

NOTICE OF FILING

Details of Filing

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File Title:	AUSTRALIAN COMPETITION & CONSUMER COMMISSION v COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Concise Statement

Federal Court of Australia

No. VID of 2024

District Registry: Victoria

Division: General

Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

Australian Competition and Consumer Commission

Applicant

Coles Supermarkets Australia Pty Ltd (ACN 004 189 708)

Respondent

A. INTRODUCTION

1. The Applicant (the **ACCC**) alleges that, between February 2022 and May 2023 (the **Relevant Period**), Coles Supermarkets Australia Pty Ltd (**Coles**) temporarily increased the prices of at least 245 different products (**Affected Products**) before placing them on 'Down Down' promotions at prices which were higher than, or the same as, the price at which each product had ordinarily been offered for sale prior to the temporary price spike. In many cases, before the price spike, Coles planned to later place the Affected Product on a 'Down Down' promotion, and effected the temporary price spike to 'establish' a higher 'was' price.
2. As a result, Coles represented to consumers that the prices of Affected Products promoted on 'Down Down' were discounted when, in fact, the purported discount was illusory. By this conduct, Coles made false or misleading representations in breach of ss 18 and 29(1)(i) of the Australian Consumer Law (the **ACL**).

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

3. Coles is the operator of one of the two largest supermarket chains in Australia, with over 840 stores nationwide.

Filed on behalf of the Applicant, the ACCC
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File ref: D2522

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B.1 The 'Down Down' Program

4. At all material times, Coles had a practice of pricing the majority of products or product categories on a nationwide basis, with the result that a large proportion of its prices were uniform nationally, whether purchased in-store or online. This was subject to some exceptions, such as in the case of meat, fresh produce and tobacco products (which were not priced nationally); stores which required remote freight; and adjustments relating to container deposit schemes.
5. The '**Down Down**' Program was introduced by Coles in June 2010 and marketed as a promotional campaign designed to reduce the regular shelf price of commonly purchased products — thereby offering customers predictable and reliable value on the items they purchased the most and reducing the cost of their shopping basket. The program has continued to be a key aspect of Coles' marketing through to at least the end of the Relevant Period.
6. In contrast to short-term specials, which involve temporarily discounting the prices of products for a few days or weeks, the promotional focus of the 'Down Down' Program was on discounting prices on a longer-term basis. During the Relevant Period, Coles typically promoted products on the 'Down Down' Program for at least 12 weeks. Many of the Affected Products were placed on 'Down Down' for six months or longer.
7. Products on a 'Down Down' promotion were identified by Coles in-store and online using different tickets ('**Down Down**' Tickets) to distinguish them from products on special or on other forms of promotion. At least throughout the Relevant Period, the 'Down Down' Ticket for a product was displayed, during the period that the product remained on promotion:
 - (a) in-store, on the shelf immediately below the relevant product (or otherwise physically near the relevant product); and
 - (b) online, when consumers shopped on Coles' website or on a mobile or tablet via the Coles mobile application, near the picture of the relevant product.
8. The precise design of 'Down Down' Tickets varied somewhat throughout the Relevant Period and depending on whether it was a physical ticket displayed in-store or a digital one displayed online. Nonetheless, the features relevant to this proceeding (set out in paragraph 9 below) remained the same.

B.2 The 'Down Down' Representation

9. Throughout the Relevant Period, 'Down Down' Tickets displayed by Coles in its stores and online included the following features:
 - (a) a red and white colour scheme, coupled with the words "Down Down" in large, bold, font;
 - (b) the name of the relevant product (for example, "Coles Soft White Wraps 8 pack | 360g");
 - (c) the price at which the product was available for sale during the 'Down Down' promotion (the '**Down Down** price'), displayed in prominent font; and
 - (d) in most cases, a '**was** price' for the product or products in the same range, displayed in smaller font, together with the date of the 'was' price (for example, "Was \$5.50 Oct 2019").
10. Examples of 'Down Down' Tickets used by Coles throughout the Relevant Period can be found at **Schedule A** to this Concise Statement.
11. The information displayed on each 'Down Down' Ticket represented to consumers that the relevant product's 'Down Down' price was a genuine reduction to, or discount from, the product's previous regular price (the '**Down Down** Representation').

B.3 Misleading representations in relation to the Affected Products

12. Throughout the Relevant Period, the 'Down Down' Representations made by Coles on 'Down Down' Tickets displayed in-store and online in respect of the 245 Affected Products were false or misleading because:
 - (a) Coles had increased the price of each Affected Product for only a relatively short period of time (the **Price Spike Period**) prior to placing the product on the 'Down Down' promotion — and, in most cases, advertising that higher price as the relevant 'was' price on the product's 'Down Down' Ticket; and
 - (b) the price at which Coles offered each Affected Product for sale during the 'Down Down' promotion (as displayed on the product's 'Down Down' Ticket) was, in fact:
 - (i) in 249 instances, higher than; and
 - (ii) in 6 instances, the same as,

the Affected Product's previous regular price (i.e. the price at which Coles had previously offered the product for sale prior to the Price Spike Period, excluding any short-term specials or promotions).

13. For some Affected Products, there was more than one occasion during the Relevant Period on which the product was placed on a 'Down Down' promotion following a Price Spike Period. For this reason, the total number of separate instances collectively referred to in subparagraph 12(b) above is 255, which is greater than the total number of Affected Products, being 245.
14. In many cases, Coles had already planned to later place the Affected Product on a 'Down Down' promotion prior to the commencement of the Price Spike Period, and effected the temporary price increase for the purpose of 'establishing' a higher 'was' price. As a general principle, Coles also sought to at least maintain its margin with respect to the Affected Products throughout the process outlined in paragraph 12 above.
15. In the case of the Affected Products the subject of this proceeding:
 - (a) there was a Price Spike Period of 45 days or less prior to the product being placed on the 'Down Down' promotion during which the price of the product (excluding any temporary price fluctuations due to short-term specials for a few days or weeks) was at least 15% higher than its previous regular price; and
 - (b) the 'Down Down' price at which the product was offered for sale after the Price Spike Period was either higher than, or the same as, the price at which that product had previously been offered for sale for a period of 180 days or more (excluding any temporary price fluctuations due to short term specials for a few days or weeks, or other temporary price fluctuations of seven days or less) prior to the Price Spike Period.
16. For example, from at least 1 January 2021 until 11 October 2022, Coles offered the Strepsils Throat Lozenges Honey & Lemon 16 pack product for sale (on a pre-existing 'Down Down' promotion) at a regular price of \$5.50 — being a period of at least 649 days.¹ On 12 October 2022, the price of the product was increased to \$7.00 for a period of 28 days (the Price Spike Period). On 9 November 2022, the product was then placed back on a 'Down Down' promotion with the tickets showing a 'Down Down' price of \$6.00 and a 'was' price of \$7.00. The 'Down Down' price of \$6.00 was 9% higher than

¹ This includes one 7-day period during which the product was on a short-term special.

the product's previous regular price of \$5.50. A graphical representation of this example is set out at **Schedule B** to this Concise Statement.

17. In the case of the above example, Coles had planned the temporary price spike to establish a new higher 'was' price for the subsequent 'promotion'. Coles had decided (following a request from the supplier for a price increase) on or around 7 October 2022 to take the product off 'Down Down', increase the price, and then put the product back on to 'Down Down' four weeks later.

C. RELIEF SOUGHT

18. The ACCC seeks the relief set out in the accompanying Originating Application, comprising declarations, pecuniary penalties, non-punitive orders, and costs.

D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

19. For the reasons set out in this Concise Statement, the ACCC alleges that by making the 'Down Down' Representations about the Affected Products during the Relevant Period, Coles, in trade or commerce, in connection with the supply or possible supply of goods (or the promotion thereof):
 - (a) engaged in misleading or deceptive conduct, in contravention of s 18 of the ACL; and
 - (b) further, or in the alternative, made false or misleading representations with respect to the price of goods, in contravention of s 29(1)(i) of the ACL.
20. It is alleged that a separate contravention of s 18 and/or s 29(1)(i) occurred on each occasion that Coles made a 'Down Down' Representation to a consumer about an Affected Product during the Relevant Period in the circumstances set out in paragraph 12 above. The total number of contraventions is therefore equivalent to the number of times a consumer viewed a relevant 'Down Down' Ticket for an Affected Product during the Relevant Period.
21. It may be inferred that this number is at least equal to the total number of consumers who purchased an Affected Product while the product was promoted as being on 'Down Down' in the circumstances set out in paragraph 12 above.

E. ALLEGED HARM

22. As a result of Coles' conduct, consumers shopping both in-store and online may have made decisions to purchase products based on false or misleading information. The

relevant conduct took place over an extended period of time, and involved one of the two largest players in a critical market for Australians. The false or misleading representations concerned the price of household staples at a time of increasing cost of living pressures, and were made in the context of a program which Coles specifically promoted as being designed to help consumers make long-term savings on the cost of their groceries. By its conduct, Coles diminished the ability of consumers to make informed choices about their essential purchases.

This concise statement was prepared by James Love of Johnson Winter Slattery and settled by Michael Hodge KC and Sarida McLeod of counsel.

CERTIFICATE OF LAWYER

I, James Love, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 23 September 2024



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James Love
Partner, Johnson Winter Slattery
Solicitor for the Applicant

SCHEDULE A

Example 1:

Example of instore 'Down Down' Ticket in use during the Relevant Period.



Example 2:

Example of online 'Down Down' Ticket – in use from August 2021 to March 2023.



Example 3:

Example of online 'Down Down' Ticket – in use from January 2021 to August 2021.



DOWN DOWN



Lipton Citrus Green Ice Tea

\$1.90 Was \$2.00 on Nov 2019

500mL | \$0.38 per 100mL

Add 1 for \$1.90

Example 4:

Example of online 'Down Down' Tickets in use on the Coles Online website from March 2023 to 4 May 2023.



Promoted

**Dairylea Regular
Cheese Slices 36 Pack |
648g**

\$10.00

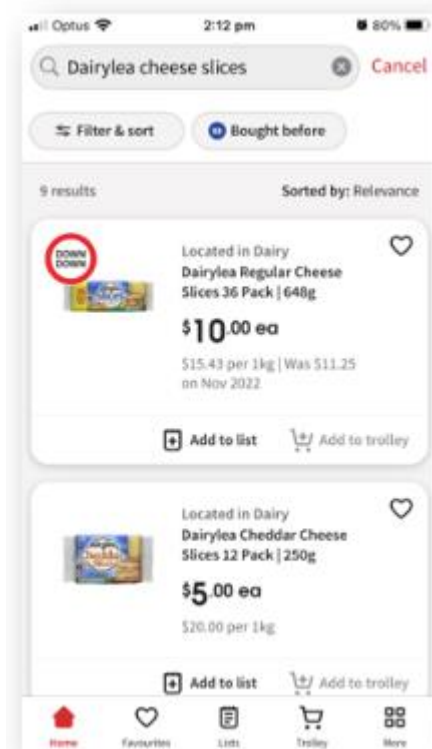
\$15.43 per 1kg | Was \$11.25
on Nov 2022

☆☆☆☆☆ 0.0 (0)



Example 5:

Examples of online 'Down Down' Tickets in use on the Coles Online mobile application from March 2023 to 4 May 2023.



SCHEDULE B

7251326 STREPSIL THROAT LOZENGES:HONEY LEMON:::16 PACK

