

HOUSE BILL REPORT

ESSB 5191

As Passed House - Amended:

April 10, 2021

Title: An act relating to regulating unfair business practices and prohibiting predatory price increases during states of emergency.

Brief Description: Regulating unfair business practices and prohibiting predatory price increases during states of emergency.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Darneille, King, Billig, Carlyle, Conway, Das, Hasegawa, Hunt, Kuderer, Liias, Lovelett, Nguyen, Nobles, Randall, Salomon, Stanford and Wilson, C.; by request of Attorney General).

Brief History:

Committee Activity:

Consumer Protection & Business: 3/15/21, 3/24/21 [DPA].

Floor Activity:

Passed House: 4/10/21, 52-45.

Brief Summary of Engrossed Substitute Bill (As Amended By House)

- Prohibits the sale, rental, or offering for sale or rental of certain goods and services at an excessive price during a state of emergency.
- Terminates price restrictions at the end of the emergency or within 60 days, whichever comes first, unless renewed by the Legislature.
- Authorizes the Attorney General to investigate violations of the act, issue cease-and-desist letters, and enforce the act by filing an action in court to obtain injunctive relief and a civil penalty of up to \$25,000 per violation.
- Establishes violations are unfair or deceptive acts in trade or commerce and an unfair method of competition for the purpose of applying the Consumer Protection Act.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON CONSUMER PROTECTION & BUSINESS

Majority Report: Do pass as amended. Signed by 5 members: Representatives Kirby, Chair; Walen, Vice Chair; Corry, Ryu and Santos.

Minority Report: Do not pass. Signed by 2 members: Representatives Vick, Ranking Minority Member; Dufault, Assistant Ranking Minority Member.

Staff: John Burzynski (786-7133).

Background:

Washington regulates business practices and requirements pursuant to Title 19 RCW.

The Consumer Protection Act (CPA) prohibits unfair or deceptive practices in trade or commerce, and the formation of contracts, combinations, and conspiracies in restraint of trade or commerce, and monopolies.

Persons injured by violations of the CPA may bring a civil action to enjoin further violations and recover actual damages, costs, and attorney's fees. If the state is injured by a violation of the CPA, the state can bring a civil action to recover actual damages, costs, and attorney's fees.

The Attorney General may also bring an action in the name of the state, or as *parens patriae* on behalf of persons residing in the state, against any person to enjoin violations of the CPA and obtain restitution. The prevailing party may, in the discretion of the court, recover costs and attorney's fees. The Attorney General may also seek civil penalties up to the statutorily authorized maximums against any person who violates the CPA. Civil penalties are paid to the state.

Summary of Amended Bill:

Excessive Pricing During a State of Emergency.

During a state of emergency, no person in the affected counties may sell, rent, or offer to sell or rent a covered good or service at an excessive price. This restriction ends upon termination of the state of emergency or 60 days after the state of emergency is declared, whichever comes first. The restriction may only be extended, renewed, or reimposed with legislative approval.

"State of emergency" means an event for which a state of emergency has been declared by the Governor.

Covered goods and services include building materials; consumer food items; goods or services used for emergency cleanup; emergency supplies; gasoline; health care services;

medical supplies; repair or reconstruction services; transportation, freight, and storage services; personal protective equipment; and housing. Housing means a short-term stay commercial enterprise including, but not limited to, a hotel or motel. Housing does not mean property governed by the Residential Landlord Tenant Act or the Manufactured/Mobile Home Landlord-Tenant Act. The Governor may modify the list of covered goods and services based on the context of a particular emergency.

"Excessive price" means a price more than 15 percent greater than the price at which the person sold, rented, or offered to sell or rent the same product or service immediately prior to the state of emergency. If the person did not sell, rent, or offer to sell or rent the product or service immediately prior to the state of emergency, or the price charged prior to the state of emergency cannot be determined, a price is presumed to be excessive if it is more than 15 percent greater than the price of the same product or service offered by other similarly situated sellers prior to the state of emergency. If a state of emergency continues for more than one year, the price on the anniversary of the state of emergency becomes the new baseline price for determining whether a price is excessive.

Exceptions.

A person who increases a price does not violate the act if the price increase is attributable to an additional cost imposed by a supplier of a good or service or to other costs of providing the good or service, including an additional cost for labor or materials used to provide a product or service.

Persons with authority to adjust or regulate prices do not violate the act if they make commercially reasonable efforts to prevent or remove offers to sell or rent a covered good or service at an excessive price.

Enforcement by the Attorney General.

The Attorney General is authorized to investigate violations of the act and issue subpoenas and civil investigation demands to persons believed to be violating the act.

The Attorney General is authorized to issue cease-and-desist letters to restrain and prevent violations of the act. If the recipient does not comply within five days, the Attorney General may file an action in superior court to enforce the cease-and-desist letter. If the court finds the recipient violated the act and failed to comply with the cease-and-desist letter, the court shall enjoin further violations, impose a civil penalty of not more than \$10,000 per violation of the cease-and-desist letter, and award the Attorney General costs and reasonable attorney's fees.

Violations of the act are subject to a civil penalty of not more than \$25,000 per violation. However, no additional civil penalty may be assessed for the same violation under the CPA.

The Attorney General must produce and maintain on its website translated versions of this act in the top 10 languages spoken in Washington and may provide translations in additional

languages. The notice must be made available upon request in printed form.

Enforcement Through the Consumer Protection Act.

The Legislature finds the practices covered by this act are matters vitally affecting the public interest. Violations of the act are deemed unfair or deceptive acts in trade or commerce and an unfair method of competition for the purpose of applying the CPA.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) Protections against price increases during emergencies are important to seniors, people with disabilities, and people with low incomes. Price increases for people on fixed incomes can be harmful and affect necessities like fuel and shelter. Predatory price increases take advantage of people at their most vulnerable and desperate. Small businesses and municipalities are also affected by price gouging. Price gouging is not an effect of supply and demand operating in a normal market.

The COVID-19 pandemic caused shortages and price increases, illustrating the need for this law. The state received approximately 1,300 price gouging complaints over the last year. Current law does not allow the state to react quickly to price gouging and time is of the essence during an emergency. In Oregon, price gouging caused individuals to lose access to clean drinking water during an emergency.

Washington is one of a small number of states that does not have a law limiting price increases during an emergency, leaving our consumers vulnerable to predatory price increases. Thirty-six states have enacted such laws. A price increase limit of 10 percent to 15 percent is typical of states with anti-price-gouging laws.

The bill allows sellers to earn all normal and expected profits during an emergency, increase prices by up to 15 percent, and further increase prices to cover increased costs from suppliers and transporters. This legislation would bar unjustified price increases during emergencies. The bill assures businesses can continue to make a profit within limits while knowing competitors must operate under the same constraints. This law would address consumer and business confusion regarding what constitutes price gouging and clarify what costs can be passed on to consumers. Price limits would be triggered by an emergency declared by the Governor and would reset after one year if the emergency persisted past one year.

(Opposed) None.

(Other) The proposed bill is not necessary. The Attorney General is already able to bring actions under existing law.

The standard for an excessive price increase should not be set by a fixed percentage. Rather, it should be discretionary. A "grossly exceeds" standard would allow the Attorney General discretion to determine which prices are excessive and which are not. A bright line percentage is a standard for complaints, investigations, and cease-and-desist letters. If a percentage cap is necessary, a 25 percent limit would be better.

"Seller" should be defined as an entity that sets the price and transfers the title to the buyer. Internet marketplaces are working with law enforcement to stop price gouging. Marketplaces do not set prices. They have policies to try to identify breaks from pricing guidelines, but the focus should be on the entity that sets the price, not the platform.

The one-year reset period is too long for long-term emergencies like a pandemic. Application of this bill to rentals is problematic. Price increases during the COVID-19 pandemic were not always the fault of retailers, but rather a result of increased costs from wholesalers. The law should provide an intermediate stage between investigation and issuance of a cease-and-desist letter to permit the Attorney General to dialogue with business owners. Business owners do not want to be in court.

Persons Testifying: (In support) Senator Darneille, prime sponsor; and Yasmin Trudeau and Cynthia Alexander, Washington State Office of the Attorney General.

(Other) Rose Feliciano, Internet Association; Bruce Beckett, Washington Retail Association; Robert Battles, Association of Washington Businesses; Catherine Holm, Washington Food Industry Association; and Gary Smith, Independent Business Association.

Persons Signed In To Testify But Not Testifying: Teresa Green, City of Tacoma.