

The Australian Competition and Consumer Commission

Press Release

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Court finds Coles engaged in unconscionable conduct and orders Coles pay \$10 million penalties

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The Federal Court has today, by consent, made declarations in two proceedings instituted by the ACCC that Coles Supermarkets Australia Pty Ltd engaged in unconscionable conduct in 2011 in its dealings with certain suppliers.

The Court has also ordered Coles pay combined pecuniary penalties of \$10 million and costs.

Coles will also enter a court enforceable undertaking to the ACCC to establish a formal process to provide options for redress for over 200 suppliers referred to in the proceedings.

In her judgment, Justice Gordon said:

“Coles’ misconduct was serious, deliberate and repeated. Coles misused its bargaining power. Its conduct was ‘not done in good conscience’. It was contrary to conscience. Coles treated its suppliers in a manner not consistent with acceptable business and social standards which apply to commercial dealings. Coles demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply with the demand. Coles withheld money from suppliers it had no right to withhold.

“Coles’ practices, demands and threats were deliberate, orchestrated and relentless.”

“Coles’ conduct was of a kind which merits severe penalty. But for Coles making the admissions it has now made and acknowledging the gravity of its contravening conduct, the conduct and circumstances in which it was committed would have warranted imposing penalties at or close to the maximum the law permits”.

ACCC Chairman Rod Sims said: “This is a very significant outcome for the supermarket sector and the business community in general. Indeed this is one of the first findings of unconscionable conduct in a business-to-business context under the Australian Consumer Law.

“Much more important is the magnitude of the penalties imposed and the recognition by the Court that Coles’ conduct in its dealings with suppliers was unconscionable and in contravention of the Australian Consumer Law. This should send a clear signal to larger businesses generally about appropriate business conduct in commercial dealings with smaller suppliers,” said Mr Sims.

The Court’s decision followed the ACCC’s long-running investigation into supplier complaints in the supermarket sector.

“This investigation was commenced after the ACCC urged suppliers to come forward to the ACCC in confidence to report their concerns about dealings with the major supermarket chains; the Court outcome has vindicated that approach.

““Another important part of the resolution of both sets of the proceedings was the establishment of the formal process to secure redress for the more than 200 suppliers impacted. Securing redress by way of a statutory undertaking for suppliers referred to in the proceedings was central to the settlement,” said Mr Sims.

“The Court decision provides a clear indication of the types of conduct that are unacceptable in commercial transactions, and gives guidance as to the standards to which businesses should conform in their dealings with other businesses, and indeed, all consumers”.

The ACCC acknowledged Coles' co-operation in resolving the proceedings and its willingness to make admissions and consent to Court orders.

The ACCC also noted recent public statements from Coles Managing Director John Durkan, who has said: "Coles unconditionally apologises and accepts full responsibility for its actions in these supplier dealings".

Mr Sims said "The response from Coles and Mr Durkan is an appropriate and responsible corporate response to the Court outcome".

The Court orders arise out of two sets of proceedings instituted by the ACCC earlier this year alleging that Coles engaged in unconscionable conduct in its dealings with suppliers in 2011 - the 'ARC proceeding' filed in May, and the 'claims proceeding' filed in October.

Background

The ARC proceedings

The proceedings related to Coles' Active Retail Collaboration (ARC) program. The ACCC alleged that the ARC program was developed in 2011 to improve Coles' earnings by the introduction of continuing rebates into the trading terms of suppliers based on purported benefits to suppliers that Coles asserted had resulted from changes Coles had made to its supply chain.

The Court made declarations that Coles engaged in unconscionable conduct in the implementation of the ARC program in respect of certain suppliers by taking steps, when those suppliers declined to make payment of the ARC rebate, including threats of the following commercial consequences:

- Coles would cease giving support to the supplier from Coles' replenishers;
- Coles would provide certain ranging information requested by the Supplier but only after the supplier agreed to pay the ongoing ARC rebate;
- a potential impact on Coles' decision about the ranging of the supplier's products;
- risks to promotional activity;
- classification as a 'transactional' supplier, which may have implications for ranging;
- Coles would not acquire new products from the supplier;
- Coles would not provide the supplier with forecasting information that it had been previously provided with;
- Coles would not meet with the supplier about its business; and
- Coles would not continue contractual negotiations then on foot with the supplier

in circumstances including:

- Coles having a greater bargaining position relative to the supplier; and
- suppliers not being provided with adequate information, and being pressured to consider or assess the value, if any, of the purported benefits of the ARC program to their business within a short period of time.

The claims proceedings

In the second set of proceedings, the ACCC alleged that in 2011 Coles pursued some suppliers for a variety of payments, including payments for 'profit gaps', waste and fines or penalties for alleged short or late deliveries by suppliers.

In relation to the second proceedings, the Court made declarations that Coles engaged in unconscionable conduct in circumstances where it had greater bargaining power in relation to certain suppliers, including, by:

- demanding payments for purported profit gaps from a supplier where this had not been the subject of prior agreement between Coles and the supplier, and the payments were attributable to issues that arose before the supplier owned the relevant product;
- demanding from a supplier a retrospective payment for waste and requiring a response within hours where the payment was not the subject of prior agreement, and using a purported profit gap claim as leverage in the negotiation;
- refusing to cease deducting and retaining payments under an agreement with a supplier for deferred rebates which was due to expire;

- demanding and processing a payment for a purported profit gap where this was outside terms and conditions and without the agreement of the supplier, and retaining and refusing to repay the money to the supplier;
- requiring agreement from two suppliers to pay for 100% of the cost of waste in relation to their products in circumstances where Coles was aware that the suppliers were in financial difficulty and where Coles did not take into account:
 - the suppliers' explanation about the cause of the waste (from the first supplier); or
 - the suppliers explanation that its products were not appropriate for a 100% waste agreement (from the second supplier);
- requiring and accepting payment from a supplier for a late delivery where this had not been the subject of prior agreement with the supplier; and
- imposing penalties for short deliveries of a supplier's products without notice to, or prior agreement with, the supplier and, refusing to repay to the supplier, the penalties imposed.

Court enforceable undertaking

The court enforceable undertaking given to the ACCC by Coles provides for the establishment of a formal process overseen by an Independent Arbiter, Mr Jeff Kennett AC, that will allow for a review of the eligibility of:

- over 200 smaller suppliers (categorised by Coles as Tier 3 Suppliers) to obtain refunds of any amounts by which their ARC rebate payments exceeded the benefits which they obtained from the ARC program; and
- suppliers referred to in the second proceedings in respect of which Coles has made admissions in the relevant Statement of Agreed Facts and Admissions filed with the Court to obtain possible payments.

The undertaking is available on [the public register](#).

This media release is available at the ACCC website:

<https://www.accc.gov.au/media-release/court-finds-coles-engaged-in-unconscionable-conduct-and-orders-coles-pay-10-million-penalties>