

# Trade Practices Amendment: Achieving Clarity in Pricing

## Bridget Edghill reviews recent amendments to the Trade Practices Act 1974 (Cth) concerning component pricing.

On 12 November 2008, Federal Parliament passed the Trade Practices Amendment (Clarity in Pricing) Bill 2008 (**Clarity in Pricing Amendment**) which inserts an amended section 53C into the *Trade Practices Act 1974* (Cth) and in doing so, introduces significant changes to the practice of component pricing.

With the proliferation of new media and forums for advertising, particularly the growth in online advertising, the practice of component pricing has become increasingly common, notably in relation to the telecommunications industry and e-commerce.

Component pricing is an important tool for businesses when vying for the attention of consumers as it enables businesses to advertise their most competitive base price and demonstrate the price difference between the goods and services they offer and those offered by competitors. With websites dedicated to allowing consumers to easily compare prices, the need to promote the most competitive base price is heightened.

In recent years online advertising expenditure has experienced significant growth. Research by the Commercial Economic Advisory Service of Australia released on 2 April 2009 found that in the Australian media industry online advertising is the fastest growing advertising sector with a 27% increase in online advertising expenditure to \$1.7 billion.

### What is Component Pricing?

Component pricing refers to the practice of displaying or advertising the price of goods or services by breaking down the components of the price and separately displaying all of the cost-elements that form the total price of such goods or services.

A number of examples of component pricing practices can be found in the telecommunications industry – such as the price display for a mobile phone plan as being, “Available on a \$15 Plan for 24 months”. In this example, the total price for the 24 months is not stated.

The travel industry provides additional examples such as a price display for a flight as being, “\$375 plus taxes and charges.” In this example, the cost of the other components, being the taxes and charges, is not made known to the consumer.

While component pricing is attractive to businesses because it enables them to display the lowest possible base price for products and service that they offer, this does not mean that the business advertising the lowest base price is offering the lowest total price payable by the consumer. For example, two travel agents may advertise the same flight with the first travel agent advertising the total price for the flight as “\$400 including all taxes and charges” and the second travel agent advertising the flight as “\$375 plus taxes and charges”. In the second example the additional taxes and charges may bring the total value in excess of the \$400 stated by the first travel agent.

Under the Clarity in Pricing Amendment, businesses may still make representations that the price is “\$x plus taxes and charges” but this representation must be accompanied by the final total selling price and must also satisfy other specified criteria. In this regard, the practice of component pricing is not prohibited but is regulated and restricted to ensure that consumers are made aware of the final total selling price (or full cost price) whenever component pricing is used.

### The motivation for the changes

The changes to the legislation concerning the display of the full cost price arose from concerns of the Australian Government in relation to the display of prices excluding Goods and Services Tax (GST).

As described in the Explanatory Memorandum, in 1999 the Australian Government received legal advice concerning the introduction of the GST that displayed

prices would include any GST payable. The Explanatory Memorandum states:

*Implicitly, it was understood that section 53C would also prohibit other forms of component pricing (e.g. excluding compulsory ‘taxes, fees and charges’ from prices).*

However, subsequent decisions of the Federal Court of Australia, such as the in decision in *Australian Competition and Consumer Commission v. Dell Computer Pty Ltd* [2002] FCAFC 434 concerning the charge of a compulsory delivery fee by Dell Computer Pty Limited, have eroded the intention that the existing section 53C of the *Trade Practices Act 1974* (Cth) would adequately address situations of component pricing.

In light of the apparent erosion of the intention of the existing section 53C, the Australian Government has amended the section and strengthened the law concerning component pricing.

### What are the changes?

As noted above, the Clarity in Pricing Amendment amends section 53C by requiring businesses which make price representations concerning consumer goods and services in which the price representation reflects an amount that is less than the final selling price, to also *prominently* display the *single price*. That is, the total price payable by the consumer must be prominently stated.

The important elements to consider when engaging in component pricing are:

- (a) the single price must be displayed: there is a requirement to specify the price as a single figure. Such figure must include all amounts that are “quantifiable” at the time of the price representation including, without limitation:
  - (i) all charges and additional fees payable by the consumer in order to acquire the goods or services; and
  - (ii) all taxes, duties and other charges that are imposed on the business

*component pricing has become increasingly common, notably in relation to the telecommunications industry and e-commerce*

## ***the Clarity in Pricing Amendment amends section 53C by requiring businesses which make price representations... to prominently display the single price.***

making the representation and that are included in the final selling price;

While the Clarity in Pricing Amendment does not define "quantifiable", the Explanatory Memorandum explains that:

*The total price is not quantifiable if, at the time of the representation concerned, it cannot be readily converted into a dollar amount.*

The effect of this is that where the total amount is not known, the minimum price payable by the consumer must be disclosed as a single figure. In circumstances where the final price is a combination of quantifiable and non-quantifiable charges, the charges that are quantifiable must be represented as a single figure and it will be necessary for the single figure to be accompanied by a statement that not all charges are included in the single figure.

The Explanatory Memorandum provides the following example of when the total price of goods or services will be considered to be quantifiable:

*In the case of a mobile phone contract, where a consumer must commit to (for example) a 12 month contract to obtain a specific monthly price, the aggregate minimum amount the consumer will be required to pay over 12 months can be quantified.*

- (b) the single price must be prominently displayed: the single figure must be displayed "in a prominent way". To comply with this requirement, the single price must be at least as prominent as the most prominent part of the component price figure. This means that displaying a component price and publishing the single price figure in the fine print will be prohibited.

An exception to this requirement, which relates to contracts that are for the supply of services for the term of a contract, which also provide for supply of the services by periodic payments, is discussed further below.

- (c) the amendments apply to advertising of consumer goods only: the new provisions

are intended to apply to the advertising of consumer goods only as the obligation to quote all inclusive prices applies only to goods or services of a kind "ordinarily acquired for personal, domestic or household use or consumption". In this regard, the Clarity in Pricing Amendment is not intended to apply to price representations exclusively between businesses or exclusively between businesses and government.

It is important to note that the changes do not prohibit component pricing, provided that the single price is also displayed.

### **Who does it affect?**

The changes affect all businesses which advertise the price of their goods or services to consumers in component parts. Businesses which commonly engage in component pricing include:

1. mobile phone and telecommunications service providers;
2. airlines and online travel agents; and
3. the motor vehicle industry.

When introducing the amendments, the Federal Government identified the advertising of cheap airfares as a key concern that the new legislation may seek to address.

In practice, the amendments may prove problematic for businesses given the increased compliance burden on businesses and the criminal penalties which may result from a breach of the proposed provisions.

### **Exceptions**

The Clarity in Pricing Amendment contains certain exceptions to the requirement that a single price must be specified and the requirement to display the single price in a prominent way. In this regard:

- there is an exception for charges relating to sending goods from the supplier to a customer. However, where a corporation does not include a delivery charge in the single price, but a delivery charge must be paid by a consumer and the amount is known, the corporation must disclose the minimum amount of those charges as a separate component of price. A corporation may also choose to include the minimum amount of such charges in the single price

- as set out above, the new section 53C does not apply to representations that are made only to bodies corporate or governments. However, section 53C will apply where a representation is made to both consumers and businesses or governments (i.e. the exception only applies where the representation is made exclusively to a corporation or governments);

- the 'at least as prominently' disclosure requirement contained in subsection 53C(4) of the Clarity in Pricing Amendment does not apply to services to be supplied under a contract if the contract provides for the supply of services for the term of the contract, which also provides for periodic payments for the services to be made during the term of the contract and if goods are also supplied under the contract - they must be directly related to the supply of services (such as a mobile telephone is directly related to a mobile telecommunications service). A good example of this is mobile phone contract which may be for a fixed term with a minimum monthly payment. The Explanatory Memorandum sets out the following example relation to telecommunications services:

*a corporation may offer telecommunications services at a cost of \$20 per month, provided that the customer enters into a contract for provision of those services for a minimum of 24 months. The single price for those services is \$480 (\$20 x 24 months). The corporation is still required to state the \$480 single price prominently, but it may also display the \$20 per month more prominently, if it chooses to...*

The effect of this is that while the total amount payable over the fixed term must be displayed, it need not be as prominent as the minimum monthly payment. A word of caution: this exception may not be sufficient to avoid a claim of misleading and deceptive conduct if the display of the total price is so small or placed in such a way as to be almost unnoticeable by a consumer.

### **Offences**

The Clarity in Pricing Amendment also amends the criminal provisions of the *Trade Practices Act 1974* (Cth) to create an offence of strict liability for a breach on the new section 53C. Under the Clarity in Pricing Amendment a breach of the new section 53C is punishable by a fine of up

to \$1.1 million per offence for a company and \$220,000 for an individual. Injunctions, declarations and damages to recover loss are also available for breach of the new section 53C, in addition to other remedial orders including, without limitation corrective advertising orders and orders to implement compliance programs.

#### **What should businesses do?**

The changes will impose an increased burden on business to ensure its compliance with the legislation.

To assist with ensuring a businesses compliance, advisors of corporations should work with the corporations to review pricing, promotional and business practices.

Such review must include, among other things:

- an examination of all costs a consumer must necessarily incur if they purchase the goods or service;
- ongoing monitoring of all costs and charges associated with enabling a consumer to obtain the relevant goods or services to ensure that such costs and charges are accurately reflected in the single-price;
- an assessment of the methods used for communicating the single price of goods and services to the consumer to ensure that it satisfies the requirement that the single figure be displayed "in a prominent way";
- consideration of all media used by a corporation to ensure the appropriate changes are made including, without limitation, changes to catalogues, websites, radio advertisements and email messages. For example, email templates that are populated with information before an advertising campaign may require reformatting;
- a review of existing or long-running campaigns to ensure they do not contain representations that may breach the new section 53C;
- where a supplier offers bundled products and services, such a telecommunications service provider, analysis of the minimum components required in order enable a consumer to use the goods or receive the service advertised and the single price attached to same;
- offering training to the marketing teams and agencies of corporations to ensure they understand the obligations and consequence introduced by the new section 53C.

#### **When will it become operative?**

The component pricing changes to the *Trade Practices Act 1974* (Cth) will come into effect on a date to be proclaimed, but no later than 25 May 2009.

***Bridget Edghill is a Senior Lawyer at Truman Hoyle in Sydney***