FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Woolworths Limited [2016] FCA 1472

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| File number: |  |
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| Judge: | **YATES J** |
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| Date of judgment: | 8 December 2016 |
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| Catchwords: | **CONSUMER LAW** – unconscionable conduct in trade or commerce – whether the design and implementation of a scheme that was targeted to reducing a projected profit shortfall was unconscionable  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Sch 2, ss 21, 22  |
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| Cases cited: | *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557; [2005] NSWCA 261*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405*Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447; [2013] FCAFC 90*Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd (in liq) (formerly known as Coverall Cleaning Concepts South East Melbourne Pty Ltd)* [2015] FCA 25*Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132; [2005] FCAFC 226*Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759; [2007] NSWCA 246*Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168; [2013] VSCA 292*Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 90 ALJR 835; [2016] HCA 28*Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50*PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446  |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Mr CA Moore SC with Mr RA Yezerski  |
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| Solicitor for the Respondent: | Ashurst Australia |

ORDERS

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|  | NSD 1625 of 2015 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | WOOLWORTHS LIMITED (ACN 000 014 675)Respondent |

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| JUDGE: | YATES J |
| DATE OF ORDER: | 8 DECEMBER 2016 |

THE COURT ORDERS THAT:

1. The originating application be dismissed.
2. In the event that the parties are unable to agree within seven days on the appropriate order for costs, the proceeding be listed for argument on that question.

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

REASONS FOR JUDGMENT

YATES J:

# Introduction

1. The applicant, the Australian Competition and Consumer Commission (**the ACCC**), alleges that, in November and December 2014 (**the relevant time**), the respondent, Woolworths Limited (**Woolworths**), engaged, in trade or commerce, in conduct in connection with the acquisition or possible acquisition of goods from its suppliers that was, in all the circumstances, unconscionable, within the meaning of s 21(1) of the *Australian Consumer Law* (**the ACL**) (Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**the Act**)).
2. The ACCC seeks declaratory and injunctive relief, pecuniary penalties, and costs against Woolworths. On 3 November 2016, I made an order that the question of the ACCC’s entitlement to injunctive relief, pecuniary penalties and other orders as sought in paragraphs 2 to 6 of the originating application, be determined separately from and after all other questions in the proceeding. Therefore, this part of the proceeding concerns the question of whether Woolworths did engage in conduct that was unconscionable, in contravention of s 21(1) of the ACL, as alleged by the ACCC in its amended statement of claim. Woolworths does not dispute the ACCC’s entitlement to declaratory relief should the alleged contravention be found.
3. In its amended statement of claim, the ACCC has identified the alleged conduct as Woolworths’ design and implementation of the **Mind the Gap** scheme. I have used the word “scheme” because that is the description given in the ACCC’s pleading. Whether the word “scheme” is an entirely apt description of what Woolworths described as an “initiative” is not a question that need be debated. I place no negative connotation on the word “scheme” when used in the context of Mind the Gap.
4. Under this scheme, Woolworths sought “payments” from certain suppliers, described collectively as Tier B suppliers (**the Tier B suppliers**), based on the performance of those suppliers in the four month period from July to October 2014, relative to the corresponding period in 2013, according to certain metrics or “lenses” adopted by Woolworths. I will describe the elements of the Mind the Gap scheme, and of the ACCC’s pleaded case, in more detail below.

# The Evidence: an overview

1. The ACCC’s case was advanced as a documentary one, based essentially on documents which Woolworths was required to produce under s 155 of the Act. The documents included copies of spreadsheets and similar records of data created or maintained by Woolworths; internal presentations, memoranda and email communications between Woolworths’ employees; and a large body of email correspondence between Woolworths’ employees (mainly category managers and buyers) with a number of the Tier B suppliers.
2. A particular feature of the ACCC’s case is that it has called no evidence from any supplier affected by the Mind the Gap scheme. This is significant not least because, in a great many instances, the email correspondence tendered by the ACCC is an obviously incomplete record of the communications between Woolworths and its supplier on the subject of Mind the Gap payments. In a number of instances, the email correspondence shows that the supplier was prepared to negotiate, and agree upon, a Mind the Gap payment. However, in many instances, it cannot be discerned from the correspondence whether a supplier was prepared to make a payment and, if so, why and for what amount or, indeed, on what terms.
3. The “why” is important. Woolworths says that the ACCC’s case proceeds on a significant misunderstanding of the relationship between suppliers and supermarket retailers, including the role of financial support which retailers such as Woolworths seek from suppliers in relation to the promotion and sale of the products concerned. I will return to this topic.
4. As Woolworths submitted, an incomplete record of the dealings between Woolworths and its suppliers in the implementation of the Mind the Gap scheme is problematic, if only for the reason that s 21(1) of the ACL requires the Court to have regard to “all the circumstances” in determining whether conduct is unconscionable. In many cases, the absence of evidence from the suppliers concerned makes it impossible to assess a number of the factors to which the Court must have regard in considering “all the circumstances”. In this connection, the email correspondence must be treated with care because, where different negotiating positions are adopted, one cannot tell which position is correct or more closely aligned to the true state of affairs between Woolworths and its supplier. As Woolworths correctly put the position:

… [T]he relevant correspondence involved commercial negotiations between sophisticated parties in an industry of some complexity. As such, one cannot know the context of each exchange between supermarket and supplier, nor can one know whether a position advanced by a supplier in a particular email was its true view or merely a negotiating position. The ACCC’s approach throughout the hearing has been to treat supplier correspondence as if each word was a matter of objective truth, while treating any correspondence from Woolworths as being self-evidently incorrect or false. There is no basis for that assumption and the Court simply does not have sufficient evidence before it to determine, in the case of any Mind the Gap negotiation, what the true position was as between Woolworths and the supplier.

1. In many instances, the email correspondence shows that a particular supplier refused Woolworths’ request. Where that occurred, there is no evidence that, because of that refusal, the supplier was met with any form of retribution by Woolworths, such as by delisting a product or by treating the supplier less favourably than would have been the case had Woolworths’ request been met.
2. The ACCC’s documentary case also included excerpts from transcripts of s 155 examinations conducted in the course of its investigation. I was not taken to any of these transcripts in the course of evidence or oral addresses. Indeed, no reference was even made to them (other than that they were in the tendered documents). There are, however, some isolated references to the transcripts in footnotes in the ACCC’s written opening and closing submissions.
3. Woolworths called evidence from:
* Alex Dower;
* James Hien Jin Tan;
* Helen Sandercock; and
* Melissa Rose Barnwell.
1. At the relevant time, Mr Dower was the Commercial Director of Woolworths Supermarkets (a trading entity within Woolworths). As Commercial Director, he had overall responsibility for the commercial and trading functions of Woolworths Supermarkets. In this role he was supported by trading departments and non-trading departments, which I will discuss in a little more detail below. He reported to Tjeerd Jegen, the Managing Director of Woolworths Supermarkets. In turn, Mr Jegen reported to Woolworths’ Chief Executive Officer. Mr Jegen is no longer employed by Woolworths. Mr Dower is also no longer employed by Woolworths. He left Woolworths in 2015 and subsequently took up the position of Chief Executive Officer of Sonoma Baking Company, a premium artisan bakery and café business in Sydney. Mr Dower is currently the Director of Food and Restaurants for Harrods in the United Kingdom.
2. Mr Dower made an affidavit in which he deposed to the nature and structure of the Woolworths Supermarkets business; the nature of Woolworths’ day-to-day negotiations with its suppliers in that business; and the conception and implementation of the Mind the Gap scheme.
3. At the relevant time, Mr Tan was the Head of Trade for Packaged and International Foods (**the Packaged Food category**) within Woolworths Supermarkets. He is currently the Head of Promotions, Buying and Marketing—Supermarkets. Mr Tan made two affidavits in which he deposed to his role as Head of Trade for the Packaged Food category; the nature of Woolworths’ day-to-day negotiations with its suppliers in its supermarkets business; and his involvement in the implementation of the Mind the Gap scheme.
4. At the relevant time, Ms Sandercock was the Category Manager for Hot Beverages within Woolworths Supermarkets. She is currently employed as the Category Manager for Household Cleaning. Ms Sandercock made two affidavits in which she deposed to her role as a category manager and her involvement in the implementation of the Mind the Gap scheme. Her evidence in this latter regard included detailed testimony as to the manner in which she approached suppliers for payments and the outcome of her negotiations with those suppliers.
5. Mr Dower, Mr Tan and Ms Sandercock were cross-examined. Having seen them
cross-examined, I have no hesitation in accepting their affidavit and oral evidence.
6. Ms Barnwell is a lawyer employed by the solicitors appearing for Woolworths in this proceeding. Ms Barnwell made an affidavit in which she deposed to searches carried out in respect of suppliers involved in the Mind the Gap scheme. Ms Barnwell was not
cross-examined. Her affidavit evidence was not a matter in contest between the parties.

# Woolworths supermarkets

1. At the relevant time, Woolworths comprised five business units. These units were managed separately and offered different products and services. The units were:
* Australian Food, Liquor and Petrol, which was concerned with the procurement of food, liquor and petroleum products for resale to customers in Australia. Brands operating within this unit included Woolworths, Thomas Dux, Woolworths Petrol, Dan Murphy’s, BWS, Cellarmasters and Langton’s;
* New Zealand Supermarkets, which was concerned with the procurement of food and liquor products for resale to customers in New Zealand;
* General Merchandise, which was concerned with the procurement of discount general merchandise products for resale to customers predominantly in Australia. Brands included Big W and EziBuy;
* Hotels, which was concerned with the provision of leisure and hospitality services including food and alcohol, accommodation, entertainment and gaming in Australia. These services were provided by the ALH Group; and
* Home Improvement, which was concerned with the procurement of home improvement products for resale to customers in Australia. Brands included Masters and Home, Timber and Hardware.
1. At the relevant time, Woolworths Supermarkets was organised within the Woolworths Food Group, which comprised the Australian Food, Liquor and Petroleum and the New Zealand Supermarkets business units. Woolworths Supermarkets managed Woolworths’ Australian supermarket businesses.
2. Woolworths Supermarkets faced competition from a large number and variety of retailers in respect of different products. Its key competitors were Coles, Aldi, Costco, IGA and other independent specialist supermarkets and banner groups. More broadly, it competitors also included many other retailers in Australia that sell the same products, including convenience stores, petrol stations, pharmacies, variety stores, butchers, fruit and vegetable stores and online stores. Mr Dower gave evidence, which was not challenged, that customer loyalty to one supermarket is very low. Most shoppers at Woolworths are also customers of many other retailers.
3. In the year to 30 June 2015, Woolworths reported sales of $60.7 billion and a net profit after tax of approximately $2.45 billion. In the same period, the Australian Food, Liquor and Petrol business unit had reported sales of $42.13 billion and earnings before interest and tax of $3.44 billion. Based on data from Nielsen’s Homescan Service (which the parties accepted as accurate), Woolworths had a 37%-39% share by retail value of grocery sales in Australia. It sourced products from approximately 4,300 suppliers.
4. At the relevant time, Woolworths Supermarkets was organised into a number of trading departments and non-trading departments. Each trading department was organised by reference to groups of like products and carried out the functions necessary for the sourcing, purchase and sale of those products. Non-trading departments were organised according to function and provided support for all the trading departments.
5. Each trading department had a large and structured buying team, typically comprising a general manager, and several “heads of trade”, category managers and buyers.
6. A head of trade (such as Mr Tan) was in charge of a particular part of the relevant trading department and reported to the general manager of that department. The role was to manage the category for which he or she was responsible in a manner which focused on Woolworths Supermarkets’ customers’ needs and preferences in a way that was financially sustainable for the supermarket business. A head of trade was responsible for leading and supporting a team of category managers and buyers.
7. A category manager (such as Ms Sandercock) was a senior buyer, who reported to a head of trade and, in general terms, managed product categories that were more complex or of higher value than the products managed by a buyer (who reported to the category manager).
8. Woolworths Supermarkets had a Commercial Department which was responsible for all the commercial and trading functions within the Woolworths Supermarkets business.
9. As I have noted, Mr Dower was the Commercial Director. One of the four non-trading departments that reported to him was the Price and Trade Investment team (**PTI team**), which Mr Dower had established in October 2014. The role of the PTI team was to support the trading departments of Woolworths Supermarkets by providing useful data, information and analysis, and by overseeing the pricing and promotional activities conducted by the trading departments. Mr Dower said that the functions of the PTI team were:
* to provide analysis and recommendations to optimise investment in lower retail prices for Woolworths Supermarkets’ customers;
* to provide analysis and recommendations to improve the effectiveness of Woolworths Supermarkets’ promotional activities;
* to provide information and support to category managers and buyers regarding supplier performance;
* to assist buyers with data for use in improving the cost of goods sold (**COGS**) to Woolworths Supermarkets by its suppliers; and
* to provide analysis and recommendations to reduce the level of “shrink” (that is, wasted or lost products).

# The contractual relationship between woolworths and its suppliers

1. At the relevant time, Woolworths and its suppliers in the Woolworths Supermarkets business entered into written trading terms called the National Vendor Trading Terms (**the Terms**). The Terms were divided into Part A (called **the Commercial Terms**) and Part B (called **the General Terms**), which also included certain other identified documents, such as Woolworths’ Fair Trading Policy and the Retail Grocery Industry Code of Conduct.
2. For each supplier, the Commercial Terms included details of pricing matters (such as allowances, rebates, freight, settlement terms and the like) which had been specifically agreed between Woolworths and the supplier concerned.
3. The General Terms contained the general terms of trade that applied to all suppliers. The ACCC places significant reliance on these terms, which included an “entire agreement” provision (clause 19(h)) and a provision giving priority to the Terms where there was inconsistency with another document (such as, for example, the terms of trade used by a supplier as part of its own commercial documentation). The General Terms also included a warranty (clause 5.2(f)) that Woolworths was purchasing the relevant goods “at the agreed price”. Clause 2.1 provided that the price of the goods was the price set out in Woolworths’ Purchase Order, adjusted in accordance with the Commercial Terms. Clause 2.3 provided that, save for disputed invoices, Woolworths would pay all rendered invoices in accordance with the settlement terms set out in the Commercial Terms.
4. Woolworths Fair Trading Policy (which, as I have noted, formed part of the Terms and on which the ACCC placed some significance) stated:

Woolworths deals fairly and honestly with all Trade Partners irrespective of your size, the nature of your product(s) or the amount of business you do.

Woolworths strongly encourages all Trading Partners to take sufficient time and opportunity to:

* Consider the proposed terms and conditions of supply to Woolworths.
* Obtain independent advice.
* Assess the benefits and costs of doing business with Woolworths before entering into any trading arrangement.

We consider it important to practice fair and equitable trading practices, and commit to open communication with our Trade Partners.

1. The ACCC drew attention to the Terms to make the point that they did not confer any legal entitlement on Woolworths to seek any payment such as that sought under the Mind the Gap scheme. Woolworths does not dispute that proposition. It says, however, that the ACCC’s focus on the contractual relationship between Woolworths and its suppliers, as revealed by the Terms alone, is misplaced and distracts attention from the commercial dynamics of supermarket businesses. Woolworths contends that the ACCC’s case relies on a “simplified and mistaken characterisation of the commerce in question”. Woolworths says that the ACCC’s case effectively ignores the myriad of negotiations that take place, and the arrangements that are entered into, between a supermarket business and its suppliers on a daily basis in relation to the promotion and supply of the products that are or are to be ranged in the business. Indeed, Woolworths contends that a “critical flaw” in the ACCC’s case is its failure to grapple with the commercial complexity and realities of this relationship, as revealed in the evidence.

# The commercial dynamics of supermarket businesses

## The evidence

1. Evidence on this topic was given by Mr Dower, Mr Tan and Ms Sandercock. Each witness had considerable experience in the conduct of supermarket businesses both here and, in the case of Mr Dower and Mr Tan, the United Kingdom. Mr Dower also had considerable experience acting for suppliers to supermarkets. Thus, he was able to give evidence from the perspective of both the supplier and the supermarket retailer. No evidence was adduced by the ACCC on this topic.
2. Mr Dower gave evidence that, like all other grocery retailers with which he has had experience in his career of grocery retailing, Woolworths does not merely acquire goods from a supplier at a price stated in a written contract, which it then sells to consumers. Although a written contract may form the basis of the trading relationship, Mr Dower explained that Woolworths also enters into commercial arrangements with suppliers that arise from ongoing telephone conversations, meetings and email correspondence, such as the email correspondence adduced in evidence in this proceeding. These conversations, meetings and correspondence occur principally between its category managers and buyers, and suppliers’ representatives. Depending on its size, a supplier may have an employee whose dedicated role is to deal with Woolworths’ representatives in respect of that supplier’s products. Some suppliers may engage the services of a specialist broker to carry out these negotiations. Sometimes these brokers manage a range of suppliers across a number of Woolworths’ grocery categories.
3. Mr Dower said that the representatives of both parties work closely towards promoting sales of the supplier’s products, making the products attractive to consumers and ensuring that the products perform well for Woolworths. These discussions may deal with packaging and presentation, supply chain, “ranging” (what products will be stocked, in what quantities, and where they will be located in the supermarket), cost price (including changes in COGS), promotions and advertising, and other initiatives to increase sales.
4. Mr Dower said that, for a retailer such as Woolworths, the financial performance of a product is primarily a function of the sales of the product and the margin earned on those sales. The supply cost to Woolworths is not just a function of the price-per-unit paid for the goods, but includes all other financial support provided by the supplier. Mr Dower gave the example of suppliers funding advertisements to be placed in sales brochures published by Woolworths and providing financial support for other promotional activities. Mr Dower illustrated this by the following simplified example:

… If Woolworths places an item that normally retails for $4 on sale for $3, then the difference of $1 is usually met at least in part by the supplier (following negotiations between the buyer and the supplier) as the supplier has an interest in increasing sales and market share of its products. The supplier may provide additional forms of support, such as increased funding for displays placed in supermarkets, staff to conduct in-store marketing, and also additional payments to the retailer. Such additional payments may take the form of a lump sum, or an amount per unit sold.

1. The making of additional payments may be deployed to fund promotional retail prices for the supplier’s goods. Mr Dower gave evidence that 40% of all sales that go through supermarkets are on promotion.
2. Mr Dower said that total sales and gross profit margin on those sales were standard measures of performance used in discussions between supermarket retailers and suppliers. Relying on his experience in acting for both retailers and suppliers, Mr Dower said that most retailers (acting through employees such as category managers and buyers) would regularly present a supplier with sales figures and the gross margin the retailer was earning on that supplier’s products. He said that, as a supplier, he would also expect to be called upon by a retailer to take steps to maintain or improve sales and margins from year to year.
3. Mr Dower said that, in general, Woolworths (and other retailers in growing markets) would expect sales to be increasing year on year, and for gross margin to be at least maintained year on year. In Woolworths’ case, Mr Dower said that sales were expected to increase because Woolworths was expanding its supermarket business, including by opening new stores. He said that if sales of a product increased significantly, Woolworths would also expect its gross margin on the product to improve, on the basis that increased sales should lead to greater economies of scale for suppliers. The ACCC criticised this reasoning as outmoded economic theory. I do not think that anything turns on that debate. Mr Dower acknowledged in his evidence in chief that there would be exceptions to the expectations he expressed. He acknowledged, for example, that significant changes to product range or product mix might lead to differing sales and profit performance of the products concerned, thus resulting in different profit expectations.
4. Mr Dower said that all aspects of the cost of goods to Woolworths are the subject of regular discussions and negotiations which are not normally recorded in any formal written agreement. The actual cost of goods will depend upon the price that applies from time to time and the level of promotional and other trade investment that is provided by the supplier. All these matters are negotiable and the actual cost of goods for Woolworths will, as a consequence, vary from time to time.
5. Speaking as at the relevant time, Mr Dower said:

Part of the role of the buyer dealing with a particular supplier was to monitor sales and gross profit margin, and other relevant measures of performance and to discuss these matters with the supplier and negotiate if appropriate to rectify any underperformance by the supplier. For example, if Woolworth’s [sic] gross margin on a particular product line was 30% in one year and then fell to 28% the next year, then part of the role of the buyer was to seek to understand what was the cause of such a margin decline and, if there were no extenuating circumstances, raise that matter with the supplier and, if appropriate, rectify the decline. Rectifying the decline could take many forms: it could take the form of a cost price cut arising out of, for example, a discussion between buyer and supplier about improving raw material costs; or it could be an agreement by the supplier to increase its funding of a promotion or promotions associated with the product or product range; or it might involve the provision of trade investment in any other way. In some cases, it would take the form of a payment from a supplier to make up the shortfall.

1. Particular examples of this monitoring—prior to and unrelated to the Mind the Gap scheme—were provided in evidence. In these examples, Woolworths sought to obtain compensation for the drop in gross profit it had experienced in relation to the particular supplier’s product or products. It is not necessary for me to detail the apparent reason or reasons, in each case, for the drop which motivated Woolworths’ approach to its supplier.
2. Some examples are particularly illuminating because they are strikingly similar to the approaches made by Woolworths to individual suppliers under the Mind the Gap scheme. It illustrates Woolworths’ contention that, while the Mind the Gap scheme was a co-ordinated approach to seeking payments from suppliers in December 2014, the individual approaches made at that time were no different in character to the approaches typically made to individual suppliers at other times in the normal course of Woolworths’ trading relationship with those suppliers.
3. In one example, Woolworths’ approach to the supplier (a major supplier of packaged tea) was initiated and actioned, as it happens, by Ms Sandercock as a category manager. I will refer to other aspects of Ms Sandercock’s evidence below. The approach was made to the National Business Manager of the supplier, in the following email:

I am reviewing YTD performance by supplier and you have experienced 26% increase in sales and GP - 15%

I would welcome a discussion around looking back at this and bringing GP growth in line with sales. Business targets are for 5% sales growth looking at a 1%pt rate growth hence total miss is $400k but we have $100k of BNI to invoice and this needs to be taken into account.

I need to ask you to review and come back in to see me Friday with a proposal or send something through to me tomorrow ?

We need to reach as resolution this week ideal as [an identified head of trade] will be taking meetings next week and I would like to try to work this through with you.

1. This review was conducted in respect of the first quarter of the 2015 financial year. The first sentence of the email indicates that this was a review undertaken by Ms Sandercock in respect of a number of suppliers, not just the particular supplier concerned. As will become apparent, the particular metric used by Ms Sandercock to assess this particular supplier’s performance (5% sales growth to be reflected in 1% profit growth for Woolworths) is substantively the same as one of the metrics used in the Mind the Gap scheme.
2. This email is an example of Ms Sandercock making an “ask”—that is, seeking a proposal from the supplier to make good, financially, its financial underperformance (according to Woolworths’ data and metrics) for the period in question. There is nothing in the ensuing correspondence that indicates that the supplier took issue with Woolworths’ profit growth expectations or, more generally, that Woolworths’ approach, through Ms Sandercock, was in some way untoward or unusual. Indeed, the supplier responded by seeking to assure Woolworths that it was committed to improving Woolworths’ percentage margins.
3. In later email correspondence, the supplier provided its own financial workings for the first quarter and then went on to say that it had “quite a big Q2 planned” and that it expected “to finish Q2 with growth rates well above those we are currently experiencing”. Ms Sandercock responded in a subsequent email:

Just to clarify however you cut numbers we target 1% rate improvement for 5%pt growth in [sales] so still would be needing the conversation. It’s tough at the moment so really need you to work with me on this somehow

1. On its face, this reply directs the supplier’s attention back to its financial performance for the first quarter of the financial year (for which Ms Sandercock was seeking rectification), not its anticipated performance for the second quarter of the financial year.
2. There is another aspect to this chain of correspondence that should be noted. Ms Sandercock was seeking an early response by imposing a deadline. I mention this aspect because the ACCC placed reliance on deadlines as a feature of the implementation of the Mind the Gap scheme. This email indicates that setting deadlines in negotiations with suppliers was present in Woolworths’ day-to-day negotiations with suppliers and was not a feature that was unique to the Mind the Gap scheme.
3. In her evidence in chief, Ms Sandercock explained that her reference in this email chain to things being “tough” was to the fact that, at that time, sales across the tea sub-category were in decline and had been for some time, even though this particular supplier’s sales were growing. Ms Sandercock said that, by requesting the supplier to “work with [her] on this”, she wanted to ensure that the supplier “understood the importance of appropriately sharing with Woolworths the benefit of the sales growth it was experiencing at Woolworths, with Woolworths’ support”. Ms Sandercock was not challenged on this evidence.
4. In another example involving Ms Sandercock making an “ask”, which was also prior to and unrelated to the Mind the Gap scheme, the email communication to the supplier was as follows:

I am reviewing YTD performance by supplier and you have experienced 17% increase in sales and GP - 13%.

I would welcome a discussion around looking back at this and bringing GP growth in line with sales. Total miss is $600k.

I need to ask you to review and come back in to see me Friday with a proposal

1. Once again, the first sentence of the email indicates that this was a review undertaken by Ms Sandercock in respect of a number of suppliers, not just the particular supplier concerned. In this instance, the supplier responded by expressing surprise at the variance between sales and Woolworths’ gross profit but not, I would add, surprise that it had been approached to come forward with a proposal to address the variance. The supplier asked for “the numbers you are using and time frame”. This information was subsequently provided. Ms Sandercock’s response included what appears to have been an extract from a spreadsheet in electronic form measuring the supplier’s performance for the period July and August for the then current year assessed against the previous year. In providing that extract, Ms Sandercock said:

Take a look and have a think of what can be done ….

1. Ms Sandercock also said:

… timelines have been set and if I cannot reach a resolution I will need to set up meetings with Chris next week

1. I mention this last passage in the email for two reasons. First, the reference to “Chris” is to Chris Preston, Ms Sandercock’s immediate superior. In saying that a meeting would need to be set up with Mr Preston the following week if resolution could not be reached, Ms Sandercock was indicating that she would “escalate” the matter to her superior. I explain this dynamic below: see [224]. The ACCC placed reliance on “escalation” as a feature of the implementation of the Mind the Gap scheme. The point of present significance is that, as indicated in this email, “escalation” was not a feature that was unique to the Mind the Gap scheme. It was a dynamic present in Woolworths’ day-to-day negotiations with suppliers. Further, as I will later illustrate, “escalation” was practised by suppliers in their dealings with Woolworths: see [218]-[222] below. Secondly, this passage is another example of
day-to-day negotiations in which a quick response was sought and a deadline imposed.
2. In yet another example in evidence—once again, prior to and unrelated to the Mind the Gap scheme—the supplier concerned (a large supplier whose products include healthcare products) was quite prepared to “unlock” $300,000 to help Woolworths “close the Q1 profit gap”, provided that Woolworths also undertook certain ranging strategies with respect to a number of identified products.
3. It is to be noted that in each of these examples Woolworths was asking for financial support based on the supplier’s underperformance for a previous period judged on Woolworths’ metrics and, hence, Woolworths’ expectations of that supplier in terms of the profit that Woolworths wished to make from the sale of that supplier’s products for that period. Woolworths was not seeking to enter into some arrangement for a future period (although it is possible that it may have done so as part of the negotiation—I cannot tell from the evidence). In each case, Woolworths was seeking to improve its financial outcome in respect of sales made in a previous period.
4. Mr Tan’s evidence was to the same effect as Mr Dower’s evidence on this general topic. Based on his experience working in buyer and category manager roles (or other managerial roles associated with buying) in supermarkets in the United Kingdom and Australia, Mr Tan said that a supermarket buyer’s negotiations with a supplier will cover a wide range of topics. These will include price promotions, new product development, delivering sales, and managing the supply base of all the products for which the buyer is responsible.
5. In relation to Woolworths and its suppliers, Mr Tan said that product-specific agreements are discussed, negotiated and agreed upon on an informal basis. He described these as
day-to-day “coal face” discussions.
6. Mr Tan said that, for Woolworths, a key measure of the financial performance of a product is the margin that Woolworths earns on the sale of that product. This margin is derived by comparing the retail price for which Woolworths sells the product with the cost of purchasing the product and other forms of financial contribution (known as “trade support”) provided by suppliers. “Trade support” can be provided in various ways. Examples include the funding by a supplier, in whole or in part, of the price promotion in-store for the product, or a catalogue or brochure advertisement. Another example is the financial support provided by a supplier in clearing stock that might have been ordered, say, for a promotional campaign that has not done particularly well. In other words, the supplier provides financial support to clear the stock that had been ordered in anticipation of the campaign, so that Woolworths can continue ordering from the supplier again.
7. Mr Tan gave evidence that suppliers also engage in discussions about Woolworths’ performance. He said that a common topic of conversation involves the supplier referring to competitive activity undertaken by one of Woolworths’ competitors in relation to a product that competes with the supplier’s product. The effect of Mr Tan’s evidence was that the end point of such a discussion is, generally, a request by the supplier that Woolworths itself provide additional promotional activity for the supplier’s product.
8. Speaking with respect to these interactions between suppliers and supermarket retailers, Mr Tan said:

… when I was a buyer for other supermarkets as well as when I was a category manager for Woolworths, these sorts of discussions were part of my daily job. Further, when I was promoted to Head of Trade for the Packaged Foods Category, I observed the buyers and category managers who reported to me conducting such negotiations on a daily basis. …

1. Mr Tan explained that category managers and buyers have the most detailed knowledge of the circumstances of Woolworths’ relationship with its suppliers and are best placed to manage effectively a particular supplier and its business relationship with Woolworths. He said that category managers and buyers regularly measure the financial performance of the suppliers for whom they are responsible. The key metrics used in considering performance include an analysis of:
* sales growth based on year-on-year analyses and against any targets agreed between the supplier and the buyer;
* gross profit rate earned on sales of the supplier’s products both year-on-year and against agreed targets;
* service levels, such as delivery on time; and
* the level of investment by the supplier, usually in dollar terms, against both
year-on-year and any agreed targets.
1. Mr Tan said that the most common financial metric used by category managers and buyers in measuring the financial performance of a supplier is total sales and gross margin to Woolworths. In this context, “gross margin” includes not only the price of the product but also the investment that has been provided by the supplier. Gross margin therefore measures all of the “trade support” made by the supplier in a particular financial period as well as the costs incurred by Woolworths in that same financial period in respect of the product. Mr Tan explained that if gross margin decreases despite total sales increasing, it is common for a category manager or buyer and the supplier to enter into discussions about how to get the gross margin “back into shape”. He said that this was a key aspect of the role of a category manager and buyer. He said that, as Head of Trade for the Packaged Food category, he expected category managers and buyers to have these conversations with their suppliers as soon as practicable after it has become apparent that Woolworths’ gross margin on the product has declined. Mr Tan said that sometimes these discussions reveal a context or other circumstances which explain the decline in gross margin (for example, commodity shortages or deleted product lines). However, in the absence of such explanations, category managers and buyers make it clear to suppliers that they are expected, even where no agreed target is in place, to improve the financial performance of their products each year, year-on-year. Mr Tan said:

The levers the buyer or category manager can use to undertake that remedial exercise are varied and in my experience include negotiating a decrease in the cost of the goods to Woolworths, asking the supplier to increase funds, negotiating more advertising for the product, for example in Woolworths’ brochures, catalogues,
in-supermarket demonstrations or sampling campaigns, all with a view to the supplier making up the gap.

1. Mr Tan said that he expected and instructed the category managers and buyers reporting to him to have reasonably regular conversations with suppliers as to their financial performance. He said that, in his experience, these discussions do occur reasonably regularly, both across the financial year as well as towards the end of accounting periods or around the time of a range review covering the supplier’s products.
2. In cross-examination, Mr Tan gave evidence that data and reports were available to Woolworths’ employees to enable them to have conversations with suppliers on questions of performance. These reports were of the same kind as the Opportunity Reports used in the Mind the Gap scheme (to which I will make further reference below) and appear to have been available electronically. Mr Tan gave evidence of regular monthly reviews, within his team, of supplier performance. He said that, on occasions, and as a reconciliation of performance, suppliers would have been asked to make “payments”. The existence of such electronic reports and their use in requesting suppliers to bring Woolworths’ gross profit into line with sales performance, is confirmed by the example to which I have referred at [52] above.
3. Mr Tan also gave evidence about Joint Business Plans. He said that Woolworths negotiates, develops and agrees upon Joint Business Plans with some of its larger suppliers. He gave evidence of his understanding that, whilst not contractually binding, such plans set targets and identify mechanisms, usually over an 18 month period, for improving the supplier’s performance. In closing submissions, I was taken to an example of one of these plans. It was extremely detailed. It included performance targets backed up by a large body of financial data. It was an example of “fact-based” information used for the purpose of measuring trade performance by the supplier concerned.
4. Ms Sandercock gave evidence of her dealings with suppliers in her role as a category manager. Ms Sandercock said that she was in almost daily contact with representatives from the suppliers with whom she deals. Whilst Woolworths and these suppliers were bound by the contractual arrangements evidenced by the Terms, Ms Sandercock said that the
day-to-day business dealings with these suppliers was conducted by negotiation on a
product-by-product basis or a category-by-category basis, in writing, by email, over the telephone or through face-to-face meetings with representatives. Ms Sandercock said that these discussions included:
* promotional plans for the supplier’s products;
* the amounts that the supplier would provide by way of marketing support and trade spend for those products;
* new product development and analysis;
* the selection of products within the supplier’s range for sale in Woolworths’ stores;
* excesses or shortages of product supply and product availability and delivery;
* the pricing of products, both from the supplier and at the retail level in Woolworths’ stores;
* requests for financial support from Woolworths for the supplier’s products at Woolworths; and
* the financial performance of the supplier’s products.
1. Ms Sandercock said that for some large suppliers, some of the matters listed above were contained in Joint Business Plans which were negotiated and agreed upon by category managers and heads of trade with the suppliers. Ms Sandercock said that, even when a Joint Business Plan is in place, frequent negotiations still take place between the category manager/buyer and supplier. Ms Sandercock described her relationship with suppliers as “dynamic and fast moving”.
2. Ms Sandercock said that her discussions with suppliers included discussions about the promotions that should be adopted in the forthcoming quarter and the extent to which the supplier and Woolworths would fund those promotions. Ms Sandercock said:

… The discussion might involve a conversation about unit price, either initiated by a supplier who wants to increase the price of a product, or initiated by Woolworths if: (i) the product is performing well and driving volume and efficiencies and Woolworths wishes to improve its cost position in relation to that product; or (ii) if Woolworths needs to be more competitive on pricing, which would increase sales volumes. It might involve the amount that the supplier is prepared to spend on advertising in a catalogue, or the amount that the supplier will contribute to promotions. The discussion might involve a negotiation as to whether the supplier should make a payment to Woolworths, particularly if the financial performance of a supplier’s product has declined (e.g. Woolworths’ gross margin on that product has declined) or if sales and volume have increased significantly, leading to better efficiencies and reduced cost for the supplier. The discussion might concern packaging or sizing, such as an exchange of views as to whether the product should be sold in a larger or smaller pack size, and it might concern which products are performing well and which are struggling, and steps that could be taken to address the latter. The discussion might concern a new product which the supplier wants to bring to market, whether that product would be suitable for Woolworths and its customers, and what pricing or trade support would apply to the product. The discussion might concern advice from Woolworths to the supplier about ways in which the supplier could streamline its production process to reduce its costs. It might concern the level of discounting or the frequency of promotions for the product that have been observed by Woolworths in Woolworths’ competitors’ stores, and whether changes should be made to ensure that Woolworths is competitive. (For example, if a brand of coffee has been on promotion at Coles for three out of the last six weeks, and only on promotion at Woolworths for one of those weeks, then there might be a conversation about why Woolworths’ competitor appeared to be obtaining greater promotional and trade support from the supplier.)

1. Ms Sandercock said that, on financial matters such as pricing or trade support, the outcome of discussions or negotiations with the supplier would often be recorded in an email setting out the matters agreed and, if relevant, the adjustments to be made. She said that, on these matters, there is often discussion about the reasons for the current observed performance of the supplier. Ms Sandercock gave the following explanation:

… For example, if Woolworths notes that the gross margin for Woolworths on a particular product has declined, then the supplier might advance reasons for that decline which may or may not be within the control of the supplier. If the margin decline was caused by some action taken by Woolworths, then this might be a good reason for no action to be taken by Woolworths in relation to [that] matter. Likewise, if the supplier has faced a significant increase in costs (such as an increase in the price of a raw material), then this is a matter that is likely to be discussed with Woolworths and this may lead to an increase in the price or a reduction in other financial support provided by that supplier. On the other hand, if it emerges that the reason for the reduction in gross margin is because the supplier has not paid for a promotion that the supplier agreed to support, then there is an obvious means for addressing the margin decline. One of my roles as a category manager/buyer is to be familiar with the history of dealings and the surrounding circumstances, so that I am able to assess what is a reasonable approach in the circumstances.

1. Ms Sandercock also gave this evidence:

As a category manager, I am expected to understand the current financial performance of the products purchased from the suppliers for which I am responsible. It is a fundamental part of my role to have conversations with Woolworths’ suppliers within the Hot Beverage Category as to the financial performance of their trading relationship with Woolworths and to discuss methods for improving that financial performance for Woolworths and its retail customers, particularly where the supplier is underperforming. From the perspective of Woolworths, the key measures of a supplier’s performance are the sales volume for the supplier’s products at Woolworths supermarkets, and the gross profit rate (or gross margin) earned by Woolworths on those sales. Where there is a joint business plan, the performance on these measures is compared to the budget or targets contained in the business plan. Where there is no joint business plan, then the performance will usually be compared to performance in a prior period
(such as year-on-year).

1. Ms Sandercock said that discussions with her suppliers on their performance occurred on an ad hoc but frequent basis. She said it was her practice to hold these discussions by reference to the gross profit that Woolworths was earning on the supplier’s products compared to the same period in a previous financial year. Ms Sandercock described gross margin as a useful measure because it takes into account pricing, trade support, promotions, unpaid commitments, and all other financial metrics which give a reasonable indication of the overall financial performance of a supplier across its product portfolio.
2. Ms Sandercock also gave evidence about the conduct of “range reviews”, which typically take place twice yearly. Ms Sandercock said that in conducting a range review, she reviews the performance of the current range of products in the current financial period and also growth opportunities within the range. She said that she also identifies changes that she considers should be made to the range. She said that if a supplier is likely to be adversely affected by a change in the range she would, as a general practice:
* discuss with the supplier by email, in person or over the telephone, and usually on a number of occasions, the financial performance of the product for Woolworths (in doing so, providing as much supporting information as possible or as requested); and
* explore whether there were any opportunities for further growth, for new products or improved financial performance of the product before making any decision.
1. Ms Sandercock said:

In order to have conversations with suppliers as to their financial performance, I obtain information from Woolworths as to the relevant sales volumes and gross margins. In an ideal world (and if I had unlimited time), I would use this information to closely monitor every one of my suppliers and identify at any early stage any change in financial performance, and negotiate with the supplier means for addressing this change. In reality, I focus to a greater extent on my key large suppliers, and monitor my other suppliers a little less frequently.

## Conclusions on the evidence

1. The evidence given on this topic by these witnesses speaks not only of Woolworths’ past and present dealings with its suppliers in the Woolworths Supermarkets business; it also places Woolworths’ dealings in the context of the general practices of other like supermarket retailers in relation to their suppliers.
2. I have no hesitation in accepting this evidence. No contrary evidence was adduced by the ACCC and although each witness was cross-examined on aspects of the evidence that he or she gave in this regard, there was no substantial challenge to the evidence as an accurate statement of the kinds of dealings and practices that routinely occur between supermarket retailers and their suppliers. I should add that the ACCC did not contend that such dealings and practices, as described by the witnesses, were, of themselves, unlawful, let alone unconscionable.
3. On the evidence before me, I accept Woolworths’ submission that the trade in question does not operate on a simple model of wholesale supply where suppliers supply goods at set or list prices recorded in contracts between the suppliers and the supermarket retailer, with the retailer then deciding how and at what price to sell the goods to consumers. On the evidence, I accept that suppliers are closely integrated into the strategies used by supermarket retailers to sell goods to consumers, and that these strategies include the provision of financial support by suppliers in amounts that are set off against the amounts that are otherwise payable by supermarket retailers as the cost of goods acquired. In one sense, the interests of the supplier and supermarket retailer are aligned: the strategies adopted (which can also include the provision of promotional funding by the supermarket retailer itself) should drive sales for the benefit of the supplier and the retailer. However, the interests of the supplier and supermarket retailer also diverge: the interest of the supplier is to maximise the wholesale prices for its goods and minimise its trade spend to drive sales at the point of retail; the interest of the supermarket retailer is to minimise the wholesale price for the goods and maximise the supplier’s trade spend to drive sales at the point of retail.
4. Thus, I accept that the overall COGS for the supermarket retailer is a matter that is always under negotiation and, depending on circumstances, constantly changing. A supplier can reduce the retailer’s COGS by reducing wholesale prices or increasing financial support. A supplier can increase the retailer’s COGS by increasing wholesale prices or reducing financial support. The effect, either way, will be to alter the retailer’s gross margin.
5. Of course, the supermarket retailer’s gross margin on the sale of particular products is also a function of the retail price for which the goods are sold. I readily accept that the prices for which goods are sold is a matter that falls within the supermarket retailer’s control, at least in part. There are, nonetheless, a number of matters to note in this regard. Undoubtedly, the retail prices offered by the retailer will be a component of its response to its competitors’ price/product/service mix. The retail prices offered may reflect promotional pricing for which the supplier has provided financial support. I note, once again, Mr Dower’s evidence that 40% of the sales that go through supermarkets are on promotion. But, as Ms Sandercock explained in her cross-examination, the supermarket retailer’s prices might, in particular, reflect its own response to the level of discounting or the frequency of promotions for a product offered by its competitors as a result of its supplier’s own dealings and negotiations with those competitors.
6. Thus, it is simplistic to approach the trading relationship between a supermarket retailer and its suppliers as one where the retailer has complete and unilateral control over the gross margins it makes because of the retail prices it chooses to offer. There was some suggestion of this approach in the ACCC’s case, particularly in its focus on Woolworths’ formal trading terms rather than on the more complex trading relationship between Woolworths and its suppliers reflected in the evidence concerning the kinds of day-to-day negotiations that take place with those suppliers.
7. I accept that, at the relevant time and surrounding times, the performance of suppliers was, within the Woolworths Supermarkets business, regularly reviewed and that where, in Woolworths’ view, a supplier was underperforming on one of Woolworths’ financial measures, the supplier would be approached, if that was appropriate, to come forward with a proposal that would remedy the underperformance. I accept that, on occasion, this would have involved the supplier making a “payment”. In this context, it is to be understood that making a “payment” involved, more usually than not, an adjustment to the balance of the account between Woolworths and that supplier.

# The Mind the Gap Scheme

1. The following paragraphs summarise my findings of fact on the design and implementation of the Mind the Gap scheme. For the avoidance of doubt, where I have referred to a particular witness’s evidence, I accept that evidence.
2. In about September 2014, it was known within Woolworths that the Woolworths Supermarkets business was unlikely to meet its sales and profit targets for the half year ending 31 December 2014. Woolworths Supermarkets was tasked with implementing measures to “close the gap” between targeted sales and profit and expected sales and profit. Mr Dower said that, for the Commercial Department, this meant focusing on gross profit margin and utilising various “levers” to improve that margin, for example by increasing sales, increasing retail prices, reducing “shrink”, improving COGS, and reviewing supplier performance.
3. On 21 November 2014, Mr Dower sent an email to various staff members including the general managers of the trading departments and members of the PTI team to “work on increasing your initiatives for closing H1” which, Mr Dower explained, was intended to urge the trading departments and PTI team to consider further ways to mitigate the risk that Woolworths Supermarkets would not meet its targeted gross profit for the half year ending 31 December 2014.
4. Mr Dower gave evidence that, in late November 2014, the PTI team reported to him that they had discussed a “focused supplier performance management initiative” directed to certain suppliers. These were the Tier B suppliers, who comprised suppliers other than those who were already in COGS negotiations with Woolworths Supermarkets; Woolworths Supermarkets’ largest suppliers (for this purpose, called **the Tier A suppliers**); and smaller suppliers with whom performance discussions would be unlikely to deliver sufficient benefit to Woolworths Supermarkets to be worthwhile.
5. There is no particular significance to the fact that some suppliers were categorised as Tier A or Tier B suppliers. The expressions “Tier A” and “Tier B” seem to have been adopted purely for the purposes of the Mind the Gap scheme. Nevertheless, generally speaking, the Tier B suppliers were not the largest suppliers to Woolworths. However, many were companies which had, in their own right, large businesses concerned with the manufacture and supply of consumer goods. The evidence shows that the Tier B suppliers included, for example, well-known suppliers, such as Colgate-Palmolive Pty Limited, Arnott’s Biscuits Limited, General Mills Australia Pty Limited, GlaxoSmithKline Australia Pty Limited, Goodman Fielder Consumer Foods Pty Limited, Mattel Pty Limited, Procter & Gamble Australia Pty Limited, Pfizer Australia Pty Limited, Unilever Australia Limited and 3M Australia Pty Limited. In all, the Tier B suppliers numbered some 821 suppliers although, in the events which happened, not all of these suppliers were approached under the Mind the Gap scheme. Indeed, the evidence indicates that many were not approached.
6. On 2 December 2014, Mr Dower participated in a teleconference with members of the PTI team and the general managers of the trading departments. This meeting was held to discuss and approve various initiatives that the Commercial Department was developing and planning to implement to “close out” the financial half year. One of these initiatives was the Mind the Gap scheme. Mr Dower gave evidence that, at that time, a member of the PTI team explained this scheme as follows:

We’ve been reviewing supplier performance using 4 “lenses”, which we think will assist buyers and category managers, combined with their own knowledge of the suppliers in their portfolio, to make “asks” for support from suppliers who are underperforming compared to last year.

The lenses we are using to compile data are: first, whether gross profit margin has declined; second, whether the supplier is behind on its JBP targets; third, whether over all co-op and promotional spend has declined compared to this time last year; and fourth, whether Woolworths has achieved a growth of 20 basis points in its gross profit margin on selling the supplier’s products for every 100 basis points of growth in Woolworths’ sales of the supplier’s products (capped at 5% gross profit rate growth or 25% sales growth). Our analysis identifies combined targets for the payments to be agreed with suppliers, by reference to the highest amount identified using any one of the four lenses, and discounted by an amount of approximately 90%.

The plan is that we’ll ask our buyers and category managers to review the data we’ve collated and work out whether it is appropriate and feasible to contact the particular suppliers we’ve identified as presenting an opportunity to ask for support. The data, of course, does not take into account the particular circumstances of individual suppliers. There might be other factors contributing to underperformance and that’s why we’ve left it in the buyer’s and the category manager’s discretion to work out which suppliers should reasonably be contacted.

This is not about making demands. All the buyers and category managers can do is ask for support and of course we don’t expect to recover most of what we’ve identified as opportunities. Nevertheless, we think it’s a good way to focus buyers and category managers in tidying up matters before the half year close.

1. Mr Dower approved the initiative. He said that, in giving that approval, he thought the initiative would bring a focused and coordinated approach to the review of suppliers’ trading performance; ensure that those discussions were conducted in a consistent and appropriate manner; and address with suppliers the cause of any perceived underperformance,
year-on-year, through structured, fact-based “conversations” using the analyses that the PTI team had prepared using various “lenses”. I refer to these “lenses” in more detail below.
2. In this latter regard, Mr Dower said:

… I understood the objective of the initiative, and my understanding in approving it was that it would be helpful for the trading team to have readily to hand “lenses” analysis which was information in a consistent format that could then be the subject of discussions with suppliers. … [I]n my experience, working at Woolworths Supermarkets and in other retailers, and as a supplier to retailers, it was common at the time for measures of trading performance such as those described as “lenses” by the PTI Team to be used as the basis for discussions with suppliers about the performance of their trading relationship with the retailer.

1. As I have recorded, Mind the Gap was one of several initiatives undertaken by Woolworths Supermarkets at this time with a view to improving its profitability to meet its sales and profit targets for the first half of the 2015 financial year. Various other initiatives were planned to raise $65 million. The Mind the Gap scheme was intended to improve the gross profit position of Woolworths Supermarkets by approximately $15 million—the “gap” between the aggregate anticipated profit shortfall for the half year and the amounts sought to be raised by the other initiatives. As things transpired, the Mind the Gap scheme raised approximately $18.1 million by 24 December 2014.
2. In order to implement the Mind the Gap scheme, the PTI team prepared analyses, called Opportunity Reports, which assessed the trade performance of the Tier B suppliers in the period July to October 2014 against the same period in 2013, using “lenses”. There is a dispute between the parties as to the number of “lenses” used. Woolworths says that four “lenses” were used, namely:
* whether Woolworths’ gross profit margin in respect of the supplier’s products had declined in the current half year compared to the same period for the previous year;
* whether, in the case of suppliers who had Joint Business Plans, the supplier was behind on any targets in that plan;
* whether the supplier’s co-op and promotional spend had declined in the current half year compared to the same period for the previous year; and
* whether Woolworths had achieved growth of 20 basis points in its gross profit margin on selling the supplier’s products, for every 100 basis points in growth of Woolworths’ sales of those products in the current half year compared to the same period in the previous year (capped at 5% gross profit rate growth for 25% sales growth).
1. The ACCC says that the meeting of targets according to Joint Business Plans was not one of the “lenses” used. This seems to be because this “lens” was not referred to in the Opportunity Reports. However this “lens” was referred to in a presentation made by Mr Dower on 8 December 2014 when addressing category managers, buyers and others involved in implementing the scheme. This “lens” was also referred to in other evidence. Although I accept Woolworths’ submission that nothing really turns on this difference between the parties, I have no hesitation in finding that, on the balance of the evidence, four “lenses” were in fact used, even though only three were referred to in the Opportunity Reports.
2. Separate Opportunity Reports were prepared—it seems one for each buying team. Each report summarised each relevant supplier’s performance against the “lenses” referred to above, other than, as I have said, the meeting of targets against Joint Business Plans. Each Opportunity Report was in the form of a spreadsheet and quantified, in dollar amounts, the underperformance, if any, of each supplier according to each “lens”. The highest amount quantified was shown in a column in the report under the heading “Consolidated View”. Each Opportunity Report contained the supporting data used to carry out the analyses by reference to the “lenses”.
3. Mr Dower was not personally involved in making the arrangements to implement the Mind the Gap scheme. This was carried out by the PTI team and the general managers in the period 2 to 8 December 2014.
4. On 1 December 2014, Mr Dower sent an email to the buying teams within the trading departments of the Woolworths Supermarkets business in anticipation of the implementation of the scheme. The email contained an attachment titled “Trade Activation – Rules of the Road” (**the Rules of the Road**). This document was designed to assist category managers and buyers to “navigate discussions” with the suppliers. It was not specifically directed to the Mind the Gap scheme, although I have no doubt that its dissemination was timed to coincide with the implementation of the scheme. The Rules of the Road addressed three matters: Preparation; Conduct in negotiations; and Follow-up.
5. With respect to Preparation, the document stated:
* All discussions must be based on commercial facts that are well supported by data
* You must consider the supplier’s point of view in developing your perspective on what is a fair outcome
* You must consider any personal conflicts that may affect your ability to conduct negotiations – if in doubt, check with your manager
* You must assume all documents (internal working papers, e-mails, etc.) will be discussed publicly – store any materials … used to prepare for negotiations, and ensure they are consistent with what you would be prepared to say to a supplier in person
1. With respect to Conduct in negotiations, the document stated:
* You may not disclose data regarding any other supplier
* You must be polite and courteous at all times, and maintain a professional and composed posture – assume anything you say or do could be discussed publicly
* You must never threaten anyone
* You may not make any unreasonable claims
1. With respect to Follow-up, the document stated:
* You must agree with suppliers an appropriate time to respond
* You must adhere to the internal hospitality/ gifts policy
1. The evidence shows that in the first week of December 2014, further communications were made in respect of the scheduling of, and targets for, the Mind the Gap scheme. Mind the Gap Day (the official day on which category managers and buyers were to approach suppliers, although the approaches were not confined to that day) was designated as Tuesday, 9 December 2014. There was a “kick-off” presentation given by Mr Dower on the morning of Monday, 8 December 2014.
2. The evidence indicates that earlier, on Thursday, 4 December 2014, the general managers and heads of trade were provided with the Opportunity Reports relevant to their teams and scripts which they were directed to “cascade” to their teams to help category managers and buyers with their “asks” of suppliers (an “ask” being the financial contribution or support that each supplier was to be asked to make). The general managers and heads of trade were also provided with targets. The targets were arrived at by estimating the total monetary value of the “opportunity” recorded in the Opportunity Reports. This figure was then scaled back to about 10% of that total monetary value.
3. It is necessary to say something more about the scripts.
4. The scripts form a composite document with an introduction, three scenarios (based on three of the “lenses”) and a “wrap up”:

**Intro**

As the end of our first half approaches, we are having a more comprehensive look at how our suppliers are tracking for the year. This highlighted a few areas of concern that I would like to discuss with you.

We are continually investing in value and a better shopping experience for our customers, and expect our suppliers to come on this journey with us, especially when they are experiencing solid growth.

**Scenario A: GP margin down YoY**

Our ability to continue to support your business is predicated on GP margin moving in the right direction. It is not sustainable for us to grow suppliers whose GP margin is going backwards.

Your YTD margin is x% in category x, down x bps on the same period LY. This represents a $xk dilution to the category’s profitability.

**Scenario B: Overall spend level down YoY**

Our ability to continue to support your business is predicated on your overall spend with Woolworths moving in the right direction. It is not sustainable for us to grow suppliers whose spend level is going backwards. We take a comprehensive view of vendor spend, including everything from trading terms and deferred deals to case deals and coop. We expect this to not go backwards as a % of total first cost.

Your YTD spend level is x% in category x, down x bps on the same period LY. This represents a $xk dilution to the category’s profitability.

**Scenario C: GP improvement not in line with Sales growth**

Your sales are up x% YTD. With this kind of growth, we would expect your GP rate to improve by ~x bps, as we share efficiency benefits. It is not sustainable for us to deliver above average growth to suppliers whose GP rate is not stepping up.

Your YTD GP rate is x% in category x, vs x% on the same period LY. This represents a gap of x bps, worth $xk on YTD sales.

**Wrap up**

What I need you to come back to me with by [this Friday, or appropriate response time] is:

1. A plan to make up the $xk shortfall YTD

2. A view on how we are going to stop this from happening going forward

I will send you an email with the detail I have just described. Feel free to contact me if you have any questions so we can get a solution by Friday, if possible, or at the earliest date that is reasonable for the vendor.

1. The evidence indicates that the scripts were to be used as “tips and hints”. How, and indeed whether, they were used in each case is not at all clear. Certainly the evidence shows that, in a number of cases, they were used, in some form, in email correspondence with suppliers. Some of the correspondence shows that statements made in the scripts were simply reproduced, sometimes not very competently. Some of the email correspondence also indicates that preliminary contact had been made with suppliers by telephone. Some email correspondence purports to record the substance of some telephone conversations, but the evidence is far from complete on this, as it is on other matters involving the individual approaches made to suppliers.
2. Mr Dower gave his presentation on 8 December 2014. This presentation included a number of slides. One of the slides identified the four “lenses” to which I have referred. Mr Dower gave evidence that, with respect to this slide, he addressed the category managers and buyers in words to the following effect:

The PTI Team has analysed the trading performance of many of our suppliers, from July to October this year against the same period for last year, using the four criteria or lenses you see set out on this slide. We’ve already given this data to GMs and Heads of Trade. *So you’ll need to get together with your GMs and Heads of Trade and start reviewing the data and, using your discretion, make decisions as to whether to engage with the particular suppliers the PTI team has identified to be underperforming, using these lenses*.

(Emphasis added.)

1. Mr Tan gave evidence that, following Mr Dower’s presentation, he (Mr Tan) had meetings with his team later in the day. He said that at one of these meetings he addressed his team as follows:

We’ve been given a challenge for this week. I’ll need you to all clear your diaries and give this your focus. Can you each have a look at the detailed data in the Opportunity Report given to you in relation to the four lenses Alex presented and consider how they apply to your suppliers.

You need to be comfortable that the amount of support you request from each supplier is realistic and it is valid for you to go after it. If there’s a reason why the opportunity looks wrong or invalid, for example because you’ve recently done a deal with the supplier and that’s not reflected in the data, then you might not want to engage in the conversation with the supplier. Apply your commercial logic to the lenses and then come back to me with whether you think there is a reasonable opportunity to ask a vendor for support. I expect you to know your suppliers. You know your suppliers better than anyone else. So I expect you to make sure you are comfortable that this is fair and credible. Be pragmatic with the opportunities identified in the Opportunity Report.

Remember that there’s no expectation that all suppliers will provide support or that you must secure support from all the suppliers identified in the Opportunity Report. You can escalate to me if you feel it would be beneficial. I am always available.

There’s a script there to help you with starting the conversation with suppliers if you need it. Of course, under no circumstances are we to threaten our suppliers and, of course, all support must be only with the supplier’s clear consent. Remember to follow Woolworths’ Code of Conduct.

1. Mr Tan said that the “lenses” used in the Opportunity Reports were well-known financial metrics discussed between buyers and suppliers in the grocery retail industry in Australia. He said that he expected most (if not all) suppliers to Woolworths to be aware of the “lenses” that were used. He volunteered that some small suppliers, who had less frequent contact with Woolworths, might not have been aware of the specific metric that Woolworths would be looking for 20 basis points in margin for 100 basis points in sales growth. He said that, nonetheless, he expected that most, if not all, suppliers were aware of Woolworths’ expectation that its gross profit margin should be improved where sales growth had been achieved.
2. Mr Tan said that he considered it part of his role to ensure that category managers and buyers were instructed to apply their “commercial logic and judgment” as to what was fair and reasonable to ask of a supplier, based on the employee’s knowledge of the supplier.
3. Mr Tan said that he did not give any instructions that category managers or buyers must achieve the identified “opportunity” or that they must obtain a particular amount of money from suppliers. He also said that he did not say that there would be adverse consequences if category managers and buyers did not achieve the “opportunities” that had been identified in an Opportunity Report. He said that, in his experience, asking for reasonable support (which was fact-based) was “the stuff of ordinary, everyday negotiations between Woolworths’ buyers and suppliers”.
4. Mr Tan said:

…[I]t is my experience as a buyer (as well as my experience as a Head of Trade having oversight of several buyers and category manager) that it is normal business practice for buyers and category managers to look at each supplier’s financial performance with Woolworths, through the metrics used in the “Mind the Gap” initiative, to identify underperformance and profit rate gaps and raise these issues with the supplier. Typically, my experience is that this is done on a monthly basis. In my role as Head of Trade, I had monthly budgets to deliver against. There is a particular discipline and focus on this task at the half and full year ends because Woolworths needs to report at these times. As a buying team we had to deliver against weekly, monthly, quarterly, half-yearly and full yearly sales and profit budgets. The budgets were impacted by market factors and had growth expectations built-in to them. These budgets make up the structure of our objectives, and measurements against these budgets were integral to assessing our performance. The focus on monthly delivery is, in my experience and to my knowledge, common practice across all the retailers for which I have worked.

1. Ms Sandercock was unable to attend Mr Dower’s presentation on 8 December 2014. However, later that day, she attended a presentation given by Mr Preston, the Head of Trade for Impulse Purchases and Beverages and, as I have already noted, Ms Sandercock’s immediate superior. Ms Sandercock recalled Mr Preston saying, in effect:

Mind the Gap is intended to have you engage in an extra push to increase the profitability of the Woolworths’ business as the end of the financial half-year approaches. Forecasts indicate that there will be a profit shortfall this half-year. We are asking you to look at your category and identify opportunities with suppliers. Consider those suppliers whose products have not performed as well for Woolworths in the current year as they had done previously, or suppliers for which the sales have increased but for which Woolworths’ gross profit on those sales is not in line with this or has decreased as compared to the same time last year.

1. Ms Sandercock also said that she recalled Mr Preston saying, in effect:

Once you have identified suppliers for whom an opportunity exists, please consider whether to approach them and what is the appropriate ask to make.

You have the discretion both as to which suppliers you approach and as to the amount of support to request based on what is fair and reasonable. The figures the PTI team have come up with are a guide to the asks you might make. You know your suppliers the best.

1. Ms Sandercock gave evidence that she reviewed the Opportunity Report that was relevant to her suppliers. She described the Opportunity Report as a spreadsheet that appeared on Woolworths’ intranet. She said that the metrics used in the Opportunity Report were familiar to her, which she had used when having “business as usual performance discussions with suppliers throughout the year as appropriate”. I have already referred to some of these discussions: see [44]-[54] above.
2. Ms Sandercock said that, when she reviewed the Opportunity Report, she immediately ruled out certain suppliers because they were “not appropriate to ask for support”. She gave examples of these suppliers as well as her reasons for not approaching them. She said:

… I had full discretion to decide whether to approach these and other suppliers identified in the Opportunity Report. My decisions not to approach suppliers such as these (and my decisions to approach other suppliers with particular “asks”) were not questioned by anyone at Woolworths. In applying my discretion, I considered what was fair or appropriate in each case, and applied the principles I had been trained on …

1. Ms Sandercock gave detailed evidence of the “asks” she made, which involved six out of twenty suppliers. In other words, she exercised her discretion not to approach 14 of her suppliers. She also contacted another supplier—a Tier A supplier—because she was aware that there had been a reduction in the gross profit earned on one of that supplier’s products.
2. A centralised “tracker” spreadsheet was used by each of the buying teams as a tool to record what “asks” had been made of suppliers during the week of 8 December 2014, and what responses had been received. Mr Tan gave evidence that, having worked at Woolworths since 2012, he knew that it was not uncommon to use “trackers” within Woolworths as a means of monitoring the progress of activities or programs. He said that, for the Mind the Gap scheme, there were several trackers. In this connection, there would seem to have been different trackers for different teams. The evidence shows that these trackers could be accessed by the relevant category managers and buyers who were able to edit the one document. This meant that each document was constantly updated on Woolworths’ computer system each time it was accessed and edited.
3. The evidence makes clear that the trackers were internal management records. The agreements recorded in them were subsequently processed in Woolworths’ accounting systems as “manual claims” in relation to a particular supplier’s account. This meant that, where an “ask” was made, negotiated and agreed upon, a claim was raised and processed to deduct the agreed amount from the amounts recorded in Woolworths’ accounting systems as due and payable by Woolworths to that supplier. As I have previously remarked (see [81] above) this is how, in general, such “payments” were made in the usual course of the Woolworths Supermarkets business (that is, by an adjustment of accounts).
4. The evidence also makes clear that the entries made in trackers used in the Mind the Gap scheme were not limited to agreed payments that were directly responsive to “asks” made as part of the scheme. The evidence shows that some of the payments were, in fact, connected with broader negotiations with some of the suppliers. Both Mr Tan and Ms Sandercock gave examples of such payments. The exemplified payments were for significant sums ($764,000, $252,800 and $963,000).
5. I mention these because they provide some context, both as to timing and amount, for the “payments” made under the Mind the Gap scheme. They also directly support Woolworths’ case that the “asks” made as part of the Mind the Gap scheme were instances of the normal commercial negotiations that category managers and buyers routinely enter into with suppliers, albeit that the Mind the Gap scheme was a focused and coordinated approach to suppliers in a particular period (the week of 8 December 2014) that was targeted to improving, by one means, Woolworths’ financial performance for the first half of the 2015 financial year. Mr Dower explained the position in his cross-examination:

To your knowledge, the suppliers were never informed prior to Mind the Gap that Woolworths intended, in December 2014, to assert a right to recover these amounts in cash in December 2014; that’s correct, isn’t it?---No, we’d have had conversations with many of the suppliers about exactly the things contained in these spreadsheets over long periods of time on multiple occasions. It is what we do. All Mind the Gap is, is a formalisation of conversations that are had with hundreds of suppliers across Australia between buyers and sellers day-in and day-out. It’s nothing – no different. So there is no sudden distinct line in the sand where we suddenly embark on these negotiations. These negotiations have been going on for years. It’s totally normal.

1. In cross-examination, Mr Tan gave evidence to the same effect:

Look, I will try to simplify this, Mr Tan. Can I put this proposition to you: Mind the Gap was not an ordinary, everyday negotiation between Woolworths’ buyers and suppliers, was it?---Mind the Gap was a program that brought about a focus, which involved ordinary, everyday negotiations by buyers and suppliers.

It was the first time ever, in your experience in Woolworths, that such a program had been implemented and undertaken, correct?---The program of Mind the Gap, yes.

It was not ordinary, agreed?---The program, no. However, the negotiations were.

1. There is evidence that suggests that a program similar to the Mind the Gap scheme was conducted by at least one of the departments in the Woolworths Supermarkets business the previous year. On 4 December 2014, Justin Nolan, the general manager of the Grocery department, sent an email to his heads of trade and buying teams that gave information about the Mind the Gap scheme, including timelines. In that email he said:

It is worth remembering that Mind the Gap was invited [quaere, invented?] by you and we have delivered significant dollars from this last year. This time you will have more information and more support plus the knowledge that your colleagues in FAV, Core Fresh & GM are following the Mind the Gap process.

1. Mr Nolan’s reference to FAV, Core Fresh & GM is to Added Value Fresh, Core Fresh and General Merchandise—three other trading departments in the Woolworths Supermarkets business.
2. I also note that after the Opportunity Reports, scripts and targets were circulated to general managers and heads of trade on 4 December 2014, the Head of Trade for the Health, Beauty and Baby (**HBB**) category, Tristan Butt, responded in an email the same day. In that email, Mr Butt said:

As a heads up we already have most of these in play / have delivered circa $9M over the last 6 weeks in COGs by taking exactly this approach of using these 4 lenses and more (ie just based on the numbers). Just flagging that going again on HBB (in exactly the same way) will be challenging to say the least. Of course, we will try our utmost and leave no stone unturned. I’ll put my thinking cap on ;-)

Can I also suggest that to avoid time wasted on arguing the numbers we have resource run the numbers including November.

1. As the text of these emails makes plain, the task envisaged by the Mind the Gap scheme was already underway in the HBB category as part of that department’s dealings with it suppliers, independently of, and without reference to, the Mind the Gap scheme developed by the PTI team. Further, the Grocery department had apparently implemented a corresponding scheme, with some success, the previous year.

# The pleaded case

1. The ACCC’s pleaded case is that, in its dealings with the Tier B suppliers, Woolworths was in a substantially stronger bargaining position. The ACCC alleges in paragraph 36 of its amended statement of claim that Woolworths’ systematic conduct in implementing the scheme, by seeking Mind the Gap payments from Tier B suppliers, was unconscionable because:
* Woolworths was in, and took advantage of, a substantially stronger bargaining position relative to its suppliers;
* Woolworths sought payments pursuant to the Mind the Gap scheme in circumstances where the scheme was approved by Woolworths’ senior management and designed for the purpose of reducing Woolworths’ expected significant profit shortfall;
* Woolworths had no contractual entitlement to the payments;
* Woolworths knew that it did not have, or was indifferent as to whether it had, a legitimate basis for requesting a Mind the Gap payment from every targeted Tier B supplier;
* Woolworths was seeking the Mind the Gap payments not because it thought it had a legitimate basis for such payments but because it expected to obtain at least $11 million from its suppliers by 31 December 2014 so as to reduce its expected half year profit shortfall;
* Woolworths applied, and intended to apply, pressure to the targeted Tier B suppliers to make payments by communicating to them that if they did not make the payment, it would or might jeopardise their ability to access customers through the Woolworths Supermarkets business;
* Woolworths expected that some or all of the targeted Tier B suppliers who agreed to make a payment would do so only because they believed that if they refused to make the payment it would or might jeopardise their ability to access customers through the Woolworths Supermarkets business; and
* Woolworths systematically implemented the scheme to take advantage of the fact that, amongst the targeted Tier B suppliers, there would be some who would agree to make a payment even though Woolworths did not have a contractual entitlement to the payment, and the money would not be used by Woolworths to promote or increase sales of the suppliers’ products, because the suppliers believed that if they refused to make the payment it would or might jeopardise their ability to access customers through the Woolworths Supermarkets business.
1. The ACCC also alleges in paragraph 36 of its amended statement of claim that Woolworths’ conduct was unconscionable “in all the circumstances alleged in paragraphs 3 to 29”. I will not attempt to summarise those paragraphs of the pleading. The principal allegations in those paragraphs are, in fact, reflected in the allegations I have noted above. In its written closing submissions, the ACCC advanced arguments specifically directed to some of these allegations. In its oral closing submissions, the ACCC also advanced 13 propositions to support its case that the Mind the Gap scheme was unconscionable in all the circumstances. I will summarise and address these propositions below.
2. It is important to note that the focus of the ACCC’s case is the design and implementation of the Mind the Gap scheme as such. Its case is not that, in implementing the scheme, Woolworths engaged in particular conduct with regard to one or more particular suppliers that was unconscionable in all the circumstances concerning those particular suppliers. Its allegations are, therefore, more broadly based and made at a high level of generality. Its case is directed to conduct concerning Tier B suppliers in the main. In opening, the ACCC submitted:

The ACCC’s case is not that every separate dealing with each supplier in furtherance of the Mind the Gap scheme was a contravention of the ACL prohibition on unconscionable conduct.

Rather, the ACCC’s case is that Woolworths, by its design and implementation of the Mind the Gap scheme, engaged in a system of unconscionable conduct, in contravention of section 21 of the ACL. There is only a single contravention of the ACL alleged, namely the design and implementation of the scheme as a whole, culminating in the requests for payments.

1. This stands in contrast to, for example, the conduct in issue in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (***Coles***) (which I discuss below), where the mere asking for payments from suppliers was not alleged to be unconscionable. Rather, in that case, it was specific conduct directed to certain suppliers in the course of seeking payments that was alleged, and found, to be unconscionable in all the circumstances.

# Relevant legislation and legal principles

1. Section 21(1) of the ACL provides:

A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

1. What does “unconscionable” mean in this context? Put simply, unconscionable conduct is conduct against conscience by reference to the norms of society that are in question: *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR 42-447; [2013] FCAFC 90 (***Lux***) at [41]. The norms in question in the present proceeding are not those that are apposite to supplier and consumer but those that are apposite to commercial relationships, in particular the relationship that exists between supermarket businesses of the kind conducted by Woolworths and its key competitors, and suppliers to those businesses, in connection with the acquisition or possible acquisition of goods in trade or commerce. I have summarised some important facets of that relationship at [33]-[81] above.
2. Whatever the norms may be in a given case, the characterisation of conduct as “unconscionable” is not equivalent to saying that the conduct is “unfair” or “unjust”, although it might be seen that “unfairness” and “injustice”, in some form, is present in conduct that is also “unconscionable”.
3. In *Attorney General of New South Wales v World Best Holdings Ltd* (2005) 63 NSWLR 557; [2005] NSWCA 261 (***World Best***) Spigelman CJ explained at [121] that to apply the concept of unconscionability as if it were the equivalent of what is fair or just would mean that “unconscionability” would not be “a doctrine of occasional application” but the “first and easiest port of call” when a commercial dispute arises, with the risk that commercial relationships might thereby be transformed in a manner not intended by the legislature. In that context, and by way of contrast, his Honour described “unconscionability” as a concept requiring “a high level of moral obloquy” or involving circumstances that are “highly unethical”.
4. In submissions, the ACCC sought to subordinate Spigelman CJ’s observations in *World Best*, even though in *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 90 ALJR 835; [2016] HCA 28 (***Paciocco***) Gageler J at [188] expressly adopted Spigelman CJ’s description of “unconscionability” as involving a “high level of moral obloquy” on the part of the person said to have acted unconscionably; see also *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132; [2005] FCAFC 226 (***National Exchange***) at [43]. To this end, the ACCC argued that the principles concerning unconscionable conduct had developed in the case law since the decision in *World Best*. It argued, in this connection, that “explanatory phrases used to elucidate the meaning of a statutory provision cannot substitute for the statutory language”, adopting Sackville AJA’s observation in *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446 at [101]. Similar observations have been made in other, like cases: see, for example, *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168; [2013] VSCA 292 (***Scully***) at [45]; *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759; [2007] NSWCA 246 at [4]; *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd (in liq) (formerly known as Coverall Cleaning Concepts South East Melbourne Pty Ltd*) [2015] FCA 25 at [116].
5. The significance or, indeed, correctness of these cautionary observations is not a matter of dispute. They underscore the fact that when “unconscionability” is set as the relevant legal standard, the legislation is not proscribing conduct in trade or commerce that is merely unfair or unjust. Had the legislature intended to proscribe conduct in trade or commerce because it is unfair or unjust, the relevant statutory provision would have said so. Thus, the focus must be whether, according to relevant, accepted norms, the conduct in issue is, objectively, “unconscionable”.
6. In my respectful view, this is the true import of Spigelman CJ’s analysis in *World Best* and his Honour’s evident purpose in distinguishing unconscionable conduct from other,
non-proscribed forms of conduct.
7. For example, in *Scully* Santamaria JA referred to Spigelman’s analysis in *World Best* and said (at [46]):

… It cannot have been the legislature’s intention to interfere with arm’s length commercial transactions by reference to loose notions of unreasonableness and unfairness. The contention favoured by the appellant that conduct may be found to be unconscionable [within s 8(1) of the *Fair Trading Act 1999* (Vic)] if it can be found to be irreconcilable with what was right and reasonable overlooks the force of the observations of Deane J in *Muschinski v Dodds* [(1985) 160 CLR 583 at 616] that judges in equity, whose jurisdiction was discretionary, had long since abandoned recourse to undefined notions of justice of what was fair. …

1. The ACCC placed significant reliance on Allsop CJ’s reasons for judgment in the Full Court in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50. In that case, Allsop CJ referred to Spigelman CJ’s use in *World Best* of the expression “moral obloquy”. His Honour recorded that Spigelman CJ used the expression to differentiate the moral or normative standard in unconscionability as higher than in unfairness or unjustness: see at [261]. After noting that “unconscionability” is “a
value-laden concept”, and after considering the respective meanings of “obloquy” and “obliquity”, Allsop CJ said (at [262]):

… That unconscionability contains an element of deviation from rectitude or right practice or of delinquency can be readily accepted, as long as the phrase “moral obloquy” is not taken to import into unconscionability a necessary conception of dishonesty. The statutory language is “unconscionable”: that is, against conscience. A sense of moral obloquy or moral obliquity can be accommodated within the meaning or conception of unconscientious or unconscionable conduct. That said, an understanding of the meaning conveyed by the word “unconscionable” in the statute is not simply restated by substituting other words for those chosen by Parliament; danger easily lurks in the use of other words to capture the meaning of the statutory language. The task involved is not the choice of synonyms; rather, it is to identify and apply the values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability: being the values and norms from the text and structure of the Act, and from the context of the provision. Parliament has given some guidance to its proper application (and to its meaning) by identifying in [the relevant provision] certain non-exhaustive factors that may be taken into account by a court in deciding whether conduct was unconscionable. Given the value-laden character of the word, it is necessary to ascertain and organise the relevant values and norms by reference to which the meaning of the word is to be ascertained, and by reference to which the application of the section is to be undertaken (the two tasks being distinct). …

1. His Honour then undertook an extensive analysis of the source, historical context and content of the legal norms and values embedded within the concept of unconscionable conduct, with reference to the abiding legal requirement of certainty in the law. His Honour noted the place of norms, values and principles in commercial law that lack particular precision but state, nonetheless, a value or general standard that is sufficient to capture or recognise precise future situations of application.
2. His Honour noted (at [296]) that the evaluation of whether conduct is unconscionable does not involve personal intuitive assertion. His Honour said:

... It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.

1. Later (at [304]), his Honour said:

In any given case, the conclusion as to what is, or is not, against conscience may be contestable. That is inevitable given that the standard is based on a broad expression of values and norms. Thus, any agonised search for definition, for distilled epitomes or for shorthands of broad social norms and general principles will lead to disappointment, to a sense of futility, and to the likelihood of error. The evaluation is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules. It is an evaluation of business behaviour (conduct in trade or commerce) as to whether it warrants the characterisation of unconscionable, in the light of the values and norms recognised by the statute.

1. In the same case, Middleton J (at [402]) said:

On the issue of statutory unconscionability, a rationally based system of law needs to set out the limits of acceptable commercial behaviour in order that persons can order their commercial affairs in advance. Such a system cannot depend on the personal approach of a judge, based upon his or her view of commercial morality. Worse still, if there is the perception that the judge makes the law in any individual case and then applies it retrospectively.

1. At [406], his Honour also said:

This approach is not to be seen as any particular judge imposing his or her perception of desirable social goals as the basis for his or her ultimate determination. Nor does this process involve the court in determining policy. The legislature has enacted the law in pursuit of the community standard or expectation of commercial behaviour, which the court then applies in any given factual scenario.

1. I have quoted the passages at [138]-[141] above because they emphasis the fact that the characterisation of conduct, in trade or commerce, as “unconscionable” is not arrived at by a process of personal intuitive assertions or idiosyncratic notions of commercial morality. The characterisation of the conduct in issue is plainly informed by fact-finding concerning the nature of the relationships involved, by which the relevant norms are to be identified. Woolworths called evidence on this subject, and its witnesses were cross-examined. The ACCC called no such evidence.
2. The ACCC placed some reliance on the decision in *Coles*. However, that case was very different from the present. The case was brought against Coles Supermarkets Australia Pty Ltd and another, (together, **Coles**) in relation to their particular dealings with particular suppliers, as I have briefly noted above. The case brought into play particular facts and circumstances germane to each supplier. It was these particular facts and circumstances that were integral, in each case, to “all the circumstances” by reference to which the question of unconscionability fell to be determined.
3. Gordon J described the case in the following general terms (at [1]):

… Coles engaged in unconscionable conduct in its dealing with a number of suppliers of products that it sold. 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. …

1. The decision in *Coles* concerned two, separate proceedings. The first proceeding was commenced by the ACCC following an investigation into dealings between Coles and suppliers called **Tier 3 Suppliers**. The ACCC alleged that Coles contravened (then) s 22 of the ACL (a provision similar to the current s 21) in relation to five Tier 3 Suppliers when Coles made demands for payment of an Active Retail Collaboration rebate in the course of its Active Retail Collaboration Program. The rebate was a payment made from a supplier to Coles, calculated as a percentage of the price Coles paid for the products. It was deducted by Coles from monies owed to the supplier for products that it had already supplied to Coles.
2. Coles admitted specific conduct described in a statement of agreed facts and admissions. Coles admitted that its conduct was unconscionable and contrary to law. Amongst other things, Coles accepted that it should not have asserted to any Tier 3 Supplier that a component of the rebate that was demanded (referable to the sharing of data) reflected the actual value to that supplier of data sharing, and, in respect of another component of the rebate, should not have made an assertion about the actual value of EOQ ordering (concerning economically efficient ordering quantities) to that supplier. However, its admitted conduct went even further than the acceptance of these particular matters.
3. The second proceeding also involved five suppliers. In general terms, Coles’ conduct involved it seeking payments from those suppliers outside of the terms of the arrangements that had been negotiated. The payments demanded by Coles were for profit gaps, waste and markdowns and short or late deliveries. They were deducted by Coles from monies due to be paid to the supplier for the products that had already been supplied. Coles admitted that it had no reasonable basis for making the claims that it made and that its particular conduct, described in a separate statement of agreed facts and admissions, was unconscionable and contrary to law.
4. As I have explained, the present case is a different case. It is more broadly based in that it is directed to the design and implementation of the Mind the Gap scheme as a whole. It is the facts and circumstances of the design and implementation of the Mind the Gap scheme, culminating in the requests for payment or “asks” made of Tier B suppliers, as a class, that comprise “all the circumstances” by reference to which the question of unconscionability falls to be determined.
5. There are some broad parallels between some of the facts in *Coles* and those in the present case in that each involved the making of “asks” and the seeking of “payments” in relation to goods supplied in an earlier period. But, from that point, the cases diverge substantially, both in structure and in fact. Moreover, unlike Coles, Woolworths denies that the broadly-based conduct alleged against it was unconscionable, particularly in light of the evidence that has been adduced.
6. Section 22 of the ACL directs attention to the matters to which the Court may have regard in determining whether a supplier or acquirer has contravened s 21. The provision relevant to the present case is s 22(2), which provides:

Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***acquirer***) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the ***supplier***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and

(e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and

(f) the extent to which the acquirer’s conduct towards the supplier was consistent with the acquirer’s conduct in similar transactions between the acquirer and other like suppliers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the supplier:

(i) any intended conduct of the acquirer that might affect the interests of the supplier; and

(ii) any risks to the supplier arising from the acquirer’s intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and

(j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:

(i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and

(iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and

(l) the extent to which the acquirer and the supplier acted in good faith.

1. Although s 22(2) of the ACL identifies matters to which the Court “may have regard”, it is not to be understood as entitling the Court to “pick and choose”. Where any one or more of the identified matters exists in respect of the impugned conduct, each such matter must be taken into account when considering “all the circumstances” for the purposes of s 21(1): see *Paciocco* at [189] per Gageler J in relation to a corresponding provision in the *Australian Securities and Investments Commission Act 2001* (Cth) (**the ASIC Act**).
2. Section 21(4) of the ACL is particularly relevant to the present case. Amongst other things, it declares the Parliament’s intention that s 21(1) is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour. This is, of course, precisely how the ACCC brings its case: the design and implementation of the Mind the Gap scheme stands as a system of conduct or pattern of behaviour. The presence of s 21(4) explains why, unlike in *Coles*, the ACCC’s case in this proceeding does not descend to particular transactions with particular suppliers in the Mind the Gap scheme.
3. Both parties addressed submissions with respect to the burden and standard of proof. The relevant principles are not in dispute and do not require recitation in these reasons. It is sufficient for me to record the ACCC’s acceptance that, given the nature of this proceeding, it carries the onus of proof in establishing the elements of the contravention it has alleged on the balance of probabilities, with evidence of a strength or standard commensurate with the gravity of the conduct alleged.

# The ACCC’s submissions

## Introduction

1. There were some contentions advanced in the ACCC’s opening written submissions that were not pursued in its closing submissions. Therefore, my focus will be the case that the ACCC addressed in its closing submissions.
2. The ACCC’s closing submissions took two forms. First, the ACCC provided written closing submissions which included a section on what it said were the factors that rendered the Mind the Gap scheme unconscionable. These submissions were directly referenced to some of the allegations I have summarised at [124] above. They were grouped under various headings. Secondly, Senior Counsel for the ACCC addressed 13 propositions which he said were the most important elements of the circumstances which s 21 would require the Court to take into account.
3. Although containing certain overlapping elements and themes, the written closing submissions and the oral closing submissions were each structured in a way that led to them proceeding as separate lines of argument. For this reason, it is necessary for me to deal with both.

## The written closing submissions

### No legitimate basis

1. The ACCC submitted that there was no legitimate basis for Woolworths to seek Mind the Gap payments from the targeted Tier B suppliers on the premise of the Opportunity Reports. This submission was specifically referenced to the fourth and fifth allegations noted at [124] above.
2. The ACCC argued that the PTI team did not consider whether there was any legitimate basis or reason to seek any “payment” on the basis of the “lenses” that were used in the analysis. It pointed to Woolworths’ reliance on the independent assessment or discretion that was reposed in the category managers and buyers in making the “asks”, but submitted that the evidence does not support the proposition that category managers and buyers themselves considered why the analysis, based on the chosen “lenses”, indicated a potential underperformance by a given supplier.
3. In this connection, the ACCC argued that the documentary evidence shows numerous examples of category managers and buyers simply asking for the amount shown in the Consolidated View column of the relevant Opportunity Report, sometimes rounded to the nearest $100 or $1,000. The ACCC submitted that this fact refutes any suggestion that category managers and buyers engaged in any assessment of the appropriateness of the amounts asked for. The ACCC also submitted that none of the written documents in evidence records an instruction given to category managers and buyers to consider the reason why the Opportunity Reports showed a “gap”. In the same vein, the ACCC submitted that there was no instruction given that would explain how a category manager or buyer could judge whether the amount of an “ask” was reasonable, and no instruction given as to the circumstances in which it might be unreasonable to make an “ask”.
4. The ACCC argued that Mr Dower’s presentation to category managers and buyers on 8 December 2014, and other contemporaneous written communications, were concerned with raising the sum of $15 million rather than focusing on whether the “asks” to be made were reasonable.
5. Relatedly, the ACCC submitted that it does not follow from the fact that a “gap” was shown in an Opportunity Report that it was reasonable to seek the “gap” from the supplier concerned. Indeed, the ACCC goes so far as to argue that the Opportunity Reports were a “data artifice” to justify the making of the “asks”. It allied this submission with the contention that the Mind the Gap scheme was “retrospective” and distinguishable from “normal, day-to-day and forward-looking business discussions” (the latter quote being a reference to evidence given by Ms Sandercock).

### Taking advantage of a stronger bargaining position and undue pressure

1. The ACCC’s submissions under this heading were specifically referenced to the first, sixth and seventh allegations noted at [124] above. The ACCC argued that Woolworths’ bargaining power and (according to the ACCC) the undue pressure it placed on suppliers were intertwined.
2. As to bargaining power, the ACCC pointed to the fact that the Woolworths Supermarkets business is and was “the biggest of the big supermarket chains in Australia”, with an approximate 38% share of the Australian grocery market over the period July to December 2014. The ACCC also pointed to the fact that Woolworths acquired products from some 4,300 suppliers and that, within a category of products, each supplier was one of a number of suppliers from which Woolworths acquired those products.
3. The ACCC argued that no supplier had sought to engage Woolworths in a similar way to the Mind the Gap scheme. As the ACCC put it, no supplier had sought to ask Woolworths for “an additional amount” because it had not recovered sufficient profit in an earlier period. It said that Woolworths was in a position where it considered that engaging in the Mind the Gap scheme would be profitable.
4. The ACCC also said:

A company without substantial bargaining power over many or all of it[s] suppliers cannot expect to raise more than $10 million in two weeks by calling and emailing its suppliers and asking them to pay it money to meet its profit targets while offering nothing in exchange to those suppliers except the possibility of staying in its future good graces.

1. This is really a summation of the ACCC’s position based on other matters advanced in its submissions. For example, the ACCC submitted that “the design of the scheme” was based on implicit threats that Woolworths would withhold future support if suppliers did not support Woolworths by making a “payment”. Woolworths argued that this “implicit threat was given charge by Woolworths’ bargaining power”.
2. As to undue pressure, the ACCC submitted that Woolworths exercised undue pressure as an invocation of its bargaining power to obtain “payments” without benefit to the supplier other than the avoidance of Woolworths’ disapproval. The ACCC also relied on what it called a short turnaround time for suppliers to respond to Woolworths’ “asks”.
3. The ACCC emphasised that its case is concerned with the manner in which Woolworths exercised its “superior bargaining power”, not simply the existence of its bargaining power. It concluded by submitting:

… Woolworths’ design and implementation of the [Mind the Gap] scheme was a use of its superior bargaining power that was contrary to fair dealing because it included the threat that Woolworths could not “support’ suppliers who did not “support” it; was entirely one-sided as it involved no benefit for the supplier other than avoiding relationship issues with Woolworths and only benefited Woolworths; and it relied on the fact that, notwithstanding this, some of the suppliers would be unable to refuse.

### A speculative scheme to take advantage of vulnerable suppliers

1. The submission under this heading was specifically referenced to the eighth allegation noted at [124] above.
2. The ACCC submitted that Woolworths knew that most of the suppliers would refuse to make a payment. Nevertheless, the ACCC says, Woolworths must have believed that some of its suppliers would respond to the implicit threat of withdrawal of support so as to be willing to make a payment. It submitted that the Court should infer that this was the reason why Woolworths set its targets at a fraction of the “opportunities” identified in the Opportunity Reports. It submitted that if there was any cogent evidence against that inference, Woolworths was in a positon to call it.

### Prevailing norms

1. The submissions under this heading were not referenced to any allegation in the pleading. Nonetheless, the ACCC submitted that Woolworths’ conduct in designing and implementing the Mind the Gap scheme was not consistent with acceptable business and community standards. Here, the ACCC refuted the proposition that the Mind the Gap scheme reflected common practice in “the supermarket industry”. It contended, firstly, that there was no evidence to support that proposition. Secondly, it argued that there was “compelling evidence” against that proposition given that “Woolworths’ nearest competitor admitted that it, and was found by this Court to have, engaged in unconscionable conduct by a scheme to extract illegitimate payments from suppliers to boost its profits for which there was no reciprocal benefit for the supplier”. This submission is, no doubt, a reference to the decision in *Coles*. The ACCC submitted that the present case is factually similar to *Coles*. It nevertheless acknowledged that the conduct in *Coles* that was found to be unconscionable involved “some elements that were different from this case”.

### Legitimate interests of Woolworths

1. The submissions under this heading were not referenced to any allegation in the pleading. They appear to be a response to Woolworths’ opening submissions which, in general terms, advocated the legitimacy of conduct carried on to pursue a lawful business in a profitable way, including by the minimisation of costs. Woolworths relied on the decision in *Paciocco* to support its contention.
2. The ACCC disputed that Woolworths had any legitimate interest in seeking payments under the Mind the Gap scheme. It distinguished the facts in *Paciocco* which, it argued, is not authority for the proposition that a party’s legitimate interests extend to cost minimisation or profit maximisation regardless of the means. The ACCC argued that the facts in *Paciocco* were very different from Woolworths’ conduct in seeking, retrospectively, to lessen its own costs by “bluntly pressing for additional payments from suppliers to which it had no contractual or other legitimate entitlement”.

## The oral closing submissions

1. As I have stated, in oral closing submissions the ACCC’s Senior Counsel propounded 13 propositions which were said to represent the most important elements which the Court should have in mind when considering all the circumstances of the case.
2. The first element was that, contrary to the case advanced by Woolworths, the Mind the Gap scheme was anything but “business as usual”. The ACCC submitted that the scheme was not part of the normal trading relationships or dealings between Woolworths and its suppliers.
3. The second element was that the Mind the Gap scheme was, in design and execution, a “last minute grab for cash”, the sole purpose of which was to make up part of Woolworths’ perceived profit gap for the half year ending 31 December 2014. In making this submission, the ACCC acknowledged that the “cash” was represented by accounting entries. As I have previously mentioned, this, too, is how “payment” is to be understood.
4. The third element is that Woolworths’ profit gap was not, in any respect, the fault of the suppliers who were being called upon to fill it. Relatedly, the ACCC argued that suppliers were neither offered nor received any benefit whatsoever from making a Mind the Gap payment.
5. The fourth element was that the Mind the Gap scheme was retrospective in the sense that the payments were not forward-looking payments in the context of anticipated commercial dealings and arrangements designed to promote the sale or increase the sales of the suppliers’ products through Woolworths.
6. The fifth element was that the Mind the Gap scheme was not foreshadowed with the suppliers or agreed to by them “as a reasonable commercial thing for Woolworths to be doing”.
7. The sixth element was that there was no contractual or any other legal basis or right which existed for the Mind the Gap “asks”.
8. The seventh element was that the quantum of the “asks” was entirely arbitrary in that they were arrived at by adding up the total values shown in the Opportunity Reports and “divided by some factor” to arrive at the $15 million figure which Woolworths needed to fill the gap in its anticipated profit shortfall. The ACCC submitted that the figures in the Opportunity Reports “were simply a set of numbers which were divided up in a manner which was intended to produce the $15 million gap that Woolworths had identified”. The ACCC submitted that no other rational, commercial basis was given for this amount.
9. The eighth element was that the “asks” were, in commercial terms, demands because they were urgent, insistent, accompanied by threats of an absence of co-operation in the future and accompanied by threats of “escalation”.
10. The ninth element was that the Opportunity Reports were “unjustified” and “arbitrary and irrational” for a number of reasons. The ACCC submitted, firstly, that the reports assessed performance by reference only to a small window of time, namely the period July to October 2014 assessed against the same period for the preceding year. Secondly, the “lenses” were “bizarre” because they were all based around the measure of gross profit. The ACCC submitted that several “lenses” were, in effect, applied to the same financial data with a view to maximising the amount of the claim that would be made. Thirdly, the ACCC submitted that the “most bizarre … and irrational and unjustifiable lens” was the one based on the relationship between sales growth and gross profit growth. This submission was based on the fact that Woolworths sought an increase in gross profit across all sales for the period under review, not just on the amount of the incremental growth in sales for that period. The ACCC submitted that this was “greedy and unreasonable”.
11. The tenth element was that no one in Woolworths questioned, checked or verified the Opportunity Reports “for rationality”.
12. The eleventh element was that Woolworths made no allowance for its role in creating its poor profit performance.
13. The twelfth element was that the working assumption behind the Mind the Gap scheme was that the suppliers were at fault for Woolworths’ poor profit performance and that the suppliers should pay for that perceived poor profitability.
14. The thirteenth element was that Woolworths’ expectations were scaled back to about 10% of the total value of the “opportunities” shown in the Opportunity Reports. The ACCC submitted that this showed that Woolworths’ senior management knew that “this was a
try-on”. In this connection, the ACCC relied on the fact that the evidence shows that, for some “asks”, Woolworths had a “zero” expectation of success but, in some cases, it was successful in obtaining a “payment”, even for a relatively large sum ($100,000 was given as one example).
15. It can be seen that, internally, these propositions involve a number of overlapping elements. They also involve a number of elements that overlap a number of contentions made in the written closing submissions, which the ACCC also addressed orally.
16. In oral closing submissions, the ACCC directed attention to the factors set out in s 22(2) of the ACL. The ACCC sought to relate, in a general way, the facts on which it relied to a number of these factors, particularly those catalogued in paragraphs (a), (b), (d), (e), (f), (h), (i) and (l) of s 22(2). In its written closing submissions, the ACCC also drew attention to paragraphs (c) and (j). The ACCC also said that paragraphs (e) and (g) may be relevant or may be relevant “in a general sense”. It is certainly not clear to me that each of these paragraphs is engaged on the evidence, even “in a general sense”. I do not propose to dwell on that question because I will address all the matters that the ACCC advanced as the relevant circumstances for the purposes of s 21(1) of the ACL, regardless of whether they fall neatly into one or other of the matters catalogued in s 22(2).

# Consideration

1. It is convenient to consider, firstly, the thirteen propositions set out above, in the order in which the ACCC advanced them.
2. As to the first element ([175] above), the evidence establishes that the Mind the Gap scheme was a structured profit program which analysed the performance of suppliers across the breadth of the Woolworths Supermarkets business, constituted by the Tier B suppliers, in accordance with the metrics shown in the Opportunity Reports (which had been compiled for that purpose) and the agreed targets in Joint Business Plans (where those plans existed and were relevant to the suppliers concerned).
3. There is no reason to doubt that the data used in the reports were sourced from Woolworths’ business records, most likely its accounting records. Thus, the Opportunity Reports were fact-based in the sense that they were based on actual financial data reflecting the actual course of trade between Woolworths and each of the suppliers identified in the reports.
4. The evidence establishes that reports, similar to the Opportunity Reports, were available to Woolworths’ category managers and buyers in the Woolworths Supermarket business, and were used by category managers and buyers in reviewing the performance of suppliers and conducting negotiations with those suppliers, including in relation to obtaining financial support from them based on their financial performance in a previous period. I am satisfied that these negotiations included negotiations that were carried out with a view to improving Woolworths’ profitability relative to that earlier period.
5. I am satisfied that the metrics used in the Opportunity Reports were not unusual. I am satisfied that these metrics, or ones very similar to them, were used by Woolworths prior to the implementation of the Mind the Gap scheme for reviewing supplier performance and in seeking financial support. The metrics were of a kind used by other supermarket businesses.
6. I am satisfied that when, prior to implementation of the Mind the Gap scheme, Woolworths sought and obtained financial support from its suppliers, that support could take a variety of forms. I am satisfied that when “payments” were made they were generally effected by adjusting the account between Woolworths and its supplier. No different course was envisaged or adopted when the Mind the Gap scheme was implemented.
7. I am satisfied that the Mind the Gap scheme was formalised across the Woolworths Supermarkets business and was implemented by a co-ordinated approach to suppliers, principally in the week commencing 8 December 2014. It was undertaken with a view to asking for, negotiating and obtaining, financial support from those suppliers who, according to Woolworths, had underperformed in the period July to October 2014 relative to the same period for the previous year. It was undertaken with a view to enhancing the profit performance of the Woolworths Supermarket business for the half year ending 31 December 2014. This co-ordinated approach was, however, one of a number of initiatives undertaken by Woolworths at that time to improve its profit performance. I am satisfied that the “asks” made of suppliers, as part of that co-ordinated approach, were typical of the approaches for financial support and negotiations that took place between Woolworths and various suppliers at other times and on other occasions, albeit that the approaches and negotiations at those times and on those occasions were not part of a co-ordinated approach across the whole of the Woolworths Supermarkets business. I would add that, on the evidence, there was nothing unusual in seeking financial support with a view to improving Woolworths’ profitability in respect of an earlier trading period (as opposed to seeking financial support with a view to increasing profitability in a future period).
8. These conclusions are based on the evidence I have accepted and summarised at [33]-[81] and [82]-[123] above.
9. Thus, while I accept that the Mind the Gap scheme was unusual in that it was a formalised and co-ordinated campaign across the whole of the Woolworths Supermarket business, Woolworths’ dealings with its suppliers in implementing that scheme—including by making “asks” based on previous financial performance with a view to profit recovery for that period—were not unusual and were typical of its dealings with suppliers. I therefore reject the ACCC’s submission to the extent that it contends that the approaches made to, and “asks” made of, suppliers were anything but “business as usual” and did not reflect an aspect of Woolworths’ normal commercial dealings with its suppliers.
10. In this connection, I accept Woolworths’ submission that, from the perspective of any individual supplier who was contacted as part of the Mind the Gap scheme, the experience would have been no different to any ordinary negotiation that the supplier might have had with Woolworths. Further, as Woolworths submitted, there is no evidence that any individual supplier would have been aware of, or would have been affected by, the fact that Woolworths was having similar negotiations with other suppliers at the same time.
11. It is important to understand that the ACCC did not suggest that individual approaches to suppliers to make “asks”, such as those exemplified at [42]-[56] above, which were outside the Mind the Gap scheme, constituted conduct that was unconscionable. In other words, the ACCC did not argue that similar conduct of Woolworths, in relation to individual suppliers, before the implementation of the Mind the Gap scheme, was “unlawfully skewed”: see, in this connection, the related observations of Keane J in *Paciocco* at [290]. The gravamen of Woolworths’ case is that the making of “asks” under, and in the circumstances of, the Mind the Gap scheme was not qualitatively different to the making of “asks” made in the normal course of the Woolworths Supermarkets business. The ACCC advanced the contrary proposition. I accept Woolworths’ submission. Further, I accept that the size and administration of the Mind the Gap scheme could not have affected whether the scheme was unconscionable in respect of an individual supplier, although the ACCC’s case was not directed to the position of individual suppliers.
12. As to the second element ([176] above), I do not think that the ACCC’s use of the pejorative expression “grab for cash” assists in the analysis of the conduct at hand. Neither the ACL nor the Act proscribes the pursuit of profit as such. Thus, the mere fact that conduct is engaged in for profit cannot be a hallmark of unconscionability, particularly in the context of trade or commerce. The plain fact is that the commercial relationships between Woolworths and its suppliers were such that each party can be taken as seeking to maximise its profit out of the relationship. Further, it can make no difference to the assessment of the conduct at hand that it took place in early December 2014 with a view to improving Woolworths’ profitability considered as at 31 December.
13. As to the third element ([177] above), I do not think that recourse to notions of “fault” or, indeed, “innocence”, assists in the analysis: see further at [235] below. I do not think that, on the evidence, it can be seriously contested that, for the Woolworths Supermarkets business, and like supermarket businesses, cost to the retailer is not just a function of the price-per-unit paid for the goods. It includes all other financial support provided by the supplier in respect of the goods.
14. In closing submissions, Woolworths provided an analysis that was taken from the Opportunity Reports. The analysis looked at one “lens”—Drop in Overall Spend Level. This showed that the Tier B suppliers, collectively, had reduced their spend to promote products through Woolworths by a combined $46 million when compared to the same period in the previous year—an amount, I observe, far in excess of the amount sought to be recovered under the Mind the Gap scheme. This reflects, for Woolworths, a relative, overall increase in the cost of goods sold, based on that measure. I accept, of course, the limitations of such a comparison. Moreover, I recognise that the determination of the cost of goods sold, in respect of individual goods, may well be affected by a variety of matters which Woolworths and the supplier concerned would be well-aware of and, I would add, well-able to negotiate. Nevertheless, the analysis gives some indication of the dynamic nature of the trading relationships involved and how, ultimately, changes in matters such as trade spend might well affect profitability from Woolworths’ perspective. The suggestion implicit in the ACCC’s submission that suppliers had not contributed to Woolworths’ profit shortfall for the relevant period, has not been established as a fact by the ACCC.
15. Finally, the proposition that suppliers were neither offered nor received any benefit from making a Mind the Gap payment requires comment. First, as a universal statement, the proposition is not correct. For example, Ms Sandercock gave evidence that, in a number of cases, she did give suppliers benefits. However, those benefits could not be given before the (calendar) year end. There is also other evidence in the email correspondence which shows that, in some cases, future benefits were offered or negotiated in the context of seeking Mind the Gap payments. Secondly, from Woolworths’ perspective as a retailer, its analyses suggested that, in the period under review, certain suppliers had already benefitted by sales growth or reduced trade spend (what Ms Sandercock described as “a profit upside for them and a profit downside for us”).
16. It is certainly true to say that the focus of the Mind the Gap scheme was to improve Woolworths’ profitability by seeking to adjust what it considered to be an imbalance between supplier and retailer of the benefits obtained from the trading relationship in the period July to October 2014. This is what Mr Tan described in his evidence in chief as getting the gross margin “back into shape”. Ms Sandercock used a similar expression in some of her correspondence with suppliers. This was the “opportunity” identified in the Opportunity Reports based on the data that Woolworths had generated. However, it does not seem to me that the attempt to realise this “opportunity” by making “asks” of suppliers based on the data provided, itself amounts to conduct that is unconscionable.
17. The fourth element—that the Mind the Gap scheme was retrospective ([178] above)—was not directly pleaded by the ACCC as an element of unconscionability, although it might be accommodated by the eighth allegation noted at [124] above. Nevertheless, my findings in relation to the third element substantially answer this allegation. The issue raised by the ACCC was not that the Opportunity Reports analysed supplier performance for a period that had passed. Indeed, it is difficult to see how an analysis of supplier performance could be anything but “retrospective” in that sense. The ACCC’s point was that the “asks” made and “payments” negotiated under the Mind the Gap scheme were not to secure benefits for suppliers that might promote or increase the future sale of the suppliers’ products through Woolworths. Rather, they related to transactions between supplier and retailer that had already taken place and Woolworths had no contractual entitlement to revisit those transactions to seek additional benefits. As I have already found, the proposition that future benefits were not secured by suppliers is not universally correct. But, in any event, approaching a supplier to re-open, as it were, a concluded transaction to seek a greater benefit than that already gained from it does not, without more, amount to conduct that is unconscionable.
18. As to the fifth element ([179] above), I do not think that a failure to “foreshadow” that an “ask” would be made or, even more, to seek prior supplier agreement to make such an “ask”, are matters of any significance once it is accepted, as I do accept, that the approaches made to suppliers under the Mind the Gap scheme were not unusual and were typical of Woolworths’ dealings with various suppliers. In any event, the ACCC’s submission is tantamount to saying that there is an element of unconscionability when a party to a trading relationship approaches the other party to make a request or to engage in a negotiation without the first party obtaining the second party’s prior agreement to that approach being made. That proposition is, with respect, untenable.
19. The sixth element ([180] above) is also without significance. Woolworths did not need a contractual or other legal right to approach its suppliers to enter into a negotiation with them; nor did it assert any such right. More importantly, the evidence does not show that, in seeking Mind the Gap payments, Woolworths asserted a contractual or other legal right to any such “payment”. The evidence shows that the Tier B suppliers were cognisant of that fact. Many of them raised it as a reason for declining to entertain the “ask” that had been made.
20. The seventh element—that the quantum of the “asks” was entirely arbitrary ([181] above)—was not pleaded by the ACCC. A particular difficulty of not pleading this allegation is illustrated by the ACCC’s submission that the Opportunity Reports were simply a set of numbers which were divided up in a manner which was intended to produce the $15 million gap that Woolworths had identified. This submission was echoed in the ACCC’s written closing submissions that the Opportunity Reports were a “data artifice” to justify the making of the “asks”. If that allegation had been properly raised—as it should have been if reliance were to be placed on it—then it was certainly capable of being addressed in evidence. However, that opportunity has been effectively denied to Woolworths. In the circumstances, I am not prepared to permit the ACCC to rely on the allegation now. It would be unfair to permit it to do so.
21. There are, in any event, a number of significant difficulties confronting acceptance of the allegation. Had it been necessary for me to do so, I would have found against this allegation on the evidence before me. As I have found, the Opportunity Reports were fact-based (in the sense I have discussed) and involved the use of metrics, or ones very similar to them, that were used by Woolworths on other occasions, prior to the implementation of the Mind the Gap scheme, for reviewing supplier performance and in seeking financial support. As I have also found, those metrics were of a kind used by other, like supermarket businesses. The fact that Woolworths’ target under the Mind the Gap scheme was set as a percentage of the total “opportunities” revealed by the Opportunity Reports can be taken as signifying no more than that Woolworths appreciated that the “opportunities” it had identified would only be realised through a course of negotiation and that some negotiations would lead to agreement and others would not. In the absence of proper evidence from the ACCC, I do not attribute any particular significance to the fact that Woolworths’ target was set at approximately 10% of the total value of the “opportunities” revealed in the Opportunity Reports. The ACCC’s submission that no other, rational commercial basis was given for the target is based on the erroneous premise that Woolworths, not the ACCC, bore the onus of proof on the question of unconscionability. The ACCC led no evidence on that particular matter and, as I have said, Woolworths was effectively denied the opportunity to do so by the ACCC’s failure to properly raise the issue.
22. As to the eighth element ([182] above), I do not accept that the “asks” made by Woolworths were “demands” or that they are properly characterised as “urgent” or “insistent”. Certainly, the evidence shows that, generally speaking, suppliers were asked to come forward with proposals within a relatively short timeframe, but I do not accept that this transformed the “asks” into “demands” or that the “asks” were made in circumstances that necessarily imported urgency. The setting of timeframes for action, like other targets, is not unusual commercial behaviour. In any event, the timeframes set in the “asks” could not be enforced by Woolworths. I have no doubt that this would have been apparent to, and appreciated by, the suppliers who were approached. I have already given examples of deadlines and timeframes being set in Woolworths’ approaches to suppliers outside the Mind the Gap scheme.
23. The evidence shows that, generally speaking, category managers and buyers were forthright in making their “asks”. However, this did not make Woolworths’ conduct “insistent” in some untoward way. Gentility was not required, although I note that, generally speaking, the tone of the email communications in evidence was civil and polite and, in many cases, cordial on both sides. Some communications between Woolworths and the supplier were, on each side, robust but no more robust than would be expected of commercial parties putting their respective positions plainly.
24. As regards the “threat” of “an absence of cooperation in the future”, the scripts provided to category managers and buyers (see [102] above) contain statements that Woolworths’ “ability to continue to support your business is predicated on [gross profit margin or trade spend] moving in the right direction”. The scripts also contain statements that it would not be sustainable for Woolworths to “grow suppliers whose [gross profit margin or trade spend] is going backwards”. These statements, or some modified form of them, were made in a number of emails to suppliers. However, when read in context, I do not think that, properly analysed, these statements could reasonably be taken as “threats”. They are but examples of plain-speaking where, in the context of a trading relationship, one party, acting in its own interests, seeks to make clear its commercial expectations. Certainly, the ACCC called no evidence from any supplier who considered that it had been “threatened” by such statements.
25. There is some email correspondence on which the ACCC placed particular reliance in this regard. Mr Tan was cross-examined on one email chain in an attempt to extract a concession from him that the dealings between Woolworths and the supplier concerned contained a threat. One significant difficulty with this approach to the evidence is that Mr Tan was not a party to the correspondence and was not otherwise involved in that particular dealing with the supplier concerned. Another significant difficulty is that the background to the email correspondence is not at all clear.
26. In this connection, the correspondence was between one of Woolworths’ category managers and a supplier, in respect of (what seems to be) another supplier’s product. The relationship between the two suppliers is not clear and, I believe, was not explained at the hearing. It is possible that the party with whom Woolworths was corresponding was a wholesaler or a broker of the second supplier’s product. What is clear is that Woolworths was seeking $23,000 trade support for the second supplier’s product. This “ask” was said to be “based on your [ie, the first supplier’s] performance in 2014”. It was also linked to “an opportunity in January to participate in the Summer Savers Campaign at $23k”. Thus, the “ask” was linked to a future marketing campaign—once again contradicting the ACCC’s contention that the “asks” were entirely retrospective in the sense in which the ACCC used that term. The subsequent emails in the chain are from the first supplier in which that supplier purported to summarise the content of intervening conversations between Woolworths’ category manager and that supplier. There is no evidence of the conversations beyond these purported summaries.
27. The summary of one conversation refers to the fact that Woolworths was seeking to invoice the $23,000 investment before the end of December 2014. The summary also records reference to the first supplier’s understanding that if the second supplier could not offer the $23,000 investment then Woolworths would “potentially delete the product”. A subsequent email in the chain, once again written by the first supplier, purports to summarise a conversation between Woolworths’ category manager and that supplier in which it was said that if the second supplier could not “fix” the $23,000 gap, distribution and support from Woolworths would decline in 2015. This email also makes clear that the second supplier had apparently advised, in response to Woolworths’ “ask”, that it would not support additional funding to Woolworths unless a price increase (to be borne by Woolworths) had been “approved and actioned for orders”. The evidence does not deal with the outcome of the negotiation. I should record, however, that the emails were written in obviously cordial terms.
28. It is entirely understandable that Mr Tan could not sensibly comment on the emails in the chain or, indeed, the conversations they purported to summarise. Woolworths submitted that there was no reliable evidence as to whether the conversations took place as recorded. The difficulty with that submission is that Woolworths did not object to the tender of the emails or seek to limit the use to which they could be put in evidence. Therefore, despite their hearsay character, the emails stand as some evidence of the substance of the conversations. Nonetheless, all the circumstances surrounding the making of the “ask” are not in evidence. For all I know, the product in question could well have been, on any objective assessment, an underperforming product for which trade support from one or other supplier was necessary in order for it to be commercially viable in Woolworths’ eyes. The statement (assuming it to have been made) that the product could, potentially, be deleted, may well have been completely justified from a commercial perspective. Similarly, the statement (assuming it to have been made) that, without the requested supplier funding, Woolworths’ distribution and support for the product would decline in the forthcoming year, may also have been completely justified.
29. Another email chain on which the ACCC placed reliance also purports to summarise conversations between one of Woolworths’ category managers and the supplier. In the email, the supplier referred to Woolworths’ request as “unusual”. The supplier recorded its understanding that, if it did not support the claim, Woolworths would not be in a position to support a particular range of the supplier’s products the following year. The supplier asked Woolworths to confirm its understanding of Woolworths’ claim. In a subsequent email, following other emails and, it would seem, telephone conversations, the supplier wrote:

We are quite concerned at this situation especially in regard to the advice that if we do not support Woolworths with this claim then Woolworths will not be in a position to support [the product range] next year.

1. The supplier went on to suggest a number of initiatives that Woolworths might consider for the range of products, and concluded by stating:

In summary, we do not accept or support the claim based on the information and criteria provided. However as always we are willing to discuss opportunities for mutually beneficial commercial outcomes.

If you have any other thoughts or ideas of what we can do together please feel free to give me a call or send me a note.

Thanks and regards,

1. In a responding email, Woolworths’ category manager refuted the fact that she had said that Woolworths would not support the product range if the supplier did not support Woolworths’ claim. She said:

… that was your wording in the first email – not mine …

1. In light of that response, there is a question whether the earlier conversation (insofar as it seeks to deal with the question of lack of future support by Woolworths) has been fully and accurately recorded in the supplier’s email. This example illustrates the danger of acting on email correspondence alone without knowing all the surrounding circumstances.
2. The chain of emails in this particular example continued, but the negotiation on this topic appears to have ended in an email dated 12 December 2014, when the supplier, through its general manager, stated:

As we do not and cannot control your selling prices, promo programme/ pricing etc we dont agree that we should contribute to the Woolworths Profit Shortfall.

…

I will brief our team and ensure we are looking at opportunities to drive both companies sales and profits on a more regular basis and I will personally review the next Half Promotional Programme as soon as it is received to see what we can action promptly.

1. This response, and others like it in the evidence, tends against the proposition that suppliers were “threatened” (as the ACCC would have it) in the course of Woolworths implementing the Mind the Gap scheme. Once again, the ACCC called no evidence from any supplier who considered that it had been “threatened” by Woolworths’ category managers and buyers when making their “asks”.
2. Another aspect of the ACCC’s case on “threats” is the threat of “escalation”. In this context, “escalation” means no more than that one person on one side of a negotiation passes the negotiation up the line to his or her superior for further handling. In cross-examination, Mr Dower described “escalation” thus:

What did “escalations” refer to?---Escalation is a common process on both sides, whether you’re buying or selling. It’s, effectively, if the negotiation is not seeming to get to a resolution – a mutual resolution, then often it’s elevated to the line manager of that individual on both sides, and it’s a very effective mechanism because, having experienced it many times, it actually relieves the pressure and actually is quite amicable as you move up the escalation and most things get resolved. I will give you an example: throughout the entire Mind the Gap program no escalation ever reached myself. Everything was resolved by mutual agreement through escalation through buyers and sellers. Entirely normal practice.

1. I accept this evidence. The email correspondence I have discussed at [218]-[222] above is an example of “escalation” practised by the supplier, when, on the face of the correspondence, negotiations with Woolworths passed from the supplier’s National Business Manager to its General Manager, who made the response quoted at [222] above. I have referred to other examples of “escalation” on Woolworths’ part (but not during the implementation of the Mind the Gap scheme) at [54] above. The fact that the negotiations between Woolworths and its suppliers, in the course of the Mind the Gap scheme, involved or might have involved “escalation”, either on Woolworths’ part or on the supplier’s part, does not, without more, signify unconscionability.
2. The ninth element ([183] above) is related to the seventh element. Further, like the seventh element, it was not pleaded by the ACCC. The ninth element focuses on the window of time in respect of which Woolworths carried out its assessment of supplier performance. It also focuses on the “lenses” adopted by Woolworths, which the ACCC branded as “bizarre”. Once again, if the criticisms raised by the ACCC’s closing submissions had been properly raised in its pleading, they could have been addressed by Woolworths in evidence. Woolworths submitted that it would have adduced evidence from its PTI team and from industry experts. I accept that to be the case. I will not let the ACCC raise these allegations now.
3. In any event, like the allegations raised with respect to the seventh element, there are a number of significant difficulties confronting an acceptance of them. Indeed, had it been necessary for me to do so, I would not have been prepared to find, on the evidence before me, that the period July to October was a small window of time to carry out the assessment, or that it was an otherwise inapt period of time for that purpose. Similarly, I would not have been prepared to find, on the evidence before me, that the “lenses” adopted by Woolworths were inappropriate, let alone “bizarre”. The latter characterisation is simply the ACCC’s
say-so.
4. The tenth element ([184] above) was also not pleaded by the ACCC. It, too, could have been specifically addressed by Woolworths in evidence had it been properly raised. Once again, I will not let the ACCC raise these allegations now. In any event, had it been necessary for me to do so, I would not have been prepared to find, on the evidence before me, that no one in Woolworths questioned, checked or verified the Opportunity Reports for “rationality”. First, as I have already found, there is no reason to question the accuracy of the data in the reports. I am satisfied that the data are based on Woolworths’ business and accounting records. Secondly, I have already addressed the question of the “lenses” used and will not repeat what I have said. Thirdly, the evidence shows, and I accept, that Woolworths’ category managers and buyers were instructed to use their discretion and knowledge of the suppliers concerned in making “asks”. This discretion covered whether an “ask” should be made and, if so, for how much. Ms Sandercock’s evidence illustrates how this process was carried out at a practical level. It is true that many “asks” were made for amounts shown in the Opportunity Reports. However, this does not mean that these amounts were not questioned, checked or verified by Woolworths’ category managers and buyers.
5. The evidence shows that, in some cases, the category managers and buyers used more than one “lens” shown in the Opportunity Reports to illustrate what Woolworths regarded to be the particular supplier’s underperformance. However, I do not think that anything turns on that fact. Typically, the supplier was asked to come forward with a plan to address its overall underperformance in light of the presented data. There are, however, two “asks” to which further comment is required. In each case, the buyer concerned made an “ask” by adding together the supplier’s underperformance measured by two “lenses”, rather than simply using the amount shown in the Consolidated View (ie, the highest amount quantified amongst all “lenses”).
6. By way of illustration, in the first case the buyer made an “ask” for “$89.03K” based on two “lenses”—“$33.1K” Drop in Overall Spend Level and “$55.8K” Drop in Coop & Other Claims. The Consolidated View in the Opportunity Report showed a value of $55,863. In this case, the guidance provided by the Opportunity Report indicated a likely maximum “ask” of $55,863. The supplier responded to the “ask” by bringing certain matters to Woolworths’ attention in relation to its current trade performance and its anticipated trade performance. The supplier’s email, which declined to make a “payment”, concluded by stating:

All of the above points shall see a major increase in our support monies to Woolworths and covering off your current short fall.

1. Woolworths’ buyer responded:

Thank you [name of recipient].

Have a good weekend.

Regards

1. This response appears to be the end of the negotiation.
2. In the second case (involving a different buyer), the only email in evidence is the supplier’s response to the “ask”. Nevertheless, it is possible that the buyer, once again, added the amounts for two “lenses” rather than relying on the guidance provided by the amount shown in the Consolidated View in the Opportunity Report. The supplier’s responding email expressed the view that the magnitude of the “ask” (in this case $287,000) was unjustified. The supplier also provided information on its promotional activities and funding in relation to the product range in question. The email concluded:

… [The supplier] is very keen to work with Woolworths to grow our sales and your profitability. We suggest developing a mutually beneficial joint business development plan that would result in increased support in return for ranging, distribution, position on shelf or other initiatives that would be mutually beneficial. We would welcome the opportunity to meet to commence work on a plan at any time.

1. It is possible that, in these two cases, each buyer either misunderstood the Opportunity Report or made a mistake by adding the amounts of two “lenses” together. It is also possible that each buyer saw an opportunity to make a greater “ask” than the Consolidated View in the Opportunity Report indicated. I am unable to tell from the evidence. The latter possibility is feasible because other “asks” made by one of these buyers suggest that she correctly understood the significance of the Consolidated View column. These were the only cases specifically drawn to my attention in which two amounts might have been added together to come up with the specific amount of the “ask”. I do not think that, in the absence of further evidence or explanation, any particular conclusion can be drawn from what appear to be, in any event, isolated incidents of this occurring.
2. The eleventh and twelfth elements ([185]-[186] above) can be dealt with together. As I have said with respect to the third element, I do not think that notions of “fault” or “innocence” assist in the analysis. Woolworths analysed the trade performance of the Tier B suppliers and, where it considered it appropriate to do so, approached particular suppliers to make good what it regarded to be the shortfall in their performance. The ACCC’s submissions proceed as if Woolworths’ perceived profit shortfall was attributable to actions which it, alone, took or failed to take. As I have found at [80] above, it is simplistic to approach the trading relationship between a supermarket retailer and its suppliers as one where the retailer has complete and unilateral control over the gross margins it makes because of the retail prices it chooses to offer.
3. As to the thirteenth element ([187] above), I do not think that Woolworths’ conduct in implementing the Mind the Gap scheme is fairly characterised as “a try-on”. The evidence persuades me that, although Woolworths had identified a number of “opportunities”, it realised that, for circumstances that might be special to particular suppliers, it might not be appropriate to make an “ask” for the amount of the “opportunity” shown in an Opportunity Report or, indeed, to make any “ask” at all. This is why the discretion to be exercised by the category managers and buyers was important. Further, Woolworths realised that any “ask” might be rejected or might be the subject of negotiation. None of this means that Woolworths considered its conduct to be “a try-on”. Further, as I have said, in the absence of proper evidence, I cannot attribute any particular significance to the fact that Woolworths’ target was set at approximately 10% of the total value of the “opportunities” revealed in the Opportunity Reports.
4. In its submissions, Woolworths relied on the application of the discount factor to gainsay the proposition that it had superior bargaining power vis-à-vis its suppliers. It argued that if its bargaining power was so strong, it surely would not have discounted the “opportunities” it had identified by 90%. It developed this submission by arguing that if it had the bargaining power that the ACCC alleged it had then, presumably, it would have expected a much better success rate. I will return to consider the question of Woolworths’ bargaining power, which did not feature in the ACCC’s thirteen propositions, although it was touched on elsewhere in oral submissions.
5. A number of the elements I have addressed also deal with aspects of the ACCC’s written closing submissions. Nonetheless, for completeness I will deal with the written submissions to the extent that it is now necessary for me to do so.
6. With regard to the contention that there was no legitimate basis for Woolworths to seek Mind the Gap payments on the basis of the Opportunity Reports ([157]-[161] above), I reject the ACCC’s submission that category mangers and buyers did not consider why the analysis, based on the chosen “lenses”, indicated a potential underperformance by a given supplier. The evidence points convincingly in the opposite conclusion. I accept that category managers and buyers were instructed to review the Opportunity Reports and use their discretion in approaching suppliers and making “asks”. The category managers and buyers were best-placed to do this in light of their day-to-day relationships with the suppliers. As I have found, Ms Sandercock’s evidence illustrates how this instruction was carried out at a practical level.
7. The ACCC’s submission that no instruction was given that would explain how a category manager or buyer could judge whether the amount of an “ask” was reasonable or not, is really a diversion. I am satisfied that category managers and buyers needed no such instruction. I repeat, they were best-placed to understand their suppliers’ trading performance, as revealed by the data presented in the Opportunity Reports, and to put that performance in context, using their intimate knowledge of the trading relationships concerned.
8. I have already dealt with the submission that there are numerous examples of category managers and buyers using the amount shown in the Consolidated View column in the Opportunity Reports. I do not think that this has the significance that the ACCC attributes to it. If anything, it tends to underscore Woolworths’ point that a hallmark of the Mind the Gap scheme was that it was fact-based and that, in making “asks”, the supplier should be given facts. Further, I have rejected the ACCC’s submission that the Opportunity Reports were a “data artifice”.
9. The evidence does not support the ACCC’s contention that suppliers made “payments” because they believed that their refusal to make a “payment” would or might jeopardise their ability to access customers through the Woolworths Supermarkets business. This is an inference I was asked to draw, but there is an insufficient basis in the primary facts that would enable me to properly draw that inference. Indeed, I am really being invited to speculate on that matter. I would add that, if it were the case that suppliers made payments on that basis, I would have expected the ACCC to call some direct evidence of that fact. No such evidence was called. I have already dealt with the ACCC’s case on “threats” and will not repeat my findings, save to note that the evidence shows clearly enough that when suppliers were not willing to make a “payment”, they showed no hesitation in communicating their refusals. This is another example of plain-speaking in commercial relationships. The ACCC’s submission that Woolworths could have called evidence to negative the inference which the ACCC asked me to draw, displaces the evidential burden on this question. I draw no such inference from the evidence that the ACCC has adduced. Therefore, the occasion for Woolworths to negative such an “inference” does not arise.
10. The ACCC’s submission that the Mind the Gap scheme was a speculative scheme designed to take advantage of vulnerable suppliers ([169]-[170] above), is not supported by any evidence. The ACCC contended that I should infer that this was the reason why Woolworths set its target at a fraction of the “opportunities” identified in the Opportunity Reports. I draw no such inference and repeat the observations and conclusions I have made at [209]-[210] above. I also refer, in this connection, to the observations and conclusions at [253]-[254] below.
11. The ACCC’s submissions on “prevailing norms” ([171] above) have been dealt with by my findings at [33]-[81] and [82]-[123] above. The ACCC’s reliance on *Coles*, in this connection, is misplaced. The case presented in *Coles* is different to the case presented in this proceeding which is, as I have noted, a more broadly-based case divorced from conduct involved in discrete and individual transactions with suppliers.
12. The ACCC’s submissions on “legitimate interests” ([172]-[173] above) do not materially advance its case on unconscionability. As I have noted, its submissions appear to be responsive to Woolworths’ opening submissions. The ACCC submitted that Woolworths cannot call upon its own commercial interests to justify its conduct. Whether that is so is not a matter that I need address in any detail. Indeed, the parties did not do so beyond alluding in a very general way to the various matters I have already discussed. I will therefore deal with this issue at the level of generality advanced by the parties themselves. The premise of the ACCC’s submissions assumes that Woolworths’ conduct was at least prima facie unconscionable unless Woolworths’ interests were brought into the balance. I accept Woolworths’ submission that a party’s “legitimate interests” will extend to include its interest in pursuing its lawful business in a profitable way and in a manner that minimises its costs. That, however, is a very general proposition. I also accept the ACCC’s submission that it does not mean that a party’s legitimate interests extend to cost minimisation or profit maximisation, regardless of the means. It is, of course, “the means” that are in question in this case. I have addressed that question in the preceding paragraphs of this section of my reasons.
13. This then leaves the ACCC’s allegation that Woolworths was in, and took advantage of, a substantially stronger bargaining position relative to its suppliers.
14. The ACCC described Woolworths’ bargaining power, as against the Tier B suppliers, as “immense”. This power was said to be evidenced by the fact that Woolworths felt able to “embark on the scheme”. It was also based on the fact that, from July to December 2014, Woolworths ordered grocery products from approximately 4,300 suppliers (although only 821 of these suppliers were Tier B suppliers) and the fact that Woolworths had a 37%-39% share by retail value of grocery sales in Australia. In oral closing submissions, the ACCC also called in aid some additional data recorded in Woolworths’ financial report for the half year ending 31 December 2014.
15. The first basis is, as Woolworths pointed out, somewhat circular: I am asked to find that Woolworths’ conduct was unconscionable because of (amongst other things) an inequality of bargaining power and, at the same time, infer that there was an inequality of bargaining power because Woolworths engaged in the conduct. Woolworths submitted that the deployment of this reasoning highlights the circumstance that, in fact, there is no evidence of an inequality of bargaining power. For my part, I am not persuaded that it is axiomatic that, as between Woolworths and its Tier B suppliers, there was an immense disparity in bargaining power, as the expression of the ACCC’s submission suggested, simply because Woolworths implemented the Mind the Gap scheme.
16. The second basis relies on objective facts. These facts are relevant but limited. They were repeated in the ACCC’s written closing submissions. Undoubtedly, the Woolworths Supermarkets business is, and was at the relevant time, “big”. There is no doubt that, at the relevant time, Woolworths had a large market share by overall sales value. There was, however, no attempt to move from generalities to specifics. For example, there was no attempt by the ACCC to relate this percentage share to the sales of products supplied by the Tier B suppliers or to identify Woolworths’ share of any particular product sold by a particular Tier B supplier. The evidence is entirely silent on these matters.
17. Further, as Woolworths argued, it may have had a significant share of overall Australian grocery sales, but that says little about the significance of Woolworths to a given supplier. A given supplier’s business with Woolworths might be small relative to the sales it makes to other persons (including, in particular, Woolworths’ key competitors) or, indeed, to the sales it makes in other markets. It also ignores the circumstance that many suppliers will be selling products and/or brands that Woolworths would consider necessary in order for it to be competitive, particularly with its key competitors. If shoppers go to Woolworths and cannot find the range of products or particular brands of products they wish to buy, they may readily switch to other retailers who can provide that offering. As Mr Dower’s evidence made clear, there is little loyalty amongst consumers to particular retailers. Therefore, a particular supplier, even a small one, may be as significant to Woolworths as Woolworths is to that supplier.
18. A further, confounding factor is that the ACCC’s case concerns Woolworths’ conduct directed to Tier B suppliers as a class. As I have repeatedly noted, its case is not directed to particular conduct in relation to a particular supplier involving circumstances peculiar to that supplier. I have identified some of the Tier B suppliers at [86] above. I would not readily assume (and do not assume) that, as between Woolworths and these suppliers, or indeed any of them, there was a substantial difference in bargaining power in favour of Woolworths, let alone an “immense” difference, as the ACCC has argued.
19. There is nothing in the evidence to suggest that, as a class, the Tier B suppliers were, at the relevant time, homogeneous. One cannot say, for example, that the Tier B suppliers were, universally, small suppliers with little bargaining power. Indeed, there is nothing in the evidence to indicate that the Tier B suppliers, as a class, shared any common characteristic concerning bargaining power, other than that they were suppliers to Woolworths.
20. In its written opening submissions, the ACCC referred to the Full Court reasons for judgment in *National Exchange*, which concerned the making of unsolicited off-market offers to buy shares in a target company for a price substantially below valuation. This conduct was alleged to have contravened s 12CC of the ASIC Act, which prohibited unconscionable conduct in trade or commerce in connection with the supply of financial services. In that case, the Full Court said (at [43]):

National Exchange set out to systematically implement a strategy to take advantage of the fact that amongst the official members there would be a group of inexperienced persons who would act irrationally from a purely commercial viewpoint and would accept the offer. They were perceived to be vulnerable targets and ripe for exploitation, as they would be likely to act inadvertently and sell their shares without obtaining proper advice, and they were a predictable class of members from whom [its controller] could procure a substantial financial advantage by reason of their commercially irrational conduct. …

1. The facts of that case are far removed from the present case. There is nothing in the evidence that would lead me to conclude that there were, among the Tier B suppliers, persons who were inexperienced or who would act irrationally from a commercial perspective. Similarly, there is nothing in the evidence that would lead me to conclude that, in designing the Mind the Gap scheme, Woolworths considered that the Tier B suppliers included “vulnerable targets” who were “ripe for exploitation”.
2. In its written closing submissions, the ACCC pointed to other indicia which, it argued, supported the existence of Woolworths’ bargaining power. As I have noted, it argued that no supplier had ever sought to approach Woolworths in the way that Woolworths’ had approached suppliers in the Mind the Gap scheme, by seeking a “payment” from Woolworths. The ACCC based this submission on Mr Dower’s cross-examination, where Mr Dower was pursued on the following line of argument:

Did any supplier ever ask you, in your experience at Woolworths, for a reimbursement in cash such as a Mind the Gap payment going in the supplier’s direction?--- Not to my knowledge.

What do you think Woolworths’ reaction to such a request would have been?---Well, I think we would have had to evaluate every situation, which we did with all buyers and suppliers. I mean, there was quite often situations where a supplier would come back and say, you know, “This promotion didn’t work. That promotion worked. We’ve overinvested here. We’ve overinvested there,” and have a conversation about the commercials, and that’s perfectly normal. Yes, that’s part of ongoing discussion.

When, in your experience, has Woolworths ever paid in cash to a supplier a payment like a Mind the Gap payment based upon similar criteria, but operating in the supplier’s favour rather than Woolworths’ favour? When did that happen?---I think it’s very difficult to create the same in reverse.

Why?--- I think – just to finish what I was saying, there are occasions where a supplier might say, “We’re coming to our half year end, or we’re coming to our year end. Woolworths, you take a lot more stock off me, could you fill your warehouse with stock for me because I’m coming to my half year end?” It’s going to be a big cost to Woolworths, we’re going to look after all that stock. We’re not going to be sell it through very quickly, so it’s actually us taking a big cost on behalf of the supplier, but because of the relationship we would often do that. So there are occasions when that would happen, yes.

1. An hypothetical example was put to Mr Dower:

… the supplier would say [to Woolworths] something along the lines of, “I’ve done this very detailed analysis and I can tell you that I think your gross profit in relation to my products has been excessive in the last period. You’ve earned an extra [dollar amount]. I’d like some of that. Would you pay it to me in cash, please?” That’s never happened, has it?---Well, actually, now you’ve described it to me, yes, that happens all the time. That’s a perfectly normal – because I’ve been a supplier for 10 years as well, so I’ve actually had those conversations, where you go to a supplier [quaere, retailer?] and you would say exactly what you’ve just described … and then you would look at ways that the retailer would need to help you out through that period. So perfectly justified. I worked for Mars for eight years. I remember asking numerous retailers for those exact things. Perfectly normal.

1. In succeeding questions, there was an emphasis placed by the cross-examiner on the receipt of (in his words) “cash, the folding stuff, Mind the Gap payments”. This line of questioning was, ultimately, a diversion because it equated Mind the Gap payments with payments of cash when, in fact, the evidence was that Mind the Gap payments were made by adjusting accounts, as I have previously explained. In the course of its oral closing submissions, the ACCC confirmed that this was so.
2. Nevertheless, the cross-examination continued in this vein:

… Mr Dower, can I put this proposition to you, and I will just ask you first to tell his Honour whether you agree or disagree with it, nothing more for the moment, please. The proposition is this: so far as you are aware, no supplier has ever asked Woolworths to reimburse it in cash because it had not recovered sufficient profit in a given period of time because, for example, its gross profit margin had not increased by 20 basis points for every 100 basis points of sales in that period. That’s true, isn’t it?---Yes, but we would have a conversation around that - - -

Thank you?--- - - - in terms of what would happen next.

And I want to put this next proposition to you: if any supplier – to your knowledge and understanding – if any supplier had come to Woolworths at any time putting that proposition to Woolworths, Woolworths would have responded that supplier was dreaming, correct?---No. Completely incorrect. It would depend on the circumstances and – and depends on where we are in the relationship, in the negotiation. It would depend on many factors - - -

That’s okay?--- - - - and it was perfectly reasonable for a supplier - - -

I can live with completely incorrect?--- - - - to ask for money from us. It’s a totally normal thing to do. So - - -

Yes. What payments of cash to suppliers have you ever seen while you were there?
---Well, the way – the way it works with a supplier is it’s not so much they would come in and say, “I would like some cash, please?” They would come an[d] say, “Actually, we really need some support from you on these areas.”

1. When Mr Dower’s evidence on this topic is considered in its entirety, I do not think that it provides the support that the ACCC’s submissions assume. The effect of Mr Dower’s evidence was that, when they considered it appropriate to do so, suppliers would approach Woolworths with a view to asking Woolworths to provide financial support for the supplier’s product(s). There are examples of this in the evidence. In responding to an “ask” made under the Mind the Gap scheme, some suppliers put forward their own assessment of their trading performance with Woolworths for the relevant period and, on occasion, made their own proposal for Woolworths’ support as part of the negotiation.
2. Thus, making requests for financial support, in whatever form that might take, is not and was not a one-sided affair. If the making of a request for financial support, either by Woolworths or one of its suppliers, is an indicium of bargaining power, then the existence and extent of that power would seem to be dependent on particular circumstances as they affect a particular trading relationship.
3. In the present case, the evidence on bargaining power did not descend to such specifics. The ACCC’s case in this regard was confined to the generalities to which I have referred. It is not possible for me to come to any firm view on this question. This is a significant gap in the ACCC’s case, although its significance to the outcome of the proceeding is not as great as it might have been had I been satisfied of other facts. This is because, overall, I am not satisfied, in light of all the circumstances brought forward, that Woolworths’ design or implementation of the Mind the Gap scheme was unconscionable, as the ACCC has alleged.
4. My analysis has necessarily required me to consider the individual elements and matters on which the ACCC has relied to argue that Woolworths’ conduct was unconscionable. However, s 21(1) of the ACL requires me to have regard to “all the circumstances”. A piecemeal analysis will not suffice. Rather, I am required to come to a broad evaluative judgment which involves “standing back and looking at the whole episode”, as the Full Court said in *Lux* at [44]. I have arrived at my conclusion by doing this.
5. It may be that some would see Woolworths’ conduct in making “asks” and seeking “payments” as unjustified, unfair or unjust according to their own standards of commercial propriety. This, however, is not the proscriptive standard that s 21(1) of the ACL imposes. I hasten to add that I have made no such evaluation myself. I mention these matters only to distinguish the task of the Court from the casual and informal judgments made by others. My task has been to consider the nature of the case that has been pleaded, the evidence that has been adduced, and the legal requirements of s 21 read in light of s 22(2) of the ACL and the authorities describing the operation of these, and like, provisions.

# Conclusion and disposition

1. For these reasons, I am not satisfied that Woolworths has contravened s 21 of the ACL, as alleged.
2. It follows that the originating application should be dismissed.
3. In the normal course, costs should follow the event. In the course of closing submissions, Woolworths indicated that it wished to be heard on the question of costs. I will list the proceeding for hearing on that question, unless the parties can come to some agreement on it.

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| --- |
| I certify that the preceding two hundred and sixty-six (266) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates. |

Associate:

Dated: 8 December 2016