

**FINAL DECISION  
OF THE COMMUNICATIONS AUTHORITY**

**ALLEGED MISLEADING OR DECEPTIVE REPRESENTATIONS  
BY WHARF T&T LIMITED  
IN RELATION TO THE PROMOTION OF  
THE DEDICATED INTERNET ACCESS SERVICE**

<b>Licensee Concerned:</b>	Wharf T&T Limited (“WTT”)
<b>Issue:</b>	The representations made by WTT’s salespersons about the transmission speed of WTT’s Dedicated Internet Access Service (“DIA Service”) and the customer’s right of early cancellation of the contracts on an unconditional basis were alleged to be misleading or deceptive
<b>Relevant Instruments:</b>	Section 7M of the Telecommunications Ordinance (“TO”) (Cap. 106)
<b>Decision:</b>	Breach of section 7M of the TO
<b>Sanction:</b>	Financial penalty
<b>Case Reference:</b>	7M/2/1-12

**THE COMPLAINT**

In September 2009, the former Office of the Telecommunications Authority (“OFTA”) received a complaint from a customer of WTT who had subscribed to the DIA Service, a business broadband service offered by WTT. The complainant alleged that WTT had failed to deliver the DIA Service as promised and sought OFTA’s assistance to cancel the contracts he had signed with WTT without penalty.

2. The complaint was initially processed by the former OFTA as a contractual dispute between the complainant and WTT. However, as matter progressed, it transpired that the complaint involved allegations that WTT's salespersons had made misleading or deceptive representations to the complainant in relation to:

- (a) the transmission speed of the DIA Service, in that the speed provided by WTT was 10 Megabits ("10M") per second<sup>1</sup>, but not 10 Megabytes<sup>2</sup> ("10MB") per second alleged to be offered by WTT's salespersons (emphasis added); and
- (b) the complainant's right of early cancellation of the contracts on an unconditional basis, alleged to be offered by WTT's salespersons if he was dissatisfied with the DIA Service, which WTT did not recognise.

## **THE INITIAL ENQUIRY**

### **The Complainant's Statement**

3. According to the complainant's statement provided to the former OFTA in June 2010, he owned a business providing network computer game services (generally known as "cybercafé") at three locations ("Shop 1", "Shop 2" and "Shop 3") in Yuen Long. Between February and March of 2009, the complainant received a call from a WTT salesperson ("Salesperson A") who had had business dealings with the complainant before when she was working elsewhere selling computer hardware. In the telephone conversation, she told the complainant that she had joined WTT and asked the complainant if he was interested in WTT's services. As the complainant's then contract with another

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<sup>1</sup> "Megabit per second" or "Mbps" is a measurement of network transmission speed of how many millions of bits of data or information are transmitted in one second. Sometimes when promoting or describing the transmission speeds of their broadband services, broadband services providers use "M" to denote "megabit per second" or "Mbps".

<sup>2</sup> A byte is eight bits. One megabyte is thus eight megabits.

broadband service provider would expire some time in March 2009, he agreed to discuss further with Salesperson A on what she had to offer.

4. Two days after the telephone conversation, the complainant met Salesperson A and her supervisor (“Salesperson B”) at Shop 2 (the “First Meeting”). Salesperson B promoted a “10Meg” broadband service of WTT to the complainant. The wording used in the complainant’s statement was “我記得當時 [Salesperson B] 同我講話佢哋公司有 10Meg 寬頻想介紹俾我”. The complainant at first was not too interested, telling Salesperson B, that his then service provider was also providing “10Meg” service. In response, Salesperson B told the complainant that WTT’s broadband service was different. It was much faster [than others’ services] (the exact wording in the complainant’s statement is “跟住 [Salesperson B] 話：「我哋寬頻係唔同啲，快好多㗎。」”). The complainant asked in what way WTT’s service was much faster. Salesperson B explained that WTT’s broadband used “Mega Byte” as the measurement unit whilst others used “Mega bit” (the exact wording in the complainant’s statement is “[Salesperson B] 話：「我哋嘅寬頻係用 Mega Byte 做單位，人地嘅係用 Mega bit。」”). The complainant indicated to Salesperson B that he was concerned about the quality of the service as he had only heard about people subscribing to WTT’s telephone service but not its broadband service. The complainant requested Salesperson B to have the claimed transmission speed clearly stated in the contracts.

5. In response to the complainant’s concern over the quality of service that was on offer, Salesperson B assured the complainant that the service could be installed at one of his three shops first. Salesperson B would personally follow up on the testing of the service. In case the complainant was dissatisfied with the service after testing, he could cancel the installations at the other two shops (the exact wording in the complainant’s statement is “[Salesperson B] 就話：「唔駛驚，到時我會親自落嚟同你試。你裝咗一條先，如果 test 嗰陣有啲咩唔滿意，你都可以 cut 咗另外嗰兩個 site 既安裝。」”). Salesperson A also added that after service installation, the complainant would be given time to test the service, during which no service charge would be imposed. In the light of the salespersons’ representations, the complainant agreed to subscribe to the DIA Service, and asked the salespersons

to prepare three contracts. The complainant indicated that he would like to have the DIA Service installed at Shop 1 first.

6. After the First Meeting, the complainant had several telephone conversations with Salesperson A to discuss the details of the contracts and service installations. Eventually, Salesperson A told the complainant that the contracts were ready and would like to meet him again.

7. The complainant met Salesperson A on 5 March 2009 at Shop 2 (the “Second Meeting”). Salesperson A brought with her two sets of three printed order confirmations (deemed as the “contracts” between the complainant and WTT), one for each of Shop 1, Shop 2 and Shop 3. The complainant discussed and agreed with Salesperson A that the installation dates should be 6 May 2009 for Shop 1, and 6 June 2009 for Shop 2 and Shop 3 respectively. The complainant noticed that the service was described as “*10MB/10MB Dedicated Internet Access (DIA) Service*” on the contracts, as against “10M/10M” which was more commonly used. The complainant said that according to his knowledge in the computer industry, the alphabet “B” in capital letter in “10MB” meant “Byte”. In the light of this, as well as Salesperson B’s earlier claim [at the First Meeting], the complainant believed that WTT would be providing a broadband service of “10 Mega Byte[s] per second” to him.

8. The complainant remembered that before signing the contracts, he had asked Salesperson A whether the DIA Service was indeed much faster [than others’ services]. Salesperson A said she was not that familiar with this, but she believed it was the case as her supervisor Salesperson B had said so (the exact wording in the complainant’s statement is “我仲有問過佢：「DIA 係咪真係快好多？」佢就答話佢未係咁熟，佢上司話係，佢就信係...”).

9. As regards the service installations, the complainant recalled that Salesperson A had said to him that if the complainant was not satisfied with the DIA Service after installation at Shop 1, he could cancel the service installations at the other two shops on an unconditional basis. Salesperson A said that for the contracts for Shop 2 and Shop 3, the installation date would be

stated to be one month after the installation at Shop 1, so that the complainant could test the service at Shop 1 until he was satisfied with it, before the service was to be installed at the other two shops. Salesperson A further said that there was a remark marked on both the contracts for Shop 2 and Shop 3 that if the complainant was not satisfied with the service, he could cancel the orders. The following is quoted from the complainant's statement:

“我記得佢話過：「裝完[Shop 1]嗰個如果唔滿意，可以無條件取消另外兩間既安裝。」佢又講：「[Shop 1]呢張就裝先嘅，另外嗰兩間如果 OK 嘅話先再裝，即係遲一個月，我呢度寫遲一個月。到你嗰邊試好嘞，冇問題嘞，咁我哋再裝嗰兩間。」我記得我當時表示我仍然擔心佢公司既服務質素，佢當時說：「唔駛擔心，裝咗一間，睇定啲，OK 晒，冇問題，試過嘞，另外嗰兩間就再裝嘞。」[Salesperson A]又提過因為等我試好[Shop 1]嗰度，試過冇問題後，才裝埋其他兩間鋪，所以有個 Remark 嘅[Shop 2]及[Shop 3]既合約上，如果我到時唔滿意，就可以取消埋呢兩張 order 。”

10. The complainant noticed that on both sets of the contracts for Shop 2 and Shop 3, there was a printed remark which is quoted below:

*“REMARK: THIS ORDER CAN BE CANCEL IF [the complainant's company] DO NOT SATISFY THE FIRST ORDER OF DIA SERVICE PROVIDED BY WHARF. (“Cancellation Clause”)*”

11. The complainant then signed and affixed the company chop on one set of the contracts which were taken away by Salesperson A. The complainant was given the duplicate set of the contracts for retention.

12. According to the complainant, service installations were delayed and it was not until June 2009 that service was installed for all three shops, and within a span of a few days. The complainant was at Shop 2 when a WTT's technician conducted the testing on 17 June 2009. The complainant noted that the broadband speed was only just over 1 “Mega Bytes [sic] per second”. The

complainant asked the technician why this was the case. The technician said that the speed that was provided was “10 Mega bits per second”. If the complainant had any issue with it, he should contact the salesperson (the exact wording in the complainant’s statement is “我當時發覺寬頻速度只得一點幾 *Mega Bytes per second*，我當時問個師傅點解只得一點幾 *Mega Bytes per second*，個師傅話：「做夠俾你，係得 10 *Mega bits per second*，有問題就問個 *sales* 啦！」”). The complainant then demanded and obtained from WTT the service test reports and noted that the broadband speed of the service for all three shops was just over 1 “Mega Bytes [sic] per second”. The complainant called Salesperson A and asked why it [i.e. the transmission speed] was not “10 Mega Bytes per second”. Salesperson A promised to follow up on the transmission speed as well as other installation issues for him. The complainant subsequently had further telephone conversations with Salesperson A and one telephone conversation with Salesperson B to follow up the matter.

13. Sometime in mid-August 2009, Salesperson A called the complainant informing him that both she and Salesperson B would leave WTT’s employ on 1 September 2009. The complainant asked Salesperson A to resolve the service installation issues for him as soon as possible but Salesperson A replied that it would be impossible for her to meet his request. The complainant alleged that, throughout the period between the completion of service testing at the three shops and the departure of Salespersons A and B from WTT’s employ, he had made repeated enquiries with Salespersons A and B on the progress of service installations. All along they had told the complainant that the speed of the service was “10 Mega Bytes per second”.

14. On 18 August 2009, Salesperson A brought Salesperson C with her to meet the complainant at Shop 2 (the “Third Meeting”). Salesperson A told the complainant that the installation work would be handed over to Salesperson C. The complainant requested Salesperson C to follow up on the outstanding items including the provision of “10 Mega Bytes per second” of

bandwidth<sup>3</sup>. The complainant told Salesperson C that WTT had only provided very little bandwidth to him and it was particularly slow when downloading files from overseas websites. Salesperson C explained to the complainant that the speed problem was due to the fact that the overseas bandwidth for his DIA Service was only “2M”, and suggested to him that he could have faster service by combining the “8 Meg Local Bandwidth” with the “2 Meg International Bandwidth”. In order to do that, the complainant had to sign a new contract. Salesperson C also promised to send the old contracts to him for reference.

15. On 25 August 2009, the complainant received via email from Salesperson C a set of new contracts and copies of the old contracts. The complainant noticed that in the set of new contracts, the service description had become “10M DIA Bandwidth” without the alphabet “B” which the complainant understood to represent the word “Byte”. The complainant claimed that at the time he had paid no particular attention to the copies of the old contracts which he had also received from Salesperson C, and therefore did not notice that the Cancellation Clause was missing from the old contract copies. Copies of both the sets of new contracts and old contracts the complainant had received from Salesperson C were attached to the complainant’s statement.

16. On 27 August 2009 the complainant had a meeting with Salesperson C and his supervisor Salesperson D in a restaurant near Shop 2 (the “Fourth Meeting”), during which the complainant asked why the service offered by WTT in the new contracts was “10M” with the capital letter “B” missing. The complainant said this would mean that the speed would be measured by “Mega Bit”. In response Salesperson C said to the complainant that the transmission speed had been changed to “Mega Bit”. The complainant then answered that the speed would then be very different from “Mega Byte” as stated in the old contracts (the exact wording in the complainant’s statement was “我當時向他們說：「如果你而家 sale 我既係 10M，你有咗個大 B，咁係咪即話俾我聽係 Mega Bit 嚟啦！」 [Salesperson C] 就答我話：「係！

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<sup>3</sup> “Bandwidth” describes the maximum data transfer rate of a network or Internet connection. It measures how much data can be sent over a specific connection in a given amount of time. The bandwidth of an Internet access service is the transmission speed of the service.

轉咗 *Mega Bit*。」咁我就話：「*Mega Bit*？我之前份合約係 *Mega Byte*，咁咪差好遠...」”。 In the end the complainant refused to sign the new contracts.

17. Between end August to October 2009, the complainant made enquiries with Salesperson C and Salesperson D via email or telephone on when WTT was able to provide the speed of “10 Mega Bytes per second” to him, but to no avail.

18. On about 20 October 2009, the complainant received WTT’s invoices requesting payment of the monthly service fees for the DIA Service. The complainant refused to settle the payment as WTT had, among other things, failed to deliver the transmission speed of “10 Mega Bytes per second” to him.

19. On 30 December 2009, relying on the Cancellation Clause, the complainant sent an email to WTT requesting to cancel subscriptions of the DIA Service unconditionally, attaching copies of the set of [old] contracts that he had retained for reference. In response WTT cancelled the complainant’s subscriptions, but demanded the complainant to pay penalty charge for early termination. The complainant said that only at that time did he review the [old] contract copies which Salesperson C had sent to him on 25 August 2009 and find that the Cancellation Clause was missing from those copies. The complainant suspected that the contracts had been tampered with.

20. The complainant then telephoned Salesperson A [who by then had left WTT’s employ] about the missing Cancellation Clause. Salesperson A told the complainant that the contracts with the Cancellation Clause had not been approved by WTT and the complainant had subsequently signed another set of contracts. The complainant told Salesperson A that he had signed only one set of contracts but he saw no point in continuing the argument with her.

### **WTT’s Comments on the Complainant’s Allegations**

21. The former OFTA wrote to WTT on 21 July 2010 attaching a copy of the complainant’s statement and inviting WTT to comment on the



complainant's allegations. WTT replied on 4 August 2010 advising the former OFTA that it had instituted legal proceedings in February 2010 against the complainant for his refusal to settle WTT's invoices. The parties were then at the stage of mediation and trial preparation. WTT claimed that in the circumstances it was not in a position to comment on the complainant's allegations.

## THE INVESTIGATION

22. In the light of WTT's refusal to comment on the complainant's allegations, the former OFTA proceeded to conduct an initial assessment of the case based on the available information, including the complainant's statement and documents provided by the complainant.

23. According to the complainant, in promoting the DIA Service to him, Salesperson B had expressly represented to him that the transmission speed of the service would be "10 Megabytes [per second]". This was supported by both the complainant's version and WTT's version<sup>4</sup> of the contracts, in which the DIA service was described as "*10MB/10MB Dedicated Internet Access (DIA) Service*". The reference to "MB" with the alphabet "B" in capital letter was generally used within the industry to refer to "megabyte"<sup>5</sup>. However, WTT failed to provide a broadband speed of "10 Megabytes per second" to the complainant. Further, according to the complainant, Salesperson C had told him that the transmission speed unit had been changed to "Mega Bit" and urged him to accept this by signing a new set of contracts which described the service as "*10M DIA Bandwidth*". The reference to "M" was generally understood within the industry to mean "megabit"<sup>6</sup>.

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<sup>4</sup> Copies of WTT's version of service contracts were provided by Salesperson C to the complainant by email on 25 August 2009 (see paragraph 15).

<sup>5</sup> "Megabyte" means a million "bytes" of data and a "byte" equals 8 bits of data.

<sup>6</sup> "Megabit" means a million bits of data, which is one eighth of "megabyte".

24. The complainant also alleged that both Salesperson A and Salesperson B had represented to him that if he was not satisfied with the service installed at Shop 1, he would be entitled to cancel the two orders at Shop 2 and Shop 3 on an unconditional basis. The complainant's claim was supported by the version of the contracts retained by him, in that the Cancellation Clause was printed on the contracts for Shop 2 and Shop 3. However, this Cancellation Clause was not recognised by WTT. Further, in WTT's version of the contracts, the Cancellation Clause was found missing in the contracts for Shop 2 and Shop 3.

25. Having considered the information available, the former Telecommunications Authority ("TA") considered that there were reasonable grounds for him to suspect that WTT had engaged in misleading or deceptive conduct in breach of section 7M of the TO. Section 7M provides that:

*A licensee shall not engage in conduct which, in the opinion of the Authority, is misleading or deceptive in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service.*

26. On 27 September 2010, the former OFTA commenced an investigation into the complaint. WTT was invited to make representations on the complainant's allegations. WTT was also required to produce the original set of contracts which had been signed by the complainant and retained by WTT.

27. On 8 October 2010, WTT, through its solicitors, requested the former TA to stay the section 7M investigation pending the outcome of the civil proceedings between WTT and the complainant. Having considered the grounds submitted by WTT's solicitors, the former TA declined the request and informed WTT's solicitors of his decision on 30 November 2010. WTT was given an extension of time to make representations and produce the original set of contracts.

## **WTT's Representations on 21 December 2010 and 7 April 2011**

28. WTT submitted its representations and supporting documents on 21 December 2010. At the former OFTA's request, WTT provided further information on 7 April 2011.

### *Description of the speed of broadband services*

29. WTT referred to the complainant's allegation that he had subscribed to a "10 Megabyte[s]" DIA Service from WTT, which would equate to 80M or 80 Mbps or 80 Megabits per second. WTT stated that in the industry, bandwidths and speeds were invariably expressed in terms of bits per second (bps), Kilobits per second (Kbps), Megabits per second (Mbps or M), or Gigabits per second (Gbps). WTT did not market or provide Internet access services with speeds measured or promoted in terms of "Megabytes", which WTT described as "*a unit of data transfer to and from a computer storage device. The term refers to capacity*". WTT was not aware of any service providers in Hong Kong or elsewhere offering Internet access services with speeds measured in terms of Megabytes. WTT provided copies of the order forms, marketing and/or promotion materials of a number of broadband service providers in Hong Kong, as well as copies of its own printed and presentation materials, to show that it was the practice not only for WTT but for the industry to describe the speed of the services in terms of M, Mbps or Kbps.

### *The meaning of "MB" on the contracts*

30. WTT advised that the complainant subscribed to WTT's DIA Service for Shop 1, Shop 2 and Shop 3 on 5 March 2009 under three separate contracts.

31. WTT advised that, on each of the contracts, the service was described as "*10MB/10MB Dedicated Internet Access (DIA), 8M x local; 2M x International*". It submitted that, such description of the service might give an impression on first reading that "10MB" referred to either "Megabits per second" or "Megabyte[s] per second" and as such, might create a degree of confusion.

However, the meaning of “10MB” should become clearer when one took into consideration the context of the DIA Service for broadband connectivity and the further breakdown and reference to “8M x local; 2M x international”. “10MB” should be interpreted as transmission speed as, by structure and wording, “10MB/10MB” referred to the “upstream and downstream [transmission]”. Irrespective of the abbreviation used (“MB”, “Mb”, “M”, or “Mbps”), WTT argued that “10MB” clearly meant “10 Megabit[s] per second”. The reference to “8M x local; 2M x international” further described how the “10MB/10MB” would be allocated between local and overseas connectivity i.e. “8 Megabit[s] per second” for local and “2 Megabit[s] per second” for international. Taking all these into account, WTT argued that it should become clear that the DIA Service was intended to have a speed of “10 Megabit[s] per second”.

32. WTT submitted that the project manager in WTT responsible “*for fulfilling the Contracts*”<sup>7</sup> had subsequently sent an email to the complainant on 12 March 2009 confirming the scope of the DIA Service to be “10M”. WTT claimed that the complainant did not dispute the scope. WTT further referred to the complainant’s original complaint, which was referred by the former OFTA to WTT in September 2009, in which it was stated, “*We have signed contract with Wharf T&T for 2 x 10M DIA (Dedicated Internet Access) service in Mar 2009 for 3 of our Game Centers located in Yuen Long*” [Emphasis by WTT]. WTT argued that the complainant himself had also acknowledged that the DIA Service he had subscribed to was “10M”.

33. At most, WTT submitted, the “10MB/10MB” stated in the contracts was a clerical error resulting from an oversight or omission in writing, and did not amount to a misstatement or misrepresentation.

#### *The complainant’s industry knowledge*

34. WTT submitted that the complainant was manifestly very experienced in the broadband field. At the time, he had established three

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<sup>7</sup> Direct quote from WTT’s wording in its letter to the former OFTA dated 21 December 2010.

cybercafés which had provided Internet game services for five years<sup>8</sup>. He had used broadband services provided by other telecommunications operators and had involved himself in his company's daily broadband management. WTT referred to the complainant's statement, and pointed to the complainant's citing of the speed of services provided by the other service providers in terms of bits or megabits per second. WTT commented that the complainant demonstrated a degree of sophistication in expressing telecommunications-related terminologies and technical concepts. He should therefore well understand the industry norm of expressions for broadband services. It was hard to believe that the complainant would wrongly interpret that the speed of the DIA Service would be measured in terms of "Megabyte per second".

35. WTT said that the statement of the complainant had revealed that he was an "educated and price-sensitive businessman". He would be fully aware that a broadband service with a connectivity of 80M, which was the equivalent of "10MB" in the complainant's interpretation, would have justified a monthly service fee far in excess of the \$4,500 quoted by WTT.

*Alleged representations by Salesperson B on the speed of the DIA Service*

36. WTT advised that Salesperson A and Salesperson B left employment with WTT on 31 August 2009 and 28 August 2009 respectively. They left before the complaint came to the attention of WTT's management.

37. In relation to the alleged representations made by Salesperson B to the complainant, that the speed of the DIA Service would be 10 Megabytes per second, WTT was unable to take a statement from Salesperson B, but considered that it was most unlikely that Salesperson B would have made such a statement for the following reasons:

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<sup>8</sup> The complainant said in his statement provided to the former OFTA in June 2010 that he had established his company which provided network computer game services for about five years. He personally followed up the broadband service subscriptions for his shops and mentioned in his statement the names of the broadband services providers which provided broadband services to his shops.

- Salesperson B was an experienced employee of WTT at the time;
- Salesperson B would have been well aware that the industry practice was invariably to quote bandwidth or speed in [Mega]bits per second, not Megabytes per second;
- WTT did not market its broadband services with speed denominated in “Megabyte”;
- WTT did not offer a 10 Megabytes per second, or 80 Megabits per second, service at the relevant time; and
- making such a statement in the circumstances could only lead to trouble for WTT and Salesperson B himself.

38. WTT suggested that this was not a misleading or deceptive conduct case at all but a private contractual dispute concerning the proper construction of a contract term i.e. the meaning of “10MB/10MB”. A more likely explanation was that the complainant was seeking to exploit the “MB” notation in the contracts after the event and had attributed the relevant pre-contractual statement to Salesperson B to support his case.

#### *The Cancellation Clause*

39. As regards the complainant’s claim that the contracts for Shop 2 and Shop 3 contained the Cancellation Clause, WTT advised that it only had copies (but not originals) of the contracts signed by the complainant, which were without the Cancellation Clause. The copies of contracts retained by WTT were provided to the former OFTA for reference. WTT advised that it was unable to locate the originals of the contracts despite extensive internal search. WTT explained that it accepted faxed in copies or emailed copies of orders or contracts and as such it might not have the originals of the service orders or contracts.

40. WTT referred to the complainant’s own statement in which the complainant stated that he had subsequently made enquiries with Salesperson A about the missing Cancellation Clause. According to the complainant, Salesperson A had told him that the contracts with the Cancellation Clause had

not been approved by WTT and the complainant had subsequently signed another set of contracts without the Cancellation Clause<sup>9</sup>. By referring to this part of the complainant's statement, WTT said that Salesperson A's reply suggested that the complainant was aware of the deletion of the Cancellation Clause before execution of the contracts. The Cancellation Clause would not be accepted by WTT as was communicated by Salesperson A to the complainant.

41. In any case, WTT advised that it had never been presented with any orders containing the Cancellation Clause for processing or acceptance. Its representations in paragraph 40 above were simply meant to suggest that if the conversation between the complainant and Salesperson A had taken place in the manner as claimed by the complainant in his statement, then logically it should imply that the complainant was aware of the deletion of the Cancellation Clause before the execution of the contracts.

42. WTT further submitted that if the complainant was certain that he had only signed one set of contracts and that set of contracts contained the Cancellation Clause, then this would be a case against the individual salesperson which should be reported to the police for fraud or obtaining property by deception.

*Statements by WTT's Staff*

43. As Salesperson A and Salesperson B had left employment with WTT before this case was brought to the attention of WTT's management, WTT was only able to provide to the former OFTA statements made by its other staff who had been involved in dealing with this case, namely:

- Salesperson C;
- Salesperson D;

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<sup>9</sup> See also paragraph 20 above.

- Assistant general manager of WTT's business market division, who led data sales teams comprising Salespersons A, B, C and D (the "Assistant General Manager");
- Product manager of WTT's business development division (the "Product Manager"); and
- Two WTT's customer service representatives, who handled the complaint, and their supervisor.

### Statement of Salesperson C

44. According to the statement of Salesperson C, she was at the time a senior account manager in WTT's business market division. In August 2009, she received instructions from her supervisor, Salesperson D, to follow up the contracts with the complainant, in the light of Salesperson A's imminent departure. Salesperson C recalled that she and Salesperson A attended a meeting with the complainant on 18 August 2009 at Shop 2<sup>10</sup>. At the meeting, the complainant expressed his dissatisfaction with the DIA Service including that WTT should provide transmission speed based on "MB", not "Mbps", and that regarding the bandwidth of "8M Local/2M International", the "2M International" was considered by the complainant to be not sufficient to meet his business requirements. Salesperson C and Salesperson A agreed to follow up the matters raised by the complainant. On the "8M Local / 2M International" issue, Salesperson C subsequently discussed with the Product Manager and came up with a suggestion to upgrade it to "10M Sharing Bandwidth".

45. Salesperson C said that she called the complainant on 19 August 2009 suggesting that he should change the service plan, and informed him that new contracts would be sent to him via email. The proposed new service plan entailed the upgrading of the "8M Local / 2M International" bandwidth service to "10M Sharing Bandwidth". After the complainant had seen the new contracts, he told Salesperson C over the telephone that he refused to sign the

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<sup>10</sup> The Third Meeting. See also paragraph 14.



new contracts because the terms of the new contracts were different from those of the set of old contracts kept by him.

46. Salesperson C received from the complainant a letter together with the copies of the old contracts via WTT's fax-to-email system on 19 August 2009. Salesperson C compared the complainant's old contracts with the new contracts and noticed the difference that there was the Cancellation Clause in the complainant's old contracts but not in the new contracts. However, she paid no attention to the Cancellation Clause as she noticed that the old contracts were not signed by either party. Subsequently she reported the matter to Salesperson D.

47. Salesperson C said that she called the complainant on 25 August 2009 telling him that WTT would resolve the service issues as soon as possible and start billing him from September 2009. She also sent copies of the signed contracts to the complainant via email on the same day. Later on that day, she and the Product Manager had a teleconference with the complainant, in which the Product Manager explained to the complainant that the transmission speed of the DIA Service was defined on the basis of "Mbps", which was commonly known in the telecommunications/computer field. The complainant had expressly stated that he was aware of that, but he said that when he had seen that [the service speed] was expressed in terms of "MB" in the contracts, he had repeatedly asked Salesperson B whether this was the case, and Salesperson B's answer was in the affirmative. Salesperson C said that even though the complainant had made it clear that he would refuse to accept the service provision in the new contracts, she still sent the new contracts to the complainant for his reference via email.

48. Salesperson C stated that she and Salesperson D met the complainant on 27 August 2009 in a restaurant near Shop 2<sup>11</sup>. At the meeting, the complainant maintained that WTT should provide broadband service with transmission speed measured in "MB" but not "Mbps".

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<sup>11</sup> The Fourth Meeting. See paragraph 16.

### Statement of Salesperson D

49. According to the statement of Salesperson D, he was a sales manager of WTT's business market division. In August 2009, his direct supervisor, namely the Assistant General Manager, assigned him to follow up the contracts with the complainant, in the light of the imminent departure of Salesperson A. Salesperson D in turn assigned Salesperson C to follow up the case.

50. On 18 August 2009, Salesperson C reported to him about the meeting that Salesperson C and Salesperson A had with the complainant, in which the complainant expressed dissatisfaction of various issues in relation to the DIA Service. Among other things, the complainant claimed that Salesperson B had told him that WTT would provide "10MB" bandwidth to him, and WTT had failed to deliver what Salesperson B had promised. The complainant also claimed that the bandwidth of "2M International" was not sufficient for his use.

51. Salesperson D said that on or about 19 August 2009, Salesperson C reported to him that she had received from the complainant contract copies which contained the Cancellation Clause. However, Salesperson D did not pay too much attention to it as the contract copies retained by the complainant were unsigned.

52. Salesperson D also mentioned that he and Salesperson C met the complainant on 27 August 2009, during which the complainant said that the same outstanding issues had still not been fixed by WTT.

### Statement of the Assistant General Manager

53. The Assistant General Manager said at the material time, Salesperson A was one of the salespersons in her team. Salesperson A reported to Salesperson B, who reported to his supervisor, who in turn reported to her.

54. The Assistant General Manager recalled that in March 2009, Salesperson A submitted three orders for DIA service to be subscribed by the complainant. Installations of the service would take around four months as WTT did not have coverage to the installation addresses at the time. Between end of July and early August 2009, both Salesperson B and Salesperson A resigned and left WTT on 28 August and 31 August 2009 respectively. Due to Salesperson A's resignation, the complainant's account was assigned to Salesperson C to follow up. Salesperson C reported to Salesperson D. Both of them were in the Assistant General Manager's team.

55. The Assistant General Manager recalled that on 18 August 2009, Salesperson D reported to her about a meeting with the complainant that had taken place on that day, in which the complainant claimed that WTT should provide "10MB" DIA line instead of "10M" DIA line. Sometime after that day, the Assistant General Manager had an internal meeting with the Product Manager, Salesperson D and a solution consultant over the "10MB" / "10Mb" issue. After some discussion they came to the view that the complainant's interpretation could not be correct, as "MB" or "Mega Byte" was not a common unit for Internet bandwidth measurement. The common unit for Internet bandwidth measurement was "Mega bit", which was widely accepted in the telecommunications industry. Salesperson D was therefore asked to get back to the complainant on this basis.

56. The Assistant General Manager said that she was informed by Salesperson D on 31 December 2009 that the complainant had sent an email complaining about the bandwidth again and attaching an order form which contained the Cancellation Clause. She said she recalled Salesperson D had mentioned the Cancellation Clause to her previously. She reviewed WTT's finance department's approval for the DIA Service and noted that no approval was granted by WTT's finance department over the Cancellation Clause. The Assistant General Manager said that in her experience, WTT's finance department would not approve such kind of cancellation clause.

### Statement of the Product Manager

57. In his statement, the Product Manager gave an account of the teleconference that he and Salesperson C had with the complainant on 25 August 2009. During the teleconference, the Product Manager explained to the complainant that the unit “MB” should be “Mega Bit” instead of “Mega Byte”, as “Mega Bit” was a common unit for Internet bandwidth measurement in the telecommunications industry and that this understanding was well established and widely understood in the industry. The complainant disagreed and claimed that perhaps WTT did not use the common unit (i.e. Mega Bit) for describing bandwidth. The Product Manager told the complainant that WTT had followed the common practice all along and the unit for describing Internet bandwidth should be “Mega Bit per second”.

### Statements of WTT’s customer service representatives and their supervisor

58. Two customer service representatives of WTT gave statements providing an account of their respective contacts with the complainant after WTT received a referral from the former OFTA in September 2009 in respect of the complaint case. The supervisor of the two customer service representatives also gave a statement providing an account of her involvement in handling the complaint, including instructing her subordinates to deal with the case and liaising with the relevant parties in the business market division of WTT to understand the matter.

### *Other submissions made by WTT*

59. WTT advised that there had not been any customer complaint similar to the present one. To ensure that its sales team would abide by its policies and procedures, and act with integrity, honesty and in a professional manner, WTT said that all members of its sales team were required to acknowledge receipt and signify understanding of and accept WTT’s Code of Conduct, a copy of which was provided to the former OFTA for reference.

### **WTT's Representations on 3 May 2011**

60. WTT made further representations on 3 May 2011, submitting that the expression “Megabits per second” had been misused and misunderstood by some members of the general public and had led to occasional false assumptions, misinterpretations and confusion. WTT referred to a copy of a press release issued by a broadband internet service provider in relation to its interim results, wherein the expression “100Mbps” was used consistently throughout the press release to denote the measurement of broadband Internet bandwidth or speed. However, four Chinese newspapers reporting on the matter adopted confusing terminologies to denote “100Mbps”, with two of them using “100MB”, and the other two using “100m”. Copies of the press release and the newspaper reports were provided to the former OFTA for reference.

61. From a technical perspective, WTT submitted that “100MB” and “100m” did not represent the measurement of Internet bandwidth or speed. “Megabits per second” was the only possible meaning conveyed by the press release.

62. WTT claimed that this example demonstrated that not all members of the public had a clear understanding of the terminologies used in the telecommunications industry. The public and the mass media seemed to mix up the usage and concept between “Megabits per second” and “Megabytes per second” and regard “M”, “Mbps”, “MB”, and “m” as equivalent terminology. However, WTT considered that the contextual meaning of the terminologies and general understanding of the measurement of Internet connection speed should always clarify the confusion.

63. As for the present case, WTT reiterated that the complainant possessed industry knowledge. Given the complainant’s background, WTT was surprised that the complainant had interpreted the network terminologies in a non-traditional way that was not in line with the general industry practice. WTT submitted that if the complainant had intended to contract for the DIA Service with a specific way of interpreting the terminologies (i.e. 10 Megabytes

per second = 80 Megabits per second), he should have expressly requested to state such requirement in the contracts.

### **WTT's Further Representations on 23 May 2012 to Discontinue the Investigation Based on Administration Priority Ground**

64. In its letter of 23 May 2012, WTT referred to “*A Guide on How Complaints Relating to Misleading or Deceptive Conduct Prohibited under Section 7M of the Telecommunications Ordinance are handled by the Office of the Telecommunications Authority*” issued by the former TA on 14 March 2012 (the “Section 7M Guide”) and submitted that it was relevant to how the Office of the Communications Authority (“OFCA”) might handle the complainant’s case<sup>12</sup>. WTT referred to paragraphs 3 to 5 of the Section 7M Guide, which stated that the Communications Authority (“CA”) had the administrative discretion to decide whether or not to pursue, or not to pursue further a case under section 7M, having weighed the likely benefits of pursuing it against the likely resources involved and the other options available. WTT argued that OFCA should exercise its discretion to discontinue the present investigation on the “administrative priority” ground having regard to the list of illustrative considerations set out in the Appendix that, where it is considered appropriate, the CA will take into account in deciding whether or not to exercise the discretion.

65. In particular, WTT claimed that the complainant and WTT were already parties to a legal action concerning the subject matter of the complaint and WTT was keen to settle the legal action with the complainant. More resources would need to be expended by the parties if the investigation were not discontinued. WTT was concerned that OFCA’s investigation was hindering the mediation or amicable settlement of the dispute.

66. WTT also argued that the alleged conduct or its potential implications did not have any significant public interest or concern, that it was a

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<sup>12</sup> The Section 7M Guide continues to be applicable to section 7M cases handled by OFCA: [http://www.coms-auth.hk/filemanager/common/policies\\_regulations/competition/complaint\\_handle\\_7Me.pdf](http://www.coms-auth.hk/filemanager/common/policies_regulations/competition/complaint_handle_7Me.pdf).

one-off incident, and that there was no need for “*any administrative action (inter alia, enforcement or investigatory actions)*”<sup>13</sup> to follow up the unconventional interpretation of bandwidth adopted by the complainant. OFCA’s action to continue the case would be highly unlikely to have any worthwhile educational or deterrent effect. WTT also claimed that it had taken remedial measures immediately after receipt of the complaint, including conducting sales briefings to remind all sales staff to strictly adhere to its internal sales guidelines and requiring all customers to return the originals of any signed service contract for WTT’s acceptance in order to avoid potential confusions.

### **Additional Information Provided by WTT on 13 November 2012**

67. On 15 October 2012, OFCA wrote to WTT requesting it to provide the following information:

- (a) copies of all the DIA Service order confirmation forms or contracts that WTT had entered into with its customers between January 2009 and March 2009, showing the bandwidth and transmission speed offered to these customers; and
- (b) information in relation to the actual bandwidth or transmission speed provided by WTT to the customers in each order confirmation form or contract.

68. On 13 November 2012, WTT provided 24 sets of all the DIA Service contract documents that WTT had entered into with its customers (other than the complainant’s company) from January 2009 to March 2009 (the “contract documents”).

69. In 21 out of the 24 contract documents, the bandwidths or transmission speeds of the DIA Service were described in terms of “M”, “Mbps” or “Mb/s”. For the remaining three cases, the bandwidths or transmission

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<sup>13</sup> Direct quote from WTT’s wording in its letter to the former OFTA dated 23 May 2012.

speeds were described in terms of “MB”. WTT confirmed that the bandwidths or transmission speeds provided to the customers in all the 24 cases, including the three cases where the term “MB” was used, were all in terms of Megabits per second (i.e. Mbps). These three cases involved three different salespersons from the ones involved in the present case.

### **WTT’s Further Representations on 31 January 2013**

70. On 31 January 2013, WTT submitted via its legal representatives its further representations in response to the CA’s Provisional Decision issued to it in November 2012, in which the CA agreed with OFCA’s assessment and took the provisional view that WTT was in breach of section 7M of the TO (“Provisional Decision of November 2012”) <sup>14</sup>.

71. WTT submitted that, in the Provisional Decision of November 2012, the CA had made serious findings of fraud against WTT and its certain former employees. It submitted that the CA should follow the jurisprudential approach taken by the Courts when dealing with fraud allegations and apply a higher standard of proof. It also submitted that, given the allegations of fraud, the heavily disputed facts, and the absence of any witness to verify or contradict the allegations made by the complainant, it would be in the interest of justice for the CA to delay the final decision until the conclusion of the civil proceedings between WTT and the complainant. In relation to the liability under section 7M, WTT further submitted that the fraudulent acts committed by Salesperson A and Salesperson B should be treated as outside the scope of authority granted to them and as such WTT should be exonerated from liability under section 7M arising from those acts.

72. In relation to OFCA’s assessment in the Provisional Decision of November 2012, WTT submitted that OFCA had erred in its approach in assessing and weighing the evidence before it, by taking into account irrelevant matters, or failing to take into account (or according appropriate weight to)

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<sup>14</sup> The Provisional Decision of November 2012 was subsequently superseded by the Revised Provisional Decision issued to WTT on 6 May 2013 for making representations.



relevant evidence and information. By failing to invoke the CA's power under section 36D of the TO to require information from Salesperson A and Salesperson B, WTT said that OFCA had failed to take reasonable steps to obtain relevant evidence on which a fair and fully informed decision could be based.

73. As regards the financial penalty proposed to be imposed on WTT by the CA in the Provisional Decision of November 2012, while WTT considered it to be excessive and arbitrary, it submitted that it had undertaken steps to strengthen its systems and practices so as to avoid the occurrence of similar complaints in future. To that end, WTT has implemented the following remedial actions following the receipt of the complaint:

- (a) Only original copies of sales orders are accepted where orders are taken in a face to face meeting;
- (b) Each sales order must clearly state the service subscribed and all relevant terms, properly signed, stamped and dated by the customer;
- (c) Any corrections on the sales orders must be initialled or stamped or signed by the customers to reduce the risk of unauthorised changes to the contracts;
- (d) All measurement units are to be described in standardised forms to eliminate any possible inconsistent use of broadband terminologies. For example, "Megabit per second (Mbps/Mb)" is the only accepted form of terminology to denote the transmission speed of broadband services;
- (e) Internal training has been given to strengthen the knowledge of the salespersons about the measurement unit of broadband services and to reinforce professional selling conduct. For example, in the first quarter of 2010, WTT's product team conducted a briefing to

all salespersons to explain bandwidth definition. In addition, all salespersons are reminded that the company will not tolerate any misconduct including the making of any representation that is untrue or misleading;

- (f) Incorporation into the contracts of clearer explanations as to what the speed of the broadband services represents. Since 20 March 2010, WTT has included speed qualifications which read:-

*“For Business Broadband and Data services, the access speed of all service plans is measured and quoted in unit of Megabit per second or Gigabit per second, which is usually specified in Mbps or Gbps respectively.”*

- (g) Enhancement of the complaint handling procedure. As soon as any complaint of misleading or deceptive conduct is received, WTT now requires the salesperson to be interviewed immediately to verify the allegation and a statement to be taken as appropriate so as to address the complaint effectively. WTT would also strive to resolve any dispute with the complainant in an amicable manner so as to prevent the escalation of the matter to the regulator.

WTT submitted that, with the implementation of these remedial measures, it was confident that the risk of similar complaints re-occurring would be unlikely. WTT also committed to closely monitoring the implementation of these measures and would reassess the need of making further improvement from time to time.

### **WTT’s Further Representations on 31 May 2013**

74. On 31 May 2013, WTT submitted its representations in response to the CA’s Revised Provisional Decision issued to it in May 2013 (“Revised Provisional Decision”).

75. In relation to the alleged misrepresentation on the transmission speed, WTT submitted that it was incorrect for OFCA to say in the Revised Provisional Decision that WTT had not offered any explanation as to why the contracts referred to “MB”, as WTT had explained that it was more likely to be a case of clerical error and “MB” was often mis-used by the public. WTT submitted that whether or not this error had been picked up by WTT’s finance department during the vetting and final approval process was irrelevant.

76. WTT reiterated that the transmission speed had often been abbreviated as “M”, “Mbps”, “m”, “Mb”, and even “MB” (see paragraphs 60 to 62 above). The acronym for transmission speed had been loosely used in all walks of life including tenders from government departments. WTT attached to its submissions a sample tender issued by a government department, in which the acronym “MB” was used to describe the bandwidth for network connectivity in service specifications. WTT submitted that in any case it must be referring to Mega bit per second or Mbps in the industry and in the context of broadband service. WTT submitted that Megabyte was ever only used in the context of storage capacity.

77. In relation to OFCA’s view as set out in the Revised Provisional Decision that the complainant might or might not have noticed the “8M” / “2M” reference in the contracts and that, even if he had noticed the discrepancy between the references to “10MB/10MB” and “8M” / “2M”, and it was possible and reasonable for him to think that it was the reference to “8M” / “2M” which had two capital “B”s missing, given that “10MB/MB Dedicated Internet Access (DIA) Service” was the main service description, WTT submitted that this was a pure speculation on the part of OFCA as to what the complainant might or might not be thinking at the time. It was wrong for OFCA to place any evidentiary weight on such speculation.

78. With respect to the email sent on 12 March 2009 by WTT’s project manager to the complainant (see paragraph 32 above), WTT submitted that the purpose of the email was to confirm the telephone call that took place between the complainant and the project manager, which was to confirm the order and the scope of service. WTT said it was WTT’s standard procedure to carry out

verification of order by calling up customers and at the same time discuss implementation details with them.

79. In relation to the alleged reply by Salesperson C that the transmission speed had been changed to “Mega Bit” at the Fourth Meeting, as claimed by the complainant in his statement (see paragraph 16 above), WTT attached to its submissions a supplemental statement of Salesperson C, in which Salesperson C denied that she had made such a statement to the complainant at the Fourth Meeting. Salesperson C further stated in her supplemental statement that the transmission speed of WTT’s DIA Service had in all time been defined in terms of “Mega Bit”.

80. WTT also responded to OFCA’s assessment in the Revised Provisional Decision that given that the complainant had been rather consistent and persistent in his claim about the misrepresentation on transmission speed allegedly made by Salesperson B when he met Salesperson C at the Third Meeting and Salespersons C and D at the Fourth Meeting, when Salesperson A and Salesperson B were still under WTT’s employ<sup>15</sup>, there should have been ample opportunities for Salesperson C, Salesperson D or the Assistant General Manager, their supervisor, to make enquiries with and confirm the truthfulness or otherwise of the complainant’s claim with Salesperson A and Salesperson B direct. OFCA considered that the fact that there was no mention of any such enquiries or confirmation being made in the statements of all these WTT staff seemed to lend credence to the complainant’s version of what had taken place at the First Meeting - namely that misrepresentations were made to him by Salesperson B about the transmission speed of the DIA Service. In relation to OFCA’s above assessment, WTT submitted that whilst the complainant might have been consistent and persistent in his claim, this should not of itself render his claim credible and greater weight of evidence. Nor could any credence be lent to the complainant’s claim by the fact that WTT had not sought verification from Salespersons A and B at the time.

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<sup>15</sup> According to the statements of Salesperson C and the Product Manager (see paragraphs 47 and 57), the complainant repeated his claim about WTT’s failure to deliver a transmission speed of 10 Megabytes per second in the teleconference with Salesperson C and the Product Manager on 25 August 2009 as well.

81. In any case, WTT had interviewed the Assistant General Manager again specifically to find out if she had made any enquiry with Salespersons A and B on the alleged misrepresentation and attached to its submissions a copy of her supplemental statement. The Assistant General Manager stated in her supplemental statement that she had attempted to talk to Salesperson A in the first instance when she was made aware of the complaint, but as Salesperson A was not in her office so she called and spoke to Salesperson B. She recalled asking Salesperson B whether he had represented to the complainant that WTT's broadband service was measured in Megabyte as alleged. She said that Salesperson B had categorically denied having made such a representation. She said that she did not see the need to enquire with Salesperson A since she was new to the industry and that she was supervised by Salesperson B. The Assistant General Manager also said that at the time she did not seek to ask about the Cancellation Clause because she was unaware of that issue, given that according to the order form signed by the complainant's company in WTT's possession, there was no such Cancellation Clause.

82. WTT also made the following observations for the CA's consideration:

- (a) The complainant made the statement to the former OFTA in June 2010, more than a year after the alleged representation was made to him. This raised question as to whether the complainant was capable of providing reliable recollection of the event;
- (b) According to the complainant, the meeting between him and Salespersons A and B (i.e. the First Meeting) took place outside the door area of Shop 2 as it was too noisy inside the shop. WTT submitted that, given the location of Shop 2 and the time of the day, it was highly likely that the area outside the door of Shop 2 was also noisy and it was possible that what Salespersons A and B said had been misconstrued;

- (c) In the complainant's statement, he recalled that at the First Meeting, Salesperson B wanted to introduce to him "10Meg broadband services". The complainant stated that he replied to Salesperson B that the service from his existing service provider was also "10Meg". WTT submitted that the conversation was conducted in Cantonese and it believed that those involved were quoting "Meg" in English and referring to "megabit", not "megabyte";
- (d) The complainant recalled that at the First Meeting, Salesperson B had said to him that WTT's broadband service was different, it was a lot faster. Salesperson B was promoting WTT's DIA Service to the complainant. WTT claimed that the service was a superior service than the ordinary broadband service in that it was directly connected to WTT's international broadband network. WTT submitted that it was likely that the complainant understood the DIA Service to be faster and from there he re-created his first conversation with Salesperson B in so far as the claim that Salesperson B represented to him that WTT's broadband service was measured in Megabytes; and
- (e) WTT submitted that it was likely that the complainant had misunderstood the DIA Service and what Salesperson B had said, and for reason unknown to WTT, thought that the broadband service that he had subscribed to was 10 Megabytes (equivalent to 80Mbps) when in reality what WTT had offered was 10Mbps DIA Service.

83. In relation to the Cancellation Clause, WTT submitted that:

- (a) though the complainant alleged he had signed the contract only once, the complainant said in his statement that Salesperson A had insisted to him that he had signed another contract (see paragraph 20 above), it was rather unusual that the complainant chose not to

further argue with Salesperson A as one would expect that in the circumstances any normal person would press for more details from Salesperson A, if indeed the complainant had only signed the contract once, yet the complainant had chosen not to press further;

- (b) it was possible that the complainant had signed the contract with the cancellation clause removed but he had forgotten about it. It was wrong for OFCA to speculate on why the complainant would not have agreed to give up the right of cancellation; and
- (c) it was wrong for OFCA to conclude in the Revised Provisional Decision that WTT had chosen to leave the complainant's claim unrefuted with the absence of any mention of the Cancellation Clause in the statements of WTT's staff. WTT submitted that, rightly or wrongly, WTT's staff had in the course of attending to the complaint relied on the signed contract. What WTT's staff did or did not do to address the complaint could not be a factor for OFCA to conclude that the complainant's account of the event was more credible.

## **OFCA'S ASSESSMENT**

84. Having considered the information provided by the complainant and taking into account WTT's representations, OFCA's assessment is set out in paragraphs 85 to 128 below.

### **Transmission Speed of the DIA Service**

#### *“Megabits” and “Megabytes”*

85. OFCA notes that Internet service providers in Hong Kong generally promote their services with description of the transmission speed in terms of “bits per second”. For broadband services, transmission speed is generally described in terms of “Megabits per second”, abbreviated as “Mbps”

with small letter “b”, or simply “M”. OFCA accepts that it is not the industry’s general practice to measure transmission speed in terms of “bytes”, where one byte is eight bits and the unit “byte” is more generally used to describe storage capacity. Using “byte” as a measurement unit for transmission speed is rare, but it would not be technically wrong to do so. A transmission speed at “10 Megabytes per second”, which can be abbreviated as “10MBps” with capital letter “B”, is equivalent to 80Mbps. OFCA also accepts that the abbreviated reference to “x Megabits” (“x M”) is more commonly understood to mean “x Megabits per second” when the reference is made in the context of network transmission speed or bandwidth.

*Salesperson B’s representations and the reference to “MB” in the contracts*

86. In relation to the transmission speed of the DIA Service, the complainant’s allegation was that:

- (a) Salesperson B represented to him at the First Meeting that the transmission speed of WTT’s broadband service was denominated in Megabytes, and that he would be provided with a broadband transmission speed of 10 Megabytes [per second];
- (b) at the Second Meeting, before he signed the contracts, he noticed that the service was described as “10MB/10MB Dedicated Internet Access (DIA) Service” on the contracts. He understood that the alphabet “B” in capital letter in “10MB” meant “Byte”. Given the description “10MB” printed on the contracts, and Salesperson B’s representations to him at the First Meeting, he believed that WTT would be providing a broadband service of 10 Megabytes per second to him.

87. In the statement he gave to the former OFTA, the complainant demonstrated that he possessed good technical knowledge in relation to business broadband services. He knew that his then service provider was providing broadband service to him at a transmission speed of “10Meg”. He obviously understood it to mean “Megabits per second”. That was why when



Salesperson B offered “10Meg” service to him and claimed that it was faster than the broadband services offered by the other operators, the complainant specifically asked him in what way WTT’s service was faster. According to the complainant, Salesperson B represented to him that WTT’s broadband used “Mega Byte” as unit whilst others used “Mega bit” as unit (the exact wording in the complainant’s statement is “[Salesperson B] 話：「我哋嘅寬頻係用 Mega Byte 做單位，人地既係用 Mega bit 。」”).

88. The complainant did not simply rely on Salesperson B’s oral representations to him to come to the belief that the transmission speed of the DIA Service provided by WTT would be “10 Megabytes per second”. The complainant had also relied on the description “10MB/10MB Dedicated Internet Access (DIA) Service” printed on the contracts, which were provided to him by Salesperson A at the Second Meeting. Given the complainant’s technical knowledge, he had understood the terminology of “MB” to mean “Megabyte”. OFCA has reviewed copies of the unsigned contracts provided by the complainant. In each copy of the contract for each shop, OFCA notes that the service was described as “10MB/10MB Dedicated Internet Access (DIA) Service”.

89. WTT’s response to the complainant’s allegations was that:

- (a) Salesperson B had categorically denied having made the alleged “10 Megabytes” misrepresentation to the complainant, as per the Assistant General Manager’s supplemental statement submitted by WTT on 31 May 2013;
- (b) Salesperson B was an experienced employee of WTT at the time and would have been well aware that the industry practice was invariably to quote bandwidth or speed in “Megabits” per second. It was most unlikely that he would have made the alleged misrepresentation to the complainant. Making such a misrepresentation in the circumstances could only lead to trouble for WTT and Salesperson B himself;

- (c) the use of “MB” in the description of “*10MB/10MB Dedicated Internet Access (DIA) Service*” on the contracts was likely to be a clerical error. With the complainant’s technical knowledge in the broadband field, on seeing the reference to “*8M x local; 2M x international*” on the contract he should have known that the description of “10MB” should mean “10 Megabits”;
- (d) WTT did not at the material time market or provide any internet access services with bandwidths measured or promoted in terms of “bytes”. It was the industry practice, as well as the practice of WTT, to offer and measure the bandwidth or speed of broadband services in terms of “bits per second”;
- (e) The acronym for transmission speed had been loosely used in all walks of life and had often been abbreviated as “M”, “Mbps”, “m”, “Mb”, and even “MB”; and
- (f) WTT’s project manager had subsequently sent an email to the complainant on 12 March 2009 confirming the scope of the DIA Service to be “10M”;

90. OFCA notes that the complainant’s claim was corroborated by the description “*10MB/10MB*” printed on the contracts. As revealed in the complainant’s statement as well as the statements of WTT’s staff, the complainant had all along been rather consistent and persistent in his claim about the alleged misrepresentation on transmission speed made by Salesperson B. On the other hand, WTT had not provided any direct evidence from Salesperson B which was able to refute the complainant’s allegation about the speed representations of Salesperson B. None of the WTT’s staff who had given statements was present at the First Meeting when the alleged representations were made by Salesperson B. WTT argued that Salesperson B was most unlikely to have made the alleged representation for a number of reasons (see paragraph 37), including the fact that he was an experienced employee who should have been well aware that WTT did not offer broadband

services with speed denominated in “Megabytes”. It might well be the case that Salesperson B was fully aware that WTT’s broadband services were not measured in terms of “Megabytes”, but this in itself does not constitute sufficient evidence to prove that Salesperson B had not made the alleged representations during the promotion process at the First meeting with the complainant.

91. OFCA however notes that, although WTT was not able to obtain statements from Salespersons A and B, who were present at the First Meeting, WTT provided in its further submissions on 31 May 2013 the Assistant General Manager’s supplemental statement, in which she stated that she had made enquiries with Salesperson B after she was made aware of the complaint. According to the Assistant General Manager, Salesperson B had categorically denied having made the alleged misrepresentation on transmission speed to the complainant (see paragraph 81).

92. As for the description “*10MB/10MB*” used in the contracts, OFCA has not only reviewed copies of the unsigned contracts provided by the complainant, but has also examined copies of the signed contracts provided by WTT. Same as the copies of the contracts provided by the complainant, in each WTT’s copy of the contract for each shop, the service was described to be “*10MB/10MB Dedicated Internet Access (DIA) Service*”. WTT’s explanation was that it was likely to be a clerical error and “MB” was often mis-used. OFCA notes from the statement made by the Assistant General Manager that the contracts had been approved by WTT’s finance department (see paragraph 56). It would therefore appear that this “clerical error”, which WTT surmised to be the case, had not been picked up by WTT’s finance department during the vetting and final approval process.

93. WTT said that the description “*10MB/10MB Dedicated Internet Access (DIA) Service*” should be read together with the reference to “*8M x Local; 2M x International*” printed on the next line, which described how the “*10MB/10MB*” would be allocated between local and overseas connectivity. WTT argued that with the complainant’s technical knowledge in the field, on

seeing the references to “8M” and “2M”, he should have known that the description of “10MB” should mean “10 Megabits” instead of “10 Megabytes”.

94. The service description of the DIA Service appeared in the following format in both the complainant’s and WTT’s copies of contracts:

Item#	Qty	Brand New / IR / ER	Service(s)	Installation / One-off Charge	Monthly Rental		
					List Price	Promotion Price	Total Amount
1	1	NEW	10MB/10MB Dedicated Internet Access (DIA) Service	\$ NIL	\$	\$	\$ 4500
			- 8M x Local; 2M x International	\$	\$	\$	\$
			- 128 x fixed IP	\$	\$	\$	\$

The main focus of the service description was clearly “10MB/MB Dedicated Internet Access (DIA) Service”. The reference to “8M x Local; 2M x International” was only, in WTT’s term, a qualifier which further described how the bandwidth would be allocated between local and international connections. In his statement, the complainant gave no account of the reference to “8M x Local; 2M x International” when he received the contracts from Salesperson A at the Second Meeting. OFCA is not able to infer from the complainant’s statement and the available evidence whether he had noticed the reference to “8M”/“2M” at the time and as such, OFCA will not speculate on what the complainant had in mind if he had indeed noticed the reference.

95. WTT pointed to the complainant’s knowledge in the telecommunications field to argue that he could not have believed that the speed of a broadband service would be provided in terms of “Megabytes per second”. OFCA considers that WTT in raising this has ignored the fact that it was the complainant’s case that Salesperson B, whom WTT acknowledged to be an experienced employee of WTT, had made specific oral representations of such effect to him, and the oral representations were reinforced by the reference “10MB” printed on the contracts. Even if the complainant had known that broadband services providers generally did not offer broadband services with transmission speed measured in terms of “Megabytes per second” (which OFCA accepts to be likely the case), it would be reasonable for him, having sought confirmation from whom WTT acknowledged to be an experienced

salesperson, to believe the salesperson's representations, which were backed up by a written description in the contracts, that WTT was different from other service providers in offering broadband services with transmission speed measured in terms of "Megabytes per second" and hence Salesperson B's allegation that WTT's service was "much faster" than other service providers (see paragraph 4) could be substantiated.

96. WTT also claimed that the complainant could not have believed that a broadband service with transmission speed equivalent to 80 Megabits per second could be offered at a mere price of \$4,500 per month. This claim of WTT could not be borne out by actual offers in the market, given the fact that, as per the complainant's statement, he ended up subscribing successfully to a 100Mbps (a transmission speed higher than 10 Megabytes per second or 80 Mbps) broadband service provided by another operator at \$4,500 per month in February 2010 i.e. eleven months later. While noting that the complainant had not provided documentary evidence to support such a claim, OFCA considers that, given the intensely competitive nature of the market and rapid technological progress in the broadband field, it would not be entirely improbable that the complainant might be able to find an operator that would provide to him a 100Mbps broadband service at that price.

97. As mentioned in paragraph 32, WTT also claimed that on 12 March 2009, i.e. after the complainant had signed the contracts, the then project manager responsible "*for fulfilling the Contracts*"<sup>16</sup> had sent an email to the complainant confirming that the scope of the DIA Service to be "10M", and the complainant did not dispute the scope. WTT was referring to an email entitled "*[the complainant's company] DIA & Netscreen firewall review*" sent by the project manager to the complainant on 12 March 2009, i.e. a week after the Second Meeting on 5 March 2009, during which the complainant signed the contracts. Apparently the email was a follow up to a conference call that took place between the project manager and complainant, because the email started with the phrase "*As a recapture of our conference call:*". The email then went

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<sup>16</sup> Direct quote from WTT's wording in its letter to the former OFTA dated 21 December 2010.

on to discuss various subject matters, namely “*Scope of Work & Service request*”, “*Schedule*”, “*Deliverable*”, “*Bill start date*” and “*site survey date*”. In relation to “*Scope of Work & Service Request*”, the email reads:

*“Scope of Work & Service request:  
DIA : 10M ( 8M local & 2M Int’l) – CP –site x 3  
NetScreen firewall x 3  
Fixed IP 128 addresses x3”* (emphasis added)

98. While noting WTT’s further submissions (see paragraph 78 above), taking into account the overall context of the email, OFCA considers that the email was more for the purpose of advising the complainant on the implementation details of the contracts, rather than serving as a formal confirmation of the scope of the service. Under such circumstances, it is possible that the complainant might not have noticed the term “10M” in the email, or taken issue over the use of the term.

99. WTT further referred to the complainant’s original complaint to the former OFTA in which the complainant stated that:

*“We have signed contract with Wharf T&T for 3 x 10M DIA (Dedicated Internet Access) service in Mar 2009 for 3 of our Game Centers located in Yuen Long”* [Emphasis by WTT]

Relying on this sentence, WTT argued that the complainant himself had also acknowledged that the DIA Service that he had subscribed to was “10M”. After a careful review of the complaint, OFCA considers that WTT’s quote was taken out of context. The details of the complaint in fact begin with the following sentence:

*“Wharf T&T cannot provided [sic] service in target date – Jun 2009 and the bandwidth could not meet as their sales verbally confirmed the 10M is in 10MB but not 10 Mbps...”*

Then the complainant went on to say that “[w]e have signed contract with Wharf T&T for 3 x 10M DIA (Dedicated Internet Access) service...”. In relation to the service bandwidth, the complainant further said that:

*“...Futhermore [sic], Wharf T&T Sales Representative [Salesperson B] stated verbally that the 10M DIA was provided in MB but not Mbps that the former is supposed 8 times faster than the later [sic]. Of course, the result is that Wharf could only provide bandwidth in Mbps.”*

100. Throughout the complaint, the complainant was claiming that WTT’s salesperson (Salesperson B) had represented to him that the bandwidth of the service would be 10MB, when in fact WTT could only provide 10Mbps to him. Viewing the complaint in its entirety, OFCA considers that WTT’s argument that the complainant himself had also acknowledged that the DIA Service he had subscribed to was “10M” is groundless.

101. Given that the complainant had been rather consistent and persistent in his claim about the misrepresentation on transmission speed allegedly made by Salesperson B at the Third and Fourth Meetings, when Salesperson A and Salesperson B were still under WTT’s employ<sup>17</sup>, there should have been ample opportunities for Salesperson C, Salesperson D or the Assistant General Manager, their supervisor, to make enquiries with and confirm the truthfulness or otherwise of the complainant’s claim with Salesperson A and Salesperson B direct. That there was no mention of any such enquiries or confirmation being made in the statements of all the above three staff of WTT seemed to lend credence to the complainant’s version of what had taken place at the First Meeting - namely that misrepresentations were made to him by Salesperson B about the transmission speed of the DIA Service. The above observation of OFCA was set out in the Provisional Decision issued for representations by WTT in November 2012. WTT’s representations on 31

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<sup>17</sup> According to the statements of Salesperson C and the Product Manager (see paragraphs 47 and 57), the complainant repeated his claim about WTT’s failure to deliver a transmission speed of 10 Megabytes per second in the teleconference with Salesperson C and the Product Manager on 25 August 2009 as well.

January 2013 was silent on this observation. It was not until its representations on 31 May 2013 that WTT had advised OFCA that it had acted on this observation, and interviewed the Assistant General Manager again to find out specifically if she had made any enquiry with Salesperson A and B on the alleged misrepresentations. In her supplemental statement, the Assistant General Manager stated that, after she was made aware of the complaint, she had asked Salesperson B whether he had represented to the complainant that WTT's broadband service was measured in Megabyte as alleged, and Salesperson B had categorically denied having made such a representation (see paragraph 81 above).

102. According to the complainant's statement, Salesperson C had said to him at the Fourth Meeting that the transmission speed (in the new contracts) had been changed to "Mega Bit" (see paragraph 16), thus implying that Salesperson C had acknowledged that the speed was originally not in "Mega Bit". OFCA ~~notes~~ noted that neither Salesperson C nor Salesperson D, who was also present at the Fourth Meeting, had made any attempt to address such a claim made by the complainant in their respective statements. The above observation of OFCA was set out in the Provisional Decision issued for representations by WTT in November 2012. WTT's representations on 31 January 2013 was silent on this observation. It was not until its representations on 31 May 2013 that WTT had advised OFCA that it had acted on this observation, in providing a supplemental statement of Salesperson C in which Salesperson C denied that she had made such an alleged statement to the complainant at the Fourth Meeting.

103. In the light of the supplemental statements provided by the Assistant General Manager and Salesperson C, OFCA has reviewed the evidence it has before it all over again. The supplemental evidence provided by WTT serves to refute the complainant's allegation. In so far as the statements by the complainant and WTT are concerned, this is now a typical case of one's words against the other's. The evidence for either party's claim is finely balanced.



104. WTT had also cited examples of some Chinese newspapers using different terminologies to denote “100Mbps”, with a viewing to demonstrating that not all members of the public had a clear understanding of the terminologies used in the telecommunications context (paragraphs 60 – 62). OFCA notes however that it was WTT’s own claim, made in the same letter of 3 May 2011 as well as its letter of 21 December 2010, that the complainant possessed industry knowledge and was well aware of the accepted industry standards (paragraphs 34, 35 and 63). As such, even though the ordinary public might get confused by various broadband terminologies, this should not apply to the complainant who was an industry expert according to WTT. In the closing paragraph of its letter of 3 May 2011, WTT argued that if the complainant had intended to contract for the DIA Service with a specific way of interpreting the terminologies, he should have expressly requested to state such requirements in the contracts. OFCA notes that the complainant had done exactly that. According to the complainant’s statement, at the First Meeting, the complainant expressly requested Salesperson B to have the claimed transmission speed (i.e. 10MB) clearly stated in the contracts (see paragraph 4). It was a fact that the contracts prepared by Salesperson A for the complainant’s signature at the Second Meeting, on which the complainant had signed, did describe the service to be “10MB”.

105. WTT’s submission that the acronym for transmission speed has been loosely used in all walks of life is supported by its own contract documents for DIA Service. OFCA has reviewed copies of the 24 DIA Service contract documents that WTT had entered into with its customers (other than with the complainant’s company) from January 2009 to March 2009, as provided by WTT. OFCA notes from the contract documents that a few WTT salespersons employed terminologies rather loosely in specifying the bandwidth or transmission speed, an essential attribute of the service under provision. Among the 24 DIA contract documents supplied by WTT, 21 of them were in the form of WTT’s standard order confirmations similar to those in the complainant’s case. While in most cases the transmission speed in terms of megabits were correctly denoted in “M”, there were three order confirmations in which “MB” was used to describe the transmission speed in megabits. OFCA further notes that these three order confirmations were processed by

three different salespersons of WTT, other than Salesperson A or Salesperson B. While this does not appear to be a widespread practice, it appears to lend support to WTT's submission that the acronym for transmission speed has often been loosely used, even within WTT. Taking also into account the supplemental statements of the Assistant General Manager and Salesperson C, OFCA considers that the possibility cannot be discounted that the use of "MB" in the main service description of the contracts could be a clerical error which was not subsequently picked up by its finance department during the vetting and final approval process.

106. Having considered the information provided by the complainant and WTT, and for the analysis set out in paragraphs 85 to 105 above, **OFCA considers that the evidence is inconclusive for establishing a finding that, on the balance of probabilities, Salesperson B had made the alleged misrepresentation about transmission speed to the complainant.**

### **The Cancellation Arrangement**

107. In relation to the cancellation arrangement, it was the complainant's allegation that:

- (a) Salesperson B represented to him during the First Meeting that the DIA Service could be installed at one of his three shops first. In case the complainant was dissatisfied with the service installed at the first shop, he could cancel the orders for the other two shops; and
- (b) Salesperson A similarly represented to him during the Second Meeting that if he was not satisfied with the DIA Service after installation at Shop 1, he could cancel the orders for the other two shops without condition. Salesperson A also pointed to the Cancellation Clause printed on both the contracts for Shop 2 and Shop 3 in support of his representations.

108. OFCA has reviewed copies of the unsigned contracts provided by the complainant and noted that the Cancellation Clause was printed below the service description of the DIA service on the copy of contracts for Shop 2 and Shop 3. The relevant part of the service description table is extracted below. The Cancellation Clause appeared in the fifth box under the “Service(s)” column:

Item#	Qty	Brand New / IR / ER	Service(s)	Installation / One-off Charge	Monthly Rental		
					List Price	Promotion Price	Total Amount
1	1	NEW	10MB/10MB Dedicated Internet Access (DIA) Service	\$ NIL	\$	\$	\$ 4500
			- 8M x Local; 2M x International	\$	\$	\$	\$
			- 128 x fixed IP	\$	\$	\$	\$
				\$	\$	\$	\$
			REMARK :THIS ORDER CAN BE CANCEL IF [the complainant’s company] DO NOT SATISFY THE FIRST ORDER OF DIA SERVICE PROVIDED BY WHARF.	\$	\$	\$	\$
				\$	\$	\$	\$
				\$	\$	\$	\$
				\$	\$	\$	\$
				\$	\$	\$	\$
				\$	\$	\$	\$

109. In response to the complainant’s allegation, WTT claimed that it has never been presented with any orders containing the Cancellation Clause for processing or acceptance. OFCA also notes that the Assistant General Manager of WTT claimed in her statement that she had reviewed WTT’s finance department’s approval for the contracts and noted that no approval was granted by WTT’s finance department over the Cancellation Clause (see paragraph 56).

110. According to the complainant, he had only signed on one set of contracts at the Second Meeting which was then taken away by Salesperson A. The former OFTA had hence requested WTT to provide the originals of the contracts for inspection. WTT said that it was not able to locate the originals of the contracts signed by the complainant. It only had copies of the contracts signed by the complainant. WTT explained that it did accept faxed copies or emailed copies of service orders or contracts and as such it might not have the original copies of the orders or contracts. In other words, WTT could not say

for sure whether WTT had once possessed the originals of the contracts but had since misplaced them, or whether it had all along only possessed copies of the signed contracts. OFCA has reviewed copies of the contracts provided by WTT and noted that none of the copy contained the Cancellation Clause.

111. OFCA observes that in WTT's copy of contract for Shop 1, the preferred installation date was stated to be "6 May 09" in handwriting. For WTT's copies of contracts for Shop 2 and Shop 3, the preferred installation date was stated to be "6 Jun 09" in handwriting. This was consistent with the complainant's claim in his statement that the installation dates were agreed with Salesperson A at the Second Meeting. Apparently, Salesperson A then marked the dates on the copies of contracts that were to be signed by the complainant.

112. According to the complainant, he had only signed on one set of contracts at the Second Meeting which were then taken away by Salesperson A. On the basis of available information, OFCA accepts that the unsigned copies of the contracts submitted by the complainant, which contained the Cancellation Clause, were the same version of the original copies of contracts he had signed on at the Second Meeting, which were taken away by Salesperson A. OFCA does not consider it necessary to ponder on why the copies of contracts kept by WTT and bearing the complainant's signature did not contain the Cancellation Clause, while the unsigned copies kept by the complaint did. To OFCA, that in the copies of contracts kept by WTT, the installation date for Shop 2 and Shop 3 was set to be one month after the installation at Shop 1 would serve to corroborate the complainant's claim that Salesperson A and Salesperson B had respectively represented to him that he could have the service installed at one shop first, and if he was not satisfied with the service, he could cancel the orders for the other two shops. Indeed, given the circumstances of the case, it would be difficult to see why the complainant would have agreed to give up the right of cancellation in the contracts which he had already signed and sign on a replacement set of contracts without the Cancellation Clause, if indeed he had been presented with the replacement set of contracts by Salesperson A (see paragraph 20).

113. As regards the evidence from Salesperson C and Salesperson D, according to their statements, as early as on 19 August 2009, they knew that the unsigned contract copies kept by the complainant contained the Cancellation Clause (see paragraphs 46 and 51). The Assistant General Manager also recalled that Salesperson D had reported the matter to her. Instead of treating the matter seriously, they chose to rely on the signed contract copies kept by WTT, which did not contain the Cancellation Clause, to process the complaint case. At the time there were ample opportunities for Salesperson C, Salesperson D or the Assistant General Manager to check with Salesperson A and Salesperson B while the latter two were still in WTT's employ as to why there was the Cancellation Clause in the complainant's copies of contracts. Given that the complainant at the time was also complaining about WTT's failure to provide the DIA Service to him at a transmission speed of "10MB" as set out in the contracts, it would have been logical for them to seek clarification with Salesperson A and Salesperson B as to what they had exactly represented to the complainant in relation to the cancellation arrangement and the "Megabit / Megabyte" issue, and to demand explanation on why the Cancellation Clause appeared in the complainant's copies of contracts but not WTT's copies, and why the speed of the DIA Service was described as "10MB/10MB" in the contracts.

114. In her first statement, the Assistant General Manager recalled that Salesperson D had mentioned the Cancellation Clause to her previously, but she did not say in her statement when exactly that had happened (paragraph 56). The Assistant General Manager claimed in her supplemental statement that, at the time when Salespersons A and B were still in WTT's employ, she was "unaware of the issue" about the Cancellation Clause (paragraph 81). OFCA considers that the Assistant General Manager's supplemental statement does not add anything further to the evidence from WTT that assists WTT in refuting the complainant's claim that Salesperson A and Salesperson B had made to him the representations in relation to the Cancellation Clause.

115. Having carefully evaluated the statements made by all parties, as well as copies of the contracts respectively provided by the complainant and WTT, **OFCA considers that, on the balance of probabilities, the**

**complainant's account of what had happened is credible, namely that both Salesperson A and Salesperson B had represented to him that if he was not satisfied with the DIA Service after the service installation at Shop 1, he could cancel the orders for the other two shops without condition; and that the contracts he signed on at the Second Meeting did contain the Cancellation Clause. The complainant had been misled or deceived as to the existence of the cancellation arrangement into subscribing to the DIA Service of WTT. Further, by applying the "reasonable person" test, OFCA considers that a reasonable person who was in the complainant's situation and who possessed similar attributes of the complainant would have been similarly misled or deceived. As such, the fact that no such cancellation arrangement was recognised by WTT renders the representations made by both Salesperson A and Salesperson B misleading or deceptive in breach of section 7M of the TO.**

116. In making the above assessment, OFCA emphasises that it has *not* concerned itself with, let alone taken a view on what had happened subsequent to the First and the Second Meetings leading up to the absence of the Cancellation Clause in WTT's contract copies. OFCA's assessment in the present case is limited to considering whether, on the balance of probabilities, Salesperson A and Salesperson B had made the representations to the complainant at the First and the Second Meetings, as alleged by the complainant (see paragraph 107 above). Upon careful consideration of all the relevant evidence and information before it, i.e. the complainant's statement, the unsigned contract copies produced by the complainant containing the Cancellation Clause, the installation dates marked on WTT's contract copies, the statements of WTT's staff and the representations of WTT, OFCA has come to the view that, on the balance of probabilities, the complainant's account of what had happened is more credible, namely that Salesperson B and Salesperson A had respectively represented to him at the First and Second Meetings that if he was not satisfied with the DIA Service after the service installation at Shop 1, he could cancel the orders for the other two shops without condition; and that the contracts he signed on at the Second Meeting did contain the Cancellation Clause.

117. WTT argued that if the complainant was certain that he had only signed one set of contracts which contained the Cancellation Clause, this would be a case against the individual salesperson and should be reported to the Police for investigation for possible fraud or obtaining property by deception. In OFCA's view, that the case may also involve the criminal act of fraud or forgery is irrelevant in the context of section 7M<sup>18</sup>. The CA's jurisdiction under section 7M is to decide whether, on the balance of probabilities, WTT had engaged in misleading or deceptive conduct in contravention of section 7M through the conduct of its salespersons. On the basis of the analysis set out above, OFCA considers that Salesperson A and Salesperson B had engaged in misleading or deceptive conduct in breach of section 7M. They were at the time acting in the course of employment with WTT. As such, WTT, as their employer, should be held liable under section 7M.

### **Administrative Priority**

118. Under the TO, the CA has the administrative discretion to decide whether or not to pursue, or not to pursue further a complaint case under section 7M, having weighed the likely benefits of pursuing it against the likely resources involved and the other options available to the CA, without taking a view on the merits of the case<sup>19</sup>. A non-exhaustive list of the considerations that, where it is considered appropriate, the CA will take into account in deciding whether or not to pursue a case further on the basis of administrative priority is provided in the Appendix of the Section 7M Guide.

119. WTT requested the CA to discontinue the investigation of the case on administrative priority ground, and argued that this case would be a

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<sup>18</sup> In a previous section 7M (Case T3/10) decided by the former TA in July 2011, which similarly involved suspected tampering of the service contracts by the licensee's salesperson, the licensee submitted that it should be exempted from liability under section 7M if the salesperson had engaged in forgery which had not been authorised by it. The former TA did not accept the argument because his concern was not so much with the criminal act of forgery, which he had not decided and needed not decide. His concern was rather whether the salesperson's conduct was misleading or deceptive in the context of section 7M. The former TA further decided that the licensee should be responsible for the misleading or deceptive conduct committed by its salesperson in the course of employment. See in particular paragraph 37 of the case summary of Case T3/10: [http://tel\\_archives.ofca.gov.hk/en/ca\\_bd/case\\_closed/T3\\_10.pdf](http://tel_archives.ofca.gov.hk/en/ca_bd/case_closed/T3_10.pdf).

<sup>19</sup> Section 7M Guide, at paragraph 3.

justifiable case for the CA to discontinue action having regard to the considerations set out in the Appendix of the Section 7M Guide.

120. OFCA has reviewed the arguments made by WTT and does not consider that the present case is an appropriate case for the CA to exercise its administrative discretion to discontinue action. One main argument raised by WTT was that the complainant's complaint formed the subject matter of an ongoing civil action between WTT and the complainant. As such, the section 7M investigation undertaken by the CA was not only a duplication of the proceedings which expended resources, but it also hindered the mediation or amicable settlement of the civil dispute between WTT and the complainant.

121. WTT had run the same argument back in October 2010 when it requested the former TA to stay the section 7M investigation pending the outcome of the civil proceedings between WTT and the complainant (see paragraph 27 above). At the time, WTT had claimed that the former TA's conducting the section 7M investigation in parallel with the civil proceedings would be unfair and prejudicial to WTT. The former TA had rejected WTT's arguments on the ground that the civil proceedings between WTT and the complainant and the section 7M investigation were of different nature and for different purposes.

122. Indeed, it is not uncommon for a complainant alleging misleading or deceptive conduct on the part of the service provider to also have contractual disputes with the service provider in relation to the telecommunication service in question. The CA's jurisdiction under section 7M of the TO is restricted to looking into the misleading or deceptive allegations made by the complainant. As regards the contractual disputes that may or may not arise as a result of the misleading or deceptive allegations, the complainant and the service provider would have to resolve them by other means, including negotiations, mediation and legal actions. It would not be appropriate for the CA to consider exercising the administrative discretion not to further pursue a section 7M investigation on the basis that the matter happens also to be the subject of a civil litigation, where the issues required to be looked into and the applicable law are very different.



123. OFCA's evaluation and conclusion of the case in the context of section 7M are:

- (a) The evidence is inconclusive for establishing a finding that Salesperson B was likely to have made misrepresentations to the complainant that the DIA Service provided to the complainant was with transmission speed measured in "Megabytes per second"; and
- (b) Salesperson A and Salesperson B were likely to have made misrepresentations to the complainant that he could cancel the service orders for Shop 2 and Shop 3 on an unconditional basis if he was not satisfied with the service provided in Shop 1.

Also, it is OFCA's view that WTT had obviously not properly supervised the two salespersons and followed up the matter, in the first place, by overlooking the reference to "MB" when it approved the contracts, and then by not taking seriously the discrepancies of the two sets of copies of contracts in relation to the Cancellation Clause, and seeking explanation from Salesperson A and Salesperson B when they were still working at WTT. Overall, OFCA considers that this is a case that the CA should not exercise its administrative discretion to discontinue action.

### **Other Issues Raised in WTT's Representations on 31 January 2013**

124. Regarding WTT's submission that the CA has made serious findings of fraud against WTT and its former salespersons, OFCA reiterates that its assessment in the present case in relation to the cancellation arrangement is limited to considering whether, on the balance of probabilities, the relevant salespersons of WTT had misled or deceived the complainant in the course of promoting the DIA Service to him, namely whether they had made the alleged representations to the complainant at the First and Second Meetings. For the purposes of establishing a breach under section 7M, OFCA needs not take a view, and indeed it has not so taken any such view, on what had happened subsequent to the First and Second Meetings leading up to the absence of the

Cancellation Clause in WTT's contract copies. As such, WTT's claim that the CA has made findings of fraud against WTT and the relevant salespersons, and its submission that because of that a higher standard of proof was required in this case, are misguided.

125. As to WTT's request that the CA should delay its final decision until the conclusion of the on going civil proceedings between WTT and the complainant, the issues have already been carefully considered and addressed in the former OFTA's declination of WTT's request to stay the investigation in November 2010<sup>20</sup>, and also in OFCA's assessment in relation to WTT's request to discontinue the investigation on administrative priority ground in paragraphs 118 to 123 above. For reasons already explained, WTT's request that the CA should delay making its final decision on the section 7M case, which deals with misleading or deceptive conduct of the salespersons of WTT, cannot be acceded to.

126. As to WTT's submission that it should not be liable under section 7M of the TO for the fraudulent acts of Salesperson A and Salesperson B, which should be treated as outside the scope of authority granted to them, it would be worth emphasising again that the section 7M investigation is on whether WTT had in the opinion of the CA committed any conduct which was misleading or deceptive. Whether Salesperson A or Salesperson B had committed any fraudulent acts falls outside the CA's jurisdiction under section 7M. As to the issue of whether a licensee-employer should be held liable for what its employee does in the course of his employment in the context of section 7M liability, the Court of Appeal has held that "*the licensee must be responsible for what that employee does in the course of his employment and in carrying out the duties which the employee does as part of his employment*"<sup>21</sup>. In the present case, OFCA has concluded that, on the balance of probabilities, Salesperson A and Salesperson B had made the alleged misrepresentations to the complainant in the course of promoting and selling the DIA Service as part of their duties as

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<sup>20</sup> See paragraph 27.

<sup>21</sup> *I-Cable Webserve Limited v The Telecommunications Authority*, CACV 329/2008, at paragraph 13.

WTT's salespersons. WTT is therefore liable for such misconduct of its salespersons.

127. On WTT's submission that OFCA had erred in its approach in assessing and weighing the evidence before it and that OFCA had failed to take reasonable steps to obtain relevant evidence by invoking the CA's power under section 36D of the TO to require information from Salesperson A and Salesperson B, it should be noted that the investigation under section 7M is not court proceedings and, as has been acknowledged by WTT in its representations of 31 January 2013, the CA is not bound by the court procedures, such as the technical rules of evidence applicable to civil or criminal litigation, in conducting such investigation<sup>22</sup>. In exercising its jurisdiction under section 7M, the CA is only required to consider all the information, evidence and representations before it in forming its opinion on whether the licensee has engaged in misleading or deceptive conduct. The CA is not obliged to hear oral testimony from the complainant or require further information from Salesperson A and Salesperson B, as submitted by WTT, if, after considering WTT's representations, the CA considers that the evidence before it is sufficient to enable it to reach an opinion on a section 7M case. In the course of processing this case, WTT had been afforded the opportunities to make representations, and to respond to the complainant's allegations, as well as to comment on the CA's Provisional Decision of November 2012 and Revised Provisional Decision of May 2013. At any of those stages, should WTT consider that it has further evidence that should be considered by the CA, such as the statements of Salesperson A and Salesperson B, it has ample opportunities to submit it to the CA, and once submitted, the CA would be obliged to consider them before making a final decision<sup>23</sup>. It is also worth noting that WTT also acknowledged in its representations on 31 January 2013

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<sup>22</sup> See *I-Cable Webserve Limited v The Telecommunications Authority*, CACV 329/2008 and *Mahon v Air New Zealand Ltd* [1984] AC 808, followed in *Yu Chee Yin v ICAC (No.2)* [2001] 4 HKC. It is acknowledged in WTT's letter of representations dated 31 January 2013 (at paragraph 10) that the CA is not bound by the procedural and evidential rules of the Court, nor is it even obliged to adopt or follow similar rules.

<sup>23</sup> WTT submitted the supplemental statements of Salesperson C and the Assistant General Manager in response to the Revised Provisional Decision and the CA duly considered such further evidence in reaching its final decision.

that the CA is *prima facie* entitled to come to its own conclusions on the factual evidence before it, and that it is the CA's prerogative to come to its own conclusion on the facts after weighing all the evidence<sup>24</sup>.

128. As regards WTT's submissions that it has since undertaken steps to strengthen its systems and practices to avoid the occurrence of future complaints of similar nature, such remedial actions though are welcome and encouraged, are irrelevant to the CA's assessment as to whether the conduct of Salesperson A and Salesperson B was misleading or deceptive in breach of section 7M of the TO. Such submission is only relevant when the CA considers the appropriate sanction after reaching a view of breach of section 7M.

## **THE CA'S ASSESSMENT AND DECISION**

129. After examining the facts of the case, the information/representations provided by the complainant and WTT, the CA affirms OFCA's assessment that WTT had engaged in misleading or deceptive conduct in breach of section 7M of the TO. A financial penalty should be imposed.

130. The CA also affirms OFCA's assessment that this is a case which the CA should not exercise its administrative discretion to discontinue action.

131. This is the second occasion on which a financial penalty is imposed on WTT under section 7M of the TO, and the maximum penalty stipulated by the TO is \$500,000. In considering the appropriate level of financial penalty in this case, the CA has had regard to the Guidelines on the Imposition of Financial Penalty issued under Section 36C of the TO (the "Guidelines"). Under the Guidelines, the CA is to consider the gravity of the breach (such as the nature and seriousness of the infringement, damage caused to third parties by the infringement, and duration of the infringement), whether

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<sup>24</sup> At page 1 and paragraph 25 of page 9 of WTT's letter of representations dated 31 January 2013.

the licensee under concern has previous records of similar infringements, and whether there are any aggravating and mitigating factors.

132. In considering the gravity of the breach and therefore the starting point for the level of penalty, the CA notes that the breach is a substantive one. Customer's right of early cancellation of a term contract on an unconditional basis upon a certain event occurring is a material term of contract between the operator and the customer. A misrepresentation on the existence of such a right will seriously prejudice the customer's interests.

133. While considering that this was a substantive breach of section 7M, the CA also notes that the former OFTA and OFCA had received only one complaint of similar nature against WTT. WTT confirmed that it had not received any customer complaint against either Salesperson A or Salesperson B. There is no evidence that a considerable number of consumers have been similarly misled or deceived.

134. In consideration of the above, the CA is of the view that the appropriate starting point for determining the level of financial penalty is \$120,000.

135. On mitigating factors, the CA notes that while WTT had declined to provide information as requested on the ground that there was a civil action in parallel during the former OFTA's early processing of the case, WTT has in general been cooperative in the investigation.

136. The CA further notes that, in its representations on 31 January 2013, WTT advised that it had implemented following the receipt of the complaint a number of remedial measures to strengthen its systems and practices with a view to avoiding the occurrence of future complaints of similar nature and has committed to closely monitoring the implementation of these measures and would reassess the need of making further improvement from time to time (paragraph 73 above). The CA has not identified any aggravating factors.

137. Having carefully considered the circumstances of the case and taking all factors into account, the CA concludes that in this case of the second occasion on which a financial penalty is imposed under section 7M of the TO on WTT, the penalty which is proportionate and reasonable in relation to the breach concerned is \$80,000.

**The Communications Authority**  
**July 2013**