

GOOD FAITH

BACKGROUND

The relationship between retailers and wholesalers and their suppliers is often characterised as a partnership. Both parties work together to put products on the shelves that meet the consumers' needs in a fast-paced and dynamic market.

This partnership is governed by agreements that are relational contracts. While these agreements attempt to set out the terms governing ongoing business dealings, it is very difficult to reduce all possible interactions between the parties into well-defined

contractual obligations, let alone ensure that all future contingencies are covered. Similarly, the FGCC cannot provide specific rules for all interactions between retailers and wholesalers and their suppliers.

As such, an obligation to act lawfully and in good faith seeks to embrace the overarching purpose of the FGCC to build and sustain trust and cooperation, to ensure transparency and certainty, and to promote and support good faith dealings between retailers, wholesalers and suppliers.

INTENT

In a relationship that involves a significant imbalance of bargaining power there is an important need for general principles of trust, fairness and good faith to underpin day to day commercial dealings.

KEY TIP

Keep a written record of all telephone calls, meetings, conversations, agreements, emails and transactions. A paper trail will serve as the best means of demonstrating concerns and a pattern of behaviour should issues of good faith arise.

RELEVANT FGCC PROVISIONS

6B Obligation to deal with suppliers lawfully and in good faith

- The retailer or wholesaler must at all times deal with suppliers lawfully and in good faith within the meaning of the unwritten law
- A Grocery Supply Agreement (GSA) cannot circumvent the requirement to act in good faith. Any provision in the GSA that attempts to limit or exclude the requirement to act in good faith has no effect.
- In determining whether a retailer or wholesaler has acted in good faith, the following non-exhaustive list of considerations may be taken into account:
 - > Have they been honest?
 - > Have they cooperated to achieve the purpose of the agreement?
 - > Have they acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives?
 - > Are they acting out of retribution for past complaints or disputes?
 - > Is the trading relationship free of duress?
 - > Is there recognition of the supplier's need for certainty

regarding the risks and costs of trading, particularly in relation to production, delivery and payment?

- > Have they observed confidentiality obligations regarding information disclosed in dealing with a complaint or dispute?
- > Has the supplier acted in good faith when dealing with the retailer/wholesaler?

35(8) and (9) Investigation by Code Arbiter

- In investigating a complaint, a Code Arbiter must always consider whether the retailer or wholesaler has acted lawfully and in good faith.
- The Code Arbiter may also consider whether the retailer or wholesaler has acted fairly, taking into account:
 - > Whether they have acted in a way that denied the supplier the benefit of the contract, or undermined those benefits for the supplier
 - > Whether they have acted in accordance with legitimate and reasonable expectations of the supplier
 - > Whether they have had due regard to the nature of their relationship with the supplier and the supplier's individual characteristics.

Remember to keep your FGCC training up to date. Contact AFGC and NextGen.

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

WHAT SHOULD HAPPEN

An assessment of what conduct or behaviour would amount to “acting in good faith” will always be depend on the context, but the requirement to act in good faith generally means that:

- Signatories must behave in a way that builds and sustains trust and cooperation.
- Signatories should act genuinely, fairly (within the given circumstances) and transparently without a hidden agenda. This does not prevent the retailer/wholesaler from acting in their own commercial interests, nor should it stop robust negotiations.
- Trying to find or exploit ‘loop holes’ to undermine the purpose and benefit of the agreement would constitute ‘not acting in good faith’.
- A signatory should honour their previous commitments.
- A signatory should not arbitrarily change arrangements and orders. It also means that they should give reasonable notice of changes and communicate expectations regarding supply arrangements.
- Not listening or acknowledging the supplier’s unique circumstances and imposing unreasonable obligations would suggest that the signatory is ‘not acting in good faith’.
- A signatory should engage in genuine dialogue and negotiation in response to any reasonable request from a supplier. An unreasonable delay or lack of communication (eg. not responding until the last minute) would suggest that the signatory is ‘not acting in good faith’.
- A signatory should cooperate to achieve the purposes of the agreement and not to undermine or frustrate the GSA.

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CONSIDERATIONS

- The good faith obligation under the FGCC has yet to be enforced, however, its application in other common law areas can provide guidance to support the new principles in 6B of the FGCC. Suppliers may consider adding good faith wording to their conversations and agreements with retailers and wholesalers to highlight their expectation of a trading relationship characterised by good faith.
- The good faith obligation does not modify, remove or dilute other existing obligations of the supplier, retailer or wholesaler under the law (eg. obligations not to mislead or deceive, not to act unconscionably etc. all still apply).
- In discussions and negotiations with a signatory, suppliers should make their unique and differentiated circumstances known to ensure they can be factored into negotiations.
- A supplier who ensures all commitments and communications are reflected in writing will be in a better position to ensure the signatory honours their commitments and continues to deal in good faith. In the past suppliers have experienced a high rate of buyer turnover, with a new buyer no longer honouring the commitments of the former. Additionally, keeping detailed records of all dealings will assist with ascertaining whether a retailer or wholesaler is acting in retribution for any issue, concern or complaint raised.
- 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, 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.