

# UNILATERAL AND RETROSPECTIVE VARIATIONS

## BACKGROUND

Retailers and wholesalers often have long term arrangements regarding the supply of food and grocery products. These arrangements need a degree of flexibility to ensure they remain fit for purpose.

However, there have been examples of retailers or wholesalers making unreasonable unilateral variations to agreements or variations that have a retrospective impact on suppliers.

## RELEVANT FGCC PROVISIONS

### 9 Unilateral variation of agreement

- The retailer or wholesaler must not vary a GSA without the consent of the supplier, unless the GSA:
  - > Provides expressly for the retailer or wholesaler to make the variation, and
  - > Sets out clearly the changed circumstances in which the variation can be made, and
  - > If the variation involved a quantitative adjustment to the terms of supply – sets out the basis or methodology for calculating the adjustment.
- Any unilateral variation must then:
  - > Be made in accordance with the GSA, and
  - > Be reasonable in the circumstances, and
  - > Be communicated to the supplier in writing, with reasonable notice, detailing the variation, the terms of the variation and the reasons for the variation.
- In determining whether the variation is reasonable in the circumstances, regards must be had to the benefits, costs and risks (if any) for the suppliers and retailer or wholesaler.

### 10 Retrospective variation of agreement

- The retailer or wholesaler must not vary a GSA with retrospective effect.

## INTENT

Tighter limitations regarding variations of grocery supply agreements (**GSA**) seek to provide commercial certainty to suppliers in their agreements with retailers and wholesalers and with regard to how they conduct their business. The new limitations regarding retrospective and unilateral variations apply to a GSA that comes into force on or after 3 October 2020 and to existing GSA's that were varied, renewed or extended after that date. Submitting a new purchase order under an existing GSA would constitute an existing agreement being varied, renewed or extended.

## WHAT SHOULD HAPPEN

- A GSA should clearly articulate the circumstances under which a retailer or wholesaler may make a unilateral variation to the agreement.
- A retailer or wholesaler should not attempt to opt out of or contract around the ban on retrospective variations.
- A supplier should always be given reasonable written notice of a unilateral variation. This includes situations where the variation is for the benefit of the supplier.

## KEY TIP

When negotiating or renegotiating any agreement that falls within the GSA, consider any boundaries you want imposed on a retailer or wholesaler's right to unilaterally vary a GSA and ensure these are clearly articulated, in the GSA.

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## CONSIDERATIONS

- Suppliers should remember that a GSA includes any and all agreements between a supplier and retailer or wholesaler that relate to the supply of groceries for the purposes of a supermarket business. Code obligations relating to unilateral and retrospective variations are not limited to the principal agreement but also extend to other agreements for example, purchase orders, promotional, supply chain and freight agreements.