

ARA SUBMISSION

INDUSTRY CODES (PENALTIES AND OTHER AMENDMENTS): EXPOSURE DRAFT LEGISLATION

October 2024

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments on the exposure draft of the Treasury Laws Amendment (Fairer for Families and Farmers) Bill 2024: Industry Codes (Penalties and Other Amendments).

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.

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.

In principle, the ARA supports a number of the Government's amendments to the Competition and Consumer Act 2010 (CCA) following the reviews of the Food and Grocery Code of Conduct and Franchising Code of Conduct. We are supportive of reforms that will strengthen the industry codes prescribed under the CCA and better enable them to protect market participants.

However, we have significant concerns regarding the imposition of excessive corporate penalties, not in line with other codes, as well as the proposed penalties on individuals, which could adversely impact their ability to negotiate robustly with large multinationals, ultimately leading to higher shelf prices for consumers.

Penalties on Individuals

The introduction of substantial penalties on individuals presents a risk that could stifle robust negotiations. The fear of facing significant personal penalties may discourage buyers from pursuing assertive negotiations that could expose them to such risks. This is likely to result in higher acquisition costs, which would eventually be passed on to consumers through increased prices or reduced product quality.

The proposed penalties for individuals outlined in the draft are notably high and significantly exceed those under other industry codes. For instance, the Penalties Bill sets individual penalties for infringement notices under the Draft Code at 120 penalty units, which is substantially higher than any other industry code, and in most cases, twelve times greater than the 10 penalty units seen elsewhere. While Dr Emerson has recommended that penalties for corporations be proportional to their size and turnover, applying this standard to individual employees is, in our view, inappropriate. It is also worth noting that Dr Emerson's review did not propose individual penalties, a stance consistent with international examples like the UK Grocery Code, which does not penalize individuals for code breaches.

There is also concern regarding how broadly these individual penalties would apply, with it being proposed to apply to 77 Code provisions. As currently drafted, individuals would attract significant penalties for minor issues like administrative matters such as not updating contact details on a form for example. This is a significant overreach and not part of Dr Emerson's recommendation.

We also hold concerns that the Draft Code introduces a new prohibition against retributive actions, which includes conduct such as reducing the volume of stock ordered from a supplier. This is automatically presumed to be retaliatory unless the party involved can prove it was for legitimate commercial reasons. We believe this will create a challenging situation for individual members of a buying team, who may hesitate to make such decisions, even when they believe they are commercially justified, due to the potential penalties. Companies have legitimate reasons that they may have for reducing orders, such as pricing, quality, consumer demand, or a strategic shift towards other suppliers, but an individual buyer may still be reluctant to act, fearing that their rationale may not be accepted as valid.

Additionally, the imposition of individual penalties could have unintended consequences, such as stifling innovation. The threat of penalties may discourage buyers from engaging with emerging suppliers, leading to more conservative and formulaic procurement strategies that would undermine the sector's global competitiveness.

Corporate Penalties

The ARA acknowledges that corporate penalties can be a strong deterrent, especially given the low margins in the sector. Penalties aligned with the Franchising Code (600 penalty units or \$187,800) already represent a significant financial burden. The proposal to impose penalties exceeding \$1 million for breaches of the Draft Code, particularly for 'less harmful breaches', is disproportionately high compared to breaches under the Franchising Code.

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.

We recommend that education and awareness efforts for buyers and suppliers should be prioritised to build trust and understanding of the Code, rather than relying on high pecuniary penalties. A more proportionate penalty framework for inadvertent breaches would allow businesses to allocate resources toward improving their practices, rather than diverting them to cover financial penalties.

We consider that disproportionately high penalties for breaches that are not serious and systemic may create a significant risk of over-deterrence, reducing incentives to negotiate better prices and quality with suppliers, and reducing the value that industry is able to deliver to consumers.

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.

Conclusion

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. However, they must also be free to make commercial decisions without the fear of excessive penalties. An overly punitive framework risks stifling innovation and efficiency, which could reduce competitiveness and ultimately harm consumers through higher prices or reduced service quality. Striking a balance between regulatory oversight and operational freedom is crucial to ensuring retailers can continue to operate efficiently and deliver the best possible service to their customers at the lowest possible prices.

Thank you again for the opportunity to provide a submission on these matters. We look forward to a continued open consultation now and into the future. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.