



## ADVISORY NOTE 2: INCORRECT PRICING

**This note is provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers of their rights and obligations under the Consumer Protection Act with regard to pricing errors.**

### **1. Legal considerations/Applicable provisions of the *Code of Conduct***

#### **Code:**

8.1 The criteria to be used in resolving disputes includes:

8.5.1 the law, especially the Act and the Code (in cases where there is conflict between the interpretation of the Code or the Act, the Act will always prevail);

8.5.2 applicable industry codes or guidelines;

8.5.3 Fairness in all the circumstances.

#### **Applicable provisions of the CPA:**

#### **Interpretation:**

**2(2)** When interpreting or applying this Act, a person, court or Tribunal or the Commission may consider—

(a) appropriate foreign and international law;

**4(3)** If any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by persons contemplated in section 3(1)(b).

## **Price:<sup>1</sup>**

**23(6)** Subject to subsections (7) to (10), a supplier must not require a consumer to pay a price for any goods or services—

- (a) higher than the displayed price for those goods or services; or
- (b) if more than one price is concurrently displayed, higher than the lower or lowest of the prices so displayed...

(9) If a price as displayed contains an inadvertent and obvious error, the supplier is not bound by it after—

- (a) correcting the error in the displayed price; and
- (b) taking reasonable steps in the circumstances to inform consumers to whom the erroneous price may have been displayed of the error and the correct price.

**30(1)** A supplier must not advertise any particular goods or services as being available at a specified price in a manner that may result in consumers being misled or deceived in any respect relating to the actual availability of those goods or services from that supplier, at that advertised price.

(2) If a supplier advertises particular goods or services as being available at a specified price, and the advertisement expressly states a limitation in respect of the availability of those goods or services from that supplier at that price, the supplier must make those goods or services available at that price, to the extent of the expressed limits.

Section 30 refers to adverts, which is what this case is about, while section 23 applies to displayed prices. Unlike section 26, section 30 does not provide how errors are to be dealt with nor what the position is if a limit was not placed on the numbers available.

## **Law:**

### **When the agreement is concluded**

Under the common law, a contract normally comes into effect where there is an offer that is accepted: *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A). An offer occurs when someone puts forward a proposal with the intention that if it is accepted, a contract will come into existence.

---

<sup>1</sup> See also the commentary in Annexure A.

The publication of an advertisement offering goods for sale at a stated price is not an offer to all who may read the advertisement but merely an invitation to make offers: *Bird v Summerville* 1960 4 SA 395(N) 401D. This is referred to as an invitation to treat.

A shop owner displaying their goods for sale is generally making an invitation to treat: *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401. They are not obliged to sell the goods to anyone who is willing to pay for them, even if additional signage such as "special offer" accompanies the display of the goods.

In *Partridge v Crittenden* [1968] 1 WLR 1204, it was held that where the appellant advertised to sell wild birds, it was not offering to sell them. Lord Parker CJ commented that it did not make "business sense" for advertisements to be offers, as the person making the advertisement may find himself in a situation where he would be contractually obliged to sell more goods than he actually owned.

## **Foreign law and practice**

### **Approach to apportionment of risk**

The CPA was drafted by Canadian attorney Phil Knight. According to him, the philosophy underpinning the CPA is the transfer of the risk attaching to doing business from the consumer, who was usually obliged to accept it by the terms of the agreement, to the business, which is best able to distribute the risk through pricing, insurance or taking preventative steps.<sup>2</sup> This philosophy is influenced by American and Australian legal thinking, considered below. Further, the CPA prevents suppliers from forcing consumers to accept risks.

Examples in the CPA where the risk is explicitly stated to be transferred to the supplier are:

- s.18: The risk of accidental damage to displayed goods is borne by the supplier and may not be passed to the consumer;
- s. 20(4): The risk of goods that may be returned ITO subsection (2)(b) to (d);
- s. 20(5): The risk of returning unsolicited goods;
- s. 56(2): The risk of goods that may be returned; and
- s 62(1)(b): Goods on lay-by

---

<sup>2</sup> Department of Trade and Industry: Consumer Protection Law Conference 'Changing the Consumer Protection Landscape in South Africa: The Consumer Protection Act 68 of 2008' Gallagher Estate, 4 to 5 March 2010.

## USA

Calabresi (1970) argued that the efficient/optimal allocation of risk should be the economic and social objective pursued by the courts and governments. This means that risks should be allocated to the party that is best positioned to know about the risks and take precautions designed to avoid the event/accident. It is a search for the “cheapest cost avoider”.<sup>3</sup>

## Australia

Government with its access to sophisticated self financing insurance pools and taxes may be in the best position to be a loss distributor compared to a multitude of small and diverse nonprofit service providers, impoverished clients receiving public goods and lack of dedicated private insurance pools serving nonprofit community service enterprise.<sup>4</sup>

## South Africa

The principal that a supplier who voluntarily participates in an activity must bear the risks associated with it was already part of South African law:

“ A bank which voluntarily decides to participate in a situation which has inherent risk was not entitled to complain and avoid its duty of care arising in that situation by pointing to the cost of safeguarding against the risk of the situation.”<sup>5</sup>

## Survey: approach to pricing

### UK

The price on display, such as the price on the actual goods, the shelf edge price, the price given in an advertisement or on a website, can form part of what the law terms 'an invitation to treat'. This means that the price given by the trader forms part of an invitation for a prospective buyer to make an offer to buy, which the trader is entitled to either accept or reject. The buyer cannot insist that a trader sells anything at the

---

<sup>3</sup> Calabresi G, (1970) *The Cost of Accidents: A legal and economic analysis*, New Haven: Yale University Press. Similarly, “Liability should be on the best risk avoider, who may or may not be the ... party best suited to distribute costs.” (Texas Law Review)

<sup>4</sup> Who should bear the risk – The party least able to refuse or the party best able to manage the risk? P17 [http://eprints.qut.edu.au/5159/1/5159\\_1.pdf](http://eprints.qut.edu.au/5159/1/5159_1.pdf)

<sup>5</sup> *Kwa Mashu Bakery Ltd v Standard Bank of South Africa Ltd* 1994 CLD 160(D) @ 178 (quoted from headnote).

marked price, whether or not the trader has made a mistake. However, trading standards can take action against a trader for giving a misleading price indication.<sup>6</sup>

### **Australia**

If you display or advertise in a catalogue the same good with more than one price, you must sell the good for the lowest displayed (or advertised) price or withdraw the goods from sale until the price is corrected.<sup>7</sup>

### **Queensland**

If an incorrect price is displayed, is the business obliged to sell the product at the lowest displayed price?

No. If a displayed price is incorrect, the business is entitled to withdraw the product from sale, fix the pricing error, and then make the product available for sale again.

In some cases, this may be as simple as fixing a price or label on a shelf. But if the incorrect price has been placed in a newspaper advertisement or pamphlet, the business would need to publish a correction before returning the item for sale at the correct price.<sup>8</sup>

### **Canada**

#### **Sale Above Advertised Price**

**Section 74.05** of the *Competition Act* is a civil provision. It prohibits the sale or rent of a product at a price higher than its advertised price. The provision does not apply if the advertised price was a mistake and the error was immediately corrected.

If a court determines that a person has engaged in conduct contrary to section 74.05, it may order the person not to engage in such conduct, to publish a corrective notice and/or to pay an administrative monetary penalty of up to \$750,000 in the case of a first time occurrence by an individual and \$10,000,000 in the case of a first time occurrence by a corporation. For subsequent orders, the penalties increase to a maximum of \$1,000,000 in the case of an individual and \$15,000,000 in the case of a corporation.<sup>9</sup>

#### **Canadian Code of Practice Scanner Price Accuracy**

If the scanned price of a non-price ticketed item is higher than the shelf price or any other displayed price, the customer is entitled to receive the item free, up to a \$10

---

<sup>6</sup> [http://www.tradingstandards.gov.uk/cgi-bin/brighton-hove/con1item.cgi?file=\\*ADVI011-1111.txt](http://www.tradingstandards.gov.uk/cgi-bin/brighton-hove/con1item.cgi?file=*ADVI011-1111.txt)

<sup>7</sup> Australian Competition & Consumer Commission <http://www.accc.gov.au/>

<sup>8</sup> Office of fair trading: Sales practice (pricing and lay-bys) [www.fairtrading.qld.gov.au](http://www.fairtrading.qld.gov.au)

<sup>9</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home>

maximum. When the item has a price tagged, the lowest price applies. When identical items are incorrectly priced, the second one will be sold at the correct price.<sup>10</sup>

## **New Zealand**

### **What are my rights if a shop advertises something at the wrong price?**

Although the shop has probably breached the Fair Trading Act, the only loss or damage you have suffered is a wasted trip to the shop. You can ask them to compensate you for this, but you cannot force the shop to sell you the goods at the advertised price.<sup>11</sup>

## **Ireland**

Traders are required to ensure that prices displayed are accurate and not misleading. Put simply, the price displayed must be the same as the price charged at the till. This also applies to special offers.

If a shop incorrectly labels something with the wrong price, and it is lower than the price charged at the till, you do not have an automatic right to buy the goods at the marked price. As long as the seller tells you before your money is taken that the higher price applies, you can decide not to buy it.<sup>12</sup>

## **2. Consideration of law**

From the comparative survey of legal approaches to price discrepancies, it is evident that there is a spectrum of approaches varying from that the incorrect price is not binding to the item must be sold at no charge below a stated value. An error in the price in South Africa prior to the CPA would not be binding as it would have been considered to be an invitation to treat. CPA section 23(6), which prohibits a supplier from charging more than the lowest price displayed, in effect overrules the common law and makes the displayed price a binding offer that converts to a binding contract once accepted by the consumer tendering payment. This rule is mitigated to the benefit of the supplier in the case where the price as displayed contains an inadvertent and obvious error (section 23(9)) if, upon discovering the error, the supplier:

- corrects the error; and
- takes reasonable steps in the circumstances to inform consumers of the error and the correct price  
(the requirements of these bullet points are hereafter referred to as the provisos) .

---

<sup>10</sup> <http://forum.smartcanucks.ca/>

<sup>11</sup> Fair Trading Act New Zealand [http:// www.consumeraffairs.govt.nz/](http://www.consumeraffairs.govt.nz/)

<sup>12</sup> National Consumer Agency Ireland <http://www.nca.ie/nca/pricing-rules#content>

On a plain interpretation of section 30, if an advertisement specified a limitation on the number available, a supplier would be bound to provide the item advertised at the advertised price up to the limit advertised, irrespective of any notice subsequently placed in the store. A failure to comply may lead to the imposition of an administrative fine.

Sections 23 and 30 appear to be contradictory with regard to errors unless section 23 is taken only to refer to displayed prices in the store and section 30 is taken to refer to advertisements in the media/ online. This is something only the Tribunal or the Courts can pronounce on.

### **3. Conclusion**

The following principles emerge from this survey of the law:

1] Suppliers are bound to provide goods at lowest advertised or displayed prices i.e. they bear the risk and costs associated with errors;

2] In the case of displayed price errors, the supplier is bound until the consumer is informed. If the consumer acts in a manner consistent with buying the item prior to being informed of the error, the consumer is entitled to pay the error price e.g. the consumer takes the item (or the product details if to be delivered or collected from dispatch) to the till with the intention of paying for it or places the order with the sales assistant and the cashier/ sales assistant then informs the consumer of the error;

3] Suppliers can limit the extent of their risk by stipulating the number of items available at a given price or the period for which the offer is valid in adverts and by correcting the error and taking reasonable steps in the case of displayed prices.

4] Reasonable steps may include:

- In the case of a display error: Withdrawing the product from sale, fixing the pricing error price or label on a shelf, and then making the product available for sale again;
- In the case where the incorrect price has been placed online, in a newspaper advertisement, e mail, sms, catalogue or pamphlet:
  - replacing the advert/ readvertising with a notification alerting consumers to the error and correct price or notifying them via email or sms;

- putting up notices at the stores affected and keeping suitable proof (including photographs with time/ date indicated) of the form of the notices, who put them up and when;
- offering to compensate customers for wasted trips by means of cash or vouchers.

5] Suppliers can also:

- ensure that goods and services have one displayed price;
- ensure that tills are capable of ringing up displayed prices and are updated as prices advertised and displayed change;
- appoint a specific employee to be responsible to check for price errors in displays at regular intervals and advertisements before they are approved;
- keep contemporaneous records of incidents of customers claiming goods at advertised prices and conversations that take place.

6] Suppliers need to bear in mind that in addition to allowing consumers to buy at lower prices or compensating them, the suppliers run the risk of having to pay administrative fines for incorrectly advertising prices.

**Adv NJ Melville**

**Ombudsman for Consumer Goods & Services**

**26 July 2013**

## LOWEST PRICE

A price is adequately displayed to a consumer if it is written on the goods or displayed in connection with the goods. If there is more than one price displayed, the consumer is only obliged to pay the lowest price. For example, where there is a price on a yogurt tub and a different yogurt price on the shelf on which the yogurt is displayed, the consumer only pays the lower price. If a price that was once displayed has been fully covered or obscured by a second displayed price, that last price must be regarded as the displayed price.

## ONE OR BOTH?

Another issue that may arise is where, for example, a gaming console is advertised with the latest game. Such advertising must not create confusion for the consumer. It must be clear whether the price advertised includes both the console and the game or one of the two and whether it is a bundled offer. Therefore, retailers must be very clear on whether accessories are included in the price advertised. Not only will this ensure compliance with the Consumer Protection Act, but it will also ensure compliance with the code of advertising practice. Advertisements should not contain any statement or visual presentation which is likely to mislead the consumer.

## OBVIOUS ERRORS

If there is an obvious error in a price displayed, the supplier will not be bound by that price if the supplier corrects the error and informs the consumer of the correct price before the sale is concluded. The supplier is not obliged to sell the goods to the consumer at the patently incorrect price. It follows that if the price is not obviously incorrect the seller will be bound by the displayed price but, the seller will not be bound where the price displayed in relation to any goods or services has been changed, covered or removed by an unauthorised person. It is a criminal offence for anyone to tamper with the supplier's prices.

## WHAT SHOULD YOU DO?

Suppliers should be vigilant when it comes to pricing on goods and they should:

- ensure that goods and services have one displayed price;
- correct pricing errors as soon as possible and ensure that consumers are informed of the error before any sale;
- appoint a specific employee to be responsible to check for price errors at regular intervals; and
- get legal advice if in doubt

Although the Consumer Protection Act protects the consumer and ensures that the consumer knows the total price that they are to be charged for the goods and that the price is fair, it does not entitle the consumer to an unfair price benefit or to take advantage of the supplier.

NORTON ROSE FULBRIGHT <http://www.golegal.co.za/>