

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 152

Issued by the authority of the Minister for Competition Policy and Consumer Affairs

Trade Practices Act 1974

Trade Practices (Industry Codes — Unit Pricing) Regulations 2009

The object of the *Trade Practices Act 1974* (the Act) is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Section 172 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part IVB of the Act provides for industry codes. In particular, section 51AE of the Act allows for regulations to be made prescribing an industry code, and declaring the industry code to be a mandatory or a voluntary industry code. Section 51AD of the Act provides that a corporation must not, in trade or commerce, contravene an applicable industry code.

These Regulations prescribe an industry code for the retail grocery industry, and declare that code to be mandatory. The purpose of the code is to require large grocery retailers, those grocery retailers that operate online, and those grocery retailers that voluntarily display unit prices, to use unit pricing when selling grocery items to consumers.

The Regulations implement the commitment to a mandatory unit pricing scheme made by the Government on 5 August 2008. That commitment was part of a preliminary response to the Report of the Australian Competition and Consumer Commission's *Inquiry into the competitiveness of retail prices for standard groceries* (ACCC Grocery Inquiry). The report recommended that a mandatory, nationally-consistent unit pricing regime be introduced for standard grocery items both on in-store price labels and in print advertising.

The development of the unit pricing scheme has been the subject of wide consultation. Several submissions to the ACCC Grocery Inquiry during 2008 discussed the need for a national unit pricing scheme in Australia. On 12 September 2008 the Government released an issues paper calling for public comment on the form of a unit pricing scheme. Based on this consultation, the Government announced the key features of the scheme on 8 January 2009, and on 23 March 2009 released a consultation draft of the code. The Government received a number of submissions on the draft code, and held a stakeholder conference on 16 April 2009 to discuss its terms and effect. This consultation process assisted the Government in deciding on the final form of the scheme.

The industry code requires grocery retailers with a floor space greater than 1000 square metres, all online grocery retailers, and all other grocery retailers that voluntarily enter the scheme, to display a unit price for all grocery items for which a selling price is displayed. The unit price – a price per unit of measurement (for example, per 100 grams) – must be displayed legibly, unambiguously, prominently and in close proximity to the selling price.

Generally, the unit price is to be displayed as per 100 grams, per 100 millilitres, per metre, per square metre, or per item. The code specifies a list of grocery categories for which alternative units of measurements are to be used. The code also contains a list of grocery categories for which unit pricing is not required (for example, books, toys and clothing).

Details of the Regulations are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on 1 July 2009. The code allows retailers a period of grace until 1 December 2009 to arrange for compliance with the code, during which time the code is not enforceable against them.

Details of the Trade Practices (Industry Codes — Unit Pricing) Regulations 2009**Regulation 1 – Name of Regulations**

This regulation provides that the title of the Regulations is the *Trade Practices (Industry Codes — Unit Pricing) Regulations 2009*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on 1 July 2009.

Regulation 3 – Code of Conduct

This regulation provides that the code set out in Schedule 1 to the Regulations is prescribed and declared as a mandatory industry code under section 51AE of the *Trade Practices Act 1974*. The effect of this declaration is to make a breach of the code a breach of the Act, which makes available certain remedies provided for in Part VI of the Act.

Schedule 1 – Retail Grocery Industry (Unit Pricing) Code of Conduct**Part 1 – Preliminary****Clause 1 – Name of code**

This clause names the code the Retail Grocery Industry (Unit Pricing) Code of Conduct.

Clause 2 – Purpose of code

This clause provides that the purpose of the code is to require the use of unit pricing by certain grocery retailers.

Clause 3 – Definitions

This clause creates a number of definitions for the purposes of the code. The definitions establish to which retailers the unit pricing requirements apply.

Three types of retailer are captured by the code. The first is a ‘store-based grocery retailer’, which is defined by reference to a three-limbed test: the retailer sells a minimum range of food-based grocery items; the retailer has more than 1 000 square metres of floor space for displaying grocery items; and the retail premises are used primarily for the sale of food-based grocery items (not, for example, a large department store with a relatively small grocery business). The second type of retailer captured would be grocery retailers that sell a minimum range of food-based grocery items online.

The third type of retailer captured by the code is grocery retailers that voluntarily display unit prices (‘participating grocery retailers’). A participating grocery retailer is a retailer that sells a minimum range of food-based grocery items, and voluntarily

displays a unit price for one or more grocery item that is required to be unit priced under the code (that is, intentionally displays a unit price – in whatever measurement and format – where it is not required to do so under a law of the Commonwealth or a State or Territory).

Clause 4 – Application

The code applies to store-based grocery retailers and online grocery retailers from 1 December 2009. The code applies to a participating grocery retailer – one that voluntarily undertakes unit pricing – from six months after the retailer begins to display unit prices.

Store-based and online grocery retailers have five months from the commencement of the Regulations, on 1 July 2009, to ensure compliance with the code before the code is enforceable against them. Participating grocery retailers have a six month transition period within which to ensure compliance with the code.

If at any time a participating grocery retailer completely stops providing unit pricing as required by the code, it ceases to be a participating grocery retailer from that time, and therefore the code no longer applies to the retailer.

Clause 5 – Consistency with other Commonwealth legislation

The code has effect only to the extent to which it is not inconsistent with a law of the Commonwealth. For example, the code does not override any Commonwealth trade measurement laws, which may require unit pricing in certain circumstances and in certain forms.

Part 2 – Requirements to display unit pricing

Clause 6 – Display of unit prices

This clause mandates the display of unit prices for all grocery items for which a selling price is displayed. Where there is no selling price displayed, for example in an advertisement based on product quality rather than product price, no unit price is required.

The unit price must be displayed prominently and in close proximity to the selling price. It must be legible and unambiguous. Within these parameters, grocery retailers are able to use such signs, labels, fonts and colours as they see fit.

Where a single selling price is displayed to refer to more than one grocery item, the code does not require grocery retailers to display a unit price in connection with that selling price. For example, a range of related grocery items (such as confectionery) may be sold at a single price, but each item may be a different weight or other measure.

Clause 7 – Exempt grocery items

This clause exempts a retailer from displaying unit prices in some situations.

A grocery item that has been marked down from its usual selling price because the item or its packaging is damaged, because it is a perishable item that may deteriorate if not used by a particular date, or because it is an item which the retailer does not intend to restock (a 'discontinued item'), is not be required to bear a unit price. However, items that are simply on special are still required to bear a unit price.

A grocery item that is a bundle of different grocery items is exempt from the unit pricing requirements. An example of such a bundle is a soup kit consisting of carrots, potatoes, onions, split peas and stock. However, bundles of the same grocery item are still required to display a unit price. For example, if one bottle of lemonade is sold for \$2.00, and the retailer offers a 'multi-buy' of five bottles of lemonade for \$8.00, the price representation of five bottles for \$8.00 requires display of a unit price.

Finally, unit prices are not required in any situation for items in any of the exempt grocery categories that are listed in clause 10.

Clause 8 – Units of measurement and form of unit price

This clause provides for the standard units of measurement to be used when calculating unit prices. While clause 11 lists a number of exceptions, the general rule established by this clause is that items are to be unit priced using the most relevant of per 100 millilitres, per 100 grams, per metre, per square metre, and per item. Where a grocery item is to be unit priced 'per item', more meaningful expressions such as 'per nappy' or 'per tablet' are permitted.

The clause provides that the most relevant unit of measurement is the measurement displayed on the grocery item's packaging or, if there is more than one unit displayed on the packaging, the unit of measurement by which items in the same grocery category are most often supplied.

The clause establishes that the unit price must be displayed in dollars and whole cents or, if the unit price is less than \$1.00, either in dollars and whole cents or in whole cents alone. Unit prices are to be worked out to the nearest cent, with half-cents rounded upwards.

Clause 9 – Advertising

This clause requires grocery retailers covered by the code to display unit pricing in their print media and online advertisements. This requirement does not apply to advertisements on television, radio or other similar media.

The display of a unit price in advertising material has to comply with the requirements of the code, that is, it must be legible, unambiguous, prominent, in close proximity to the selling price, and in accordance with the established units of measurement.

Part 3 – Exempt grocery categories and alternative units of measurement

Clause 10 – Grocery categories exempt from unit pricing

This clause creates a list of grocery categories for which display of a unit price is not required. The list includes categories for which unit pricing would not be meaningful

or practical. It also includes categories that do not contain traditional grocery items and are not likely to form part of a consumer's regular grocery purchases.

Clause 11 – Alternative units of measurement

This clause creates a list of grocery categories for which units of measurement different from those established by clause 8 are required.

This list includes categories for which existing state and territory trade measurement legislation already requires alternative units of measurements. For example, meat, fruit, vegetables and cheeses are to be unit priced per kilogram rather than per 100 grams.

The list also includes categories for which the standard units of measurement would generate excessively large, small or meaningless unit prices. For example, herbs and spices are to be priced per 10 grams, and products supplied by number in packages of 41 or more items, including sheets on a roll, are to be priced per 100 items or sheets.

If use of the alternative units of measurement leads to grocery items in the same grocery category having unit prices in different units of measurement, retailers are able to use in all cases the unit of measurement most often required for products in that category. For example, if most nappies are supplied in packages of fewer than forty nappies, a retailer is able to unit price a 44-pack of nappies 'per nappy' notwithstanding the fact that clause 11 requires that pack to be unit priced 'per 100 nappies'.