



Logie-Smith Lanyon Lawyers

ISP / Telco advertising law masterclass

9 December 2008

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Introduction: a case study

1. How it's supposed to work

- design ads
- place ads
- get positive response to ads
- make sales
- pay creative and media
- bank profit



2. How it can work: the Crazy John case

2.1. design ads

- campaign based on 'free' or '\$0' handsets¹

2.2. place ads

Between October 2007 and January 2008, Crazy John's caused to be published, broadcast or communicated the following advertisements:

- a newspaper advertisement published in the Daily Telegraph on 15 October 2007;
- a television advertisement broadcast on the Nine Network in the Sydney Television Licence Area on 21 October 2007;
- a brochure distributed in December 2007 at Crazy John's stores;
- a brochure distributed in December 2007 and January 2008 at Crazy John's stores;
- a magazine-style brochure distributed in January 2008 at Crazy John's stores; and
- promotions communicated via the Crazy John's website at www.crazyjohns.com.au between 21 December 2007 and 24 January 2008,

2.3. attract ACCC section 155 Notice

- extensive questions
- penalties of perjury and contempt of court

¹ Alarm !!! Warning lights !!! Signals !!!



- no privilege

2.4. get taken to court

ACCC takes Crazy John's to court²

Thu Jan 17, 2008

The consumer watchdog has launched proceedings in the Federal Court against the mobile phone company Crazy John's for alleged breaches of the Trade Practices Act.

The Australian Competition and Consumer Commission (ACCC) alleges Crazy John's engaged in misleading or deceptive conduct by advertising that handsets on its 'crazy phone plans' were free, when in fact customers had to pay for the handsets through higher call rates.

The ACCC is seeking a range of remedies including corrective advertising.

2.5. say crazy stuff in response

Crazy John's managing director, Brendan Fleiter, told The Age³ Crazy John's had only been notified of the ACCC complaint yesterday evening.

'We hadn't had any communication with them whatsoever prior to that, because as I understand it at this early stage the complaints relate to ads that ran in October last year, which are no longer up,' Mr Fleiter said.

'The mobile phone plans they're complaining about are less than 10% of the mobile phone plans that we have on offer.

'We stand by our advertising and the value of our products, but obviously we're happy to discuss any concerns the ACCC may have.'

An ACCC spokeswoman said it understood the advertising remained on the Crazy John's website and its point-of-sale material today.

² <http://www.abc.net.au/news/stories/2008/01/17/2140518.htm>

³ <http://business.theage.com.au/business/accc-charges-crazy-johns-with-false-advertising-20080117-1mj5.html>

2.6. end up caving in and submitting to Enforceable Undertaking

- pay \$15,000 ACCC costs
- acknowledge misleading conduct
- restrictions on future advertising
- offer all affected customers a \$7.91 per month credit through to end of plan
- three year trade practices compliance program.

3. What went wrong ?

- the 'f' word !!!



- ACCC Chairman⁴: 'Advertised discounts must be real and not illusory. It is also important that businesses put systems in place to **ensure advertising is accurate** before it is released,' he said. 'This decision highlights the need for businesses to have a **current trade practices law compliance program in place** and to continue to **review its systems for placing advertising.**'

⁴ <http://www.accc.gov.au/content/index.phtml/itemId/851267>

4. Trade Practices compliance program

- key to avoiding breaches
- major factor in ACCC response assessment
- major outcome from ACCC enforcement action
- **So we'll be giving you a certificate.**

5. It's not 'punishment'

ACCC: It's just 'correction'.

6. Substantiation Notices: Coming to a regulator near you

- section 155 notices demand resources
- Substantiation Notice ... 'Prove it !'
- throws workload and risk back on advertiser
- so for every claim ... 'Can we prove it ?'

7. Crazy John's solution

Nothing in paragraph 10 precludes Crazy John's from using the expression '\$0 upfront' in relation to Handsets provided with Mobile Telephony Products.



Promotional competitions

8. Typical scenario

You're a lawyer. It's lunchtime Thursday. Looking forward to second One Day Cricket Final at the G tonight. Hoping to get away early for a beer with the boys before the game.

Phone rings. It's FunnyTel. 'Hi, we're just after a quick check.'

You think, 'Well, you have \$10k over 60 days, and we're after a quick cheque, too.' But you don't say it.

FunnyTel: 'We're running an SMS competition tonight and we just wanted you to look over the T&Cs.'

You: 'I see them here in my inbox. Three pages. Hmmm. And what's the lottery permit number?'

FunnyTel: 'Agency said we don't need one.'

You: 'Are these three pages going to appear in every advert for the competition?'

FunnyTel: 'No, couldn't fit.'

You: 'Then you need a permit.'

FunnyTel: 'Agency said we don't need one.'

You think: 'Agency has crap for brains.' But you don't say it. You say: 'Why do they think that?'

FunnyTel: 'Agency guy says we can make it a game of skill instead of a competition. We can have them name the Australian captain, and winner has to get it right.'

You: 'But everybody know the name of the Australian captain. There'll be lots of correct answers. Who wins?'

FunnyTel: 'We'll pick out a correct entry at random.'

You think: 'Agency does have crap for brains.' But you don't say it. You say: 'You need a permit. Or we need to shrink those conditions to a handful of words that will fit in every advert.'

FunnyTel: 'But we're just about to start the promo. What's our risk if we just go ahead?'

You: 'Well, if it's not too prominent a promotion, you probably won't be caught. So where's it running?'

FunnyTel: 'Only on the main scoreboard at the MCG throughout the One Day Final tonight.'

You think: 'Oh, hell.' But you don't say it.

What do you say?

9. What you need to know about promotional competitions

Three kinds

- game of skill
- trade promotion lottery with a State permit
- trade promotion lottery with no permit, but satisfying certain conditions

9.1. games of skill – harder to set up than people think

- must not have *any* element of chance
- how will winning entries be judged?
- who will judge entries? how long will it take?
- every winner's a winner?

9.2. trade promotion lottery – anything other than a game of skill

- primary purpose must be to promote a business
- legislation differs slightly from State to State

9.3. trade promotion lottery with a State permit

- (in Victoria) entry forms and advertisements must include: competition closing date, when / where winners will be drawn, how winners will be notified, who is eligible to enter and the permit number
 - must have permits for each State and Territory in which competition is being run
- 9.4. trade promotion lottery with no permit, but satisfying certain conditions
- (in Victoria) retail value of the total prize pool must not exceed \$5,000
 - (in Victoria) entry forms and ads must include all the information required for lotteries with a State permit (other than the permit number) *and* the conditions of entry

10. The lesson: Know what you're doing and prepare for it in good time

- Game of skill or element of chance ?
- What is the retail value of the total prize pool ?
- In which States and Territories will the competition be run ?
- Permit required ? How long will it take to get a permit for each State / Territory ?

TPA basics: deceptive business conduct

11. Deceptive conduct – in a nutshell

The rule

In doing business, you may not give other people the wrong idea – either by action or inaction – deliberately or accidentally.

An example

e.g. Advertising mobile phones for sale at a particular price without informing the consumer of the tied service arrangements.

This is misleading because the consumer would naturally have the impression that the advertised price was all they needed to pay.

12. What the TPA says


The TPA prohibits false, misleading or deceptive representations and other deceptive conduct. It has a wide scope in prohibiting deceptive business conduct.

The TPA prohibits:

- engaging in misleading or deceptive conduct
- making false representations that products are of a particular standard, quality, value, grade, composition, style, model, or have had a particular history or previous use
- making false representations that second-hand equipment is new

- making representations that products have performance characteristics, accessories, uses or benefits they do not have
- making representations that they have a sponsorship, approval or affiliation they do not have



- making false or misleading representations about the price of products
- making false or misleading representations about the place of origin of products
-  making false or misleading representations about the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy
- engaging in misleading conduct in relation to employment
- offering gifts or prizes without the intention of providing them as offered
- engaging in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of products.

Some more examples

Conduct which could be misleading or deceptive might involve:

- making **false representations on the packaging** or labels of products
- attempts at '**passing off**' i.e. giving the impression our product was another company's brand
- **unauthorised use of a competitor's or other person's intellectual property**, such as their trade marks, trade names, or designs

- making **false representations to customers, suppliers or partners** in contract negotiations
- **not disclosing information** which consumers, customers, suppliers or others would expect to be disclosed, or
- making **unreasonable predictions** or offering **unreasonable opinions**.

Conduct would be misleading or deceptive in breach of the TPA if, in a court thought it was capable of leading people into error.

It doesn't have to be deliberate

Conduct can be misleading or deceptive without any intention or deliberate decision to mislead people.

13. Lessons from the case book

Here's a real life example from the ACCC files.

Fruit juice distributor corrects misleading labels



Dannon Pty Ltd, which distributes Ceres fruit juice products in Australia, has acknowledged that the '100 per cent fruit juice' labelling on some of its products may have misled consumers.

Dannon has provided court-enforceable undertakings to the ACCC in relation to its packaging.

'The undertakings are the latest enforcement action the ACCC has been required to take against fruit juice distributors', ACCC Chairman, Mr Graeme Samuel, said.

The ACCC was concerned that the composition of the fruit juices was being misrepresented.

In particular, the illustrations on the packaging of many of the Ceres juices created the overall impression that those juices contained 100 per cent of the characterising fruit, when in fact those juices contained a number of different juices.

The ACCC was also concerned that all of the juices in the Ceres fruit juice range were labelled as '100% fruit juice blend' when the addition of vitamin C meant that this was not the case.

When the matter was brought to the company's attention it cooperated fully and swiftly.

Dannon has agreed that:

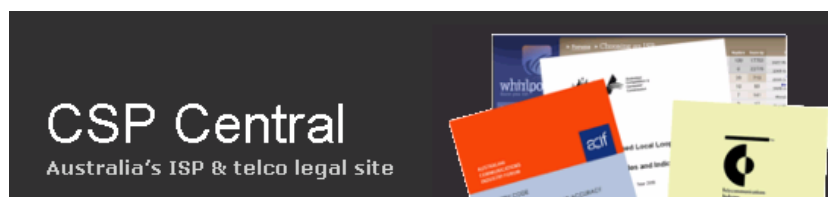
- it will not in the future create an overall impression that a juice product contains 100 per cent of a particular fruit juice when that is not the case; nor will it represent a fruit juice to be a 100 per cent product when vitamin C has been added
- it will publish a corrective notice, and
- it will implement and maintain a trade practices law compliance program.

Things to note

Notice that:

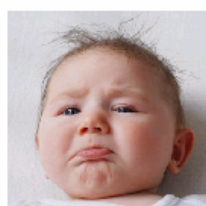
- The Dannon case wasn't about a high cost product – just plain old juice. The ACCC is very interested in everyday, ordinary products and how they are promoted.
- It wasn't an extreme case. The ACCC moved in because consumers *may* have been misled.
- Dannon behaved very well when the ACCC contacted it. But that didn't get it 'off the hook'.
- Dannon was required to give 'court enforceable undertakings' i.e. promises to the ACCC that are equivalent to voluntarily accepting a court order.
- Dannon had to publish a corrective advertisement. No good for the public image.
- Dannon also had to implement and maintain a TPA compliance program.
- This was the 'latest action against fruit juice distributors'. The ACCC often targets particular industries for 'clean up'.

And if you want a heads up about a 2009 target



ACCC 'getting very cranky' about premium mobile services

Peter Moon



ACCC Enforcement Commissioner Sarah Court has identified premium mobile services as an **ACCC** hot spot for 2009.

Speaking to a packed audience at the Law Institute of Victoria, the former Australian Government lawyer indicated a personal view that the Commission is 'getting very cranky' about ringtone and wallpaper download services that 'are costing consumers millions and millions of dollars.'

'It's a personal view'

Ms Court prefaced her presentation to Melbourne lawyers with a disclaimer that her views weren't necessarily those of the Commission. And the audience question only asked for her personal thoughts about areas of interest to the ACCC next year.

Instant answer

The Commissioner, **appointed just six months ago** after a decade working for the Commonwealth's in-house legal team, certainly knew what her personal opinion was: 'mobile phones'. She quickly went on to identify premium services, where often unwitting consumers subscribe to low value / high cost downloads and information, as the target.

Ms Court said her views were partly based on the TIO's **2008 Annual Report** which shows a massive number of complaints about premium services. (It reports complaints in this area more than doubled over the previous year, reaching 22,391.)

Acknowledging that the content is often based offshore, Ms Court indicated that the Commission may look to local service providers and advertisers to help reform the area.

www.cspcentral.com.au

14. And another 'sleeping' target – the word 'cap'

- industry now uses 'cap' to mean 'minimum spend'
- exact opposite of natural meaning
- many consumers understand this upside-down use
- see <http://cspcentral.com.au/wordpress/?p=190>
- TIO position statement:⁵

Core position

As a general principle, it is the TIO's view that products should only be marketed as capped... when those products **are in fact capped ... in the everyday sense of that word.**

Companies may **confuse consumers if they use this terms in another sense**, either directly or indirectly such as through qualifying contractual terms and conditions.

Capped

Recent years have seen many telecommunications providers market products they describe as capped plans. Such products generally involve an arrangement where a consumer pays a fixed—usually monthly—amount to obtain service value for what is stated to be a higher amount, e.g. a customer agrees to pay \$50 per month so they can make calls up to the value of \$300.



⁵ <http://www.tio.com.au/policies/Contracts/UseofMarketingTerms.htm>

Contractual terms and conditions for such plans vary considerably, even when they are plans offered by the same company.

Some of the claims made by complainants about capped plans include:

- that they were not aware that they would have to pay more than the fixed monthly payment if their usage exceeded the value associated with the cap, e.g. that they would have to pay more than \$50 if they made calls beyond \$300
- that they were not aware that the arrangement did not include all types of usage, e.g. that if they made data calls to access the internet they could not count these as part of their \$300 in value and instead would have to pay for them separately at the rate of \$2.50 per minute, and/or
- that they were not aware that the arrangement set limits on the duration of individual calls, and that they would have to pay separately for any calls that were longer than a defined period.

These and other complaints indicate that consumers may not clearly understand what capping means in the specific context of a plan for telecommunications services. Rather, they appear to understand the term capped in the generally protective sense of the term, i.e. that there is a maximum limit or 'ceiling' on the amount of money that they can spend or that they will be charged.

Special cases to be aware of

15. Comparative advertising

- means what it suggests: advertising that compares our products or services with those of a competitor
- examined more strictly by courts than non-comparative advertising
- misleading or deceptive if statements about a competitor's product were inaccurate or open to misinterpretation, or if the superiority of your product could not be measured objectively
- it's your job to find and make genuine comparisons
- For instance, pizza shop A might offer:

Small		8 inches	\$7.50
Medium		10 inches	\$9.00
Large		12 inches	\$12.00

And pizza shop B might offer:

Small		10 inches	\$9.00
Medium		12 inches	\$10.00
Large		14 inches	\$11.00

If pizza shop A advertised 'Our medium pizzas are a dollar cheaper than shop B's medium pizzas' it would be misleading. It is literally true, but because of the different product ranges, the fair comparison would be between shop A's medium and shop B's small, which are the same price.

16. Bait Advertising

Unlawful to advertise goods for a discounted price when there are reasonable grounds to believe that the goods either:

- won't be available or
- won't be available for a reasonable time at the advertised price.

Customers are entitled to expect discounted goods to be available in sufficient quantities to meet anticipated demands unless it is clearly stated otherwise.

Key points

Do:

- clearly state the time limit on an offer
- have enough stock to satisfy the expected demand
- make it clear if there are limited supplies
- offer a 'rain-check' if you can't to supply goods at the advertised price within the offer period
- clearly distinguish between genuine 'closing down' sales and mere stock clearances
- honour offers to 'beat any competitor's price'
- make sure photographs and drawings correspond with the advertised product and price

Don't:

- make a low price offer unless you make it open for a reasonable period in reasonable quantities
- run continuous or non-stop 'sales'
- advertise 'introductory' offers on products you have previously carried

17. Sponsorship or approval

The TPA bans false representations about:

- sponsorship
- approval
- affiliations
- performance characteristics
- accessories
- uses, or
- benefits

that they do not have.

A representation about 'sponsorship' or 'approval' could be a representation, whether express or implied, that an person or organisation had endorsed particular product.

18. Representations about 'price'

The TPA bans misrepresentations about:

- price
- recommended price
- usual retail prices
- the actual selling price of products
- availability of tax rebates.



19. Sales and 'normal' price

In a sale, the so-called 'normal' price must actually have been charged by supplier or its competitors for a reasonable period immediately before the sale, and the sale price must be a genuine reduction.

There is nothing unlawful about words like '50 % off', 'save \$60', 'was \$300 / now \$200' – if they are true.

20. Comparison with RRP

Comparisons with an 'RRP' or recommended retail price may also be misleading if that price has not really been used as a selling price by the supplier, or is not widely used by others in the industry and is therefore not a realistic valuation.

21. Assertions of 'value'

Comparisons with a product's 'value' or 'worth' should only be used if a recognised, objective valuation is available.

Advertisements offering goods at:

- a reduced price
- a discounted price
- a special price,
- a lower than normal price

must be accurate to avoid breaching the TPA.

22. Percentage discounting campaigns

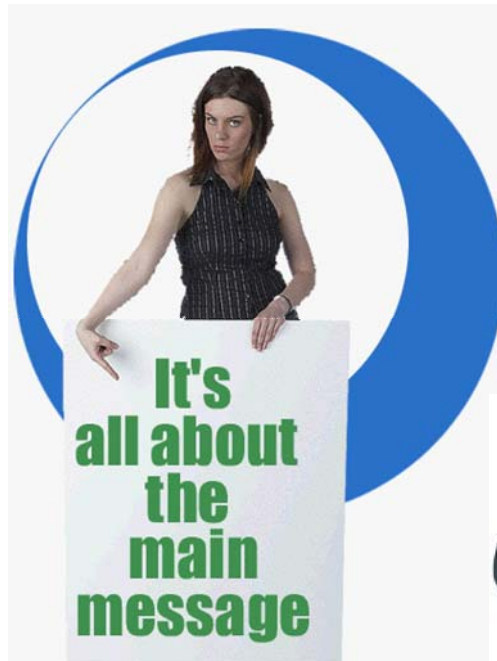
- Misleading to use statements like 'up to 50% off' where only a few items are discounted.
- Consumers may believe that a number of items are discounted by 50% and that all other items are discounted to some degree.
- OK to specify the type of goods



that the discount applies to i.e. '50% off all toasters' or, or use phrases like '50% off selected stock'.

- Bottom line is that it must be clear to consumers that not all stock is discounted.
- It is also misleading to use phrases such as '50% off storewide' where exclusions apply which are not made clear to consumers.

23. Two Golden Rules



24.  Price reductions – ‘was / is’ pricing

Particular care needs to be taken with ‘was’ and ‘is’ pricing. There are special rules.

A representation that a price is less than, say, the Recommended Retail Price is **false if the products have not been sold for a sufficient period** at that RRP or at all.

Claimed price reductions can be misleading where the ‘before’ price is **not the price that the goods were actually sold** or where the ‘now’ price is **not a temporary reduction**.

The ACCC has **published a guide** on issues to be addressed before a comparative price promotion. Here’s a summary:

Key points

‘Was / is’ pricing

Do be sure that:

- the products were actually sold at the ‘was’ price for a period of at least 14 days before the advertisement
- at least 75% of the sales of the product before the promotion were at the ‘was’ or higher price
- the ‘was’ price is not simply the Recommended Retail Price, if the products were not actually sold at that price for the requisite period of time and in the requisite quantities
- the promotion is intended to end and / or the intention is to remove the ‘was’ price by a specified date
- the length of the promotion is shorter than the time for which the products were offered at the ‘was’ price and in any event less than 1 month

- there are reasonable grounds to believe that there will be stock at the end of the promotion (i.e. this is not a stock run out)
- if the promotion is a stock run out sale then that is made clear to customers

Examples of what goes wrong

- A television may have an RRP of \$2,000. But if it is a 2 year old superseded model which is actually selling in the market place for \$1500, this advertisement would be misleading: 'Was \$2,000, Now \$1,500'.
- The RRP of a product is \$800 but the seller has not actually sold it at that price.
- The 'was' price is \$550 but only a few products were sold at that price with other products sold at discount.

'Free' or 'bonus' offers



The TPA bans offers of gifts, prizes or other free items where a company does not intend to provide them as offered, or at all.

Advertisements using **words like 'free' and 'bonus' are particularly powerful** and have a strong tendency to create a misleading impression if not used carefully.

This type of advertising can include offers like:

- 'two for the price of one'
- 'interest free'
- 'buy one, get one free'
- 'no up front costs', and
- 'zero dollars'

To be safe, any respect in which the 'free' goods and services may not really be free should be prominently and clearly spelled out.

Examples from the ACCC files

- Abel Rent-A-Car advertised 'free insurance' and 'free delivery'.
But the insurance was subject to a significant excess and the free delivery was subject to availability.
- Telstra advertised mobile phone handsets for \$0 but the zero price only applied if the customer signed up for two years at \$20-\$60 a month, with penalties for early termination.

Key points

Do:

- advertise clearly, honestly and accurately
- make any conditions, qualifications or exclusions conspicuous, clear and legible

Don't:

- increase prices to coincide with 'buy one, get one free' promotions – it is misleading
- offer 'free' prizes that are impossible to claim
- load up prices to pay for 'free' parts of the deal

25.



Representations about legal rights or remedies

Scenario: 'No return allowed or refunds given'

The TPA bans, in connection with the supply or promotion of products, misrepresentations about the

existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Any deviation, however minor, from the true position about a person's legal rights, would breach the TPA.

In particular, it would breach the TPA to misstate the nature or extent of a guarantee or warranty, or to misstate a person's rights or remedies under the TPA or other legislation.

And it's a criminal offence.

Review: more ACCC deceptive conduct cases

- A company sold an electronic 'ion mat', claiming numerous health and wellbeing benefits, when no such benefit could be found.
- Computer manufacturer Dell failed to disclose an unavoidable delivery charge attached to the purchase of its products.
- A drug company misled the public by inaccurately comparing its product with a competitor's, but not with the competitor's *most similar* product.
- Canon Australia leased a laser photocopier to a business after making a number of representations about its performance. The machine turned out to be capable of producing less than half the stated number of photocopies before servicing was required. The business failed substantially due to these deficiencies and Canon was ordered to pay damages of over \$200,000.
- A car dealer received a penalty of \$1,000 for selling a superseded Ford with a 20-month old compliance plate as a new vehicle.
- In 1974 Sharp Corporation claimed that all its microwave ovens were tested and approved by the Standards Association of Australia (SAA). In fact the

SAA at that time had no approved test of microwave safety. Sharp was fined \$100,000.

- In television advertising of a particular model of the 4WD Patrol, Nissan stated that consumers would save 'a whopping \$6,290 on a brand new RX Turbo Patrol at only \$39,990 including free air conditioning'.

The advertisement described the amount of \$6,290 as 'end of year savings'. In fact the model in question was normally \$39,990 and the only real saving was free air conditioning valued at \$2,195.

Nissan was convicted and fined a total of \$130,000 on this count.

Nissan's advertising agent pleaded guilty to aiding and abetting the conduct, and was fined \$10,000

- A retailer of electrical goods introduced a promotion where people could accumulate points merely by visiting its store, and even more by buying goods. A certain number of points earned one of ten prizes. When the promotion ended, the retailer planned to insert fictitious names as 'winners'.
- Cue Design, a national fashion retailer, released a new range of shorts, skirts, vests and tops from its Sydney warehouse. Swing tags attached to each garment showed two prices – the higher price was crossed out and prices ranging from between \$13 and \$56 less were written underneath.

The ACCC alleged this would lead shoppers to believe that the garments had previously been sold at the higher price and had now been discounted.

In fact, the garments had never been sold before. Cue was fined \$75,000 by the Federal Court and ordered to pay the ACCC's legal costs.

26. Remember, better late than never

November 2008



December 2008



27. New TPA 'clarity in pricing' law

From CSP Central (13 November 2008) ...

New prices advertising law passed in Federal Parliament



The *Trade Practices Amendment (Clarity in Pricing) Bill 2008* was passed by Federal Parliament on 11 November 2008. It will come into force within the next few months - date to be announced.

The new law amends the Trade Practices Act 1974 to **mandate advertising of a single buy price** for certain goods and services.

Outline of the new prices advertising law

The key rules are:

- Is your advert for goods or services that would commonly be acquired for **personal, domestic or household use** or consumption? If 'no', you don't need to worry about this law.
- Could you prove that advert is only relevant to **companies i.e. not people**? If 'yes', you don't need to worry about this law.
- Does the advert state any pricing at all? If 'no', you don't need to worry about this law.

Otherwise:

- Advertisement must **state the single figure all-in buy price** for the goods / services it offers.
- Single price **must be prominent**.
- **Single price must be at least as prominent as any other pricing mentioned - except for any monthly / periodic service charge under a term contract (as long as any goods advertised in same advertisement are for use with the service).**

- No obligation to bundle delivery charge in single price.
- If minimum delivery charge is not bundled in single price but is known, it must be separately stated.
- Single price may exclude optional extras.
- Single price must include GST if applicable.

Penalties for breach

Breach of the new law will trigger the offences provisions, with maximum fines per offence of \$1.1 million for a corporation and \$220,000 for an individual.

A



FunnyTel Mobile
\$69 / month
Total price over 24 month term = \$1,656

B



FunnyTel Mobile
\$69 / month
\$0 upfront handset
Total price over 24 month term = \$1,656

C



FunnyTel Mobile
\$69 / month
\$0 upfront handset
Free xBox
Total price over 24 month term = \$1,656

Telecommunications Industry Codes

28. It's a myth that the codes 'are not the law'

Once a code is registered, section 121 of the Telecommunications Act allows ACMA to issue a direction to a CSP to comply with it.

A breach of a direction then becomes a breach of the Telecommunications Act as well.

After that, failure to comply isn't healthy for the CSP. Penalties for breaching an ACMA direction to comply run up to attracts penalties of up to \$250,000 for companies and \$50,000 for individuals who are involved.

See <http://cspcentral.com.au/wordpress/?p=836>

29. Code 628:2007 Telecommunications Consumer Protections

Content of Advertising Material

Advertising Material must:

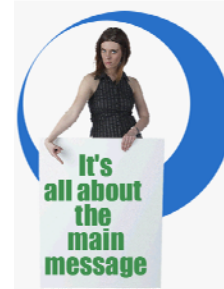
- clearly **communicate any condition**, limitation, qualification or restriction on an offer in a manner that is reasonable, having regard to the medium used and the intended audience
- clearly **communicate any call connection fee** not included in any stated call rate, in a manner that is reasonable having regard to the medium used and the intended audience
- if a Telecommunications Product is offered for a limited period or in a limited quantity, **communicate that limitation**

- if a Telecommunications Product is available only to a limited class of Customers, **clearly communicate the eligibility requirements**
 - contain sufficient **details of any Special Offer**, including:
 - its principal elements
 - any conditions or limitations
 - any future start date and any known end date
 - if the offer of Telecommunications Goods is **conditional on the Customer connecting to a Telecommunications Service**, state so and in all printed Advertising Material (other than billboards, posters or similar), state:
 - any minimum period for the Telecommunications Service connection
 - any connection fees
 - any monthly access fee
 - any minimum monthly call fees or other compulsory payments
 - the minimum total cost over the minimum term of the Contract, if it can be calculated
 - if any fee applies for early termination of the Contract
 - specify the service, rate or other matter **on which a Savings Claim is based**
 - clearly communicate any **conditions, including time limits, caps or fair use policies**, on free calls, credits or other benefits;
 - clearly communicate any **conditions and costs which may apply to any Telecommunications Product component of a Bundled Telecommunications Product**
-


- clearly communicate any **geographical or technical limitations** which substantially affect claimed availability or performance.

Disclaimers:

-  A Disclaimer must **not** be used to **negate the principal messages** of Advertising Material.
- Disclaimers must be **clear and readily understandable**, having regard to the type of Advertising Material, including the medium or format used and its intended audience.
- Disclaimers must:
 - be placed **next to the offer**
 - be **linked to the offer by an asterisked footnote** or other symbol
 - form a **visual or aural part of television and radio Advertising Material**.



Use of the term 'free'

-  Must ensure that:
 - the Telecommunications Product described as 'free' or equivalent, is **not subject to any charge**, fee or cost
 - the Advertising Material **identifies those elements that are referred to as 'free'** or equivalent
 - **other conditions** that qualify the offer are **stated**
 - the **prices** of Telecommunications Products accompanying the offer are **not inflated** to cover some or all of the offer described as 'free' or equivalent.



Use of the term 'unlimited'

Must:

- **identify which elements** of the offer are 'unlimited'
- state **any other conditions** that may qualify the offer.

Comparative Advertisement

Must:

- be **clear what** the preferred products are **being compared with**
- provide sufficient information so the **comparison is clear**
- be based on **accurate, current and relevant information.**

Draft Code 637:2008 Mobile Premium Services

30. It's a draft

'The draft Code sets out obligations on suppliers to establish appropriate community safeguards in the provision of Mobile Premium Services.

'The Code specifies minimum requirements on **advertising, provision of information, service delivery, complaint handling** and **opt-out** mechanisms.'

PUBLIC COMMENT PERIOD CLOSSES AT 5.00 P.M. ON FRIDAY 12 DECEMBER 2008

31. The advertising rules

3.1 All Mobile Premium Services – Advertising

The Rules for advertising any Mobile Premium Service are:

3.1.1 **Scope of general advertising requirements:** Clauses 3.1.2 to 3.1.17 only apply to:

- (a) advertisements for Premium SMS or MMS Services; and
- (b) advertisements for Proprietary Network Services to the extent that a Content Supplier is using the advertisement to fulfil its obligations under clause 4.5.1 or 4.5.2.

3.1.2 **Advertising display requirements:** In advertisements for Mobile Premium Services, a Content Supplier must:

- (a) include clear, prominent and legible information on price and material terms:
 - (i) accurately and within sufficient proximity to the:
 - (A) Short Code for; or
 - (B) if no Short Code is displayed, the primary mechanism displayed to enable Customers to request or subscribe to, the Mobile Premium Service being offered to make it obvious that the information applies to that Mobile Premium Service;
 - (ii) in the same orientation and direction;
 - (iii) simultaneously and for the same duration;
 - (iv) for long enough to allow it to be read or heard by and average person;
 - (v) on the same page as the rest of the advertisement; and
 - (vi) if the advertisement is online, above the fold;
 - (b) expressly refer to any Carriage Fees that will apply for access or use of the Mobile Premium Service;
 - (c) use a minimum 6 point font for all text in any print medium; and
 - (d) include the Content Supplier's Helpline.
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3.1.3 **Pricing information:** A Content Supplier must ensure that a Customer can access pricing information about Mobile Premium Services, including:

- (a) any sign-up cost; and
- (b) frequency of charging information, including any:
 - (i) charge per MO Message;
 - (ii) charge per MT Message; or
 - (iii) charge per time period,

without requesting supply of the Mobile Premium Service.

3.1.4 **Requirements for disclaimers:** A Content Supplier must ensure that any disclaimer included in an advertisement for a Mobile Premium Service is:

- (a) placed next to the offer for the Mobile Premium Service;
- (b) linked to the offer by an asterisked footnote or other symbol; or
- (c) if the advertisement is for radio or television, is part of the advertisement visually or aurally, and

is readily available and clearly indicated and stated, having regard to the type of advertising and its intended audience.

3.1.5 **Prohibitions on disclaimers:** A Content Supplier must ensure that any disclaimer included in an advertisement for a Mobile Premium Service is not:

- (a) inconsistent with anything in the principal message of the advertisement;
- (b) negating the principal message of the advertising; or
- (c) introducing a new or additional offer.

3.1.6 **Limitations:** If an advertisement offers a Mobile Premium Service:

- (a) for a limited period or in limited quantity; or
- (b) that is available only to a limited class of Customers,

the Content Supplier must ensure that the advertisement clearly communicated that limitation.

3.1.7 **Special offers:** A Content Supplier must ensure that advertisements for special offers to give a discount or rebate from

a standard Mobile Content Fees for a limited period contain sufficient details of the special offer including:

- (a) its principal elements;
- (b) any conditions or limitations; and
- (c) any future start date, and the end date.

3.1.8 **Savings claims:** A Content Supplier must ensure that advertisement which make any savings claim about a Mobile Premium Service specify the service, rate or other matter on which the savings claim is based.

3.1.9 **Advertising 'free' services:** A Content Supplier must ensure that any advertisement for a Mobile Premium Service that is described as 'free' clearly states the terms and conditions of supply, including whether the supply is conditional on the Customer also accepting any other service for which Mobile Content Fees may be incurred.

3.1.10 **Use of the term 'free':** Where a Content Supplier uses the terms 'free' or an equivalent in an advertisement for Mobile Premium Services, the Content Supplier must ensure that:

- (a) where the 'free' period is greater than 6 days, a message is sent to the Customer's nominated mobile phone without charge, when the 'free' period is over including details of:
 - (i) the impending charges for the Mobile Premium Service;
 - (ii) the Helpline; and
 - (iii) the 'STOP' Message;
- (b) the 'free' Mobile Premium Service is not subject to any charge, fee or cost, other than Carriage Fees;
- (c) the duration of the 'free' period is clearly stated to the Customer in any messages sent as part of the Mobile Premium Service;
- (d) the advertisement clearly identifies those elements that are referred to as 'free' or equivalent;
- (e) other conditions that qualify the offer are stated; and

- (f) the prices of other products or services accompanying the Mobile Premium Service are not inflated to cover some or all of the offer described as 'free' or equivalent.
 - 3.1.11 **Benefits:** A Content Supplier must ensure that advertisements which offer or promote any any benefits in relation to Mobile Premium Services clearly communicate any conditions upon the Customer's ability to use the benefits.
 - 3.1.12 **Misleading advertising:** A Content Supplier must ensure that advertisements for Mobile Premium Services are not confusing, misleading or deceptive, having regard to the intended audience.
 - 3.1.13 **Up to date advertising:** A Content Supplier must ensure that advertisements for Mobile Premium Services do not contain out of date material.
 - 3.1.14 **Mobile marketing messages:** A Content Supplier must ensure that any Mobile Premium Service marketing message sent to a Customer's mobile phone is sent at no cost to the Customer, and must:
 - (a) commence with the phrase 'FreeMsg';
 - (b) not imply that it is a personal message or otherwise suggest a false imperative for the Customer to reply;
 - (c) not include any adult related language or concepts; and
 - (d) include details of the 'STOP' Message, and the Short Code to which it must be sent, if that Short Code is different to the Short Code used for the marketing message.
 - 3.1.15 **Limited number of marketing messages:** A Content Supplier must not send more than Mobile Premium Service marketing message to a Customer's mobile phone per week, unless the Customer consents to receive more.
 - 3.1.16 **Scams:** A Content Supplier must not use a Mobile Premium Service for conducting or participating in the promotion of a scam.
 - 3.1.17 **Advertising to children:** If the placement, context and content of a Mobile Premium Services advertisements is reasonable likely to attract or encourage a significant number of persons under 15 years of age to use that Mobile Premium Service, the Content
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Supplier must include a warning to the effect 'If you are under 15 you must ask the account holder before using this service' in the advertisement.

3.2 Premium SMS or MMS Services – Advertising

The additional Rules for advertising Premium SMS or MMS Services are:

- 3.2.1 **Endorsements:** A Content Supplier must ensure that advertisements for Premium SMS to MMS Services only imply that they are supplied or endorsed by a particular End Carriage Supplier or Aggregator if that is, in fact, the case.
- 3.2.2 **Short Code:** A Content Supplier must ensure that television advertisements for Premium SMS or MMS Services display the Short Code for the Premium SMS or MMS Service for at least 10 seconds.
- 3.2.3 **Pricing information:** A Content Supplier must ensure that advertisements for Premium SMS or MMS Services include pricing information:
- (a) in the case of television advertisements:
 - (i) in a prominent and highly visible manner in the visual elements of the advertisement; and
 - (ii) in font at least 50% of the size of the Short Code;
 - (b) In the case of print advertisements:
 - (i) in a prominent and highly visible manner in the main body of the advertisement;
 - (ii) if the Short Code is displayed in 24 to 48 point font size, in font at least 25% of the size that Short Code; and
 - (iii) if the Short Code is displayed in larger than 48 point font size, in at least 12 point font size;
 - (c) in the case of online advertisements:
 - (i) in a prominent and highly visible manner in the main body of the advertisements; and
 - (ii) on the same page as the Short Code and in font at least 50% of the size of the Short Code or, if the Short Code is not displayed, on the first page of
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the advertisement so that it is obvious to the Customers; and

(d) in radio and IVR advertisements.

3.2.4 **Terms and conditions:** A Content Supplier must ensure that visual advertisements for Premium SMS or MMS Services set out the material terms and conditions of the relevant Premium SMS or MMS Service in a manner that is:

(a) clear, legible and contrasts with the background; and

(b) in the case of television advertisements, easily comprehensible and on screen long enough for an average viewer to read all text.

3.2.5 **Marketing, prompt and inducement messages:** If a Content Supplier supplies a Premium SMS or MMS Service which includes the provision of marketing, prompt or inducement messages as a component of the service, the Service Provider must give Customers the option of not receiving such messages prior to, or commencing, supply.

3.2.6 **WAP Push Marketing Messages:** A Content Supplier must ensure that:

(a) any Mobile Premium Services marketing message sent to a Customer's mobile phone by WAP Push Message is recorded in a call log in clear text format; and

(b) any website linked to such a WAP Push Message includes a link enabling the Customer to opt-out of marketing.

3.2.7 **Call logs:** A Content Supplier must:

(a) ensure that the call log described in clause 3.2.6(a) enables the reader of the log to easily read the content of each recorded WAP Push Message; and

(b) make records from that call log available to the relevant End Carriage Supplier or Aggregator on request.

3.3 Premium Messaging Subscription Services – Advertising

The additional Rules for advertising Premium Messaging Subscription Services are:

3.3.1 **Charges for receiving marketing messages:** A Content Supplier must not charge a Customer for receiving any marketing or

promotional material in relation to Premium Messaging Subscription Services.

- 3.3.2 **Charges for replying to marketing messages:** If a Customer would incur Mobile Content Fees for replying to a marketing, prompt or inducement message sent as part of a Premium Messaging Subscription Service, the Content Supplier must identify those Mobile Content Fees in the marketing, prompt or inducement message.
- 3.3.3 **Post subscription marketing:** If a Content Supplier wishes to advertise directly to the mobile phone of a Customer who has unsubscribed to a Premium Messaging Subscription Service, the Content Supplier must:
- (a) in the unsubscribe confirmation message sent pursuant to clause 7.2.5 provide an option for the Customer to opt-in to receive this advertising; and
 - (b) only send advertisements to that Customer's mobile phone of the Customer has opted in to receive them.
- 3.3.4 **Subscription advertisements:** A Content Supplier must ensure that advertisements for a Premium Messaging Subscription Service clearly state:
- (a) whether, by subscribing, the Customer is also consenting to their details being included in a marketing database;
 - (b) in a prominent manner, that it is a Subscription Service and the material terms of use, including details of:
 - (i) any sign-up cost; and
 - (ii) frequency of charging information, including any:
 - (A) charge per MO Message;
 - (B) charge per MT Message; or
 - (C) charge per time period, and the time period;
 - (c) details of the 'STOP' Message;
 - (d) how to opt-out of receiving marketing; and
 - (e) the word 'subscription' or 'subscribe' to convey the activation method:
 - (i) in the case of television advertisements:
-

Writing ISP and Telco advertisements

- (A) in a prominent and highly visible manner in the visual elements of the advertisements:
 - (aa) for as long as the Short Code is displayed; and
 - (bb) in font at least 50% of the size of the Short Code; and
- (B) in the voice over the advertisements;
- (ii) in the case of print advertisements:
 - (A) in a prominent and highly visible manner in the main body of the advertisement;
 - (B) if the Short Code is displayed in 24 to 48 point font size, in font at least 25% of the size of that Short Code; and
 - (C) if the Short Code is displayed in larger than 48 point font size, in at least 12 point font size;
- (iii) in the case of online advertisements:
 - (A) in a prominent and highly visible manner in the main body of the advertisement; and
 - (B) on the same page as the Short Code and in font at least 50% of the size of the Short Code or, if the Short Code is not displayed, on the first page of the advertisement so that it is obvious to Customers; and
- (iv) in voiceovers for radio and IVR advertisements.

Wrapping it all up

32. There's a check list

When we 'legal' an advert, we do apply a detailed mental checklist of requirements.

For instance:

- Are there disclaimers ?
- If not, why not ?
- How are they related to the main image / wording ?
- Do they materially alter the main message ?

33. But there's a 'big picture' test as well

- a smell test
- 'misleading or deceptive ?'

34. And from 2009, a 'substantiation test' as well

- for every material claim in every ad ... can you prove it ?

35. It's a balancing act



About Logie-Smith Lanyon

Thanks for attending this Logie-Smith Lanyon Masterclass.

Logie-Smith Lanyon is a law firm with strong capabilities in traditional areas like:

- commercial law
- business sale and acquisition
- property sale and acquisition, development and leasing
- employment and IR law
- litigation
- direct and indirect taxation.

We also offer expert skills and service in more unusual practice areas of:

- telecommunications
- technology
- call centre legal compliance
- defence procurement
- trade practices training and compliance.

We are located in Melbourne and serve a national and international client base.

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