

# MEMBER BRIEF

## RETAILER TRADING TERMS and CODE COMPLIANCE

Retailers (including Woolworths and Coles) who have signed up to Food and Grocery Code of Conduct (“Code”) are now providing Members with documentation intended to bring supplier trading terms (called Grocery Supply Agreements, or GSAs) into compliance with the Code. Different retailers are seeking to vary current terms by different means – for example by variation deed or by providing new agreements.

Member companies are encouraged to review all elements of the new documents against the Code of Conduct and the AFGC has prepared the attached GSA Code Compliance Checklist to assist Members in this evaluation. There are three issues to which Members should give particular attention:

- Clause 9 of the Code limits when retailers can unilaterally or retrospectively vary an agreement. Clause 9 requires that unilateral variation is only permitted where the GSA “sets out clearly the changed circumstances in which the variation can be made” (in effect, the specific events that trigger a possible variation) AND sets out a method or basis for calculating any quantitative adjustment. There are additional considerations that retailers must address should they seek to apply a unilateral variations (around reasonableness and notification), but for present purposes **any provision that allows the retailer to change the terms of supply without your consent is a unilateral variation** that must meet the above requirements of the Code.
- Under contract law, a generally expressed ‘agreement to agree’ is unenforceable. As the Code is intended to provide transparency and clarity in commercial relationships between supplier and retailer, **it may be counterproductive if a GSA contains provisions that suggest an issue will be the subject of agreement in the future.**
- Record keeping is vital. Any documents referenced in an agreement are incorporated as at the time the agreement is made – and so **it is important that you download and retain copies of all referenced documents at the time a GSA is made** so that terms of such incorporated documents (at the time of contract, rather than as later modified) can be proven in the event of a dispute.

The Code does not seek to directly address issues of price, but rather seeks to ensure that GSAs are the outcome of a negotiated process delivering certain and transparent outcomes.

**Next steps**

Member companies should evaluate 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, you should contact the retailer with suggested amendments.

If you consider there is some remaining lack of clarity as to the respective rights and obligations of the parties in your GSA you should seek clarification and make sure clarification is included in the GSA.

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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