

# MEMBER BRIEF

## WOOLWORTHS FGCC – FURTHER INFORMATION PROVIDED.

Woolworths has recently issued further information seeking to clarify several clauses within its Variation Deed. The Variation Deed is the Woolworths mechanism to bring supply arrangements into compliance with the Food and Grocery Code of Conduct (FGCC).

There are three issues on which Woolworths has provided further clarity and to which Members should give particular attention:

- Clause 2.3 Deductions for Wastage
  - Part (a) states that *'We will not deduct or withhold or seek to deduct or withhold from any payments due to you by us, or Require you to pay to us, any amount in respect to Wastage incurred at our premises except as agreed with you in writing in Additional Terms.'*

**This is an example of how you should go about such matters, settle now in writing, in Additional Terms. This provides transparency (you know what the deal is) and certainty (you know the retailer will stick to the deal).**

- Part (b) states that *'The parties may, from time to time, negotiate and agree an amount in respect of Wastage which is not incurred at our premises that you will pay to us, or that we may set-off from any payments due to you by us. This may include Wastage which arises prior to Delivery but which is not apparent to us until after Delivery.'*

**This clause seeks an 'agreement to agree' – it may result in a lack of transparency and certainty because you could be asked for more money in the future at any time – so you don't know what the deal is.**

Under contract law, a generally expressed 'agreement to agree' is unenforceable. As the FGCC is intended to provide transparency and clarity in commercial relationships between supplier and retailer, it may be counterproductive for provisions that suggest an issue will be the subject of agreement in the future. The Code does offer some protection in that any such future payments are subject to tests of reasonableness and fair dealing, but it is better to get a deal done now that tells you where you stand.

- Clause 6 Payments by You

- The clauses in this section include Payments to list a New Grocery Product; Payments for better positioning of goods; Payments for our activities; and Funding promotions.

**Similar to the above comment it is best to settle agreements now and in writing, in Additional Terms. This should set out the circumstances in which any such payment might be made giving you greater certainty and transparency. In the first instance Woolworths could be asked to set out what payments might be required in your circumstances for your consideration and negotiations.**

- Clause 24 Good Faith

- Part (a) states '*you must at all times deal with us lawfully and in good faith within the meaning of the unwritten law as in force from time to time.*'

**This clause requires you to act in manner that is genuine, fair and without any hidden agenda.**

As Woolworths correctly notes, it provides a counterpart to a similar obligation on retailers in the Code. However, you should note that only the ACCC can enforce the retailer good faith obligation, whereas this clause provides a contractual right against you that a retailer can enforce directly. You might therefore want to think about this clause and whether it should be expressed as a joint obligation on both parties.

### **Next steps**

Member companies should review carefully any GSA agreements provided to them for consideration, and should seek legal advice if questions remain. If you consider that the GSA provided to you does not comply with the Code's requirements or meet your commercial needs, you should contact the retailer with suggested amendments.

AFGC operates an advice line to provide assistance to members on whether a specific practice may be covered by the Code and, if so, what options exist to seek a remedy. To access, please contact [Chris Preston](#) at the AFGC. For general enquiries pertaining to the Code you can also contact [Samantha Blake](#).

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