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## All Inclusive Pricing To Be Mandated

On 21 April 2005 the Federal Treasurer announced that the Government would be amending the Trade Practices Act (TPA) in response to its perception that component pricing was increasing in a number of industries.

### Key message

*The Federal Government will amend the Trade Practices Act to mandate all-inclusive pricing.*

Component pricing is where a trader advertises the price of component parts rather than a single, all-inclusive figure. The move to amend the law follows a request from the Australian Competition and Consumer Commission (ACCC) asking the Federal Government to address the issue of component pricing.

The Government intends to amend the TPA to clarify that when advertising or quoting a price for a product or service, businesses must include a prominently displayed single-figure price at which the product or service can be obtained. The Government does not anticipate that the proposed amendment will prohibit businesses from including component prices provided that the total price is also prominently displayed.

### The existing law

At present, false or misleading pricing representations are regulated by the general prohibition against misleading or deceptive conduct in section 52 of the TPA or section 53(e) which disallows the making of a false or misleading representation concerning the price of goods or services.

Section 53C also regulates 'component pricing' practices. Under section 53C, where a representation is made which would constitute part of the consideration for

the supply of goods or services, then the corporation must also specify the 'cash price'. It requires an upfront statement of the 'cash price' when advertising the price of goods or services. Traditional targets of this prohibition are statements pertaining to low weekly or monthly payments for goods or services without an upfront statement as to the total price.

In the face of these existing general and specific prohibitions, it is less than clear why any amendment of the TPA is necessary.

### Airlines and undertakings

The ACCC has previously expressed concern relating to the manner in which airlines advertised airfares (which separately identified the price of the airfare component, as well as other charges, levies and taxes), alleging that this may contravene sections 52, 53(e) and 53C of the TPA. The concern appeared to focus upon the fact that further charges, levies and taxes were payable in addition to the advertised fare or that the total outlay payable by the consumer for the airline ticket may not have been clearly disclosed.

The airlines have responded to concerns the ACCC expressed about component advertising and changed their industry practices to minimise any possible risk of

confusion to consumers. This begs the question as to whether the proposed amendment is warranted.

While the Federal Treasurer's press release indicates that the proposed amendment is in response "to the increased use of component pricing in a number of industries", the release does not identify the industries referred to or the nature of the problems arising in those industries.

## Commentary

While very few would disagree with the desirability of businesses conveying a single total price to consumers, the proposed legislative reform is likely to give rise to a range of legitimate practical difficulties. The price for many kinds of goods and services are often advertised as a price per unit (for example, \$X per measure of weight or volume, per hour of time spent or per kilometre travelled). Many professional services charge an hourly rate that excludes disbursements. Third party charges are often not specified in up-front price specifications. While an explanation of such practices can easily be made up front, a specific dollar inclusion in the upfront price will be difficult for businesses.

To illustrate, in the motor industry, an 'all-inclusive price' in motor vehicle advertising includes all mandatory payments such as dealer delivery charges and administration fees. It does not include the *additional* charges the consumer has to pay directly to a third party, such as the registration fee, stamp duty and third party compulsory

insurance. Is the effect of the proposed amendment that when the motor vehicle dealer makes a representation to the effect of 'drive away, no more to pay', will all additional charges need to be included in the price?

The Federal Government has recently clarified that it is aware that flexibility in pricing practices is an important aspect of the competitive process. To this end, the Government does not intend to prohibit component pricing. Businesses will be able to determine the format in which they advertise their prices, provided a single-figure price is included.

However, the Government's insistence on a single-figure price is likely to be problematical for a number of industries. For example, in the building industry, it is common practice for builders to quote a price for construction work that excludes various provisional cost items such as tiles, mirrors and cabinetry. Will the builder's exclusion of these component prices fall foul of the proposed law?

Any legislative interference with current pricing practices may unintentionally reduce efficiency and impose costs on consumers.

It is difficult to justify a stricter pricing law of general application in the absence of substantive evidence of pricing complaints, particularly when the current law appears to be sufficiently flexible to deal with pricing misrepresentations.

**Amy Southwell** | Solicitor

## Consequences of Bundling

*The process of offering two or more goods for sale together is known colloquially as 'bundling'. In **Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd** [2005] FCA 581 (Baxter), the Federal Court has issued a warning to firms which offer their products for sale in bundles in breach of the Trade Practices Act (TPA).*

### Key message

*A recent Federal Court decision warns those with significant market power about product 'bundling'.*

While Justice Allsop dismissed the application made by the Australian Competition and Consumer Commission (ACCC) under sections 46 (misuse of market power) and 47 (exclusive dealing) of the TPA, this was because Baxter's dealings with State purchasing authorities attracted Crown immunity. The decision has been the subject of an appeal to the Full Federal Court and the parties are currently awaiting judgement.

### Background

The proceedings related to five long term contracts between Baxter and various State and Territory purchasing authorities for the supply of medical products. Between 1998 and 2001, certain purchasing authorities of NSW, QLD, WA and SA called for tenders for the supply of sterile fluids and peritoneal dialysis (PD) solutions to public hospitals. The sterile fluids included a number of different water based products, in respect of which Baxter has the only manufacturing plant in Australia. The ACCC claimed Baxter had a monopoly in the market for sterile fluids but that there was a competitive market in relation to PD solutions.

In response to the tenders, Baxter offered to supply sterile fluids and PD solutions on an item-by-item basis at prohibitively high

prices. It also offered to 'bundle' the sterile fluids and PD solutions together and supply them at significantly lower prices on a long term basis.

### The ACCC's claims

The ACCC claimed that:

- » by offering prohibitively high item-by-item prices so as to compel the States to agree to purchase the bundled products, Baxter took advantage of its substantial market power in the market for sterile fluids for the purpose of harming competitors and/or preventing competitive conduct in the PD market, and thereby breached section 46 of the TPA
- » the same conduct constituted exclusive dealing and was in breach of section 47 of the TPA.

The ACCC claimed that because of Baxter's monopoly power in the market for sterile fluids it was not constrained from offering to supply sterile fluids on an item by item basis at elevated prices. The conduct of bundling sterile fluids together with the PD fluids was alleged to eliminate the effectiveness of any competition from rival PD suppliers who could not compete with Baxter in the market for sterile fluids. It was

not rational for consumers to choose not to purchase the bundle, thereby 'forcing' the bundled products on to consumers anti-competitively.

## Market definition

Justice Allsop found that there was an Australia-wide PD market separate from an overall Australian sterile fluids market:

- » the structure of the industry, namely the existence of specialist renal companies, supported the view that renal products such as PD fluids were seen as separate to sterile fluids;
- » despite there being a State based distribution network, a determination of the market required an analysis of the ability of a competitor to enter the national market.

## The section 46 claim

Baxter was found to possess a substantial degree of market power in the market for sterile fluids.

However, Allsop J found, with one exception, that Baxter had not taken advantage of its market power because it had structured its bid in a manner that either permitted or in some cases expressly encouraged the exclusive supply of all products. It was only in relation to Baxter's bid for the S.A contract that Allsop J concluded that Baxter had taken advantage of its power for the purpose of deterring or preventing a person engaging in competitive conduct in the PD

fluids market. The specific conduct that was held to contravene section 46 was its refusal to offer a discount for a certain volume being acquired.

## The section 47 claim

Justice Allsop held that the conduct of Baxter fell within section 47(2) as it had the purpose of ensuring that the competitive process of the tender would not bring about realistically competitive bids for PD products.

## Bundling

The decision in *Baxter* demonstrates that where an arrangement requires a customer to acquire goods together – that is goods that are 'bundled' – it may in some circumstances constitute exclusive dealing or a misuse of market power.

Firms may offer bundles for either efficiency or strategic reasons. Dominant firms offering bundles for strategic reasons may raise competition concerns, particularly if they impair the acquirer's ability to obtain the most competitive outcomes.

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