

## Part Three

# Is the grocery retailer's 'ask' reasonable in the circumstances?



This T|W Insights is the final in our three-part weekly series on the [Grocery Supply Code](#) (Code). But first, an announcement from the new coalition government and then a quick recap of the Grocery Supply Code Series:

### *New government to explore strengthening the powers of the Grocery Commissioner*

In the coalition deal announced last week, the new coalition government will explore options to:

- strengthen the powers of the Grocery Commissioner;
- improve competitiveness; and
- address the lack of a third entrant to remove the market power of a duopoly.

This signals a strong possibility that there may be more government intervention in the grocery retail sector – watch this space.

### *A quick recap*

In **Part 1: Introducing the Grocery Supply Code** we set out what behaviours are required by regulated grocery retailers under the Code, and which are prohibited.

In **Part 2: The 'good faith' principle: What it means and how it can be leveraged**, we considered how the concept of 'good faith' can be leveraged and discussed examples of 'unconscionable conduct' from the ACCC's prosecution of Coles and Woolworths in Australia.

In **Part 3**, we consider what is "reasonable in the circumstances" and some factors to help a supplier evaluate whether an 'ask' by a regulated grocery retailer (**grocery retailer**) is reasonable.

Certain conduct under the Code is prohibited, unless that conduct is permitted in the supply contract **and** the conduct is 'reasonable in the circumstances'. For example, a grocery retailer cannot require a supplier to fund the costs of a product promotion, unless it is provided for under the supply contract and the supplier's contribution to the promotion is reasonable in the circumstances. The commercial tension on this issue, between the supplier and the retailer will be:

- how is reasonableness determined; and
- from who's perspective?

The Code only gives general guidance on the types of factors that must be considered when determining "reasonable in the circumstances".

Here are some other factors to think about:

## What is “reasonable in the circumstances” under the Code?

### Factors that the grocery retailer must consider under the Code:

- The benefits, costs, risks for the grocery retailer.
- Contributions made by the grocery retailer.\*
- The benefits, costs, risks for the supplier.

## Other commercial factors to consider

- Is the ‘ask’ reasonably necessary to protect the grocery retailer’s legitimate commercial interests?
- Does the grocery retailer’s ‘ask’ result in the supplier being unable to perform its other contractual obligations, either to the grocery retailer or to a third party?
- Does the grocery retailer’s ‘ask’ put the supplier in breach of any laws?
- Is the contribution that the grocery retailer is asking the supplier to make proportional to the benefit that the supplier will gain or purport to gain?
- Are there viable commercial alternatives available to the grocery retailer, other than a straight transfer of risk and cost to the supplier? (i.e. To what extent can the cost or risk be controlled, managed or mitigated by the grocery retailer using other avenues?).
- If the supplier shares the downside with the grocery retailer, will the supplier also share the upside?

\* Payments for the grocery retailer’s business activities (cl 16) and funding promotions (cl 17)

## The wrap up

- Grocery retailers have until 28 March 2024 to review and amend their supply contracts so they comply with the Code.
- The Code sets out clearly what behaviours are required of grocery retailers, what behaviours are strictly prohibited, and what behaviours are prohibited unless the behaviour is permitted under the supply contract and is ‘reasonable in the circumstances’.
- While the Code is not a “silver bullet”, there is leverage to be gained under the ‘good faith’ and ‘reasonableness in the circumstances’ cards.



## The wrap up

In addition to the Code ([view part 2 here](#)):

- Suppliers still have all their contractual rights and remedies under their supply contracts with the grocery retailer, and the ability to enforce those in the event of a breach.
- Suppliers may have recourse under the Fair Trading Act 1986 if they consider that:
  - the grocery retailer's 'standard form' grocery supply contract breaches the unfair contract terms regime,
  - the grocery retailer has acted unconscionably in trade, or
  - the grocery retailer has made false or misleading representations in the course of its commercial dealings with suppliers.
- The Grocery Commissioner has pledged to enforce bigger penalties to give the Code teeth to level the playing field.
- There is a strong possibility of more government intervention in the grocery retail sector under the new coalition government– watch this space for developments in 2024.

## Contacts

If you have questions about the Code or would like more information, please contact one of our experts:



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