

NOTICE OF FILING

Details of Filing

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File Title: BENJAMIN GLENN DEMERY 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.



Defence

No. VID 1247 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

Unless otherwise stated, this Defence adopts the headings and defined terms used in the Statement of Claim dated 12 November 2024, however in doing so, the Respondent (**Coles**) does not thereby make any admissions.

In answer to the allegations in the Statement of Claim, Coles states as follows.

A. INTRODUCTION AND OVERVIEW

1. As to paragraph 1, it:
 - (a) refers to and repeats paragraphs 3A to 3G below;
 - (b) otherwise denies the allegations in the paragraph and says further that Annexure A to the Statement of Claim lists 245 products (the **Relevant Products**) and 255 price change instances.
2. It denies the allegations in paragraph 2 and refers to and repeats paragraphs 15, 16 and 20(b) below.

Filed on behalf of (name & role of party)	Coles Supermarkets Australia Pty Ltd (ACN 004 189 708), the Respondent
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3. It denies that the Applicant or Group Members are entitled to the relief referred to in paragraph 3.

B. IMPORTANT FACTS

- 3A. During the Relevant Period, Coles and its suppliers were experiencing significant cost increases including, but not limited to, economy-wide inflation, a surge in global commodity prices, and in the cost of packaging, freight, utilities and international shipping.
- 3B. Coles' promotional activities:
- (a) are a complex exercise for both Coles and its suppliers, involving the promotion of many products across Coles' network of over 800 stores;
 - (b) generally, including in respect of Down Down program promotions (as described in paragraph 3C below), entail promotions being planned approximately six months in advance of the start of each half year;
 - (c) include promotions such as short-term discounts (known as specials), discounts on purchases of multiple units of a product within the same transaction (known as multi-saves) and longer-term discounts such as the Down Down program (as described in paragraph 3C below);
 - (d) typically involve suppliers submitting to Coles a proposed **promotional plan** in respect of their product or products for the upcoming half year period, which includes a proposed discount to the non-promotional price and the supplier's proposed promotional funding to support that proposed discount (also known as a **trade plan**);
 - (e) generally, trade plans are negotiated and agreed between Coles and its suppliers, including in respect of the promotional discount, the duration of any promotional discount and the funding of the promotional discount.
- 3C. The Down Down program:
- (a) was introduced by Coles in June 2010;
 - (b) is a national program, meaning that the same products are offered on Down Down across Coles' store network, with some exceptions;

- (c) comprises one aspect of Coles' promotional activities described in paragraph 3B above, being a promotional program by which Coles offers to customers a range of commonly purchased products at prices which are discounted from their non-promotional shelf price;
- (d) entails discounts for a longer duration compared to other promotional activities, such as weekly specials where products are periodically discounted for limited periods of time before returning to their non-promotional price.

3D. As to the setting of prices:

- (a) Coles is responsible for setting the prices of products sold in its stores;
- (b) in determining the prices of products, including as to whether, to what extent, and for how long products will be sold at promotional prices or non-promotional prices, Coles typically has regard to, among other things, the following matters:
 - (i) competitors' prices;
 - (ii) the list price (also referred to as the wholesale price) of products that suppliers charge Coles;
 - (iii) Coles' costs;
 - (iv) supplier's recommended retail price (**RRP**) for each relevant product, if any;
 - (v) the financial performance of the relevant product;
 - (vi) the nature of the product and the role of the product within the broader product category;
 - (vii) the trade plan submitted by suppliers;
 - (viii) the amount, if any, of promotional funding available from suppliers, the amount, if any, of promotional funding available from Coles, or any combination thereof;
- (c) in the vast majority of price change instances listed in Annexure A to the Statement of Claim, the Down Down promotion was funded by both Coles and the supplier.

3E. As to cost price alterations:

- (a) under Coles' Cost Price Alteration Policy (**CPA Policy**), where a supplier's production costs increase, they can seek to increase the list price that they charge to Coles for their products, by submitting to Coles a request for a CPA;
- (b) at or around the time any CPA request is made, the supplier may also submit an update to the trade plan and/or promotional plan for their product or products, including a revised RRP.

3F. During the Relevant Period:

- (a) Coles received a significant volume of CPA requests, across a range of categories, reflecting the significant increases in the suppliers' production costs;
- (b) Coles considered all CPA requests in line with the CPA Policy and discussed requests with the supplier;
- (c) in response to CPA requests, Coles together with the supplier reassessed the promotional and non-promotional pricing of the supplier's products, including in relation to products referred to in this proceeding as "Affected Products" or "Relevant Products", and including those products particularised at paragraph 18 of the Statement of Claim;
- (d) where a CPA was agreed for a Relevant Product participating in the Down Down program, Coles' practice was to remove the product from the Down Down program and sell the product at its new non-promotional price, alternatively described as its "white ticket" price, which was typically at or below the new RRP provided by the supplier;
- (e) in the circumstances described in sub-paragraph (d) above, the Relevant Products were offered for sale and sold at the non-promotional price in substantial volumes and for up to six weeks (depending on the product), and the sale of Relevant Products at their non-promotional price was a sale at a genuine, undiscounted price;
- (f) if Coles and the supplier had agreed for a Relevant Product to be included again in the Down Down program, the non-promotional price would later be discounted to a new promotional price, and the product would be promoted as part of the Down Down program;

- (g) in the circumstances described in sub-paragraph (f) above, the new promotional price was a genuine and non-illusory discount from its prior non-promotional shelf price.

3G. Further to paragraph 3F, during the Relevant Period:

- (a) Coles also received requests from suppliers for changes to promotional funding arrangements;
- (b) in response to requests for changes to promotional funding arrangements, Coles together with the supplier reassessed the promotional and non-promotional pricing of the supplier's products, including in relation to products referred to in this proceeding as Affected Products or Relevant Products;
- (c) if the supplier had requested that, due to production cost increases, the supplier's promotional funding for a Relevant Product participating in the Down Down program, be decreased or that the Relevant Product be removed from promotion, Coles' practice was to remove the product from the Down Down program and sell it at its genuine undiscounted price, which was generally at the supplier's RRP;
- (d) in the circumstances described in sub-paragraph (c) above, the Relevant Products were offered for sale and sold at the non-promotional price in substantial volumes and for up to four weeks or more (depending on the product), and the sale of Relevant Products at their non-promotional price was a sale at a genuine, undiscounted price;
- (e) if Coles and the supplier had agreed for a Relevant Product to be included again in the Down Down program, the non-promotional price would later be discounted to a new promotional price, and the product would be promoted as part of the Down Down program;
- (f) in the circumstances described in sub-paragraph (e) above, the new promotional price was a genuine and non-illusory discount from its prior non-promotional price.

4. As to paragraph 4, it:

- (a) says that Coles operates more than 800 stores throughout Australia;
- (b) otherwise admits the allegations in the paragraph.

B.1 The 'Down Down' program

5. As to paragraph 5, it:

- (a) says that, at all material times, Coles priced its products by reference to a number of distinct geographic regions in Australia;
- (b) says that, in practice, the majority of products or product categories had uniform retail prices across Australia;
- (c) says further that, the retail prices that Coles charged were consistent across Coles' physical stores and Coles Online, subject to limited exceptions;
- (d) otherwise denies the allegations in the paragraph.

6. As to paragraph 6, it:

- (a) refers to and repeats paragraph 5 above;
- (b) otherwise admits the allegations in the paragraph.

7. As to paragraph 7, it:

- (a) refers to and repeats paragraphs 3B and 3C above;
- (b) otherwise admits the allegations in the paragraph.

8. As to paragraph 8, it:

- (a) refers to and repeats paragraphs 3A to 3G above;
- (b) otherwise denies the allegations in the paragraph.

9. As to paragraph 9, it:

- (a) refers to and repeats paragraphs 3B and 3C above;
- (b) otherwise denies the allegations in the paragraph.

10. As to paragraph 10, it:

- (a) refers to and repeats paragraphs 3A to 3G above;
- (b) otherwise admits the allegations in the paragraph.

11. It admits the allegations in paragraph 11.
12. It admits the allegations in paragraph 12.
13. As to paragraph 13, it:
 - (a) admits that the precise design of Down Down Tickets varied throughout the Relevant Period and depending on whether it was a physical ticket displayed in-store or a digital ticket displayed online;
 - (b) refers to and repeats paragraph 14 below;
 - (c) otherwise admits the allegations in the paragraph.

B.2 The alleged 'Down Down' Representation

14. As to paragraph 14, it:
 - (a) admits that throughout the Relevant Period, the Down Down Tickets in physical stores and online, contained:
 - (i) the words "Down Down";
 - (ii) details of the relevant product including its name;
 - (iii) the Down Down promotional price of the relevant product;
 - (iv) typically, but not always, a "was" price for the relevant product, being the price described at sub-paragraph 16(b)(i)(B) below, and the date at which the product was last offered for sale at that price;
 - (b) otherwise denies the allegations in the paragraph.
15. As to paragraph 15, it:
 - (a) denies that the Down Down Tickets conveyed the Down Down Representation;
 - (b) refers to and repeats sub-paragraphs 3F(d) to 3F(g) and 3G(c) to 3G(e) above and 16(b) below;
 - (c) says that Down Down Tickets accurately conveyed that the price of the product had been reduced to the Down Down Price from its previous "white ticket" non-promotional price;

(d) otherwise denies the allegations in the paragraph.

B.3 The alleged falsity of the representation

16. As to paragraph 16, it:

- (a) it refers to and repeats paragraphs 1(b) and 3A to 3G above;
- (b) says that:
 - (i) the Statement of Claim refers to three different prices in respect of the Relevant Products, being:
 - (A) the first price (**Price 1**), described in the Statement of Claim as the Previous Long-Term Regular Price, which was, in the majority of cases, a promotional price, such as a Down Down program price or a different promotional price;
 - (B) the second price (**Price 2**), described in the Statement of Claim as the Spike Price, which was the new non-promotional price, being the "was" price on the Down Down tickets, introduced in the circumstances described in sub-paragraphs 3F(d) and 3G(c) above;
 - (C) the third price (**Price 3**), described in the Statement of Claim as the 'Down Down' Price, which was the new promotional price introduced in the circumstances described in sub-paragraphs 3F(f) and 3G(e) above;
 - (ii) the period of time over which Relevant Products were offered for sale at Price 2, relative to the period of time over which they had previously been offered for sale at Price 1, is irrelevant to whether, and incapable of establishing that, customers did not receive a genuine discount when those products were purchased at Price 3;
 - (iii) comparing the prices described as Price 1 and Price 3 is inapt because Price 1 is superseded by the impact of cost price increases during the Relevant Period;
- (c) otherwise denies that the Down Down Representation, if made (which is denied), was false or misleading.

17. As to paragraph 17, it:

- (a) refers to and repeats sub-paragraphs 3F(d) to 3F(g) and 3G(c) to 3G(f) and 16(b) above;
- (b) otherwise denies the allegations in the paragraph.

C. THE APPLICANT'S AND GROUP MEMBERS' CLAIM FOR LOSS OR DAMAGE

C.1 The Applicant's purchases of one or more Affected Products

18. As to paragraph 18, it:

- (a) admits that the Applicant purchased:
 - (i) 1 x Colgate Total Original Toothpaste 200g from Coles Online on 3 August 2022 for \$6.00;
 - (ii) 1x Rexona Women's Classic Antiperspirant Aerosol Deodorant 250ml from Coles Online on 27 October 2022 for \$6.00;
 - (iii) 1 x Arnott's Shapes Multipack Variety 15 Pack 375g from Coles Online on 23 April 2023 for \$5.50;
- (b) refers to and repeats paragraph 15 above;
- (c) otherwise does not know and therefore cannot admit the allegations in the paragraph.

19. It denies the allegations in paragraph 19 and refers to and repeats paragraph 15 above.

20. As to paragraph 20, it:

- (a) refers to and repeats paragraphs 15 and 16 above;
- (b) denies that the discount reflected by Price 3 was illusory;
- (c) otherwise denies the allegations in the paragraph.

C.2 The Group Members' purchases of Affected Products

21. It admits the allegations in paragraph 21 by reason of the definition of Group Member in paragraph 3 of the Statement of Claim.

22. It denies the allegations in paragraph 22 and refers to and repeats paragraph 15 above.

- 23. It denies the allegations in paragraph 23 and refers to and repeats paragraph 15 above.
- 24. It denies the allegations in paragraph 24 and refers to and repeats paragraphs 15, 16 and 20(b) above.

C.3 The Applicant's claim for loss or damage

- 25. It denies the allegations in paragraph 25 and refers to and repeats paragraphs 15 and 16 above.

C.4 Group Members' claim for loss or damage

- 26. It denies the allegations in paragraph 26 and refers to and repeats paragraphs 15 and 16 above.

D. PRIMARY LEGAL GROUNDS FOR RELIEF CLAIMED

- 27. It denies the allegations in paragraph 27 and refers to and repeats paragraphs 15 and 16 above.
- 28. It does not plead to paragraph 28, as it contains no allegations against it.

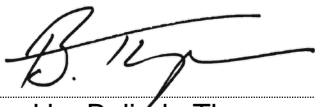
E. COMMON QUESTIONS OF LAW OR FACT

- 29. It does not plead to paragraph 29, as it contains no allegations against it.

F. RELIEF CLAIMED

- 30. It denies that the Applicant or Group Members are entitled to the relief referred to in paragraph 30.

Date: 4 April 2025



Signed by Belinda Thompson
Lawyer for the Respondent

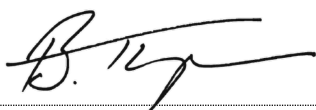
This pleading was prepared by Jonathan Kirkwood and Jacob Waller, counsel for the Respondent.

Certificate of lawyer

I Belinda Thompson certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 4 April 2025

A handwritten signature in black ink, appearing to read 'B. Thompson', written over a horizontal dotted line.

Signed by Belinda Thompson
Lawyer for the Respondent