

## THE OLD “PRICE JACK” BARGAIN PLAY - KOGAN IN COURT FOR ALLEGED MISLEADING TAX-TIME DISCOUNT CLAIMS

By Meagan Boschetti, Solicitor

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The end of financial year is rife with promotional sales, and in an increasingly competitive market place, businesses strive to stand out from the crowd with attractive discount offers. Rivalry aside, online marketplace Kogan (Kogan Australia Pty Ltd), has managed to achieve quite the response to its 2018 end of financial year promotion, although unfortunately not at the check-out, and from one stakeholder the online retailer was *not* trying to attract - the ACCC.

### What happened?

Kogan, known for offering leading brands across a wide range of categories, ran a promotion between 27 and 30 June 2018, in which a 10% discount was offered on most of its products by using the code “TAXTIME”. However, not so coincidentally, the price of more than 600 eligible products increased the day before the promotion by at least 10%, and then decreased just two days after the promotion concluded, with many items returning to their pre-promotion price. Despite the price fluxes, Kogan promoted the offer as limited, by distributing email, online and text message advertisements towards the end of the promotional period with messaging such as “48 HOURS LEFT” and “ENDS MIDNIGHT TONIGHT”, driving a sense of urgency and scarcity about the sale.

Ironically, one year later Kogan’s campaign is far from over, as the ACCC has issued its own timely reminder to advertise fairly this tax time, instituting proceedings against Kogan in the Federal Court alleging that Kogan made false or misleading representations about their discount promotion.

### Price jacking - what’s the deal?

In colloquial terms, Kogan’s conduct is known as ‘price jacking’ and the ploy is as old as the hills. More problematically, many brands make this mistake as they fail to understand what is actually wrong with it from a legal perspective. After all, the inflated price IS the price, and the retailer IS discounting it at the promotional rate... so, what’s the problem?

Some background first. As the term suggests, price jacking involves sellers inflating the original price of an item immediately before a sale, and then slashing that newly inflated price for the promotional period. Sometimes, the price reduction will be to lower than was on offer before the sale, which makes the retailer seem more generous than they really are – after all, 15% off sounds so much more attractive than 1.5% off. Other times the price reduction may be to exactly what the price actually was before the offer, but the retailer makes discount claims based on the reduction (and ignores the increase). Even more cynically, a retailer could boost a price, then reduce it by less than the increase, and claim a discount, although this is far less common.

Consequently, regardless of the specifics, price jacking by retailers can give consumers a misleading impression of the discount on offer and the value of the relevant sale, contravening the Australian Consumer Law, as the case at hand demonstrates. With Kogan, the ACCC alleges that on **25 June 2018 Kogan offered a 15” Apple Macbook Pro for \$3,199**. On **26 June the price of the Macbook increased by just under 11% to \$3,549** and remained at that price for the duration of the offer. Then, just two days after the offer finished on **2 July 2018, the price went down to \$3,149**, notably lower than the pre-sale price. The ACCC contends that by way of such conduct, which was mirrored in varying degrees on some 621 products, Kogan’s advertisements were likely to have caused consumers to think they were getting the products below their usual prices. However in reality Kogan had inflated product prices which created a false impression of the effective discount, given the item’s price had been proportionately increased and decreased closely outside

the promotional period, and in some cases to the extent that consumers would have gotten a better deal if they had waited until after the promotion ended.

Kogan also communicated that consumers would have a limited time to receive the discount with its messaging regarding the end of the promotion. By doing so, the ACCC contend that Kogan had also made false representations as to future matters, by implying the discount code would give 10% off the price at which these products would be available for a reasonable period after the promotion. Consumers could therefore reasonably deduce products such as the Macbook Pro would remain at the price it was offered for during the promotional period- \$3,549. This was however not the case, and in fact consumers could purchase the Macbook Pro for over *11% cheaper* after the promotion at \$3,149.

Whilst Kogan maintains that it at all times made clear that the price reduction was off the currently displayed price and applied at the time of checkout by using the discount code, what they failed to consider is the influence of pre and post promotional conduct, which as exemplified, contributes to the representations made to consumers when promoting sales and discount offers. Kogan's conduct, by increasing prices before the promotion and decreasing prices after the promotion, counteracted any real discount offered to consumers by the promotion, which as alleged by the ACCC, runs risk of falsely enticing consumers to purchase the products on offer.

Instead, what Kogan needed to do was view this entire offer in totality, from the perspective of the consumer. The correct rule of thumb to apply to any price offer or sales promotion, whether under the "WAS/NOW" or strike-through style of discount claim, or any other form, is that the base price must be the price that has been charged for a reasonable period of time, in reasonable quantities given the products in question. Clearly, Kogan's offer failed this simple test according to the ACCC's allegations, because their prices were basically brand new, and had only just gone up – they simply could not properly function as "was" prices in these settings. All of this can be difficult to unpack and apply in practice of course, which is why so many retailers and brands get it wrong.

### **Comparable conduct**

Unfortunately, this is not the first time Kogan have come under scrutiny from the ACCC for misleading discount claims.

In 2009 Kogan used price comparisons such as *Now \$X (Save Y%)* and *save over \$X* to promote its products. However, it was found that the products had not been offered by Kogan at the higher price and the savings were based on an estimated average price a consumer might pay for a product with similar specifications from another manufacturer. In a similar vein to the current proceedings, the ACCC claimed that such conduct was misleading, given the discounts and savings were not based on prices at which the products had been advertised for sale or sold in reasonable quantities at the higher price for a reasonable amount of time before the representations.

In their statement at the time, the ACCC explained that a comparison in value does not equate to a comparison in price. Rather, a value comparison is based on an estimated average price a consumer might pay for a product with similar specifications from another manufacturer, whereas a price comparison should only be made when the exact good or service has been previously offered or sold at the associated higher price. As highlighted in the 2009 case, it is important to distinguish a value comparison from a price comparison, so consumers can make an informed choice.

### **Lessons on avoiding misleading conduct when making discount claims**

Businesses must not make claims about discounts or sales unless they are offering genuine value/savings, and in making this assessment consideration must be given to prices in the time preceding and succeeding the offer.

For a discount or sale to be genuine, products must be available at a higher price during a non-sale period, and the higher price promoted in the discount offering must have been available either immediately before or after the sale, for a reasonable period of time, and applied to a reasonable number of sales. A reasonable period of time will depend on the nature of the products promoted (for example the RRP price of FMCG items are far more susceptible to change than large furniture items) but as a rule of thumb the comparison price must be available for at least an equal to or longer period than the sale price is valid, both before and after the sale. Ancillary sales messaging

that drive up urgency and scarcity may also be problematic, and should be used carefully – i.e. “only 24 hours left on these fantastic prices” will be an issue if the offer price becomes the standard RRP once the offer period concludes.

Businesses should also be aware of the distinction between value comparisons and price comparisons and clearly frame such claims accordingly. Value comparisons should be clearly identified by, for example, identifying the brand name, features, and model of the product being compared, and price comparisons should only be made where the good or service has previously been offered or sold for the higher price for a reasonable period of time.

### Contact us

If you would like further information on how to compliantly make discount and pricing claims, please contact one of our experts below. We can provide tailored legal and practical advice to assist you with drafting or clearing your advertising material, to avoid the above pitfalls.

**Meagan Boschetti**

03 9907 4304

meagan.boschetti@anisimoff.com.au

**Clint Fillipou**

03 9907 4302

clint.fillipou@anisimoff.com.au

[www.anisimoff.com.au](http://www.anisimoff.com.au)<https://www.facebook.com/AnisimoffLegal><https://twitter.com/AnisimoffLegal><http://www.linkedin.com/company/anisimoff-legal>