ARA SUBMISSION

EXPOSURE DRAFT: COMPETITION AND CONSUMER (INDUSTRY CODES - FOOD AND GROCERY) REGULATIONS

OCTOBER 2024

The Australian Retailers Association (ARA) welcomes the opportunity to make a submission on the exposure draft of the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024*.

The ARA is the oldest, largest and most diverse national retail body, representing a $420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects and unifies our independent, national and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

EXECUTIVE SUMMARY

The ARA welcomes the chance to provide comments on this Exposure Draft. The draft regulations make amendments to the Food and Grocery Code of Conduct (the Code) to implement the government response to Dr Craig Emerson's review of the Code. The amendments to the Code outlined in the Exposure Draft include making the code mandatory, strengthening dispute-resolution arrangements, addressing retribution fears, penalties for breaching the code, and improving outcomes for suppliers of fresh produce.

While we support efforts to enhance protections, the current draft goes beyond the scope of Dr. Emerson's recommendations, particularly in areas concerning individual penalties and retribution provisions. We are concerned these changes could introduce excessive penalties and disproportionately target certain businesses. There is a real prospect that the Draft Code will lead to higher grocery prices due to the regulatory burden and the effect that penalties will have on buyers negotiating with large multinational companies.[1]

Additionally, the potential for individual penalties to affect retail workers - including store team members - needs to be carefully examined. For example, supermarket employees, from store managers to junior team members, could face penalties far exceeding their annual wages for honest mistakes made in the course of their daily duties. A store manager who unintentionally misplaces a product, for instance, could potentially be liable for penalties up to $500,000, with young or junior employees who assisted them being similarly at risk. No other employees of the same type in Australia are subject to such extreme penalties for inadvertent mistakes. Introducing such punitive measures on employees will do little to lower grocery prices and may instead create unnecessary fear and uncertainty within the workforce.

Stronger penalties, while necessary for serious breaches, must remain proportionate to avoid stifling competition and innovation, and imposing undue compliance burdens on retailers. The introduction of prohibitions against retributive actions risks conflating legitimate commercial decisions with unfair practices. Clearer guidelines and a more balanced approach are required to protect market integrity without unduly disadvantaging businesses.

We also still hold concern over the unprecedented political scrutiny on our sector that continues to undermine confidence in some of Australia's most trusted retail brands - by calling into question the integrity of business decisions that serve a primary purpose of providing choice, convenience and value for money for consumers.

ECONOMIC CONTEXT

Despite economic headwinds, retailers have managed to keep more downward pressure on prices than other consumer-facing sectors, like insurance and energy. Decisions made by retailers to limit the impact of higher costs on their customers, have translated into prices in key retail segments growing slower than overall inflation. Data from the Australian Bureau of Statistics (ABS) confirms that Trimmed Mean Inflation (TMI) rate averaged 4.4% in the 12 months to July 2024. Over the same period, the ABS reported inflation on food and non-alcoholic beverages at 4.1%, clothing and footwear at 0.9% and household furnishings and equipment at 0.2%. In comparison, inflation on insurance was 8.1%, inflation on fuel was 7.7% and inflation on electricity was 5.9%.

Data Series	12-month average	Aug-23	Sep-23	Oct-23	Nov-23	Dec-23	Jan-24	Feb-24	Mar-24	Apr-24	May-24	Jun-24	Jul-24
Trimmed Mean Inflation	**4.4%**	**5.6%**	**5.4%**	**5.3%**	**4.6%**	**4.0%**	**3.8%**	**3.9%**	**4.0%**	**4.1%**	**4.4%**	**4.1%**	**3.8%**
Segment Inflation (Retail)													
- Food and non-alcoholic beverages	**4.1%**	4.4%	4.7%	5.3%	4.6%	4.0%	4.4%	3.6%	3.5%	3.8%	3.3%	3.3%	3.8%
- Clothing and footwear	**0.9%**	1.5%	-0.1%	-1.5%	-0.9%	-0.8%	0.4%	0.8%	0.3%	2.4%	2.8%	3.6%	1.9%
- Household furnishings and equipment	**0.2%**	4.0%	2.3%	0.4%	-0.3%	-0.3%	0.3%	-0.3%	0.1%	-0.8%	-1.1%	-1.1%	-0.9%
Segment Inflation (Non-retail)													
- Insurance and financial services	**8.1%**	8.8%	8.6%	8.6%	8.8%	8.2%	8.2%	8.4%	8.2%	8.2%	7.8%	6.4%	6.4%
- Automotive fuel	**7.7%**	13.9%	19.7%	8.6%	2.3%	5.3%	3.1%	4.1%	8.1%	7.4%	9.3%	6.6%	4.0%
- Electricity	**5.9%**	12.7%	18.0%	10.1%	10.7%	0.4%	0.8%	0.3%	5.2%	4.2%	6.5%	7.5%	-5.1%

Source: ABS Monthly Inflation | July 2024 [link]

Consumers expect retailers to continue to focus on what they can control to minimise the impact of higher costs. However, government also has an obligation to support these efforts by focusing on meaningful interventions that improve supply chain efficiencies, eliminate red tape and reduce government-imposed costs that are passed onto consumers, fueling the current cost-of-living crisis.

MANDATORY CODE

The new *Competition and Consumer (Industry Codes - Food and Grocery) Regulations 2024* mark a significant shift, introducing a mandatory code that replaces the existing voluntary Food and Grocery Code of Conduct.

This change, supported by ARA members Woolworths and Coles, presents a unique opportunity to strengthen the regulatory framework.

The voluntary code has been effective with few complaints. Given the major supermarkets - Coles, Woolworths, ALDI, and Metcash - are already signatories, the move to a mandatory code has the potential to provide more robust protections across the board. The mandatory nature eliminates the possibility of future non-participation and ensures all major supermarkets remain bound by its provisions, ensuring consistency across the sector.

However, the prospect of new signatories being subject to a mandatory Code is problematic and inequitable. Unlike current signatories, who had the opportunity to implement the Code over an extended period of time, new signatories to the Code will be subject to the threat of penalties for non-compliance under the mandatory Code without the same transition timeframe.

The ARA recommends that these organisations, who may trigger the $5 billion revenue threshold in the future, be provided more time than current signatories to prepare for implementation and demonstrate compliance. Alternatively, the revenue threshold should be the function of just those categories listed in the Code.

The introduction of penalties for non-compliance under the mandatory code does present a stronger deterrent for unethical behavior. Ensuring that these penalties are proportionate and do not overburden supermarkets with compliance costs is critical to maintaining market competitiveness. The concerns around increased regulatory burden, potential costs, and unintended consequences - such as stifling innovation and competition - must be carefully balanced to avoid negative impacts on both businesses and consumers.

DISPUTE RESOLUTION

The proposed amendment aims to strengthen the dispute-resolution framework to enhance the speed, cost-effectiveness, and fairness of resolving conflicts between suppliers and retailers.

However, it is unclear how the proposed changes - such as replacing the Code Arbiter with the Code Mediator, and the Independent Reviewer with the Code Supervisor - will support this objective. On face value, these changes look superficial in nature and require further clarification regarding their material impact.

In principle, this process must remain quick, informal, confidential, and low-cost, while providing binding outcomes through independent mediation and arbitration. It should also be equipped to deliver compensation and investigate systemic issues, which has been a strength of the current system.

Additionally, it is crucial to reinforce the primacy of alternative dispute resolution mechanisms. In cases where a grocery business has agreed to pay compensation to the supplier, and this compensation has been accepted, the penalties under the Code for breach of any provision other than the Higher Penalty provisions should not apply. This would ensure that parties are encouraged to resolve disputes in a manner that is both efficient and mutually acceptable, without the added burden of punitive penalties that may not be necessary once resolution is reached.

If these outcomes can be achieved without introducing new naming conventions for key roles under the Code, the ARA would question why such changes are being pursued.

While the government is proposing significant increases in penalties for breaches of the code, we are concerned that the magnitude of these fines may disproportionately affect the food and grocery sector. While we support strong penalties as a deterrent, it is critical that they remain reasonable and proportionate. It is crucial that these penalties do not single out the supermarket sector with disproportionately high fines compared to those imposed on other industries, as this could lead to an increased compliance burden that undermines competition and innovation within the sector.

RETRIBUTION CONCERNS

We hold significant concerns that the Draft Code introduces a new prohibition against retributive actions, such as reducing the volume of stock ordered from a supplier. While the Code aims to prevent retaliation, it overlooks legitimate commercial reasons - such as pricing, quality issues, or shifts in consumer demand - that may lead to reduced orders. The draft conflates retribution with routine business decisions, which are standard practices across the retail sector.

The exposure draft outlines a list of actions viewed as retaliatory, but these are in fact standard business practices, such as adjusting product placement, renegotiating promotional contributions, or terminating contracts. While these actions may create tension, they are driven by valid commercial considerations rather than malicious intent. Under the Draft Code, these practices are automatically presumed to be retaliatory unless proven otherwise. This will create a challenging environment for companies even when they are commercially justified, due to potential perceptions of retribution. We believe this will create a challenging situation for companies even when they are commercially justified, due to potential perceptions of retribution and the onerous requirement to thoroughly document every perceived adverse decision against a supplier.

We are concerned that the Draft Code's prohibition on retributive actions fails to consider intent. By omitting intent in its definition, the Draft Code risks conflating legitimate commercial decisions with retribution, leading to unfair penalties for standard business practices that are not retaliatory.

We reject the notion that our members engage in retaliatory practices when making legitimate commercial decisions. A more balanced approach is needed - one that enables supermarkets to act on genuine commercial reasoning without fear of penalty, while still protecting suppliers from actual retribution. This would help maintain a competitive market without disproportionately favoring suppliers under the mandatory code.

PENALTIES

As outlined in our submission on the exposure draft of the *Treasury Laws Amendment (Fairer for Families and Farmers) Bill 2024: Industry Codes (Penalties and Other Amendments)*, we support reforms that aim to strengthen industry codes and better enable them to protect market participants. However, we hold significant concerns regarding the imposition of excessive penalties, not in line with other codes.

While we support higher penalties for the most serious breaches, we believe the proposed penalties for minor infractions are excessive and could lead to unintended consequences. Excessive penalties risk over-deterrence, potentially reducing the incentive to negotiate better prices and quality with suppliers, which would ultimately harm consumers.

The proposal to impose penalties exceeding $1 million for breaches of the Draft Code, particularly for 'less harmful breaches', is disproportionately high. For the above reasons – corporate penalties for 'non-harmful' breaches of the Code on body corporates should be consistent with other industry codes, i.e., 600 penalty units.

ADDITIONAL RECOMMENDATIONS

Timing of Implementation

We are also concerned about the timeline for implementing the new mandatory code. With the voluntary code set to sunset on 1 April 2025, we believe it would be premature for the Government to rush the transition to meet that deadline. We recommend extending the current code by 12 months to allow adequate time for the Government and all stakeholders to thoroughly assess and refine the draft mandatory code. This would help ensure it is well-designed and does not inadvertently stifle innovation or competition within the industry.

Effective Date

For new signatories of the Code, we believe that their compliance obligations under the Code should align with the external release of information about revenues, to avoid any out-of-cycle disclosure for companies with public reporting obligations. The Code is silent on whether this trigger point is at the time when a company becomes aware they may have obligations under the Code, or when the release of publicly available information confirms they have triggered the threshold. In our view, the trigger date for compliance obligations under the Code must be linked to external reporting of sales through established channels such as annual reports, financial statements or tax lodgements.

Revenue Threshold

We recommend that the $5 billion threshold, which triggers obligations under the Code, should be determined only by sales of those products listed in the Code - not total annual sales. Put another way, those categories not listed in the Code (for example, fuel) should be excluded from calculation of the revenue threshold.

In handing down his report, we also note that Dr Emerson recommended "that the Code continue to apply to supermarkets as conventionally understood as places for regular grocery shopping." While we acknowledge a range of views among industry participants about expanding the Code to include other types of retailers, the ARA supports Dr Emerson's recommendation that the Code should not be expanded to include retailers not currently covered.

The Code is silent on the exclusion of revenues from categories not listed in the Code, which could create an unintended compliance burden for retailers that only trigger the $5 billion revenue threshold because of sales in product categories not covered by the Code.

Transition Arrangements

We recommend that the transition period for new signatories should be extended from six months to 12 months, to allow sufficient time to prepare for and allocate resources to managing obligations under the Code.

CONCLUSION

The ARA is supportive of the Government's efforts to strengthen the Food and Grocery Code of Conduct, emphasizing the importance of a thoughtful and balanced implementation of the new mandatory code. Key considerations include extending timelines, clarifying provisions, and ensuring that compliance requirements remain proportionate. Such measures will help prevent unintended consequences that could stifle competition and innovation. A well-calibrated approach will not only safeguard the interests of suppliers and retailers but also contribute to a more sustainable, competitive, and efficient industry overall.

A more thorough consultation process is necessary to ensure the code fosters fairness and transparency while maintaining competitiveness and innovation in the sector. Extending timelines and clarifying provisions will better align the mandatory code with industry needs and consumer interests.

Thank you again for the opportunity to provide comments on the exposure draft of the *Competition and Consumer (Industry Codes - Food and Grocery) Regulations 2024*. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.