

**Component Pricing – Trade Practices Legislation
Amendment Bill (No. 3) 2006**



Australian Mobile Telecommunications Association

Submission to Treasury

May 2006

1. Introduction and overview

- 1.1 The Australian Mobile Telecommunications Association (**AMTA**) is the peak industry body representing Australia's mobile telecommunications industry. AMTA's mission is to promote an environmentally, socially and economically responsible and successful mobile telecommunications industry in Australia. AMTA members include mobile Carriage Service Providers (**CSPs**), handset manufacturers, retail outlets, network equipment suppliers and other suppliers to the industry. For more details about AMTA, see <http://www.amta.org.au>.
- 1.2 AMTA welcomes this opportunity to comment on the draft Trade Practices Legislation Amendment Bill (No. 3) 2006 (**Bill**).

Summary

- 1.3 Good contracting practice is important to ensure consumers receive relevant and useful information in relation to prices for goods and services. AMTA believes that the existing regulatory framework provides appropriate protection for consumers, especially consumers of telecommunications goods and services. AMTA therefore submits that additional regulation is not necessary.
- 1.4 If AMTA's view is not accepted, and Government considers further regulation of price promotion necessary, AMTA submits that:
- the legislation should be amended to specifically not apply to representations in relation to on-going contracts which do not have a fixed term or minimum period;
 - the legislation should not apply to representations about business-to-business or business-to-government contracts; and
 - the Explanatory Memorandum (**EM**) to the Bill should be amended to explain the application (or not) of the legislation to:
 - usage charges;
 - 'add-on' products or services where there is a base product; and
 - variation of contracts; and discounts, credits or 'rewards'.

2. Over-arching concerns

- 2.1 The Component Pricing – Trade Practices Legislation Amendment Bill (No. 3) 2006 proposes to amend section 53C of the *Trade Practices Act 1974 (TPA)* as follows:

Total minimum price to be stated in certain circumstances.

A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, 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 specifies, in a prominent way and as a single figure, the total minimum price for the goods or services.

- 2.2 AMTA submits that the TPA already prohibits unacceptable business conduct and adequately protects consumers from inappropriate business practices. Consideration of a new regime must have regard to the costs and benefits of introducing a change, and whether such change would deliver a net benefit to the community as a whole. Although there may be circumstances when failure to provide a total price as a single figure may not breach either section 52 or 53 of the TPA, AMTA considers that this should only be a concern when it is misleading or deceptive or amounts to a misrepresentation.
- 2.3 Further, AMTA believes that the proposed Bill amendments could serve to confuse pricing issues for telecommunications customers, rather than to provide the clarity sought. AMTA believes that most mobile telecommunication consumers plan their mobile communication budget on a periodic basis in an ongoing service contract, based on predicted expenditure (eg. fortnightly or monthly), and would prefer to continue budgeting on this basis, rather than looking at the total minimum price over the entire length of the contract based on a notional minimum contractual spend obligation. A notational minimum contractual spend would, of necessity, not be the amount paid by the customer at the end of the contract because their contract period and/or usage charges are not quantifiable at the point of contracting. To that end, AMTA believes that, in many cases, a total minimum price for a service contract will not address a customer's budgeting requirements, and will provide irrelevant or potentially confusing information to a customer when making their purchasing decision.

- 2.4 In addition, there is already a registered, enforceable code to address consumer pricing information in the telecommunications industry: the Australian Communications Industry Forum (**ACIF**) Prices Terms and Conditions (**PTC**) Code. The PTC Code was developed by a committee comprising representatives from consumer groups and the regulators, as well as from industry, to specifically address the needs of consumers in the telecommunications industry, taking into account the particular circumstances of the industry.
- 2.5 AMTA recommends that, where industry is able to develop a code that adequately addresses the issues, that industry should be exempt from the amended TPA provisions. AMTA notes that this approach has been applied in the financial services sector, where there are exemptions that recognise industry codes.
- 2.6 AMTA also believes that it would be impractical to comply with the proposed amendments in radio and television advertisements, which by their short duration may not be able to include the amount of information provided in a print advertisement. Requiring short broadcast advertisements that promote, say, the price of an ancillary product, to include all components of a price as well as the total minimum price, would eliminate the ability to promote the product, service or brand.

3. Practical issues

Contracts with no fixed contract term

- 3.1 Many telecommunications and other services are not provided under fixed period contracts with a minimum contract term. Examples of such services include: fixed line phone services, electricity services, gas services, rates payable to local councils, appliance rental, residential rental services, many mobile phone services (especially pre-paid services), gym memberships and car leasing.
- 3.2 AMTA understands that Treasury does not consider the amended section 53C would apply to representations about these ongoing contracts. However, it remains arguable that the proposed wording of section 53C could capture representations about such contracts. Although it would be useful for the EM to clarify the intention of the legislation, AMTA suggests it would be more appropriate for the wording of the legislation to be sufficiently clear so as to make an interpretation of this section in the EM unnecessary. AMTA proposes amending section 53C by including the following words at the end of the section:
- “, provided that the total minimum price can be accurately ascertained at the time of entering into the contract.”*

- 3.3 If ATMA's preferred option of amending the legislation as suggested above is not accepted, AMTA would support Treasury's suggestion that a clear example be included in the EM to address the uncertainty. AMTA suggests words to the following effect would be appropriate for the EM:

"Where it is not possible to ascertain the total minimum price at the outset of a contract because there is no minimum period over which a customer must contract, the "total minimum price" should continue to be specified as a per period amount.

For example:

- where there is an access charge for a service (eg. phone or utility services); or*
- where there are regular payments which must be made but no end date on the contract (eg. some property rental agreements or gym memberships),*

it will not be a contravention of s.53C if, when access charges are specified, they are specified at the rate for a relevant period (eg fortnightly, monthly, quarterly or annually)."

Complex and bundled products

- 3.4 AMTA is further concerned that it may not be possible to comply with the proposed amendments for 'bundles' of goods or services with varying combinations of a number of 'add-ons', such that each of the minimum package prices is dependent on a number of different decisions made by the customer. AMTA considers that it should be sufficient in this circumstance that the total minimum price for the 'base' product or service is available, with any add-on products or services clearly priced as individual components. AMTA understands that this aligns with Treasury's view that, as long as it is possible to purchase the 'base' product or service without any additional elements, the total minimum price that must be provided in a representation is the total minimum price of the 'base' product. AMTA recommends a statement in the EM clarifying this point, as follows:

"4.XX Where it is possible for a consumer to obtain a 'base' product or service either with or without additional features, 'add-ons' or 'optional extras', representations about the base product or service may state the total minimum price for that base product or service without including the cost of the additional features in that single figure."

- 3.5 AMTA is also concerned that there are many circumstances in which it is not possible to know the total minimum price of a good or service, due to benefits that may be offered depending on the way the customer consumes that good or service. AMTA understands that it is Treasury's opinion that representations in relation to benefits such as discounts and/or rewards are not representation as to the price of a product. However, in order to address potential confusion about this, AMTA recommends a clear explanation be given in the EM, and suggests the following:

"4.XX Where a consumer obtains a benefit (eg a discount, credit or a reward) for taking up a product or service or otherwise acting in a particular way, this is not a representation about a part payment and accordingly the

total minimum price in relation to the product, in respect of which the benefit is provided is not required.”

Variable costs

- 3.6 In many service industries, a significant component of a consumer's charges are 'usage' charges. Unless a consumer has a "capped" usage component to their service (either by cost or volume), it is not possible to ascertain usage prior to a consumer taking up the service. It is therefore not possible to factor usage into a single figure, total minimum price for such a good or service. AMTA understands that it is Treasury's view that variable charges, such as usage charges, are not captured by the proposed section 53C. AMTA agrees with this view, but suggests that clarity of this position should be provided by the insertion of a new clause to section 4 of the EM:

“4.XX Where a customer's usage of the product or service is variable and will have an impact on the amount the consumer pays (eg. phone services and utility services), the total minimum price may be provided exclusive of the variable usage charges.”

Variation of contracts during fixed-period term

- 3.7 During the term of a fixed period contract, changes are sometimes made to the terms and conditions of the contract (including to price terms). Clearly suppliers must inform customers of detrimental changes to the contract. For the telecommunications industry, such notification is mandated under the *Telecommunications (Standard Form of Agreement Information) Determination 2003* (amended, May 2006) and the ACIF Consumer Contracts Code.

- 3.8 It is not possible for suppliers to assess the impact of changes to price (whether beneficial or detrimental), on the total minimum price that was represented to a customer before they entered a fixed period contract, as each customer will have a different period remaining in their fixed period contract. AMTA believes that the EM should provide some certainty on this issue, clearly stating that information relating to the amended terms and conditions of a contract would not be considered a representation in relation to price that would attract the amended section 53C. AMTA recommends a new clause be inserted in section 4 of the EM as follows:

“4.XX Where a consumer has entered a fixed period contract, and that contract is amended in a way that would change the total minimum price of the contract, information in relation to those changes would not be a representation for the purposes of section 53C.”

4. Inclusion of Business to Business and Business to Government products and services

- 4.1 AMTA submits that it is unnecessary for the proposed amendments to apply to business to business (B2B) or business to government (B2G) transactions. Existing legislation sufficiently protects businesses against the exercise of inappropriate business practices. AMTA understands that the proposed amendments may not be intended to impact representations made to businesses or government customers. This needs clarification, however, as the proposed amendments do not limit the provisions to consumers or non-business customers.

GST in B2B and B2G transactions

- 4.2 AMTA is concerned with the proposed requirements relating to GST and suggests they are not appropriate when dealing with entities that are registered, or are required to be registered for GST purposes, or for non-incorporated entities carrying on a business. The concept that the GST inclusive price is the “right” amount to be disclosed, particularly in B2B and B2G scenarios, is inconsistent with other requirements (such as the *Income Tax Assessment Act 1997* and Australian accounting standards).
- 4.3 AMTA understands that Treasury’s view is that this issue can be addressed with “an extra step”, suggesting that suppliers should continue with component pricing (showing GST exclusive amounts), and then represent the total minimum price inclusive of GST. AMTA contends that this adds no benefit in the B2B and B2G environment. It simply adds unnecessary and unwanted information.

Mass representations

- 4.4 AMTA understands that section 53C is intended to capture “mass” market representations such as print, television and radio advertising, rather than representations made on an individual basis in B2B and B2G transactions. AMTA considers that it is necessary to clarify this in the legislation and suggests this clarity could be achieved through the two suggested amendments below.

Recommended amendments to section 53C

- 4.5 AMTA considers it both appropriate and necessary to limit the proposed amendment of section 53C to exclude representations in relation to B2B and B2G contracts. AMTA suggests the following subsection be added to section 53C:

“(2) In this section 53C a reference to “goods or services” means goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services”

This wording is congruent with that used in Part 2B of the Victorian Fair Trading Act.

- 4.6 In addition, AMTA suggests inserting “*to the general public*” after “representation” in section 53C to focus the legislation properly on “mass” representations (i.e. print, radio and television advertising).

5. Conclusion

- 5.1 AMTA submits that the proposed amendments to the TPA are not required. Sections 52 and 53 of the Act already adequately address misleading or deceptive representations made in relation to prices of goods or services. Further, the proposed amendments will have unintended consequences that will prohibit otherwise acceptable conduct, particularly in the context of ongoing contracts.
- 5.2 AMTA recommends that, where an industry develops a code that addresses the issues, that industry should be exempt from the amended provisions. Telecommunications providers are already subject to industry-specific regulation and codes in relation to representations made for prices, terms and conditions. Codes registered under the Telecommunications Act (including the ACIF PTC Code) are enforceable by the Australian Communications & Media Authority.
- 5.3 If the Treasury decides to proceed with the proposed amendments to the TPA, AMTA makes a number of specific recommendations for incorporation into the EM. These recommendations would provide significant clarity and certainty for industry, and ultimately benefit consumers by promoting greater consistency among providers. AMTA urges the Treasury to adopt these recommendations, and would be pleased to meet with the Treasury to explain and discuss the recommendations in greater detail.