



ANNEXURE A

OPT-OUT NOTICE

FEDERAL COURT OF AUSTRALIA

Coles Class Action

Benjamin Glenn Demery v Coles Supermarkets Australia Pty Ltd (VID1247 / 2024)

Part A

Why is this notice important?

1. A class action has been commenced in the Federal Court of Australia by Benjamin Glenn Demery (**Applicant**) against Coles Supermarkets Australia Pty Ltd (ACN 004 189 708) (**Coles**). The action is brought by the Applicant on his own behalf and on behalf of other persons (**Group Members**) who purchased one or more of the products listed in Annexure A to the Statement of Claim (**Affected Products**) from Coles (whether in-store or online) between February 2022 and May 2023 (**Relevant Period**) (see the section "**Are you a Group Member?**" below).
2. The class action alleges that Coles contravened certain provisions of the Australian Consumer Law in respect of information displayed about the pricing of the Affected Products during the Relevant Period, and seeks relief by way of declarations to that effect and compensation for loss or damage suffered by the Applicant and Group Members. Further details as to the allegations are found in the section "**What is this class action?**" below.
3. Coles denies that it has engaged in any conduct that contravenes the Australian Consumer Law, and denies that the Applicant and Group Members are entitled to any of the relief sought in the class action.
4. The Federal Court of Australia has ordered that this notice be published for the information of persons who might be members of the class on whose behalf the action is brought and might be affected by the action. **You should read this notice carefully. Any questions you have concerning the matters contained in this notice should not be directed to the Court.** If there is anything in this notice that you do not understand, you should seek legal advice.

What is a class action?

5. A class action, also called a 'representative proceeding', is a legal proceeding that is brought by one person (**Applicant**) on their own behalf and on behalf of a class of people (class members or **Group Members**) against another person or entity (**Respondent**) where the Applicant and the Group Members have similar

claims against the Respondent.

6. The Applicant in a class action does not need to seek the consent of Group Members to commence a class action on their behalf or to identify a specific Group Member. However, Group Members can cease to be Group Members by opting-out of the class action.
7. Group Members in a class action **are not** individually responsible for the legal costs associated with bringing the class action. In a class action, only the Applicant is responsible for the costs (see also the section “**Will you be liable for legal costs if you remain a Group Member?**”).
8. Group Members are “bound” by the outcome in the class action, unless they have opted out of the proceeding. A binding outcome can happen in one of two ways: a *judgment* following a trial, or a *settlement* at any time that is approved by the Court. If there is a judgment or a Court-approved settlement of a class action, Group Members *will not* be able pursue the same claims and *may not* be able to pursue similar or related claims against the Respondent in other legal proceedings. Group Members should note that:
 - (a) In a *judgment* following trial, the Court will decide various common factual and legal issues in respect of the claims made by the Applicant and Group Members. Unless those decisions are successfully appealed, they bind the Applicant, Group Members and the Respondent. Importantly, if there are other proceedings between a Group Member and Coles, neither of them will be permitted to raise arguments in that proceeding which are inconsistent with a factual or legal issue decided in the class action. This means that if the issues are decided against the Applicant, Group Members will be unable to pursue claims they have which are the same as the Applicant's claims, and will not be able to pursue other claims which are dependent upon common issues which have been decided against the Applicant.
 - (b) In a Court-approved *settlement* of a class action, where the settlement provides for compensation to some or all Group Members, the settlement is likely to extinguish all rights to compensation which a Group Member might have against the Respondent which arise in any way out of the events or transactions which are the subject-matter of the class action.
9. If you consider that you have claims against Coles which are based on your individual circumstances or are otherwise additional to the claims described in the class action, then it is important that you seek independent legal advice about the potential binding effects of the class action **before** the deadline for opting out (see below).

What is this class action?

10. On 13 November 2024, the class action was filed by Gerard Malouf & Partners on behalf of Benjamin Glenn Demery.
11. Mr Demery brings the claim on his own behalf and on behalf of all persons who purchased one or more of the Affected Products listed in Annexure A to the Statement of Claim between February 2022 and May 2023 from Coles (whether in-store or online).
12. The class action concerns Coles' conduct and alleged representations made by it in respect of the pricing of Affected Products during the Relevant Period. As part of the class action, the Applicant seeks declarations from the Court of contraventions, and compensation for loss or damage suffered by the Applicant and Group Members.
13. The Applicant alleges that, between February 2022 and May 2023, Coles:
 - (a) temporarily increased prices of the Affected Product 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; and
 - (b) represented to the Applicant and Group Members that the prices of Affected Products subject to the 'Down Down' promotion were discounted when, in fact, the purported discount was illusory.
14. The Applicant alleges that the above conduct by Coles contravened certain provisions of the Australian Consumer Law which prohibit misleading or deceptive conduct and/or false or misleading representations about the price of goods. The class action seeks declarations of contravention, and compensation for loss or damage suffered by the Applicant and Group Members.
15. The Respondent to the class action is Coles Supermarkets Australia Pty Ltd. Coles is defending the class action and has filed a defence in this proceeding. In summary, Coles contends that:
 - (a) the increase in price of each of the Affected Products was in response to requests from suppliers for cost price alterations and/or changes to supplier promotional funding arrangements;
 - (b) the Affected Products were offered for sale at the increased (non-promotional) price for up to six weeks (depending on the product) and sold in substantial volumes before being placed on the 'Down Down' program. The non-promotional price was a genuine, undiscounted shelf price. The subsequent Down Down program price was therefore a

genuine discount from that shelf price. The discount was not illusory.

16. Coles denies that it has engaged in any conduct that contravenes the Australian Consumer Law and denies that the Applicant and Group Members are entitled to any of the relief sought in the class action. A copy of Coles' Defence is available at <https://www.gerardmaloufpartners.com.au/coles-class-action/>.

Class Action Initial Trial:

17. The Federal Court has ordered that an initial trial in the class action (**Class Action Initial Trial**) is to be held to determine whether Coles contravened provisions of the Australian Consumer Law. The Class Action Initial Trial will not consider whether Coles' conduct caused any loss or damage to the Applicant and Group Members, nor what the amount of any such loss or damage may be.
18. The Class Action Initial Trial is to be conducted in respect of a list of 12 **Sample Products** drawn from the Affected Products. The selection of the Sample Products was agreed by the Applicant and Coles for the purpose of the Class Action Initial Trial. The Court's intention in conducting the Class Action Initial Trial on the basis of the Sample Products is to resolve issues of liability as quickly, inexpensively and efficiently as possible. However, if the outcome of the Class Action Initial Trial is mixed, with liability being established in respect of certain Sample Products but not others, further steps may need to be taken to resolve the full extent of liability in each proceeding.
19. If the Applicant is successful at the Class Action Initial Trial, a second stage trial may be held at a later date to determine loss or damage suffered by the Applicant and Group Members.

The ACCC Proceeding:

20. Separate from the class action, the Australian Competition and Consumer Commission (**ACCC**) has also commenced a proceeding in the Federal Court of Australia against Coles (**ACCC Proceeding**) alleging the same contraventions of the Australian Consumer Law in respect of the same Affected Products in the same Relevant Period and seeking relief including declarations of contravention and a pecuniary penalty to be imposed on Coles for its contraventions. A pecuniary penalty is in the nature of a fine, and is paid to the Australian Government, not as compensation to consumers who have suffered loss or damage. Coles denies the allegations in the ACCC Proceeding and denies that the ACCC is entitled to any relief sought in the ACCC Proceeding, and Coles is defending the ACCC Proceeding. The Federal Court has ordered that questions of liability in the ACCC Proceeding be determined in an initial trial (**ACCC Initial Trial**) in respect of a list of sample products. The list of sample products in the ACCC Initial Trial is the same as the list of Sample Products in the Class Action

Initial Trial.

21. In light of the substantively similar allegations as to liability between the class action and the ACCC Proceeding, and to minimise unnecessary expenditure on Court and legal fees, the Applicant and Coles have agreed, and the Federal Court has ordered, that:
- (a) the Class Action Initial Trial will be heard with the ACCC Initial Trial in a **Joint Liability Trial**;
 - (b) evidence in the ACCC Initial Trial will be evidence in the Class Action Initial Trial; and
 - (c) up to and including the time of the Joint Liability Trial, the Applicant will need to obtain the leave (i.e. permission) of the Court:
 - (i) to take any active step in the class action, including adducing evidence or making arguments; or
 - (ii) to seek to intervene (i.e. be involved in) the ACCC Proceeding;
 - (d) the Applicant will undertake, on his own behalf and on behalf of all Group Members except those who opt out of the class action, to be bound by all findings of fact, findings of law and mixed findings of fact and law which the Court makes in the Joint Liability Trial.
22. It is the intention of the Applicant and Coles that these arrangements will minimise the expenditure incurred by the Applicant and Coles in respect of the class action, while at the same time allowing questions of liability to be effectually determined in the Joint Liability Trial.

Are you a Group Member?

23. You are a Group Member if at any time during the Relevant Period you purchased one or more of the Affected Products from Coles while that Affected Product was offered for sale at the 'Down Down' Price.
24. The Statement of Claim in the class action, which includes the list of Affected Products as Annexure A, is available at:
<https://www.gerardmaloufpartners.com.au/coles-class-action/>
25. If you are unsure whether or not you are a Group Member, you should visit the website for the class action: <https://www.gerardmaloufpartners.com.au/coles-class-action/>. If you are still unsure after visiting the website, you may contact the Applicant's lawyers, Gerard Malouf & Partners on 1800 934 243 or email ColesClassAction@gmp.net.au, or should seek your own legal advice without delay. Gerard Malouf & Partners is the law firm acting for the Applicant.

Funding of the class action

26. The class action is being run by Gerard Malouf & Partners on a no-win, no-fee basis pursuant to a Conditional Costs Agreement entered into between that firm and the Applicant.
27. If the class action results in an award of damages or a settlement sum payable to Group Members, the Conditional Costs Agreement provides that, subject to approval by the Court, Gerard Malouf & Partners is entitled to recover its professional fees and disbursements, plus an uplift of 25% on its professional fees. The uplift is in consideration for the firm running the risk of the class action not resulting in damages or a settlement, and in the meantime for its professional fees not being paid and for meeting out-of-pocket disbursements.
28. In the event that an award of damages or settlement sum is payable to the Applicant and Group Members, the Applicant will seek the approval of the Court for the deduction from any settlement or judgment of such amount of the Applicant's legal costs (i.e. his lawyers' professional fees, uplift on professional fees, and disbursements) as the Court considers just.
29. The total of any amounts deducted from compensation payable to Group Members for legal costs will never exceed the amount a Group Member receives in the event of a successful outcome. **That is, you will never be out of pocket by remaining in the class action.**

Will you be liable for legal costs if you remain a Group Member?

30. In the event that the class action is unsuccessful, Group Members will have no liability to pay any legal and/or funding costs.
31. In the event that the class action is successful (that is, if any compensation becomes payable to you as a result of any order, judgment or settlement in the class action) the Court may make an order that some of that compensation be used to help pay a share of the costs which are incurred by the Applicant in running the class action but which are not able to be recovered from the Respondent. Any such amounts will only be payable in the event of a successful outcome by way of a deduction from any compensation to which you become entitled, and will never exceed the amount of compensation to which you may otherwise become entitled. The Court will assess whether any amounts proposed to be deducted are just. You will be notified at that time of the amount which it is proposed to be deducted and given an opportunity to tell the Court if you agree or disagree with what is proposed.
32. Class actions are often settled out of court. If this occurs, you may be able to claim from the settlement amount without retaining a lawyer.

What will happen if you choose to remain a Group Member?

33. Unless you opt out, you will be bound by any Court-approved settlement or judgment of the class action. If the class action is successful you will be entitled to share in the benefit of any order, judgment or settlement in favour of the Applicant and Group Members, although you may have to satisfy certain conditions before you receive any compensation. If the action is unsuccessful or is not as successful as you might have wished, you will not be able pursue the same claims and may not be able to pursue related claims against Coles in other legal proceedings.

What do you need to do?

(a) How can you remain a Group Member?

34. **If you wish to remain** a Group Member there is **nothing you need to do** at the present time. The Applicant will continue to advance the proceeding on your behalf up to the point where the Court determines those questions that are common to the claims of the Applicant and the Group Members. You are invited to visit the website for the class action (<https://www.gerardmaloufpartners.com.au/coles-class-action/>) and register your details so that future notices about the class action can be sent to your preferred address.

(b) How can you opt out of the class action?

35. If you do not wish to remain a Group Member you must opt out of the class action. If you opt out you will not be bound by or entitled to share in the benefit of any order, judgment or settlement in the class action, and you will be at liberty to bring your own claim against Coles, provided that you issue Court proceedings within the time limit applicable to your claim. If you wish to bring your own claim against Coles, you should seek your own legal advice about your claim and the applicable time limit prior to opting out.
36. **If you wish to opt out** of the class action you **must** do so by completing an “**Opt out notice**” in the form shown in Part B below (Form 21 of the Court’s approved forms), then returning it to the Registrar of the Federal Court of Australia at the address on the form. **IMPORTANT: the Opt out notice must reach the Registrar by no later than 4.00 pm (AEDT) on 21 November 2025**, otherwise it will not be effective. Each Group Member seeking to opt out should fill out a separate Opt out notice. If you are opting out on behalf of a company or business please provide your name, the name of the company or business and your position within the company or business (e.g. director or partner).



Where can you obtain copies of relevant documents?

37. Copies of pleadings filed by the parties, including the Originating Application, the Statement of Claim, the Defence and the Reply (which may be subject to change), may be obtained by:
- (a) downloading them from <https://www.gerardmaloufpartners.com.au/coles-class-action/>; or
 - (b) by contacting a District Registry of the Federal Court (contact details are available www.fedcourt.gov.au) and paying the appropriate inspection fee.
38. Please consider the above matters carefully. If there is anything of which you are unsure, you should visit the website for the class action (<https://www.gerardmaloufpartners.com.au/coles-class-action/>). If you are still unsure after visiting the website, you may contact Gerard Malouf & Partners on 1800 934 243 or e-mail ColesClassAction@gmp.net.au or seek your own legal advice. You should not delay in making your decision.



Part B

Form 21
Rule 9.34

Opt out notice

Important: You should only complete this form if you do **NOT** want to participate in the Coles Class Action

No. VID1247 of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

Benjamin Glenn DEMERY

Applicant

COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708)

Respondent

To: The Registrar
Federal Court of Australia
Victorian District Registry
Owen Dixon Commonwealth Law Courts Building
Level 7, 305 William Street
Melbourne VIC 3000

[Name of group member], a group member in this representative proceeding, gives notice under section 33J of the *Federal Court of Australia Act 1976*, that [Name of group member] is opting out of the representative proceeding.

Date:

.....
Signed by [Name]
[Insert capacity eg group member / Lawyer
for the group member]

*****PLEASE ALSO COMPLETE CONTACT DETAILS OVER THE PAGE*****



Group Member details

Full Name

Address

Telephone

Email

If you are signing as the solicitor or representative of the Group Member

Full Name

Capacity

Address

Telephone

Email