



Trade Practices Amendment (Clarity in Pricing) Bill 2008

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Law and Bills Digest Section

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Trade Practices Amendment (Clarity in Pricing) Bill 2008

Date introduced: 25 September 2008

House: House of Representatives

Portfolio: Competition Policy and Consumer Affairs

Commencement: Sections 1–3 on the day of the Royal Assent; Schedule 2 on the day after the Royal Assent; and Schedule 1 on a day to be fixed by Proclamation or six months after the Royal Assent, whichever is the earlier.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to amend the *Trade Practices Act 1974* (TPA) to require corporations to prominently specify a single figure price that a consumer must pay to obtain a product or service.

The Bill does contain some exceptions to this requirement such as:

- **for charges relating to sending goods from a supplier to a customer**
- **where a single price is not quantifiable and**
- **for business to business transactions.**

Background

The intention of section 53C of the TPA

Section 53C of the TPA requires advertisers to state the cash price in relation to advertisements for goods and services. The Explanatory Memorandum for the Trade Practices Revision Bill 1986, which inserted section 53C into the TPA states that:

The new section 53C prohibits a corporation advertising part only of the consideration payable for goods or services without disclosing the total consideration for which the goods or services may be purchased outright. This provision is directed at a trader

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advertising that a consumer may buy a product for a low deposit without disclosing the total price payable.¹

In *Trade Practices Commission v Autoways Pty Limited*² the Court observed:

the policy [of section 53C] is to cause advertisers to tell the whole story and at least in one respect – if selling goods on time payment – they must say how much you could buy the good for by paying the cash price. This is likely to be of assistance, particularly to the less sophisticated buyers, in determining whether a purchase is desirable, and also in comparing the desirability of one purchase against that of another.³

Consideration by the Courts

Despite this intention, the decision of the Federal Court of Australia in *Australian Competition and Consumer Commission v Dell Computer Pty Ltd* (the Dell Computer case)⁴ suggested that section 53C of the TPA **does not require** a single figure price to be specified.

In that case, advertisements by Dell Computer Pty Ltd had a prominent display or statement of the price for computer products and, elsewhere in the advertisement, a reference to an additional charge for delivery. The complaint to the Australian Competition and Consumer Commission (ACCC) was that the advertisements did not make it sufficiently clear to potential customers that the delivery fee that was charged by Dell was compulsory and not optional.⁵

The question for the court was about the definition in the TPA of **'price'**, that is, whether the sums of money which were specified in the advertisements as the price of the computer products, constituted part only of the consideration for their supply, having regard to the fact that a compulsory delivery charge was payable.⁶

The court decided that there was **no breach** of section 53C. Justice Branson considered that it was not necessary to specify a whole price in dollar terms. In her view a cash price specified as \$1 999 plus \$99 is as much a specification of the whole price as a statement that the single cash price is \$2 098.⁷

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1. Explanatory Memorandum, Trade Practices Revision Bill 1986, paragraph 93, p. 26.
 2. (1990) ATPR 41-051.
 3. (1990) ATPR 41-051, at 51,676.
 4. (2002) FCAFC 434.
 5. (2002) FCAFC 434 at paragraph 30.
 6. (2002) FCAFC 434 at paragraph 57.
 7. (2002) FCAFC 434 at paragraph 23.

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Similarly, in the case of *Australian Competition and Consumer Commission v Signature Security Group Pty Limited*⁸ the court determined that the expression ‘\$295 plus GST’ is a compound statement of price which did not breach section 53C of the TPA.⁹

This Bill seeks to address the issue of compound statements of price, also referred to as ‘component pricing’. Component pricing occurs when a trader advertises a price in its component parts, rather than as a single all-inclusive figure.¹⁰

Initial moves to amend the Trade Practices Act

Complaints were aired in the media in 2005 about ‘businesses that suck consumers in with a cheap price, then bump up the final bill with taxes, fees and other charges’.¹¹ The motor vehicle industry, the airline industry and the rental car industry were singled out for particular criticism.

Draft amendments to the TPA to respond to component pricing were released for public consideration by the former government on 10 March 2006. Those draft amendments were expected to be part of the Trade Practices Legislation Amendment Bill (No 3) 2006. They were intended to implement the Australian Government’s announcement in April 2005 that it would amend the TPA to respond to the increased use of component pricing.¹²

However, the proposed legislation was not introduced. Instead, on 11 December 2006 the Hon Chris Pearce, then Parliamentary Secretary to the Treasurer announced that the Productivity Commission would commence a year long public inquiry into Australia’s consumer policy framework and its administration stating that:

[The] inquiry reflects the Australian Government’s commitment to leadership in consumer policy reform and will build on the Government’s ongoing reform agenda, including reform of Australia’s consumer product safety system and the laws governing component pricing.¹³

8. [2003] FCA 3.

9. [2003] FCA 3 at paragraph 17.

10. Denise Cullen, ‘But wait, there’s more’, *Sydney Morning Herald*, 11 October 2005, p. 3.

11. *ibid.*

12. Hon. Chris Pearce, MP Parliamentary Secretary to the Treasurer, *Component pricing: Time to have your say*, media release no 0009, Parliament House, Canberra, 10 March 2006.

13. Hon. Chris Pearce, MP Parliamentary Secretary to the Treasurer, *Productivity Commission Inquiry into Australia’s Consumer Policy Framework Welcomed*, media release no 042, Parliament House, Canberra, 11 December 2006.

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The Terms of Reference of the inquiry do not make specific mention of component pricing.¹⁴ The Productivity Commission issued a draft report on 12 December 2007. Its final [report](#) was published on 8 May 2008. However it does not appear to make specific recommendations about component pricing.

The draft Bill

In March 2008, without waiting for the final Productivity Committee report, the current government circulated draft legislation to address the issue of component pricing in advertising to consumers.¹⁵

A number of formal submissions were made to Treasury in response to the draft legislation. In particular, the submission by the Business Council of Australia¹⁶ was not supportive of the proposed amendments to the TPA on the following grounds:

- the absence of a clearly articulated problem at which the proposed amendments are aimed
- the absence of clear cost-benefit analysis
- practical problems associated with businesses attempting to comply with these provisions which will, in turn, impose costs on business and create uncertainties for consumers and
- the possibility for disproportionate penalties, given that the proposed amendments are likely to be difficult to implement in practice, which may result in businesses inadvertently contravening the law.¹⁷

Many of the drafting issues raised in the submissions by Choice¹⁸ and the Law Council of Australia¹⁹ were incorporated into the current Bill.

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14. Productivity Commission, 'Review of Australia's Consumer Policy Framework', *Productivity Commission Inquiry Report No. 45*, Commonwealth of Australia, 30 April 2008, pp. vi-viii.
 15. Hon. Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, *Rudd Government moves to reveal hidden costs of purchases*, media release no 019, Parliament House, Canberra, 30 March 2008.
 16. Business Council of Australia, *Submission to Treasury*, 18 April 2008, available at: <http://www.bca.com.au/Content/101411.aspx>, accessed on 9 October 2008.
 17. *ibid.*, p. 1.
 18. Choice, *Submission in response to the draft legislation on Component Pricing*, April 2008, available at: <http://www.choice.com.au/files/f132580.pdf>, accessed on 9 October 2008.
 19. Law Council of Australia, Trade Practices Amendment (Component Pricing and Other Measures) Bill 2008, 24 April 2008, available at: <http://www.choice.com.au/files/f132580.pdf>, accessed on 9 October 2008.

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The current Bill

It is important to note that this Bill is different from the draft bills which were circulated both by the former and current governments. In particular, the 2006 draft bill proposed that similar amendments would be made to the *Australian Securities and Investments Commission Act 2001*.²⁰ This Bill does not affect financial services. No formal explanation for this has been given. However, it is noted that financial services are already covered by the financial disclosure provisions of the *Corporations Act 2001*.²¹

The current Bill will particularly target the advertising of cheap air fares. The Hon. Chris Bowen is reported as stating:

It is not appropriate that additional compulsory fees and charges are disclosed in fine print disclaimers, particularly when those additional compulsory charges may be significantly larger than the component price that is highlighted.

The Australian Competition and Consumer Commission received 430 complaints over confusing component pricing last year. Many other consumers were probably misled, but had not complained to a regulator²²

Committee consideration

At its meeting of 25 September 2008, the Selection of Bills Committee deferred consideration of the Bill until its next meeting.²³

Financial implications

According to the Explanatory Memorandum, the Bill has no significant financial impact on Commonwealth expenditure or revenue.²⁴

Main provisions

Schedule 1

Schedule 1 of the Bill makes changes to the TPA in relation to component pricing.

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20. Law Council of Australia, op. cit., paragraph 2.
 21. Part 7.9 of the *Corporations Act 2001* contains financial product disclosure and other provisions relating to issue, sale and purchase of financial products.
 22. 'Airlines on notice to play fair on fares', *Australian Financial Review*, 26 September 2008, p. 20.
 23. Selection of Bills Committee, *Report No. 12 of 2008*, 25 September, 2008, paragraph 4.
 24. Explanatory Memorandum, p. 4.

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Item 1 of Schedule 1 repeals the existing section 53C and substitutes **proposed section 53C**. **Proposed subsection 53C(1)** introduces the term *‘relevant person’* which is repeated in various subsections of proposed section 53C. **Proposed subsection 53C(1)** applies to a corporation in connection with:

- the supply (or possible supply) of goods or services²⁵ to a person (the *‘relevant person’*) or
- the promotion by any means of the supply of goods or services to a person (the *‘relevant person’*) or
- the promotion by any means of the use of goods or services by a person (the *‘relevant person’*).

The corporation must not, in trade or commerce, make a representation about an amount that, if paid by the relevant person, would constitute only part of the total amount to be paid for the supply of goods or services unless the corporation also specifies in a prominent way, and as a single figure, the ‘single price’²⁶ for the goods and services: **proposed paragraph 53C(1)(c)**. These two concepts of a ‘single figure’ and a ‘single price’ are repeated throughout the Bill.

Proposed subsection 53C(7) defines the term *‘single price’* as the minimum quantifiable consideration for the relevant supply at the time of the representation to the relevant person and is to include each of the following amounts that can be quantifiable at that time:

- a charge of any description, payable by the relevant person, other than a charge that is payable at the option of the relevant person: **proposed paragraph 53C(7)(a)**²⁷
- the amount of any tax, duty, fee, levy or charge imposed on the corporation making the representation in relation to the relevant supply: **proposed paragraph 53C(7)(b)**²⁸
- the amount paid or payable by the corporation in relation to the relevant supply with respect to any tax, duty, fee, levy or charge: **proposed paragraph 53C(7)(c)**.²⁹

25. **Proposed subsection 53C(6)** provides that a reference in **proposed section 53C** to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

26. The term ‘single price’ replaces the term ‘cash price’ which is used in the existing section 53C of the TPA.

27. Example 1 for **proposed subsection 53C(7)** is of a corporation which advertises lounge suites for sale. Persons have the option of paying for fabric protection. The fabric protection charge does not form part of the single price as it is payable at the option of the relevant person.

28. For example, GST.

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The submission by Choice took issue with the use of the term ‘quantifiable’ in **proposed subsection 53C(7)**, citing the motor vehicle industry as an example. Choice strongly recommended that where a charge is ‘unquantifiable’, and thus excluded from the single price, the advertiser should be required to state in a prominent way the fact that the charge is payable and the nature of the charge.³⁰

There is an exception to the requirement that the corporation must specify the *single price*, namely, where the supply relates to goods for which a delivery charge may apply: **proposed subsection 53C(2)**.

However, where the corporation knows, at the time of making the representation about the amount to be paid for the supply of the goods, the minimum charge for sending the goods to the ‘relevant person’, then the corporation must **also** specify that minimum amount: **proposed paragraph 53C(1)(d)**.

A corporation will not have satisfied the requirement that the single price be specified in a prominent way unless the single price is at least as prominent as the most prominent of the component parts of the consideration: **proposed subsection 53C(4)**.

According to **proposed subsection 53C(5)** the ‘at least as prominent as’ requirement in **proposed subsection 53C(4)** does not apply to services supplied under a contract in the following circumstances:

- the contract provides for the supply of services for the term of the contract
- the contract provides for periodic payments for the services to be made during the term of the contract
- if the contract also provides for the supply of goods – the goods are directly related to the supply of the services.

The Explanatory Memorandum provides the following example of the circumstances in which this proposed subsection would apply:

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; however;

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29. Example 3 for **proposed subsection 53C(7)** is of the passenger movement charge imposed under the *Passenger Movement Charge Act 1978* which requires airlines to pay an amount equal to the charge that would otherwise be payable by passengers departing Australia.
30. Choice, op. cit. p. 4.

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if the contract also provides for the supply of goods, for subsection 53C(5) to apply those goods must be directly related to the supply of the services (for example, a mobile phone would be directly related to a mobile telecommunications service but a DVD player would not be).³¹

Proposed subsection 53C(6) provides that a reference to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. This means that the Bill does not apply to supplies by a corporation in trade or commerce with another corporation or non-corporate business or a government. It does not apply to business to business transactions.³²

Item 2 of Schedule 1 repeals existing subsection 75AZF(1) which is in similar terms to existing section 53C. The subsection provides for criminal penalties in cases where a corporation fails to specify the cash price in relation to advertisements for goods and services. **Item 2** also substitutes **proposed subsection 75AZF(1)** which is a criminal offence provision. As with its predecessor, it is in similar terms to proposed section 53C, that is, it provides that a corporation must not, in trade or commerce, make a representation about an amount that, if paid by the 'relevant person', would constitute only part of the total amount to be paid for the supply of goods or services. The maximum penalty for making such a representation is 10,000 penalty units.³³ According to existing (and unchanged) subsection 75AZF(3), the offence is one of strict liability.

Item 3 of Schedule 1 repeals existing subsection 75AZF(2) and substitutes **proposed subsections 75AZF(2)–(2D)** which provide exceptions to rule in **proposed subsection 75AZF(1)**. It will **not** be a criminal offence if a corporation fails to make a representation of the single price to be paid by the relevant person for a supply of goods and services in the following circumstances:

- if the corporation specifies both the single price for the goods or services **and** where, there is a delivery charge for sending the goods to the relevant person, the minimum amount of the delivery charge, if that amount is known to the corporation at the time of making the representation: **proposed subsection 75AZF(2)**³⁴
- where the representation is made exclusively to a body corporate: **proposed subsection 75AZF(2B)**³⁵.

31. Explanatory Memorandum, Trade Practices Amendment (Clarity in Pricing) Bill 2008, p. 6.

32. Law Council of Australia, op. cit., paragraph 3.

33. Under section 4AA of the *Crimes Act 1914* 'penalty unit' means \$110. Therefore the maximum penalty is \$1 100 000.

34. Under subsection 13.3(3) of the *Criminal Code* the onus of proof is on the defendant.

35. This is consistent with **proposed subsection 53C(6)** which is inserted by item 1.

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- in the circumstances set out in **proposed subsection 53C(5)**, that is, in relation to contracts that provide for the supply of services for the term of the contract, which also provide for periodic payments, and if goods are also supplied under the contract that those goods are directly related to the supply of the services.

Item 4 inserts **proposed subsections 75AZF(4) and (5)** which are in the same terms as **proposed subsections 53C(6) and (7)** and effectively insert mirror provisions into the offences section of Part VC of the TPA.

Item 5 of Schedule 1 is an applications provision which confirms that amendments made by Schedule 1 of the Bill apply to conduct engaged in after its commencement.

Schedule 2

Schedule 2 of the Bill contains miscellaneous amendments to the TPA.

Items 1 and 2 are minor consequential amendments.

Existing section 65E sets out the power of the Minister to declare by notice in writing published in the Gazette, product safety or information standards. **Item 3** amends existing subsection 65E(2) so that where such a notice is published, the standard referred to in the notice is taken to be:

- for section 65C³⁶ – a prescribed consumer product safety standard: **proposed paragraph 65E(2)(a)**
- for section 65D³⁷ – a prescribed consumer product safety information standard: **proposed paragraph 65E(2)(b)**
- for section 75AZS³⁸ – a consumer product safety standard prescribed by regulations: **proposed paragraph 65E(2)(c)**
- for section 75AZT³⁹ – a consumer product safety information standard: **proposed paragraph 65E(2)(d)**

Items 5 and 6 add notes to existing sections 75AZS and 75AZT to clarify that a breach of a notice about a standard which has been published in the Gazette under existing section 65E may be a criminal offence.

36. Section 63C of the TPA relates to product safety standards and unsafe goods.

37. Section 63D of the TPA relates to product information standards.

38. Section 75AZS of the TPA contains the offence provisions in relation to section 63C.

39. Section 75AZT of the TPA contains the offence provisions in relation to section 63D.

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