

28 February 2019

Unit Pricing Code Consultation Paper
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: UnitPricingReview@TREASURY.GOV.AU

Dear Consumer and Corporations Policy Division,

Retail Grocery Industry (Unit Pricing) Code of Conduct consultation paper

1. The Competition and Consumer Committee of the Business Law Section of the Committee of Australia (the **Committee**) appreciates the opportunity to consult on the review of the Retail Grocery Industry (Unit Pricing) Code of Conduct (the **Code**).
2. The Committee recognises the value that the Code has brought to consumers and submits that the Code should be remade (with some amendments), rather than be allowed to sunset.
3. The Committee would appreciate the opportunity to comment on any draft amendments to the Code.

A Application of the Code

4. The Committee notes that since the introduction of the Code in 2008 there have been significant changes to the structure of the grocery retail market, in particular in relation to the number of online grocery retailers.
5. The Committee considers that the application requirements in the Code could be better adapted to the online environment. In particular, as currently drafted, the Code requires online retailers to sell a prescribed minimum range of food-based grocery items online before the Code applies.¹ The minimum range reflects the items that would typically be sold at a traditional retail grocery site, such as bread, fresh fruit and vegetables, meat and fresh milk. Certain of these items, in particular fresh food items, may not be sold by online retailers, even though a substantial proportion of the online retailer's business is focused on grocery.

¹ Bread, breakfast cereal, butter, eggs, flour, fresh fruit and vegetables, fresh milk, meat, rice, sugar and packaged food.

6. In the Committee's view, substantial consumer benefits would flow from ensuring that large online retailers who supply a broad range of grocery products are captured by the Code. This would enable consumers to better compare prices between traditional and online grocery retailers, driving increased competition. The Committee also notes that the costs of compliance for online grocery retailers is unlikely to be significant in comparison to store-based retailers as any changes would be limited to the costs of altering existing webpages.
7. Ensuring that large online grocery retailers are captured by the Code could be achieved in a number of ways. For example, retailers could be required to comply with the Code if they sell a certain number of products on the minimum range list. An additional requirement could also be introduced which would ensure that only larger online retailers are required to comply with the Code. For example, online retailers could be captured by the Code once they are delivering to a certain number of state or territories, once they reach a certain number of customer deliveries or once they reach a certain turnover threshold.
8. In relation to the application of the Code to smaller store-based retailers, the Committee submits that the current store-based retailer size requirements set out in the Code are appropriate and should be retained. The Committee considers that the substantial costs of requiring smaller store-based retailers to comply with Code requirements would outweigh the benefits to consumers. This is particularly the case given that unit pricing is of most benefit in larger stores where consumers are faced with a large volume of comparable and substitutable products.

B Display requirements

9. The Committee submits that prescriptive standards for the display of unit pricing are not required, as the existing principles-based approach has proven to be sufficient in meeting the objectives of the Code.
10. The Committee considers that introducing prescriptive standards for the display of unit pricing would be inefficient, costly and unnecessary. The current requirements for the display of unit prices ensure that grocery retailers display unit prices in a manner that is clear and accessible to consumers, while allowing the retailer to comply with the Code within the confines of existing operational systems.
11. Should prescriptive standards for the display of unit prices be introduced into the Code, the Committee is concerned that this will result in very significant implementation costs to store-based retailers that are disproportionate to any benefit to consumers. For example, we have been told that prescribing minimum size or other display requirements could result in store-based retailers incurring significant costs to update shelf edging in stores across their networks and upgrade software, printing and labelling equipment.

12. The Committee also notes that legislation requiring grocery retailers to advertise kilojoule information stipulates that the size of the kilojoule information must be displayed in the same size as the unit price.² As such, any amendment to the Code requiring the unit price to be displayed in a prescribed size will result in the retailer being required to outlay costs in relation to:
- a. ensuring compliance with the Code; and
 - b. consequential adjustments to the retailer's kilojoule labelling (and shelf label format more generally).
13. The Committee also considers that a principles-based approach is well suited to application in an e-commerce context, where a consumer's individual device may affect the way in which information is displayed. Providing the unit price is clear, prominent and legible on all devices, prescriptive standards regarding font size etc are not required.

C Alternate units of measurement

14. The Committee notes that the prescribed units of measurement in the Code have in some circumstances resulted in the same food item using different units of measurement, which detracts from the consumer's ability to accurately compare price. For example, the Code stipulates that fruit is to use a unit measurement of 'per item' or, if supplied by weight, 'per kilogram'. This can result in circumstances where, for example, loose lemons use a unit measurement of per item, whereas a pack of lemons is measured per kilogram. Other products affected by this inconsistency include fruit, nuts, flour, air freshener and tinned goods.
15. The Committee also notes that the broad product categories which require alternative units of measurement in the Code have led to the application of inappropriate unit measurements on certain products. By way of illustration, chillies fall within the 'fruit and vegetable' product category and therefore require the application of a unit price based on the price per kilogram. This inevitably leads to the unit price for packs of chillies being very high (i.e. \$600 per kilogram), which diminishes the ability for consumers to use the unit price to make an informed purchasing decision.
16. The Committee submits that the Code would better achieve its objectives if it provided retailers with greater flexibility to determine the appropriate unit of measurement to apply to particular products, subject to the requirements of trade measurement legislation.

D Exemptions to the Code

17. The Committee considers that there are a number of additional items sold by grocery retailers that should be exempt from the application of the Code on the basis that the

² See, for example, *Food Act 1984* (Vic), s 18G. Similar legislation exists in other States and Territories.

unit price is less relevant for customer decisions (and may in some cases create customer confusion). For example:

- a. Laundry detergents are sold in various concentrations. Under the Code, they are required to display a unit price based on the volume or weight of the product. However, using this unit of measurement means that it is possible for a high-concentrate product to appear more expensive (based on the unit price) than a lower-concentrate product of equal volume, despite the fact that the high-concentrate product may be cheaper on a 'price per wash' basis.
 - b. Seasonal merchandise (such as merchandise relating to Christmas or Australia Day) is required to have a unit price of 'per item', yet stores typically do not stock a large range of seasonal items for consumers to compare unit prices, nor do consumers typically make purchasing decisions based on volume.
18. The Committee recommends that the list of exemptions in the Code be expanded, in consultation with retailers, to ensure that the Code is primarily directed at products where the unit price is of assistance to customers in making purchasing decisions.

E Print advertising

19. The Committee notes that, as currently drafted, the Code requires unit prices to be displayed where a grocery retailer advertises a grocery item in print media, which arguably captures any grocery items advertised by way of billboard or poster. In contrast, where a grocery item is advertised on television or radio, there is no requirement for a retailer to use unit pricing.
20. The Committee considers that billboard advertising is akin to television or radio advertising. This is because billboard or poster advertisements:
- a. typically advertise a small number of different grocery products. As such, the advertisement does not lead consumers to make comparisons between a number of substitutable grocery products, which reduces the impact and effectiveness of unit pricing in the context; and
 - b. are intended to be viewed by consumers briefly and thus will only leave a transitory impression. As a result, consumers are less likely to pay close attention to the unit price.
21. On this basis, the Committee submits that the Code should be amended to clarify that retailers are not required to display unit pricing on billboard or poster advertising.

F Enforcement and compliance

22. The Committee notes that in 2010, the Australian Competition Consumer Commission (**ACCC**) conducted a survey in order to determine the level of compliance with the Code. That survey indicated a compliance level of 98% with the Code.
23. On this basis, the Committee does not consider that any changes to the Code in relation to enforcement are required (for example, amending the Code to provide the ACCC with additional or different powers to address non-compliance).

If you have any questions in relation to this submission, please do not hesitate to contact Rosannah Healy (Rosannah.Healy@allens.com.au or 03 9613 8421).

Yours sincerely,



Rebecca Maslen-Stannage
Chair, Business Law Section