FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited [2015] FCA 330

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| Citation: | Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited [2015] FCA 330 |
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| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v COLES SUPERMARKETS AUSTRALIA PTY LIMITED** |
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| File number: | VID 475 of 2013 |
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| Judge: | **ALLSOP CJ** |
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| Date of judgment: | 10 April 2015 |
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| Catchwords: | **CONSUMER LAW –** pecuniary penalties – relevant matters – loss and damage – whether absence of evidence mitigating factor – relevance of purpose – Australian Consumer Law s 224(2)(a)  **CONSUMER LAW** – pecuniary penalties – relevant matters – finding by a court that offender had previously engaged in similar conduct – whether breach of Australian Consumer Law, Part 2-2 similar to breach of Part 3-1 |
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| Legislation: | *Australian Consumer Law* ss 18, 21, 22, 29, 33, 224, Part 2-2, Part 3-1, Part 5-2  *Competition and Consumer Act 2010* (Cth) Sch 2  *Evidence Act 1995* (Cth)  *Fair Work Act 2009* (Cth) s 557  *Spam Act 2003* (Cth) s 25 |
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| Cases cited: | *Australian Competition and Consumer Commission v Coles Supermarkets (Australia) Pty Limited* [2014] FCA 634; 317 ALR 73  *Australian Competition and Consumer Commission v Coles Supermarkets (Australia) Pty Limited (No 2)* [2014] FCA 1022  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405  *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (in liquidation)* [2007] FCAFC 146; 161 FCR 513  *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274  *Australian Competition and Consumer Commission v Global One Mobile Entertainment Limited* [2011] FCA 393  *Australian Competition and Consumer Commission v Leahy (No 3)* [2005] FCA 265; 215 ALR 301  *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2011] FCA 382; 279 ALR 609  *Australian Competition and Consumer Commission v Reebok Australia Pty Ltd* [2015] FCA 83  *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; 282 ALR 246  *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2010] FCA 790; 188 FCR 238  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640  *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 5)* [2013] FCA 1109  *Barbaro v The Queen* [2014] HCA 2; 305 ALR 323  *Director of Public Prosecutions v De La Rosa* [2010] NSWCCA 194; 79 NSWLR 1  *Hili v The Queen* [2010] HCA 45; 242 CLR 520  *Markarian v The Queen* [2005] HCA 25; 228 CLR 357  *Matthews v The Queen* [2014] VSCA 291  *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249  *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 190; 210 FCR 277  *Trade Practices Commission v CSR Limited* [1991] ATPR 41-076  *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296 |
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| Date of hearing: | 24 February 2014 |
|  |  |
| Place: | Melbourne |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 104 |
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| Solicitor for the Respondent: | King & Wood Mallesons |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 475 of 2013 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | COLES SUPERMARKETS AUSTRALIA PTY LIMITED Respondent |

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| JUDGE: | ALLSOP CJ |
| DATE OF ORDER: | 10 APRIL 2015 |
| WHERE MADE: | SYDNEY (heard in melbourne) |

THE COURT ORDERS THAT:

1. In respect of the contraventions of s 29(1)(a) and s 33 of the *Australian Consumer Law* (as set out in *Competition and Consumer Act 2010* (Cth), Sch 2) the subject of declarations 1 and 2 made by the Court on 29 September 2014, the respondent pay to the Commonwealth within 30 days the sum of $2.5 million by way of pecuniary penalty under s 224(1) of the *Australian Consumer Law*.
2. The respondent pay the costs of the applicant in respect of the balance of the proceedings after the liability hearing.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant |
| AND: | COLES SUPERMARKETS AUSTRALIA PTY LIMITED  Respondent |

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| JUDGE: | ALLSOP CJ |
| DATE: | 10 April 2015 |
| PLACE: | SYDNEY (HEARD IN MELBOURNE) |

**REASONS FOR JUDGMENT**

1. In reasons delivered on 18 June 2014, I concluded that the respondent, Coles Supermarkets Australia Pty Limited (**Coles**), had engaged in misleading conduct and thereby contravened s 18(1), s 29(1)(a) and s 33 of the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) (**ACL**): *Australian Competition and Consumer Commission v Coles Supermarkets (Australia) Pty Limited* [2014] FCA 634; 317 ALR 73 (the **liability judgment**). Those contraventions arose from the use of the expressions “Baked Today, Sold Today”, “Freshly Baked”, “Baked Fresh” and “Freshly Baked In-Store” in advertising certain bread products which had been partially baked off-site, snap frozen and then baked to completion at a Coles Supermarket.
2. On 29 September 2014, orders and declarations were made giving effect to those reasons: *Australian Competition and Consumer Commission v Coles Supermarkets (Australia) Pty Limited (No 2)* [2014] FCA 1022. It is not necessary to refer to these latter reasons in any detail. The conclusions reached in the liability judgment are captured in the terms of the declarations made as follows:

**THE COURT MAKES THE FOLLOWING DECLARATIONS:**

1. A declaration that the respondent (Coles), from 1 July 2012, by supplying in Coles supermarkets which have an in-store bakery (Coles Bakery Stores) bakery products in packaging displaying the words “Baked Today, Sold Today”, represented to customers in its supermarkets in Australia that the products contained in the packaging were entirely baked on the day on which they were offered for sale, in circumstances where only some baking of certain products contained in that packaging had taken place on the day on which they were offered for sale, and in relation to these products Coles thereby:

* 1. engaged in conduct in trade or commerce that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18 of the *Competition and Consumer Act 2010* (Cth), Sch 2 (*Australian Consumer Law*) (**ACL)**;

* 1. made a representation in trade or commerce, in connection with the supply or possible supply or promotion of the supply of goods that was false or misleading as to the history of the goods in contravention of section 29(1)(a) of the ACL; and
  2. engaged in conduct in trade or commerce that was liable to mislead the public as to the nature, the manufacturing process, and the characteristics of goods in contravention of section 33 of the ACL.

1. A declaration that Coles, from 1 July 2012, by supplying in Coles Bakery Stores bakery products in packaging displaying the words “Freshly Baked In-Store” and by displaying signage in Coles Bakery Stores which displayed the words “Freshly Baked” and “Baked Fresh” represented to customers in its supermarkets in Australia that the products contained in the packaging and the products offered for sale proximate to the signage were baked from fresh dough and that they had been entirely baked on the day on which they were offered for sale and that they had been entirely baked in the Coles Bakery Store in which they were sold on the day on which they were offered for sale, in circumstances where only some baking of certain products contained in that packaging and the products proximate to the signage had taken place in the Coles Bakery Store in which they were sold on the day on which they were offered for sale and that baking was of frozen par-baked product, not fresh dough, and Coles thereby:

(a) engaged in conduct in trade or commerce that was misleading or deceptive or likely to mislead or deceive, in contravention of section 18 of the ACL;

(b) made a representation in trade or commerce, in connection with the supply or possible supply or promotion of the supply of goods that was false or misleading as to the history of the goods in contravention of section 29(1)(a) of the ACL; and

(c) engaged in conduct in trade or commerce that was liable to mislead the public as to the nature, the manufacturing process, and the characteristics of goods in contravention of section 33 of the ACL.

1. In addition to those declarations, orders were made that Coles be restrained from engaging in further conduct of the character described in the declarations and that it display corrective notices in its stores and on its website. The question of pecuniary penalties for the contraventions of ss 29(1) and 33 of the ACL was later set down for hearing. That hearing took place on 24 February 2015.

# Penalty principles

1. The principles governing the imposition of a penalty were not in dispute. The Court is empowered, under s 224 of the ACL, to order a person to pay to the Commonwealth “such pecuniary penalty, in respect of each act or omission … to which [s 224] applies, as the court determines to be appropriate”. For present purposes, that provision applies only to the contraventions of ss 29(1)(a) and 33 as they fall within Part 3-1 of the ACL: s 224(1)(a)(ii).
2. As a corporate respondent, the maximum penalty that may be imposed on Coles for each contravention is $1.1 million: the ACL, s 224(3), Item 2.
3. The process of arriving at the appropriate sentence for a criminal offence involves an intuitive or instinctive synthesis of all relevant factors: *Markarian v The Queen* [2005] HCA 25; 228 CLR 357. The approach set out by the High Court in *Markarian* can be taken to be applicable to civil penalty proceedings of this nature: *TPG Internet Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 190; 210 FCR 277 at 294 [145]; *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274 at [103]; *Australian Competition and Consumer Commission v Reebok Australia Pty Ltd* [2015] FCA 83 at [116]. The setting of the penalty is a discretionary judgment that does not involve assessing with any precision the “range” within which the conduct falls or by applying incremental deductions from the maximum penalty. Nonetheless, the maximum penalty must be given due regard because it is an expression of the legislature’s policy concerning the seriousness of the proscribed conduct. It also permits comparison between the worst possible case and the case the court is being asked to address and thus provides a yardstick: *Markarian* at 372 [31].
4. In setting the penalty, s 224(2) requires regard to be had to all relevant matters including:

(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and

(b) the circumstances in which the act or omission took place; and

(c) whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.

1. A convenient summary of the other matters that will usually be relevant in such cases can be found in the judgment of Perram J in *Australian Competition and Consumer Commission v Singtel Optus Pty Ltd (No 4)* [2011] FCA 761; 282 ALR 246 at 250 [11]:
   * 1. The size of the contravening company.
     2. The deliberateness of the contravention and the period over which it extended.
     3. Whether the contravention arose out of the conduct of senior management of the contravenor or at some lower level.
     4. Whether the contravener has a corporate culture conducive to compliance with the Act (or the new Australian Competition and Consumer Law) as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention.
     5. Whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention.
     6. Whether the contravener has engaged in similar conduct in the past.
     7. The financial position of the contravener.
     8. Whether the contravening conduct was systematic, deliberate or covert.
2. These factors can be traced back to the decision of French J (as the Chief Justice then was) in *Trade Practices Commission v CSR Limited* [1991] ATPR 41-076 at 52,152-52,153 and have been developed, in particular, through the decisions of the Full Court in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 292-294; and *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (in liquidation)* [2007] FCAFC 146; 161 FCR 513 at 527 [58]. There is a degree of overlap between these factors and the mandatory considerations in s 224(2). These factors do not necessarily exhaust potentially relevant considerations; nor do they regiment the discretionary sentencing function.
3. As both parties accepted, deterrence (both general and specific) is a primary concern of the Court in setting an appropriate pecuniary penalty: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 at 659 [65].
4. The ACCC adopted the position that the High Court’s decision in *Barbaro v The Queen* [2014] HCA 2; 305 ALR 323 had no impact on its ability to make submissions as to the appropriate range and penalty in proceedings for a civil penalty – as opposed to a criminal sentencing. In doing so, it relied upon the decision of the Victorian Court of Appeal (constituted by five judges) in *Matthews v The Queen* [2014] VSCA 291 at [29] where the majority (Warren CJ, Nettle JA (as his Honour then was) and RedlichJA) expressed the *obiter* view that the comments in *Barbaro* were inapplicable to proceedings for civil penalties. In the absence of objection from Coles, the ACCC was permitted to make submissions of that nature. I raised the matter directly with the parties in open court. Coles accepted the approach of the ACCC. As the matter was not argued before me, I do not express any view as to the correctness of their Honour’s views in *Matthews* and I note the conflicting decisions of single judges of this court (see *Australian Competition and Consumer Competition v Reebok Australia Pty Ltd* at [121] and the cases cited therein).

# The Evidence Relied Upon

1. The ACCC relied upon the evidence of a solicitor, Mr Alexander Daniel Wolff whose affidavit, sworn 14 November 2014, was read without objection. Mr Wolff was not required for cross-examination. Some reliance was also placed on the documents tendered at the liability hearing, referred to at [63]-[87] of the liability judgment, to the extent that they were admitted at that stage. I will refer to some of these documents later; and to the basis upon which some were rejected.
2. Coles read affidavits of Mr Mark Simon Watson (Category Manager, In-store Bread for Coles), Mr Brant Charman (in-house counsel for Wesfarmers – Coles’ parent company) and Ms Carly Richardson (a solicitor). One objection was taken, unsuccessfully, to a number of paragraphs of Mr Watson’s affidavit sworn 16 December 2014. Mr Watson was also cross-examined by the ACCC. In addition, Coles relied upon affidavits of Ms Tahlia Brysha-Pullen, Mr Hael Musa, Ms Jacqueline Healing and Mr Steven Carroll that were read at the liability stage of the proceeding (and taken as read in this hearing).
3. The agreed statement of facts tendered at the liability hearing was also relied upon by both parties.

# submissions

## Quantifying the contraventions – maximum penalty and the course of conduct principle

1. Section 224 of the ACL permits the imposition of a pecuniary penalty for “each act or omission” which constitutes a contravention. This is qualified by s 224(4) which prohibits the imposition of multiple penalties for the same conduct – even where that conduct constitutes a breach of one or more the provisions of the ACL in respect of which a pecuniary penalty may be imposed.
2. The ACL does not, however, contain any express limitation requiring a course of conduct potentially involving multiple acts that contravened the ACL to be treated as a single contravention, such as s 557(1) of the *Fair Work Act 2009* (Cth), or to otherwise limit the penalty payable such as s 25(3)(b) of the *Spam Act 2003* (Cth).
3. It was submitted by the ACCC, and conceded by Coles, that if the sales of par-baked products were taken to be the yardstick by which the contraventions were measured, there would be some 85 million contraventions. If one adopts the remarks of Tracey J in *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 5)* [2013] FCA 1109 at [23] (before his Honour identified the caution demanded by the authorities), it may be the case that every time a misleading representation is put on public display there is an effective contravention of the ACL. Using this approach, the number of contraventions was well in excess of the 85 million figure. The ACCC did not seek to contend that the Court should identify a precise number of contraventions for the purposes of determining the maximum penalty that could be imposed in aggregate. Coles submitted that the contraventions formed part of a single course of conduct; it accepted, however, that this did not operate to limit the maximum penalty to $1.1 million, but rather to “frame the analysis of the appropriate penalty”. The ACCC accepted that the task of the Court was to identify a figure that was considered appropriate as punishment for multiple offences – each of those offences having a nominal maximum penalty of $1.1 million.
4. Put simply, the position of the parties was that there were so many contraventions it was not helpful to seek to make a finding as to the precise number or to calculate a maximum aggregate penalty by reference to such a number. Rather, the better approach was to determine the penalty assisted by understanding the extent to which there was a certain number of courses of conduct leading to potentially a huge number of contraventions. The instinctive synthesis endorsed by the High Court in *Markarian* should then be conducted by reference to a recognition of the multiplicity of breaches, a broad view of the course or courses of conduct, and an assessment of the overall extent and seriousness of offending, together with all other relevant considerations, in particular deterrence. The comments of the Full Court in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at 262-263 [52]-[55] support this approach.
5. The ACCC also placed some reliance on the comments of the High Court in *TPG* at [61], where the majority found that the medium of communication and the different messaging used in an advertising campaign were both matters which could be taken into account in determining the different courses of conduct giving rise to separate contraventions of the ACL. The ACCC submitted that it was appropriate to find that Coles’ contraventions entailed four courses of conduct based upon the four different combinations of the impugned phrases that could be used and the manner in which they were communicated to the public. It posited the following distinct contravening courses of conduct:
   1. packaging stating “Baked Today, Sold Today”;
   2. packaging stating “Freshly Baked In-Store”;
   3. packaging stating both “Baked Today, Sold Today” and “Freshly Baked In-Store”; and
   4. signage stating “Freshly Baked” and “Baked Fresh”.
6. Coles’ approach was to argue that the use of the impugned phrases all formed part of a single marketing campaign, which should be characterised as a single course of conduct – albeit accepting that it was not a single contravention limited to a maximum penalty of $1.1 million. Senior counsel for Coles placed emphasis on the need to use “synthesising principles” (by which I take him to mean the totality and course of conduct principles) to ensure that Coles is not punished twice for the same conduct.

## Nature and extent of the acts or omission and any loss or damage suffered: s 224(2)(a)

1. The ACCC contended that Coles’ contraventions were extensive and serious in that the representations were directed to the general public and they had the potential to mislead a wide range of consumers in relation to the sale of a staple consumer product. This was potentially significant because of the so-called “halo” effect on sales of other supermarket goods that key products like bread and milk were said to drive by providing an impetus for consumers to come into the supermarket in the first instance. Further, the conduct in question took place over a period of about three years. Approximately 106 product lines were involved and a very significant quantity of those products were sold across 637 supermarkets in Australian States and Territories. The ACCC adduced evidence about the revenue derived from the sale of par-baked products over approximately two thirds of the relevant period. It was a considerable sum. The fact that the impugned representations were made at the point of sale, using prominent messaging, and formed the central component of Coles’ marketing strategy were also identified as relevant. I address below the question of Coles’ revenue and earnings generally, and for par-baked bread.
2. Coles drew attention to its pre-litigation efforts to address the concerns raised by the ACCC. In particular, it noted that it discontinued sale of the “Cuisine Royale” line (which had been par-baked in Ireland) after less than two months. It also pointed out that a number of the impugned representations had been removed from labels and packaging in 2012 and early 2014. It argued that, in respect of those representations which were not removed until early 2014, it was not clear that they were misleading or deceptive until the liability judgment was delivered in July 2014. A considerable amount of time was dedicated by senior counsel for Coles to this contention in oral submissions. He sought to emphasise the fact that it was not a situation where “someone [was] selling sesame oil as olive oil” and also attempted to characterise the campaign as part of a storewide strategy to improve sales generally rather than sales, specifically, of par-baked bread.
3. Coles also submitted that the par-baked products were not a principal component of its supermarket business – accounting for only 0.29% of the Coles Group’s revenue or $104 million in the 2013 financial year.
4. On the question of loss and damage, Coles noted that the ACCC had adduced no evidence of consumer complaints, of any link between the impugned phrases and the purchasing decisions of customers, of any concern about the production methods used on the part of consumers, or any harm to, or any disappointment of, consumers. It also argued that the fact that the products were of an “everyday nature” and a low price meant that they did not represent a substantial investment by consumers. These factors, it claimed, should mean that the conduct could not be characterised as “serious” and any penalty should be at the lower end of the range. The absence of any evidence of harm or disadvantage to competitors also constituted a factor in mitigation. Indeed, the increase in sales of its par-baked range was said to have been contributed to by a number of factors including improvements in their quality, changes to Coles stores, lower prices and shifts in consumer demand. It should be noted that at no stage did the ACCC seek to suggest that there was, or rely upon, any difference in quality between par-baked bread and bread baked from scratch.
5. Coles also submitted that increased awareness of the fact that the products were par-baked rather than baked from scratch had not discouraged consumers from purchasing those products. It referred to the matters deposed to by Mr Watson about the trend of sales of par-baked sales since 2012, the extent of the improvements to stores and the significance of lower prices on the volume of sales of baked goods. Cross-examination of Mr Watson by senior counsel for the ACCC sought to undermine the validity of these claims. Mr Watson’s evidence about the strength of sales of par-baked products in 2012 (a time period in which the witness conceded that no data was available) was also challenged for lacking foundation beyond his general recollection. Mr Watson conceded that no evidence had been provided by him as to the volume of sales of par-baked goods before and after the commencement of the campaign employing the impugned phrases.
6. The ACCC’s approach to the question of loss or damage depended on inferential reasoning. It argued that the absence of consumer complaint was unsurprising because consumers were not in a position to ascertain the falsity of the claims in the impugned phrases. In any event, it claimed that the loss to the consumer was impossible to quantify (cf *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [107]) but was based on consumers “not receiving a product with the nature, manufacturing process, characteristics or history represented”. I was invited to infer that the misrepresentations deprived consumers of the opportunity to make properly informed purchasing decisions and that consumers were more likely to have purchased products from Coles that they would otherwise have purchased from its competitors by reason of those representations. It was this consequence that is of significance – the potential loss of customers by competitors, in particular the specialty bakeries.

## The circumstances in which the contraventions took place: s 224(2)(b)

1. Whilst the ACCC’s submissions did not address this matter in terms (it can be accepted that the balance of its submissions dealt with overlapping considerations), Coles raised a number of points. First, it submitted that the contraventions in question occurred by reason of there being multiple interpretations of the impugned phrases, that it was not possible to say that the claims contained in the impugned phrases were “clearly untrue”. Secondly, it submitted that similar expressions are common in the Australian baking industry when marketing par-baked products. Thirdly, it submitted that its conduct was in no way surreptitious and that steps had been taken to make the relevant information available to consumers. Finally, it argued that the conduct could not be considered “serious” where, in addition to the matters already raised, no evidence has been adduced of consumer complaints or confusion.

## Whether Coles has previously engaged in similar conduct

1. Section 224(2)(c) requires that account be taken as to whether Coles “has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct”. The ACCC relied on a number of other examples of Coles’ prior conduct that it claimed were relevant. In particular:

* Representations made in cartoons distributed on the internet regarding the prices paid by Coles to dairy farmers for milk which were said to be misleading. Coles apparently gave enforceable undertakings in relation to these cartoons.
* Representations about the country of origin of its fresh produce that were alleged to be misleading. These were apparently the subject of six penalty notices totalling $61,200 paid by Coles.
* Unconscionable conduct engaged in by Coles towards certain suppliers that was the subject of declarations made by Gordon J and pecuniary penalties totalling $10 million. See: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405. It was said that this demonstrated a disregard by Coles of its obligations under the *Competition and Consumer Act*. Somewhat circularly, the ACCC also argued that because her Honour found it appropriate to have regard to my liability judgment in this proceeding ([2014] FCA 1405 at [110]), it was therefore appropriate for me to have regard to her Honour’s decision.

1. Coles accepted that Gordon J’s findings were not a matter which should be ignored, but distinguished it on two bases. First, the conduct in that case was directed towards suppliers, rather than consumers. Secondly, the conduct was said to be qualitatively different because that case did not involve the construction of language which was “susceptible to a number of available interpretations” and did not occur “in circumstances where no evident loss or damage had been suffered”.
2. With respect to the conduct relied upon by the ACCC that was not the subject of any curial findings, although this is plainly not something which I am required to consider pursuant to s 224(2)(c), it is nonetheless a relevant matter which would be open to be taken into account. In the circumstances here, however, those matters will not be taken into account for two reasons. First, no evidence of the specific conduct was adduced. The written submissions cited a website which I infer to be an ACCC Register. The content of that Register was not tendered or annexed to any affidavit. No provision of the *Evidence Act 1995* (Cth) permits me to take judicial notice of such matters. Secondly, the weight that could be ascribed to it in determining the appropriate penalty would necessarily have to reflect the fact that that conduct has not been the subject of any contested hearing on the merits. I am not prepared in these circumstances, without more, to treat such matters as sufficiently clear admissions that the conduct in question did in fact give rise to contraventions.

## Coles’ size and financial position

1. The ACCC noted that Coles operates 726 supermarkets across Australia and that in 2008 Australian supermarkets supplied 59% of all bread sold. Coles’ operations were said to permeate everyday consumer life. It also complained that Coles had failed to provide it with any specific data about the revenue or profits of the Coles bakery section or any revenue or profits derived from the sale of par-baked products. However, such information that was provided by Coles was contained in a letter annexed to the affidavit of Mr Wolff. That information included revenue and earnings before interest and tax (**EBIT**) of the entire Coles Group (which included the revenue and EBIT from a number of arms of the business which were not involved in the conduct found to constitute contraventions of the ACL). Those figures were set out in the table reproduced below:

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| --- | --- | --- | --- |
| **Financial Year** | **Revenue ($millions)** | **EBIT ($millions)** | **EBIT Margin** |
| 2012 | 34,117 | 1,356 | 3.98% |
| 2013 | 35,780 | 1,533 | 4.29% |
| First half of 2014 (July – December 2013) | 18,946 | 836 | 4.41% |

1. The letter also set out the revenue derived from all par-baked products in the 2013 financial year ($104 million) and the first half of the 2014 financial year ($64 million). The EBIT figures for the par-baked products were also provided based on an extrapolation using the EBIT margins for the entire Coles Group. This indicated estimated EBIT of $4.46 million and $2.82 million (totalling $7.28 million) over the 2013 financial year and the first half of the 2014 financial year, respectively. EBIT figures on par-baked goods were not provided for the period commencing 1 January 2014 to the date of judgment. Coles suggested that the use of EBIT margin for the Coles Group was likely to overstate the relevant EBIT for the par-baked product on the basis that costs for in-store bakeries were higher than in other parts of the business. No evidence permits a reliable deduction for these supposedly higher costs, or for the cost of funds for Coles; but assuming the suggestion to be accurate, I will ignore any EBIT after 1 January 2014. The total value of sales for par-baked products during the period 8 August 2012 to 7 August 2014 was provided on a confidential basis to the Court, but that figure provides little assistance as it gives no indication of profit obtained.
2. Coles accepted that it was one of the two largest supermarket chains in Australia and that it had significant financial resources. It also submitted that it was not open to suggest that it had adopted a “cynical attitude” by which it had effectively factored in any potential penalty as one which could be accommodated by its budget. Lastly, Coles relied on internal marketing documents that indicated that the supermarket chain only anticipated that the campaign would have a minor impact on its sales. It should be noted that the document that Coles relied upon to make good this submission is headed:

The [lead business initiative] is expected to deliver an incremental uplift of **more than 20%** for in store bread sales

(Emphasis added.)

1. Perhaps Coles’ most significant submission in this regard was to contend that its significant financial resources alone were not a reason for setting a higher penalty than might otherwise be imposed.

## The deliberateness of the conduct

1. It was submitted for the ACCC that the impugned phrases were deliberately selected and used as part of a nationwide campaign up until the liability judgment was delivered. It suggested that Coles’ intention in using the phrases was to convey a message of freshness and recency in relation to, *inter alia*, the par-baked products and that must lead to the conclusion that the conduct was deliberate. The following statement from the Chief Marketing Officer in an email annexed to Mr Wolff’s affidavit were relied on to support this contention:

I spoke to Greg pre Xmas. BTST should remain…core to our customer proposition esp re Bakers Delight and esp because customers believe our bread isn’t fresh. That said, the team are planning to have a final bake at 4pm to ensure fresh bread right up until store closing which is great. From a customer POV this means the freshest of fresh bread for dinner tonight and importantly fresh bread for school lunches tomorrow morning. We need to find a compelling way to communicate and “own” the 4pm bake-off (Michael to lead)…in addition to BTST as the core proposition.

The subject line of that email is “Baked Today Sold Today”. I infer from that that “BTST” is employed as an acronym for that phrase.

1. Coles’ failure to include information on the packaging that permitted the true message to be found by a consumer (cf the situation in *TPG*) was also relied on by the ACCC as a significant aggravating factor.
2. Coles responded by arguing that there was no intention on its part to contravene the ACL and that the design of the impugned phrases to evoke “appealing ideas and connotations” was a legitimate objective. It claims that it did not seek to conceal its baking methods and that there was information available to consumers on the Coles website, in-store on the “barker cards” and through the media attention received prior to judgment. It also relied upon the steps it took to limit the period in which the contravening conduct referred to at [22] above took place.
3. The ACCC rightly noted that the “barker cards” were not available until October 2013 – approximately two years after the use of the impugned phrases began. Similarly, the website information was only available from October 2012 – approximately one year after the commencement of the campaign. Further, contravening conduct in some form or another continued to take place up to delivery of the liability judgment.

## The role of senior management in the conduct

1. The ACCC pointed to evidence that showed several senior managers were closely involved in the marketing campaign. A trail of emails annexed to Mr Wolff’s affidavit were said to illustrate the high levels at which the campaign was developed and approved and the fact that the campaign was centrally developed and deployed.
2. Coles sought to place a different complexion on these emails – framing the involvement of senior management to be directed to a broader campaign in relation to which the bread strategy only formed a small part. No attempt was made by Coles to adduce evidence from those in management as to any view that the impugned phrases were not misleading, or as to the decision-making process and considerations to use the phrases.

## Whether Coles’ corporate culture was conducive to compliance with the ACL

1. This factor received little attention in either oral or written submissions. The ACCC simply noted that no evidence had been adduced by Coles as to its training or disciplinary procedures and pointed to the recent actions taken against Coles discussed above.
2. Coles relied on the size and expertise of its in-house legal and compliance teams to suggest that its corporate culture was one that was inclined to compliance with the ACL. It should be observed that it called no evidence about those matters. It also argued that the contravening conduct did not arise from any “lack of proper compliance” and that the liability judgment acknowledged that the impugned phrases were susceptible of more than one meaning on which opinions may differ (see [143] of the liability judgment).

## Coles’ disposition to co-operate with the ACCC

1. In the ACCC’s submission, Coles was not entitled to any “discount for co-operation” as the findings of contraventions were made following a full contested hearing on the merits. Similarly, it notes that the use of the impugned phrases did not cease in its entirety until the liability judgment was delivered.
2. Coles argued that its conduct and co-operation in the course of this litigation reduced the costs, time and resources that needed to be committed to the proceeding. Specifically, it referred to the fact that it prepared the first draft of the agreed statement of facts and negotiated an agreement about its contents with the ACCC which included a number of admissions and narrowed the issues in dispute. Further, it notes that it voluntarily provided a considerable amount of information on request by the ACCC at its own expense. No evidence was adduced as to the amount of information provided or the expense incurred. It also relied on the steps it took to minimise the period of time, and the manner in which, the impugned phrases were used once the ACCC notified its concerns (see steps at [22] above).

## The need for specific deterrence

1. In order for specific deterrence to be achieved, the ACCC submitted that the penalty needed to be at the higher end of any range. Unless that were so, given Coles’ size, the extent of sales and usage of the impugned phrases, the revenue captured and the period of time over which the contraventions took place, there was a risk that the penalty could simply be seen as part of the cost of doing business by Coles.
2. Coles argued that specific deterrence should not be a prominent consideration in the determination of a penalty. In doing so, it submitted that it was not open to find that it had been courting a risk of contravening the ACL in adopting the impugned phrases. To this end, it relied upon the fact that had already displayed “barker cards” to inform its customers about the par baking methods, the fact that it had progressively ceased to use the impugned phrases prior to judgment and its agreement to orders preventing the use of the impugned phrases for three years. It also pointed to its new bakery products campaign that was said to include marketing claims that were “not subjective or open to more than one meaning”.

## The need for general deterrence

1. It was suggested by the ACCC that the penalty imposed needed to be sufficient to   
   “effectively deter the use of misleading marketing phrases, particularly in relation to a consumer staple, to encourage responsibility in labeling (sic) and signage and not to view marketing untruths as a minor matter”.
2. Coles argued that the media coverage given to this proceeding was extensive and sufficient, in and of itself, to send a deterrent message to other retailers. Evidence contained in the affidavit of Mr Watson was also said to show that this proceeding had already had a deterrent effect on Australian retailers selling par-baked products. It made the following claim in its written submissions:

… The Watson Affidavit shows that other major supermarket stores have removed marketing claims such as “*Baked Today, Sold Today*”, “*Baked Fresh Daily*” and “*We Bake Fresh Everyday*” in connection with in-store bakery products which are likely to have been made using the par bake method of production, in circumstances where those retailers were using such claims previously.

1. The ACCC responded thus:

… if these competitors sold par baked products, there is no evidence that any of the marketing material alleged to have been changed ever related to sale of products that were par baked, or if it did then as to the extent of usage of the marketing material.

1. The ACCC further submitted that the purpose of general deterrence is to deter others who may be inclined to engaged in prohibited conduct of a similar kind (see *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296 at 298; *N W Frozen Foods Pty Ltd* at 292). To the extent that other sellers of bread may have changed their conduct, the purpose of general deterrence extends more broadly to those who may engage in conduct which – without being the same – may nevertheless be similar.

## Consistency with other cases

1. It was the ACCC’s position that the Court has never seen contravening conduct of this scale. A number of cases were raised as examples of circumstances where high penalties had been awarded for misrepresentations by large corporations on a national scale (between $2 million and $3.6 million). A number of cases were also identified as examples of penalties imposed for misrepresentations involving the nature, manufacturing process and history of certain products. The ACCC nonetheless submitted that all were of general assistance only for two reasons. First, none involved conduct that was as longstanding or widespread as in the present case. Secondly, in many cases the respondent was smaller than Coles. It was noted by senior counsel for the ACCC that “to spend time worrying about what happened in other cases is … to mislead the exercise of the discretion”.
2. Coles instead pointed to the fact that the substance of the conduct complained of concerned food and grocery claims. It identified a number of cases involving claims of that nature where the penalty imposed was at the lower end of the range (between $50,000 and $400,000). In Coles’ view, a number of parallels could be drawn between the decision of Tracey J in *Turi Foods Pty Ltd (No 5)* and its underpinning factual circumstances:

* the impugned phrasing had been adopted from industry usage;
* no evidence was adduced to show that competitors had lost market share or that the respondents had profited at the expense of law-abiders;
* the contravention was not deliberate;
* the respondent had not abused their strong financial position to purse a knowing contravention of the ACL or treated the risk of a penalty as part of the “cost of doing business”;
* the impugned phrasing was not universally misleading as regards all products that it was used in connection with; and
* although the respondents had defended the litigation, they were found to have co-operated with the ACCC nonetheless.

# Consideration

1. At the conclusion of oral argument, I asked Counsel to identify the matters genuinely in dispute and in need of resolution before the relevant factors could be weighed to determine an appropriate penalty. Counsel jointly identified four matters. First, the impact of the lack of evidence about loss or damage being suffered by consumers or competitors. Secondly, what impact, if any, the judgment of Gordon J should play in the determination of the penalty. Thirdly, the extent to which Coles could be said to be “courting risk” and engaging deliberately in the conduct. Lastly, the weight to be given to the matter of specific deterrence in the present case.

## The significance of loss and damage

1. The nature of the conduct involved in this case means that precise or even global assessment of any loss to consumers or competitors is difficult, if not impossible. Bennett J observed in *Australian Competition and Consumer Commission v Global One Mobile Entertainment Limited* [2011] FCA 393 at [135]:

… The Commission submits that the absence of loss or damage or an inability to quantify accurately the extent of loss or damage is not a mitigating factor in the imposition of a penalty, relying on *Trade Practices Commission v ICI Australia Operations Pty Ltd* (1991) 105 ALR 115 and *Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd* (2001) ATPR 41-809. Justice Perram in *MSY Technology* examined a similar submission and rejected it as not arising from *TPC v ICI* or *Roche Vitamins* as a matter of general application. In a case involving the misleading of consumers, Perram J observed at [79] that where no evidence was led of any harm suffered by reason of the contravening conduct, respondents are entitled to be sentenced on the basis that the conduct has not caused harm. As Perram J said, this conclusion is “commonsense”. I agree, although it may not be the case where loss or damage is established but the extent of it cannot be quantified accurately. In the present case, the Commission has not led evidence of any loss or damage on the part of any consumer.

1. This proposition was also endorsed in the decision of the Full Court in *Singtel Optus* at [58]-[59]. Both the Full Court and Bennett J adopted the reasoning of Perram J in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2011] FCA 382; 279 ALR 609 at 627 [77]-[79]. The basis of his Honour’s reasoning is exposed in [79]:

… In cases where, as here, it is easy to imagine detriment to consumers I would accept that the absence of any evidence of suggested harm should be regarded as a mitigating factor. The reason for this is no more than commonsense: if harm is likely to have been suffered by reason of the contravening conduct but no evidence is led which suggests that it was, the respondent is entitled to be sentenced on the basis that the conduct has not caused harm which, plainly enough, will be a mitigating circumstance.

1. *MSY Technology* was a case where retailers were selling various computer-related goods and making representations which fell into three categories (at [57]):

.. The first category consists of statements in which the respondents purported to disclaim or exclude their responsibility for providing warranties to consumers. The second consists of statements which purported to restrict the responsibility of the respondents for providing warranties to consumers in various ways. The third consists of statements suggesting that consumers were required to pay a fee for warranties beyond those provided by the manufacturer.

1. The “commonsense” nature of his Honour’s suggestion is, with respect, far more apposite to a case such as the one before his Honour than it is in the present. It would be simple enough to adduce evidence of consumers who paid for additional warranties or who incurred expenses in the belief that they were not entitled to a warranty. The circumstances of that case were such that the misleading or deceptive conduct could clearly have a quantifiable and ascertainable pecuniary consequence for consumers. Here, the ACCC did not contend that the quality of the par-baked products was of any lower standard than goods baked from scratch. The primary source of any loss or damage to consumers was of a non-pecuniary nature. The fact that they had lost the opportunity to make a different purchasing choice that they may have made had they been provided with accurate information about the goods they were purchasing. In light of the period of time over which the conduct took place, I am not prepared to sentence on the basis that no one was in fact misled by Coles’ conduct.
2. There is an alternative source of loss or damage, and that is loss or damage to competitors. Pecuniary damage might be proved here, but a number of other factors (such as those referred to in the affidavit of Mr Watson) may well be to blame for the loss. Demonstrating a causal link beyond a merely temporal connection is nearly impossible in these circumstances. This is not a situation like *MSY Technology*. That case involved a conclusion based on the specific factual circumstances of the case. Care must be taken to not elevate conclusions based on factual considerations to the status of rules of law.
3. In the present case, documents in evidence demonstrated that Coles was well aware of its competition and the steps its competitors were taking. As a large, experienced and successful commercial operator, one would expect nothing less. One e-mail chain, responding to a marketing initiative launched by Baker’s Delight, invoked the language of warfare, referring to Baker’s Delight as “the enemy”, “fighting back” and holding a “war committee”. Competitive behaviour by commercial entities may be fierce and combative – from a legal standpoint there may be nothing inherently wrong with this. But the manner in which Coles “fought back” constituted a breach of provisions of the ACL.
4. The evidence before the Court showed that Coles had engaged in the campaign with the clear purpose of improving its market share vis-à-vis its competitors, being bakeries such as Baker’s Delight. Coles’ own evidence indicated that its sales of products marketed in connection with the impugned phrases had increased since the campaign began in 2012. It was not suggested by either party that the size of the market for bread had expanded considerably (indeed the ACCC squarely raised the fact that Coles had adduced no such evidence). Nor was it suggested that Coles’ market share had remained steady. There was no detailed analysis of market share over the relevant period.
5. Accordingly, I am not prepared to find that Coles’ conduct did not harm its competitors. It set out to achieve a purpose of bettering its position over its competitors. It set out to do so by engaging in the conduct that, in fact, breached the ACL. I am not prepared to sentence on the basis that it failed to achieve that purpose. Any harm that did occur has not been quantified and would be extremely difficult to quantify. Indeed, the task of quantification would only be complicated by the fact that a dearth of information was provided by Coles about the extent to which its sales of par-baked goods had increased.

## The role of Gordon J’s judgment

1. Justice Gordon’s judgment ([2014] FCA 1405) dealt with claims that Coles had engaged in unconscionable conduct in dealing with its suppliers. This unconscionable conduct involved demanding payments from suppliers “to which it was not entitled by threatening harm to the suppliers that did not comply with the demand”: [1]. Such conduct was conceded to be in contravention the unconscionable conduct provisions of the ACL (ss 21 and 22) as they stood at the relevant time.
2. The statutory formulation that is said to require me to take into account her Honour’s judgment bears repetition. Section 224(2)(c) of the Australian Consumer Law provides that in determining the appropriate penalty, the Court must have regard to all relevant matters including:

whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.

1. Chapter 4 of the *Competition and Consumer Act* refers to offences. The reference to “this Part” is a reference to Part 5-2 of the ACL, entitled “Remedies” and includes s 224 – the provision permitting the imposition of pecuniary penalties. Justice Gordon’s judgment clearly falls into the latter category.
2. The role that her Honour’s decision can play in determining the appropriate penalty in this case thus turns on whether the conduct complained of before Gordon J and the conduct which Coles had been found to have engaged in in this proceeding is “similar”. Her Honour was concerned with conduct which was unconscionable in connection with the supply, acquisition or possible supply or acquisition of goods or services. The relevant provisions were found in Part 2-2 of the ACL, entitled “Unconscionable Conduct” dealing with business to business conduct. As her Honour observed at [36]:

Courts have for some time characterised unconscionable conduct as conduct that is clearly unfair or unreasonable, or serious misconduct … Recently, in *Australian Competition & Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41] the Court stated that “unconscionability” means “something not done in good conscience”. The Court went on to describe “unconscionability” as “conduct against conscience by reference to the norms of society that is in question” and that the norm “must be understood and applied in the context in which the circumstances arise”. It is against that test or description that the conduct is to be assessed.

1. However, her Honour’s judgment followed a penalty hearing. The conduct was admitted. It is a nice question (not addressed by the parties) as to whether this was “found by a court”.
2. The provisions contravened in this case were ss 29 and 33. Section 29 prohibits false or misleading representations about goods or services and s 33 prohibits misleading conduct as to the nature of goods. Both provisions are found in Part 3-1 of the ACL entitled, “Unfair practices”.
3. The distinct characterisations of the conduct prohibited and the demarcation established by the way the ACL is structured might suggest that the conduct in each case is not “similar” – except to the extent that the conduct is contrary to the ACL. One is unconscionable conduct in the way it deals with other businesses; the other is conduct that misleads consumers.
4. The nature of the conduct in respect of which I have made declarations is conduct that involves misleading or deceiving consumers. The conduct complained of before Gordon J went beyond mere deception – it was coercive. Whereas Gordon J was addressing conduct undertaken by Coles against its suppliers, I am dealing with Coles’ conduct towards its customers. Suppliers and consumers can both be vulnerable classes. The actions undertaken by Coles in the present case were designed to boost its sales and attract consumers, necessarily at the expense of its competitors or perceived competitors. Before Gordon J, those actions were undertaken to obtain payments through abusing its bargaining position and position of power. The relevant distinction is to be found in the nature of the conduct prohibited by the ACL. I am satisfied that the conduct was of a qualitatively different nature. I therefore do not need to deal with the question of the meaning of the phrase “found by a court”.
5. The fact that her Honour relied upon the liability judgment in this case as evidence of the fact that Coles’ had engaged in similar prior conduct in her determination of the penalty for unconscionable conduct says little about any requirement that I take into account her Honour’s decision. I will not accede to the ACCC’s invitation to enter into, as senior counsel for Coles put it in oral submissions, “a Dante’s Circle of Hell spiral to the bottom”.
6. However, it was put that, at the very least, the decision of Gordon J was illustrative of Coles’ disregard for its obligations under the *Competition and Consumer Act*. This does not appear to be the “similarity” that is spoken of in s 224(2)(c) (which refers to the similarity of the conduct, rather than the conclusion or result that flows from being found to have engaged in that conduct) but the fact that Coles has engaged in other contraventions of the ACL – irrespective of their similarity – is clearly a “relevant matter” referred to by s 224(2) – even if it is not a prescribed consideration under s 224(2)(c).

## The deliberateness of Coles’ conduct

1. On Coles’ submission, its conduct was not deliberate because it did not engage in that conduct with the intention of breaching the ACL. In support of this, it refers to Tracey J’s consideration of the deliberateness of the respondents’ conduct in *Turi Foods (No 5)*:

47 The ACCC accepted that, in making the impugned representations, Baiada Bartter and ACMF did not deliberately contravene the TPA or the ACL. The ACCC did not seek to contend that these respondents acted dishonestly or with the intention of misleading and deceiving consumers.

1. Whilst no knowledge of the falsity or misleading nature of a representation is necessary to make out a contravention of ss 29(1)(a) or 33 of the ACL, knowledge or an intention to mislead will clearly be an aggravating factor. So much was accepted by Tracey J (albeit in the context of different provisions):

49 It is now well established that s 53(a) of the TPA and 29(1)(a) of the ACL can be contravened “even if [a statement] is not false to the knowledge of the person making the representation”: see authorities collected in *Turi (No 4)* at [78]. As a result, if a respondent contravenes s 53(a) inadvertently, as the present respondents have done, their inadvertence will not serve as a mitigating factor. Had they been found to have engaged in a deliberate contravention of the provision, this would have been regarded as an aggravating consideration: see *ACCC v AirAsia Berhad Company* [2012] FCA 1413 at [51].

1. No finding has been made that Coles intended to mislead or deceive consumers. The question is not, as the ACCC contends, whether Coles intended to engage in the conduct that in fact contravened the provisions in question. That is too low a threshold for it to be an aggravating factor in the penalty-setting process. Rather, the question is more appropriately whether it “courted the risk” of doing so.
2. In the liability judgment I said that the interpretation of the phrases was something about which minds could differ. What, however, seems to me to be evident from the impugned terminology alone is that there was tolerably clearly a debate to be had about calling par-baked bread fresh. To that extent a degree of risk was evident. This risk was patent and should have been appreciated by Coles’ management.
3. At the liability hearing I rejected a number of documents that could have laid a foundation for the submission that Coles deliberately courted a risk of contravention. They were rejected as irrelevant to the liability hearing: see [63] to [88] of the liability judgment. They may have been relevant and admissible in the penalty hearing. They were not re-tendered. In this light, I do not draw a conclusion that Coles consciously courted the risk of contravention or was reckless as to such. I do, however, conclude from the obvious linguistic debate that some risk was objectively evident and at least ought to have been apprehended, though it might have been lessened by the industry usage.

## The weight to be given to specific deterrence

1. Deterrence is a primary function of a pecuniary penalty. The essence of Coles’ submissions on this point is that it was highly unlikely that it would engage in contravening conduct again and that specific deterrence should not weigh heavily. In support of this, it pointed to the steps already taken by it – providing barker cards, progressively removing the impugned phrases prior to judgment, agreeing to orders banning the use of those expressions for three years and adopting a new marketing campaign. This is an empty submission.
2. In respect of the barker cards, I have already made the following observations in the liability judgment at [157]:

Looking at the evidence as to the positioning of these cards and the size of the print, it is highly doubtful whether many people, if any, would read them. Secondly, even if they did, the first two do not differentiate in identifying product between scratch and frozen, and frozen and par-baked. Given the nature of the signage and packaging otherwise, in my view, these barker cards, in their particular positioning with size and print in the evidence, are inadequate as a disclaimer to remove the misleading or deceptive impression from the conduct and representations which I have discussed. As I said earlier, the process of buying bread is not such as to be likely to entail or call for astute attention to disclaimers or barker cards such as these about the wares on sale at the counter, when those wares on sale are being prominently promoted and lauded as “baked today” or “baked fresh” or “freshly baked”. Further, it is not clear how many stores complied with Mr Carroll’s direction, although there was some evidence that five stores had complied. My conclusions as to the inadequacy of the barker cards to remedy the misleading or deceptive character of the conduct and representations does not depend on what is otherwise the inadequate evidence of compliance with Mr Carroll’s instructions.

1. The steps taken to remove the phrases prior to judgment hardly support the suggestion that specific deterrence should not be an important factor. As the ACCC rightly pointed out, contravening conduct continued (in some form or another) until the liability judgment was delivered. Furthermore, the fact that Coles “agreed” to an injunction restraining the use of the impugned phrases does not speak to whether or not it needs to be deterred from future similar conduct. Agreement to orders of that nature (where warranted) should be encouraged because it minimises the wastage of court time and costs. It cannot, however, rightly be taken as some sign that the consenting party has seen the error of its ways and is unlikely to engage in similar conduct again.
2. Finally, it is not clear how the adoption of a new bakery marketing campaign removes the need for specific deterrence. All that it shows is that Coles is not, in the immediate post-judgment phase, engaging in the sort of conduct which attracted the ACCC’s attention in the first place. An understanding that it must comply with its obligations under the ACL cannot be inferred from this.
3. There is nothing to suggest that the need for specific deterrence should not feature in a prominent way in the determination of the appropriate penalty. Indeed, the fact that the conduct in question went on for such a long period of time and that the products marketed using the impugned phrases reaped significant revenue for Coles suggests that it must be made unequivocally clear to Coles that greater caution is required to ensure that its future marketing campaigns comply with the ACL.

## The appropriate penalty

1. At the outset, the number of contraventions should be addressed. I accept that a vast number of contraventions have occurred. The effect of this as a matter of law is to raise the potential aggregate maximum penalty to a number well beyond what this Court would ever impose. Nevertheless, it is helpful to identify the courses of conduct by which to evaluate a potential aggregate maximum penalty.
2. One can view the conduct as four contravening courses of conduct that have taken place:
   1. packaging stating “Baked Today, Sold Today”;
   2. packaging stating “Freshly Baked In-Store”;
   3. packaging stating both “Baked Today, Sold Today” and “Freshly Baked In-Store”; and
   4. signage stating “Freshly Baked” and “Baked Fresh”.
3. Yet in one sense it was one advertising campaign. Just as senior counsel for Coles accepted that this one course of conduct did not limit the maximum penalty to $1.1 million, so the segregation of the conduct into four courses does not limit the maximum penalty to $4.4 million. It does, however, assist the analysis.
4. I propose to identify a single penalty in respect of all contraventions in accordance with the totality principle, bearing in mind that what can be seen as four courses of conduct formed part of a single marketing strategy. This is appropriate to ensure that there is not double punishment.
5. The contravening conduct in this case is substantial and serious. Notwithstanding the absence of any specific evidence as to loss or damage by a consumer or a competitor, it is clear that the significant potential to mislead or deceive and thus to damage competitors, the duration of the conduct, and the fact that the goods in relation to which the impugned phrases were used were “consumer staples” indicate that the objective seriousness of the offending conduct was considerable. The sheer number of products (approximately 106 different product lines), the territorial reach of the campaign (637 supermarkets across all Australian States and Territories), the time over which the conduct occurred (about three years) and the EBIT derived from the par-baked products (in the order of $7.28 million) suggests that there is a strong case for ensuring that the ends of both specific and general deterrence are achieved by the penalty imposed.
6. I do not accept that the fact that the phrases were open to multiple interpretations, rather than being phrases that were inherently false, is a mitigating factor. Though open to interpretation, a debate about their misleading quality was real and objectively evident, and should have been appreciated. The fact that, as Coles suggests (relying on the evidence in Mr Watson’s affidavit), the claims contained in the impugned phrases are common in the Australian baking industry might, in some circumstances, constitute a factor in mitigation (cf *Turi-Foods (No 5)*). There was no evidence, however, of how this industry usage affected decision-making. No-one at Coles took responsibility for the decision to use the phrases; and no one said that they relied on industry usage.
7. Coles’ prior breaches of the ACL also demonstrate the need for specific deterrence, but their character does not, in itself, call for a higher penalty than I would otherwise impose.
8. One of Coles’ main submissions was that its size alone did not justify the imposition of a higher penalty. In support it referred to *Turi Foods Pty Ltd (No 5)* where Tracey J, at [62], observed:

Baiada and Bartter filed confidential affidavits which disclose that the companies are in receipt of substantial income and are in a strong financial position. Whilst they have a demonstrated capacity to meet any pecuniary penalty falling within the appropriate range, this is not a reason for imposing a higher penalty than would otherwise be imposed. There will be cases in which, in fixing the appropriate range, the requirements of specific deterrence may, nonetheless, dictate that a penalty at that higher end of the range should be imposed where the offender is a company with vast resources: cf *ACCC v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301 at 309. This is not such a case. Baiada and Bartter have not sought to take advantage of their strong financial position to pursue a course of conduct which they knew to be in contravention of the TPA and the ACL. Nor did they adopt the cynical attitude that any penalties which might be incurred were worth the risk and could easily be accommodated within their budgets: cf *Singtel Optus* [(2012) 287 ALR 249] at 265.

1. His Honour there made reference to a decision of Goldberg J in *Australian Competition and Consumer Commission v Leahy (No 3)* [2005] FCA 265; 215 ALR 301. The reference was, presumably, to the following paragraph (at 309):

39 The penalty imposed must be substantial enough that the party realises the seriousness of its conduct and is not inclined to repeat such conduct. Obviously, the sum required to achieve this object will be larger where the court is setting a penalty for a company with vast resources. However, as specific deterrence is only one element and general deterrence must also be achieved, consideration of the party’s capacity to pay must be weighed against the need to impose a sum which members of the public will recognise as significant and proportionate to the seriousness of the contravention.

1. I was also taken to the following passage from Middleton J’s decision *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2010] FCA 790; 188 FCR 238by senior counsel for the ACCC in the course of the hearing (at 273-274):

208 In respect of the size of the contravening company, Goldberg J in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238 said at [35]-[36]:

I accept that the penalties must be proportionate to the contraventions but in my view corporations the size of GWF have a responsibility to the public at large to ensure that its commercial activities do not contravene Part IV of the Act. When a corporation’s commercial activities substantially permeate the commercial and consumer life of the public it is appropriate, in my view, to take that fact into account in determining an appropriate level of penalty for contravention.

209 In a similar vein, in *Rural Press*, Mansfield J said at [56]:

The size of a contravener is clearly significant in the assessment of penalty, the imposition of a higher penalty will ordinarily apply where a large corporation is involved, to achieve a deterrent effect on that specific individual …

1. These authorities make it clear that Coles’ financial resources do not alone justify a higher penalty than might otherwise be imposed. However, they are clearly relevant to considering the size of the penalty required to achieve the end of specific deterrence and can be weighed against the need to impose a sum which will be recognised by the public as significant and proportionate to the seriousness of the contravention for the purposes of achieving general deterrence. Further, the resources of Coles are relevant to understanding whether it can pay (and not be crushed by) an appropriate penalty, especially when one takes account of revenue earned by products sold using the impugned phrases.
2. The role of senior management in approving and implementing the campaign is a consideration which is relevant to both specific and general deterrence. The fact that the use of the impugned phrases – notwithstanding the lack of any findings about an intent to mislead or deceive – was approved at such a high level in respect of language about which debate should have been appreciated, is necessarily a highly relevant consideration.
3. Coles did not adduce any evidence of any corporate culture of compliance; nor did it adduce evidence of the decision to use these phrases. Its bare assertions about the size and expertise of its in-house legal and compliance teams in its written submissions are insufficient for me to make findings of such. It chose not to adduce any evidence of its training, approval or other compliance programs. I cannot, therefore, treat this as a factor in mitigation. However, in the absence of evidence to the contrary neither can I infer that there is a deficient corporate compliance culture and rely upon it as an aggravating factor.
4. Furthermore, the suggestion that the contraventions in this case did not arise from any “lack of proper compliance” cannot be accepted. Although the interpretation of the impugned phrases is a matter about which minds could differ, the fact that a debate that the phrases were misleading was objectively open indicate that the impugned phrases should never have been deployed in the way that Coles chose to deploy them. Corporations that market goods and services to consumers have an obligation to ensure that they do not mislead or deceive the public about the goods and services they are marketing. The existence of alternative constructions of the phrases they use is a matter they must take into account in their decision-making processes. The fact that some people may not be misled is not the point. It is important that sellers in the market recognise that consumers are entitled to reliable, truthful and accurate information. Confidence in such is a matter of importance for the Australian community and economy. It is an important factor in market efficiency. General and specific deterrence are important in order to encourage the maintenance of a fair, reliable and efficient market. Consumers play a vital part in that market. They buy the goods and services that commercial entities proffer.
5. I am not satisfied that any discount for co-operation should be applied. Whilst I accept that Coles is fully entitled to contest the claims made by the ACCC, the matters to which it refers as proof of its co-operation (such as narrowing the issues in dispute and negotiating agreed statements of facts) are matters which are expected of it as a litigant in this court, especially as a litigant of its commercial standing. It cannot be said, however, that Coles failed to co-operate with the ACCC in any material way. There was no evidence of any unreasonable or obstructionist conduct on Coles’ part. This particular factor does not contribute materially the determination of the penalty.
6. The case for specific deterrence has been made out. In light of the revenue received by Coles from par-baked goods marketed in conjunction with the impugned phrases and Coles’ substantial financial resources, the penalty should be at a level to achieve the ends of specific deterrence in that commercial context.
7. The nature of the (staple) goods marketed, the high profile of the case and the period of time over which the contraventions occurred similarly demand that a significant penalty be imposed also to achieve the ends of general deterrence. I do not accept that the fact that this case has received considerable media attention reduces the need for a higher penalty to achieve general deterrence. Indeed, if a low penalty were imposed in such circumstances, the high-profile nature of the case would mean that general deterrence would be undermined by the fact that the inadequacy of the penalty would be disseminated even more widely.
8. Coles’ claim that behaviour in the market has already changed by virtue of the liability judgment similarly do not undermine the need for a penalty sufficient to achieve general deterrence. To the extent that any behaviour change has taken place – and putting to one side the question as to whether the evidence adduced to that effect adequately proved this – that behaviour change is open to be undermined or reversed if vendors see that the penalty for such conduct is low enough to be factored in as part of the cost of doing business.
9. The information that was available to the Court about any profit made by Coles on the sale of par-baked goods marketed in connection with the impugned phrases is an important consideration to the question of general and specific deterrence. This information is outlined at [31]-[32] above. EBIT figures are a general measure of trading profit which excludes interest and tax. That information is the only measure of the gains that may have been made by Coles from the sale of the par-baked goods which is available to the Court. Specific deterrence demands that a penalty be imposed that bears a real relationship with the profit earned – even if it is difficult to identify a causal proportionate contribution to EBIT by the impugned phrases. Coles should understand that it will not profit by its conduct. The market should understand that also. General deterrence can be achieved by demonstrating to others who might engage in similar conduct that the Court will seek to ensure that any penalty imposed in these cases will be adequate to ensure that conduct that is liable to mislead or deceive consumers will not be profitable: that penalties are not just a cost of doing business.
10. Although the information was less than complete, for the purposes of the sentencing process it is sufficient. I have used the EBIT figures from 2013 financial year to first half of 2014 financial year, leaving the others (from 1 January 2014) out of account in the light of Coles’ assertion as to costs in the bakery sections. The penalty arrived at will take into account the fact that EBIT is not a calculation of net profit, and that the breaches of the ACL would not have been the sole cause of all earnings derived from the par-baked products. Further, it can be readily accepted that some, perhaps many consumers, would have purchased the products even knowing the truth about the production processes employed.
11. Finally, I have derived little assistance from the cases cited on penalties given in other and very different factual contexts except to note that the conduct in this case appears to be far more significant than conduct that might be seen as similar which has been the subject of penalties previously imposed by the Court on account of its far wider geographical reach and the considerably longer period of time over which it occurred. There is no demand from the other cases cited to recognise any range or unifying principles beyond the matters to which I have made reference: *Hili v The Queen* [2010] HCA 45; 242 CLR 520 at 536-537 [53]-[54]; *Barbaro v The Queen* at 41; and *Director of Public Prosecutions v De La Rosa* [2010] NSWCCA 194; 79 NSWLR 1 at 70-71 [304].

# Conclusions

1. Having taken into account the matters in s 224(2) and the other relevant factors identified by the parties, bearing in mind the capacity to assess the conduct as falling into four courses of conduct and taking into account all the matters to which I have referred, in particular revenue and EBIT for par-baked products over the period, I would impose a penalty of $2.5 million. One way of looking at this is that the offending was above the mid-range for four courses of conduct with a notional maximum penalty of $4.4 million. Another way of looking at it is that it is a sum which (ignoring the opportunity advantage of the use of the funds brought by the revenue, which may have been considerable) strips Coles of over one third of its EBIT of the par-baked products (recognising the imprecision of the calculation, and making a rough adjustment for the asserted higher costs of the bakery sections). Neither is a mechanical calculation. Both are useful checks. In my view, the sum is in all the circumstances the appropriate penalty.
2. Coles should pay the ACCC’s costs.

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| I certify that the preceding one hundred and four (104) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop. |

Associate:

Dated: 10 April 2015