



Commercial Law Newsletter

July 2009

>>Clarity in pricing: Trade Practices Act amendments mean the price has to be right!



The “clarity in pricing” amendments came into effect on 25 May 2009. A revised section 53C of the Trade Practices Act (TPA) now requires businesses to specify the full price of goods or services, in a single figure, in a prominent way, where the goods are of a kind ordinarily acquired for personal, domestic or household use.

These changes to the TPA arose from concern about advertised prices being misleading when the stated “price” has additional amounts added to it before you get to the total amount payable. Think plane fares and fuel surcharges, motor dealers and on-road costs, and “This computer sells for \$1999 plus \$99 for delivery”, where the delivery charge is mandatory. Think also of GST-exclusive prices where some purchasers may not get the benefit of input tax credits.

“Single price” means “the minimum quantifiable consideration for the supply at the time of the representation”. It includes applicable taxes, charges and levies (eg GST), but does NOT include elements of the price which are at the option of the purchaser. For example, delivery charges don’t need to be included if the purchaser can opt for delivery or to collect the goods personally. This avoids the problem of stating a single price including delivery when charges vary because of distance – however if there is a minimum delivery charge, at least the minimum must be included.

“Prominence” means that the total price must be at least as prominent as the most prominent components of the price as advertised: so if the basic cost is \$1999 and the mandatory delivery charge is \$99, the total price including delivery would have to be shown at least as \$2098, or in some other way so as to be as, or more, prominent than the basic cost*.

Communications which are made exclusively to a body corporate are excluded from these requirements, but as it is difficult to be sure that any advertisement or other material stating a price is only going to a body corporate, the opportunity to rely on this exception is limited. Many business-to-business communications go to partnerships, so even purely commercial communications may not fit into this exception, let alone communications which go to individuals as well as to a commercial audience.

As the goods or services must be “of a kind ordinarily acquired for personal, domestic or household use” for the clarity-in-pricing rules to apply, many business-to-business communications will be excluded. But the exact scope of “ordinarily acquired for personal, domestic or household use” is open to interpretation. Past decisions have excluded a crop-dusting plane from this description, but have accepted an ostrich egg incubator as being within it!

Penalties for infringement include fines of up to \$1.1m. Businesses need to take care with price representations in advertising material, on

>>Clarity in pricing: Trade Practices Act amendments mean the price has to be right! cont.

websites, price lists, and verbal representations as to price (salespeople must state the full price!).

Some businesses will also need to prepare different price lists for different circumstances. For example, restaurants that charge surcharges for Sundays and public holidays will need a different menu for those days, or a menu showing both ordinary and surcharged prices: a note of the surcharge at the foot of the general menu will not suffice. Where a business wants to show GST-exclusive prices for commercial customers who can claim input

tax credits, it will also need to take care to show the full GST-inclusive price at least as prominently.

- An asterisk directing a customer to the total price may not give sufficient prominence.

If you would like more information about pricing practices and the clarity-in-pricing rules, contact:

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>>Planning for the future: Protect your estate



An estate that we are currently administering here at Coleman & Greig has demonstrated yet again the need to frequently review

Wills and, even more importantly, the need to give the Estate Planning and Business Succession process far more attention than it usually receives.

A client (let's call him Bill) had left a Will in which one of his children was appointed Executor and the estate was to be divided equally between his three children – nothing unusual and, on the face of it, nothing to cause any concern. One of the children was fairly wealthy and the other two children were struggling financially.

Bill owned a substantial business and numerous parcels of real estate. His original intention was that the shares in the Company that owned the business would be distributed equally between the three children, and that the real estate would also be equally distributed.

The business was very profitable and it had recently gone through a period of considerable growth. That growth had been financed by

bank borrowings secured by a Charge over the Business Assets and Bill's personal guarantee, which was supported by Mortgages over the real estate which was owned in his name. Again nothing unusual.

Bill's estate (including his real estate and shares in the business) had a total value of approximately \$30M. The bank borrowings amounted to approximately \$10M – again nothing unusual.

>>So what IS the problem?

The issues with "Bill's" Estate...

Bill's guarantee to the bank was an unlimited joint and several guarantee. Accordingly he was personally liable for the whole of the \$10M debt. That liability then falls upon his Executor after his death and the Executor cannot distribute the estate until the liability is satisfied.

The bulk of the value of Bill's estate is tied up in the business and the family do not want to sell either the business or the real estate. Even if they did want to sell, it is a difficult market at the moment and the sale of the real estate would not realise enough cash to pay out the debt and the sale of the business would also be almost impossible in the present economic environment.

>>Planning for the future: Protect your estate cont.

Unfortunately, the Executor only has a limited number of options available to him:

1. He can liquidate sufficient assets to pay the debt – clearly an undesirable option in the current climate.
2. He can negotiate with the bank to see if the bank will release the estate and accept personal guarantees from the three children.

Potential problems with this option may include:

- The agreement of the bank cannot be assumed.
- Wherever there is change in management of a Company, particularly where there has been strong leadership in the past, the bank might be expected to be concerned about the future of the Company.
- If the bank did agree to accept three individual guarantees it could be assumed that it would expect joint and several guarantees from each child/beneficiary. This would mean that although each of the children is only inheriting their one-third share of the estate, they are nevertheless each potentially assuming the whole of the liability of the estate.
- It could be assumed that the wealthier child would be concerned about having individual guarantees. If there is a default in the future, it is likely that the bank will pursue him first knowing that he has assets which could potentially satisfy the debt. He will then be left in a position of potentially having to launch proceedings against his siblings to recover their share of the liability.

>>Could this have been prevented?

The problems arising in this estate are difficult and would not have been easily resolved even if Bill had spoken to us before his death.

However, the negotiations required between the children would have been far easier to resolve while Bill was still alive, and it might have been possible to come to an understanding with the Bank at that point.

If an appropriate solution did not present itself during Bill's lifetime, then perhaps steps could have been taken to reduce the level of debt in the Company to a more acceptable level.

Estate administration, especially when a family business is concerned, is rarely as simple as it first appears. There is a great deal to be said for playing the "what if" game and resolving a few issues before problems arise. If you are a family business owner, ask yourself the following questions:

>>What if I get seriously ill?

What if I want to retire from running the business?

>>What if I die?

Your answers will help you to ensure the appropriate arrangements are in place should the circumstances arise.

For advice and assistance with estate planning and business succession planning, contact:

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or

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>> Family Court now deals with De Facto relationships



New legislation dealing with de facto relationships came into effect on 1 March 2009. These changes now mean that when a relationship breaks down, either between married persons or de

facto couples, the Family Court deals with all aspects of the parenting agreement, property settlement and spouse maintenance.

The biggest change under the new regime is that the principles applied to determine property settlement and spouse maintenance under the Family Law Act will now apply to de facto couples. These provisions are more generous than the old state laws that used to apply when de facto relationships broke down.

In practical terms, it means that a person in a de facto relationship who has made a greater non-financial or homemaker contribution to the relationship is now likely to receive a greater benefit if the relationship breaks down. This may produce an undesirable result for someone in a de facto relationship who is concerned with protecting their assets or financial position.

Under the new laws, the Family Courts can make orders about de facto property and spouse maintenance issues where:

1. The parties have been in a relationship for at least 2 years; or
2. There is a child of the relationship; or

3. One of the parties made substantial financial or non-financial contributions to a property, or made a substantial contributions as a homemaker or parent such that an injustice would be done if an order was not made; or
4. The de facto relationship has been registered in a State or Territory having laws that allow for registration.

A complicating element to the new scheme is that it does not apply to couples who live in Western Australia or South Australia.

Because of the way in which the legislation has been drafted, only those relationships that break down after 1 March 2009 will be dealt with under the new scheme. Any relationships that broke down before this time will be dealt with under the previous state-based regime. This will mean that couples who separated before 1 March 2009 must approach state courts for assistance in solving a property or maintenance issue after their relationship has broken down for quite some time.

For those couples who do not want the new regime to apply to them, it is possible for them to make a private agreement about their financial affairs. This type of agreement is similar to what is commonly described as a financial agreement or “pre-nuptial” agreement. Both parties need independent legal advice before an agreement like this can be finalised.

For more information on the legislation concerning de facto relationships, contact one of our accredited family law specialists phone: 9635 6422.

>>Deposit Instalment Clauses in Contracts for Sale: Do they provide adequate protection?

In conveyancing transactions, it is not uncommon to find clauses that allow the deposit to be paid in a series of instalments, namely part of the deposit on exchange and the balance on completion. Such contracts often contain a clause to the effect that, if the full deposit has not been paid by the required date, then the unpaid amount may be recovered as a liquidated debt.



NSW Courts however have increasingly taken the view that the deposit paid on exchange constitutes the “deposit”, and that this is the sum that should be forfeited if the purchaser fails to complete the purchase.

Example 1

In a 2008 case the Court highlighted that greater care needs to be exercised when drafting reduced deposit clauses.

In this case, contracts were exchanged on a property in Bellevue Hill. The front page of the Contract provided that the purchase price was \$3,311,000.00 (with an initial deposit being paid of \$165,550.00) and a special condition in the Contract provided for the following:

“The deposit is 10% of the purchase price, but payable in instalments, with half the deposit payable on exchange and the balance payable on the completion date” (Special condition 12).

The date for completion was defined in the Contract for Sale. As the purchaser was unable to complete the Contract, the vendor then sought an order for specific performance.

In this case, the Court held that the second instalment of the deposit was only due if the purchaser did not complete on the date for completion (which did not happen), and the deposit was, therefore, held to be a penalty and therefore void.

Example 2

In another case where the Court found that the reduced deposit clause amounted to a penalty, the front page of the Contract stated that the deposit was less than 10% however the Contract for Sale provided for the following in special condition 5:

“In the event that the Purchaser pays less than 10% of the purchase price as a deposit then if the Purchaser commits a default hereunder the whole of the 10% deposit shall become due and payable notwithstanding this Contract is not completed. This clause shall not merge on completion and the Vendor shall be entitled to sue for recovery of so much of the 10% deposit that remains outstanding as a debt due by the Purchaser to the Vendor”.

The problem with this kind of wording in the Contract was the intertwining of the liability to pay the balance of the deposit with a breach of Contract. The Court of Appeal held that this effected the essential characteristic of the obligation as an additional payment which the purchaser must make in the event of default.

No guarantees

Careful attention needs to be taken when drafting instalment provisions to ensure that it is not in the nature of a penalty and that the wording retains the nature of a deposit. The nature of a deposit has been previously defined by the courts as being of “an ‘earnest’ of the bargain or its performance that is designed to demonstrate the sincerity of the contracting party who is to pay it” (Ashdown v Kirk [1999] Qd R).

>>Deposit Instalment Clauses in Contracts for Sale: Do they provide adequate protection? cont.

A deposit that exceeds, or can be characterized as being other than a true payment in earnest made upon entry into the Contract may attract the law of penalty and therefore be void.

Vendors should therefore be aware that reduced deposit clauses in a contract will not guarantee any more than the deposit that was paid on exchange, and that they will be

at risk of not recovering the full 10% deposit regardless of the special conditions contained in the Contract for Sale.

For more information on Contracts for Sale and your legal rights and obligations contact Sandra Van Den Bosch in our Property Team on svandenbosch@colgreig.com.au.

>>Identification of Mortgages



On the 13th May 2009 the Real Property and Conveyancing Legislation Amendment Act 2009 ("Amending Legislation") was agreed to, which sees the inclusion of Section 56C into the Act.

In addition to the power to refuse registration, the Registrar General will also be entitled to make requisitions to determine whether section 56C has been complied with.

Consequently, there will need to be proper identification of the mortgagor by the witness to the mortgagor's signature, with certification and evidence as to the identity of the mortgagor by the witness.

The new Section 56C requires more rigorous identification of a mortgagor and even gives the Registrar General the power to reject the registration of a mortgage, or cancel the registration of a mortgage, if there is insufficient evidence of identification.

Under Section 56C, a mortgagee (i.e. bank or finance institution) must take reasonable steps to ensure that the person named on the mortgage will become the registered proprietor of the land/property to which the mortgage relates.

The mortgagee must keep a written record for seven years, from the date of registration of the mortgage, of the steps it has taken to comply with this requirement and a copy of any document obtained for that purpose.

Neither the Regulations relating to the Real Property Act, the Land and Property Information Service or the Law Society have issued guidelines as yet as to the form or content of the certification and evidence required, or as to what will need to be lodged with the mortgage at the time of registration. Once this information is to hand, we will advise you further.

In the meantime, if you need legal advice regarding mortgage documentation, please do not hesitate to contact:

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