

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Competition, Charities and Treasury

Competition and Consumer Act 2010

Competition and Consumer (Industry Codes—Food and Grocery) (Consequential Amendments) Regulations 2024

The *Competition and Consumer Act 2010* (the Act) enhances the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Section 172 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part IVB of the Act provides for industry codes, which regulate conduct among participants in an industry. Specifically, section 51AE of the Act provides that the regulations may prescribe an industry code under the Act and declare the industry code to be a mandatory or voluntary industry code.

The *Competition and Consumer (Industry Codes—Food and Grocery) (Consequential Amendments) Regulations 2024* (the Regulations) rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that where an Act confers a power to make an instrument of a legislative character (including rules, regulations or by-laws) the power shall be construed as including a power to repeal, amend, or vary any such instrument.

The main purpose of the Regulations is to provide contingent amendments that increase the amount of civil penalties in relevant provisions in the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024* (the Food and Grocery Code) to reflect the strengthened penalty framework provided by Schedule 4 to the Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Bill 2024 (the Amending Bill), once that Schedule commences.

The Food and Grocery Code replaces the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (the voluntary Food and Grocery Code) and implements the Government's response to various statutory reviews of the voluntary Food and Grocery Code, most notably the Independent Review of the Food and Grocery Code (the Review) in 2024. The Food and Grocery Code is a mandatory industry code to address an imbalance in bargaining power between large grocery retailers or wholesalers and their suppliers, to support a competitive and sustainable food and grocery sector.

The Regulations also contain consequential amendments to support the transition from the voluntary code into the mandatory Food and Grocery Code.

Public consultation was undertaken on an exposure draft of the Food and Grocery Code (which included the contingent and consequential amendments in the Regulations) between 23 September and 18 October 2024. This process built on the extensive consultation undertaken by the Review. Submissions were received from the public and industry stakeholders. Submissions broadly supported remaking the voluntary Food and Grocery Code as a mandatory code, but some were concerned about the potential for unintended consequences. In response to stakeholders' feedback, the Food and Grocery Code was

adjusted to refine drafting of penalty provisions to ensure core obligations, such as those relating to retribution and ADR processes, work effectively in practice.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced on 1 April 2025.

The Regulations are subject to disallowance, and will sunset on 1 April 2035.

Details of the Regulations are set out in Attachment A.

A Statement of Compatibility with Human Rights is set out in Attachment B.

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA24-07551) and agreed that the Review, supplemented by further analysis to quantify the net impact, has been certified as a process equivalent to an Impact Analysis. The certification and analysis is available here: <https://oia.pmc.gov.au/published-impact-analyses-and-reports/independent-review-food-and-grocery-code-conduct>.

The measure is estimated to have a low impact on compliance costs.

Details of the *Competition and Consumer (Industry Codes—Food and Grocery) (Consequential Amendments) Regulations 2024*

Section 1 – Name

This section provides that the name of the regulations is the *Competition and Consumer (Industry Codes—Food and Grocery) (Consequential Amendments) Regulations 2024* (the Regulations).

Section 2 – Commencement

Sections 1 to 3 of, and Schedule 1 to, the Regulations commence at the same time as the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024* (the Food and Grocery Code) commence: 1 April 2025.

Schedule 2 to the Regulations commences the later of immediately after sections 1 to 3, or at the same time as Schedule 4 to the Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Bill 2024 (the Amending Bill). This sequence is necessary as Schedule 2 contains amendments to the Food and Grocery Code which are contingent upon passage of the Amending Bill. As such, Schedule 2 does not commence at all if the Amending Act does not commence.

Section 3 – Authority

The Regulations are made under the *Competition and Consumer Act 2010* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument is amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1—Repeal of the old Food and Grocery Code of Conduct

Item 1 in Part 1 of Schedule 1 to the Regulations repeals the voluntary Food and Grocery Code.

Part 2 of Schedule 1 to the Regulations makes consequential amendments to the *Competition and Consumer (Industry Codes—Dairy) Regulations 2019* (the Dairy Code) to remove references to the voluntary Food and Grocery Code.

Item 2 repeals the definition of the voluntary Food and Grocery Code in section 5 of the Dairy Code.

Item 3 repeals section 10 of the Dairy Code, which provides that the voluntary Food and Grocery Code does not apply to the extent that it conflicts with Division 2 of Part 2 of the Dairy Code. This provision of the Dairy Code has been replaced by paragraph 14(a) of the Food and Grocery Code, which achieves the same effect.

Schedule 2—Amendments relating to the Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Act 2024

Schedule 2 to the Regulations sets out amendments to civil penalties under the Food and Grocery Code which are subject to the enactment of primary legislation.

Section 51AE of the Act, which contains the regulation-making power to prescribe an industry code, also includes restrictions around the amount of the pecuniary penalty for a contravention of a civil penalty provision imposed by a code. For all industry codes other than the *Competition and Consumer (Industry Code—Franchising) Regulations 2024* (the Franchising Code), this maximum amount is 600 penalty units.

The Act provides two tiers of civil penalties for the Franchising Code, according to the importance of the obligation and gravity of the consequences of contravention. Under this two-tier regime, higher penalties based on the Australian Consumer Law may apply for a contravention of a core obligation, and contraventions of other obligations are capped at 600 penalty units.

If enacted, the Amending Bill will apply a similar two-tier approach to the Food and Grocery Code, and increase the maximum amount of penalties under the second tier. If the Amending Bill is enacted, the amendments in Schedule 2 to the Regulations will commence. This will result in the following core obligations of the Food and Grocery Code being subject to the higher tier penalty:

- subsection 16(1) – a large grocery business must deal with suppliers in good faith;
- section 17 – a grocery supply agreement must not exclude the obligation to act in good faith;
- section 18 – a grocery supply agreement must be in writing;
- subsection 19(1) – a grocery supply agreement must cover specific matters;
- subsection 29(1) – incentive schemes must be consistent with the Code;
- section 30 – a large grocery business must not engage in retribution against a supplier;
- section 31 – a large grocery business must have policies and procedures to protect against retribution;
- subsections 42(1) and (2) – a large grocery business must not prevent a supplier from associating with other suppliers or discriminate against a supplier from doing so;
- subsections 77(1), (2) and (3) – a large grocery business must train staff with respect to the Code; and
- subsections 78(1) and (2) – a large grocery business must keep records.

The penalty which a court may impose for contravention of one of these provisions by a body corporate is the greatest of \$10 million, three times the value of the benefit that the large grocery business obtained which is reasonably attributable to the contravention, or (if that value cannot be determined) 10 per cent of the annual turnover of the large grocery business during the year ending at the end of the month of the contravention.

The higher tier penalty for breach of one of these provisions by a person that is not a body corporate is \$500,000.

Items 2 to 5, 20 to 22, 51, 52, 83 to 87 increase the maximum penalty for a contravention of the core obligations to the higher tier penalty. The higher amount of these penalties reflects the large size of the grocery businesses which are subject to obligations under the Food and Grocery Code, and is necessary to deter contraventions of core provisions of the Food and Grocery Code which may cause significant harm to suppliers and damage confidence in the industry.

Items 6 to 19, 23 to 50, and 53 to 82 increase the maximum amount of penalty units under other civil penalty provisions of the Food and Grocery Code, which are not subject to the higher tier penalty. These items also provide separate penalties for bodies corporate and individuals consistent with the ratio set by the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Instead of 600 penalty units, the penalty for a contravention by a body corporate is 3,200 penalty units and the penalty for a person other than a body corporate is 640 penalty units.

The majority of penalty provisions are obligations on a large grocery business. A small number of penalty provisions apply to other persons such as a Code Mediator or a supplier. These latter penalty provisions are necessary to support efficient dispute resolution and oversight of such processes conducted under the Food and Grocery Code. Other than those provisions, penalty provisions of the Code do not apply directly to individuals. In limited circumstances an individual could be subject to a civil penalty due to the operation of subsection 76(1) of the Act, which allows a Court to impose a penalty on a person if satisfied the person committed an ancillary contravention, such as being knowingly concerned in a contravention of a civil penalty provision. These longstanding provisions for ancillary contraventions in the Act serve a legitimate purpose of deterrence and ensure a comprehensive regulatory regime for competition and consumer matters.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Competition and Consumer (Industry Codes—Food and Grocery) (Consequential Amendments) Regulations 2024

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Competition and Consumer (Industry Codes—Food and Grocery) (Consequential Amendments) Regulations 2024* (the Regulations) implement contingent amendments that increase the amount of civil penalties in relevant provisions of the *Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024* (the Food and Grocery Code) to reflect the strengthened penalty framework provided by Schedule 4 to the Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Bill 2024 (the Amending Bill), once that Schedule commences.

The Food and Grocery Code replaces the *Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015* (the voluntary Food and Grocery Code) and implements the Government’s response to various statutory reviews of the voluntary Food and Grocery Code, most notably the Independent Review of the voluntary Food and Grocery Code (the Review) in 2024. The Food and Grocery Code is a mandatory industry code to address an imbalance in bargaining power between large grocery retailers or wholesalers and their suppliers, to support a competitive and sustainable food and grocery sector.

The Food and Grocery Code applies to supermarkets with annual Australian revenue exceeding \$5 billion and has strong civil penalty and dispute resolution provisions to improve accountability and address suppliers’ fear of retribution for exercising their rights under the Code. The Regulations increase the amount of civil penalties in response to recommendations of the Review, to reflect the size of the entities being regulated and encourage compliance with the Food and Grocery Code.

The Regulations also contain consequential amendments to support the transition from the voluntary code into the mandatory Food and Grocery Code.

Human rights implications

The Regulations may engage with the right to proper processes for a fair trial under Articles 14 and 15 of the International Covenant on Civil Political Rights (the ICCPR).

Civil penalty provisions and criminal processes

Articles 14 and 15 of the ICCPR provide the right to a fair trial, as well as the presumption of innocence. Article 14(2) of the ICCPR recognises that all people have the right to be presumed innocent until proven guilty according to the law. Articles 14 and 15 apply only in relation to the rights of natural persons, not legal persons, such as companies.

Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR. Although there is a domestic law distinction between criminal and civil penalties, ‘criminal’ is separately defined in international human rights law. Therefore, when a provision imposes a civil penalty, it is necessary to determine whether or not the penalty amounts to a ‘criminal’ penalty for the purposes of Articles 14 and 15 of the ICCPR.

The Regulations amend the Food and Grocery Code to apply two tiers of civil penalties, according to the importance of the obligation and gravity of the consequences of contravention. This is a proportionate approach similar to the mandatory industry code for the franchising industry, as recommended by the Review. The amendments in the Regulations to Part 2 of the Food and Grocery Code establish the two-tier regime, providing separate penalties for bodies corporate and individuals using a ratio that is consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Most of the civil penalty provisions in the Regulations apply to the conduct of large grocery businesses in the food and grocery industry. These civil penalty provisions have limited engagement with Articles 14 and 15 of the ICCPR, as the Regulations do not apply the penalties to natural persons.

A small number of penalty provisions may apply to a person other than a large grocery business. An individual who is a Code Mediator may be subject to a civil penalty under subsection 64(3) of the Food and Grocery Code, for failing to provide information about a complaint that is reasonably requested by the Code Supervisor. The civil penalty provisions relating to participation in dispute resolution processes in subsections 67(2) and (4) of the Food and Grocery Code may also apply to suppliers, including any that are sole traders. Items 75, 77 and 78 of the Regulations amend those subsections of the Code to increase the maximum amount of the penalty. These penalty provisions are necessary to support efficient dispute resolution and oversight of such processes conducted under the Food and Grocery Code. Other than those provisions, penalty provisions of the Food and Grocery Code do not apply directly to individuals. In limited circumstances an individual could be subject to a civil penalty due to the operation of subsection 76(1) of the Act, which allows a Court to impose a penalty on a person if satisfied the person committed an ancillary contravention, such as being knowingly concerned in a contravention of a civil penalty provision. The Regulations do not disturb these longstanding provisions for ancillary contraventions in the Act, which serve a legitimate purpose of deterrence and ensure a comprehensive regulatory regime for competition and consumer matters.

The civil penalty provisions contained in the Regulations are not ‘criminal’ for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary, and they aim to encourage compliance with the Food and Grocery Code. Further, the provisions do not apply to the general public, but to large grocery businesses and suppliers in the food and grocery industry, who should reasonably be aware of their obligations under the Food and Grocery Code. Therefore, imposing these civil penalties will enable an effective disciplinary response to non-compliance.

While the civil penalties are large, they are an appropriate in size in the corporate context of the Regulations. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that larger penalties are more appropriate for bigger companies, as they provide an adequate disciplinary response.

Furthermore, the judiciary continues to have discretion to consider the seriousness of the contravention and impose a penalty that is appropriate in the circumstances. The civil courts are experienced in making civil penalty orders at appropriate levels having regard to the maximum penalty amount, taking into account a range of factors including the nature of the contravening conduct and the size of the organisation involved.

Therefore, a relevant consideration in setting a civil penalty amount is the maximum penalty that should apply in the most egregious instances of non-compliance with the Regulations.

The maximum civil penalty amounts that can be imposed under the Food and Grocery Code, as amended by the Regulations, are intentionally significant and they are in line with the penalties under similar provisions of the mandatory industry code for the franchising industry. Additionally, the maximum civil penalty amounts that can be imposed under subsections 67(2) and (4) of the Food and Grocery Code, which may apply to individuals, are lower than the civil penalty amounts for core obligations of the Code, which apply to large grocery businesses, consistent with the Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Based on the considerations above, the civil penalties in the Regulations are not ‘criminal’ for the purposes of the international human rights law and therefore do not limit criminal process rights under the ICCPR.

Conclusion

The Regulations are compatible with human rights as they do not raise any human rights issues.