# EXPLANATORY STATEMENT

**Select Legislative Instrument 2013 No. 177**

## Issued by the authority of the Assistant Treasurer

*Competition and Consumer Act 2010*

*Competition and Consumer Amendment Regulation 2013 (No. 3)*

The objective of the *Competition and Consumer Act 2010* (the Act) is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. Schedule 2 to the Act contains the Australian Consumer Law (ACL). The ACL aims to protect consumers and ensure fair trading in Australia.

Section 139G of the Act provides that the Governor-General may make regulations prescribing matters that are required or permitted by Schedule 2 to the Act, or are necessary or convenient to be prescribed for carrying out or giving effect to that Schedule.

The *Competition and Consumer Amendment Act 2013* amended section 48 of the ACL by inserting subsection 48(4A) which contains a regulations-making power that enables exemptions from the component pricing requirement to be prescribed by regulation.

Section 48 of the ACL (the component pricing requirement) prohibits a person in trade or commerce from representing a component of a price when making a representation about the price of a good or service, without also prominently specifying the single figure price (total price) a person must pay to obtain the good or service, to the extent that a single figure price is quantifiable at the time of making a representation.

The purpose of the *Competition and Consumer Amendment Regulation 2013 (No. 3)* (the Regulation) is to amend the *Competition and Consumer Regulations 2010* to:

* prescribe representations that are made on a menu of a restaurant and which refer to the imposition of a surcharge on specific days as exempt from the component pricing requirement in the ACL; and
* prescribe conditions relating to disclosure, prominence and transparency that must be satisfied for these representations to obtain the exemption.

The Regulation gives effect to the Australian Government's response to a recommendation of the Productivity Commission (PC) in its 2010 *Annual Review of Regulatory Burdens on Business: Business and Consumer Services* (the Report) that: "The Australian Government should amend the *Trade Practices Act 1974* to have restaurant and café menu surcharges for specific days placed outside the scope of the component pricing provision of that legislation."

The Regulation reduces the regulatory burden on small businesses in the restaurant and café sector, as identified in the PC Report.

Details of the Regulation are set out in Attachment A.

Pursuant to the State and Territory consultation requirements in Clause 11 of the 2009 *Intergovernmental Agreement for the Australian Consumer Law* (IGA), the Commonwealth consulted State and Territory Consumer Affairs Ministers on the Amendment Act and the accompanying Regulation.

Clause 19 of the IGA provides that, before the Commonwealth can introduce a Bill into the Commonwealth Parliament, the support of four other jurisdictions, including at least three States is required. To meet this obligation under the IGA, the Government called a vote on the Amendment Act and the Regulation collectively via written notice.

In May 2013, the Commonwealth received the requisite State and Territory support in favour of the Amendment Act and the Regulation.

The Act does not specify any other conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commenced on the day after the Regulation was registered on the Federal Register of Legislative Instruments (FRLI).

A Statement of Compatibility with Human Rights is at Attachment B.

### Attachment A

### Details of the *Competition and Consumer Amendment Regulation 2013 (No. 3)*

**Section 1 – Name of Regulation**

This section specifies the name of the Regulation as the *Competition and Consumer Amendment Regulation 2013 (No. 3)* (the Regulation).

**Section 2 – Commencement**

This section provides that the Regulation commences on the day after the Regulation is registered on the Federal Register of Legislative Instruments.

**Section 3 – Authority**

The Regulation is made under the *Competition and Consumer Act 2010* (the Act)*.*

**Section 4 – Schedule(s)**

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1 – Amendments of *Competition and Consumer Regulations 2010***

**Item [1]** – **After regulation 80**

Item 1 inserts regulation 80A to provide for a conditional exemption on specific days for surcharges on food or beverage in restaurants from the component pricing requirement under section 48 of the Australian Consumer Law (ACL). The ACL is Schedule 2 to the Act.

Restaurants that comply with the current requirements in section 48 of the ACL are not required to change their menus or print new menus to comply with the Regulation. The Regulation provides an exception for business; it does not impose any additional obligation on business.

Restaurants are defined within the Regulation to include commonly known terms such as café and bistro.

Under the Regulation, a restaurant can rely on the exemption where:

* a restaurant menu displays a surcharge for the supply of food or beverage on specified days by the restaurant; and
* the menu displays a prescribed form of words to inform customers that a surcharge applies on specified days; and
* the prescribed words are displayed in a transparent and prominent manner on the menu.

The evidential burden rests with the restaurant seeking to rely on the conditional exemption to prove that the representation it has made satisfies the prescribed conditions.

Regulation 80A features a number of subregulations.

Subregulation 80A(1) provides that regulation 80A is made for the purposes of paragraphs 48(4A)(a) and (b) of the ACL by exempting the component pricing provision of section 48 of the ACL where certain representations are made and certain conditions are complied with.

The Regulation does not provide restaurants with a wide-ranging exemption from other obligations under the ACL and the Act more broadly (such as the misleading and deceptive conduct provisions contained in section 18 of the ACL). Restaurants and cafes should be aware of their general obligations under the ACL when displaying and marketing prices and charges.

*Class of representations*

Subregulation 80A(2) establishes what is meant by ‘a class of representations’ for the purposes of the Regulation. ‘A class of representations’ is deemed to be representations that appear on a menu of a restaurant and involve the imposition of a surcharge on any payment relating to the supply of food or drinks on a specified day or days.

For the purposes of subregulation 80A(2), a menu is a list of separate food and beverage items available at a restaurant for purchase. A menu may be, but is not limited to, a list on a blackboard, a list on a sheet of paper or a list on a wall of a restaurant premise.

Subregulation 80A(3) has been inserted for the avoidance of doubt. It is not uncommon for restaurants to have menus which do not contain a complete list of all food and beverage items for sale, or menus which display the availability of general items such as ‘value meals’ or ‘sandwiches’. The purpose of subparagraph 80A(3)(a) is to ensure that such menus, if captured by the component pricing requirement in the ACL, will be exempt if the other requirements of regulation 80A are satisfied.

Similarly, there are instances where restaurants do not list prices for all menu items. Subparagraph 80A(3)(b) is intended to ensure that these menus, if captured by the component pricing requirement in section 48 of the ACL, will be exempt if the other requirements of regulation 80A are satisfied.

*Conditions in relation to a representation in the class*

Subregulations 80A(4), 80A(5), 80A(6) and 80A(7) provide the conditions that must be met for an exemption to apply.

Subregulation 80A(4) stipulates that for restaurants to obtain the benefit of the conditional exemption outlined in the Regulation, the menu must include a representation which comprises the words “a surcharge of [percentage] applies on [the specified days or days]”.

The intention of this subregulation is that the text of the representation outlined in subregulation 80A(4) need not be displayed for each individually listed item (for example where the text is repeated under each menu item). This is because menu items together constitute ‘the representation’ as a whole (sub-regulation 80A(2)). The intended outcome of the Regulation would be that on typical menus, the text is placed prominently and transparently on the menu; once on a blackboard list or once on a list on a wall of a restaurant premises.

Subregulation 80A(5) provides that for the required words to obtain the benefit of the exemption outlined in subregulation 80A(4) it must be stated transparently. ‘Transparent’ is defined in section 2 of the ACL to mean, in relation to a document, expressed in reasonably plain language, legible and presented clearly.

Subregulation 80A(6) specifies that to obtain the benefit of the exemption, restaurants are required to display the text prescribed in subregulation 80A(4) at least as prominently as the most prominent display on the menu, whether that be either the price of the particular food or beverage, or any other fee or surcharge relating to the food or beverage (for example, a credit card surcharge) – whatever is the more prominent of the two.

As indicated, it is not uncommon for restaurants to have menus which do not contain a complete list of all food and beverage items for sale, menus which generally display the availability of items such as ‘value meals’ or ‘sandwiches’.

Subregulation 80A(7) indicates that if the menu does not display the consideration for the food or beverage, or any other fee or surcharge related to the food or beverage, the text in subregulation 80A(4) must be displayed in an obvious and visible manner where applicable. This may occur in circumstances where not all items are individually listed on a menu.

Subregulation 80A(8) provides a definition of “restaurant”. For the purposes of the Regulation, a business, service or arrangement may obtain the benefit of the exemption (that is, it is considered to be ‘a restaurant’) if that entity sells food or beverage to customers and is within a class commonly known as a restaurant, café, bistro or any comparable term.

For example, a takeaway shop that sells food and beverage or a business that sells food and beverage delivered to households for immediate consumption may obtain the benefit of the exception. Other examples may include a pizza delivery business or a fish and chip takeaway shop.

However, pursuant to the definition, the Regulation will not apply to a business, service or arrangement that supplies food or beverage to households for use at another time (for example, home delivered groceries or businesses that deliver prepared meals). These entities are not considered to fall within the definition of “restaurant” and therefore cannot obtain the benefit of the exception provided for in Regulation 80A.

**Attachment B**

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Competition and Consumer Amendment Regulation 2013 (No. 3)**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

**Overview of the Legislative Instrument**

The Regulation amends the *Competition and Consumer Regulations 2010* to:

* prescribe representations that are made on a menu of a restaurant and which refer to the imposition of a surcharge on specific days as exempt from the component pricing requirement in the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010*); and
* prescribe conditions relating to disclosure, prominence and transparency that must be satisfied for these representations to obtain the exemption.

**Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.