



Trade Practices Alert February 2009

Clarity in pricing for consumers is murky water for corporations and advertisers - with a \$1.1m sting

From 26 May 2009, corporations will be prohibited from advertising a component of a price without also stating just as prominently and as a “single figure” the total cost the consumer must pay to acquire the goods or services.

Corporations failing to comply with the new “single price” provision may face fines of up to \$1.1 million.

In response to community discontent with component pricing, and in particular airlines advertising cheap airfares without adequately detailing significant additional costs such as airport taxes and fuel surcharges, the Federal Government has passed amendments to the *Trade Practices Act 1974* that will require corporations to spell out to consumers the full cost of acquiring goods or services.

The Federal Government noted that the Australian Competition and Consumer Commission had received around 430 complaints during 2007-2008 relating to “component pricing”, where prices are specified as components and not as a single price.

- > The *Trade Practices Amendment (Clarity in Pricing) Act 2008* (amending Act) is the Federal Government’s answer to those concerns. Unfortunately, in some ways, the amending Act confuses more than it clarifies.

The Clarity in Pricing Act

The amending Act amends section 53C of the *Trade Practices Act 1974* (TPA). The amendment introduces an

obligation to display a “single price” and a test of “prominence” in relation to the way that price is displayed. The intention is that consumers should be able to make purchases by comparing and choosing between specified - all inclusive - “single prices”.

Once s 53C comes into operation a corporation will be prohibited from using a component price when making a representation as to the price of goods or services without also specifying in a prominent way, and as a single figure, the “single price”.

Examples

- > A corporation will no longer be able to represent the price for an item as \$199 plus \$99 in taxes. The corporation must state that the price is \$298, or it may state that the price is \$199 plus \$99 taxes to the total of \$298. Qualifications of prices such as “\$199* *excludes taxes” will also be unlawful where the taxes are quantifiable at the time of the representation. The “single price” of \$298 in the above example must be specified prominently - and at least as prominently as any of the other components of the price.



- > A corporation can represent a price as “\$155 plus GST for a total price of \$170.50”. However, it is not acceptable to represent the price as “\$155 plus GST” without also stating the “*single price*” of \$170.50.
- > Where payment for a service may only be made by credit card and a quantifiable compulsory surcharge of, say, 2% is imposed for the use of a credit card the “*single price*” must include the surcharge. So, if a consumer were to purchase a service for \$100, the single price required to be displayed is \$102 (or \$100 plus \$2, totalling \$102). However, if payment by credit card is optional and the purchaser can, for example, pay cash, only the price of \$100 need be stated but the offer must then be qualified to state that the price “*excludes any applicable credit card or transaction fees*”.

Corporations that advertise on radio and television should note that the “*as prominent*” test also applies to oral price representations. As a result, where an advertiser promotes a component of a price orally, it is likely that the “*single price*” will also need to be represented orally and at the same volume and tempo as any component of the price. Quiet oral disclaimers such as “*plus fees and charges*” will not comply where those fees and charges are quantifiable and the primary component of the price (eg “from \$29,990”) was trumpeted earlier in the advertisement.

The unquantifiable question

The amending Act defines a “*single price*” as “*the minimum quantifiable consideration for the supply [of goods or services] at the time of the representation...*” So when is a component of a price “*quantifiable*”?

The explanatory memorandum asserts that “*the ‘total price’ is not quantifiable if, at the time of the representation concerned, it cannot be readily converted into a dollar amount*”.

To confuse matters, the explanatory memorandum asserts that where there is a mix of quantifiable and non-quantifiable charges, the quantifiable charges should be represented as a “*single-figure*” but does not suggest that such a representation will equate to the “*single price*”.

This is important because a corporation must not represent a component of a price without also stating the “*single price*”. But where one component of a price is “*quantifiable*” and the other components are not, the “*single price*” may in fact be the (known) component – a curious but probably unintended outcome!

It must be noted that the amending Act itself does not define “*quantifiable*” or “*minimum quantifiable consideration*” and does not make any reference to “*minimum total price*”.

As a result, it is unclear whether, for example, motor vehicle manufacturers will be required to calculate the lowest dealer delivery and statutory cost

applicable to a national advertisement by that manufacturer so as to obtain a “*single price*”. Arguably that may be the “*minimum quantifiable consideration*”. However, such charges are not generally consistent across dealers or States. If dealer delivery charges were consistent, or a motor vehicle manufacturer sought to make them consistent, serious questions might then arise under, for example, the price fixing provisions of the TPA.

Further, a requirement for a “*single price*” based on the minimum quantifiable on road costs available from a range of dealers may in fact cause confusion, as such an offer may not be – will not be – available at all dealerships. Does that lead to issues under sections 52 and 53 (e) of the TPA?

Finally, it is not a question of whether the minimum quantifiable consideration was within the knowledge of the corporation at the time of making the representation. As such, there is an obligation on corporations to make enquiries and keep up-to-date with changes in taxation, duties, fees and levy rates (to name but a few). Changes to those rates during the life of an advertisement will require the advertisement to be amended as and from the date of those changes.

Exceptions

The “*at least as prominently*” disclosure requirement does not apply in the exactly same way to contracts for supply of services by periodic payments. The amending Act provides that in this case the total cost of the



services over the life of the contract must be stated prominently, but does not have to be “*as prominent*” as the periodic component price. For example, an advertisement for a mobile phone contract that is \$20 per month for 24 months must display the price of \$480 as the minimum quantifiable price. However, it does not have to be as prominent as the \$20 per month periodic component price.

The new provisions will not apply to representations which are made exclusively between bodies corporate or representations in relation to goods or services not ordinarily acquired for personal, domestic or household use or consumption.

Postage charges do not have to be included in the single price if the minimum postage charges are not known by the corporation at the time of making the representation. However, if a minimum amount of postage charges is known, the corporation must specify that minimum amount for postage but need not include that amount in the “*single price*”.

Offences

The amending Act also amends the criminal provisions of the TPA to create an offence of strict liability, punishable by fine of up to \$1.1 million. It is an offence for a corporation to make a representation with respect to an amount that, if paid, would constitute only part of the total amount to be paid for the supply of goods or services. However, if the corporation also specifies the “*single price*”, it will not have breached the criminal sections of the amending Act.

Comments

The Federal Government intended that details of the total amount a consumer will ultimately pay not just be “*lost somewhere in a footnote*” and that the total actual price be “*abundantly clear*.” However, it remains to be seen whether the amendments will in fact provide clarity or confusion.

The amendments to the TPA will come into force by 26 May 2009 and when in effect will change the landscape for price advertising in Australia. The uncertainty associated with quantifying a “*single price*” and the potentially significant penalties for non-compliance with the amending Act creates significant risk.

Corporations should immediately review current advertising and business practices to comply with the amending Act. If corporations are unsure of how to comply with their obligations, they should seek further advice on how the amendments will affect their business and in particular how to communicate the price of their goods or services to customers.

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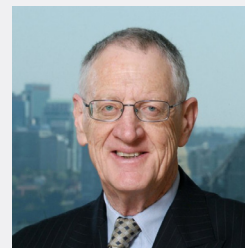
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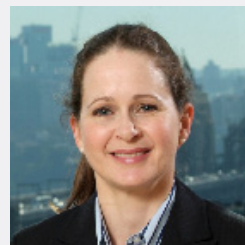
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