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Competition Policy Unit

Treasury

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RE: Industry codes (penalties and other amendments): exposure draft legislation

The Australian Chamber of Commerce and Industry (ACCI) appreciates the opportunity to provide comment on the exposure draft of the Treasury Laws Amendment (Fairer for Families and Farmers) Bill 2024: Industry Codes (Penalties and Other Amendments).

ACCI is Australia's largest and most representative business association. Our members are all state and territory chambers of commerce, which in turn have 430 local chambers as members, as well as over 70 national industry associations. Together, we represent Australian businesses of all shapes and sizes, across all sectors of the economy, and from every corner of our country.

ACCI supports industry-led codes of conduct as a form of voluntary self-regulation. These codes set obligations and behavioural standards, as well as offering transparency in industry operations. Industry-led codes have a lower compliance burden on business and foster a more competitive environment, which is essential to ensure businesses perform well. They ensure consumers get competitive prices, while supporting efficient business operations, which is good for the economy as a whole. By allowing industries to manage their conduct, businesses can operate more flexibly while maintaining accountability.

However, the government is now moving towards mandating these industry codes, with the Food and Grocery Code of Conduct the latest episode. The existing voluntary code, with behavioural standards, obligations and penalties, has been effective until now. Introducing tighter regulation and stricter penalties has the potential to decrease competition and inhibit innovation.

As part of the move to make the food and grocery code of conduct mandatory, the government is proposing a substantial increase in the penalty amount of an infringement notice. It is proposing to apply maximum penalty for breaches of 600 penalty units, which is a 12-fold increase from the current industry code. This is unfairly targeting the food and grocery sector.

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We acknowledge that it also proposed to increase the infringement notice penalties for all other sectors, but this is more credible, increasing 20 per cent from 50 penalty units to 60 penalty units. Though, still a substantial increase under the new law, it is more than a sufficient deterrent for uncompetitive behaviour.

Further, for 'more harmful breaches' under the Food and Grocery Code of Conduct, it is proposed to increase infringement penalties to the greater of:

- \$10 million
- 3 times the benefit gained from the contravening conduct
- 10 per cent of business turnover in the last 12 months

ACCI agree that where supermarkets are found in breach of the Food and Grocery Code of Conduct, they should face significant penalties that are a significant deterrent against poor behaviour and encourage them to treat customers and suppliers fairly. However, the penalties must be reasonable and proportionate and not single out the supermarket sector with exceptionally higher penalties than that imposed on any other sector.

While the ACCC has recently launched an investigation into the pricing practices of supermarkets, they deserve procedural fairness and be assumed innocent until proven guilty in a court of law.

In the current atmosphere there is a risk that policymakers overreact on the basis of as yet unproven allegations and implement hastily conceived but ill-considered changes. The proposals to apply penalties from 50 to 600 under the Food and Grocery Code of Conduct and set penalties at a minimum of 10 per cent of annual turnover (which equates to over \$500 million for a business with a turnover above \$5 billion), are extreme and overdone. A penalty of this magnitude would severely impair the commercial viability of a supermarket, which would not be in the interests of industry competition and could have perverse flow-on consequences along the entire supply chain.

Oligopolistic markets are common in countries with small, geographically dispersed populations like Australia. Australia's supermarket sector has four major supermarket chains, Coles, Woolworths, Aldi and Metcash, which are highly competitive and are currently signatories to a voluntary Food and Grocery Code of Conduct. While Australia's supermarket sector is more concentrated than that of other high-income economies, this high concentration does not mean low competition. Many local areas are serviced by stores from all our major brands. The attraction of customers to these retailers clearly shows that they are providing a service that customers want and at prices that are competitive.



More clarity and consultation are needed in relation to 'more harmful breaches'. The higher penalties should be limited to cases of serious and systemic breaches contrary to the intent of the Code, and not one-off breaches of the Code.

Furthermore, there is limited guidance on the penalty regime for wholesalers, which are not wholly or predominantly in the business for wholesale supply of groceries. For example, Metcash's Hardware and Liquor business divisions generate more than \$5 billion in revenue and sell some non-alcoholic beverages or gardening supplies. However, they are primarily engaged in the sale of products that are not food or groceries. Applying the same penalty regime as the food and grocery code to these retailers would only lead to confusion and increase the regulatory burden for them. It also creates an unfair playing field, as their competitors may face less stringent penalties under other industry codes. A careful balance is needed to determine which retailers should fall under the Food and Grocery Code's penalty regime.

Moreover, the penalties imposed in Australia should be at a comparable level with other countries. For instance, in New Zealand, the new grocery code of conduct applies to the two main supermarket chains, Countdown (Woolworths) and Foodstuffs. It imposes penalties of:

- three million NZD or
- the commercial gain or three per cent of turnover for each accounting period in which the breach occurred¹.

whichever, is greater.

In making the Food and Grocery Code of Conduct mandatory, the inclination to introduce a penalty regime that is far greater (an order of magnitude) than other industry codes, is concerning. We had cautioned in our previous submissions that instituting undue regulatory requirements on the food and grocery sector, by making the code of conduct mandatory, sets a significant precedent that could lead to regulatory contagion. We are now discussing imposing an extremely onerous penalty regime on the food and grocery sector. What is next? Will the government subsequently be considering imposing these extremely high penalties as part of other industry codes?

Ultimately, it must be recognised that retailers and supermarkets provide an essential service to all Australians. It is important that they treat their customers and suppliers fairly. Equally so, they must be free to make commercial decisions without the fear of excessive penalties, to ensure they operate efficiently, effectively and competitively, and provide the best service to their customers at the lowest prices.

¹ [The Grocery Supply Code- New Zealand](#)



We look forward to further consultation on the Industry Codes (Penalties and other Amendments) to ensure the final position that is reached is workable for the retailers, and their suppliers.

Yours sincerely

Peter Grist

Director Economics, Industry and Sustainability

