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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (FAIRER FOR FAMILIES AND FARMERS)
BILL 2024: INDUSTRY CODES (PENALTIES AND OTHER AMENDMENTS)

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law as set out in Schedule 2 to the <i>Competition and Consumer Act 2010</i>
CCA	<i>Competition and Consumer Act 2010</i>
Bill	Treasury Laws Amendment (Fairer for Families and Farmers) Bill 2024: industry codes (penalties and other amendments)
Franchising Code	<i>Competition and Consumer (Industry Codes—Franchising) Regulation 2014</i>
Franchising Code Review	Independent Review of the Franchising Code of Conduct
Food and Grocery Code	<i>Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015</i>
Food and Grocery Code Review	Independent Review of the Food and Grocery Code of Conduct
Guide	A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers

Chapter 1: Industry codes—penalties and other amendments

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Outline of chapter

1.1 Schedule 1 to the Bill amends Part IVB of the CCA to:

- increase the penalty to be specified in infringement notices issued in relation to an alleged contravention of a civil penalty provision:
 - of an industry code that relates to the industry of food and groceries (and that states that the relevant enabling provision applies)—to 600 penalty units for a body corporate and 120 penalty units otherwise, and
 - of any other industry code—to 60 penalty units for a body corporate and 12 penalty units otherwise;
- increase the maximum penalty for contravention of a civil penalty provision that may be prescribed in an industry code relating to the industry of food and groceries, and

- clarify the functions and powers that may be conferred on persons under industry codes.

1.2 All references in this Chapter are to the CCA unless otherwise stated.

Context of amendments

Background

1.3 Part IVB establishes the statutory framework for the operation of industry codes. Industry codes, prescribed in regulations, regulate the conduct of participants in an industry towards other participants or consumers in the industry and generally address imbalances in market power.

1.4 The Food and Grocery Code was made in 2015 to improve standards of business behaviour in the food and grocery sector. It is a voluntary industry code, so participants (retailers and wholesalers) must agree to be bound. The Food and Grocery Code has no civil penalty provisions and infringement notices cannot be issued.

1.5 The Food and Grocery Code is due to sunset on 1 April 2025 in accordance with the *Legislation Act 2003*. In January 2024, the Government announced the appointment of Dr Craig Emerson to lead the Food and Grocery Code Review. The Food and Grocery Code Review examined whether the Food and Grocery Code was effective, how it could address the imbalance in market power between supermarkets and their suppliers and how it could better serve Australian families and farmers.

1.6 A consultation paper was released on 5 February 2024, with 51 submissions received. The Interim Report of the Food and Grocery Code Review was published on 8 April 2024, and made several recommendations including making the Food and Grocery Code mandatory with higher penalties. Thirty-seven submissions were received for this consultation.

1.7 The Final Report of the Food and Grocery Code Review found that compliance with the Food and Grocery Code is vital for the sustainability of suppliers' businesses and therefore the welfare of Australian consumers, and that the Food and Grocery Code should be remade as a mandatory industry code regulating wholesalers and retailers that meet a \$5 billion annual turnover threshold. The Final Report of the Food and Grocery Code Review also relevantly recommended that:

- the maximum penalties for more harmful breaches of the Food and Grocery Code should be the greatest of \$10 million, 3 times the benefit gained from the contravening conduct or, where the benefit cannot be determined, and 10 percent of turnover in the preceding 12 months. Maximum penalties for other breaches should be 3,200 penalty units, and,
- the penalty amount for infringement notices for contraventions of the Food and Grocery Code should be 600 penalty units, an increase from 50 penalty units that otherwise applies for industry codes.

- 1.8 The Government agreed to both recommendations. Schedule 1 to the Bill is intended to ensure that the maximum civil penalties that may be prescribed in the remade Food and Grocery Code are proportional to the size and turnover of the retailers or wholesalers that are proposed to be regulated, and sufficient to provide a meaningful deterrent to poor behaviour, not just seen as a cost of doing business. The new maximum penalties for more harmful breaches also align with existing maximum penalties under the CCA for an industry code that relates to the industry of franchising (as increased in 2021 under the *Treasury Laws Amendment (2021 Measures No. 6) Act 2021*).
- 1.9 The proposed penalty for an infringement notice is necessary given the size and turnover of the retailers and wholesalers that are proposed to be regulated under the new Food and Grocery Code.
- 1.10 The Franchising Code is a mandatory industry code that aims to promote confidence in the Australian Franchising Sector and improve the relationship between franchisees and franchisors. Similarly to the Food and Grocery Code, the Franchising Code is due to sunset on 1 April 2025 in accordance with the *Legislation Act 2003*.
- 1.11 In August 2023, the Government announced the Franchising Code Review, which included consideration of whether the sunseting Franchising Code was fit for purpose. The Franchising Code Review involved broad consultation. A public consultation paper was released on 22 August 2023, which received 95 responses, and involved more than 40 stakeholder roundtables and meetings, and 2 online surveys.
- 1.12 The Franchising Code Review found that the Franchising Code should be remade subject to a number of recommendations to improve its operation. This relevantly included that the infringement notice regime in Part IVB should be increased. The Franchising Code Review further suggested that infringement notices should impose a penalty equivalent to the upper limit of infringement notices issued under the ACL (60 penalty units for a body corporate). In response to the Franchising Code Review, the Government agreed to consider the suitability of increasing the amount of penalty units to 60 penalty units for infringement notices issued under the CCA for a breach of the Franchising Code. Schedule 1 to the Bill implements this increase.

- 1.13 In 2014, the *Competition and Consumer Amendment (Industry Code Penalties) Act 2014* amended Part IVB to allow the ACCC issue an infringement notice for an alleged contravention of an industry code, in the amount of 50 penalty units if the person is a body corporate and 10 penalty units for a person that is not a body corporate.
- 1.14 This is lower than the prescribed penalty for an infringement notice issued to a body corporate (other than a listed corporation) in relation to most alleged contraventions of the ACL. In addition to implementing the recommendation of the Franchising Code Review, Schedule 1 to the Bill increases the penalty for an infringement notice issued under all industry codes (excluding an industry code that relates to the industry of food and groceries) to 60 penalty units for a body corporate and 12 penalty units for a person that is not a body corporate. This is intended to ensure consistency while strengthening the enforcement regime across industry codes to deter non-compliant behaviour.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
The penalty to be specified in an infringement notice issued to a person in relation to an alleged contravention of a civil penalty provision of an industry code (other than a code relating to the industry of food and groceries) is 60 penalty units for a body corporate, and 12 penalty units otherwise.	The corresponding penalties under the current law are 50 penalty units if the person is a body corporate, and 10 penalty units otherwise.
The penalty to be specified in an infringement notice issued to a person in relation to an alleged contravention of a civil penalty provision of an industry code that relates to the industry of food and groceries (and that states that subsection 51ACF(2) applies) is 600 penalty units if the person is a body corporate, and 120 penalty units otherwise.	The corresponding penalties under the current law are 50 penalty units if the person is a body corporate, and 10 penalty units otherwise.
An industry code relating to the industry of food and groceries may prescribe a pecuniary penalty for contravention of a	An industry code (other than a code that relates to the industry of franchising) may prescribe a pecuniary penalty not exceeding

<i>New law</i>	<i>Current law</i>
<p>civil penalty provision by a body corporate that is the greatest of:</p> <p>(i) \$10,000,000;</p> <p>(ii) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, has obtained directly or indirectly and that is reasonably attributable to the contravention—3 times the value of that benefit; and</p> <p>(iii) if the Court cannot determine the value of that benefit—10 percent of the adjusted turnover of the body corporate during the period of 12 months ending at the end of the month in which the contravention occurred.</p> <p>If the penalty above is not prescribed, the maximum penalty that may be prescribed is 3,200 penalty units.</p> <p>The maximum pecuniary penalty for other industry codes is unchanged.</p>	<p>600 penalty units for a contravention of a civil penalty provision of the code.</p>
<p>An industry code relating to the industry of food and groceries may prescribe a pecuniary penalty for contravention of a civil penalty provision by a person that is not a body corporate is \$500,000.</p> <p>If the penalty above is not prescribed, the maximum penalty that may be prescribed is 640 penalty units.</p> <p>The maximum pecuniary penalty for other industry codes is unchanged.</p>	<p>An industry code (other than a code that relates to the industry of franchising) may prescribe a pecuniary penalty not exceeding 600 penalty units for a contravention of a civil penalty provision of the code.</p>
<p>Updated drafting of the provision that allows industry codes to confer functions and powers on persons and bodies.</p>	<p>Industry codes can confer functions and powers on certain persons and bodies.</p>

Detailed explanation of new law

1.15 Schedule 1 to the Bill amends Part IVB to:

- increase the penalty to be specified in infringement notices issued in relation to an alleged contravention of a civil penalty provision:
 - of an industry code that relates to the industry of food and groceries (and that states that the relevant enabling provision applies)—to 600 penalty units for a body corporate and 120 penalty units otherwise; and
 - of any other industry code—to 60 penalty units for a body corporate and 12 penalty units otherwise;
- increase the maximum penalty for contravention of a civil penalty provision that may be prescribed in an industry code relating to the industry of food and groceries; and
- clarify the functions and powers that may be conferred on persons under industry codes.

1.16 The new penalty regime will deter non-compliant conduct and reduce the financial benefits and incentives for businesses to engage in conduct in breach of the law.

Penalty to be specified in an infringement notice

1.17 Division 2A of Part IVB allows the ACCC to issue an infringement notice to a person where the ACCC has reasonable grounds to believe that a person has contravened a civil penalty provision of an industry code.

1.18 An infringement notice is a notice served on a person by the ACCC, alleging a contravention of a civil penalty provision of an industry code. The notice gives the recipient the option of paying the penalty amount specified in the notice to avoid further action by the ACCC in relation to that particular alleged contravention. Infringement notices are designed to provide a timely, cost-effective enforcement alternative to commencing court proceedings in relation to a contravention of an industry code.

1.19 Prior to Schedule 1 to the Bill commencing, the penalty to be specified in an infringement notice issued to a person in relation to an alleged contravention of a civil penalty provision of an industry code was 50 penalty units if the person is a body corporate, and 10 penalty units otherwise.

- 1.20 The amendments split the penalties to be specified in infringement notices into two new categories—industry codes which relate to the industry of food and groceries, and all other industry codes.

Food and Grocery Code

- 1.21 For an industry code that both relates to the industry of food and groceries and states that subsection 51ACF(2) applies, the new penalty to be specified in an infringement notice issued to a person in relation to an alleged contravention of a civil penalty provision is 600 penalty units if the person is a body corporate, and 120 penalty units otherwise.
- 1.22 This implements the Government response to recommendation 10 of the Food and Grocery Code Review, which provided that the penalty amount for infringement notices for contraventions of the Food and Grocery Code should be 600 penalty units.
- 1.23 The Food and Grocery Code is a voluntary industry code which is due to sunset on 1 April 2025. It does not include civil penalty provisions or enable the ACCC to issue infringement notices.
- 1.24 The Food and Grocery Code is proposed to be remade as a mandatory industry code that includes civil penalty provisions, which will allow the ACCC to issue infringement notices in relation to an alleged contravention of such civil penalty provisions, pursuant to section 51ACD.
- 1.25 The new Food and Grocery Code is proposed to regulate wholesalers and retailers that meet a \$5 billion annual turnover threshold. While the new penalties for infringement notices are higher than those recommended in the Guide, the Guide provides that if the amount payable under an infringement notice is too low, it will be an inadequate deterrent and may simply be paid by the guilty and innocent alike as a cost of doing business. The high penalties for an infringement notice are necessary to act as a meaningful deterrent to poor behaviour given the size and turnover of retailers and wholesalers that are proposed to be regulated under the new Food and Grocery Code.
- 1.26 The new infringement notice penalty of 600 penalty units only applies to an industry code that both:
- relates to the industry of food and groceries, and
 - provides that subsection 51ACF(2) applies.
- 1.27 The new penalty is only intended to be prescribed in the new Food and Grocery Code; it is not intended to be prescribed in other industry codes that may relate to the industry of food and groceries industry tangentially, such as the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019*.

Other Industry Codes

- 1.28 For industry codes that do not relate to the industry of food and groceries, the new penalty to be specified in an infringement notice issued to a person in relation to an alleged contravention of a civil penalty provision is 60 penalty units if the person is a body corporate, and 12 penalty units otherwise.
- 1.29 This implements the Government’s response to recommendation 22 of the Franchising Code Review, which provided that the infringement notice regime in Part IVB should be increased. The Franchising Code Review further suggested that infringement notices should impose a penalty equivalent to the upper limit of infringement notices issued under the ACL (60 penalty units for a body corporate).
- 1.30 Beyond the changes outlined in the Government’s response to the recommendation of the Franchising Code Review, the amendments increase the penalty to be specified in an infringement notice issued to a person in relation to an alleged contravention of a civil penalty provision of an industry code generally (excluding an industry code that relates to the industry of food and groceries, as detailed above) to ensure consistency while strengthening the enforcement regime across industry codes to deter non-compliant behaviour.
- 1.31 The new penalties for infringement notices are within the maximum recommended amount payable for an infringement notice in the Guide and align with the penalty for an infringement notice issued in relation to an alleged contravention of certain provisions of the ACL, such as Division 2 of Part 3-2 of the ACL (other than section 85 of the ACL).

[Schedule 1, item 1, section 51ACF]

Maximum penalty for breach of civil penalty provision—industry of food and groceries

- 1.32 Item 4 to the table in subsection 76(1A) provides that the maximum pecuniary penalty payable for a civil penalty provision of an industry code is:
- if the person is a body corporate, the amount set out in the civil penalty provision of the industry code, and
 - if the person is not a body corporate, the amount set out in the civil penalty provision of the industry code.
- 1.33 Subsection 51AE(2) provides that if regulations prescribe an industry code (other than a code that relates to the industry of franchising), the industry code may prescribe a pecuniary penalty not exceeding 600 penalty units for a contravention of a civil penalty provision of the code.
- 1.34 The amendments exclude an industry code that relates to the industry of food and groceries from the maximum pecuniary penalty of 600 penalty units, in

addition to the existing exclusion for a code that relates to the industry of franchising.

[Schedule 1, item 2, subsection 51AE(2)]

- 1.35 Subsection 51AE(2A) sets out a two-tier civil penalty system for an industry code that relates to franchising, whereby the higher tier maximum penalty may be prescribed, or a penalty up to the maximum lower tier penalty.
- 1.36 The amendments provide for a similar two-tier civil penalty system for an industry code that relates to the industry of food and groceries in accordance with recommendation 9 of the Food and Grocery Code Review. The higher tier civil penalty that may be prescribed in an industry code that relates to the industry of food and groceries is the same as for an industry code that relates to the industry of franchising. That is, if regulations prescribe an industry code that relates to the industry of food and groceries, the code may prescribe a pecuniary penalty for a contravention of a civil penalty provision of the code by a body corporate that is the greater of the following:
- \$10,000,000;
 - if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is attributable to the act or omission—3 times the value of that benefit; and
 - if the Court cannot determine the value of that benefit—10 percent of the body corporate’s adjusted turnover during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.
- 1.37 If the higher tier penalty is not prescribed, an industry code that relates to the industry of food and groceries may prescribe a pecuniary penalty for contravention of a civil penalty provision of the code by a body corporate of up to 3,200 penalty units.
- 1.38 The higher tier penalty for breach of a civil penalty provision in an industry code that relates to the industry of food or groceries by a person that is not a body corporate is \$500,000.
- 1.39 If the higher tier penalty is not prescribed, an industry code that relates to the industry of food and groceries may prescribe a pecuniary penalty for contravention of a civil penalty provision of the code by a person that is not a body corporate of up to 640 penalty units.
- 1.40 The new Food and Grocery Code is proposed to regulate wholesalers and retailers that meet a \$5 billion annual turnover threshold. The existing penalties for contravention of an industry code under subsection 51AE(2) would not provide an effective deterrent because it is open to retailers and wholesalers to

weigh the potential benefit of breaching the law against the possible size of the financial penalty, and to knowingly take action in breach of the industry code.

- 1.41 The amendments allow for the imposition of large maximum penalties for breach of an industry code that relates to the industry of food and groceries to provide a strong deterrent against breach of the law. This is proportional to the size and turnover of the wholesalers and retailers that are proposed to be regulated under the new Food and Grocery Code and is intended to provide a meaningful deterrent to poor behaviour that is not just seen as a cost of doing business.
- 1.42 As per the Guide, serious pecuniary penalties are most appropriately placed in primary Acts of Parliament rather than subordinate legislation. The penalties in industry codes are prescribed in regulations, however, the maximum penalty that can be given as a penalty to a breach of an industry code that relates to the industry of food and groceries has been placed in primary law. As such, the amendments implement the recommendations in the Review of the Food and Grocery Code (to prescribe high maximum penalties for more harmful breach in relation to the new Food and Grocery Code to ensure a meaningful deterrent), while also meeting the principles set out in the Guide.
- 1.43 The higher tier maximum penalties are only intended to apply in the most egregious instances of non-compliance; therefore, they are only proposed to be prescribed for the most harmful breaches of the new Food and Grocery Code. Courts have the discretion to determine the appropriate penalty amount, up to the maximum set out under the law.

[Schedule 1, items 3-4, subsection 51AE(2A)]

Conferral of functions and powers on persons

- 1.44 Subsections 51AE(1A) and (1B) deal with the conferral of functions and powers on persons and bodies under regulations that prescribe industry codes.
- 1.45 The amendments update the drafting of subsection 51AE(1B) to clarify the kind of person or body on whom an industry code may confer functions and powers.

[Schedule 1, item 7, subsection 51AE(1B)]

Consequential amendments

- 1.46 Consequential amendments are made to ensure the infringement notice scheme under Part IVBA continues unchanged.

- 1.47 The reference to “paragraph 51ACF(a) to 50 penalty units” is substituted with “subparagraph 51ACF(1)(b)(i) to 60 penalty units” in subsection 52ZZG(2) to ensure Division 2A of Part IVB (dealing with infringement notices in relation to industry codes) applies in relation to an alleged contravention of a provision of Division 4 of Part IVBA in the same way in which it applies in relation to an alleged contravention of a civil penalty provision of an industry code, with a reference to 60 penalty units taken to be a reference to 600 penalty units.

[Schedule 1, item 5, subsection 52ZZG(2)]

Commencement and application provisions

- 1.48 Schedule 1 to the Bill commences on the later of 1 April 2025 and the day after the Bill receives Royal Assent. 1 April 2025 is the date the Food and Grocery Code and Franchising Code sunset. Both the Food and Grocery Code and Franchising Code are proposed to be remade.
- 1.49 Schedule 1 to the Bill applies from commencement. The amendments to section 51ACF and 51AE made by Part 1 of Schedule 1 to the Bill apply in relation to contraventions which happen, or are alleged to happen, on or after the day the Schedule commences.

[Schedule 1, item 6]