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Competition Policy Unit
Treasury
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Via email: IndustryCodeConsultation@treasury.gov.au

Subject: Submission to exposure draft of the Treasury Laws Amendment (Fairer for Families and Farmers) Bill 2024: Industry Codes (Penalties and Other Amendments)

Thank you for the opportunity to provide a response to the exposure draft of the Treasury Laws Amendment (Fairer for Families and Farmers) Bill 2024: Industry Codes (Penalties and Other Amendments) to make legislative changes to the *Competition and Consumer 2010 (CCA)*.

NSW Farmers understands the legislation is intended to:

- allow higher maximum penalties for breaches of the Food and Grocery Code of Conduct
- introduce higher infringement notice penalties for alleged breaches of the Food and Grocery Code of Conduct and Franchising Code of Conduct
- clarify the ability for industry codes prescribed under the CCA to confer functions and powers on persons and bodies.

In principle, NSW Farmers supports the intent of the amendments to provide a substantial disincentive against activities that contravene instances of non-compliance with industry codes, including the proposed mandatory Food and Grocery Code of Conduct (FGCC) as recommended by the Emerson Review.¹ Through previous consultation processes, the Association has called for a mandatory FGCC has the ability to apply significant civil pecuniary penalties when it is breached including necessary enforcement tools for the ACCC to protect suppliers against retailers that fail to comply with the code requirements.² This included a recommendation for significant civil pecuniary penalties and infringement notices for contraventions such as those within the Horticulture and Dairy Code. Significant penalties are important to provide greater confidence to suppliers in the objectives of the Code and to disincentive harmful behaviour by retailers.

¹ The Australian Government the Treasury, Independent Review of the Food and Grocery Code of Conduct Final Report - June 2024

² NSW Farmers submission to the Review of the Food and Grocery Code of Conduct – February 2024.

As such, NSW Farmers supports the intent of this Bill to enable higher maximum penalties for both infringement notices and pecuniary civil penalties for breaches of food and grocery-related industry codes.

To be both meaningful and effective, it is critical that the maximum penalties and infringement notices can be applied appropriately in practice where a retailer conduct towards a supplier harmfully breaches the FGCC. The exposure draft for the proposed mandatory FGCC³ outlines a number of ‘serious’ breaches of the Code that would attract a higher-tier penalty, including:

- Not dealing with suppliers in good faith
- Not having a grocery supply agreement in writing
- Not having incentive schemes consistent with the Code
- Engaging in retribution against a supplier
- Not having policies and procedures to protect against retribution
- Preventing suppliers from associating with other suppliers
- Not training staff with respect to the Code
- Not keeping records

However, NSWFA notes that, as stated in the explanatory materials “*Courts have the discretion to determine the appropriate penalty amount, up to the maximum set out under the law.*” In Australia, Courts are obliged to follow precedent when determining liability and penalties, according to Common Law. Previous case law indicates that Judges will impose penalties that redress the damages suffered by an injured party, plus some multiple of that amount for deterrence. For example, in *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* (2019, FCA 2166), Foster J imposed a penalty of \$125 million for 473 separate but identical breaches, applying a multiple of 2.5 to the estimated \$50 million in profits gained from the offending conduct.

With respect to the established case law, it is potentially unlikely that the Australian Competition and Consumer Commission (ACCC) would be able to seek penalties approaching the maximums set out by the amendment unless it could simultaneously prosecute several, if not hundreds of individual breaches. As such prosecutions may include many different farmers separated by geography, commodity and time, or many different acquisitions teams within the major supermarkets, the complexity and evidentiary requirements of potential cases seeking large penalties may be overwhelmingly prohibitive – rendering the higher-tier maximum penalties ineffective deterrents in practice. **Therefore, NSW Farmers recommends that additionally the amendment to the CCA authorise the ACCC to seek higher-tier penalties, for example, a multiple applied to related infringement notices, where there is an established history of breaches that may have only attracted lower-tier infringement notices individually, but collectively represent a systematic pattern of unlawful behaviour – such as not dealing in good faith.**

In addition, NSWFA notes that the explanatory materials state that the higher penalties are “*not intended to be prescribed in other industry codes that may relate to the industry of food and groceries industry tangentially*”. It is difficult to imagine a circumstance where the Horticulture or Dairy industry codes are not considered directly related to food production and

³ Exposure draft of the Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024

consumption. However, on principle, it would be a deeply perverse outcome if other industry codes that apply where a farmer has direct supply arrangement with supermarket were not subject to equivalent maximum penalties that have been deemed appropriate for these businesses⁴ or excluded from the broader protections offered by the larger proposed penalties as a disincentive. For example, dairy farmers generally supply raw milk to a processor that supplies to a supermarket, however, where the first purchaser of the milk is a supermarket, penalties for anti-competitive conduct should not be lesser as the supply relationship is covered under a different industry Code.⁵ The Dairy Code should continue to be the primary instrument for raw milk supply, but those who supply supermarkets directly should not be excluded from the protections offered by the larger proposed penalty units. Where applicable, ensuring that there is equivalence in penalties and protections for suppliers who sell to directly to supermarkets should be considered through this consultation and upcoming reviews of industry codes such as Horticulture and Dairy. **NSW Farmers recommends that the explanatory materials clarify that the higher infringement and pecuniary penalties may apply to any contravening conduct, where it is identified to apply under any relevant food industry code and is not limited only to the FGCC and Franchising Code of Conduct.**

Should The Treasury Competition Policy Unit require further information from NSW Farmers for this inquiry, please contact NSW Farmers Head of Policy and Advocacy, Kathy Rankin via email at [REDACTED] or by phone on [REDACTED].

⁴ As outlined in the exposure draft explanatory materials, 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.

⁵ The Dairy Code of Conduct aims to promote fair trading in the dairy industry by imposing minimum standards of conduct on farmers and processors. Under the code all raw milk must be bought from dairy farmers under a milk supply agreement that complies with the code. This code (not the Food and Grocery Code) applies to retailers, such as supermarkets, to the extent that they buy milk directly from farmers.