



The Component Pricing Law: Section 53C of the Trade Practices Act

A LOGIE-SMITH LANYON EXPERT SEMINAR

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The least you need to know

Welcome to this Logie-Smith Lanyon Expert Seminar on section 53C of the Trade Practices Act 1974.

Section 53C in a nutshell:

'If you market consumer goods or services to non-ACNs, and our marketing material states any part of the price payable, it must also *prominently* state the total price payable'

- Came into force on 25 May 2009.
- Applies *now*.
- ACCC says there is *no* grace period.

Your notes:

The new TPA component pricing law

Menu

- Overview the Trade Practices Act
- Brief look at Part V of the Trade Practices Act (which is where the component pricing law is located)
- Section 53C in detail – the component pricing law
- Range of real life factors that might make certain pricing statements 'prominent' as required by the law.

Your notes:

The Trade Practices Act – an overview

TPA:

- passed by the Commonwealth Parliament in 1974
- intended to keep business honest and fair
- grown a lot since 1974.

Does these important things:

1. Creates ACCC.

Australian Competition & Consumer Commission has powerful investigate and enforcement tools and weapons for enforcing the Trade Practices Act.

2. Part IV of TPA – protects competition

Bans:

- making an agreement with a competitor to divide up a market and not cross-compete
- forcing independent resellers to resell goods at a minimum price
- refusing to sell goods to someone unless they also buy something from a third party you specify
- agreeing with a competitor to keep both your prices at a certain level
- buying a competitor's business where that unacceptably reduces competition in some market.

The new TPA component pricing law

3. **Part V of TPA – protects the public from unfair business practices.**
- Section 52: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'
 - Section 53(a): 'A corporation shall not, in trade or commerce, in connexion with the supply or promotion of goods or services, falsely represent that goods are of a particular **standard, quality, value, grade, composition, style or model.**'
 - Section 53(eb): 'A corporation shall not make a false or misleading representation concerning the **place of origin** of goods.'
 - Section 53(g): 'A corporation shall not make a false or misleading representation concerning the existence, exclusion or effect of any **condition, warranty, guarantee, right or remedy.**'
 - Section 54: 'A corporation shall not offer gifts, prizes or other **free items with the intention of not providing them,** or of not providing them as offered.'
 - Section 56: 'A corporation that has **advertised goods or services at a specified price** shall offer such goods or services at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.'
 - And section 53C of Part V sets out the **component pricing law.** We'll examine that in detail shortly.
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The new TPA component pricing law

4. Penalties for breaching the TPA

- Single breach of Part IV can carry a penalty of up to \$10 million for corporations and up to \$500,000 for individuals.
- Single breach of Part V can carry a penalty of up to \$1.1 million for corporations and up to \$220,000 for individuals.

Those are the maximum penalties that apply to breaches of the component pricing law.

5. Costs of breaching the TPA

Allow for:

Legal and administrative costs of complying with an ACCC investigation notice	\$10,000
Legal costs of responding to ACCC court action and / or negotiating settlement	\$35,000
Contribution required by ACCC to its legal costs	\$10,000
Costs of complying with typical ACCC requirements for corrective advertising / customer refunds	\$25,000
Cost of 3 year trade practices compliance program an annual audits	\$30,000
Total	\$110,000

That's over \$100,000 in costs without a single dollar in ACCC fines being applied !

Your notes:

Section 53C – the component pricing law

In a nutshell:

'If you market consumer goods or services to non-ACNs, and our marketing material states any part of the price payable, it must also *prominently* state the total price payable'

Or:

'If you mention price at all, you have to mention *all* the price.'

The full text of section 53C appears over the page.

Your notes:

The new TPA component pricing law

Trade Practices Act 1974 – section 53C

Single price to be stated in certain circumstances

(1) A corporation must not, in trade or commerce, in connection with:

- (a) the supply or possible supply of goods or services to a person (the relevant person); or
- (b) the promotion by any means of the supply of goods or services to a person (the relevant person) or of the use of goods or services by a person (the relevant person);

make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the corporation also:

- (c) specifies, in a prominent way and as a single figure, the single price for the goods or services; and
- (d) if, in relation to goods:
 - (i) the corporation does not include in the single price a charge that is payable in relation to sending the goods from the supplier to the relevant person; and
 - (ii) the corporation knows, at the time of the representation, the minimum amount of a charge in relation to sending the goods from the supplier to the relevant person that must be paid by the relevant person;

specifies that minimum amount.

(2) A corporation is not required to include, in the single price for goods, a charge that is payable in relation to sending the goods from the supplier to the relevant person.

(3) Subsection (1) does not apply if the representation is made exclusively to a body corporate.

The new TPA component pricing law

- (4) For the purposes of paragraph (1)(c), the corporation is taken not to have specified a single price for the goods or services in a prominent way unless the single price is at least as prominent as the most prominent of the parts of the consideration for the supply.
- (5) Subsection (4) does not apply in relation to services to be supplied under a contract if the following apply:
- (a) the contract provides for the supply of the services for the term of the contract;
 - (b) the contract provides for periodic payments for the services to be made during the term of the contract;
 - (c) if the contract also provides for the supply of goods – the goods are directly related to the supply of the services.
- (6) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (7) In this section:
- ‘single price’ means the minimum quantifiable consideration for the supply concerned at the time of the representation concerned, including each of the following amounts (if any) that is quantifiable at that time:
- (a) a charge of any description payable by the relevant person to the corporation making the representation (other than a charge that is payable at the option of the relevant person);
 - (b) the amount which reflects any tax, duty, fee, levy or charge imposed, on the corporation making the representation, in relation to the supply concerned;

The new TPA component pricing law

- (c) any amount paid or payable, by the corporation making the representation, in relation to the supply concerned with respect to any tax, duty, fee, levy or charge if:
 - (i) the amount is paid or payable under an agreement or arrangement made under a law of the Commonwealth, a State or a Territory; and
 - (ii) the tax, duty, fee, levy or charge would have otherwise been payable by the relevant person in relation to the supply concerned.

Your notes:

Unpacking section 53C

6. Subsection (1)

If:

- you are a company or conduct trade across State borders, and
- you offer goods and services that are often bought for consumer use, and
- you offer them to anyone that isn't a company, and
- you mention any part of the cost of the goods and services –

then:

- you must also state the full cost of the goods and services as a *single price*, and
- you must state it *prominently* (which normally means as prominently as any other price) – **the normal prominence test**
- except in the case of monthly contracts – **the service plan prominence test**.

The component pricing law isn't just about newspaper advertisements or web pages – it could apply to a billboard, a radio ad, a brochure, a marketing SMS, a telemarketing script, a face-to-face pitch, etc.

The new TPA component pricing law

7. Subsection (2)

- You can choose to:
 - include a **delivery charge** in the single price or
 - you can state it separately.
- But if you don't include delivery in the single price and you know what the minimum delivery charge is, you must state it as well as the single price.

8. Subsection (3)

The component pricing law does not apply if you're marketing *exclusively* to a company.

Getting within this exception to the component pricing law is not as easy as it sounds. You need to be 100% certain that your advertisement is being made to ACN-holders exclusively – not individuals, not sole traders and not partnerships.

9. Subsection (4)

- You will fail the normal prominence test if the single price is *not as prominent as any other pricing appearing in the advertisement*.
- Rule of thumb, you will probably satisfy the prominence test if no other pricing in the advertisement is more prominent than your single price.

The law doesn't say what prominent means but says what it doesn't mean. So the law gives some guidance but leaves it up to you to work out what is meant by 'prominent'.

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10. Subsection (5)

If:

- you're selling a service (e.g. a mobile phone service), and
- there's a contract term (e.g. 24 months), and
- there are periodic payments (e.g. \$39 a month), and
- any **goods** that you also supply are **directly related to the service** (e.g. a mobile handset) –

then you won't automatically fail the normal prominence test just because the prominent single price is not *as prominent* as some other price in the advertisement.

- The 'service plan exception'
- Important
- Means an advertisement is legal even though the monthly charge is more prominent than the single price.

Even if your advertisement falls within the service plan exception you must still include the single price and it must still be prominent. It just doesn't need to be as prominent as the other pricing that is mentioned.



The new TPA component pricing law

11. Subsection (6)

- Component pricing law only applies to what might be called 'consumer goods or services'.
- 'Consumer goods or services' is actually a complicated area of law.
- Rule of thumb, if at least 5% of the market for the goods or services in question is non-business users, the goods are probably consumer goods or services.

12. Subsection (7)

- 'Single price' = minimum, quantifiable, mandatory charges payable for the goods or services.
- Minimum amount that can be calculated at the time of the advertisement or statement must be stated in the single price e.g.:
 - set up charges plus MUST BE INCLUDED
the total monthly
minimum payments
for an internet access
contract
 - excess usage charges NEEDN'T BE INCLUDED
- Genuine optional extras do not have to be included in the single price (e.g. upgrade to leather seats in a car).
- supplier tax, levy, etc that is to be passed on to the buyer (e.g. GST) must also be included in the single price.
- Any tax, levy, etc that the supplier will collect on behalf of a government (e.g. airport departure tax that is added to the ticket price) must also be included in the single price.

That's the new law, subsection by subsection.

Here's a quick and useful summary of the key elements of the component pricing law:

- If you're a company
- or you trade interstate
- and you offer goods or services that are often bought for consumer use
- and you offer them to anyone that isn't a company
- and you mention any part of their cost
- then you must also state their full cost
- and you must state it prominently
- which normally means 'as prominently as any other price'
- except in the case of monthly contracts.

Don't forget that the component pricing law is only one area of compliance – your advertising must also comply with the other sections of the Trade Practices Act (such as section 52) and other advertising laws.

Let's get practical



Your notes:

The new TPA component pricing law

Just \$39.95[★] per month

Get yaself NAKED with funnytel

Free modem !!!

★ 24 month contract / \$69.95 set up / Total cost = \$1,028.75

The advertisement features a clown character in a blue shirt, green pants, and a red hat, floating in a yellow starburst against a blue background. The word 'NAKED' is written in large, 3D blue letters on a green oval. A red banner with a white border contains the text 'Free modem !!!' with a small starburst icon.

Your notes:

The new TPA component pricing law

Just \$39.95^{*} per month

Get yaself NAKED with funnytel

Free modem !!!

Bonus 16 GB USB key^{*}

*On 24-month contract. With 360 GB connection fee.

The advertisement features a clown character on the left, a large yellow starburst background for the price, and a blue background for the main text. The word 'NAKED' is written in large, 3D blue letters with a yellow shadow. A red banner at the bottom right contains the text 'Free modem !!!' and 'Bonus 16 GB USB key*'. A small asterisked note at the bottom left of the starburst area reads '*On 24-month contract. With 360 GB connection fee.'

Your notes:

The new TPA component pricing law

Just \$39.95^{*}
per month

Get yaself NAKED
with funnytel

Free modem !!!
Bonus flight to Bali^{*}

*On 24-month contract. With \$69.95 connection fee.

The advertisement features a clown character in a white shirt, green pants, and a red hat, jumping joyfully against a blue background with yellow starburst patterns. The text is bold and colorful, with 'NAKED' in large, blue, 3D letters on a green oval. Two red banners at the bottom right contain the offers 'Free modem !!!' and 'Bonus flight to Bali^{*}'. A small asterisked note at the bottom left specifies the contract terms.

Your notes:

Just \$39.95[★] per month

Get yaself NAKED with funnytel

Free modem !!![★]

Bonus flight to Bali[★]

24 month contract
\$69.95 set up
Total cost = \$1028.75

The advertisement features a clown character in a blue shirt, green pants, and a red hat, jumping joyfully. The background is a bright yellow starburst on a blue field. The word 'NAKED' is written in large, 3D, blue letters with a yellow shadow. The text 'with funnytel' is in yellow. The pricing information is in blue and green. The 'Free modem' and 'Bonus flight' are highlighted in red banners.

Your notes:

No set up fee [★]
winter sale !!!

Get yaself
NAKED
with funnytel

Free modem !!! [★]
Bonus flight to Bali [★]

[★] On 24 month contract

The advertisement is set against a blue background with a large yellow starburst shape on the left. A clown character is depicted in the center, wearing a red hat, a white shirt with a red bow tie, and green pants. The text is arranged in a dynamic, eye-catching layout with various colors and fonts.

Your notes:

No set up fee^{*} winter sale !!!

Get yaself

NAKED

with funnytel

\$49 wireless modem !!!^{*}

*On 24 month contract

The advertisement features a clown character in a green outfit and red hat, jumping joyfully against a blue background with yellow starburst patterns. The text is bold and colorful, with 'NAKED' in large, blue, 3D letters on a green oval background. A red banner at the bottom right contains the offer '\$49 wireless modem !!!'.

Your notes:

No set up fee 
winter sale !!!

Get yaself
NAKED
with funnytel



 24 month contract @ \$39.95 per month
Total price inc. modem = **\$1007**

\$49 wireless modem !!! 

Your notes:

The new TPA component pricing law

\$10 off per month

Get yasef

NAKED

with funnytel

Free modem !!!

On 24-month contract with \$69.95 connection fee.

The advertisement features a clown character in a white shirt, green pants, and a red hat, jumping joyfully against a yellow starburst background. The text is bold and colorful, with 'NAKED' in large, blue, 3D letters on a green oval. A red banner at the bottom right contains the text 'Free modem !!!'. A small asterisk and fine print are located near the bottom left of the clown.

Your notes:

The new TPA component pricing law

\$10 off per month

Get yasef
NAKED
with funnytel

Free modem !!!

24 month contract / \$69.95 connection fee
Total price =
\$1028.75

The advertisement features a clown character on the left, a large yellow starburst background, and a blue background on the right. The text is in various colors and fonts, including red, blue, yellow, and black. A red banner with a starburst contains the text 'Free modem !!!'. The total price is displayed in large black font at the bottom.

Your notes:

What is 'prominent' ?

13. Big writing

This is prominent.



14. High contrast

This is prominent

15. Isolation

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This is prominent.

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16. Consistency

e.g. Crazy John

17. The big bucks factor

\$2,345,987,898

18. The fame factor



19. Strong asterisks



Just \$39.95 per month **Get yaself**
NAKED
with funnytel

Free modem !!!
Bonus flight to Bali

24 month contract
\$69.95 set up
Total cost = \$1028.75

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20. Standardised icons



21. Unusual positioning

Sample radio script:

Let me tell you about a Bali holiday that will set you back just \$999. With 7 nights at Bobo Beach at only \$29 a night ... yes that's just \$29 per person twin share ... and an all meals voucher for just \$200, we'll also include your return airfare and transfers ... and a welcome package valued at \$49. Call Holiday Planet today.

There will be curious cases

22. The upgrade offer

- Already on DSL1 contract @ \$40 / month
- Offer: DSL2+ for \$5/month more – no contract extension
- e.g. 12 months to run
- ??? Total price = 12 x \$45 or 15 x \$5 ???

Your notes:

Finally ... coming to a regulator near you

- New trade practices laws to start 1 January 2010
- Substantiation Notices
- National unfair contract terms law
- Wider penalty regime
- ACCC representative actions

23. ACCC in *The Age*

Agents to face \$1m fines for fake bids

July 19, 2009

THE Australian consumer watchdog says real estate agencies involved in under-quoting and dummy bidding will be hit with fines of up to \$1.1 million from January 1.

Australian Competition and Consumer Commission chairman Graeme Samuel said a new Australian Consumer Law is aimed at any businesses involved in misleading and deceptive conduct, including real estate agents.

Maximum penalties will be fines of up to \$1.1 million for businesses and \$220,000 for individuals convicted of dishonest behaviour under the bill, which is now before the Senate.

'It's a generic law that applies to all misleading and deceptive conduct — false labelling, false pricing on goods, everything,' Mr Samuel told *The Sunday Age*.

'It will cover under-quoting by real estate agents, dummy bidding, the airbrushing of photos,' he said. 'It's a substantial improvement on where we've been for the last 30 years.'

Mr Samuel said the law would give the ACCC and all state consumer bodies significant powers to deal with dishonest conduct by businesses.

The new TPA component pricing law

'If someone was engaged in deceptive conduct in the past, the worst they got was a rap over the knuckles,' he said.

'Offenders were slipping through the cracks in the law — now there'll no longer be any cracks. It's a big step forward. Being hit with penalties in excess of \$1 million is going to hurt, as it should.'

Mr Samuel said businesses could be issued with a substantiation notice where they would have to back up their claims. If they can't, they face being charged with misleading and deceptive conduct.

'It's been virtually impossible for us to get compensation or damages or restitution for consumers who suffer loss if a business misleads or deceives them. This new law will give us the capacity to go to court on behalf of consumers.'

And really finally

Drop into

www.cspcentral.com.au

for regular updates.

The screenshot shows the CSP Central website. The header includes the site name 'CSP Central' and the tagline 'Australia's ISP & telco legal site'. There are navigation links for 'Contact', 'Legal', and 'RSS'. A search bar is present with the placeholder text 'To search, type and hit enter'. The main content area features a news article titled 'National consumer law Bill hits Parliament'. The article text states: 'On 24 June 2009, the Government introduced the Australian Consumer Law Bill into Parliament. It represents the biggest shake up of Australian consumer law in a long time.' It also mentions that from 1 January 2010, the Government intends to have a national unfair contract terms law, and that ACCC will have power to demand that advertisers positively substantiate any claims they make. There will be new penalties, enforcement powers, and options for compensating consumers. The article concludes with a note to stay tuned to CSP Central for news and expert commentary. Below the article are 'Links' to 'CSP Central backgrounders', 'Parliament home page for the Bill', and 'Treasury's information site'. On the right side, there are sections for 'Important' (Get legal advice specific to your situation before relying on any information on this site.), 'Recent Posts' (Why AFACT can't (really) lose the iiNet Case, FunnyTel introduces unit pricing in new mega-value FAT plans, Consumer Bill's bonkers bit, National consumer law Bill hits Parliament, Component pricing law seminar announced, Australia tolerates currency forging, 3's 'Up yours' to ACCC), and 'Categories' (Select Category).