

8 June 2012

By email: gina.papas@justice.vic.gov.au

Component Pricing Consultation
Policy and Legislation Branch
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Dear Ms Papas

Single pricing legislation - proposal to exempt restaurants and cafes

On 7 May 2012, the Hon Michael O'Brien MP and the Hon Anthony Roberts MP wrote to the Consumer Action Law Centre (**Consumer Action**) inviting us to comment on the proposal to exempt restaurants and cafes from national single pricing requirements¹. We welcome the opportunity to comment on this proposal.

We do not support the proposal because (briefly):

- The single pricing law appears to create clear benefits for consumers and competition;
- The single pricing regulation does not appear to impose any burden on businesses; and
- Neither the Australian Hotels Association, nor the Productivity Commission, nor the Australian Government have attempted to assess the costs that the regulation creates for business. Nor have they assessed the benefits of retaining the regulation. That being so, there is simply no reason to allow a carve-out.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

We also operate MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians experiencing financial difficulty.

¹ The relevant provision is section 48 of the Australian Consumer Law, formerly section 53C of the Trade Practices Act.

The single price requirement creates clear benefits for consumers and competition

When the Productivity Commission first considered this proposal,² they concluded that "it is not clear" that requiring restaurants and cafes to provide a single price on their menus "will provide significantly greater benefits to consumers" than benefits already provided by other consumer protection law. We disagree. In our view there are a number of clear benefits for consumers and competition. Further, we do not believe governments should place any significant weight on the Productivity Commission's conclusion, which was made without making any attempt to assess the benefits and costs involved.

The Productivity Commission's assertion that the single pricing law does not create significant benefits is based on two unfounded assumptions. The first is that consumers will be aware of the surcharge³ which is by no means certain. Many traders will not charge this kind of surcharge, so consumers will not necessarily expect it or look for it. There is also no guarantee that businesses will make sure details of the surcharge are clear, prominent or unambiguous—in fact there is a clear competitive benefit for business owners to ensure the detail of the surcharge is not apparent to consumers until they have made a decision to eat at their restaurant.

The second assumption is that consumers will be able to calculate the total price once aware of the price and surcharge.⁴ We do not accept the assertion that all consumers will be able to calculate with any certainty the total price of a product including a surcharge. Many people, despite being intelligent and well educated are simply not good with numbers and will not be able to perform this calculation mentally (or even with a calculator). Many other consumers with numeracy difficulties will struggle even more.

Even if it were the case that surcharges were disclosed prominently and all consumers could mentally calculate total cost of an item with some accuracy, most people would have trouble comparing the prices of two or more restaurants with different surcharges. For example, assume café A, B and C are located in the same shopping strip and display their menus on their front windows to attract customers. All three menus offer steak sandwiches which cost \$22.50 in Café A, \$18.75 in Café B and \$17.25 in Café C. A 12 per cent surcharge applies in Café B, and a 15 per cent surcharge in Café C. Café A has no surcharge. Given time, a piece of paper with the figures above (and perhaps a calculator), many people could calculate which café has the cheapest steak sandwich without any trouble. But a consumer who is walking from café to café looking through the three menus over the course of five or ten minutes would likely find the task a tricky and frustrating one. A consumer with poor numeracy may find it impossible. That being so, it is clear that the single price requirement is not only good for consumers, it is also good for competition because makes it far simpler for consumers to identify the best deal on offer.

² See Productivity Commission (2010) *Annual Review of Regulatory Burdens on Business: Business and Consumer Services*, pages 105-109. Accessed from: <http://www.pc.gov.au/projects/study/regulatory-burdens/business-consumer-services/report>

³ The AHA's submission argued that consumers will be able to understand the price they will be charged provided surcharges are "presented in a clear and unambiguous manner". As cited by the Productivity Commission, p 106.

⁴ In support of this argument, the AHA says that customers are able to calculate tips for service. See Productivity Commission, p 106.

As well as the points above, there are also other factors that in our view need to be considered before making an informed conclusion about whether the single price requirement benefits consumers in cafes and restaurants. For example:

- Consumers are often unaware of the total price of goods and services they purchase at restaurants and cafes until after they have consumed the product, and so have less capacity to refuse to pay a surcharge which has not been disclosed to them. Most other consumer transactions are not like this—the consumer is told the price before they acquire or consume the goods and so can refuse to purchase if they don't like the price. Does this mean the single pricing provision is more beneficial in the restaurant/café setting than in other transactions, and if so, by how much?
- The single price requirement is a clear, unambiguous requirement, whereas other regulation applicable to this situation (such as prohibitions against misleading or deceptive conduct) are more fluid and open to interpretation. Do we create costs and uncertainty for businesses and consumers by removing the single price requirement, and if so, how is this quantified?
- Related to the point above, does the simplicity of the single price regulation mean consumers and traders will spend less time and money disputing bills?
- Does carving restaurants and cafes from the single price provision create more or less cost for regulators?

The Productivity Commission did not consider any of these factors and indeed did not appear to consider the benefits of the single price regulation at all before making its conclusion. Until a real assessment of the benefits of this regulation is undertaken, that conclusion cannot be given any weight.

The single pricing requirement does not appear to create a burden for business

The Productivity Commission recommendation to exempt restaurants and cafes from single pricing was made on the basis that “it appears” that the single pricing requirement has “imposed costs on these businesses without providing any significant additional benefit to consumers”.⁵ The Government’s decision to accept that recommendation was also made because it would “reduce the regulatory burden for small businesses in the tourism and hospitality sector.”

Again, we disagree with this conclusion. As far as we can see, the single pricing requirement should not create any additional costs for cafes and restaurants. As the Australian Hotels Association (which originally proposed the exemption) and the Productivity Commission note, businesses who choose to charge a surcharge on weekends and public holidays could comply with the single price requirement by simply publishing one menu with both prices.⁶ This could be as simple as having two price columns—one showing the weekday price and one with the weekend and public holiday price (including the surcharge). The two column layout could be inserted in menus when they are next routinely updated, meaning this would create no extra labour for businesses except for the insubstantial effort required to change the menu format. Businesses who have their menus printed by a contractor could also have the format changed when the menu was next due to be updated. There is no need for businesses to print a different menu for weekends and public holidays. However, if there was a cost related to this (and we

⁵ Pages 108-109.

⁶ Productivity Commission, p 105.

think it would be one-off and small), businesses could presumably add this cost to the surcharge and still not make any loss.

It is also quite possible that the single pricing law in fact reduces costs for restaurants and cafes. As argued by Stephen King:

the clear pricing rules were introduced so that the ACCC did not have to take businesses one-by-one through the courts for misleading and deceptive conduct. Exempting the restaurants from the clear pricing rules will simply subject them to the laws against misleading and deceptive conduct. And clearly *misinforming* consumers about prices is misleading and deceptive. So restaurants that go back to the old system will raise the potential for prosecution.⁷

It is unclear how the Productivity Commission and the Government came to the conclusion that the single price requirement imposes a significant burden on industry. Neither they, nor the Australian Hotels Association seem to have made any real investigation into whether any costs exist or their extent. As above, we do not believe the Productivity Commission's finding on this point can be given any weight until it is supported by proper analysis.

The burden of proof lies with industry

The requirement to provide a single price for goods and services is designed to apply nationwide and economy-wide. Furthermore, it is a sensible and proportionate—it is hard to argue that a consumer should not know the price of a good or service before they consume it. It should follow that any party suggesting an industry should be carved out from this requirement bears the burden of proving why such a carve-out should occur. Meeting that burden requires a genuine effort to assess the costs and benefits of the carve-out.

The Productivity Commission did not attempt to assess the costs and benefits of the proposed exemption, but they did attempt to justify it by noting that there are already some limited exemptions from the general requirement. We do not propose to offer a view on whether those exemptions are legitimate, and indeed that is beside the point. The fact that such exemptions have been made does not allow us to conclude that this requirement was not designed to apply economy-wide and so that particular industries can be exempted at a whim. The existence of exemptions only indicates that exemptions can be allowed if a compelling case is made on the facts of the particular circumstances. No such case has been made for cafes and restaurants and this proposal should not be considered seriously until it has.

The Productivity Commission also notes that the original amendments were inspired by criticism of particular industries, namely airlines and car dealers. From this, the Productivity Commission appears to conclude that an exemption in this case is somehow justified because restaurants and cafes are not one of those industries. This conclusion overlooks the fact that Parliament could have easily limited the application of this requirement to specific industries if it had wished to, but it did not. On the contrary, the Parliament made an express decision on two separate occasions to include this requirement in Acts that apply to all trade and commerce—once when the requirement was inserted into the Trade Practices Act, and again when it was included in the

⁷ Stephen King, 'Productivity Commission encourages misleading and deceptive pricing', *Core Economics blog*, 31 May 2012, available at: <http://economics.com.au/?p=8925>.

Australian Consumer Law. It cannot be assumed from extraneous materials that the Parliament intended any narrower application.

Responses to questions in the letter

Question 6: Could consumers be misled or deceived by the presence of percentage surcharges on menus? Is it likely that consumers would be able to effectively calculate the price of a meal?

As discussed above, we believe it will be likely that at least some businesses will not disclose the surcharge prominently, so there is clear potential for consumers to be misled about prices. If they are misled, it will be difficult for them to enforce their rights under misleading conduct provisions either with the business directly or through a court and tribunal.

Question 7: If consumers are misled, deceived or unable to effectively calculate the price of a meal, could this affect consumers' decision making? If so, what sort of consumer detriment (including loss or damage) could arise?

We believe this potential to mislead will affect consumer decision making. As discussed in the example above, consumers will find it very difficult to compare prices of different businesses and find the best deal. This could cause detriment to consumers by having them pay more than they otherwise would, both because they may find it difficult to locate the best price, and also because competitive pressure on prices will be blunted. Consumers are also more likely to have disputes with business owners if they are surprised with surcharges, which imposes further cost.

Question 8: Could surcharge structures become more complicated in future?

While we have no specific evidence to suggest surcharge structures may become more complicated, the removal of the single pricing requirement would risk this occurring.

Question 9: Would restaurants that represent the full dollar amount of meals in their menus be placed at a competitive disadvantage compared to those that use a percentage surcharge.

Yes. It is reasonable to expect that, when given the choice between two or more restaurants, a consumer will choose the one with cheaper 'headline' prices (not including the surcharge) even if this is not the cheaper option of two or more competitors once surcharges are included. In our view, this will actually encourage restaurants who charge weekend/public holiday surcharges to disclose them as obscurely as possible.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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