

Q&A on competition issues

From the NZFGC webinar on 17 April 2023, as answered by Andy Matthews of Matthews Law

Can suppliers set a maximum promotional price? As we have seen retailers recently increasing promotional prices above the RPP specified on agreed deal sheets?

- Yes suppliers can set maximum promotional price. RRP is not the same – it’s just a “recommended” retail price, and not binding.
- Commercially, suppliers still need to negotiate and agree maximums with retailers. Be careful that a specified maximum price does not accidentally become a minimum price in negotiations. It may help to set out arrangements clearly in writing (emails) to avoid ambiguity.
- Commerce Commission RPM [Guidelines](#) note:

Practical tips.

A supplier can:

- recommend a retail price for goods
- set a maximum price for the on-sale of goods.

With regards to the price increase passed on by the suppliers to the retailers, sometimes retailers pass on a higher increase to the consumers than the increase they have received. Are there any rules around this?

- No, retailers are generally entitled to decide what retail price they charge consumers so long as they do not do this in a misleading manner. Often, they will face other costs increasing too. But if it was stated or implied the sole reason was due to the supplier price increase, this would likely be a misleading representation in breach of the Fair Trading Act.
- Check contracts / communications to see if you and the retailer agreed to any additional rules on retail pricing (eg promotions).
- As noted, suppliers can set maximum retail prices. This needs to be agreed with retailers to be legally binding on them.

If a supplier offers funding to hit a promotional price and then the retailer retails higher and banks additional margin then the retailer has undermined the suppliers business case to invest. How can this be legal?

- This depends on what was agreed and / or what representations have been made. If the deal is that a supplier will pay funding if the retailer prices at the promotional price or lower (ie a maximum), and the retailer does not meet that price, they may be in breach of contract or not entitled to the promotional funding.
 - If the deal is just that a supplier will pay funding to the retailer for the purposes of retailer promotions without specifying what the retailer’s obligations, then the retailer may not be legally bound to hit the promotional price. Check what was agreed.
 - If the retailer made other representations that the funding would be used to ensure a promotional price is hit, then they may also be in breach of the FTA prohibitions against misleading or deceptive conduct and false or misleading representations.

- To ensure promotional funding is used for its intended purposes, we recommend capturing this in writing (eg the supply contract, or by email assurances from the retailer).
- This area may also be covered in the future grocery code of conduct.
- Final points:
 - Be careful in communications with “policing” retailers’ continuing with (low) promotional prices after the funded promotion has finished. This can look at an attempt at RPM – it’s better to simply note that the funding / period has stopped.
 - Watch out for inadvertent price fixing – you should not seek commitments about what prices the retailers will set for products (including its own) that compete with yours. Retailers will know these rules and may be able to give more general assurances.

If a retailer puts a product onto EDLP (removes promotions and lowers to a lower shelf price) without consultation because the product is on net cost - what are the rules around navigating that?

- If I have interpreted this correctly, it is a concern that a retailer has transitioned a promotional price to a standard but ‘good’ price (Every Day Low Price).
- A retailer can obviously sell any product at any price it likes, except if there is an agreed maximum retail price, or an agreed promotional price.
- There3 may be an issue in the question about the “net cost” pricing, which may be addressed by the other responses.
- Some care needs to be taken about what is agreed on promotions, beyond the scope of this short answer.
- There may also be related issues as whether consumers are sufficiently clear on what EDLP’s mean – but no doubt they have taken advice on ensuring that this does not mislead consumers.