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Down, Down, and Out: A win for the ACCC in Coles consumer law decision

On Thursday 14 May, Justice Michael O'Bryan of the Federal Court found that Coles supermarkets' 'Down, Down' promotions were not genuine discounts, and therefore amounted to misleading, deceptive conduct under the Australian Consumer Law. Although this high-profile decision does not break new legal ground, it nonetheless offers important practical guidance for retail businesses.

Background

Coles is one of Australia's two largest supermarkets, and in 2010 initiated a well-known promotional program which featured the 'Down down, prices are down' jingle, as well as the infamous red hand pointing in the direction of products' prices: Down, down.

Importantly, the promotion in issue involved 'was/is pricing', (also known as 'strikethrough' or 'markdown' pricing) which highlights the savings that shoppers make by contrasting a product's earlier ('was') price with the discounted Down Down ('is') price.

Ultimately, Justice O'Bryan held that the Down Down promotions (in relation to such ordinary household goods as soft drink, dog food, paper towel, and deodorant) did not amount to genuine discounts, as the 'was' price had not been maintained for a reasonable period before the introduction of the 'is' price.[1] Coles misled shoppers in the majority of instances considered into believing that they were obtaining genuine discounts, when they were not. On this basis, the ACCC successfully argued that Coles had:[2]

- Engaged in conduct (in trade or commerce) that was misleading, in contravention of s 18(1) of the *Australian Consumer Law*; and
- Conveyed misleading representations with respect to the was/is prices of the affected products, in contravention of s 29(1)(i) of the *Australian Consumer Law*.

Coles' submissions

On the other hand, Coles argued that the 'was' prices were maintained so briefly due to increased financial pressure stemming from surging global commodity prices, and growing costs associated with packaging, freight, utilities and shipping.

Coles also unsuccessfully argued that the Down Down prices were not misleading: After all, the 'is' prices were, *in a sense*, lower than the 'was' prices (even if, as in many instances, the 'was' price had been pre-emptively increased to higher than the regular price).

The relevant legal principles, and the Federal Court's findings

Accordingly, the Court had to assess whether the 'is' price was a *genuine discount*, or whether the Down Down program amounted to contraventions of ss 18 and 29.

Although s 18 refers to *misleading* and *deceptive conduct* and s 29 refers to *false* or *misleading representations*, Justice O'Bryan held that, altogether, the two provisions apply essentially the same test: "In most cases, there is no meaningful difference between the words 'misleading or deceptive' in s 18 and 'false or misleading' in s 29."[3]

In considering ss 18 and 29, Justice O'Bryan applied the principles established by the High Court in *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8, [80]-[84] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ), which involve four key questions of fact:[4]

1. **What is the alleged conduct?**

As noted, Coles' conduct was the promotion of Down Down prices, which contrasted the 'was' price with the 'is' price for a range of household products.

2. **Does the evidence establish that the person engaged in that conduct in trade or commerce?**

This was a similarly uncontroversial inquiry; Coles' Down Down promotion was clearly conduct in trade or commerce.

3. **What meaning did that conduct convey to its intended audience?**

However, assessing audience and meaning was somewhat more complicated. Given Coles' ubiquity, their audience is shoppers "from all walks of life", and is "as varied as is the population of Australia."[5] Justice O'Bryan similarly acknowledged that "ordinary consumers… would not undertake an intellectualised… analysis of the [Down Down] ticket, but rather would absorb the immediate and dominant messages" of the apparent discount.[6] Notably, the Court rejected Coles' submission that everyday shoppers are necessarily "commercially astute" and aware of discount behaviour. This is a timely reminder of the *Australian Consumer Law*'s key purpose: Protecting consumers from unfair, unscrupulous trading practices.[7]

In this sense, the meaning conveyed to Coles shoppers was that, plainly enough, the Down Down tickets represented a genuine discount.

4. **Does the conduct, in light of that meaning, meet the statutory tests for 'misleading or deceptive… or likely to mislead or deceive'?**

Justice O'Bryan held that the Down Down promotions were misleading (in contravention of ss 18(1), 29(1)(i) *Australian Consumer* Law) because the products had not been sold at the 'was' price for a reasonable period before being discounted to the 'is' price.[8] Whilst the promotion was commercially acceptable, selling the relevant products at the 'was' price for *less than twelve weeks* (ie; a reasonable period) mislead ordinary consumers into believing that the Down Down 'is' price was a genuine discount (when it was not).[9] Although Coles' internal policies initially required that products be sold at the 'was' price for a minimum twelve week period, this policy was eventually relaxed to *four* weeks following increased overheads and perceived competitive pressure from Woolworths.[10]

It is important to recognise that this conclusion is relatively *narrow* – Twelve weeks is not a 'magic number' or a rule, and what constitutes a 'reasonable period' of price stability (at the 'was' price) will vary from product to product and on the facts of a case. After all, this case only considered manufactured, packaged grocery products; Justice O'Bryan emphasised that a different conclusion would likely be drawn for fresh food products, for example.[11] Whether a discount is 'genuine' will turn closely on each scenario's facts.

Orders as to penalties are still pending, but Coles could theoretically receive a maximum fine of up to $650 million (at $50 million for each of the 13 breaches), reflecting the range of products that were not genuinely discounted, the extended period of the Down Down promotion, and the desire to send an industry-wide message. While a much *smaller* penalty is likely, this outcome does not bode well for Woolworths (who are subject to similar ACCC proceedings) if they have similarly contravened their own policies regarding reasonable minimum periods for price establishment.

Conclusion

While this decision represents a symbolic victory for the ACCC and consumers alike, its importance should not be overstated: It has not significantly changed the law, and largely confirms what shoppers had already felt for quite some time.

All the same, the decision reminds all business-owners of the caution that must be exercised when initiating 'was/is' promotions: Consumer perceptions of discount behaviour, 'reasonable time' for price establishment, and price stability are all of paramount importance, and will vary from product to product. It also affirms that the *Australian Consumer Law* is, perhaps unsurprisingly, geared to the interests of consumers.

Key Takeaways

- Business-owners who are planning on introducing 'was/is' promotions must be careful to ensure that they are offering a genuine discount, by offering products at the relevant price-points for sufficiently long enough. However, twelve weeks isn't necessarily the 'magic number': Justice O'Bryan emphasised that the necessary timeframe for price stability will vary depending on the products sold.
- It is vital that businesses exercise caution when discounting their products, particularly at a time when unstable market forces can unexpectedly and suddenly impact overheads, lead times, and commercial interests.
- Businesses should seek guidance on their responses to perceived competition, particularly where it might involve modifying internal policies, discount behaviours, or promotional mechanics.

What this means in practice going forward

- Short "price establishment" periods, for example 2 to 4 weeks, are now high risk.
- Internal pricing policies of businesses will be scrutinised.
- Literal truth that the "price was higher last week" is not enough. Regard will be had to the overall impression created in the minds of consumers.
- Documentation of pricing decisions (cost increases, supplier pass-throughs) will be critical in defending claims.

Piper Alderman have extensive experience advising companies on a range of issues involving competition law. If you are considering initiating a promotional program, it is important that you think carefully about how it is implemented, and the impact it will have on your consumers and competitors.

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[1] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [42], [15], [5].

[2] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [518], [6].

[3] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [9], [366].

[4] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [9], [36].

[5] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [409].

[6] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [427].

[7] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [409].

[8] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [521].

[9] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [458].

[10] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [457].

[11] *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2026] FCA 598, [17], [40]-[42].