines Part A [17].

¹⁶⁶ *Ibid* [16].

¹⁶⁷ HK Ordinance s 30N(1)(c)–(d). See HK Ordinance s 30N(1)(a)–(b) for other grounds.

¹⁶⁸ *Ibid* s 30N(3). See also HK Guidelines Part A [25].

a breach of the undertaking)¹⁶⁹ or criminal prosecution.¹⁷⁰ Thus, although the trader is under no compulsion to provide an undertaking,¹⁷¹ there are built-in incentives to provide and adhere to it. The trader would have been advised by the enforcement agency on all the implications of providing an undertaking or not, the possibility of withdrawal of acceptance, and the attendant consequences.¹⁷²

Australia takes a similar approach, but with some interesting differences. Like Hong Kong, certain unfair practices are made criminal offences.¹⁷³ Unlike Hong Kong, the offences do not attract custodial sentences, only significant fines.¹⁷⁴ However, the Australian Compliance and Enforcement Guide ('Australian Guidelines') stresses that civil compliance measures will be the preferred tools of deterrence over criminal prosecution.¹⁷⁵ Unlike Singapore and Hong Kong, civil compliance measures are not limited to the trader's undertaking or an injunction or publicising the same. The ACL provides a range of civil compliance measures of increasing severity,¹⁷⁶ with the trader's written undertaking being among the least severe. A trader that thinks it has committed an unfair practice can offer an undertaking, which the regulator (the ACCC)¹⁷⁷ may, but is not obliged to accept.¹⁷⁸ Once accepted, a breach of any undertaking enables the ACCC to apply to a court for orders against the trader, which include any or all of the orders to comply; pay any financial benefit gained from the breach to the Commonwealth, State or Territory; or compensate any consumer.¹⁷⁹ Unlike Hong Kong, the ACCC does not require admission of the unfair practice in the undertaking, but will reject one where the trader denies

¹⁶⁹ HK Ordinance s 30P(1).

¹⁷⁰ Ibid s 30O.

¹⁷¹ HK Guidelines Part A [17].

¹⁷² Ibid [18].

¹⁷³ See ACL s 151 (False or misleading representations about goods or services), s 152 (False or misleading representations about sale etc. of land), s 153 (Misleading conduct relating to employment), s 154 (Offering rebates, gifts, prizes etc.), s 155 (Misleading conduct as to the nature etc. of goods), s 156 (Misleading conduct as to the nature etc. of services), s 157 (Bait advertising); s 158 (Wrongly accepting payment), s 159 (Misleading representations about certain business activities).

¹⁷⁴ In Australia, penalty on conviction is a fine of AUD1.1 million for a body corporate and AUD220 000 for an individual, see ACL ss 151–9.

¹⁷⁵ Commonwealth of Australia, *Compliance and Enforcement – How Regulators Enforce the Australian Consumer Law* (2010), 11 <http://www.cbs.sa.gov.au/assets/files/compliance_enforcement_guide.pdf>.

¹⁷⁶ These include, but are not limited to, ACL s 218 (court-enforceable undertakings from trader), s 219 (substantiation notices), s 223 (public warning notices), s 224 (civil pecuniary penalties), s 232 (injunctions), s 246 (non-punitive orders), s 247 (adverse publicity orders), s 248 (disqualification orders).

¹⁷⁷ ACL s 2 defines 'regulator' as 'the Commission' where the ACL is applied 'as a law of the Commonwealth'.

¹⁷⁸ ACL s 218(1). See, generally, SG Corones, *The Australian Consumer Law* (Lawbook Co, 2011) 491–2 [13.275]. See also Commonwealth of Australia, *The Australian Consumer Law – A Framework Overview* (July 2013), ('*ACL Overview*'), 7 <http://consumerlaw.gov.au/files/2015/06/ACL_framework_overview.pdf>.

¹⁷⁹ ACL ss 218(3)–(4).

liability.¹⁸⁰ Similarly to Hong Kong, the terms of the undertakings are published in a public register.¹⁸¹

Apart from criminal prosecution, the more severe civil compliance measures also provide incentives for the trader to offer an undertaking. For example, the ACCC can apply to a court for civil pecuniary penalties¹⁸² to be imposed on the errant trader and other parties involved in the unfair practice (which only requires proof of contravention on the balance of probabilities).¹⁸³ The ACCC can also apply to a court for an order to disqualify a person who has committed, attempted to commit or been involved in committing any of the specified unfair practices from managing corporations for a period that the court deems fit.¹⁸⁴ As such, the Australian approach has a greater range of built-in incentives that places the ACCC in a strong position to induce voluntary civil compliance and adherence to undertakings given.

2 *Transparency and Assurance of Balance*

Since the 2016 amendments came into force, the only guidance published by SPRING is a three-page list of Frequently Asked Questions ('FAQs').¹⁸⁵ Brief explanations on the CP(FT)A, its scope, the general definition of 'unfair practice' are set out in the FAQs. Further, SPRING's role as the administering agency tasked to gather evidence against persistent errant retailers, file timely injunction applications and enforce the injunction orders is reiterated. Consumers with complaints are directed to approach CASE, STB or the Small Claims Tribunal ('SCT') rather than SPRING. Although simplicity is not necessarily a bad thing, more guidance and assurance can perhaps be given to businesses (honest or dishonest) and consumers alike on the manner of implementation of the 2016 CP(FT)A. For example, on the timeliness and proportionality in complaints handling and, as mentioned, the manner in which powers of investigation will be wielded.

(a) *Singapore Compared: The Australian and Hong Kong Examples*

In this vein, the enforcement guidelines in Hong Kong and Australia provide greater transparency and assurance of their respective governments' resolve in taking a calibrated approach towards regulation.

¹⁸⁰ Corones, above n 178, 491 [13.275].

¹⁸¹ Ibid 492 [13.275]. See also Australian Competition & Consumer Commission *s 87B Undertakings (Trade Practices Act 1974 & Competition and Consumer Act 2010)* Australian Competition & Consumer Commission Public Registers <<http://registers.accc.gov.au/content/index.phtml/itemId/815599>>.

¹⁸² ACL ss 224(1), (3).

¹⁸³ Commonwealth of Australia (*ACL Overview*), above n 178, 7. See also Corones, above n 178, 468 [13.145].

¹⁸⁴ ACL s 248. See also Corones, above n 178, 488–91 [13.270].

¹⁸⁵ See SPRING, *Frequently Asked Questions on the Consumer Protection (Fair Trading) Act* (15 September 2016) Raising Confidence <https://www.spring.gov.sg/Building-Trust/Raising-Confidence/Documents/FAQs_on_CPFTA.pdf>.

For instance, the HK Guidelines clarify that ‘guiding principles’ underpin enforcement actions. These ‘guiding principles’ include:

- ‘Targeting’: making the best use of resources to protect the interests of consumers and honest traders by setting investigation priorities through a risk-based approach, with particular attention paid ‘to repeated [sic] offenders and contraventions that significantly undermine consumer interests’;¹⁸⁶
- ‘Proportionality’: ensuring that enforcement action is commensurate with the extent of ‘consumer detriment and the harm done to the community at large’;¹⁸⁷
- ‘Consistency’: ensuring ‘consistency ... in determining the most appropriate enforcement actions to be taken in different cases’;¹⁸⁸ and
- ‘Transparency’: to help traders understand what is expected under the HK Ordinance,¹⁸⁹ the guidelines indicate the general circumstances where any one enforcement action will be taken and consequences for non-compliance including specific information on undertakings;¹⁹⁰ injunctions;¹⁹¹ and prosecutions;¹⁹² some of which have been highlighted in the foregoing discussion.

The Australian Guidelines express a commitment to the same principles generally,¹⁹³ and additionally, to balancing ‘confidentiality’ of information acquired during investigations with the need to inform the public; ensuring ‘timeliness’ in complaints handling and enforcement action; ‘accountability’ to the public for enforcement activity; and maintaining an ‘awareness’ of national implications of the enforcement decisions.¹⁹⁴ As mentioned, the Australian Guidelines stress that civil enforcement measures can be applied more broadly than criminal prosecution.¹⁹⁵

3 *Encouraging Reform*

As noted, the orders under the 2016 CP(FT)A for traders to notify potential customers at the store of their injunction status are harsh, and could incentivise the trader to avoid strict compliance. This would reduce their effectiveness as tools to deter much less, encourage reform of a recalcitrant trader. Other options, apart from naming and shaming, should be considered to rehabilitate recalcitrant traders.

¹⁸⁶ HK Guidelines Part A [6], [7]–[11].

¹⁸⁷ Ibid [6], [12]–[13].

¹⁸⁸ Ibid [6].

¹⁸⁹ Ibid.

¹⁹⁰ Ibid [14]–[25].

¹⁹¹ Ibid [26]–[28].

¹⁹² Ibid [29]–[30].

¹⁹³ Australian Guidelines 6–11.

¹⁹⁴ Ibid 9.

¹⁹⁵ Ibid 11.

(a) *Singapore Compared: The Australian and Hong Kong Examples*

In Hong Kong, when the enforcement agency applies for an injunction against the trader, the Court is given the discretion to accept the trader's undertaking not to continue or repeat the unfair practice instead of granting the injunction.¹⁹⁶ If the undertaking is accepted, the Court has the further discretion not to order the trader to publicise it.¹⁹⁷ This adds another layer to the measures in Hong Kong that serve to encourage reform.

In Australia, a court may, on the ACCC's application, make non-punitive orders that require the errant trader to take remedial actions for the benefit of the public or to prevent a repeat of the unfair practices by its employees and others involved in its business. These include:¹⁹⁸

- performing a community service that counters the particular unfair practice the trader had perpetrated, for example, making a trader who falsely advertised to make available a training video which explains advertising obligations under the law, or a trader who engaged in misleading or deceptive conduct to carry out a community awareness programme to alert consumers against such practices; and/or
- during a specified period (not exceeding 3 years):
 - establish a compliance programme for employees and other person involved in the trader's business;
 - establish an education and training programme for them; or
 - revise the trader's internal operations that had led to the unfair practice.

Having a range of civil compliance measures that begins with the VCA and that increase in severity in response to the trader's level of cooperation or contrition, while reserving criminal prosecution for the most egregious of traders could help achieve meaningful deterrence and reform. Coupling this with guidelines on a calibrated approach would signal the Singapore Government's resolve to better balance the interests of consumers and businesses even if they have no binding effect on SPRING. In sum, MTI's 2015 review should have seriously considered some of the highlighted Hong Kong and Australian measures so as to provide for a comprehensive regulatory approach.

V REMEDIES

The 2016 amendments have not done much to improve consumer remedies. Under both the previous and 2016 CP(FT)A, the consumer may lodge a complaint with CASE or STB, which may invite the errant trader to enter

¹⁹⁶ HK Ordinance s 30P(2).

¹⁹⁷ Ibid s 30P(3).

¹⁹⁸ ACL s 246. See also Corones, above n 178, 485–6 [13.245]–[13.250].

into a VCA that, at the consumer's request, could include the trader's undertaking to compensate the consumer.¹⁹⁹ However, if the trader breaches the undertaking, the consumer would have to initiate legal action for 'a civil debt due to the consumer'.²⁰⁰

Alternatively, a consumer could initiate legal action against the trader in the SCT, Magistrate or District Court²⁰¹ directly, without any prior complaint to CASE or STB. However, the consumer would still be in a predicament if the trader fails to comply with the court order or judgment. As stated in Parliament when Singapore's first consumer protection bill was debated²⁰² and which remains true today:

If the merchants do not comply with the order of the [SCT] and refuse to compensate the consumers, keep on delaying payment or even close down their business, these claimants would have a big headache. They will have to apply for a writ of seizure and sale. If the other party has absconded or has deliberately closed down its business, the claimants will have to go through more legal proceedings to enforce the court order. Otherwise they will just have to resign [themselves] to fate and give up their claims. These unscrupulous merchants will just run away scot-free.

Additionally, under both regimes, should an injunction application against the trader be made to court while the consumer action for redress is pending, any party, including the trader, may apply to have the consumer's action stayed pending a determination of the injunction application.²⁰³ The Court could grant a stay if satisfied that the determination of the injunction application will be material to the consumer action.²⁰⁴ This may not work to the advantage of consumers, such as tourists, whose priority is a quick claim for compensation.

As mentioned, the 2016 amendments only introduce one new substantive consumer remedy: a right to cancel contracts where the trader under injunction fails to specifically notify the consumer and obtain acknowledgment in writing of his injunction status prior to contracting.²⁰⁵ The consumer may give notice of cancellation within six months of the date of contracting and render the contract unenforceable.²⁰⁶ Among others, the consumer obtains a right to a refund of any sum paid within 60 days of the notice of cancellation²⁰⁷ and may claim against the trader for

¹⁹⁹ Previous CP(FT)A; 2016 CP(FT)A ss 8(1), (3), (5).

²⁰⁰ Previous CP(FT)A; 2016 CP(FT)A s 8(6).

²⁰¹ Previous CP(FT)A; 2016 CP(FT)A ss 6(1), 7.

²⁰² Singapore, *Parliamentary Debates*, 11 November 2003, vol 76 at col 3444 (Dr Ong Seh Hong).

²⁰³ Previous CP(FT)A; 2016 CP(FT)A s 6(7).

²⁰⁴ Previous CP(FT)A; 2016 CP(FT)A s 6(8).

²⁰⁵ 2016 CP(FT)A ss 9(4)(b), (12).

²⁰⁶ *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009* (Singapore, S65/2009) regs 4A(1), 5(1)(a).

²⁰⁷ *Ibid* reg 5(1)(b).

breach of statutory duty for failure to pay.²⁰⁸ However, this remedy is limited to consumers dealing with a trader under an injunction and a concomitant order to specifically notify.²⁰⁹ Combined with the fact that consumers who cancel contracts still need to initiate actions on their own if unpaid, does not make the cancellation of contracts a significant remedy. Although a new procedural right to rely on evidence disclosed to SPRING during their investigations helps ease consumers' evidentiary burden in their claims for compensation,²¹⁰ the usefulness of this procedural right depends on consumers commencing action in the first place.

A Singapore in Comparison: The Australian and Hong Kong Examples

In contrast, both Hong Kong and Australia provide greater assistance to the aggrieved consumer. In Hong Kong, if a person is convicted of an offence involving certain unfair practices, a court may, in addition to passing a sentence, order the person to pay 'compensation to any person who has suffered financial loss... [that is] recoverable as a civil debt.'²¹¹ In Australia, the ACCC may accept undertakings by the errant trader and for breach of any undertaking, apply to a court for orders which include a requirement to 'compensate any ... person who has suffered loss ... as a result of the breach'.²¹² Where the ACCC applies for an injunction, the court may, in granting the injunction, also require the trader to 'refund money; transfer property; or honour a promise.'²¹³ The ACCC is also expressly empowered to apply to a court for compensation on behalf of victims of unfair practices who have consented in writing to their doing so. Whether the ACCC applies for the imposition of civil pecuniary penalties²¹⁴ or criminal proceedings are commenced against the trader,²¹⁵ the Court may order compensation of 'a person who has suffered loss.'²¹⁶ Further, a court must give preference to ordering compensation over civil pecuniary penalties²¹⁷ or criminal fines²¹⁸ where the trader does not have sufficient financial resources to pay both.²¹⁹ In anticipation of such

²⁰⁸ Ibid reg 5(4).

²⁰⁹ Curiously, the remedy is unavailable to consumers dealing with traders ordered to divulge their injunction status in every invoice or receipt. The reasons behind this are not discussed in this article.

²¹⁰ 2016 CP(FT)A s 12N(2)(b).

²¹¹ HK Ordinance s 18A. This is apart from the consumer's right to pursue civil redress on his own under HK Ordinance s 36.

²¹² ACL ss 218(1), (3), (4)(c).

²¹³ Ibid ss 232(1), (6).

²¹⁴ Ibid ss 224, 227.

²¹⁵ Ibid s 213.

²¹⁶ Ibid s 238.

²¹⁷ Ibid s 227.

²¹⁸ Ibid s 213.

²¹⁹ Ibid ss 237(1)(b) and 239(1) read with s 242.

monetary relief, fines or penalties, an order to freeze the errant trader's assets may be obtained.²²⁰

Singapore could do more for consumers in this respect. Even to empower courts to order compensation for the aggrieved consumers when issuing an injunction against the trader, would save them the time and cost of having to initiate action on their own.²²¹ If compensation orders are available, a Mareva Injunction under the Singapore Rules of Court could be taken out to freeze the trader's assets to prevent the trader dissipating his assets to defeat the order.²²² Consumers would thus be more likely to receive compensation.

VI SUGGESTIONS FOR FURTHER REFORM

In light of the foregoing discussion, further reforms for deterrence, remedies, rehabilitating errant traders, and guidelines are suggested in turn.

A *Deterrence*

While the 2016 revisions to the CP(FT)A have some deterrent effect, most significantly due to SPRING's new investigatory powers, the truly recalcitrant trader remains a concern. Even the prospect of an investigation by SPRING may not be sufficient deterrence. All the trader has to do is comply with SPRING's searches and requests for information, as criminal penalties only come into play if an investigation is obstructed. Indeed, a trader may even consider complying with SPRING's investigations as a mere cost of doing business. The idea of criminalising unfair practices therefore bears revisiting, especially given the Singapore Government's stated objective of resolving potential or actual unfair practices at the 'front end of the spectrum', through measures such as education, negotiation, mediation and VCAs.²²³

The Singapore Government has consistently eschewed making unfair practices criminal offences on the basis that more serious offences related to business dealings were already covered by existing legislation,²²⁴ and

²²⁰ ACCA s 137F. See also *ACCC v Get Qualified Australia Pty Ltd* [2016] FCA 976.

²²¹ See 'Consumers Welcome Proposed Changes to Law against Errant Retailers' *Today* (online), 18 May 2016 <<http://www.todayonline.com/singapore/consumers-welcome-proposed-changes-law-against-errant-retailers>>, where consumers suggested that the authorities be empowered 'to make the errant company compensate or refund their victims' since '[i]f [the authorities] cannot enforce [recourse] ... it all boils down to zero'.

²²² (Singapore, GN No S 71/1996, 2014 rev ed) Order 29 rules (1)–(2).

²²³ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 103 (Minister for MTI Dr Koh Poh Koon), where Dr Koh stated 'I hope that the strengthening of the injunction will move more cases towards the front end of the spectrum — towards education, towards awareness, towards mediation and towards voluntary compliance agreements.'

²²⁴ MTI took this stance when the CP(FT)A was first introduced, see Singapore, *Parliamentary Debates*, 10 November 2003, vol 76 at col 3355 (Mr Raymond Lim Siang Keat). It continued to do so during the 2015 review, see Ministry of Trade and Industry,

that ‘egregious cases [involving] criminal activities’ would be handled by the police.²²⁵ Admittedly, existing Singaporean law already criminalises serious offences such as cheating, criminal intimidation, touting, false labelling and false trade descriptions.²²⁶ However, the police did not, until recently,²²⁷ take serious action against errant traders even when the unfair practice amounted to a crime; the police often classified consumer-trader disputes as civil rather than criminal in nature.²²⁸ Although the trader in the Vietnamese tourist case was ultimately prosecuted, it is fair to surmise that it came about only because of the bad publicity generated internationally that threatened Singapore’s reputation as a ‘shopper’s paradise’.²²⁹ In a number of cases egregious traders have been the ones calling the police when any consumer protested against their unfair practices.²³⁰ Additionally, it is unknown whether any misgivings were expressed at the continued refusal to criminalise unfair practices in the public consultation feedback to the proposed 2016 CP(FT)A amendments. Because a consultation report has not been published,²³¹ consideration of the arguments for and against criminalising is therefore apposite.

Public Consultation on Proposed Amendments to the Consumer Protection (Fair Trading) Act (‘CPFTA’), (7 August 2017)

<<https://www.mti.gov.sg/MTIInsights/Pages/Public-Consultation-on-Proposed-Amendments-to-the-Consumer-Protection-Fair-Trading-Act-CPFTA.aspx>> [2.3.1(f)].

²²⁵ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 68 (Minister for MTI Dr Koh Poh Koon).

²²⁶ See *Penal Code* (Singapore, cap 224, 2008 rev ed); *Miscellaneous Offences (Public Order and Nuisance) Act* (Singapore, cap 184, 1997 rev ed); *Sale of Food Act* (Singapore, cap 283, 2002 rev ed); the *Consumer Protection (Trade Descriptions and Safety Requirements) Act* (Singapore, cap 53, 2013 rev ed).

²²⁷ See ‘Jover Chew and 4 Others Arrested Over Cheating Cases at Sim Lim Square’, *Asiaone* (online), 27 May 2015

<<http://news.asiaone.com/news/singapore/jover-chew-and-4-others-arrested-over-cheating-cases-sim-lim-square>>; Vanessa Paige Chelvan, ‘Mobile Air Owner Jover Chew Sentenced to 33 months’ Jail, Fined’, *Channel News Asia* (online), 30 November 2015 <<http://www.channelnewsasia.com/news/singapore/mobile-air-owner-jover-chew-sentenced-to-33-months-jail-fined-8253178>>.

²²⁸ Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 72 (President of CASE, Lim Biow Chuan).

²²⁹ See ‘Netizens Give Thumbs Down for Police Team that Brought Jover Chew to Justice’, *The Independent* (online), 29 June 2016 <<http://www.theindependent.sg/netizens-give-thumbs-down-for-police-team-that-brought-jover-chew-to-justice/>>.

²³⁰ See, eg, Roland Loh, ‘Victim Opens up on Traumatic Encounter with Jover Chew’, *The New Paper* (online), 1 December 2015 <<http://www.np.sg/news/singapore/victim-opens-traumatic-encounter-jover-chew>>. See also, ‘Sim Lim Square Management Seeks Help in Cracking Down on Errant Retailers’, *Asiaone* (online) 3 November 2014 <<http://www.asiaone.com/singapore/sim-lim-square-management-seeks-help-cracking-down-errant-retailers>> where it was reported that ‘[f]requently, it would be the retailer who calls the police and accuses the aggrieved customer of causing a scene at the shop.’

²³¹ The MTI only issued a press release to announce the ‘favourable’ results of the consultation, see Ministry of Trade and Industry Singapore ‘Public Support for proposed changes to the Consumer Protection (Fair Trading) Act’ (30 June 2016) <<https://www.mti.gov.sg/legislation/Documents/Press%20release%20->

In a 2005–2006 survey on some OECD countries’ consumer protection regimes, certain jurisdictions that have criminalised unfair practices, like Australia and Belgium, recognised that criminal investigations and prosecution are time and resource intensive (since crimes require proof beyond reasonable doubt), and are not practical for ‘rapidly stopping illegal conduct or providing timely consumer redress’.²³² Yet these countries also acknowledge that criminal law plays a role where alternative measures do not provide sufficient deterrence.²³³ This view is shared by academics who identified other possible shortcomings, for example, the enforcement agency’s reluctance to initiate criminal proceedings except in the clearest cases and the courts’ tendency to view ‘consumer offences as lesser crimes with the result that the fines imposed might not be sufficiently heavy and might be treated by traders as a cost of business.’²³⁴ In Singapore, notwithstanding existing offences under the law, a deliberate identification of particular unfair practices as offences could add to the deterrent effect by ‘headlining’ the impugned acts. It is important for another reason — certain instances of unfair practices may not so clearly amount to an existing crime. Examples include bait advertising, hard selling, and circumstances where consumers are made to sign agreements containing onerous terms that are not explained to them, even when they are not familiar with the language.

It is recommended that specific unfair practices be identified as criminal offences under the CP(FT)A. Like Hong Kong, it should at least identify the more common and contumelious practices.²³⁵ Based on the 2016 CP(FT)A’s general definition of unfair practice and the list of specific practices in the Second Schedule, the following could be specifically identified:

- Unconscionable conduct;²³⁶
- Wrongly accepting payment;²³⁷
- Bait and switch;²³⁸

[%20Public%20support%20for%20proposed%20changes%20to%20the%20Consumer%20Protection%20\(Fair%20Trading\)%20Act%20\(30June2016\).pdf>](#).

²³² Michael Faure, Anthony Ogus and Niels Philipsen, ‘Enforcement Practices for Breaches of Consumer Protection Legislation’ (2008) 20 *Loyola Consumer Law Review* 361, 386–7. See also Australian Competition & Consumer Commission, Submission No 80 to the Productivity Commission, *2008 Review of Australia’s Consumer Policy Framework*, June 2007, 93–4.

²³³ See Faure, Ogus and Philipsen, above n 232, 389.

²³⁴ Stefan Lo, ‘Limitations in the Regulation of Unfair Marketing Practices in Hong Kong’ (2008) 7 *Journal of International Business and Law* 77, 110 nn 204–7 therein and accompanying text.

²³⁵ Hong Kong, *Official Record of Proceedings*, Legislative Council, 29 February 2012, at 6474–8.

²³⁶ Covering, for example, situations envisaged under 2016 CP(FT)A s 4(c), Second Schedule, cls 11, 20.

²³⁷ *Ibid.*, Second Schedule, cl 21.

²³⁸ *Ibid.*, cls 17, 19A.

- Bait advertising,²³⁹
- Unsolicited consumer agreements,²⁴⁰
- Deceptive and misleading omissions²⁴¹ or representations as to any material aspect of the goods or services or the relevant transaction,²⁴² and
- Aggressive commercial practices.²⁴³

Notably, most, if not all, of the above comprise conduct criminalised under the Hong Kong or Australian regimes.²⁴⁴ It is further recommended that the Singapore Government impose imprisonment (apart from fines) as a possible sanction, like Hong Kong does, for the greater deterrent potential. Significantly, although Australia currently does not impose custodial sentences, the recent 2017 Australian Consumer Law Review noted that there could be circumstances where such sentences were appropriate and that the relevant consumer affairs agencies would monitor if a change in this direction was justified.²⁴⁵

Even so, criminal prosecution should be reserved for the most blatant and egregious. Importantly, to meet the practical concerns for a ‘rapid stop to the illegal conduct’, civil pecuniary penalties should be considered as an alternative to criminal prosecution. Indeed, in Australia, the limits of criminal prosecution paved the way for the introduction of civil pecuniary penalties (to strip the trader of the profits of his illegal conduct) during the 2008 review of the Australian Consumer Policy Framework.²⁴⁶ Requiring proof on a balance of probabilities rather than beyond reasonable doubt, it allows for relatively quicker action against errant traders and has equal deterrent force.²⁴⁷

Thus, the authors further recommend that civil pecuniary penalties be made available in respect of the same specific unfair practices to be identified under the CP(FT)A, as an alternative to criminal prosecution. SPRING should be empowered to refer the matter to court for civil pecuniary penalties to be imposed instead of referring the matter to the police in cases where a quick stop to the unfair practice is needed and a strong deterrent signal sent. For even stronger deterrence, civil pecuniary penalties could be coupled with

²³⁹ Ibid, cl 18.

²⁴⁰ Ibid, cls 22–3.

²⁴¹ Ibid, cl 20.

²⁴² Ibid, cls 1–8, 9–10, 13–16, 19, 20.

²⁴³ Ibid, cl 12.

²⁴⁴ See HK Ordinance ss 13E–13I, 18(1) and ACL ss 151–9 for unfair practices that are criminal offences under the Hong Kong and Australian regimes respectively.

²⁴⁵ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review — Final Report* (2017) (‘2017 ACL Review’) Australian Consumer Law, 91–2 [3.2.3] <https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf>.

²⁴⁶ Productivity Commission, *Review of Australia’s Consumer Policy Framework, Final Report* (2008), 235–9, 251 (Recommendation 10.1) <<http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>>.

²⁴⁷ Corones, above n 178, 468–9 [13.145].

court orders to disqualify incorrigible traders or complicit individuals from managing corporations for a given period.²⁴⁸ These civil options should provide the necessary incentive for errant traders to enter into VCAs and abide by their terms. Indeed, the upper limit of the monetary penalties, whether criminal fines or civil pecuniary penalties, must be set high enough so that ‘a trader, acting rationally and in its own best interest, would not be prepared to treat the risk of such a penalty as a business cost’.²⁴⁹

B Remedies

Criminalising certain unfair practices or making perpetrators liable to civil pecuniary penalties and/or disqualification orders could deter future misdeeds and result in reduced consumer complaints. As mentioned, the prospect of punitive action by SPRING could steer traders who have misbehaved towards entering into VCAs and abiding by their terms that could include undertakings to compensate the victims. Upon breach of the VCA, enabling SPRING to apply for a court order for the trader’s compliance with the VCA’s terms would help the victim recover compensation. Even where the trader refuses to enter into a VCA, rather than to leave victimised consumers to pursue private action against the trader on their own, it would help to make court orders for consumer compensation available when injunctions or civil pecuniary penalties are ordered at SPRING’s application, or when passing sentence for a crime. Like Australia, identified victims should be required to consent to SPRING acting on their behalf. In addition, the court should give priority to consumer compensation over civil pecuniary penalties or criminal fines if the trader is unable to afford both in the particular case. This would go some way towards ensuring meaningful consumer remedies.

C Encouraging Rehabilitation of Errant Traders

The authors also recommend implementing measures aimed at encouraging the ‘rehabilitation’ of errant traders, and which would ideally have the bonus of reducing the number of instances in which the more punitive measures will be required. One suggestion might be for the VCA to incorporate the trader’s undertaking to take corrective action, including to implement a compliance program to prevent a repeat of the unfair practices by its employees and others involved in its business. The VCAs entered into should also be made available to the public in a website for transparency and to discourage others from unfair practices. This would be akin to the current practice in Hong Kong and Australia.

A possible problem is that while traders provide undertakings to the respective regulators in Hong Kong and Australia, in Singapore, CASE

²⁴⁸ See ACL s 248; *ibid* 488–91 [13.270] highlighting disqualification orders under the Australian regime.

²⁴⁹ This consideration undergirded a recommendation to increase the quantum of pecuniary penalties under the ACL, see *2017 ACL Review*, above n 245, 88 [3.2.2].

(and not SPRING) is the counter-party to the VCAs. As a non-profit, non-governmental organisation,²⁵⁰ CASE is likely to face funding difficulties in monitoring traders for compliance with such undertakings. The best scenario would perhaps be to have SPRING as the counter-party to the VCAs. However, since CASE has historically borne this task, the arrangement is unlikely to change.

A workable alternative is to empower the court to make the orders at SPRING's application. SPRING would then be the agency tasked with monitoring compliance, which coheres with its existing role. The range of court orders SPRING could apply for should be widened to include any or a combination of the following as is appropriate and proportionate to deal with the case at hand:

- non-punitive orders to implement a compliance program or perform community service to counter the unfair practice committed, at the trader's expense;²⁵¹
- injunction orders against the trader and complicit individuals;
- where a VCA exists, an order to comply with its terms;
- orders for consumer compensation; and
- orders publicising the injunction status of the trader and complicit individuals, at their personal expense.

It is suggested that the orders to publicise be made against the trader and/or complicit individuals under injunction only if there is an urgent need to protect other consumers from becoming victimised. These may be general or targeted as is appropriate. However, the authors recommend a reconsideration of the particular forms of targeted publicity orders introduced by the 2016 amendments because of the unintended problems they could potentially create.²⁵²

Breach of these orders will expose the parties to contempt proceedings. Where attempts at rehabilitation appear futile, SPRING should be allowed to pursue more punitive options such as disqualification orders, civil pecuniary penalties or referring the matter for criminal prosecution. Ultimately, an assessment has to be made of the trader's level of cooperation or contrition in deciding on the appropriate course of action.

²⁵⁰ See Consumers Association of Singapore, *Introduction*, <<https://www.case.org.sg/aboutus.aspx>>.

²⁵¹ In the *2017 ACL Review*, above n 245, 90-1 [3.2.2], Proposal 19 recommends that the ACCC be empowered to nominate a third party to give effect to the community service order in cases where the trader is not trusted or not qualified to carry out the order. Singapore should consider this too if the recommendation is accepted.

²⁵² See the discussion in Part IVC1 above.

D Guidelines

As already discussed, published guidelines for how SPRING would implement the above measures, including the use of its new powers of investigation, would reassure consumers and honest traders alike. Such guidelines should make clear that there are a series of escalating measures which SPRING can impose for commission of unfair practices, the most onerous of which would only be imposed on egregious traders.

VII CONCLUSION

The Singapore Government has often cautioned that a careful balance must be struck between the needs of consumers and businesses, and that legislation that imposes too onerous a burden on businesses is undesirable as the costs could be passed on to consumers.²⁵³ Although greater costs do indeed accompany greater regulation, one should also ask if the higher costs are justified by the need for more robust consumer protection. Indeed, one wonders if the 2016 regime would make much difference to the Vietnamese tourist mentioned at the beginning, since he would still not be able to obtain full compensation under the 2016 regime.

Thus, while the authors agree that the 2016 introduction of investigatory powers, enhancements to court powers, and remedies have added to the consumer protection regime in Singapore, the regime remains inadequate. More can be done to provide a more robust and comprehensive regime. In this regard, Singapore can learn from the Hong Kong and Australian experiences. In particular, certain unfair practices should be criminalised with custodial sentences as a possible sanction, in addition to fines. As an alternative, civil pecuniary penalties, which could be coupled with orders disqualifying errant parties from managing corporations, should be made available. To encourage reform, SPRING should be empowered to apply for a greater range of court orders, which should include orders for the trader to take remedial action to counter the unfair practice committed. Meaningful consumer remedies could be achieved if the courts are empowered to order compensation for aggrieved consumers when imposing injunctions, civil pecuniary penalties or sentences. Finally, published guidelines could clarify the Singapore Government's approach to consumer protection regulation.

²⁵³ See, eg, Singapore, *Parliamentary Debates*, 10 November 2003, vol 76 at col 3355 (then Minister for MTI Mr Raymond Lim Siang) then Minister for MTI Mr Raymond Lim Siang Keat said: 'we do not want to over-regulate and add to business costs'; Singapore, *Parliamentary Debates*, 13 September 2016, vol 94 at 68 (Minister for MTI Dr Koh Poh Koon), current Minister for MTI Dr Koh Poh Koon stated: 'We are conscious of the need to take a balanced approach, as overly onerous measures can impose unnecessary business costs which would ultimately be passed on to customers.'