

CHANGES TO THE FOOD AND GROCERY CODE OF CONDUCT

BACKGROUND

The Food and Grocery Code of Conduct (FGCC) was introduced in 2015. In 2018, the Government commissioned an Independent Review which made 14 recommendations. A revised FGCC was finalised in October 2020 bringing to life 13 of the 14 recommendations.

This document outlines the three most significant changes and when they come into play.

PRICE INCREASE

27A – Price Increases

In effect from 2 January 2021

Clause 27A requires price increases to be conducted in the following manner:

1. Supplier notifies a retailer or wholesaler of a price increase in writing
2. Within 30 days of being notified, the retailer or wholesaler must respond in writing stating they:
 - a. Accept the price increase
 - b. Accept an increase in price but do not accept the full amount as notified by the supplier
 - c. Do not accept the price increase.
3. Should the retailer or wholesaler respond with b. or c. above, the supplier may request they enter into negotiations regarding the price increase.
4. The retailer or wholesaler must engage in the negotiations in good faith and take all reasonable steps to conclude its position without delay.
5. The retailer or wholesaler cannot require the supplier to disclose commercially sensitive information regarding the price increase.

Nothing in this clause affect the rights of a supplier to determine the price of its products.

THINGS TO CONSIDER

The purpose of clause 27A is to ensure that the retailer or wholesaler engages with the supplier, and provides a response in a timely fashion (within 30 days). The Government has stated that it expects the majority of price increases to be settled within 30 days. While this does not stop a retailer or wholesaler from requiring a longer time period (say, the currently common 12 week period) for complex price negotiations, a retailer or wholesaler that routinely delays, or limits, actively engaging with a supplier until near the end of such longer time period would be in breach of this provision.

This clause seeks to improve and clarify the expectations around the process for price increases – Robust price increase negotiations will remain but should take place in a timely fashion.

Retailers and wholesalers are required to report on the number of price increase requests received, the number of negotiations that were not concluded within the 30 day period, and how long these extended negotiations took.

We would like to thank Baker McKenzie for their support in preparing this publication.

All companies should seek independent legal advice when considering matters under the Food and Grocery Code of Conduct

REMEMBER TO KEEP YOUR FGCC TRAINING UP TO DATE. CONTACT THE AFGC OR NEXTGEN FOR MORE INFORMATION.

GOOD FAITH

Part 1A – Good Faith

In effect from 3 October 2020

The new FGCC places a greater emphasis on the obligation for retailers and wholesalers to deal with suppliers in good faith. Another change that emphasises the new centrality of good faith is clause 35(8) which requires that in considering a complaint about an alleged breach of any provision of the FGCC, the Code Arbiter must consider whether the retailer or wholesaler has acted in good faith.

Retailers and wholesalers must at all times deal with suppliers lawfully and in good faith. The good faith obligation has been expanded to include a non-exhaustive list of guiding principles that characterise a retailer or wholesaler acting in good faith. These include:

- Acting honestly
- Acting to achieve the purpose of a grocery supply agreement
- Not acting arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives
- Not acting in retribution for past disputes or complaints made by the supplier
- Acting without duress

- Recognition of the supplier's need for certainty regarding the risks and costs of trading particularly in relation to production, delivery and payment
- Observing confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute

If the actions of a retailer or wholesaler in relation to good faith are under consideration, a Code Arbiter, the ACCC or a court may consider whether the supplier involved has also acted in good faith.

35(8)-(9) Fair dealings

When investigating a complaint, a Code Arbiter may also consider whether the retailer or wholesaler acted fairly in dealing with the supplier. In doing so, the Code Arbiter may consider whether the retailer or wholesaler:

- Acted in a way that denied the supplier the benefits of the contract, or undermined those benefits
- Acted in accordance with the legitimate and reasonable expectations of the supplier
- Had due regard to the nature of the relationship with the supplier and their individual characteristics.

THINGS TO CONSIDER

The expanded good faith provision articulates well-understood characteristics of good faith dealings. Suppliers may consider adding similar wording to their conversations and agreements with retailers and wholesalers to highlight their expectation of a trading relationship characterised by good faith.

Suppliers also ought to be aware that if it seeks arbitration or mediation of a complaint or dispute under the FGCC, the retailer or wholesaler does not need to participate in the mediation/arbitration if the mediator/arbitrator determines that the supplier did not act in good faith themselves.

The potential for a Code Arbiter to consider "fair dealing" acknowledges that while a retailer or wholesaler may not

have breached any legal obligations in their dealings with signatories, it is still possible that their actions, the subject of the complaint, may not meet community expectations as to their dealing fairly with suppliers. This is arguably a higher standard than that set by the good faith obligation. In considering whether the retailer or wholesaler acted fairly, the Code Arbiter will focus on the way that the retailer or wholesaler dealt with the supplier in respect of the subject of the complaint, i.e. the details of the process, rather than the specific outcome. However, in some cases the outcome of a retailer's or wholesaler's decision making process may be so manifestly unreasonable as to call into question the fairness of that process and the way that the supplier was dealt with.

DISPUTE RESOLUTION

Part 5 – Dispute Resolution

In effect from 3 December 2020

Part 5 of the FGCC introduces a new dispute resolution system with Code Arbiters, replacing the previous Code Compliance Managers, and an Independent Reviewer.

Code Arbiter

Each retailer or wholesaler will be required to appoint a Code Arbiter to handle complaints raised by suppliers in relation to the FGCC.

A Code Arbiter:

- Must sit outside the organisation and not be engaged with the organisation in any other capacity (there are however, concessions in this regard for smaller retailers and wholesalers)
- Must not be unduly influenced by the retailer or wholesaler
- Handles and investigates complaints submitted by suppliers in relation to the FGCC
- Has the authority to enter into agreements on behalf of the retailer or wholesaler to settle a dispute relating to a retailer's or wholesaler's obligation under the FGCC, including paying up to \$5M in compensation to the supplier per complaint

- Must keep the identity of the supplier confidential at all times until the supplier expressly allows for their identity to be shared with the retailer or wholesaler.

Independent Reviewer

The Independent Reviewer is appointed by the Government. The functions of the Independent Reviewer are to:

- Consider requests from suppliers to review Code Arbiters' processes in dealing with complaints
- Identify and address emerging and systemic issues in the grocery supply chain relating to the FGCC
- Publish guidance material relating to compliance with the FGCC
- Conduct an annual survey of suppliers, retailers and wholesalers relating to the operation of the FGCC.

The Independent Reviewer is to act collaboratively with stakeholders including Code Arbiters, retailers and wholesalers, suppliers and relevant industry representative bodies.

THINGS TO CONSIDER

Wherever possible, suppliers should attempt to resolve disputes and raise concerns through their commercial relationships with retailers and wholesalers. Where this is not possible, the dispute resolution framework presents another option for seeking appropriate outcomes.

Suppliers should review and familiarise themselves with the complaints handling procedure published on the website of the wholesaler or retailer.

If a supplier is not happy with the remedy offered by the Code Arbiter, the supplier can refer the complaint to the Independent Reviewer for review. However, suppliers should note that the Independent Arbiter's review is only limited to

review of the process followed by the Code Arbiter, and not whether the remedy offered by the Code Arbiter is adequate.

In addition to referring a specific complaint/dispute, a supplier may separately confidentially raise a general concern directly with the Independent Reviewer to assist them in identifying emerging and systemic issues.

AFGC members are encouraged to provide details to the AFGC to facilitate the identification of systemic issues and concerns. Confidentiality will be maintained at all times.