

## BACKGROUND

Effective trading relationships between suppliers and retailers and wholesalers often require the sharing of confidential information. This may relate to pricing, promotions, new product development, strategy or innovation coming through the pipeline.

In the past suppliers have raised concerns that confidential information has been used by retailer and wholesalers for ulterior purposes, such as the development of private label offerings.



## INTENT

Protections of confidential information should give suppliers confidence in sharing their plans with signatory retailers and wholesalers to drive mutual growth and trust and cooperation in the supply chain.

## RELEVANT FGCC PROVISIONS

### 25 Confidential information

1. This clause applies if a supplier discloses confidential information to the retailer or wholesaler in connection with the supply of grocery products, including confidential information relating to product development, proposed promotions or pricing.
2. The retailer or wholesaler must not use that information other than for a purpose for which it was disclosed and may only disclose it or make it available or accessible to employees or agents of the retailer or wholesaler (as the case may be) who need to have that information in connection with that purpose.
3. The retailer or wholesaler must establish and monitor systems to ensure compliance with subclause (2).
4. To avoid doubt, information is not confidential information for the purposes of this clause if the information:
  - a. is publicly available; or
  - b. comes into the possession or knowledge of the retailer or wholesaler:
    - i. independently of the supplier; and
    - ii. without any breach of subclause (2) on the part of the retailer or wholesaler.

### 27A Price increases

5. The retailer or wholesaler must not require the supplier to disclose commercially sensitive information in relation to the following:
  - a. the price increase
  - b. negotiations about an increase in the price for the groceries.

## WHAT SHOULD HAPPEN

- » Suppliers should take due care to protect their confidential information.
- » A Grocery Supply Agreement should clearly articulate that confidential information should only be used for its specified purpose.
- » During price increase negotiations retailers and wholesalers are free to request details of commercially sensitive information. **Retailers cannot, however, require a supplier to provide this information.**
- » The distinction between a request and a requirement will go beyond the words used but also look at the way the communication was made, for example, was the request free of duress?
- » The outcome of price increase negotiations is also an important consideration, for example, if a retailer or wholesaler only accepts price increases that are accompanied by the requested commercially sensitive information this may amount to the information being required.



## SUPPLIER CONSIDERATIONS

- » This clause looks to the purpose for which information was provided in determining the scope of confidentiality. For greater clarity and confidence, suppliers should consider writing into agreements, documents and communications, the purpose and confidentiality they expect for the information contained within.
- » In 2021, Woolworths Group CEO stated that Woolworths understood clause 25 meant that they were unable to share supermarket trading terms with any other business vertical.
- » Suppliers should consider whether this confidentiality commitment should be written into their trading terms arrangements with any signatory retailer or wholesaler.
- » Protection for confidential information can be sought outside of the FGCC through contract arrangements such as non-disclosure agreements.

## KEY TIP

It may not always be clear to others that information being shared is confidential. Suppliers should always identify the information or material as confidential and identify the specific purpose for sharing the information. Handing over a written document specifying the confidential information and the purpose is important to keep the record trail intact.

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